SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2017] SC GLA 58

B959/17

NOTE BY SHERIFF A Y ANWAR

Appeal in terms of section 154 of the Children's Hearings (Scotland) Act 2011

by

CM

Appellant

Against a decision of the Children's Hearings at Kirkintilloch on 22 March 2017 in respect of

AB & BB

Glasgow, 13 September 2017

INTRODUCTION

[1] The appellant is the mother of AB, aged 14 and BB, aged 13 ("the children"). The appellant appealed against decisions of a children's hearing dated 22 March 2017, in respect of each child, under section 154 of the Children's Hearings (Scotland) Act 2011 ("the Act"). The appeals were heard together. The appeals are treated as one appeal for the purposes of this note.

[2] At the hearing on the appeal, the appellant was represented by Mr Allison. Mr Mobbs represented the Principal Reporter. Mr B, the father, appeared and was unrepresented. Ms Black, the safeguarder, was also in attendance.

[3] On 13 July 2017, I refused the appeal and confirmed the decisions of the children's hearings dated 22 March 2017.

[4] Mr B moved the court to have the appellant deemed a frivolous and vexatious litigant in terms of section 159 of the Act. As there had been no prior intimation of the motion, a hearing was assigned for 9 August 2017 to consider the motion.

[5] At the hearing on 9 August 2017, on behalf of the Reporter, Mr Mobbs conjoined in Mr B's motion. The safeguarder was not present. Mr Sturdy appeared on behalf of the appellant.

BACKGROUND

[6] Grounds of Referral were established at Glasgow Sheriff Court on 7 January 2013 in respect of the children and their elder brother, CB (who is now 17). Put shortly, the established supporting facts narrate (a) that the appellant suffers from "extremely high stress levels" which have impacted upon her ability to provide stability and security for the children; (b) that since the relationship between the appellant and Mr B ended in 2005, the appellant has, on occasions used the children against Mr B which has been "emotionally distressing" for the children by, for example, (i) refusing to allow Mr B contact with the children and (ii) leaving the children with Mr B without notice for extended periods on a number of occasions; and (c) that the appellant's chastisement of the children has, on occasions, been inappropriate. The statement of facts narrate that the acrimonious relationship between the appellant and Mr B continues to impact the children.

[7] On 27 March 2013 a Compulsory Supervision Order ("CSO") was made as a result of which, the children were placed in Mr B's care. No measure of contact was made, in order to allow contact to operate flexibly. On 20 May 2013, the CSO was varied to include a measure of contact between the appellant and the children (including CB) for a period of

two hours once per week, supervised by the social work department. On 19 September 2013, the CSO was varied to prohibit contact between the appellant and the children.

[8] Since January 2014, various children's hearings have been convened in respect of the children. In particular;

(a) On 28 January 2014, the CSO was not varied in relation to contact. That decision was appealed by the appellant ("the first appeal"). The first appeal was not opposed by the Reporter who conceded that the reasons did not expressly state the children's views on contact.

(b) On 24 July 2014, the CSO was varied to allow contact between the children and the appellant, facilitated and supervised by the social work department. It was a matter of agreement between the parties that no contact in fact took place between the children and the appellant. That decision was appealed ("the second appeal"). The second appeal was refused by Sheriff Baird. The appellant appealed that decision to the Sheriff Principal however the appeal was subsequently withdrawn.

(c) On 17 November 2014, the CSO was varied to prohibit contact between the appellant and the children. The hearing noted that the appellant had failed to engage with the social work department to carry out the preparatory work for contact to operate. The appellant appealed the decision of the hearing *quoad* the prohibition of contact ("the third appeal"). The third appeal was refused by Sheriff Reid. The appellant appealed that decision to the Sheriff Principal however the appeal was subsequently withdrawn.

(d) On 24 March 2016, the CSO was continued, including the measure of no contact between the appellant and the children. The appellant appealed that decision ("the fourth appeal"). The fourth appeal was refused by Sheriff Wood.

[9] Neither AB nor BB have had contact with the appellant for approximately three years.

[10] Between autumn 2014 and early 2015, the appellant exercised supervised contact with CB. In early 2015, CB's placement with Mr B broke down and he resided with the appellant for several months. He returned to reside with his father, and then, again, returned to reside with his mother. CB was discharged from his CSO in June 2016.

