SHERIFF APPEAL COURT

[2023] SAC (Civ) 29

Sheriff Principal C Dowdalls KC
Sheriff Principal G Wade KC
Appeal Sheriff A M Cubie

OPINION OF THE COURT

delivered by APPEAL SHERIFF A M CUBIE

in appeal by

F

Pursuer and Appellant

against

M

Defender and Respondent

Pursuer and Appellant: Allison, advocate; Gibson Kerr Ltd
Defender and Respondent: Thompson; Thompson Family Law

13 September 2023

[1] This appeal concerns the child H aged 12 at the time of the orders appealed against, now aged 13. The parties to this appeal are H's parents, F and M who were married and are now divorced. H was the only child of the marriage. By interlocutor dated 12 November 2021, following the lodging of a joint minute, a decree was pronounced regulating residential contact to be exercised by F.

[2] On 16 February 2023, F did not return H to M notwithstanding the terms of the decree and despite repeated requests. M lodged a minute of variation of decree with Glasgow Sheriff Court on 24 February 2023. The minute of variation sought (i) delivery of H

to M within 48 hours; (ii) to interdict F from removing H from M's custody without her permission and (iii) to reduce F's contact with H to nil or for the court to issue such other order as the court saw fit. The sheriff fixed a hearing on the afternoon of 24 February 2023. The only party represented at the hearing on 24 February 2023 was M.

[3] Having heard from M's solicitor, the sheriff granted an order for delivery of H to the care of M within a period of 48 hours. The sheriff granted an interim interdict preventing F from removing H outwith the care and control of M. The sheriff considered that the balance of convenience favoured such an order being granted on an interim basis. The sheriff fixed a post-service hearing to call seven days later on 3 March 2023 so that he could hear from both parties.

[4] F failed to return H in accordance with the sheriff's interlocutor of 24 February 2023. Sheriff Officers and M attended at F's property to enforce that interlocutor; however, H remained in F's custody and care. Prior to the hearing fixed for 3 March 2023, F lodged, among other productions, an affidavit in which he stated that H did not wish to return to M, despite F's encouragement; that F did not allow sheriff officer's access to his property as he considered it would cause distress to H; and that he would respect H's wishes. M also lodged productions, including a copy of the sheriff officer's report and a voice recording of a call between M and H, in which H expressed a desire to return to her care.

[5] Having heard both parties on 3 March 2023 and having regard to the material lodged, the sheriff allowed the crave of the minute of variation to be amended to grant the power to sheriff officers to open shut and lockfast places and to deliver H from F to M. The sheriff allowed this amendment on the basis that he considered F had failed to obtemper his interlocutor of 24 February 2023. The sheriff proceeded to grant the order as amended.

Finally, the sheriff ordered a child welfare report to obtain the views of H and assigned a child welfare hearing in person for 2 May 2023 for consideration of those views.

[6] Subsequently, a further motion for interim delivery was enrolled by M on 9 March 2023. F had again failed to return H to M on two occasions, contrary to the sheriff's interlocutors. The motion enrolled by M also sought to suspend the existing contact arrangements between F and H as provided for in the interlocutor of 12 November 2021. Given the urgency of the matter the sheriff assigned a hearing for 10 March 2023. Having heard from both parties at this hearing, the sheriff granted a further order for delivery of H to M and, given the repeated failure by F to obey the previous orders of the court and the impact his approach was having on H, suspended the existing contact arrangement between F and H in terms of the decree dated 12 November 2021. Thereafter, the matter was continued to the child welfare hearing fixed for 2 May 2023.

[7] F thereafter lodged this appeal against the sheriff's interlocutors of 24 February 2023, 3 March 2023 and 10 March 2023.

[8] Since the sheriff's interlocutor of 10 March 2023, there has been no contact between F and H. A child welfare reporter took the views of H, which are set out in her report dated 28 April 2023.

Submissions for the appellant

[9] Counsel for the appellant advanced four propositions. Firstly, that the sheriff erred in his failure to afford H an opportunity to express his views at the hearings on 24 February 2023, 3 March 2023 and 10 March 2023. H was of a sufficient age to express a view. The sheriff was under a duty to take H's views, unless it was not practicable to do so: *M* v *C* 2021 SC 324 at paragraph [12]. There were no such circumstances here. There was no

suggestion that H was at risk of harm in the care of F. There was, consequently, no pressing urgency that required a decision immediately without taking the steps of obtaining H's views first. The sheriff could, for example, have taken H's views in chambers that week, or appointed a child welfare reporter to report orally within a short period of time.

