

Children's Hearings, Relevant Persons and the Welfare of the Child

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Introduction

It was not surprising that one of the earliest issues to be litigated under the Children's Hearings (Scotland) Act 2011 was who would be entitled to be treated as a "relevant person". The matter had frequently exercised the higher courts – even the Supreme Court – in the years immediately prior to the 2011 Act, where the issue was analysed through the prism of human rights. One of the major changes in the 2011 Act was to narrow the definition of relevant person while at the same time to create a means whereby those who do not come within that definition can nevertheless seek "to be treated as a relevant person" for most purposes of the 2011 Act. The definition, in s.200, leaves little room for interpretative dispute, but the new procedure, in ss.79-81, for deeming an individual outwith that definition to be a relevant person always was likely to generate dispute because the test to be satisfied is much more open-ended than the definition.

The Test

The test to be applied (primarily by a pre-hearing panel) is contained in s.81(3) of the Children's Hearings (Scotland) Act 2011, and if it is met the panel "must" deem the individual to be a relevant person. The test is whether the pre-hearing panel "considers that the individual has (or has recently had) a significant involvement in the upbringing of the child". A sheriff may overturn the determination made by the pre-hearing panel on this matter but, as usual with decisions of a judgmental nature, may not do so simply because he or she would have come to a different conclusion: the deemed relevant person decision can be overturned only when the sheriff is satisfied that the determination of the pre-hearing panel is not "justified" (2011 Act, s.160(3) and (4): on the meaning of this ground of appeal, see Norrie, *Children's Hearings in Scotland* (3rd edn) at paras 14.13 – 14.17).

The Cases

Reported in the *Family Law Bulletin* in January 2014 is the decision of Sheriff McCulloch from January 6: *M, Appellant* (2014 Fam. LB 127/7). Here a pre-hearing panel had refused to deem a three year old child's grandmother to be a relevant person. The child had been removed from his mother under the terms of a child protection order and, at the second working day hearing, an interim compulsory supervision order was made, requiring the child to reside with his grandmother, which interim order was confirmed at the eighth working day hearing. Around three weeks later the child was placed with foster carers and, a few days after that, a children's hearing ratified the foster placement. At that hearing, the grandmother was not present, as she did not come within the s.200 definition of "relevant person". So she required, as was her right, a pre-hearing panel to consider whether she should be deemed to be a relevant person for the future. She argued that her involvement was significant since she had been involved with the child throughout his life, including him staying overnight with her every Friday, and occasionally at other times. The panel, however, held that since she had not been involved in medical, dental or nursery decisions in respect of the child, the involvement in the child's upbringing was not "significant" as required by the Act.

The grandmother appealed on the ground that the panel had adopted too narrow an approach: the significance of her involvement in the child's upbringing could be seen by the fact that she had given the mother advice on matters like inoculations, and in particular by the three weeks during which the child was placed with her on an emergency basis. The sheriff accepted this argument, overruled the pre-hearing panel, and deemed the grandmother to be a relevant person.

Now, it is well-known that sheriffs cannot overrule decisions of children's hearings or pre-hearing panels as being not justified just because they disagree with them (the jurisprudence on this point is extensive, but in this context see in particular the comments on Sheriff Principal Nicholson in *W v Schaffer* 2001 (S.L.T. (Sh.Ct) 86 at 87K-88A). There was no procedural irregularity in the case and so Sheriff McCulloch must be holding either that the panel had made an error of law or that no reasonable panel would have reached the determination that this pre-hearing panel reached.

The error of law (though it is not explicitly identified as such) seems to be that the panel, in assessing the significance of the grandmother's involvement in the child's upbringing, ignored the welfare of the child. At para. 6 of his judgment Sheriff McCulloch says this: "All decisions relative to a child, including those made by a children's hearing, or a pre-hearing panel, or a sheriff, must have at its heart the 'best interests of the child' principle. Thus, when looking to see if a person should be deemed as a relevant person, and applying the test of significant involvement (past or present), the consideration must be made in the light of the child's best interests." He finds it to be in the best interests of the child for the grandmother to be deemed to be a relevant person, and so he interprets the s.81(3) test in such a way as achieves that result.