[11] Between April 2016 and November 2016, the appellant's solicitors wrote to the social work department seeking clarification in relation to what was required of the appellant before contact with the children could be reinstated. The social work department referred the appellant's solicitor to the terms of the comprehensive review report dated 10 February 2016 and to earlier correspondence in May 2015.

[12] During 2016, the appellant instructed a report by Ms Mellon, a social worker. The report asserts a number of failures and breaches of statutory duty on the part of the local authority.

[13] In November 2016, the appellant sought a relevant person review and submitted the report by Ms Mellon to the hearing. A hearing was convened on 24 January 2017. The hearing decided to appoint a safeguarder to obtain the children's views on contact. Those views having been obtained, a children's hearing was convened on 22 March 2017.

[14] The appeal before me of the decision of the children's hearing on 22 March 2017, to continue the CSO, including the measure of no contact between the appellant and the children, constitutes the fifth appeal by the appellant ("the fifth appeal").

[15] The decisions appealed against in the fifth appeal were as follows:

1. to allow permission for the solicitor for the local authority to be present at the hearing ("Decision 1");

2. to continue the compulsory supervision order dated 23 March 2016 ("Decision 4");
3. to include a measure directing that there shall be no contact between the children and the appellant ("Decision 6").

SUBMISSIONS

Submissions for Mr B

[16] Mr B explained that in his view, whatever the outcome of any children's hearing, the appellant would challenge the decision. He stated that the repeated reviews sought by the appellant and the subsequent inevitable appeals were designed to harass him and the children. The appellant had no desire to address the issues which caused the cessation of contact between herself and the children. He objected to what he described as the "continual examination" of his children by professionals who had been tasked with taking the children's views; multiple social workers, multiple safeguarders, legal representatives, staff from Barnardos, Action for Children and members of the police have had cause to speak to or interview the children. He estimated that between 28 and 30 professionals had met with the children. Social workers had been replaced to seek to improve relations between the appellant and the social work department, or as a result of the appellant's complaints. Each time there was change of staff, the children had required to be introduced to them. Each time the appellant sought a review or an appeal of a decision of the hearing, the children required to receive notification and they were fully aware of the situation. There was a risk the children would disengage from the children's hearings process. He stated that the appellant was motivated to disrupt and destabilise the children's placement with him and to undermine his parenting of them. She did not have regard to the welfare of

the children. He asserted that any pause in the appellant's applications for reviews or appeals only lasted for as long as it took for the appellant to secure legal aid funding.

Submissions for the Reporter

[17] On behalf of the Reporter, Mr Mobbs very helpfully produced written submissions which were lodged in advance of the hearing. I am grateful to him for doing so. He explained that with the exception of the first appeal, he had represented the Principal Reporter at each appeal. Each had been dismissed as being without merit. Two further appeals had been lodged with the Sheriff Principal and thereafter withdrawn without a determination. Additionally, in December 2013, the appellant made an application for a Child Protection Order in respect of the children. That application was refused. Mr Mobbs explained that the appellant had also made various complaints against agencies and professionals involved in the care and protection of the children. He referred me to the terms of the stated cases prepared by Sheriffs Baird and Reid. He submitted that Sheriff Wood had similarly dismissed the fourth appeal as "without merit". Mr B had made a motion in terms of section 159 at the conclusion of the fourth appeal. That motion was refused, however Sheriff Wood had noted that Mr B's application for an order under section 159 was "understandable" but that "it was a decision for another day".

[18] Mr Mobbs submitted that the proceedings had taken an unnecessary toll upon the children. He agreed with Mr B that a number of agencies had been involved to support the children, and that the appellant's aggressive and volatile behaviour and her consistent complaints against members of the social work department had led to changes of personnel. The appellant had also lodged a complaint against a safeguarder. The appellant had made allegations that Mr B was involved with illicit substances and that he had assaulted the

children. These had required to be investigated by the social work department and by the police, neither of whom took any further action after their investigations.

