EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 14
XA87/20

Lord Malcolm
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Appeal

by

M

Pursuer and Respondent

against

C

Defender and Appellant

Pursuer and Respondent: Ardrey; Allan McDougall
Defender and Appellant: Aitken; Drummond Miller LLP

23 February 2021

[1] This case concerns the court's duties when considering whether to explore the views of a child before making an order under section 11(1) of the Children (Scotland) Act 1995. Section 11(7)(b) states that, taking account of the child's age and maturity, the court "shall so far as practicable" take steps to ensure that any views he or she wishes to express are taken into account.

The decisions of the sheriff and the Sheriff Appeal Court

[2] When refusing an application for a contact order the sheriff stated that it would not be appropriate to inquire into any views of the child. He had a concern that information might be communicated which a child of just under 5 years of age should not be told, but he did not explain the nature of the information or why it would not be practicable to ascertain the child's views without it being divulged. On appeal to the Sheriff Appeal Court ("SAC") the appeal sheriff held that the sheriff had failed to apply the correct test. A child who is capable of forming a view has a right to be heard unless it is not practicable to consult him or her. In this regard "practicable" means "able to be put into practice, able to be accomplished, effected or done, feasible" (Shorter Oxford Dictionary 6th ed). He remitted to the sheriff to proceed in the light of this guidance.

LRK* v *AG

[3] Subsequently, in *LRK* v *AG* [2021] SAC (Civ) 1 a differently constituted SAC considered another case where the views of a 6 year old child were not explored. It held that the sheriff failed to address the test of impracticability. There are many ways in which the position of a child can be ascertained. Some might be impracticable, but others might not (paragraph 8 of the opinion of the court).

[4] The SAC had a concern that if "impracticable" was given its strictest sense the views of the child would have to be sought even where taking that course would be damaging to the child. It supposed a case (paragraph 11) where a child had always wrongly thought that someone was her father. A psychologist had reported that telling her that she was another's child and asking whether she wanted to see him would be harmful to her mental health. The court canvassed the possibility that impracticability might be construed in light of the overriding considerations expressed in article 3 of the United Nations Convention on the

Rights of the Child (1989) ("UNCRC") (that "the best interests of the child shall be the primary consideration") and in section 11(7)(a) of the 1995 Act (to regard the welfare of the child concerned as the paramount consideration). It ventured that if that was the correct approach it would mean that the sheriff does indeed have a decision to make no matter that it is possible, for example, for the child to be interviewed by a reporter, curator or the sheriff. It observed that the issue will not be resolved when section 11ZB of the 1995 Act comes into force. (This provision, introduced by the Children (Scotland) Act 2020, removes the test of practicability with the only exceptions to the court's duty being when the child's whereabouts are unknown or if the child is incapable of forming a view. We note, however, that section 11ZA will provide that in deciding whether or not to make an order under section 11(1) and what order (if any) to make, the court must regard the welfare of the child concerned as its paramount consideration.)

Parties' submissions

[5] Turning to the parties' submissions to this court, counsel for the appellant contended that the practicability test should be interpreted in a manner which allows potentially harmful consequences for the child to be taken into account. The appeal sheriff's approach of a strict feasibility test creates a conflict with the paramount consideration which is causing concern in courts throughout the country. In the present case at the end of the proof the sheriff listened to submissions on the matter and reached a decision which was open to him. The appeal should be upheld and the sheriff's decision restored. Counsel for the respondent submitted that the appeal sheriff was correct to remit the case on the basis that the sheriff failed to apply the correct test, but it did not follow that the welfare of the child is an irrelevant consideration. Reference was made to certain authorities in this area of the law, including *S* v *S* 2002 SC 246 and *Woods* v *Pryce* 2019 SLT (Sh Ct) 115, however the court has

not previously been asked to adjudicate on the present issue concerning the nature of the practicability test, thus they are of little assistance.