[10] At the hearing on 10 March 2023, the sheriff's actions were conflicted. On the one hand, he had instructed a child welfare reporter to speak to H and produce a report of H's views which would be a factor towards determining contact going forward. Yet, on the other hand, the sheriff had proceeded to grant one of the craves sought in the minute of variation, notwithstanding that H's views were yet to be taken. Either the sheriff considered that H's views were necessary to determine the issue or they were not.

[11] Secondly, the sheriff erred by failing to allow F to effectively participate at the pre-service hearing on 24 February 2023. Whilst it is competent for a court to grant protective orders pre-service where there are circumstances justifying the same, the granting of a section 11 order (specifically the granting of delivery) pre-service is exceptional. Respect for Article 8 rights requires those whose rights are or may be affected by decisions in a particular case to be sufficiently engaged in the decision making process. The taking of a decision on the basis of ex parte submissions for one parent without affording the other the right to be heard is a step that can only be taken where there are cogent and compelling reasons to make that necessary, in the sense of Article 8.2. There were no such reasons on 24 February 2023 and, accordingly, doing so was unlawful in terms of section 6 of the Human Rights Act 1998. Doing so created a presumption in advance of the later hearings on 3 and 10 March 2023 as to where the child's welfare lay.

[12] The success or failure of the third ground of appeal was dependent upon whether the first and second ground were accepted. In short, F argued the sheriff had failed to

comply with the obligations placed upon him by section 11(7) of the Children (Scotland) Act 1995 ("the 1995 Act"). There was insufficient information available to the sheriff and, as a consequence, it was not open to him to make the decisions that he did.

[13] The fourth ground of appeal was that the sheriff erred in suspending all contact between F and H on 10 March 2023. The decision of the sheriff to suspend contact was, on the face of it, done for punitive reasons, rather than being based upon the child's best interests and was contrary to the paramount consideration of section 11(7)(a).

[14] Whether the appeal was allowed or refused, counsel moved for a finding of no expenses due to or by either party. Even if this court were to be critical of F, it could not be said the situation is entirely of F's making.

[15] Finally, counsel asked that when the matter was returned to the sheriff that it be sent back to a different sheriff on the basis that the sheriff here had already formed an adverse view of F.

Submissions for the respondent

[16] The solicitor for M submitted that prior to 24 February 2023 there was a status quo in fact and in law. M was the main carer of H. The interlocutor of 12 November 2021 (which interponed authority to the joint minute) regulated contact between the parents and H. On 24 February 2023, the sheriff was presented with a situation in which F had failed to comply with an extant order of the court (the interlocutor of 12 November 2021). As such, the order he granted on 24 February 2023 intended to re-establish the status quo.

[17] The authorities F cited to this court relating to taking the views of the child were all cases which were appealed following proof (ie after a substantive decision on contact). Those authorities could be distinguished in this instance. It had to be remembered that the

three interlocutors challenged by F in this appeal were issued in a fourteen day period. It was both reasonable and practical for the sheriff, where the extant order on contact was not being obtempered, to issue the interlocutors that he did, absent the views of H. The sheriff had sufficient information before him to make the orders that he did. The situation which arose in this appeal was not unique. It was a situation where the status quo on contact had been altered by one parent which the other parent sought to restore.

[18] Notwithstanding the sheriff's interlocutor of 24 February 2023, F failed to comply with it. The sheriff had fixed a hearing within seven days of 24 February 2023 to allow F to be represented. By 3 March 2023, F had not returned H to M's custody. F had not co-operated and had not encouraged H to return to M's custody. When the matter called before the sheriff on 3 March 2023, the position was that F had failed to comply with interlocutors of 12 November 2021 and 24 February 2023. The sheriff had a sheriff officer's report to the effect that F did not co-operate in returning H to M. In the circumstances, it was reasonable for the sheriff to restore the status quo and order a child welfare hearing and a child welfare report, as well as granting authority to sheriff officers to enter F's property and remove H.

[19] As for the interlocutor of 10 March 2023, the sheriff was presented with yet further evidence of non-compliance by F with the interlocutors issued by the sheriff. F was ignoring them. This was objectively obvious to the sheriff. The sheriff suspended contact between F and H to remove the child from the dispute between F and M. The sheriff suspended contact for a short period to protect H. The suggestion from F that a child's views must be taken in every instance in these emergency situations was unsound. Moreover, it overlooked the fact that there was an extant order of the court already regulating contact with H.

[20] The true issue was F's conduct. He failed to obtemper the sheriff's interlocutors. The appeal was not about what was in H's interests, but was rather about F vindicating himself.

