Judicial Interpretation of the Scottish Juvenile Justice System: Fostering or Frustrating the Welfare Model?

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I. INTRODUCTION

In 1961 the Secretary of State for Scotland appointed the Honorable Lord Kilbrandon to chair a committee to evaluate the powers and procedures of the Scottish courts treating juvenile delinquents and juveniles in need of care or protection. At the time of the Committee's formation, juvenile crime in Scotland

1. The Secretary of State for Scotland, a government minister, maintains various administrative responsibilities for Scottish affairs. Among the Secretary's duties are the administration of health, education, housing, roads, and the courts. Traditionally, the Secretary of State is always a member of the House of Commons. F.M. Martin, S.J. Fox & K. Murray, Children out of Court 16 n.4 (1981) [hereinafter cited as Children out of Court].

2. Charles James Dalrymple Shaw, Baron of Kilbrandon. Lord Kilbrandon, a noted Scottish advocate, served as Dean of the Faculty of Advocates at Edinburgh University (1957), as a sheriff of the Sheriff Court (1954-57), and as Chair of the Standing Consultative Council on Youth Service in Scotland (1960-68). Lord Kilbrandon was a member of the College of Justice, the Scottish Law Commission, the Court of Session, and the House of Lords. Who's Who: An Annual Biographical Dictionary 1246 (135th ed. 1983-84).

3. In addition to Lord Kilbrandon, the committee members included two judges of the Sheriff Court, three magistrates with experience in the juvenile courts, a juvenile court clerk, a professor of law, a child psychiatrist, a secondary school headmaster, an approved school manager, and a senior county chief constable. Kilbrandon, Children in Trouble, 6 Brit. J. Criminology, Delinqu. and Deviant Soc. Behavior 112, 113-14 (1966). For a definition of "approved school", see infra note 208.

4. Although Parliament is the sole legislative body for the United Kingdom, Scotland maintains its own court system, sharing with the English system only the House of Lords, the highest level of civil appellate review in the United Kingdom. Children out of Court, supra note 1, at 1. The High Court of Justiciary is the highest Scottish Criminal Court and has both original and appellate jurisdiction. Id. at 16 n.8. When hearing civil matters, judges of the High Court of Justiciary sit as the Court of Session. Id.

Below the High Court of Justiciary and the Court of Session are the Sheriff Courts, which deal with the majority of both civil and criminal cases in Scotland. Id. A sheriff, an experienced legal practitioner with a permanent Crown appointment, presides over the Sheriff Court. Id.

Prior to 1975, the Burgh Courts, or Police Courts, dealt with minor offenses and were presided over by lay magistrates who were generally senior officials of the local authorities. Id. at 16 nn.8-9. In 1975, when the Scottish local governments were reorganized into regional authorities, these courts were replaced by new District Courts. Id. The equivalent of the Burgh Courts in rural Scotland were the Justice of the Peace (J.P.) Courts. Fox, Juvenile Justice Reform: Innovations in Scotland, 12 Am. Crim. L. Rev. 61, 68 (1974).

5. The Kilbrandon Committee never specifically defined the term "delinquent," but used it generally to refer to children who have deficiencies in their upbringing. Children out of Court, supra note 1, at 4.

6. In general, children in need of care or protection are children who lack fit guardianship; who have been abused, neglected, or victimized; who are beyond control; or who are "exposed to moral danger." See Children and Young Persons (Scotland) Act, 1937, 1 Geo. 6, ch. 37, § 65. See also Report of the
had been increasing at an accelerated rate,7 and the then-existing juvenile court system was unable to handle the heavy caseload that resulted from this increase.8 The Kilbrandon Committee studied both the structure of several juvenile justice systems and possible remedies for juvenile delinquency.9 The Committee concluded that delinquency originated in the home during the child-rearing process,10 and that an effective remedy for delinquency was not punishment but rather social treatment.11 It further concluded that social treatment should not be administered through the juvenile court system, since the court system is geared primarily to fact-finding and the administration of punishment.12 The Committee recommended that while the fact-finding power should remain in the Scottish courts, Parliament should create a separate forum to administer treatment to both juvenile offenders and juveniles in need of care or protection.13 Finally, the Committee realized that cooperation of the child's family was essential to effective treatment,14 and accordingly, it expressed concern that the new system appear just from the public's perspective.15

The Kilbrandon Committee published its report in April 1964.16 Its recommendations for reform precipitated the publication of a White Paper17 and the subsequent passage of a parliamentary act18 creating the Children's Hearings System as a replacement for the ailing juvenile court system.19 The Secretary of State issued the Children's Hearings (Scotland) Rules,20 which, together with the provisions of the Act, defined the powers, duties, responsibilities, and procedures of the system.21 The Children's Hearings System became effective in April 197122 with the passage of the Sheriff Court Procedure Rules.23

COMMITTEE ON CHILDREN AND YOUNG PERSONS (SCOTLAND), CMND. No. 2306, ¶ 8 (1964) [hereinafter cited as KILBRANDON REPORT].
8. Fox, supra note 4, at 64.
9. KILBRANDON REPORT, supra note 6, ¶ 2-3.
10. Id. ¶¶ 15, 87.
12. Id. ¶¶ 52, 71.
13. See id. ¶ 72.
14. Id. ¶ 17.
15. Fox, supra note 4, at 67-68.
16. KILBRANDON REPORT, supra note 6.
21. Bruce, supra note 19, at 12.
The Children’s Hearings System centers around the reporter,24 who receives referrals and initiates contact with the family.25 The reporter decides whether to bring the parents and child before a children’s hearing, a three-person lay panel composed of members of the local community.26 If the family comes before a hearing, the hearing members and the family discuss the facts of the child’s situation,27 and the hearing decides the appropriate treatment.28 If the case involves disputed facts, the hearing will direct the reporter to take the case before the sheriff for a finding of fact before the hearing considers treatment.29 As a forum for administering treatment, a children’s hearing is not empowered to decide questions of fact.30

Since the system began to operate, its effectiveness has been evaluated ideologically,31 empirically, 32 and comparatively.33 Judicial evaluation, however, was not immediately forthcoming because, under the new system, only a handful of juvenile cases reached the appellate court level each year.34 Of the cases that have reached the Court of Session in the fourteen-year life of the system, most have concerned questions of procedure.35 The Court of Session, in its attempt to standardize procedure throughout the hearings system, frequently considered questions in the context of the foundations of the Kilbrandon Committee’s treatment model.36 Despite such consideration, the Court of Session’s opinions have sometimes fostered, yet sometimes frustrated, the treatment model of

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25. See id. at 48-49.
26. Id. at 49. The term “hearing” has a dual meaning in the context of the Scottish system. It refers to a group of three lay persons who meet with the family, reporter, and social worker to discuss the case. It also refers to the actual meeting at which the case is discussed and evaluated. Murray, *supra* note 22, at 15 n.4.
27. Fox, *supra* note 4, at 87-88.
28. Act, *supra* note 18, §§ 43, 44. For a discussion of available treatment alternatives see *infra* notes 205-14 and accompanying text.
30. See id.
32. See generally S. Asquith, *supra* note 31; *Children Out of Court*, *supra* note 1.
juvenile justice. Because of the occasional adverse effects on the hearings system, Parliament has acted in at least one instance\textsuperscript{37} to reduce the adverse consequences of the Court of Session’s opinions while preserving the positive consequences which foster justice within the treatment model.

This Comment focuses on the effect of some of the major Scottish court opinions handed down over the fourteen years since the implementation of the Children’s Hearings System. The Comment first discusses the need for reform under the former juvenile court system. The Kilbrandon Committee’s suggestions for reform, as well as the procedural system actually implemented to accomplish this reform, will be examined. Next, the Comment examines the circumstances and opinions of some of the major court cases concerning procedural issues within the Children’s Hearing System. The Comment then analyzes whether the holdings in these cases have fostered or frustrated the reform envisioned by the Kilbrandon Committee.

II. BACKGROUND: THE JUVENILE COURT SYSTEM PRIOR TO 1971

Prior to 1971, Scotland maintained a traditional court system to handle juvenile offenses.\textsuperscript{38} The High Court of Justiciary\textsuperscript{39} presided over serious crimes involving children, including murder, treason, rape, and incest; a network of lower courts\textsuperscript{40} heard less serious juvenile cases.\textsuperscript{41} Despite provisions in the Children and Young Persons (Scotland) Act empowering the Secretary of State to establish specialized juvenile courts,\textsuperscript{42} the Secretary created such courts in only four areas of Scotland.\textsuperscript{43}

By 1962, the Sheriff Courts,\textsuperscript{44} sitting as juvenile courts, heard approximately 32 percent of the juvenile cases in Scotland.\textsuperscript{45} The Burgh Courts\textsuperscript{46} heard up to 45 percent of the juvenile cases,\textsuperscript{47} and the Justice of the Peace Courts\textsuperscript{48} heard about 7 percent.\textsuperscript{49} The Justice of the Peace juvenile courts\textsuperscript{50} heard only 16 percent of juvenile cases brought into the court system.\textsuperscript{51}

\textsuperscript{37} See Health and Social Services and Social Security Adjudications Act 1983, ch. 41, ¶ 8, sched. 2.
\textsuperscript{38} Grant, supra note 7, at 24; Rink, supra note 33, at 185.
\textsuperscript{39} See supra note 4.
\textsuperscript{40} See supra note 4.
\textsuperscript{41} Fox, supra note 4, at 63.
\textsuperscript{42} Children and Young Persons (Scotland) Act, 1937, 1 Edw. 8 & 1 Geo. 6, ch. 37, ¶ 24. These juvenile courts were special Justice of the Peace courts with jurisdiction to handle juvenile cases. Id.
\textsuperscript{43} The four areas having juvenile courts were Ayrshire, Renfrewshire, Fife, and the city of Aberdeen. KILBRANDON REPORT, supra note 6, ¶ 43.
\textsuperscript{44} See supra note 4.
\textsuperscript{45} KILBRANDON REPORT, supra note 6, ¶ 45.
\textsuperscript{46} See supra note 4.
\textsuperscript{47} KILBRANDON REPORT, supra note 6, ¶ 45.
\textsuperscript{48} See supra note 4.
\textsuperscript{49} KILBRANDON REPORT, supra note 6, ¶ 45.
\textsuperscript{50} See supra note 42.
\textsuperscript{51} KILBRANDON REPORT, supra note 6, ¶ 45.
Juvenile crime was increasing at a rate unacceptable to the public,\textsuperscript{52} and the existing system was poorly equipped to handle the problem.\textsuperscript{53} Because the Secretary of State had established very few specialized juvenile courts,\textsuperscript{54} juvenile cases were being channeled into the Sheriff Courts rather than into other summary courts.\textsuperscript{55} This trend threatened to clog the Sheriff Courts with caseloads that they were ill-equipped to handle.\textsuperscript{56} A change in the system was necessary to accommodate this increasing volume of cases in the Sheriff Courts,\textsuperscript{57} and the Kilbrandon Committee was appointed to investigate possible solutions.\textsuperscript{58}

