

LEGAL NOTES

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CASES

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Appeal against granting of a Permanence Order refused despite mother's progress in managing her alcoholism

Decision of the Court in Appeal by *Scottish Borders Council v SRZ [2020] SAC(Civ) 21*
1 December 2020 delivered by Appeal Sheriff AG McCulloch

Circumstances of the Case

Since 2014 the child had been subject to a Compulsory Supervision Order with a condition that he reside with his maternal grandparents, where his older brothers also lived, in a secure and nurturing environment. This was due to his mother's alcoholism and the consequent ongoing impact on her ability to meet the needs of the child. The mother's alcohol issues dated back to 1995 and were characterised by periods of sobriety- when she could fulfil her parenting responsibilities, and bouts of drinking- when she could not. Since 2017, with the support of professionals, the mother appeared to have managed her addiction. Supervised contact between the mother and child had taken place for a few hours every 4 weeks. The mother wanted the child to live with her at her home hundreds of miles from his grandparents' home. The child's father was not involved in his upbringing.

The Sheriff granted the Permanence Order (PO) with a condition that contact between the mother and child should take place at the discretion of the Local Authority.

Appeal

The mother appealed the decision on the basis that:

1. The "threshold test" had not been met, namely that it had not been established under the Adoption and Children (Scotland) Act 2007 S 84 (5(c)(ii) that were the child to reside with her it "is, or is likely to be, seriously detrimental to the welfare of the child". Reference was made to Lord Reed's dicta in *West Lothian Council v B 2017 SC (UKSC) 15* in which the conditions of this test were laid out at para 9: -
"if the court finds that the threshold test is satisfied, it should be clear: (1) what is the nature of the detriment which the court is satisfied is likely if the child resides with the parent; (2) why the court is satisfied that it is likely; and (3) why the court is satisfied that it is serious."
2. In the absence of a parenting capacity assessment the Sheriff had insufficient information to draw the conclusion that a PO was necessary
3. The Sheriff had not proceeded on the basis of minimum intervention by exploring the possibility of granting a Residence Order under Children (Scotland) Act 1995 Section 11 in favour of the grandparents. This would have allowed for the sharing of PRRs between the mother and the grandparents in a way that best suited the child's circumstances.
4. Leaving contact at the discretion of the Local Authority could result in contact being terminated or reduced without the mother being able to challenge it.

Decision

1. The Appeal Court held that the Sheriff had correctly considered the need to satisfy the threshold test before granting the PO and had properly set out in his notes the reasons for this. These included the mother's ability to look after the child; her alcoholism and relapses; the risk of future relapses and the effect on the child if he were removed from where he had spent 2/3 of his life

and be returned to the mother. While the risk of relapse was a factor in his decision making, this was in the context of *“the whole lengthy history of an alcohol problem.”*

2. The absence of the parenting assessment was not fatal to the PO being granted. The Sheriff required to assess the risk to the child were he to be returned to his mother. The sheriff did this by considering the detailed information available to him. Furthermore, the reason for there being no parenting assessment was largely due to the mother’s non- co-operation with everyone involved with the child’s care, other than those who were assisting her in maintaining her abstinence. The Court found it to be, *“simply wrong to criticise the absence of a parenting assessment at this stage, when the main reason for there not being one was the appellant’s own attitude.”*

3. The appeal court was satisfied that the Sheriff in the first instance had in fact decided that a Residence Order was not a viable option and that the child’s best interests would be met by a PO. The mother seemed not prepared to concede any of her rights, which although not stated, presumably was a factor in the sheriff’s deciding on the necessity of the PO and this being upheld by the appeal court. The distinction was made between the 2 in relation to a parent seeking to vary the Order. A parent may only seek to vary a PO with the leave of the court where there has been a material change in circumstances or other proper reason; this requirement does not exist when seeking to vary a Residence Order.

