



SHERIFF APPEAL COURT

[2024] SAC (Civ) 38

Sheriff Principal A Y Anwar
Sheriff Principal C Dowdalls KC
Sheriff Principal G A Wade KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C DOWDALLS KC

in the appeal in the cause

GLASGOW CITY COUNCIL

Petitioner and Respondent

against

MM

Respondent and Appellant

Petitioner and Respondent: Sharpe; JK Cameron
Respondent and Appellant: Allison; Livingston Brown Ltd

12 August 2024

Introduction

[1] Are parts (a) and (b) of section 81(1) of the Adoption and Children (Scotland) Act 2007 (“the 2007 Act”) to be read as one or are they severable? Can a permanence order consist of only one part of section 81(1) or must it contain both? Is the word “and” where it appears in section 81(1) used conjunctively? Those were the questions this court considered arose in this appeal when it refused the appellant’s application to remit to the Court of

Session: *Glasgow City Council v MM* [2024] SAC (Civ) 14 at para [13]. This opinion answers those questions.

Adoption and Children (Scotland) Act 2007

[2] The provisions of the 2007 Act relevant to this appeal are:

“80 Permanence orders

- (1) The appropriate court may, on the application of a local authority, make a permanence order in respect of a child.
- (2) A permanence order is an order consisting of—
 - (a) the mandatory provision,
 - (b) such of the ancillary provisions as the court thinks fit, and
 - (c) if the conditions in section 83 are met, provision granting authority for the child to be adopted.
- (3) In making a permanence order in respect of a child, the appropriate court must secure that each parental responsibility and parental right in respect of the child vests in a person.

81 Permanence orders: mandatory provision

- (1) The mandatory provision is provision vesting in the local authority for the appropriate period—
 - (a) the responsibility mentioned in section 1(1)(b)(ii) of the 1995 Act (provision of guidance appropriate to child's stage of development) in relation to the child, and
 - (b) the right mentioned in section 2(1)(a) of that Act (regulation of child's residence) in relation to the child.
- (2) In subsection (1) '*the appropriate period*' means—
 - (a) in the case of the responsibility referred to in subsection (1)(a), the period beginning with the making of the permanence order and ending with the day on which the child reaches the age of 18,
 - (b) in the case of the right referred to in subsection (1)(b), the period beginning with the making of the permanence order and ending with the day on which the child reaches the age of 16.

...

84 Conditions and considerations applicable to making of order

- (1) Except where subsection (2) applies, a permanence order may not be made in respect of a child who is aged 12 or over unless the child consents.
- (2) This subsection applies where the court is satisfied that the child is incapable of consenting to the order.
- (3) The court may not make a permanence order in respect of a child unless it considers that it would be better for the child that the order be made than that it should not be made.
- (4) In considering whether to make a permanence order and, if so, what provision the order should make, the court is to regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration.
- (5) Before making a permanence order, the court must—
 - (a) after taking account of the child's age and maturity, so far as is reasonably practicable—
 - (i) give the child the opportunity to indicate whether the child wishes to express any views, and
 - (ii) if the child does so wish, give the child the opportunity to express them,
 - (b) have regard to—
 - (i) any such views the child may express,
 - (ii) the child's religious persuasion, racial origin and cultural and linguistic background, and
 - (iii) the likely effect on the child of the making of the order, and
 - (c) be satisfied that—
 - (i) there is no person who has the right mentioned in subsection (1)(a) of section 2 of the 1995 Act to have the child living with the person or otherwise to regulate the child's residence, or
 - (ii) where there is such a person, the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child.
- (6) A child who is aged 12 or over is presumed to be of sufficient age and maturity to form a view for the purposes of subsection (5)(a).

85 Child in respect of whom order may be made

- (1) A permanence order may be made in respect of a child who is an adopted child.
- (2) A permanence order may not be made in respect of a child who is or has been—
 - (a) married,
 - (b) a civil partner."

The sheriff's judgment

[3] The sheriff held that, in terms of section 84(4), the paramount consideration for a court considering whether to grant a permanence order was “the need to safeguard and promote the welfare of the child throughout childhood”. He considered that the term “throughout childhood” meant until a child reached the age of 18. The 2007 Act made provision for a child aged 16 or 17 to be the subject of a permanence order; however, the only aspect of the mandatory provision that would apply to a child aged 16 and 17 was that set out at section 81(1)(a).