III. Kilbrandon Report: The Roots of the Scottish Juvenile Justice System

Soon after its formation in May 1961, the Kilbrandon Committee began its task of evaluating the Scottish juvenile justice system. It initially gathered both oral and written testimony on the subject from various Scottish social and legal organizations.\textsuperscript{59} In addition, Committee members observed procedures in juvenile courts and residential institutions in both Scotland and England, and gathered information about Scandinavian welfare boards.\textsuperscript{60} As a result of its findings, the Committee proposed not merely a modification of the existing juvenile court arrangements, but a fundamental change in the organization and administration of Scottish juvenile justice.\textsuperscript{61}

According to the Committee, juvenile court systems, as extensions of the criminal law, are geared primarily to the principles of criminal procedure.\textsuperscript{62} A criminal court’s primary functions are to determine the guilt or innocence of the accused and, when it finds the accused guilty, to administer the appropriate punishment.\textsuperscript{63} The system attributes a high degree of personal responsibility to

\textsuperscript{52} See, e.g., 764 Parl. Deb. H.C. (5th ser.) 60 (1968) (remarks of Michael Noble, M.P.), cited in Grant, supra note 7, at 25 n.6.
\textsuperscript{53} See Grant, supra note 7, at 25.
\textsuperscript{54} Id.
\textsuperscript{55} Fox, supra note 4, at 64.
\textsuperscript{56} Id.
\textsuperscript{57} Id. One expert speculates that if more local authorities had requested the creation of special juvenile courts, the reform that led to the Children’s Hearings System would not have been necessary. Grant, supra note 7, at 25.
\textsuperscript{58} See Grant, supra note 7, at 24-25.
\textsuperscript{59} Kilbrandon Report, supra note 6, ¶ 2.
\textsuperscript{60} Id. ¶ 3. One example of the Scandinavian system is the child welfare board in Sweden. It is empowered to administer treatment to juveniles in the form of probation, warnings to child offenders or guardians, placement in residential homes or boarding schools, or assistance and guidance in finding suitable employment. O. Nyquist, Juvenile Justice: A Comparative Study with Special Reference to the Swedish Child Welfare Board and the California Juvenile Court Systems 11 (1960).
\textsuperscript{61} Fox, supra note 4, at 65.
\textsuperscript{62} Kilbrandon Report, supra note 6, ¶ 50.
\textsuperscript{63} Id. ¶ 52.
the actor; it assumes a conscious choice between right and wrong, and the actor, by choosing to do the wrong, requires punishment. 64

A juvenile court, however, is required to consider the welfare of the individual before the court when it administers sentences. 65 Whereas the criminal adjudication process focuses on personal responsibility for a specific act, welfare considerations are not necessarily linked to personal responsibility and may involve a broad range of factors. 66 Sentencing in a juvenile court may be punitive in part, but, in consideration of the child's welfare, sentencing should also provide a measure of treatment to prevent a child's further antisocial behavior. 67

Although juvenile courts do provide mechanisms for both punishment and preventive treatment, 68 the Committee believed that the two principles conflicted in four ways. First, the crime-responsibility-punishment model utilized by the criminal courts resists preventive action against potential delinquents. 69 This model imposes criminal liability for a particular act, and it maintains a high standard of proof of guilt because it is concerned with punishment rather than preventive treatment. 70 The punishment administered by the system carries a stigma in the public eye as an evaluation of a criminal's worth, the worth tested by the high standard of proof. 71 Therefore, any preventive action taken by a juvenile court to aid potential delinquents who have not been convicted of a crime risks labeling them with the stigma of a criminal offender. 72

Second, the Committee believed punishment to be a narrow concept that cannot apply beyond the person or persons guilty of committing the criminal act. 73 Treatment, however, may be administered not only to the individual offender, but to others whose potentially altered behavior might affect the behavior of the offender. 74

Third, because the punishment must fit the crime under the crime-responsibility-punishment principle, the Committee felt that ordering punishment might inhibit the court in ordering treatment for the offender. 75 Treatment under welfare principles, however, need not be directly related to the criminal act, 76 and may apply to situations beyond the reach of punishment. 77

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64. Id. ¶ 51.
65. Id. ¶ 50.
66. Id. ¶ 55.
67. Id. ¶ 52.
68. For example, the Committee acknowledged a recent trend toward sentencing that focuses on educating and reforming the offender. Id. ¶ 52.
69. Id. ¶ 54(1).
70. Id.
71. Id.
72. Id.
73. Id. ¶ 54(2).
74. Id.
75. Id. ¶ 54(3).
76. As an example of the way in which a criminal court may be bound by the nature of a criminal
Fourth, the Committee recognized that punishment is administered one time, at the court sentencing. Since the acts that have merited such punishment have been done and cannot be altered, the punishment itself is unalterable. Treatment measures, on the other hand, offer a flexible approach which may be altered over the course of time in response to the changing circumstances and the changing needs of the individual. The Committee concluded that it was "inconceivable that a court could ever guarantee to have chosen, at the moment of commencement of its sentence, the exact treatment — to be given perhaps over a period of several years — appropriate to the individual person before it." 

The Committee also noted that general principles of criminal law have been modified with respect to juveniles. Perhaps the most important modification is the recognition that, because children differ from adults in their moral and intellectual capacity to distinguish right from wrong, the criminal responsibility of youth should be mitigated. Youth limits the degree to which children can be held personally responsible for criminal acts. A second modification is the recognition that a court may consider all of the circumstances surrounding the juvenile offender, including future events, rather than administer punishment strictly on the basis of the offense. A third modification demonstrates concern about the motives and causes of juvenile crime, and attempts to eliminate the source of the crime, rather than merely to punish the offender. Characteristic of the concept of preventive treatment, these three considerations emphasize the need for an institution that can effectively implement preventive treatment to cope with the problem of juvenile crime.

In concluding its observations about juvenile courts, the Committee agreed that the shortcomings of the Scottish system existed because the juvenile courts sought "to combine the characteristics of a court of criminal law with those of a specialised agency for the treatment of juvenile offenders, proceeding on a
preventive and educational principle."88 The Committee proposed that Parliament abolish the juvenile court system and replace it with a specialized agency that would hold children's hearings and administer treatment to juveniles.89 The agency would not be empowered to make findings of fact, and would administer treatment only in cases where the facts surrounding the child's situation had already been established.90

As the Committee envisioned the procedure, the child and parents would attend an initial hearing which would inquire into the family's understanding of the facts and allegations in the referral.91 If the family understood and acknowledged as true the facts in the referral, the hearing would then proceed to consider treatment measures.92 If either the parents or the child did not understand or accept the facts as stated, the hearing would refer the case to the sheriff court to determine the facts of the case.93 Upon completion of the fact-finding process, the case would return to the hearing for treatment consideration.94

Under this proposed system, the fact-finding forum would remain separate and distinct from the treatment forum.95 The hearing could proceed with treatment only if the facts were not disputed, or had been determined by a court of law.96 The courts, if necessary, would be involved in the proceedings only to determine the facts or legal issues in question; decisions involving treatment would be left to the hearing.97 The Committee recommended that the hearing itself be composed of lay members who had been instructed as to the purpose and procedure of the system.98

The proposed system would accommodate both juveniles who had committed offenses and children in need of care or protection, because treatment of both groups depends upon the application of preventive measures, which the hearing is equipped to impose.99 The Kilbrandon Committee believed that the problems of both children in need of care and protection and delinquent children could most often be attributed to "shortcomings in the normal 'bringing-up' process — in the home, in the family environment, and in the schools."100 Since these problems originate from the same source and share common treatment methods,101 the Committee saw the inclusion of the two groups of children within the

89. Id. ¶ 73.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id.
97. Id.
98. Id. ¶¶ 74, 75.
99. Id. ¶¶ 15, 72-79.
100. Id. ¶ 87; see also Kilbrandon, supra note 3, at 115-16.
101. KILBRANDON REPORT, supra note 6, ¶ 15; Kilbrandon, supra note 3, at 115-16.
same procedural system as a realistic acceptance of the common source of their problems and as a realistic approach to treating both groups of children. 102

A final concern of the Kilbrandon Committee was that the proposed system appear to do justice in the eyes of the parents and children whom it purported to serve. 103 The Committee recognized that the cooperation of both children and their parents was essential to providing effective preventive treatment. 104 Observance of the strict proportionality approach to sentencing 105 may at times lead to unduly severe punishment for juvenile misbehavior. 106 Abidance by this approach also may hold a child responsible for misbehavior learned from the antisocial attitudes of the parents, as well as preclude consideration of the child’s best interest. 107 In order to maintain the support and cooperation of those whom it seeks to serve, the hearing system strives to minimize the confusion and misconceptions surrounding the decision-making process so that the decisions appear just from the participants’ perspective. 108

102. Kilbrandon Report, supra note 6, ¶ 87.

One of the harshest and most frequent criticisms of the Kilbrandon Report arises from its rather simplistic assumption that the roots of juvenile problems lie almost solely with the family and the child rearing process. May, supra note 31, at 222-24; Morris, supra note 31, at 360-64. Despite its goal of creating a system to eliminate the source of delinquency, the Committee documents neither research on the origin of delinquency nor any attempt to synthesize some of the many criminological theories of juvenile justice. May, supra note 31, at 222. Instead, the Committee assumes that the family is at the source of the problem and structures a system that reaches to this perceived source through family participation in the hearing and the treatment measures. Id. at 223-24. If, in fact, the family does not cause delinquency, as some theories of criminology suggest, treatment administered by the hearing may be irrelevant, or even counter-productive. Id. at 224. For further discussion, see May, Delinquency Control and the Treatment Model: Some Implications of Recent Legislation, 2 Brit. J. Criminology 359 (1971).