[19] Mr Mobbs referred me to the decision of *MB* v *Hill* 2017 SAC (Civ) 10. He referred to the approach of the Inner House in *Lord Advocate* v *McNamara* 2009 SC 598. Mr Mobbs invited me to conclude that (a) the appellant had 'habitually and persistently' instituted proceedings, having appealed all but one of the substantive decisions made by the children's hearings since 28 January 2014; (b) that the appellant had instituted proceedings without any reasonable grounds (Mr Mobbs submitted that the appellant had clearly and openly stated at the outset of hearings that she would appeal decisions made against her); and (c) that it was in the interests of justice, having regard to the cumulative effect of the appellant's conduct, that the court should exercise its discretion to make an order in terms of section 159 of the Act.

Submissions for the Appellant

[20] On behalf of the appellant, Mr Sturdy referred to the Oxford English Dictionary definitions of the words "frivolous" and "vexatious". He submitted that while both Mr B and Mr Mobbs had spoken of the "disruption" to the children of continuing proceedings, as a matter of fact, there had been no disruption as the status quo of there being no contact between the appellant and the children had remained. He accepted that repeated reviews of CSOs and appeals of decisions of hearing have the potential to cause uncertainty for the children involved, however, he submitted that such concerns only arise where the children are aware of such proceedings. If an order under section 159 of the Act was granted, the appellant would require to seek leave of the court if she wished to appeal the decision of a

hearing. Any application for leave would also require to be intimated upon the children and thus they would be aware, in any event, that such an application had been made.

[21] In relation to Mr B's submission that between 28 to 30 professionals had become involved with the children, while Mr Sturdy was not in a position to dispute that figure, he submitted that outside agencies had become involved with the permission of and at the instance of the social work department, and not the appellant. He argued that weight could not be attached to the submission that the complaints of the appellant had led to changes of allocated social workers for the children, unless it was accepted that those complaints had been upheld.

[22] He submitted that the language of section 159 of the Act permitted only a consideration of the appeal before the court at the time the motion was made and not a wider consideration of the procedural background and previous appeals. In the event that the court was of the view that a wider consideration of the procedural background was merited, he noted that there had been 15 hearings involving the children and that whilst some of the decisions were not capable of being appealed, only five had in fact been appealed. He noted that the appellant had been represented in each of the appeals, which distinguished her position from that of the appellant in *MB* v *Hill supra.* He noted that none of the sheriffs who had dismissed the four previous appeals had determined that those appeals were frivolous and vexatious. The court could only infer that the previous appeals had not had sufficient merit, not that they had *no* merit. He noted that when faced with a similar motion under section 159, Sheriff Wood had refused the motion after the fourth appeal. The fifth appeal, Mr Sturdy submitted, had involved lengthy submissions and the court had delivered a lengthy *ex tempore* decision. The fifth appeal had merit and the appellant had received the benefit of legal advice to the effect that the appeal was statable.

[23] Finally, Mr Sturdy submitted that the appeal could not be considered to be 'vexatious' unless the primary motive of the appellant was to cause disruption or angst, rather than to seek contact with her children. The appeal could not be said to have been frivolous if the grounds of appeal were statable. Unlike the position in *MB* v *Hill supra*, the appellant had raised points of law. Unlike the position in *MB* v *Hill supra*, the appellant had instructed her agents to write to the local authority to seek information on the level of co-operation expected of her and she had obtained a report from Ms Mellon which set out a way forward in terms of better co-operation between the appellant, Mr B and the social work department. He invited the court to refuse Mr B's motion.

DISCUSSION

The Applicable Law

[24] Section 159 of the 2011 Act is in the following terms:

> (1) This section applies where the sheriff—
> (a) determines an appeal under section 159 or section 161 by confirming a decision of a children's hearing to vary or continue a compulsory supervision order, and
> (b) is satisfied that the appeal was frivolous or vexatious.
>
> (2) The sheriff may order that, during the period of 12 months beginning on the day of the order, the person who appealed must obtain leave from the sheriff before making another appeal under section 154 or 161 against a decision of a children's hearing in relation to the compulsory supervision order.

[25] The court may make an order in terms of section 159 if satisfied that the appeal is either frivolous or vexatious. The Act does not offer any further assistance in relation to what might constitute a "frivolous" or "vexatious" appeal. With the exception of the decision of the Sheriff Appeal Court in *MB* v *Hill supra,* it would appear that there are no reported decisions in which the provision has been considered in any detail.