[4] The sheriff was referred to paragraph 20.22 of Wilkinson and Norrie, *The Law Relating to Parent and Child in Scotland*, (3rd ed), in which the authors expressed the view that the two aspects of the mandatory provision were complementary and not alternatives. They concluded “it would seem to be incompetent to make a permanence order in respect of a 16 or 17 year old”. That analysis was ultimately accepted by the summary sheriff in *Clackmannanshire Council, Applicants*, unreported, 1 June 2022 at para [78].

[5] The sheriff considered that section 81(2) provided distinct periods for the provisions mentioned in section 81(1)(a) and 81(1)(b) to apply. The term “for the appropriate period” qualified the application of the different elements of the mandatory provision and specified different appropriate periods for each. Simply because the time period for granting the provision mentioned in section 81(1)(b) had passed, it did not follow that the time for granting an order in terms of section 81(1)(a) had passed.

[6] In summary, Wilkinson and Norrie and the summary sheriff in *Clackmannanshire Council, Applicants* considered that section 81(1) is not severable; that the mandatory provision must contain both parts of section 81(1); and that the word “and” where it appears in section 81(1) is used conjunctively. By contrast, the sheriff considered that

section 81(1) is severable; that the mandatory provision did not need to contain both parts of section 81(1); and that the word “and” where it appears in section 81(1) is not used conjunctively.

Grounds of appeal

[7] The appellant appeals the decision of the sheriff on the following grounds:

- (i) The sheriff erred in his interpretation of section 81(1) of the 2007 Act by concluding that parts (a) and (b) of subsection (1) were severable, and that therefore a permanence order could competently be made without inclusion within the mandatory provision of the parental right in section 2(1)(a) of the Children (Scotland) Act 1995 Act (“the 1995 Act”), being the right to regulate the child’s residence. Where a child has reached the age of 16, it is accordingly not competent to make a permanence order.
- (ii) The sheriff erred in making the permanence order on the basis he was satisfied that the threshold test in section 84(5)(c)(ii) was met, as no right to regulate the child’s residence vested in the appellant on the day the order was made.

Submissions for the appellant

Competency

[8] The court raised the issue of the competency of the appeal with the appellant. The sheriff had determined whether it was competent for the respondent to seek a permanence order in his interlocutor of 19 December 2023. As part of that interlocutor, the sheriff fixed a diet of proof on 4 January 2024. At the diet of proof on 4 January 2024, the appellant did not oppose the granting of the permanence order. Thereafter, the appellant lodged her appeal;

however, as the substantive issue on appeal had been decided on 19 December 2023, the court asked to be addressed as to: (i) why leave to appeal had not been sought from the sheriff within 7 days of 19 December 2023; and (ii) whether the appeal was competent, standing the withdrawal of opposition to the petition on 4 January 2024.

[9] In response to the court's first question, the appellant submits that, by virtue of section 116(2) of the Courts Reform (Scotland) Act 2014, an appeal against a final interlocutor opened up all prior interlocutors for review. There was nothing within that section, or elsewhere in the 2014 Act, which suggested that a failure to seek leave to appeal at an earlier stage was a barrier to seeking to appeal at the conclusion of the action. The circumstances under which a prior interlocutor could be reviewed upon appeal had been recently considered by this court in *Ashraf v Accountant in Bankruptcy & Anr* [2024] SAC (Civ) 22 at para [57]. The final interlocutor of 4 January 2024 was contingent upon that of 19 December 2023. Without the decision of 19 December 2023, there could have been no permanence order granted on 4 January 2024. The review of the interlocutor of 19 December 2023 was necessary to allow justice to be done.

[10] As to the second question, the appellant's opposition to the permanence order centred on whether such an order was competent. That question was resolved by the sheriff in his interlocutor of 19 December 2023. Following that, the respondent on 3 January 2024 substantially altered the nature of the order sought. The appellant thereafter withdrew her opposition, albeit on a specific understanding. As the appellant was not opposing the making of a permanence order in the limited terms now sought, if competent, that was the responsible course of action. The alternative was to oppose the petition on its merits simply as a vehicle to maintain dissatisfaction with the sheriff's earlier interlocutor of 19 December 2023; that would have been inappropriate. The alternative, to have sought leave to appeal

within 7 days of 19 December 2023, would have simply caused delay for final disposal, in circumstances where the issue in controversy between the parties had been disposed of.

[11] Whilst there are limitations upon appeals against decisions of consent (Macphail, *Sheriff Court Practice* (4th ed) at paragraph 18.161), those were not relevant to this appeal. The appellant withdrew opposition, rather than offering consent. It was still for the sheriff to be satisfied that the conditions in section 84 of the 2007 Act were met.