The Committee has also received criticism for assuming too readily that juvenile offenders and children in need of care or protection were merely different manifestations of the same underlying problems. Morris, supra note 31, at 363. Although both types of problems share some common sources, at least one study has shown that juvenile delinquency is primarily linked to social disorganization, such as overcrowded living conditions and high infant mortality rates, while child mistreatment is frequently linked to family disorganization, such as separated nuclear families and trauma between parents and children. Philip & McCulloch, Uses of Social Indicators in Psychiatric Epidemiology, 20 Brit. J. Prev. Soc. Med. 122 (1966), noted in Morris, supra note 31, at 364. In formulating a social institution to penetrate both types of problems, the Kilbrandon Committee’s decision to obscure these differences rather than to highlight them seems contrary to its goal of developing an effective remedy for the problems. Given the resources of the hearings system, however, the practical consequences may be immaterial. Morris, supra note 31, at 364.

103. Fox, supra note 4, at 67-68.

104. Kilbrandon Report, supra note 6, ¶ 17; Fox, supra note 4, at 67.

105. The strict proportionality approach contemplates that the severity of the punishment be determined by the severity of the offense. See Kilbrandon Report, supra note 6, ¶ 54(3).

106. Fox, supra note 4, at 67; see Kilbrandon Report, supra note 6, ¶ 56.

107. Fox, supra note 4, at 67; see Kilbrandon Report, supra note 6, ¶ 56.

108. Fox, supra note 4, at 68.

The Committee realized, however, that eradication of all negative feelings toward the system is not possible because some clients of the system will inevitably see any type of public interference as a punishment. Kilbrandon Report, supra note 6, ¶ 57. At best, the Committee hoped to “reduc[e] considerably such conflicts in the eyes of the parents, if less frequently in the eyes of the child.” Id.
gained confidence and trust in the system, they will be more willing to accept the social treatment offered on behalf of the child's welfare.\textsuperscript{109}

Thus, the Kilbrandon Committee concluded that social treatment, and not punishment, was an effective tool for coping with juvenile delinquency. Because a criminal court is primarily a fact-finding forum that administers punishment based on the facts of the offense, the Committee considered the court system to be an inappropriate institution for administering treatment. Instead, the Committee recommended the separation of the fact-finding forum from the treatment forum, and placed the power to administer treatment to both juvenile offenders and juveniles in need of care or protection within a lay system of children's hearings.

\section*{IV. Operation of the Children's Hearings System}

The Kilbrandon Committee submitted its findings and recommendations in 1964.\textsuperscript{110} In 1966 a White Paper, \textit{Social Work and the Community}, proposed essentially the same system of children's hearings as were originally set forth in the Kilbrandon Report.\textsuperscript{111} In 1968, Parliament passed the \textit{Social Work (Scotland) Act}.\textsuperscript{112} Part III of the the Act established the Children's Hearings System.\textsuperscript{113} The Secretary of State implemented the Children's Hearings (Scotland) Rules,\textsuperscript{114} and when the Sheriff Court Procedure Rules\textsuperscript{115} became effective, the system became operational in 1971.\textsuperscript{116} Although the Act and rules provided the legal frame-


\textsuperscript{110} Kilbrandon Report, supra note 6, \textsection 1.

\textsuperscript{111} See Social Work and the Community, supra note 17, \textsection 56-75: The Kilbrandon Report and the White Paper differed slightly in their proposal for social services reorganization. See Morris, supra note 31, at 354. Compare Kilbrandon Report, supra note 6, \textsection 232-251 (proposal for formation of a social education department) with Social Work and the Community, supra note 17, at \textsection 8-11, 18-55 (organization of a new social work department). The White Paper also suggested that panel members be drawn from a wide circle of classes and occupations, so as to bring to the panel views and experiences which were representative of those of the community. May, supra note 31, at 213; see Social Work and the Community, supra note 17, \textsection 76-81.

Despite the attempt to maintain a diversity among panel members, the result of the selection process has been the appointment of a rather homogeneous group with respect to social and educational backgrounds, and cultural and moral values. See May, supra note 31, at 212. For further discussion concerning the problems associated with panel recruitment and selection see May & Smith, \textit{The Appointment of the Aberdeen City Children's Panel: A Comment on the Social Work (Scotland) Act 1968}, 1 BRIT. J. SOC. WORK 7 (1971); Mapstone, \textit{The Selection of the Children's Panel for the County of Fife: A Case Study}, 2 BRIT. J. SOC. WORK 445-69 (1972); A. Rowe, \textit{Initial Selection for Children's Panels in Scotland} (1972).

\textsuperscript{112} See supra note 18.

\textsuperscript{113} Murray, supra note 22, at 13.

\textsuperscript{114} See supra note 20.

\textsuperscript{115} See supra note 23.

\textsuperscript{116} Bruce, supra note 19, at 12.
work under which the system was to operate, they did not offer guidance as to how the ideals discussed by the Committee were to be achieved in practice.

The operation of the Children's Hearings System involves the cooperative effort of several agencies and individuals, among them the reporter, the Children's Panel Advisory Committee, the children's panel, and the social work department. The system is also heavily dependent on the cooperation of the police in the initial detection and referral of children in need of treatment.

A. The Reporter

The central figure in the hearings system is the reporter, who functions as the administrator of the hearings system, its advisor on legal matters, and a decision-maker with considerable discretion as to which cases are brought before a hearing. The reporter is appointed by the regional authority and usually has several assistants. Reporters and assistants have varied backgrounds, but most have some qualifications either in law or in social work. The reporter is responsible for the intake of cases, as well as for performing other broad administrative duties. In exercising the discretionary powers of the office, the reporter has license to adjust the system of juvenile justice to suit the needs of the local community.

Under the Act, a reporter may receive information relating to a child in need of care from any source; most frequently, the police provide such information with respect to children who have committed offenses. After receiving a referral, the reporter must decide whether the circumstances of the referral fit one of the preconditions laid down by section 32 of the Act for which interven-
tion in the child's life is justified. The reporter must also decide whether, given the circumstances, the child appears to be in need of compulsory measures of care. To assess the circumstances, the reporter may gather information from the police, the social work department, the child's school, or any other person or agency having information on the child's need for care.

After fully assessing the child's situation, the reporter has three options. The reporter may choose to take no further action and subsequently inform the child, the parents, and the persons submitting the referral of that decision. If some other action appears necessary for the child's benefit, the reporter may request that the family accept voluntary guidance and assistance from the social work department. Finally, if the family refuses voluntary services, or if more stringent treatment seems necessary, the reporter may bring the child to a children's hearing. Reporters exercise this third option only when they believe that children need compulsory measures of care and when the investigations of the children's circumstances reveal sufficient evidence to support at least one ground of referral.

This Act if any of the conditions mentioned in the next following subsection is satisfied with respect to him.

(2) The conditions referred to in subsection (1) of this section are that —
   (a) he is beyond the control of his parents; or
   (b) through lack of parental care he is falling into bad associations or is exposed to moral danger; or
   (c) the lack of care as aforesaid is likely to cause him unnecessary suffering or seriously to impair his health or development; or
   (d) any of the offenses mentioned in Schedule I to the Criminal Procedure (Scotland) Act, 1975 has been committed in respect of him or in respect of a child who is a member of the same household; or
   (dd) the child is, or is likely to become, a member of the same household as a person who has committed any of the offenses mentioned in Schedule I to the Criminal Procedure (Scotland) Act, 1975; or
   (e) the child, being a female, is a member of the same household as a female in respect of whom an offence which constitutes the crime of incest has been committed by a member of that household; or
   (f) he has failed to attend school regularly without reasonable excuse; or
   (g) he has committed an offence; or
   (h) he is a child whose case has been referred to a children's hearing in pursuance of Part V of the Act.

Act, supra note 18, § 32, as amended Children's Act 1975, ch. 72, sched. III.

Schedule I of the Criminal Procedure (Scotland) Act 1975, ch. 21, mainly concerns sexual offenses and offenses constituting cruelty and abuse of children. Part V of the Act concerns children moving to Scotland from another part of the United Kingdom who have been referred to a reporter by an authority from the area in which the child previously resided.

130. Murray, supra note 22, at 14.
131. Id. For a definition of compulsory measure of care see supra note 129.
134. Act, supra note 18, § 39(1).
135. Act, supra note 18, § 39(2); Kelly, supra note 133, at 261; Murray, supra note 22, at 14.
136. Act, supra note 18, § 39(3); Kelly, supra note 133, at 261; Murray, supra note 22, at 14.
137. Kelly, supra note 133, at 261-62; Murray, supra note 22, at 14.
A reporter who has decided to refer a child to a children’s hearing must make arrangements with the local authority,138 the panel chair, and the social work department (which must provide a social background report for use at the hearing).139 At least seven days before the hearing, the reporter must send the child and parents written notice of the time, date, and place of the hearing, along with a written statement of the grounds of referral.140 At least three days prior to the hearing, the reporter must make available to the members of the hearing the relevant documents, including the grounds for the referral and the social background report.141 Hearing members must return all documents to the reporter at the conclusion of the hearing.142

In addition to making the arrangements, the reporter must attend the hearing.143 The reporter is responsible for recording the minutes of the proceedings at the hearing and for advising hearing members on legal or legally-related matters that may arise during the proceedings.144

The reporter has the further responsibility to appear in court.145 The hearing may direct the reporter to present evidence to the court in a case with disputed facts.146 If the family decides to appeal from a final decision of the hearing, the reporter must supply the court with all relevant reports and documents.147 The reporter acts as the respondent to the family’s appeal.148

Finally, the reporter performs a number of functions not specified by the Act but necessary to the efficient operation of the Children’s Hearing System.149 The most important of these functions is the maintenance of open communication between the reporter's office and the social work department, panel members, the police, schools, voluntary agencies, and other offices with which reporters work closely.150 Open communication ensures that these offices continue to understand and aid the workings of the system.151

In sum, the reporter, the central figure of the Children’s Hearings System, is responsible for the system’s initial involvement in all cases. The reporter acts as a fact-gatherer, decision-maker, organizer, recorder, and legal advisor. In addition, the reporter is responsible for the continuous maintenance of the system through communication with associated agencies.