4. The Court stated that *“an award of contact is ultimately a question of judgement”*. The sheriff had set out his reasons for leaving this largely at the discretion of the Local Authority, taking account of the child’s wishes. Over and above this, since the granting of the PO, the Local Authority had taken on board the Sheriff’s views and contact had increased in duration, was unsupervised and would extend to overnight visits. This was predicated on the continued abstinence of the mother. For these reasons, the appeal was refused on all grounds.

Comment

This case, as with others, turns on the individual facts of the case and the needs and circumstances of the child involved. Both courts referred to the familiar legal tests and considerations to be taken into account in the granting of a Permanence Order.

The appeal court did not support a general proposition that the “removal effect” on its own would be sufficient to satisfy the threshold test under S.84(5)(c) (ii). Nor that if this were the only factor, it would not be insufficient to meet the test. Instead, in each case, the court must consider all aspects of the evidence when deciding whether or not the serious detriment test is met. The court would look **in context** at the likely effect on the child of being moved back to a parent from a place where they had been settled for some time which would result in the loss of protective factors. In clarifying it was stated that: *“It is wrong to compartmentalise issues; the court should consider them all as holistically as possible, in coming to a decision about the threshold test, and the welfare test.”*

Establishing Paternity by DNA testing in Children’s Hearings

Appeal under S.154 of the Children’s Hearings (Scotland) Act 2011 by JS Edinburgh [2021] Sc Edin 1

Sheriff Alison Stirling at Edinburgh Sheriff Court
19 November 2019. (Published 8 January 2021)

Circumstances of the Case

The child was born in November 2017 and was referred to the Children’s Reporter on the basis of lack of parental care and being closely connected to a domestic abuser (the putative father). The parents accepted the Grounds for Referral in March 2018, which were established in court and thereafter the child was made subject to a Compulsory Supervision Order (CSO).

Sometime afterwards the mother claimed that the man was not in fact the child's father. The man had continued to attend Children's Hearings as a relevant person on the basis that he was the father. Through the Hearings' system, he had sought reinstatement of contact with the child, but this was refused until the question of paternity had been resolved. He requested a Hearing to review the CSO and in August 2019 a Children's Hearing refused to add a measure onto the CSO to require the local authority to organise a DNA paternity test, deeming that to be incompetent. This would have involved taking a cheek swab from the child. The man appealed the decision to the Sheriff.

Appeal

The Sheriff was asked to decide:

1. The competency of including a measure on a CSO requiring that a DNA sample is obtained from a child to establish paternity and in ordering that the implementation authority arrange and facilitate it.
2. The correct legal tests to be applied in deciding to include a measure in a CSO.
3. Whether the Hearing had failed to act in accordance with the child and man's rights under Article 8 of the ECHR.

In the event of the appeal being successful, whether the matter should be remitted to a Children's Hearing for disposal or if the Sheriff should substitute her decision for that of the original Hearing's.

Decision

1. Taking a cheek swab for DNA sampling is by definition a "medical or other examination of a child" which is provided for under the Children's Hearings (Scotland) Act 2011 S.83(2)(f) or (h). Therefore, it is competent to include such a measure in a CSO and ordering that the implementation authority arrange such an appointment and facilitate the taking of the sample and the DNA test.
2. The test for the addition of measures in the CSO is set out under Ss25-28 of the 2011 Act. Accordingly, the Hearing should have asked themselves whether it was in the best interests of the child that an order was made requiring a cheek swab to be taken for the purposes of DNA testing and whether it was better for that order to be made than that it should not be made. The "necessity" test, which was in fact applied, was the incorrect test.
3. A decision by a Children's Hearing must be ECHR compliant. Article 8 requires that the private family life of the child and parent is upheld in their decision making. Therefore, the CSO had to be varied to avoid unnecessary delay for the child and the man in eliminating without unnecessary delay "the uncertainty as to the child's personal identity and the legal relationship (if any) between them".
4. The Sheriff found no merit in requiring the Reporter to arrange a Hearing and substituted her decision for that of the Hearing's in granting the variation of the CSO to allow for the DNA testing.