Section 81(1) of the 2007 Act

[12] In relation to the first ground of appeal, the definition of “appropriate period” in section 81(2)(b) means that, where a child has already attained the age of 16, a court cannot vest the right contained at section 81(1)(b) in a petitioning local authority because the appropriate period would have already lapsed. The issue is whether the two components in section 81(1) are severable, notwithstanding the reference in both section 80 and section 81 to “the mandatory provision” (ie singular) and the use of the word “and” between subsections (1)(a) and (b) of section 81.

[13] The natural and ordinary meaning of section 81(1) is that the mandatory provision includes both the responsibility mentioned in section 81(1)(a) and the right mentioned in section 81(1)(b). Had the Scottish Parliament intended otherwise, it could have easily made that clear by, for example, the addition of the words “one or more of” at the end of the preamble in section 81(1). Absent such language, the word “and” conveys a clear intention that the right referred to in section 81(1)(b) - the right to regulate residence in terms of section 2(1) of the 1995 Act – is always part of the mandatory provision, and so must be included in every permanence order. There is no ambiguity in section 81 itself.

[14] The appellant also questioned the purpose of a permanence order being issued for a child aged 16 and 17 years old if the only duty it created was one which was already implicitly placed upon the petitioning local authority by virtue of section 17 of the 1995 Act in respect of children who are looked after and section 22(1) of the 1995 Act in respect of all children in their area. Moreover, a further duty imposed upon the local authority was contained in section 29 of the 1995 Act; it required a local authority to advise, guide and assist a child aged between 16 and 19 years old who used to be looked after by the local authority, but no longer was.

[15] Given almost all children who are the subject of applications for permanence orders will already be the subject of compulsory supervision orders under the Children's Hearings (Scotland) Act 2011, it was difficult to see what possible benefits to the cohort of 16 and 17 year olds there could be to a permanence order being made, when the same benefits could be achieved via a compulsory supervision order. If, as occurred here, the intention was that the compulsory supervision order be terminated, then that was absurd because it involved replacing an order that allowed for various steps to be taken in respect of a child in need (where necessary) with one that did not allow for those steps to be taken.

[16] The appellant accepted that the terms of section 85(2) of the 2007 Act sat uncomfortably with her interpretation of section 81; however, following the ordinary rules of statutory interpretation, the appellant's interpretation ought to be preferred, even if that made section 85(2) redundant. In a similar vein, the appellant accepted that her interpretation of section 81 was inconsistent with the definition of "child" in section 119; however, that definition applied to the 2007 Act as a whole, rather than specifically relating to permanence orders.

[17] With respect to the second ground of appeal, the sheriff had made a typographical error in his interlocutor of 4 January 2024. The appropriate threshold test it ought to refer to was that contained in section 84(5)(c)(i). The sheriff's error is material, in respect that it purports to reach a conclusion that is adverse to the appellant; her lack of opposition to the making of a permanence order was founded on an understanding that the test in section 84(5)(c)(ii) would not be addressed.

Submissions for the respondent

Competency

[18] The respondent made no submissions on the issue of competency of the appeal.

Section 81(1) of the 2007 Act

[19] The sheriff was correct to refuse the appellant's challenge on competency on the granting of the permanence order. The sheriff adopted a contextual and purposive approach to his interpretation of section 81 of the 2007 Act. He was entitled to do so, rather than adopt a literal approach: *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 per Lord Bingham at para [8]; *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2022] AC 1 per Lords Reed and Hodge at para [155]; and *Veale v Scottish Power UK Plc* 2024 SLT 607 per Lord President (Carloway) at paras [26] - [27].

[20] The sheriff was entitled to conclude that the term "for the appropriate period" qualified the application of the different elements of the mandatory provision at the time when the court was considering a permanence order which specifies different appropriate periods for each.

[21] The sheriff's interpretation made sense when the terms of section 85(2) of the Act were considered: "A permanence order may not be made in respect of a child who is or has been (a) married, (b) a civil partner." By implication, a child aged 16 or 17 could be the subject of a permanence order if they were not married or were not in a civil partnership. That was coherent, given that section 119 defined "child" as "a person who is under the age of 18".

[22] The appellant's references to the Children (Scotland) Act 1995 and the Children's Hearings (Scotland) Act 2011 were irrelevant. Those statutes related to different statutory regimes for the care and protection of children. This court had to interpret section 81(1) of the 2007 Act and thereafter ask whether the sheriff was entitled to grant the order that he did.