138. Act, supra note 18, § 34(3).
139. Act, supra note 18, § 39(4); Murray, supra note 22, at 14.
140. Children’s Hearings (Scotland) Rules, supra note 20, rules 7, 8, 14, 15, 27.
141. Id. rule 6(1).
142. Id. rule 6(4); Murray, supra note 22, at 15.
143. Finlayson, supra note 24, at 49.
144. Id.
145. Id.
146. Id. at 50.
147. Id.
148. Id.
149. Id. at 55-56.
150. Id.
151. Id.
B. The Children’s Panel

Each regional authority has at its disposal a children’s panel which provides members for a children’s hearing. Panel members are nominated by the Children’s Panel Advisory Committee (CPAC), a regional committee formed to recruit and select panel members, and are officially appointed by the Secretary of State. In 1982, about 1700 adults concurrently served as panel members in Scotland; panel sizes ranged from eleven members on the Shetland regional panel to over 900 on the Strathclyde regional panel. Panel membership is a voluntary public service.

As originally proposed by the Kilbrandon Committee, panel members are chosen because of their “personal qualities” and not because of their professional credentials. Desirable qualities include a genuine concern for the welfare of children and a moderate attitude toward treatment, free from tendencies toward extreme punitiveness or extreme permissiveness. Because panel selectors look for the same desirable qualities in each panelist that they choose, the selection process suggested by the Committee produces a relatively homogeneous panel.

The White Paper that followed the Kilbrandon Report suggested that panels consist of members with diverse characteristics, who together form a body representative of the community. Panelists come from a variety of occupational, income, and age groups. They generally have some experience in dealing with children although the responsible authority provides all formal training necessary for the position. The formal training introduces panelists to the operation of the hearings system, explains the treatment methods and facilities available through the system, and outlines the duties and responsibilities of the panel member. Panelists receive both introductory training before beginning their service term and in-service training throughout their five year terms. The CPAC faces the difficult task of selecting persons with particular

152. Murray, supra note 22, at 15.
153. Id. For a further discussion of the composition of the CPAC, see id.
154. Id.
155. Id. at 15-16.
157. KILBRANDON REPORT, supra note 6, ¶ 74.
158. Id.
159. Children’s Panel, supra note 156, at 59; Murray, supra note 22, at 16.
160. May, supra note 31, at 213; see supra note 111.
161. SOCIAL WORK AND THE COMMUNITY, supra note 17, ¶ 76; see supra note 111.
162. See supra note 111; see May, supra note 31, at 213.
163. SOCIAL WORK AND THE COMMUNITY, supra note 17, ¶ 76.
164. Id. ¶ 80; see Murray, supra note 22, at 16.
165. See Children’s Panel, supra note 156, at 64-65.
166. Murray, supra note 22, at 16. Most regional authorities appoint panelists to five year terms. A few authorities, however, give appointments for only two or three years. Id.
qualities to serve on the children's panels while balancing the panels with panelists from different occupations and age groups.\textsuperscript{167}

\textbf{C. Social Work Department}

Created by the Act, the social work department\textsuperscript{168} works closely with the reporter and panel members within the Children's Hearings System.\textsuperscript{169} A social worker is responsible for providing background reports on each child brought before a hearing.\textsuperscript{170} In addition, a social worker is present at the hearing\textsuperscript{171} and may participate in the discussion that precedes the panel's decision.\textsuperscript{172} Finally, the social work department administers treatment, whether voluntarily accepted by the family or imposed by a hearing.\textsuperscript{173}

\textbf{D. Proceeding Through the System}

Any person reasonably believing that a particular child needs compulsory measures of care may refer the case to a reporter.\textsuperscript{174} The Act lists eight conditions, any of which, if satisfied, may indicate that the child is in need of compulsory measures of care.\textsuperscript{175} In general, a child who is beyond parental control, truant, suffering from parental neglect, or who has allegedly committed an offense, satisfies the conditions set forth in the Act.\textsuperscript{176}

After receiving an initial referral and conducting a preliminary investigation, the reporter then assesses the merits of the case to determine whether the child is in need of compulsory measures of care under the Act.\textsuperscript{177} If insufficient evidence exists to support the referral, the reporter must dismiss the case.\textsuperscript{178} If, however, the evidence in the case satisfies at least one of the preconditions set by the Act, the reporter will then consider the need for care.\textsuperscript{179}

\begin{enumerate}
\item[167.] See supra note 111.
\item[168.] Although the Scottish social work department was an integral part of the Kilbrandon Committee's reform recommendations and the Act, a thorough discussion of its reorganization and operation is beyond the scope of this Comment. For a discussion of the social work department, see Martin, \textit{The Social Work Department in Children's Hearings} 67-75 (F.M. Martin & K. Murray eds. 1982). See also Smith, \textit{Little Kiddies and Criminal Acts: The Role of Social Work in the Children's Hearings}, 7 \textit{Brit. J. Soc. Work} 4 (1977).
\item[169.] Murray, supra note 22, at 16.
\item[170.] See Act, supra note 18, § 39(4); Children's Hearings (Scotland) Rules, supra note 20, rule 6(1). For a discussion of the contents and use of the social background reports, see Hiddleston, \textit{The Role of the Hearing: Using Reports in The Scottish Juvenile Justice System} 32-47 (F.M. Martin & K. Murray eds. 1982).
\item[171.] Murray, supra note 22, at 21.
\item[172.] Grant, supra note 7, at 28.
\item[173.] Murray, supra note 22, at 16.
\item[174.] Act, supra note 18, § 37(1).
\item[175.] Act, supra note 18, § 32 (quoted supra note 129).
\item[176.] See Kilbrandon Report, supra note 6, § 5.
\item[177.] Finlayson, supra note 24, at 49.
\item[178.] Kelly, supra note 133, at 261.
\item[179.] See id. at 261-62.
\end{enumerate}
In considering the need for care, a reporter has wide discretion as to whether treatment should be administered, whether it should be voluntary or mandatory, and what form it should take.\textsuperscript{180} Some referrals may require no more than a family conference with the reporter to remedy the situation.\textsuperscript{181} In other situations, the reporter may ask the family to accept voluntary treatment from the social work department, usually in the form of advice, guidance, or assistance.\textsuperscript{182} If the reporter chooses either of these alternatives, thereby alleviating the conditions suggesting a need for care, the child will not appear before a children’s hearing.\textsuperscript{183}

Generally, the reporter looks beyond the immediate circumstances of the referral to determine the child’s needs within the context of the child’s social background.\textsuperscript{184} If the reporter believes that the circumstances of the referral are serious enough to require that the child receive compulsory measures of care, the reporter must refer the child to a children’s hearing.\textsuperscript{185}

A children’s hearing is comprised of three members of the children’s panel for the local authority.\textsuperscript{186} The hearing must include at least one male and one female member; one of the three is designated to chair the panel.\textsuperscript{187} The reporter and the social worker assigned to the case are also present.\textsuperscript{188}

Prior to the hearing date, the three hearing members receive and review information containing the child’s social background report, the grounds for referral, and the reporter’s statement of the reasons that the case is before the panel.\textsuperscript{189} When the parents\textsuperscript{190} and the child\textsuperscript{191} appear before the hearing, the chair must begin by explaining the grounds of referral as stated by the reporter.\textsuperscript{192} Both parents and child must then decide whether they accept in whole or

\begin{footnotes}
\item[180.] Finlayson, \textit{supra} note 24, at 49.
\item[181.] Sinclair, \textit{Entering the System in The Scottish Juvenile Justice System} 24, 26 (F.M. Martin & K. Murray eds. 1982).
\item[182.] Finlayson, \textit{supra} note 24, at 49; Kelly, \textit{supra} note 133, at 261.
\item[183.] Finlayson, \textit{supra} note 24, at 49.
\item[184.] Kelly, \textit{supra} note 133, at 261-62; Sinclair, \textit{supra} note 181, at 26-27.
\item[185.] Finlayson, \textit{supra} note 24, at 49.
\item[186.] Act, \textit{supra} note 18, § 34(1), (2).
\item[187.] Id. § 34(2).
\item[188.] Murray, \textit{supra} note 22, at 15 n.*.
\item[189.] Children’s Hearings (Scotland) Rules, \textit{supra} note 20, rule 6.
\item[190.] Parents have both a right and a duty to attend all stages of the hearing, unless the hearing determines that the requirement of attendance is either unreasonable or unnecessary. Parents who fail to attend are subject to a fine. Act, \textit{supra} note 18, § 41.
\item[191.] After receiving proper notice, a child is obligated to attend the hearing unless the hearing is satisfied that the child’s attendance is unnecessary or would be detrimental to the child’s interests. Act, \textit{supra} note 18, § 40(1),(2).
\item[192.] Act, \textit{supra} note 18, § 42(1).
\end{footnotes}
In part the grounds of referral, as put forth by the reporter, as an accurate description of the situation.\footnote{193}{See id.} If the child and the parents accept the grounds of referral as true, the hearing may then discuss the merits of the case.\footnote{194}{Id. at § 42(2)(a).} The hearing considers all relevant reports, and, through discussion with the family, discovers the feelings and opinions of the parents and child.\footnote{195}{Fox, supra note 4, at 87-88; Kelly, supra note 133, at 262-63.} Most frequently the hearing participants, including the parents and child, sit around a table in order to facilitate conversation.\footnote{196}{Fox, supra note 4, at 80-81; Children Out of Court, supra note 1, at 95.} Hearing members, through their words and demeanor, try to assure the child from the outset that the system is interested in helping the child and that the hearing is interested in listening to the family’s views.\footnote{197}{See Fox, supra note 4, at 68-69, 82-83, 87-88.} Once the family gains confidence in the system, discussion and cooperation more readily follow.\footnote{198}{See Kilbrandon Report, supra note 6, ¶ 109.}

If the child or parents do not accept the grounds of referral and the hearing wishes to pursue further the merits of the case,\footnote{199}{At this point, the hearing has the option of discharging the referral without further discussion. Act, supra note 18, § 42(2)(c); see infra note 231.} the chair directs the reporter to refer the case to the Sheriff Court\footnote{200}{See supra note 4.} for a finding of fact to establish the grounds of referral.\footnote{201}{Act, supra note 18, § 42(2)(c).} Once satisfied that the evidence supports a ground of referral, the sheriff remits the case to the hearing for discussion and consideration of proper treatment.\footnote{202}{Act, supra note 18, § 42(6). The sheriff weighs the evidence to decide whether it supports the grounds of referral. If the child is accused of an offense, the sheriff uses the “beyond a reasonable doubt” standard in weighing the evidence. In a care or protection referral, the sheriff uses the “balance of probabilities” standard of proof for the referral. Finlayson, supra note 24, at 48-49.} If a family accepts only a portion of the grounds of referral, the hearing may choose whether to proceed with respect to the grounds not in dispute or to refer the case to the sheriff for a fact-finding on the disputed grounds.\footnote{203}{Act, supra note 18, § 42(2)(b), (c).} With either procedure, the hearing may not discuss any portion of the case for which the grounds have not been established.\footnote{204}{Fox, supra note 4, at 72; Grant, supra note 7, at 28.}

