SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2019] SCABE95

ABE-B471-19

NOTE BY SUMMARY SHERIFF M F H HODGE

in the appeal

under section 154(1) of the Children's Hearing (Scotland) Act 2011

by

CA and CM

against

A decision of The Children's Hearing at Aberdeen dated 4 June 2019 in respect of the child, DHB

[1] On 11 September 2019, having heard submissions in an appeal in terms of section 154 of the Children's Hearings (Scotland) Act 2011, ("the 2011 Act") I made an order in terms of section 156(3) of that Act. A Note is therefore required in terms of Rule 3.58(2) of the Act of Sederunt (Child Care and Maintenance Rules) 1997.

Factual and legal background

[2] DHB ("the child") was born on 6 May 2017, the son of CH and DB. He has been in care since just after his birth. His parents could not care for him, owing to a history of substance misuse and involvement with the Criminal Justice System. Permanence planning was put in place and prospective adoptive parents subsequently identified. The child was placed in the care of the prospective adopters in October 2018. The adoption petition is contested by the natural parents, and I understand that there is a diet of proof fixed for one

day in November 2019 in a sheriff court outwith this jurisdiction, although it may be that further days are required. The prospective adopters are relevant persons for the purposes of the 2011 Act.

[3] On 4 June 2019, a Children's Hearing in Aberdeen continued and varied a Compulsory Supervision Order dated 28 March 2019 in respect of the child. The Compulsory Supervision Order of 28 March date contained a measure prohibiting disclosure of the child's residence to the parents of the child. The Children's Hearing on 4 June 2019 removed that measure, with the result that the child's address (which is where he resides with the prospective adopters) could be disclosed to the natural parents.

[4] That decision was appealed by the prospective adopters. The appeal was opposed by both parents and the Reporter. The decision of 4 June 2019 was suspended pending the outcome of the appeal so as not to prejudice the appellants.

[5] It was not disputed that the Panel on 4 June 2019 made their Compulsory Supervision Order, and the measures included therein in terms of section 83 of the 2011 Act. This section defines the meaning of a Compulsory Supervision Order and specifies in detail the type of measures which it is open to the Panel to include in such an order.

[6] Section 83(2)(a) provides that one of the measures that can be included in a Compulsory Supervision Order is "a requirement that the child reside at a specified place".

[7] Section 83(2)(c) provides that a further measure which can be included in a Compulsory Supervision Order is "a prohibition on the disclosure (whether directly or indirectly) of a place specified under subparagraph (a)", (in other words the place where the child is residing).

[8] In Part 3 of the 2011 Act, which is headed "GENERAL CONSIDERATIONS", is to be found in section 25, entitled "Welfare of the Child", which provides as follows:

> "(1) This section 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.
>
> (2) 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."

For the sake of brevity, I will refer to this as "the welfare test".

[9] Part 18 of the 2011 Act is headed "MISCELLANEOUS". Within this Part is found section 178, which is entitled "Children's Hearing: disclosure of information". Section 178(1) is in the following terms:

> "A Children's Hearing need not disclose to a person any information about the child to whom the hearing relates or about the child's case if disclosure of that information to that person would be likely to cause significant harm to the child."

[10] On 4 June 2019, the Panel provided the following reason for making the order in relation to non-disclosure:

> "By majority decision, the Panel decided that the case did not meet the test for non-disclosure as there was no information to suggest that DHB was at risk of significant harm. The minority felt that past history of the natural parents in caring for their offspring suggested that there could be a future risk to DHB".

Submissions

[11] I heard submissions from Mr Inglis, Counsel on behalf of the appellants, and Miss Low, for the Reporter. Although Answers had been lodged to the appeal by the legal representatives of the natural parents, I was informed by Miss Guinnane, Counsel for CH, and Mr Sharp, Counsel for DB, that they were no longer opposing the appeal.

[12] Mr Inglis' submission, in essence, was that the Children's Hearing had applied the wrong test. There was no test of "significant harm to the child" in relation to measures put in place by the Panel under section 83. There was indeed no test at all specified in relation to the particular prohibition in section 83(2)(c). It must be taken therefore to be governed by

the welfare test in section 25. The Panel had become confused by the test of "significant harm" in section 178 relating to the non-disclosure of certain information, which in his submission did not include the address of a child. He pointed to the fact that where specific tests require to be applied in decisions to be reached under the 2011 Act, such tests are expressly provided for. For example, in section 83 subsections (4) and (5); or alternatively where a measure is made subject to another part of the Act, as in section 83(2)(f).