[26] The intention behind section 159 is clear and is succinctly expressed by Professor Norrie who notes the aims of the provision as being

> "(i) to ensure that the courts are not cluttered by appeals that have no chance of success; (ii) to protect the child from needless uncertainties caused by appeals when no change whatsoever has occurred in the child's circumstances since the last hearing; and (iii) to avoid the possibility of the appeal process being used for illegitimate motives, such as to prolong the procedure or to create trouble and unnecessary effort on the part of others" ('*Children's Hearings in Scotland*' 3rd ed at para 14-29).

In *MB* v *Hill, supra* (at paragraph 7), Sheriff Principal M Stephen QC also described section 159 as being designed to:

> "stop or mitigate the detrimental effect which a frivolous appeal has on decision making for 'looked after' children by causing uncertainty, delay and disrupting further reviews of the supervision order".

[27] In its application and interpretation of section 159(2), Mr Mobbs invited the court to adopt the approach of the Inner House in relation to section 1 of the Vexatious Actions (Scotland) Act 1898 (now replaced by the Courts Reform (Scotland) Act 2014 sections 100-102). In particular, and with reference to the decision in *Lord Advocate* v *McNamara, supra*, he submitted that a person making a motion under section 159 required to establish (i) that proceedings are instituted by the appellant habitually and persistently; (ii) that proceedings are instituted without any reasonable grounds; and (iii) the whole circumstances of the litigations raised by the appellant merited the conclusion that an appeal was frivolous or vexatious. Mr Mobbs submitted that the court was entitled to have regard to the procedural history, the conduct of the appellant and the outcome of the previous four appeals when considering whether the fifth appeal was frivolous or vexatious.

[28] I am not persuaded that what is suggested is the correct approach. The terms of section 1 of the Vexatious Actions (Scotland) Act 1898 and its successor, section 101 of the

Courts Reform (Scotland) Act 2014 are quite different to those of section 159 of the Act. Both the 1898 Act and the 2014 Act refer to a person having "habitually and persistently instituted vexatious legal proceedings without any reasonable grounds for instituting such proceedings". The test under section 159(1)(b) of the Act does not necessitate an analysis of whether the appellant has acted "habitually" or "persistently" or "without reasonable grounds"; such concepts represent an unwarranted gloss on the clear statutory language. Indeed, it is possible that the court may be satisfied that an appeal is frivolous or vexatious after the very first appeal of a decision of a children's hearing under sections 154 or 161.

[29] An order under section 159 impedes or curtails a right of access to the court. As such it falls within the scope of the presumption that statutory interferences with constitutional rights should receive a strict rather than an expansive construction (*Lord Advocate* v *McNamara, supra* at page 605). Section 159(1)(b) requires the court to consider whether "the appeal" was frivolous or vexatious. The language used is clear; the court is restricted to an analysis of the grounds upon which the instant appeal was argued. There is no justification for a more expansive construction of section 159(1)(b).

[30] Should the court determine that the appeal before it was either frivolous or vexatious, there then follows the question of whether the court should exercise its discretion in terms of section 159(2). At that stage, in my judgment, the procedural history, the conduct of the appellant, and the outcome of previous appeals are all relevant considerations. However, the fact that previous appeals have been refused may not, of itself, warrant the conclusion that an order under section 159 ought to be granted. Each previous appeal may have been an entirely appropriate challenge to a prior decision of a children's hearing. It will be necessary to examine the reasons for the refusal of previous appeals and to consider whether the appellant has sought to challenge the decisions of

children's hearings on unmeritorious grounds or has sought to pursue similar unsuccessful arguments repeatedly.

[31] What then constitutes a 'frivolous' or 'vexatious' appeal? Both are familiar legal terms, commonly used in a variety of statutory appeal processes. The Oxford English Dictionary defines the term "frivolous" as "not having any serious purpose or value". It denotes something which is trivial, lacking in substance or which does not merit consideration, something which is "futile, misconceived, hopeless or academic" (per Lord Bingham LCJ in *R* v *North West Suffolk (Mildenhall) Magistrates Court* [1998] Env LR 9). A frivolous appeal includes one which has no basis in law (*MB* v *Hill*, *supra* at para 25). A frivolous appeal does not require to be one made in bad faith; an appeal can be frivolous even when made in good faith if it is hopelessly misconceived (per Lord Kingarth in *Law Society of Scotland* v *Scottish Legal Complaints Commission* 2011 SC 94). "Vexatious" appeals, on the other hand, involve an abuse of process. The meaning of the term "vexatious" was considered by the Inner House in *Lord Advocate* v *McNamara, supra* at paragraphs 31 *et seq*. The Inner House agreed with the view expressed in *HM Advocate* v *Frost* 2007 SLT 215 (at paragraph 30) that "legal proceedings may be properly seen as 'vexatious' if they are devoid of reasonable grounds for their institution". Their Lordships also referred to the following comments of Lord Bingham of Cornhill CJ in *Attorney-General* v *Barker* [2000] 1 FLR 759 (at page 764):