[6] Counsel for the appellant explained how and why the issue has arisen now. Until recently, 12 years of age was regarded as an appropriate milestone for these purposes. However a review of procedures recognised that this meant that the views of primary school children were being overlooked. Reference was made to Ordinary Cause Rule 33.19 and the Form F9 procedure. If the child returns the form or otherwise indicates a wish to state views "the sheriff shall order such steps to be taken as he considers appropriate to ascertain the views of that child." Rule 33.7A allows an initial writ to seek dispensation from the Form F9 procedure when it would be "inappropriate", with a child under 5 years of age being given as an example. While the 12 years rule of thumb was reduced to 5 years, sheriffs considered that they had been afforded a relatively wide discretion to proceed as seemed best for the child.

Discussion and decision

[7] Section 11(7)(a) of the 1995 Act provides that when considering whether to make an order under Section 11(1) the court "shall regard the welfare of the child concerned as its paramount consideration ---". Section 11(7)(b) states that when considering such an order, taking account of the child's age and maturity the court "shall so far as practicable" give him an opportunity to indicate whether he wishes to express views; if yes, give him an opportunity to express them; and have regard to such views as are expressed.

[8] Both considerations arise in the same statutory provision. It seems inherently unlikely that Parliament intended that steps had to be taken to explore any views of the child no matter how harmful that would be for him or her. On the contrary, and in line with

article 3(1) of UNCRC, the court's over-arching duty is to safeguard the welfare of children and promote their best interests.

[9] The approach of the appeal sheriff disengages the paramount consideration when the court is considering the terms of section 11(7)(b), and this on the basis of a dictionary definition of what is meant by something being "practicable". However the court's function when interpreting a statute goes beyond the application of the day to day usage of a word or phrase. The aim is to ascertain the intention of Parliament, which requires the passage in question to be set in its context, not only in respect of the surrounding provisions, but also with regard to its purpose. Where necessary the court can imply a meaning which the words used would not ordinarily carry. If a suggested meaning would contradict another provision in the statute, that should prompt particular care as to whether another construction is available which would avoid the conflict.

[10] The word "practicable" is not a straightforward term. It can be seen as having a narrow or a more extended meaning depending on the circumstances of its use. If a court is ordered to treat the best interests of a child as paramount, and also to do something concerning the child if it is practicable, it does little if any violence to that wording to decide not to do that something if it violates the first instruction. As a result of the adverse consequences, which include a breach of the court's primary duty, it would not be within the realms of a possible or workable course of action. Even under reference to the definition relied on by the appeal sheriff, in such circumstances it would be sensible to say that it is not something which is able to be put into practice. It is not a feasible thing for the court to do because it conflicts with the duty to treat the child's best interests as its paramount consideration.

[11] We have no hesitation in reading the test in section 11(7)(b) as importing a consideration of any harmful consequences for the child in question and whether they render all and any steps to explore the child's views not practicable. This follows from the shared context of the provisions in this part of the statute, namely the court's consideration of whether to make a section 11(1) order, and the paramountcy of the child's best interests. In *LRK* the SAC expressed a concern about applying the practicability test in its strictest sense. By "strictest sense" it meant an approach whereby if particular steps to explore the child's position can be taken, they must be taken. In our view "practicable" is a more nuanced term which need not exclude all consideration of consequences. If something can be done, but only at the cost of serious harm to the child at the heart of the proceedings, it can be said that it is not a practicable course of action.

[12] It is necessary to warn that this does not replace the statutory test with a judicial discretion. Both section 11(7)(b) and article 12 of UNCRC place great weight on the right of a child to be heard in proceedings such as this. That right is not unqualified, but it will rarely be correct to conclude that seeking the views of a child will cause unavoidable and material harm to the child. Vague concerns that inappropriate information might be communicated are not a good reason for not seeking a child's views. Such matters can be guarded against. If children are of sufficient age and maturity to form and express a view, their voices must be heard unless there are weighty adverse welfare considerations of sufficient gravity to supersede the default position. Careful thought as to how a child's position is to be ascertained will often resolve concerns. The court would require to be in a position to justify the proposition that the welfare issues are such as to render the exercise impracticable.

[13] As for the present appeal, the sheriff did not address the correct test, thus the appeal sheriff did not err in remitting the matter to him. It follows that the appeal is refused.