[23] As for the error in the sheriff's interlocutor of 4 January 2024, the respondent invited the court to delete part (iii) of the interlocutor and substitute the following:

"The Compulsory Supervision Order is revoked in terms of section 89 of the Adoption and Children (Scotland) Act 2007, in that compulsory measures of supervision in respect of the child are no longer necessary."

Decision

Competency

[24] On the issue of the competency of this appeal, we agree with the appellant's submissions. The competency of making the order sought by the respondent had been determined by the sheriff on 19 December 2023. That decision did not dispose of the petition, so was not a final order. No leave was sought by the appellant to appeal the order and no final order was made until 4 January 2024. The appellant did not offer any opposition to the making of the permanence order on that date, but neither did she consent

to it. It was for the respondent to satisfy the court that the permanence order should be granted. There is no mechanism within sections 80 to 85 of the 2007 Act whereby the appellant could consent to the making of the permanence order. By withdrawing opposition, therefore, she was doing no more than leaving it to the respondent to establish its case and the sheriff to reach a decision.

[25] Upon the lodging of this appeal, in terms of section 116 of the Courts Reform (Scotland) Act 2014, all prior decisions in the proceedings became open to review. The appellant's failure to seek leave to appeal an earlier decision in the proceedings does not create a barrier to appeal at the conclusion of the proceedings. We agree with the statement of general principles set out in *Ashraf* at para [57]. This is a competent appeal.

Section 81(1) of the 2007 Act

[26] The language of sections 80 and 81(1) of the 2007 Act is clear. A permanence order must consist of the mandatory provision and such of the ancillary provisions as the court thinks fit. Section 80(3) provides: "In making a permanence order in respect of a child, the appropriate court must secure that each parental responsibility and parental right in respect of the child vests in a person." In making a permanence order, the court must secure that each parental responsibility and each parental right, in terms respectively of sections 1 and 2 of the 1995 Act, vests in a person. Unless that is achieved, there can be no permanence order.

[27] The mandatory provision mentioned in section 80(2)(a) is explained in section 81(1). It vests in the local authority the responsibility in section 1(1)(b)(ii) of the 1995 Act, being the responsibility to provide guidance appropriate to the child's stage of development; and the right in section 2(1)(a) of the 1995 Act, being "the right ... to regulate the child's residence."

[28] The ancillary provisions, mentioned in section 80(2)(b), are explained in section 82(1). These include the vesting in the local authority of the parental responsibilities in section 1(1)(a), (b)(i) and (d) of the 1995 Act, respectively to safeguard the child's health, development and welfare, provide direction to the child and act as the child's legal representative; and the parental rights mentioned in section 2(1)(b) and (d) of the 1995 Act, being to control, direct or guide the child's upbringing and act as the child's legal representative. The parental responsibilities in section 1(1) of the 1995 Act may be vested in a person other than the local authority. The parental rights mentioned in section 2(1)(b) to (d) may also be vested in a person other than the local authority. Provision is also made, in section 82(1)(c) to (f) for ancillary orders extinguishing certain parental rights and responsibilities, specifying arrangements for contact with the child and determining questions in connection with any parental rights and responsibilities in relation to the child or any other aspect of the welfare of the child.

[29] The effect of the making of the permanence order is the redistribution of parental rights and responsibilities which, where there was previously a person with parental rights and responsibilities in relation to the child, would otherwise have vested in that person. The local authority will, on the making of a permanence order have, at least, the responsibility to provide guidance to the child and the right to regulate the child's residence. The right to regulate the child's residence vests solely in the local authority and may not be vested in any other person.

[30] Section 81 of the 2007 Act also provides, in relation to the mandatory provision, that the responsibility and right mentioned in subsection (1) will vest in the local authority "for the appropriate period". The appropriate period is defined in subsection (2) as, in the case of the responsibility to provide guidance to the child, the period beginning with the making

of the order and ending on the day the child reaches the age of 18. In the case of the right to regulate the child's residence, the appropriate period is defined as beginning with the making of the permanence order and ending on the day the child reaches the age of 16.

[31] The question for us is whether the sheriff erred in making a permanence order vesting in the local authority only that part of the mandatory provision in section 81(1)(a), being the responsibility to provide guidance appropriate to the child's stage of development. The question arises because the child in respect of whom the order was sought was over the age of 16 when the order was made, such that the appropriate period for which the right to regulate the child's residence in terms of section 81(2)(b) could vest in the local authority had passed.