> "The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

[32] I do not accept, as the appellant suggested I should, that simply because an appellant has received the benefit of legal advice, an appeal cannot be either frivolous or vexatious.

Was the Appeal Frivolous or Vexatious?

[33] In my judgment, the appeal was indeed frivolous. It was trivial, misconceived and lacking in substance.

[34] It is necessary to examine briefly the grounds of appeal advanced by the appellant. There were several over-lapping grounds of appeal (one in relation to Decision 1, four in relation to Decision 4 and four in relation to Decision 6). I explained my reasons for refusing the appeal when delivering an *ex tempore* decision. I set out below a summary of those reasons.

[35] In relation to Decision 1, being the decision of the hearing (in terms of section 78 of the Act) to allow Ms Taylor, a solicitor for the local authority, to be present at the hearing, the appellant argued that the decision was *ultra vires* and amounted to a procedural irregularity. The local authority had wished Ms Taylor to be present in the event of a discussion of the criticisms of the social work department contained within a report which had been submitted on behalf of the appellant. It is well established that before an irregularity in the conduct of the children's hearing can found a successful appeal, it is necessary for it to be shown that the irregularity has a material effect upon the conduct or outcome of the proceedings, or materially prejudiced one of the parties (Norrie "*Children's Hearings In Scotland"* at para 14-14; *C* v *Miller* 2003 SLT 1379; Kearney "*Children's Hearings in the Sheriff Court"* at paragraph 49.07). Mr Allison, who represented the appellant at the appeal before me had not been present at the children's hearing. When asked, he submitted

that he could not say whether Ms Taylor's presence affected the outcome of the hearing but that "there was a reasonable prospect" that it had. He did not elaborate upon that submission. Mr Mobbs and the safeguarder who had been present at the children's hearing explained that after Ms Taylor was permitted to remain, she in fact made no representations to the hearing at all as those present agreed that the focus should be on the children's present circumstances and not the criticisms set out in the report submitted by the appellant. I had little difficulty refusing this ground of appeal which, in the absence of any submission focussed on the issue of materiality, was entirely trivial, without merit and lacked any basis in law.

[36] In relation to Decision 4, being the decision to continue the CSO, the appellant had argued that (a) the reasons provided by the hearing were inadequate; (b) the hearing had made an error of law (by failing to consider the alternative means by which the children's residence with their father could be secured); (c) no reasonable hearing would have made the same decision (the continuation of the CSO being detrimental to the children's interests by requiring them to remain engaged in the process); and (d) there had been a failure to take the children's views on alternatives to a CSO such as orders under section 11 of the Children (Scotland) Act 1995. I was not persuaded that any of these arguments had any merit.

[37] It is well established that the decision of a children's hearing requires to be read in the context of what had been decided and documented as decided at previous hearings and the contents of the papers made available to the hearing (*JT* v *Taylor (Authority Reporter)* 2015 SC 71). The submissions on behalf of the appellant during the appeal before me appeared to largely focus on the decision of the children's hearing without any meaningful discussion of the context in which it was made. Read in context, the reasons given by the children's hearing were proper and adequate and provided a manifestly clear and intelligible

statement of the material considerations to which the hearing had regard. The papers available to the hearing disclosed the appellant's persistent determination to disrupt the children's placement with their father. In particular:

(a) a hearing in January 2014 had noted that the appellant was 'focussed on disrupting the placement';

(b) a hearing in May 2014 had noted the appellant's erratic behaviour towards Mr B and his partner;

(c) a hearing in November 2014 had noted the necessity of a CSO as residence remained in dispute;

(d) a hearing in July 2015 had noted a CSO was necessary to secure the children's placement;

(e) a hearing in March 2016 had noted that a CSO was necessary to protect the care arrangements;

(f) the integrated comprehensive assessment report dated 11 January 2017 set out in detail the circumstances in which CB's placement with his father had broken down, the appellant's role in that breakdown and the risk that the appellant may seek to undermine AB and BB's placement in the same manner.