AFA Scotland - Updated Information following on from January 2021 Lockdown

Mainland Scotland is again subject to Lockdown restrictions which will stay in place for the rest of January. Some islands remain at Level 3 so the following advice will relate to them only where there is contact with the rest of Scotland.

Everyone must now stay at home except for essential purposes, some of which will apply to social care workers carrying out their work. It is expected that the Government will issue updated and specific Guidance for this period; below is the recent information provided on 5 January which also refers to the existing Guidance already in place.

[Coronavirus \(COVID-19\): stay at home guidance - gov.scot \(www.gov.scot\)](https://www.gov.scot/topics/health/coronavirus/covid-19/stay-at-home-guidance)
[Coronavirus \(COVID-19\): guidance - gov.scot \(www.gov.scot\)](https://www.gov.scot/topics/health/coronavirus/covid-19/guidance)

In the meantime, the following may provide some help in assessing what can and should be done:

General social work duties

Public services will be delivered online where possible. Face-to-face services can continue where this is essential.

Therefore, the stay-at-home message is clear but there are specific exemptions to this which are directly relevant to social workers continuing to provide support and guidance services to families.

If services must take place in-person, relevant guidance must be followed. Responsibilities in respect of vulnerable people are particularly referred to in the Guidance and these include the provision of care, assistance, support to or respite for a vulnerable person and also to provide or receive emergency assistance.

You can go into another person's house to carry out essential work, to join your extended household or to provide care and support for a vulnerable person. Children are legally classified as vulnerable and so social work provision to children and their families will fall under this category. It's also worth bearing in mind that children under the age of 12 do not count towards the total number of people permitted to gather indoors and that children under 12 do not need to maintain physical distance from others indoors. This might be helpful in Following on from the practical aspects of delivering services to children.

Where remote delivery of services is not possible, support groups and one-to-one support may be delivered in person where it is essential for people's wellbeing. An essential support service is one where the participant's health (including their mental health) and wellbeing would be significantly impacted by non-attendance. This can include providing emotional support for someone whose wellbeing is at risk, including for those who are isolated because of disability or a caring situation.

The Government provides various examples of what constitutes support groups including families' support groups-which would extend to adoption and fostering and addiction services.

the definition of essential services, the one-to-one support provided to individual children and families would fall into this category.

[Coronavirus \(COVID-19\): one to one support and support groups - gov.scot \(www.gov.scot\)](https://www.gov.scot/topics/health/coronavirus/covid-19/one-to-one-support-and-support-groups)

A further excusable reason for not staying at home is to meet a legal obligation. Local Authorities have a myriad of legal obligations in respect of children and families from implementing Children's Hearings' Orders to maintaining contact between children and parents who are living apart where this is appropriate and practicable.

Reassuring families and carers about their rights

Families are also permitted to leave home for certain purposes; specifically, in relation to the families that are involved with social services, the following are likely to be relevant:

- for childcare or support services for parents or expectant parents.
- for essential services, including services of a charitable or voluntary nature such as food banks, alcohol or drug support services.
 - services provided to victims (such as victims of crime),
 - social-care services,
 - accessing day care centres,
- to provide care, assistance, support to or respite for a vulnerable person
- to provide or receive emergency assistance.

- to participate in or facilitate shared parenting.
- to visit a person in an extended household.
- for attendance at court or a children's hearing,
- to visit a person detained in prison, young offenders institute, remand centre, secure accommodation or other place of detention.

Courts

The Scottish Courts and Tribunals Service (SCTS) has confirmed that courts and tribunals will continue to operate business as currently scheduled during the latest lockdown. The existing exemptions to restrictions continue as before, namely, allowing court and tribunal users to travel to court and tribunal premises and also for court workers to attend work.

This means that there is a greater likelihood of court business continuing, such as the granting of PO(A)s, Adoption Orders, CPOs and other child court Orders. A new directive has been issued by the Lord President which sets out his expectations of all court and tribunals users to help people stay safe. Virtual and face to face court hearings will take place with the emphasis on the delivery of effective and safe justice.