After the facts have been established, and after the hearing members, reporter, social worker, parents, and child have thoroughly discussed the case, the three hearing members are responsible for recommending treatment.\footnote{205}{Act, supra note 18, § 43(1).} If the hearing decides that the child needs no further treatment, it may dismiss the case.\footnote{206}{Id. § 43(2).}
of care, it issues a supervision requirement.207 The supervision requirement either allows the child to remain at home under the mandatory supervision of the social work department, or requires the child to attend a residential institution, such as a List D school208 or a children's home.209 After implementing a supervision requirement, the hearing must monitor and periodically review the case.210 No supervision requirement may be imposed longer than one year without review by the hearing.211

Upon review of the case, the hearing may extend or vary the requirement for another year, and the process may continue until the child's eighteenth birthday.212 A supervision requirement that has not been reviewed within one year automatically lapses.213 Additionally, no child over eighteen years old may be subjected to supervision orders by a children's hearing.214

In addition to the hearing's mandatory reviews, the family has a right after three months to request a review of the original order for adjustment of a supervision requirement.215 After six months, the family may also request a review of a renewal of the identical terms of the original requirement.216 This provision allows the hearing to adjust the supervision requirement to meet a child's changing circumstances, both when the child has shown improvement and when the treatment recommended has not been effective.217 To review a requirement, the parents, child, reporter, and social worker again come before the hearing to discuss the current circumstances of the case.218 The decision to alter the supervision requirement remains in the hands of the three hearing members.219

In addition to their right to request review of supervision, the parents and child have the right to appeal any final decision.220 The reporter assumes the duty of providing the sheriff with all reports and statements concerning the case.221 In the event of dissatisfaction with the sheriff's decision, the family has a

207. Id. § 44(1).
208. List D schools are specialized residential schools for young delinquents. Formally known as "approved schools," they derive their present name from the list on which they appear in the Scottish Education Department's index. CHILDREN OUT OF COURT, supra note 1, at 31 n.4.
209. Kelly, supra note 133, at 264. The social work department is responsible for the maintenance of the children's homes. Murray, supra note 22, at 16.
211. Id. § 48(3).
212. Id. §§ 47(2), 48(3).
213. Id. § 48(3).
214. Id. § 47(2).
215. Id. § 48(4).
216. Id.
217. See KILBRANDON REPORT, supra note 6, ¶ 91.
218. See Children's Hearings (Scotland) Rules, supra note 20, rule 17.
219. See id., rule 17(4).
220. Act, supra note 18, § 49(1).
221. Id. § 49(2).
Further right of appeal to the Court of Session.\textsuperscript{222} This appeal is limited, however, to points of law and questions of procedure.\textsuperscript{223}

In sum, the Children's Hearings System separates the fact-finding forum from the treatment forum; the duty to make all necessary fact-finding decisions rests with the courts, while treatment decisions are the responsibility of the reporter and the hearing. The family has the opportunity to discuss the situation with the reporter and hearing members, although the family has no actual voice in the hearing's decision making process. The family does have the right to appeal to the courts any final hearing decision that they consider unjust.

V. Court Decisions

After the Children's Hearings System became effective on April 15, 1971, it was hampered by procedural difficulties caused by omissions and ambiguities in the statutes governing the system.\textsuperscript{224} Proponents of the system hoped that routine practice within the system itself would remedy most ambiguities and that those practices that were challenged in court would be clarified by judicial opinion.\textsuperscript{225} They recognized that the courts have the power to rule on interim issues of fact-finding and to review final orders of the panels.\textsuperscript{226} By establishing precedents through judicial review, the courts could establish a uniform practice throughout the hearings system.\textsuperscript{227}

A. H. v. McGregor

One of the first opinions handed down from the judiciary on the subject of children's hearings concerned the appealability of panel decisions to the courts. In \textit{H. v. McGregor},\textsuperscript{228} a child who allegedly assaulted another child was referred to a hearing.\textsuperscript{229} When the child refused to accept the grounds of referral, the chair of the hearing directed the reporter to apply to the sheriff for a fact-finding.\textsuperscript{230} The parents objected to the chair's directive, contending that the panel should dismiss the referral.\textsuperscript{231} The hearing, however, could not discuss the

\begin{itemize}
\item \textsuperscript{222} See \textit{supra} note 4.
\item \textsuperscript{223} Act, \textit{supra} note 18, § 50.
\item \textsuperscript{224} Grant, \textit{Bridging Gaps: Three Cases on Children's Hearings}, 1973 S.L.T. (News) 190 [hereinafter cited as \textit{Bridging Gaps}].
\item \textsuperscript{225} \textit{Id.}
\item \textsuperscript{226} Act, \textit{supra} note 18, §§ 42(2)(c), 49.
\item \textsuperscript{227} \textit{See Bridging Gaps, supra} note 224, at 190.
\item \textsuperscript{228} 1973 S.L.T. 110.
\item \textsuperscript{229} \textit{Id.} at 113.
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Id.} at 114. A significant distinction exists between a discharge as an alternative to requesting a fact-finding from the sheriff and a discharge after a full evaluation of the case. The panel generally recommends the first type of discharge only if it decides that further treatment would be unnecessary, even if the grounds of referral were established. The panel recommends the second type of discharge
merits of the case until the grounds of referral were established.232 The parents appealed the hearing’s direction for a fact-finding, basing their right of appeal on section 49(1) of the Act.233 Both the sheriff and the Court of Session agreed that a decision to obtain a fact-finding from the courts is not a decision on the disposal of the referral, and section 49(1) of the Act refers only to decisions disposing of the referral.234 Section 42(2)(c) grants the hearing discretion to discharge the referral when the grounds are not accepted,235 but should the hearing decide not to exercise this discretion, it must refer the case to the sheriff before the case can proceed.236 A decision not to discharge the referral is, at best, a procedural decision, and the intention of the drafters of the Act was not to permit the delays accompanying appeals on points of procedure.237 Thus, the Court of Session concluded that the family has no right to appeal a hearing’s directive to the reporter to establish disputed facts before the sheriff. The hearing has the right to request that the sheriff hear contested facts.

B. Kennedy v. B. and Another

Within the same year that the Court of Session decided H. v. McGregor, it decided a second case involving contested facts before the sheriff. In Kennedy v. B. and Another,238 the Court of Session considered whether a hearing retains jurisdiction when the circumstances of the case change significantly before the sheriff establishes the grounds of referral.239 In Kennedy, an eight year old child was referred to a children’s panel as in need of compulsory measures of care under section 32(2)(c) of the Act.240 The grounds of referral was that lack of parental care would likely cause him unnecessary suffering or seriously impair his health or development.241 According to the facts of the referral, the boy lived in Glasgow with his mother and seven siblings in a one-room house that lacked basic amenities and a sufficient supply of bedding.242 When the local authorities

only if it decides, after completely and carefully evaluating all information available, that further treatment orders are not necessary. Bridging Gaps, supra note 224, at 192.
A child, or his parents, or both, may, within a period of three weeks beginning with the date of any decision of the children’s hearing, appeal to the sheriff in chambers against that decision and the child or his parents shall be heard by the sheriff as to the reasons for the appeal.
Act, supra note 18, § 49(1).
235. Act, supra note 18, § 42(2)(c); see supra note 231.
237. Id. at 116.
239. Id. at 39.
240. See supra note 129 (text of section 32 of the Act).
242. Id. at 39.
eventually took the children into care, the children's skin and hair were verminous, and their clothing was so filthy that it had to be destroyed.243

The child was taken into care on August 9, 1971, and brought before a hearing on August 16, 1971, where he and his mother refused to accept the grounds of referral.244 The hearing directed the referral to the sheriff, who heard evidence on September 13, 1971, including a statement from the child's mother that circumstances had substantially improved since August 9 because the child was now living with his grandparents, and, therefore, the grounds as stated by the reporter no longer existed.245 The sheriff agreed that the grounds were not established and dismissed the application.246 The reporter appealed, focussing the appeal on whether the sheriff's decision should be based on the situation at the time of the original referral or the time that the case was brought into court.247

The Court of Session concluded that the sheriff should base the decision on the circumstances existing at the time that the sheriff hears the evidence.248 The Court looked to the present tense wording of the Act,249 which provides that the sheriff has the duty to decide whether the grounds of referral are established and whether the lack of care is likely to be detrimental to the child.250 Thus, the sheriff is obliged to consider pertinent facts or events occurring since the time of the original referral to the panel in determining whether the grounds of referral are still valid.251

The holding in Kennedy, which also applies to children beyond the control of their parents,252 compels the reporter to continue investigating the circumstances of the referral up to the date of proof for referrals under section 32(a), (b), or (c) of the Act.253 Although the holding may not impose upon the reporter a specific duty to investigate, as a practical matter a reporter who fails to continue the investigation may find the referral challenged by evidence of improved circumstances.254 If the reporter is unprepared to rebut such evidence, the sheriff will most likely adjourn the case and order the reporter to continue the investigation in light of the changed circumstances.255 If the reporter cannot discover new evidence to support the referral, the holding in Kennedy allows the sheriff to

243. Id.
244. Id. at 40.
245. Id. at 39-40.
246. Id. at 40.
247. Id.
248. Id. at 41.
249. Act, supra note 18, § 42(2)(c).
251. Id. at 40-41.
252. Id.
254. See id. at 191.
dismiss the referral. Thus, not only may the hearing request that the sheriff review evidence of disputed facts, but the sheriff must also review evidence gathered after the hearing has requested the fact-finding.

C. McGregor v. D.

In 1977 the Court of Session decided another children's hearing case concerning a ruling on evidence before the Sheriff Court. In McGregor v. D., a child previously charged with breaking into a neighbor's home was referred to a children's hearing because he allegedly attempted to interfere with the administration of justice. The facts of the referral stated that the child returned to the neighbor's home and, knowing that the owner might testify at his trial, threatened her with physical injury if she were to appear in court. At the hearing, the child and his father refused to accept the grounds of referral, and the chair directed the reporter to apply to the sheriff for a fact-finding.