[38] The papers also included the previous decisions of Sheriff Baird (in relation to the second appeal) and Sheriff Reid (in relation to the third appeal). In his decision, Sheriff Baird had set out the appellant's efforts to disrupt CB's placement and referred to the distress and the upset this had caused to AB and BB. In his decision, Sheriff Reid stated (in relation to the same argument pursued before him) that:

> "the perceived risk of instability can be found in the papers of the hearing. That perceived risk of instability to the placement, arising out of the

> appellant's conduct, features as a consistent, articulated strand of evidence through the papers that were before the hearing".

That remained the position in respect of the fifth appeal before me.

[39] It was abundantly clear from both the submissions of Mr Mobbs and the safeguarder (both of whom had been present at the children's hearing), that the hearing was fully addressed on the alternatives to a CSO and had concluded, on the basis of the information before it, that the CSO was necessary. The challenge to the hearing's decision *anent* its alleged failure to consider alternatives to a CSO had no basis in fact.

[40] The hearing was specifically addressed by the safeguarder in relation to the detriment to the children of being exposed to continued children's hearings. The hearing clearly balanced this against the detriment to the children of being exposed to the hostility between the parties in the event that the CSO was terminated. It could not be said that no reasonable hearing would have made the decision to continue the CSO.

[41] While the safeguarder accepted that she had not specifically asked the children whether they would prefer the CSO to remain in place or would prefer the protection of some other form of court order, I was not persuaded that there was any basis for the conclusion that the absence of a view from the children, on the complex legal differences between various forms of court orders or their consequences, vitiated the decision of the children's hearing to continue the CSO. The children had expressed the view that they did not wish to be exposed to the hostility between their parents and that they did not wish to see their mother until she was able to "get on with" the social work department and their father. That view was sufficient for the children's hearing's purposes.

[42] In relation to Decision 6, being the decision that there should be no contact between the appellant and AB and BB, Mr Allison submitted that (a) the reasons were inadequate; (b)

the prohibition on contact was unnecessary and disproportionate as the hearing had failed to evaluate the risk of disruption of the children's placement in the event that the appellant had contact with the children; (c) the hearing had failed to explore the reasons for the children's views; and (d) the prohibition on indirect contact was grossly disproportionate to any perceived risk to the children. He conceded that in view of the children's ages, considerable weight required to be attached to their views.

[43] Once more, in my judgment, read in the context of the previous decisions of the children's hearings and the papers available to the hearing, there was no basis upon which it could be said that the reason for the decision *anent* contact was unjustified.

[44] Mr Allison submitted that the appellant had sought information from the social work department as to the nature of the perceived risk to the children and what steps she might take to address that risk. I did not accept that the appellant was not aware of the nature of the perceived risk nor of what was required of her. As noted by Sheriff Reid (in relation to the third appeal, at paragraph 31 of his stated case):

> "while [the] perceived risk may be disputed by the appellant, it cannot reasonably be supposed that a party, such as the appellant, familiar with the papers, should be unaware of (i) the previous articulation of that risk or (ii) the evidential basis for it within the papers".

The papers before the hearing set out clearly the appellant's lack of engagement with the social work department, her hostile and aggressive conduct towards staff during children's hearings and before Sheriff Baird, her inability to accept the authority of the children's hearings and her continued hostile behaviour towards Mr B who was now the children's primary carer. The papers set out very clearly the repeated clandestine contact she had made with CB and the derogatory comments she had made about the social work department and about Mr B which eventually led to the breakdown of CB's placement with his father. Her

resolve to undermine the children's hearings process and the children's placement was well documented. Indeed, during the hearing on 22 March 2017, the appellant again exhibited the same behaviours which had given rise to these concerns. Mr Mobbs described the appellant as having engaged in a "shouting match" and having made derogatory comments to the safeguarder and to Mr B. The appellant then left the hearing. Rather surprisingly, Mr Allison sought to persuade me that the appellant had acted appropriately by leaving when tensions rose. However, Mr Mobbs's description of what transpired is reflected in the somewhat constrained language used by the hearing which referred to "[the appellant's] behaviour having escalated to a point where she left the room" which was perceived by the hearing as an attempt by her to "control the proceedings". In all of the circumstances, there was no basis upon which it could reasonably be concluded that the prohibition upon all forms of contact was unjustified, unnecessary or disproportionate.