Sheriff McCulloch has form here. In the far more straight-forward case of *X, Appellants*, 2013 S.L.T. (Sh. Ct) 125, parents challenged a pre-hearing panel's determination that the foster carers who had been looking after their children for the previous 18 months satisfied the test for being deemed to be relevant persons. The foster carers had attended previous hearings, they being then within the now repealed definition of "relevant person" in s.93 of the Children (Scotland) Act 1995, but since the coming into force of the 2011 Act they could continue to do so only if deemed by a pre-hearing panel to be relevant persons. Holding that the panel were correct to find the foster carers to be relevant persons (and that this constituted no infringement of the parents' article 8 right to respect for their family life), Sheriff McCulloch said at para 4 of his judgment: "the overarching principle is the welfare test. Section 25 of the 2011 Act requires all decisions, whether by a sheriff or children's hearing or pre-hearing panel, to have regard to the need to safeguard and promote the welfare of a child throughout the child's life as the paramount consideration. On one view, and indeed it is my view, the child's welfare right trumps that of a parent's art.8 right, where those rights appear otherwise to conflict." Later, in discussing the pre-hearing panel's application of the s.81(3) test, he says (at para 9): "But any decision taken by a pre-hearing panel must have the child's welfare as its paramount consideration."

The Flaw in these Cases

In *X, Appellants*, the determination of the pre-hearing panel was plainly right and the sheriff's decision to confirm that determination was inevitable. In *M, Appellant*, the matter was more evenly balanced and there was clearly room for different panels reaching different determinations (though that in itself does not justify a sheriff quashing the determination). What is troubling and, in my view, wrong in both decisions is the sheriff's reliance on s.25 and the child's welfare in reaching his conclusion as to whether the test in s.81(3) is satisfied.

Section 25(2) of the 2011 Act reads: "The children's hearing, pre-hearing panel or court is to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration". Section 25(1) tells us that this requirement applies "where by virtue of this Act a children's hearing, pre-hearing panel or court is coming to a decision about a matter relating to a child". On the face of it this seems absolute: the welfare of the child is paramount in any decision that requires to be made under the 2011 Act if that decision "relates to a child". But this does not mean that s.25 governs all decisions made under the 2011 Act. Children's hearings, pre-hearing panels and courts are required to come to various different types of decision under the 2011 Act, some of which clearly cannot be determined by regarding the child's welfare as paramount. A court might, for example, be asked to make a decision on the competency of an action (as indeed may a children's hearing). An incompetent action does not become competent just because it is in the interests of the child to take the action and so a determination of competency cannot be governed by s.25. That proposition has judicial authority, in the shape of the decision of Lord Menzies in *S v Proudfoot* 2002 S.L.T. 743. Here a hearing's decision that the 1995 Act did not allow them to suspend a condition in a supervision requirement pending an appeal (as opposed to suspending the whole requirement) was challenged and Lord Menzies, agreeing that such an action would be incompetent, explicitly denied the relevance of s.16 of the 1995 Act (the welfare predecessor to s.25 of the 2011 Act) to his decision.

A competency decision is not the only decision to be made under the 2011 Act to which the child's welfare is not determining (or even relevant). A sheriff, for example, might be asked to determine whether a s.67 ground of referral to the children's hearing has been established or not. It would be entirely illegitimate for a sheriff to hold, say, that he cannot determine from the evidence whether or not the