The solicitor for the family challenged the relevancy of the grounds of referral, arguing before the sheriff that the facts as set forth, even if proved, did not constitute the offense mentioned in the referral. The reporter conceded this argument but requested that the sheriff hear the evidence of the case and find that the child had committed an offense, albeit a different offense than the one named in the referral. The reporter asked in the alternative for leave to amend the grounds of referral in order to substitute the name of the offense which the facts would support. The sheriff dismissed the application as irrelevant, denied leave to amend, and discharged the referral. The case presented three issues to the Court of Session on appeal: first, whether the sheriff has the power to dismiss the application as irrelevant; second, whether the sheriff was correct in dismissing the application as irrelevant; and third, whether a reporter should have leave to amend a referral.

In considering the questions on appeal, the Court of Session emphasized that the nature of the proceedings under Part III of the Act are not criminal proceedings; rather, they are civil proceedings sui generis to which the ordinary

257. Id. at 182, 184.
258. Id.
259. Id. at 184.
260. The Act recognizes the family's need for legal representation in proceedings before the sheriff. Act, supra note 18, § 42(4). The Act further provides for legal aid to those families who qualify. Id. § 53.
262. Id.
263. Id.
264. Id.
265. Id.
266. Civil proceedings sui generis are proceedings of their own kind or class. BLACK'S LAW DICTIONARY 1286 (5th ed. 1979).
codes of civil and criminal procedure do not apply. In fact, the Sheriff Court Procedure Rules expressly exclude the ordinary code of civil procedure from the sheriff court proceedings. Since the ordinary codes are inapplicable, the Court of Session looked to the Act itself, and to the subsequent statutory procedures pertaining specifically to the Children's Hearings System as the sole sources of procedural authority.

The Sheriff Court Procedure Rules list no specific provision allowing for dismissal of applications before hearing the evidence. To the contrary, the rules explicitly state that "the sheriff shall . . . hear the evidence tendered by or on behalf of the reporter." Moreover, section 42 of the Act refers to a finding upon evidence presented to the court and requires a ruling on questions of fact before a decision can be reached as to whether the child has committed an offense. Basing its reasoning on the wording of the Sheriff Court Procedure Rules and on section 42 of the Act, the Court of Session held that a sheriff has the obligation to hear the reporter's evidence. Therefore, the sheriff in McGregor v. D. was not entitled to dismiss the referral before the evidence was presented.

Thus, not only is the hearing entitled to request a fact-finding, but the sheriff must hear the evidence that the reporter presents, even if the reporter has failed to name an offense relevant to the evidence. Under this rule, if a child is referred to a hearing on irrelevant grounds, and the family, usually legally unadvised and unfamiliar with the concept of relevancy, accepts those grounds, the hearing may proceed to a disposal. If the child or parent denies the grounds and sends the case to the sheriff for fact-finding, the sheriff is obligated to hear the evidence, despite the irrelevant grounds.

Although a second opinion, written by Lord Emslie, acknowledged that these proceedings were a waste of time in situations that constitute no recognized

270. Id.  
271. See supra note 23.  
273. Sheriff Court Procedure Rules, supra note 22, rule 8(1).  
274. Act, supra note 18, § 42(2)(c), (5), (6).  
276. Id. at 186, 187.  
277. Id.  
279. Id.  
280. Id.
offense at law,281 cases brought on irrelevant grounds of referral will not always be dismissed after hearings on the evidence.282 Rule 10 of the Sheriff Court Procedural Rules283 allows the sheriff to find that the child has committed any offense supported by the evidence; the offense need not have been specified in the grounds of referral.284 Therefore, after the reporter has presented evidence and the sheriff has established the facts of the referral, the sheriff may then proceed to determine whether the facts support any offense at all, regardless of the offense that the reporter previously named in the referral and communicated to the family.285 If the facts do not disclose an offense, then the sheriff may reasonably discharge the referral.286 If the sheriff errs in the decision to discharge, the parties may appeal the decision under section 50 of the Act.287

In regard to the third issue of the case, the reporter took the appeal with the hope that the Court of Session would give a definitive ruling on the competence of amendment or addition of grounds.288 The Act, the Children's Hearing (Scotland) Rules, and the Sheriff Court Procedure Rules are all silent on the subject.289 The opinions of both judges, relying heavily upon the lack of express power in the procedural acts, concluded that the reporter may not amend the grounds of referral before the sheriff.290 Furthermore, a material amendment before the sheriff could radically alter the grounds of referral on which the hearing authorized the reporter to proceed.291 Neither opinion made clear

282. See More Bridge-Building, supra note 278, at 302.
283. Rule 10 of the Sheriff Court Procedure Rules provides: "Where the grounds of referral are alleged to constitute an offence or offences or any attempt thereat the sheriff may find on the facts that any offence established by the facts has been committed." Sheriff Court Procedure Rules, supra note 22, rule 10.
284. More Bridge-Building, supra note 278, at 302.
285. Id. Although the holding of McGregor v. D. was phrased in broad terms, the facts pertained to an offense committed by the child. In McGregor v. A., 1982 S.L.T. 45, 47, the Court of Session held that rule 10 of the Sheriff Court Procedure Rules and the holding in McGregor v. D. were equally applicable to offenses committed by another against the child.
287. Id.
288. More Bridge-Building, supra note 278, at 303.
289. Id.
290. Id.
Amendment is a familiar creature of the rules of procedure for criminal and civil business and it finds no place, either expressly or by implication, in the procedure designed to regulate the operation of [application of fact-finding to the sheriff]. McGregor v. D., 1977 S.L.T. at 186 (opinion of Lord President).

. . . [T]here are no provisions in the statutory code for the application or use of any of the familiar steps of civil process in the sheriff court. There are no answers to the statement to the ground of referral and therefore no adjustment of pleadings. There is consequently no closed record which can suffer "amendment" nor are there any operative conclusions which could be amended.
Id. at 187 (opinion of Lord Cameron).
291. Id. at 189.
whether amendment of the referral was permissible at any time prior to appearance before the sheriff.292

In sum, the decision in McGregor v. D. held that a sheriff may not dismiss a referral as irrelevant, and that a reporter has no power to amend a referral before the sheriff. The decision instead recognized the power set forth in Rule 10 of the Sheriff Court Procedure Rules that allows a sheriff to find that any offense supporting the facts of the case upholds the referral.

D. J.F. and Others v. McGregor

The Court of Session extended the rulings in Kennedy and McGregor v. D., which required the sheriff to hear the evidence presented by the reporter, to the case of J.F. and Others v. McGregor.293 Four children were referred to a hearing under section 32(2)(d) of the Act because another sibling had been assaulted in the family household.294 The children were too young to accept the grounds of referral, but at a hearing before the sheriff, the parents took the advice of a solicitor and accepted the grounds in order to minimize the expense of trial.295 The sheriff held the grounds to be established based solely on the parents' acceptance and remitted the case to a children's hearing to proceed with treatment.296 Appeal from the order was taken to the Court of Session.297

The Court of Session noted that neither the Act nor the subsequent procedural rules provided guidelines for accepting grounds of referral before the sheriff, but it emphasized that the procedure explicitly required the sheriff to hear evidence before deciding that the grounds had been established.298 Section 42(7) of the Act299 requires the sheriff to find the grounds of referral when a child is incapable of understanding the explanation of the referral.300

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292. See More Bridge-Building, supra note 278, at 303.
295. Id. at 335.
296. Id.
297. Id. at 334.
298. Id. at 335.
299. Section 42(7) of the Act, as in effect when this case was decided, provides:

Where a children's hearing are satisfied that the child for any reason is not capable of understanding the explanation of the grounds of referral required by subsection (1) of this section, or in the course of, or at the conclusion of that explanation, it appears not to be understood by the child, the hearing shall, unless they decide to discharge the referral, direct the reporter to make application to the sheriff for a finding as to whether any of the grounds for the referral have been established, and the provisions of this section relating to an application to the sheriff under subsection (2)(c) thereof shall apply as they apply to an application under that subsection.

Act, supra note 18, § 42(7). Cf. note 374 infra and accompanying text (text of Section 42(7) with 1983 amendments and a discussion of reasons for the amendment).

is to proceed with the findings as specified under section 42(6) by examining the evidence before the court. The Court of Session interpreted the word "evidence" in section 42(6) to mean evidence in its ordinary legal use, and referred to Rule 8(1) of the Sheriff Court Procedure Rules, which mandates the sheriff to hear evidence before ruling on disputed grounds of referral. By definition under Rule 2(3) of the Sheriff Court Procedure Rules, the facts in J.F. and Others were in dispute because the children were not capable of consenting to them.

The Court concluded that the the procedure for accepting the grounds of referral at hearings of section 42 applications should not be altered simply because of the absence of guidelines or provisions dealing with the acceptance. Thus, the Court remanded the case to the sheriff for a finding of fact. The decision in J.F. and Others v. McGregor, considered in conjunction with the holding in McGregor v. D., effectively prohibits a sheriff from determining the grounds of a referral under section 42(2)(c) and section 42(7) of the Act without first hearing the evidence.

The four cases discussed above illustrate the Court of Session's attempt to establish a uniform procedure for fact-finding before the sheriff. In H. v. McGregor, the Court recognized the hearing's right to request a fact-finding when the case involves disputed facts. Next, in Kennedy v. B. and Another, the Court held that the sheriff must make the finding of fact in light of the child's present circumstances. In McGregor v. D., the Court stated that although a reporter may not amend the grounds of referral before the sheriff, the sheriff is permitted to find that an offense not mentioned in the referral has been established by the facts of the case. Finally, in J.F. and Others v. McGregor, the Court required the sheriff to hear all of the evidence in cases where a child is incapable of understanding the explanation of the referral.

301. Section 42(6) of the Act, as in effect when this case was decided, provides:

Where the sheriff is satisfied on the evidence before him that any of the grounds in respect of which the application has been made has been established he shall remit the case to the reporter to make arrangements for a children's hearing for consideration and determination of the case, and where a ground for the referral of the case is the condition referred to in section 32(2)(g) of this Act, the sheriff in hearing the application shall apply to the evidence relating to that ground the standard of proof required in criminal procedure.