[45] In relation to the children's views, the hearing had the benefit of a report from the safeguarder who was also present at the hearing. The children's views were also clearly set out in the integrated comprehensive assessment report. There was no basis for concluding that the children's hearing had not properly considered those views or the reasons for those views.

[46] The various grounds of appeal were, in my judgment, an elaborate legal construct which when untangled and analysed, offered no meaningful or reasonable basis upon which to conclude that the decision of the children's hearing was not justified. In my judgment, the court was being invited in essence to review the decision of the children's hearing, to reconsider the papers before the hearing (including the report by Ms Mellon) and to take a different view. That is no part of this court's function.

[47] The fifth appeal was at best misconceived. I had little difficulty in concluding that each of the various grounds of appeal were without merit and lacked substance. The appeal was in my judgment, frivolous.

[48] I am unable to conclude that the fifth appeal was vexatious. The effect of the appeal has indeed been to subject Mr B and the Reporter to inconvenience and expense, out of all proportion to any gain likely to accrue to the appellant. However, there is insufficient information before me to conclude that the appellant has sought to abuse the court process on this occasion, for a purpose which is significantly different from the ordinary and proper use of the court process; however ill-fated the grounds of appeal may have been, it cannot reasonably be concluded, based on the information before me, that when invoking the court's jurisdiction on this occasion, she was not motivated primarily by her desire to seek contact, in any form, with her children.

Should the Court Exercise its Discretion to Make an Order under Section 159?

[49] I am satisfied that it is appropriate that an order under section 159 be granted.

[50] It is important to note that section 159(2) of the Act does not deprive a person from his or her right of access to the courts. It imposes a requirement upon such a person to satisfy the court that he or she has *prima facie* grounds of appeal. The need for leave of the court to pursue an appeal is limited to 12 months. An order under section 159(2) does not prohibit or restrict, in any manner, the right to seek a review of a CSO in terms of section 132 of the Act. Nevertheless, the power of the court to restrict the rights of a litigant, even for the limited duration of 12 months, is one which cannot be exercised without due regard for the serious consequences for the litigant. I have paid due regard to the appellant's right of

access to the courts, to her Article 8 rights and to the consequences for her of an order under section 159.

[51] However, the court must also pay due regard to the welfare of the children, their Article 8 rights and to the effect upon them of the continued uncertainty caused by the appellant's repeated appeals. The children are entitled to have confidence in the children's hearings process and in particular in relation to the finality of decisions which are designed to promote and safeguard their welfare. Repeated appeals which are frivolous or vexatious erode that confidence. Repeated engagement with a variety of professionals tasked with obtaining their views, where little or nothing has materially changed in the *interim*, will also undermine that confidence.

[52] On behalf of the appellant it was submitted that an order under section 159 was of little or no practical benefit to the children; the appellant could seek a review every three months notwithstanding an order under section 159 and thereafter the children would also become aware of any application by the appellant for leave of the sheriff to appeal any decision made by a hearing. Whilst that may be correct, the submission is not only unsound but is also indicative of the appellant's reckless disregard for the welfare of the children. The court should not be deterred from granting parties whatever limited protection the court is able to afford against frivolous or vexatious appeals on the basis of hypothetical positions, however ill-advised, the appellant may choose to adopt in the future.

[53] I have set out above the procedural history. Since January 2014, all but one of the substantive decisions made by the children's hearings have been appealed by the appellant.