child has misused alcohol, or has committed an offence, or has failed to attend school regularly – but that since the child’s welfare requires that the child be subject to a compulsory supervision order he will hold the ground established. Whether a fact exists or not cannot logically be determined by the consequences for the child’s welfare of that fact. Nor can the welfare test determine whether or not any of the more evaluative s.67 grounds have been established. If a sheriff is faced with a question of whether the child’s relationship with a schedule 1 offender is a “close connection” for the purposes of the ground in s.67(2)(c), or whether the child is “likely” to suffer unnecessarily for the purposes of the ground in s.67(2)(a), the welfare principle in s.25 is not – cannot be – determining. It might determine “suffering” but not “likelihood”: a risk is made no more “likely” just because the child’s interests lie in the ground being established; equally, it does not become less likely because the child’s interests lie in the referral being discharged. In other words, these decisions of the sheriff are, fundamentally, decisions of fact even when the facts require evaluation. This is very different from the judgment of what to do *in response to* established facts: it is only such matters of judicial or quasi-judicial discretion that are governed by s.25(2) – notwithstanding the apparently all-encompassing terms of s.25(1).

So the question becomes: what sort of decision is a pre-hearing panel making when it is applying the test in s.81(3)? The test is clearly not one of competency, nor is it one of pure fact. Rather, when asked to determine whether or not a person has, or has recently had, a significant involvement in the upbringing of a child, the pre-hearing panel is evaluating sometimes contested facts. How “significant” is the person’s involvement? Was the involvement “recent”? Did the involvement concern matters of “upbringing”? These are not susceptible to being answered by reference to the child’s welfare, though clearly the child’s welfare might well be affected by the decision. Section 25 does not, in other words, apply to the evaluative determination of whether a person meets the test in s.81(3), just as it does not apply to the evaluation of the facts that found a s.67 ground. If the sheriff is not satisfied that a s.67 ground has been made out then he must discharge the referral; if a pre-hearing panel is not satisfied that the s.81(3) test has been met then it must refuse to deem the person a relevant person – each irrespective of whether it is in the interests of

the child to be referred to a hearing, or to be accompanied at the hearing by the person in question.

Welfare works both ways of course. An individual may seek to be deemed to be a relevant person when it would be disastrous for the child so to recognise him, for example if the individual is a schedule 1 offender of whom the child is afraid. Yet if the offender shows that he has or has recently had significant involvement in the upbringing of the child the pre-hearing panel *must* (according to s.81(3), and as recognised by Sheriff McCulloch in *X, Appellants* at para.3) deem him to be a relevant person, and the fact that the child's welfare would be compromised thereby does not allow the panel to refuse to do so.

So, in sum, Sheriff McCulloch was, it is submitted, wrong to focus on the child's welfare in reaching his decisions in the two cases discussed above. He clearly made the right decision in *X, Appellants*; he probably made the decision that I would have made in *M, Appellant* (because I want the test in s.81(3) to be interpreted expansively). But the decision was not mine: it belonged to the pre-hearing panel, which ought not to have been overturned unless the sheriff determined that an error of law had been made or that no reasonable pre-hearing panel would have come to the decision in question. Evaluating facts differently from how the sheriff would evaluate them is not, in itself, an error of law. The error of law lies in using s.25 to make the evaluation, and the pre-hearing panel was correct not to do so. It is to be hoped that other sheriffs do not follow the approach in these two cases, and that we do not have to wait too long until a higher court firmly rejects that approach.

On a Related Issue

The 2011 Act gives to the pre-hearing panel the primary role of deeming an individual to be a relevant person, but gives it no role in removing deemed relevant person status. Only a children's hearing, after a review the outcome of which is to maintain the compulsory supervision order, may remove the relevant person status of an individual previously deemed as such (2011 Act, s.142). That will change, however, when the recently enacted Children and Young People (Scotland) Act 2014 comes into force, because a new s.81A is to be inserted into the 2011 Act permitting

a pre-hearing panel to be convened to determine whether a deemed relevant person “should continue to be deemed to be a relevant person”. That “should” must not be interpreted by regarding the welfare principle in s.25 as determinative. A person “should” – by which is meant “must” – continue to be deemed to be a relevant person if they continue to meet the test, even when that is bad for the child. And they should (must) have their relevant person status removed if they now fail to meet the test – even when their continued involvement in the hearing system would be good for the child.