[13] He drew my attention to Professor Norrie's discussion of the measure in section 83(2)(c) at page 188 of "Children's Hearings in Scotland" (3rd edition) at paragraph 11.05. Professor Norrie's interpretation of the subsection is that there is no specific test to be applied by hearing in reaching this decision other than the overarching need to have regard to the welfare test in section 25. Mr Inglis also pointed to the fact that Professor Sutherland, in "Child and Family Law" came to the same conclusion in relation to the same wording in the 1995 statute which had preceded the 2011 Act.

[14] He turned to examine section 178, including its consideration by Professor Norrie, at page 112, paragraph 6-49, and the annotations to section 178 contained in Green's Annotated version of the 2011 Act. Those commentaries, in his submission, made it clear that section 178 deals with the disclosure of evidence, particularly *vis-a-vis* a "relevant person".

[15] He noted at paragraph C.557.4 of the annotations, that there is discussion of the situation where a Children's Hearing deny access to information which has formed the "basis for the hearing's decision". Mr Inglis contended that this was a strong indication that the whole discussion was clearly about evidential material. A person's address was not a matter which could form the basis for a hearing's decision. He made the point that the provision for a test of significant harm was understandable in the context surrounding section 178. It was evident from the discussion in the annotations that at the heart of the

concerns about confidentiality are the Article 6 rights of persons who may be accused of ill-treating a child. A higher test is therefore required than the section 25 welfare test. In short, he submitted that section 83 should be considered on its own as a discrete section of the Act, its operation governed by section 25 unless otherwise specified.

[16] He submitted that this view of the purpose of section 178 became clearer if one examined the relevant Rules, and in particular Rule 84[1]. Rule 84, which is headed "Non-disclosure requests" defines such a request as follows:

> " …a request made by a person that any document or part of a document or information contained in a document relating to a pre-hearing panel or to a children's hearing should be withheld from a specified person….on the grounds that disclosure of that document or part of the document or any information contained in it would be likely to cause significant harm to the child…."

[17] Rules 85-87 provide for a specific procedure to be applied when a party makes a non-disclosure request in relation to section 178 information. Such requests must be submitted by the Reporter to a Children's Hearing and are subject thereafter to the procedural rules in Rules 86 and 87.

[18] Mr Inglis pointed out there had been no such application under section 178 or Rule 84 in this case.

[19] Mr Inglis had an *esto* submission in the event that I did not agree with his primary submissions. If I concluded the Children's Hearing were correct to apply the significant harm test then he wished me to take into account that there were factors known to them which should have satisfied the test. He adduced the parents' long history of criminal conduct and the fact that their last conviction was for a serious violent offence. He submitted that the court had to take into account the future, and the fact that the adoption

[1] Children's Hearings (Scotland)Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 (SSI 2013/194)

was opposed by the natural parents, although it was supported by the local authority and the Children's Hearing. He pointed out that in contrast to the sorts of information which might be requested in terms of section 178, there was no prejudice to the natural parents in not knowing the address where the child resided.

[20] Miss Low for the Reporter made submissions to me, opposing the appeal. She accepted that the order made by the Children's Hearing on 4 June 2019 was in terms of section 83, and that the Panel, in the operation of section 83 had to have regard, above all, to the statutory welfare test. However, in her submission, the "significant harm" test set out in section 178 should be implied into section 83. She also advised me that the Reporter was aware of the views of Professor Norrie, but disagreed with his interpretation.

[21] She pointed out that at a Children's Hearing on 19 September 2018, when the Reporter had sought a review hearing for the purposes of transferring the child's care to the prospective adopters, the hearing had considered a non-disclosure request from the local authority. The test applied at that stage was whether such disclosure was likely to cause significant harm to the child.

[22] Miss Low maintained that the only way that the non-disclosure order could have come about was because a non-disclosure request was made in terms of section 178. Miss Low drew my attention to Rule 16 of the 2013 Rules.