[54] This court has the advantage of the stated cases of Sheriffs Baird and Reid in relation to the second and third appeal. It is instructive to note the appeal before Sheriff Baird also challenged a prior decision of a children's hearing on the basis *inter alia* that (a) the reasons

were inadequate; (b) the hearing had failed to consider the alternatives to, and the necessity of, a CSO or of its continuation; (c) the decision constituted a disproportionate interference with the appellant's rights and (d) the hearing had failed to take the views of the children. While I accept that each appeal seeks to challenge a different decision of a children's hearing, the similarity of the arguments pursued on behalf of the appellant for the second and the fifth appeals is striking. In relation to the grounds of appeal before him, Sheriff Baird very clearly had no difficulty refusing the grounds of appeal, describing them as having 'no merit' (at paragraphs 18 and 22), by noting that "it was difficult to see why [a ground of appeal] was ever stated" (paragraph 22) and by noting that it was 'impossible' or 'not possible' to agree with the various arguments advanced on behalf of the appellant (at paragraphs 20, 21 and 23). Finally, having been asked to provide a stated case, Sheriff Baird noted "I am disappointed, but not surprised, nor will the parties be, that the apparently never ending process of appeal continues".

[55] Similarly, in relation to the third appeal, it is apparent that Sheriff Reid had no difficulty refusing the appeal. He noted that there was "no persuasive basis" for the submission that that a prior hearing had failed to distinguish between the children (at paragraph 26); that the reasons for the decision of that hearing were "tolerably clear and relatively straightforward" (at paragraph 27); and in relation to an argument that there was insufficient evidential basis for the conclusion that a prohibition of contact between the appellant and the children was justified, necessary and proportionate, Sheriff Reid noted there was "more than a sufficient basis" (paragraph 62).

[56] Mr Mobbs, who represented the appellant at the fourth appeal before Sheriff Wood, submitted that that appeal too had been dismissed as "without merit". Indeed, Sheriff Wood had commented that Mr B's motion under section 159 of the Act was

"understandable". Mr Mobbs' account of what transpired at the fourth appeal was not disputed and I had no reason to doubt the veracity of his account.

[57] The conduct of the appellant is also a relevant consideration. According to the integrated comprehensive assessment report dated 10 January 2017 and the submissions made by both Mr Mobbs and Mr B, the appellant had lodged a 111 page complaint against the social work department and education department in 2013; she had sought and was refused a child protection order in December 2013; she alleged that Mr B had used illicit substances, had assaulted the children and that the children were at risk in his care, which allegations were investigated and no further action was taken; she acted in defiance of previous decisions of children's hearings by making repeated clandestine contact with the children (her conduct is detailed in Sheriff Reid's stated case at paragraphs 41 to 53); her repeated complaints have caused changes in personnel at the social work department and have necessitated the involvement of outside agencies; and she has failed to engage with the social work department, to take part in a parenting assessment, and has been unable or unwilling to accept any responsibility for her role in the breakdown of her relationship with the children.

[58] There are copious references throughout the record of the proceedings of the various children's hearings to the appellant's volatile, aggressive and belligerent conduct which at times necessitated repeated adjournments. Sheriff Baird felt compelled to note "it is important to record the level of the hostility demonstrated by the appellant to all other professionals present at the hearing before me, including the court" (paragraph 8); he noted that she had referred to the safeguarder and the reporter as "an imbecile" (at paragraphs 9 and 11); and he noted that after an adjournment, the appellant had made a deliberate decision to absent herself from the appeal hearing (paragraph 15). It would appear that the

hearing on 22 March 2017 had noted very little change in the appellant's attitude or behaviour (see paragraph 44 above). The appellant appears unwilling or unable to address the main impediment to contact with the children, namely, her failure to engage positively and work constructively with the social work department and with Mr B.

[59] At the conclusion of the fourth appeal, the appellant and her agents had been placed on notice that further appeals may be challenged as frivolous or vexatious.

[60] The appellant has persistently and doggedly challenged the decisions of children's hearings with little or no regard for the prospects of success, the disruption and distress that such appeals may cause to the children or to Mr B as their primary carer, or to the effect of such appeals on judicial time or resources. In my judgment, the procedural history, the repeated unsuccessful appeals, the conduct of the appellant and the welfare of the children are factors which all point overwhelmingly in favour of the court exercising its discretion and making an order in terms of section 159(2) of the Act. Such an order is both necessary and proportionate in the circumstances.

DECISION

[61] Accordingly, I shall make an order in terms of section 159(2) of the Act requiring the appellant to obtain leave of the court before making another appeal under sections 154 or 161 of the Act for a period of 12 months.

[62] In light of the particular circumstances of this case, the nature of my decision and the contents of this note, I have instructed my clerk to make a copy of this note available to the Scottish Legal Aid Board.