[Courts and tribunals to operate during lockdown - Scottish Legal News](#)

[Lord President calls on court users to follow protective measures - Scottish Legal News](#)

Children's Hearings

SCRA has confirmed that face to face Children's Hearings will continue to take place. Children's Hearings are classed as an essential service and this means that anyone attending a Hearing is also allowed to travel to and from the Hearings centre. They have advised that they will notify families and workers if there are any changes to a Hearing, but otherwise people should attend a Hearing as planned.

SCRA has issued information about this and also refer to their earlier advice on attending face-to-face and virtual Hearings.

[Face to face Children's Hearings - latest update - SCRA](#)

[Coronavirus – attending Children's Hearings - SCRA](#)

LEGISLATION AND REGULATIONS

UNCRC (Incorporation) (Scotland) Bill

The UNCRC (Incorporation) (Scotland) Bill was introduced to the Scottish Parliament on 1st September 2020 and it passed Stage 2 on 11th February 2021. The Bill says that:

- Public authorities must not act in a way that's incompatible with the UNCRC requirements.
- Courts will have powers to decide if legislation is compatible with the UNCRC requirements.
- Scottish Government can change laws to make sure they are compatible with the UNCRC requirements.
- The Children and Young People's Commissioner in Scotland will have powers to take legal action if children's rights under the UNCRC are breached.
- Scottish Government must publish a Children's Rights Scheme to show how it is meeting UNCRC requirements and explain their future plans for children's rights.
- Scottish Government must review how the Children's Rights Scheme is working each year.
- Other public authorities listed in the Bill must report every three years on what they are doing to meet the UNCRC requirements.

Children (Scotland) Act 2020

While the Children (Scotland) Act 2020 was passed by the Scottish Parliament in August 2020, it has not yet been brought into force. Some of the provisions were due to become operational this month, but until the Coronavirus (Scotland) Act 2020 ceases to have effect, it is difficult to see how this can happen. It was anticipated that the majority of the provisions would become effective in July 2021, but again, we cannot be sure if this will be the case.

Proposed changes to the Looked After Children (Scotland) Regulations 2009

The Looked After Children (Scotland) Amendment Regulations 2014 introduced a limit to the number of unrelated children who could reside in one fostering placement. One of the exceptions to this rule is where a child is placed with a carer on an emergency basis which has the consequence of there being more than 3 unrelated looked after children in placement.

While at the moment, this arrangement could last for only 4 weeks, the amendment would allow for this to last for longer before being brought to Panel for Panel to review whether this is an acceptable arrangement.

It is also expected that the proposed amendments will reinforce the importance of the sibling relationship so that the presumption is that they will be placed together unless it is contrary to their best interests for this to happen. The individual needs of each of the siblings should be separately assessed.

It will be vital that a comprehensive assessment is made of the capacity of the carer to look after more than 3 children where it is a sibling group or in an emergency situation. This will include specifying what is being done to make sure that the foster carer is properly supported, and resources put in place to strengthen her capacity to meet the needs of each child.

Needless to say, evidencing that the best interests of each child is served by the placement will be of fundamental importance. It is anticipated that these amendments will be passed in Parliament this Session.

OTHER DEVELOPMENTS

Children's Hearings Advocacy Service

In November 2020 a national advocacy service was launched to reinforce the rights of children involved in the Children's Hearings system.

The service, backed by £1.5 million in 2020-2021, means children and young people will be offered support to express their needs and views on decisions that affect their lives. The funding will support the training and provision of advocacy workers.

The provisions in section 122 of The Children's Hearings (Scotland) Act 2011 came into force on 21 November 2020. This activates the duties which require the chairing members of Children's Hearings to inform children of the availability of children's advocacy services.

Children's Hearings must consider views of children as far as possible and are able to do this in a number of ways – through the child, their parents and families, through social workers and other professionals. The introduction of the advocacy service is an additional support. It does not prevent children and young people sharing their views through local authorities, third sector organisations or solicitors.

The child's social worker is expected to facilitate access to the service for each child and to throughout the process, make sure that the child can make use of this service at any time.

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