[23] Miss Low also drew my attention to certain sections (pages 30-31 and 130-131) of The Children's Hearing Scotland Practice and Procedure Manual (3rd edition, Version 2 2019), which she said supported her contention that a "significant harm" test was imported from section 178 into section 83. Paragraph 3.39 thereof deals with the measure prohibiting disclosure of the child's address in terms of section 83 (although no reference is made to the

operative section of the statute). No test is mentioned at all in that paragraph and the test applied in the worked example is not explicitly set out.

[24] Paragraph 3.43 states:

> "The ethos of a children's hearing is openness. Withholding information from a party otherwise entitled to that information should be exceptional. The test which should be applied is whether disclosing the place of residence would be likely to cause significant harm to the child".

There is no reference to sections 25, 83 or 178, or indeed any authority cited for this proposition.

[25] Ms Low submitted that in light of the above, the Panel had applied the correct statutory test and furthermore, applied it appropriately, there being nothing to show that there was a significant risk of harm to the child. In short, she submitted that the Panel had no option but not to include the measure. She asked me to confirm the Panel's decision of 4 June.

[26] In reply, Mr Inglis addressed the issue of whether there could be implication into section 83 of the test contained in section 178. He submitted that the circumstances in which matters could be implied into legislation were very limited. He noted that section 25 was explicitly implied into the whole of the 2011 Act. The Human Rights Act 1998 was, of course, also implied into all legislation. If there is to be implication of a statutory test, then it has to be clear. He asked me to sustain the appeal and substitute for the Hearing's decision a measure prohibiting disclosure of the address where the child is residing whether directly or indirectly to the natural parents.

Conclusion

[27] In my view this was a matter of statutory interpretation. Section 83 of the 2011 Act is an important section defining and limiting the powers of a Children's Hearing. The order of 4 June 2019 uses the terms of section 83(2)(c), namely:

> "the Children's Hearing orders that the place/places where the child is required to reside in accordance with this order shall not be disclosed, whether directly or indirectly, to the child's parents….."

[28] Section 25 of the 2011 Act makes it clear that in reaching any decision about a child a hearing has to take into account the child's welfare throughout its childhood as the paramount consideration. Section 25 is therefore quite explicitly implied into the whole Act as the test to which a hearing should have regard whatever decision they are taking. Where another competing test is to be applied in relation to any matter, it is therefore spelled out (as for example, in section 178 or section 138, which deals with the powers of a Children's Hearing upon review and provides for a test of necessity). Section 83 itself contains such examples and exceptions. Section 83(5) provides for a Hearing to include a secure accommodation authorisation in any CSO. Section 83(6) specifically sets out the conditions which must be met before a Children's Hearing can make such an authorisation. In addition, before a Children's Hearing makes an order that a child is to have a medical examination or treatment, in terms of section 83(2)(f), it is specifically stated to be subject to section 186 (which deals with consent). Since there is no other test mentioned in section 83 in relation to the prohibition on disclosure of a child's residence, the only inference to be drawn from a plain reading of the statute is that this measure is subject to the welfare test.

[29] Professor Norrie discusses the measure in section 83(2)(a) at paragraph 11.05 of "Children's Hearings in Scotland". With reference to the prohibition, he states:

> "The statute gives no indication as to when it would be appropriate for the children's hearing to exercise the power to prohibit disclosure of the child's place of residence, and there is nothing to prevent them from doing so for the benefit of someone other than the child, such as foster-carers, kinship carers or prospective adopters……".

[30] I note that in paragraph 11.07, Professor Norrie draws a distinction between the ability of the Children's Hearing to include the prohibition on its own initiative (my emphasis), and that it may also be asked to do so by someone else. He refers to the procedure discussed elsewhere for dealing with what he refers to as the *"rather wider "non-disclosure" request"* (Rules 84-87, per paragraph 6.49 in Norrie).

[31] Professor Sutherland, addressing the similar provision in the earlier legislation, at paragraph 10-109, notes that there is no indication of when it would be appropriate for the hearing to make such a prohibition. She says that the child's welfare is relevant but non-disclosure might serve to protect other parties such as foster carers or prospective adopters.

[32] In my opinion, section 178 is in very different terms and has a different purpose from section 83(2)(c). Section 83 is central to the operation of the Children's Hearing System. The prohibition which can be included on the Panel's own initiative in terms of section 83(2)(c) is aimed at all persons and is aimed at disclosure howsoever it comes about. By contrast, section 178 (located in a part of the Act dealing with "miscellaneous" matters) is permissive, providing an exception (section 178(2)) to the normal rules of disclosure of information, (to those who would otherwise be entitled to receive that information). The relevant Rules (84-86) make it clear that section 178, and its related "non-disclosure requests", depend on consideration of documents or information contained in documents. Furthermore, the discretion conferred on Hearings by section 178 only comes into operation when a request is made and a certain procedure followed.