Act, supra note 18, § 42(6). Cf. note 373 infra and accompanying text (text of Section 42(6) with 1983 amendments and a discussion of reasons for the amendments).


303. Id.

304. Rule 2(3) of the Sheriff Court Procedure Rules provides:

In these Rules any reference, however expressed, to disputed grounds of referral shall be construed as a reference to grounds of referral which form the subject of an application under subsection (2)(c) or subsection (7) of section 42 of the Act.

Sheriff Court Procedure Rules, supra note 23, rule 2(3).


306. See id. at 335.

307. Id. at 335-36.

308. Forshaw, supra note 34, at 194.
VI. Analysis

A. Effects of the Court Decisions

In instituting uniform procedures in the Children's Hearings System, the Court of Session frequently looked to the wording of the Act and the principles of the Kilbrandon Report to support its decisions. The results of those decisions, however, were not always in harmony with the original intent of the Kilbrandon Committee. Some of the Court of Session's opinions fostered the principles of preventive treatment supported by the Committee; other rulings of the Court merely frustrated the principles upon which the Committee founded the hearings system.

While *H. v. McGregor* held that the family has no right to appeal a hearing's request for a fact-finding because the request is not a final dispositional order, the decision nevertheless recognizes the rights of both child and parents to appeal from a final order of the hearing. As provided in the Court's opinion, the right of appeal remains even if the hearing decides to dismiss the referral. In practice, few appeals will be made from discharges because a party would act illogically to deny the grounds of referral in front of the hearing and then insist that the sheriff review the facts once the hearing had granted a discharge.

In a few situations, however, the right of appeal from a discharge may provide an important protection for either abused children or parents unable to control a child. For example, if the hearing's ultimate decision in a care and protection referral is to discharge the case, the child may wish to appeal to the sheriff for protection, perhaps from physically abusive parents. Likewise, parents unable to control a child may believe that a discharge is contrary to the child's best interests, and will appeal to the sheriff for mandatory social services. If the sheriff allows the appeal and finds that the hearing's decision was not justified in all circumstances, the sheriff must remit the case to the hearing for reconsideration.

Thus, an appeal from a discharge allows the appealing party to take an additional step to prevent further injury to the child or future delinquency in cases where either the child or the parents feel that the hearing's disposal was imprudent. The recognition of the right to appeal a discharge by the sheriff courts provides an additional procedural safeguard to insure that the decision of the hearing is in the child's best interest. This decision is consistent with the

310. See id. at 114, 116.
312. Id.
313. Id.
314. Id.
315. Id. (citing Act, supra note 18, § 49(5)(b)).
316. See *Bridging Gaps*, supra note 224, at 92.
317. See id.
prevention principles espoused by the Kilbrandon Report. By recognizing this additional procedural safeguard, the Court of Session has encouraged the prevention of a child's harm or delinquency through a functional hearings system.

The decision in Kennedy v. B. and Another, like the H. v. McGregor decision, protects children in need of care or protection and children beyond the control of their parents. The holding requires a sheriff considering the grounds of referral to hear any evidence collected subsequent to the initial referral that is presented to the court. The reporter must continue to monitor the child's situation to determine the facts of the case while the case is before the sheriff.

Reporters particularly need to monitor cases that fall under section 32(2)(b) and (c) of the Act because these cases involve harm or potential harm to a child. Both provisions of the Act are concerned with the child's future welfare, and evidence of changing circumstances may strongly affect the sheriff's assessment of the child's situation and risk of future harm. Similarly, a child beyond the control of parents under section 32(2)(a) at the time of referral, but back within their control by the time the case is before the sheriff, may show by evidence of current circumstances that the conditions that precipitated the referral no longer exist and, therefore, that the child's welfare is no longer in jeopardy. By compelling the reporter to gather the most recent facts, the holding in Kennedy ensures that the sheriff's decision takes into account the child's present circumstances and considers the child's welfare in light of those circumstances.

While Kennedy ensures that referrals are disposed of in the child's best interests by ensuring that the sheriff considers the most recent circumstances relevant to the grounds of referral, the case also compels a second, and perhaps less desirable, conclusion. The Kennedy decision in effect gives the sheriff an opportunity to decide the final disposition of a case. If a case before the sheriff contains facts that would support a referral, but the family brings to the sheriff's attention evidence of changed circumstances, the sheriff has the opportunity to decide whether, in light of the new facts revealed, the child needs social care or assistance. Although the Kennedy decision may seem reasonable in terms of its statutory interpretation, it nonetheless undercuts the Kilbrandon Committee's
primary goal of separating the fact-finding forum from the treatment forum. By allowing the sheriff to consider new evidence in determining whether to dismiss a case, the Court of Session has opened the door to deciding questions of a child's welfare and treatment in the forum reserved for fact-finding. In the hypothetical extreme, a sheriff may dismiss a case brought before the court on disputed grounds based on a finding that the family's circumstances had improved. If the improvement were only temporary, however, the referral could be brought again in front of a children's hearing. The family could then dispute the facts again and ask that the case be presented to the sheriff. If the family once again showed that its circumstances had improved, even if temporarily, the sheriff again would have the discretion to dismiss the referral free of all treatment measures. In this way, the family could successfully, and perhaps continuously, avoid compulsory treatment. Thus, the decision may allow for disposal of a case without consideration of future care and treatment of the child. Also, it may allow for a parent to present to the court a superficial remedy, which may neither bind a party to its terms nor truly rectify the situation, in order to escape the hearing's jurisdiction.

In the Court of Session reiterated its decision in to recognize a sheriff's power to dismiss a referral. Concerning the other issues raised in the case, the Court employed two different canons of interpretation in justifying its holdings.

In examining the reporter's duty to specify the nature of the offense in the grounds of referral, the Court dismissed such a duty as irrelevant to the objective of the Act. In the proceedings below, the sheriff reasoned that the provisions of Rule 15(4) of the Children's Hearing (Scotland) Rules imply that the sheriff has a power to dismiss referrals that do not specify the nature of the

330. See Bridging Gaps, supra note 224, at 191; Kilbrandon Report, supra note 6, ¶¶ 70, 73.
331. Bridging Gaps, supra note 224, at 191.
332. Id.
333. Id.
334. Id.
335. See id.
336. See id.
337. See id.
338. See id.
340. Id. at 185-86.
341. More Bridge-Building, supra note 278, at 302.
342. See Children's Hearings (Scotland) Rules, supra note 20, rule 14.
344. Rule 15(4) provides:

In the case of a condition mentioned in section 32(2)(g) of the Act, the statement of the facts constituting the offence shall have the same degree of specification as in a charge contained in a complaint under the Summary Jurisdiction (Scotland) Act 1954(a) and the statement shall also specify the nature of the offence in question.

Children's Hearings (Scotland) Rules, supra note 20, rule 15(4).
offense in questions; otherwise, the provision would be unenforceable and therefore meaningless. The Court of Session preferred a functional approach to the legislation; it reasoned that because reporters often lack legal training, a reporter should not be expected to know the correct labels for offenses. Since proceedings under Part III of the Act are civil proceedings sui generis, a reporter is not bound to high standards of specificity and accuracy in specifying criminal offenses. Rule 15(4) is subordinate and ancillary to section 42 of the Act; the rule would have little value if it functioned contrary to the best interests of the child and therefore against the overall objective of the statute.

In subordinating the importance of Rule 15(4) to the overall objective of providing for the child's best interest, the Court of Session may have overlooked two important aspects of the rule. First, the drafters of the Children's Hearing (Scotland) Rules may have foreseen that reporters would not always be legally qualified and that families would not always have access to legal advice. Under these circumstances the drafters may have intended that a reporter be held to a high standard of specification in the grounds of referral and may have constructed Rule 15(4) to convey that intent.

Second, the Court of Session apparently ignored the fact that the community has no right to interfere with a child's life unless one of the conditions under section 32(2) of the Act occurs. The disposal of a children's hearing is somewhat akin to an action taken in criminal court insofar as the disposal may include the deprivation of liberty and may last for an extended period of time, until the child's eighteenth birthday. Since the family may not wish the child to be subject to compulsory treatment, the referral should be drafted to best protect the child according to high standards of judicial scrutiny. To deny children these protections is to deny them rights which adults possess, which could make compulsory treatment seem "more punitive and arbitrary than a criminal sanction."

Given the Kilbrandon Committee's concern that the hearings system should appear to administer justice, the Court of Session failed to consider that the de-emphasis of the offense itself may contradict the child's own sense of just-

346. Id. at 186.
347. Id. at 185.
348. More Bridge-Building, supra note 278, at 302.
350. More Bridge-Building, supra note 278, at 302.
351. Id.
352. Id.
353. More Bridge-Building, supra note 278, at 302.
354. Id.
355. Id.
356. More Bridge-Building, supra note 278, at 302.
357. Fox, supra note 4, at 68; cf. Kilbrandon Report, supra note 6, ¶ 57.
In the vast majority of cases, the commission of the offense is both the formal and obvious grounds of referral, and the offense must remain at the center of the case for the system to make sense to the family. A child and parents confronted with discussion and questions concerning conditions in the home, the child’s schooling, and the child-rearing process in general may become confused and resentful if they see no link between the hearing’s inquiries and the offense that precipitated the referral. A family that sees no foundation for the treatment orders issued by the hearing is likely to regard such a system with bewilderment and suspicion rather than with trust.

In contrast to the functional approach taken by the Court of Session to downplay specific references to the offense itself, the Court in *McGregor v. D.* also took a literal approach. The Court used this literal approach in interpreting the duties of the sheriff to hear all of the evidence presented by the reporter and the power bestowed on the sheriff by Rule 10 of the Sheriff Court Procedure Rules to find that any offense supported by the evidence has been committed. This procedure could completely deprive a family of any notice of the offense until the sheriff pronounced the finding. This lack of notice may easily engender the sense of confusion and unfair treatment that the Kilbrandon Committee wanted to avoid.

The holding in *McGregor v. D.* places at risk the public’s trust in the Children’s Hearings System’s ability to administer justice. If a reporter carelessly drafts the referral statement, the family may have no actual notice of the offense until the sheriff pronounces the finding. The holding in this case prohibits the family from learning the true grounds of referral, and thereby prevents them from addressing the actual merits of the case. As a result, the parents and child may become unwilling, uncooperative participants in the treatment ultimately recommended by the hearing. According to the Kilbrandon Committee, lack of the family’s cooperation would likely result in ineffective treatment.