[32] The appellant argues that the constituent parts of the mandatory provision are not severable; it follows therefore that the permanence order made by the sheriff is not competent. In making that submission, the appellant acknowledged that there may be some inconsistencies in the legislation. Section 119 defines a "child" as a person under the age of 18. We do not consider that definition to be inconsistent with the provision at section 81(2)(b). That latter provision does no more than recognise and reflect the effect of the definition of "child" in sections 1(2) and 2(7) of the 1995 Act. Section 2(1) of the 1995 Act is clear that parental rights vest in a parent in order to enable the parent to fulfil his parental responsibilities in relation to the child; they do not stand separate from those responsibilities. Parliament has enacted sections 80 to 85 of the 2007 Act by reference to parental rights and responsibilities in terms of sections 1 and 2 of the 1995 Act. Had it considered it appropriate to do otherwise, it would have done so.

[33] The appellant also recognises the apparent inconsistency between sections 80(1) and 85 of the 2007 Act. Section 85(2) provides that a permanence order may not be made in

respect of a child who is or has been married. In Scotland, the minimum age for marriage is 16 years. Section 85 prohibits the making of a permanence order in respect of any person over 16 who has been legally married. Far from being inconsistent with section 80(1), section 85 recognises that, once a person has reached the age of 16 and has married, a permanence order may not be made. That is entirely consistent with the requirements of section 81, and the requirement that both components of the mandatory provision vesting in the local authority upon the making of a permanence order.

[34] We have also considered the significance of the right to regulate a child's residence in the context of the conditions and considerations applicable to the making of a permanence order, in terms of section 84. Subsection (5)(c) of section 84 requires that the court is satisfied that (i) there is no person who has the right mentioned in subsection (1)(a) of section 2 of the 1995 Act to have the child living with the person or otherwise to regulate the child's residence, or (ii) where there is such a person, the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child. Unless the court is so satisfied, the threshold test in section 84(5)(c) is not met and no permanence order may be made. We are compelled to the view that the vesting of the right to regulate the child's residence in the local authority is critical to the making of a permanence order. Without that right, the local authority cannot do what the permanence order is intended to do, which is to provide the child with a person, in the form of a corporate parent, with the right to regulate the child's residence in a way that is not and is not likely to be seriously detrimental to the child's welfare.

[35] We do not agree with the sheriff's conclusion that:

“[s]imply because the time period for granting the provision mentioned in section 81(1)(b) has passed, it does not follow that the time for granting an order in terms of section 81(1)(a) has passed.”

Nor do we agree that the Act clearly intends that children aged 16 and 17 will be the subject of permanence orders and that the only mandatory provision that will apply during that time will be that described in section 81(1)(a). There is only one mandatory provision, which is described in section 81(1) of the 2007 Act. The mandatory provision so described is comprised of two components. Giving the words of section 81 their natural and ordinary meaning and having regard to the effect and purpose of a permanence order these components are not severable. Accordingly, the order made by the sheriff, granting the permanence order subject only to the responsibility mentioned in section 81(1)(a) was not competent.

[36] We recognise that the effect of our decision is that a permanence order may be made in respect of child who is under 16 but will continue to have effect in terms of vesting in the local authority the parental responsibility to provide guidance appropriate to the child's stage of development, until the child attains the age of 18; those children who are over 16 however, will not so benefit. In that respect, it may be suggested that the legislation offers a lesser degree of protection to young people who are over 16 when an application for a permanence order is made. However, those who are over 16 and in a similar position to the young person in this appeal, will continue to derive the protections afforded by section 17 and section 22(1) of the 1995 Act and the duties incumbent upon the local authority in terms of section 29 of the 1995 Act requiring the local authority to advise, guide and assist a young person aged between 16 and 19 years old who used to be looked after by the local authority, but no longer is.

[37] We are conscious of the effect of our decision on the young person at the centre of this appeal, who had consented to the making of the permanence order and wanted the order to be made. It is regrettable that the respondent local authority was unable to make

the application in sufficient time to enable the court to make the order prior to his 16th birthday. We have a significant degree of sympathy with the young person, who we know is likely to be disappointed by the outcome of this appeal, which will likely result in him remaining subject to compulsory measures of supervision for the foreseeable future.

[38] It is not necessary in the circumstances for us to address the second ground of appeal which was directed at the terms of the sheriff's interlocutor.

Disposal

[39] We will allow the appeal and recall the sheriff's interlocutor of 4 January 2024 and refuse the petition. We shall make no award of expenses to or by either party, and sanction the appeal as suitable for the employment of junior counsel.