[33] The concept of the prohibition in section 83(2)(c) seems to me to be capable of encompassing more than disclosure of documentation or information contained therein, and could include all other means (for example, oral transmission) of finding out and communicating the child's address. I agree with Mr Inglis that the matters referred to as "information" in section 178, on the basis of the annotations, seem to me to refer to evidential material or other material which would form the basis of a Panel's decision. An address is not such material.

[34] Rule 16 of the 2013 Rules, to which I was referred by Miss Low, provides for a power to be conferred on the Reporter to withhold information, and is therefore a quite separate matter from the powers open to a Hearing in terms of section 83. Even so, it is striking that Rule 16 explicitly sets out a "significant harm" test, and does not through silence leave it to implication.

[35] The guidance with which the hearings are issued is possibly supportive of the Reporter's position, but the propositions it advances are less than clear, (making no distinction between a section 83 measure and a response to a request under section 178) and no authority (not even a statutory reference) is provided for those propositions. Of course, I understand the guidance is not written with lawyers in mind, but it seems to be that, at the very least, it may be confused and misleading. I therefore attach little weight to that guidance, particularly in light of the academic comment to which I was referred.

[36] Standing Professor Norrie's distinction between the Hearing's ability to make the section 83(2)(c) prohibition on their own initiative and the Hearing responding to a non-disclosure request, I note that a perusal of the history, as revealed by the papers lodged by the Reporter, suggests that previous Hearings did issue prohibitions in terms of section 83 on their own initiative, without non-disclosure requests, and indeed without apparently

utilising an explicit or indeed implicit "significant harm" test, (for example, the Panel's decisions on 26 September 2017 and 3 April 2018).

[37] When the hearing on 4 June was considering making the order for non-disclosure of the child's address in terms of section 83(2)(c), they were not responding to a request for non-disclosure in terms of section 178 (although they have been under the erroneous impression that they were). I agree with submissions for the appellants that, standing the structure of the Act, it does not make sense in terms of either logic or practicalities for section 178 to apply in relation to a prohibition of disclosure of a child's address. I consider that to read into section 83(2)(c) an implied test, from quite another Part of the Act dealing with other matters, which must be met before there can be a prohibition on the disclosure of a child's address, is unjustifiable. If section 25 did not exist, then there might be some force in the argument, but the Reporter offered no authority for this interpretation of the Act. One would have thought that had the importation of such a test been the intention of the legislators, it should have been explicitly stated, given the central significance of section 83, and its structure.

[38] Finally, the statutory welfare test is stated to be "paramount". In those circumstances, courts should be slow, in my view, to imply tests which override the paramountcy of the child's welfare. I have reached the conclusion that the Children's Hearing on 4 June 2019 applied the wrong test in law, and the decision is therefore unjustified. Given my conclusions I do not consider that it is of any assistance for me to address the issue of whether the Panel, applying the wrong test, came to an unjustifiable conclusion in that respect.

[39] In terms of section 156(2)(b), having allowed the appeal, I am permitted to take one or more of the steps mentioned in section 156(3), which include continuing, varying or

terminating any order, interim variation or warrant which is in effect (section 156(3)(b)). I am to be guided by the welfare principle, which is paramount and is to apply throughout the child's childhood. I take into account that there is an adoption petition pending, which is opposed. The adoptive parents had a degree of anonymity in that Petition, in that the Petition has been assigned a serial number. Regrettably, that anonymity has apparently been breached to the extent that their first names and surnames are known to the natural parents. I do not know the circumstances of that breach.

[40] The issue is not solely the risk of physical harm, as appeared to have been at the forefront of the Panel's minds when they were considering the matter. The adoption petition may be granted, in which case, it is in the long-term interests and indeed it is the right of the child throughout his childhood to be able to pursue his family life peacefully and without disturbance, for the sake of his emotional and psychological wellbeing. Once the address is revealed, those interests and that right is compromised, whatever the intentions of the natural parents. In my view, the child's best interests, and his welfare throughout his childhood are served by the making of an order in terms of section 83(2)(c).