The requirement that the sheriff must hear all evidence presented by the reporter, as stated in *McGregor v. D.*, may also work to protect the child from false fact-finding. *J.F. and Others v. McGregor* established another requirement, providing that a finding of fact occur when the child is silent, either because he or she has refused to answer or is too young to answer. This requirement guarantees that a case cannot reach disposal unless the child accepts the facts, or

359. Id.
360. Id.
361. Id.
362. See More Bridge-Building, supra note 278, at 301-302.
363. Id.
364. Id. at 302-303.
365. Forshaw, supra note 34, at 194.
a separate authority, the sheriff, ensures on behalf of the child that the facts are true.\textsuperscript{367} In this way, the child is protected from parental assent when the parents' interests may differ from the child's interests.\textsuperscript{368}

Perhaps the only disadvantage of these protections afforded to children is that they may not extend far enough.\textsuperscript{369} The sheriff court acts as curator on behalf of the child only when the child is silent, but even in the most complex cases, the court may be excluded if the child accepts the grounds of referral.\textsuperscript{370} The sheriff may not interfere with the child's decision, even if this decision is the result of the child's limited experience or intelligence, inadequate legal advice, or other factors which the child never articulates to either parents or hearing members.\textsuperscript{371}

\textbf{B. The 1983 Amendments}

One unfortunate result of the Court of Session's insistence that the sheriff hear all of the evidence in disputed referrals was the expenditure of judicial time on proceedings where the grounds of referral truly were no longer in dispute.\textsuperscript{372} After the decision in \textit{J.F. and Others v. McGregor}, sheriffs began to hear evidence not only in care or protection cases where the child was too young to understand the grounds of referral, but also in cases of teenage offenders who, after consulting a solicitor, chose not to dispute the facts of the offense before the sheriff as they had before the hearing.\textsuperscript{373} Parliament, concerned with time spent on unnecessary court procedures, expressed its disapproval of the Court of Session's holding by amending sections 42(6) and (7) of the Act.\textsuperscript{374} The amend-

\begin{itemize}
\item \textsuperscript{367} Id.; see also 1981 S.L.T. at 334.
\item \textsuperscript{368} See Forshaw, \textit{supra} note 34, at 194, 195.
\item \textsuperscript{369} See \textit{id.} at 194.
\item \textsuperscript{370} Id.
\item \textsuperscript{371} Id.
\item \textsuperscript{373} Id. at 270.
\item \textsuperscript{374} Id. The amendments to the Act consist of the addition of subsection (6A) and modification of subsection (7) of section 42 to read as follows:
\begin{quote}
(6A) Notwithstanding the provisions of subsection (2)(c) of this section, where, in the course of the proceedings before the sheriff, the child and his parent accept any of the grounds in respect of which the application has been made, the sheriff may dispense with the hearing of evidence relating to that ground unless he is satisfied that in all circumstances such evidence should be heard, and deem that ground to have been established for the purposes of this section.
\end{quote}
\begin{quote}
(7) Where a children’s hearing are satisfied that the child for any reason is not capable of understanding the explanation of the grounds of referral required by subsection (1) of this section, or in the course of, or at the conclusion of that explanation, it appears not to be understood by the child, the hearing shall, unless they decide to discharge the referral, direct the reporter to make application to the sheriff for a finding as to whether any of the grounds for the referral have been established, and the provisions of this section relating to an application to the sheriff under subsection (2)(c) thereof shall apply as they apply to an application under that subsection except that where any of the grounds for the referral are accepted by the child's parent, whether or not accepted by the child, then, notwithstanding subsection (6A) of this section, the sheriff may dispense with the hearing of evidence relating to that ground if he is satisfied that in all the circumstances it would be reasonable to do so.
\end{quote}

ments give the sheriff broad discretion to determine whether the court needs to hear the evidence in order to establish the grounds of referral.375

Subsection 6(A) will most often become significant in a case where the child is alleged to have committed an offense. The child or the parents may dispute the grounds of referral at the hearing, but, after seeking the advice of a solicitor or reconsidering the circumstances on their own, both parents and the child may decide not to dispute the grounds in the Sheriff Court.376 The sheriff then has the discretion either to declare the grounds of referral established or to require the reporter to present evidence supporting the referral.377 The amendment, however, gives no guidelines to the sheriff as to the elements to be weighed in deciding whether to hear evidence; it merely states that the sheriff should be satisfied that all circumstances require the evidence to be heard.378 The elements will most likely be the extent to which the sheriff perceives that the child and parents understand the full definition of the offense charged, as well as the circumstances surrounding the offense.379 The sheriff may also wish to discuss with the family outside pressures or considerations (other than the circumstances listed in the referral) that may have led to the decision not to dispute the facts.380

In cases involving care or protection rather than juvenile offenses, a sheriff considering whether to hear evidence under the new subsection (6A) may have a more difficult time determining the criteria to investigate.381 This difficulty arises from the extent of the types of care or protection referrals, the frequent inability of families to understand the implications of such referrals without legal advice, and the added consideration established by Kennedy v. B. and Another382 that evidence regarding a change of circumstances since the hearing is relevant to the grounds of referral.383 If the sheriff, after speaking with the family, is not convinced that the circumstances support the referral or that the family fully understands the act of accepting the stated grounds, the sheriff may request to hear the evidence.384

Not only would hearing the proof serve to dispel doubts in the sheriff's mind concerning the merits of the case, but, in certain cases, hearing of proof may demonstrate to the involved parties that a neutral court has tested and evaluated the merits of the case to determine whether further proceedings are necessary.385

375. Kearney, supra note 372, at 270.
376. Id.
377. Id.
378. Id.
379. Id. at 270-71.
380. Id. at 271.
381. Id.
384. Id.
385. Id.
It may also show that proceedings in the hearings system are in fact dependent on the merits of the referral, despite the family's acquiescence to the merits of the referral because of convenience or misunderstood legal advice. This second consideration is consistent with the Kilbrandon Committee's goal of enlightening the family about the operation of the system and its own situation in order to facilitate cooperation between the family and the system.

As amended, section 42(7) encompasses primarily care or protection cases. Like the cases that fall within subsection 6(A), the sheriff will likely consider the parents' understanding of the nature of the referral and their motivation behind their decision not to dispute the referral before deciding whether to hear evidence on the case. The amendment to subsection (7) does not eliminate the protection afforded by the court to the child from assenting parents who may not share the child's interests; rather, it places the power of protection within the discretion of the sheriff to determine when protection is necessary for the child's best interests.

In sum, Parliament passed the amendments to the Act primarily to avoid expenditure of judicial time on cases where the facts are no longer disputed. The amendments grant the sheriff discretion to decide whether to hear the evidence or whether merely to declare the grounds established. Through the exercise of this discretion the sheriff is able to protect both children and parents from situations where their assent is not truly voluntary, or where they do not clearly understand the consequences of their actions. In such cases, the hearing of proof may show the family that the impartial court has tested the merits of the case and reached a decision. A family believing that the sheriff had ruled fairly on the merits of the case is likely to cooperate with subsequent treatment orders. With such cooperation, the treatment has a better chance of working effectively against the child's problem.

VII. Conclusion

This Comment has focused on the effect of some of the Court of Session's opinions on procedure in the Children's Hearings System. It has discussed the deficiencies in the former Scottish juvenile court system, the reforms proposed by the Kilbrandon Committee, and the procedural system implemented to accomplish those reforms. The Comment also examined some of the Court of Session's opinions on procedural issues and the way in which those opinions have

386. Id.
388. See supra note 374 (text of amendment); Kearney, supra note 372, at 272.
389. Id. at 273.
390. Id.
391. Id. at 272.
both helped and hindered the implementation of the treatment model of juvenile justice.

The Court of Session's opinion in *H. v. McGregor* fosters the goal of the treatment model by recognizing that both the child and the parents have the right to appeal from a final order of the hearing discharging the case. In recognizing this additional procedural safeguard, the Court has encouraged the prevention of a child's future harm or delinquency by allowing an appeal where either party feels that the hearing's decision was imprudent. The prevention of delinquency is the goal of the treatment model.

Likewise, the decision in *Kennedy v. B. and Another* has fostered the treatment model by assuring that the sheriff considers the most recent information relevant to the child's circumstances when ruling on the facts presented. The decision, however, comes dangerously close to undercutting the structure of the hearings system. The Committee recommended the separation of the fact-finding and treatment forums because it felt that the two processes were incompatible. By allowing the sheriff to consider new evidence in deciding whether to dismiss the case, the *Kennedy* decision permits a question of the child's welfare to be decided in the fact-finding forum. This procedural anomaly contradicts the original intent of the Committee, and, at least hypothetically, allows a family to circumvent the treatment forum.

The opinion in *McGregor v. D.* contained elements that both foster and frustrate the treatment model's ideals. The opinion held that a reporter's failure to specify in the referral the exact offense committed is not a valid reason for the sheriff to dismiss a referral. Instead, the Court recognized that the sheriff may find that any offense supported by the facts of the case had been committed. The holding serves to de-emphasize the named offense and allows the sheriff to proceed according to the facts of the case. The de-emphasis of the offense, however, may only confuse the family and create mistrust in the system. This possible effect on the family frustrates the Kilbrandon Committee's goal of creating a system which can win the trust and cooperation of those whom it purports to serve.

Finally, in *J.F. and Others v. McGregor*, the Court attempted to ensure that a child's interests are protected despite the child's own lack of understanding about the case. Protection of the child's best interest is crucial to the treatment model, but in its attempt to extend this protection, the Court made its holding too broad. This overly broad holding resulted in many unnecessary appeals to the sheriff and precipitated a parliamentary amendment.

The amendments to section 42 of the Social Work (Scotland) Act demonstrated Parliament's concern for the smooth functioning of the Children's Hearings System and its willingness to act against unfavorable procedural rulings by the Court of Session. Although the 1983 amendments are the only actions in this regard, Parliament seems not to have conceded to the Court of Session the final
word on procedural interpretation. At least some of the procedural gaps in the original Act need to be remedied through the legislative rather than the judicial process. Parliament is not likely to amend the Act routinely in response to the Court's decisions, but the recent amendments indicate that Parliament shares the responsibility with the Scottish courts to preserve the principles of the treatment model and the foundation of the Children's Hearings System.

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