[21] Finally, in relation to the issue of expenses, the court was advised that M was legally aided. Whatever the outcome of the appeal, the matter would have to be returned to the sheriff to deal with going forward. F's appeal had only served to incur expense and delay in the resolving of the issue of contact. As a consequence, it was submitted that if the appeal was allowed then there should be no expenses due to or by either party and if the appeal was refused then F should be liable for M's expenses.

Decision

Context of the appeal

[22] We clarify two matters; it is not necessarily clear to us that an order for delivery would fall within the definition of a section 11 order, but without further and detailed submissions we reserve any conclud**e**d view on that point. We proceed on the basis that the granting of the interim interdict on 24 February 2023 is an order under section 11(2)(f) of the 1995 Act and that section 11 is thereby engaged.

[23] The decision to suspend contact made on 10th March 2023 can be seen to be a section 11 order in terms of section 11(2)(d) of the 1995 Act in that it regulated the arrangements for personal and direct contact between F and H. Section 11(13) makes it clear that an order includes an interim order.

[24] Secondly we proceed on the basis that as the order made by the court on 12 November 2021 was for residential contact by F, the logical, indeed irresistible corollary is that H otherwise resided with M. Although F sought to persuade us that the existence of only a contact order did not give rise to that conclusion, we consider that if H was not with F

during the detailed residential contact, then he should be with M. That background, and the existence of an order to that effect (whether achieved by agreement or after proof) informed the sheriff's decisions.

[25] We recognise that both parties retain their parental rights and responsibilities; the order made in November 2021 was to regulate the personal and direct contact between the appellant and the child;

[26] Section 2(2) of the 1995 Act is in the following terms:

> "(2) Subject to subsection (3) below, where two or more persons have a parental right as respects a child, each of them may exercise that right without the consent of the other or, as the case may be, of any of the others, unless any decree or deed conferring the right, or regulating its exercise, otherwise provides."

[27] M's right to regulate residence is fettered by her obligation to facilitate the contact that was ordered in F's favour. F's right to regulate residence is subject to the limitations imposed by reason of the contact order, which is enforceable against both F and M. The effect of the order of 12 November is that F's right to exercise his parental right of residence is restricted by providing for a specific framework which regulates the personal and direct contact.

[28] The sharing of parental rights and responsibilities between M and F does not entitle F to take all and any action unilaterally (nor, for that matter, is M so entitled) in respect of the arrangements for H's care.

Views of the child

[29] We accept that the views of the child are an essential component to be taken into account before the court can make a substantive section 11 order; the authorities are clear about the requirement to obtain such views where practicable (*M* v *C* and the cases referred

to therein). We observe that each of these cases related to a decision made after proof; each arose in circumstances where the court did not take the views of the child, or applied the wrong test in determining whether the views of the child should be taken. The current case arises from steps taken at a very early stage in the minute to vary process.

[30] While we recognise of course the need to take the views of the child, we consider that such a requirement does not arise in relation to every decision, hearing or step in procedure in a section 11 action. The requirement is to take the views during the proceedings. In *M v C* the court said:

> "[12] It is necessary to warn that this does not replace the statutory test with a judicial discretion. Both sec 11(7)(b) and Art 12 of UNCRC place great weight on the right of a child to be heard in proceedings such as this … If children are of sufficient age and maturity to form and express a view, their voices must be heard unless there are weighty adverse welfare consideration of sufficient gravity to supersede the default position."

[31] We consider the test of practicability and considerations of welfare do not impose a requirement to take the views of the child immediately upon receipt of an application for a section 11 order; in some cases it will be practicable to do so, while in others it will not. The question of the taking the views is mandatory but the timing must be susceptible to the exercise of a discretion. F, unfairly in our view, criticises the sheriff for not articulating the complete thought process in electing not to take the views of H before making any order.

[32] Accordingly, we consider that there was no requirement for the sheriff to take H's views in advance of the decision he made on 24 February 2023. He was faced with a situation where H had not been returned to M eight days after the conclusion of a period of residential contact prescribed in a court order. The sheriff, competently and intelligibly, sought to restore the status quo by the order for delivery. The decision made was not substantive, conclusive or determinative of the competing interests of the parties. It

preserved their right to advance their positions in the context of the minute procedure. Importantly, the interlocutors of 24 February 2023 and 3 March 2023 preserved the residential contact set out in the interlocutor of 12 November 2021. Effectively, the sheriff recognised the need to take the views of the child but sought firstly to restore the status quo in terms of the court order before considering the possibility of a variation.

[33] Issues of welfare and urgency (about which the sheriff was satisfied) rendered the immediate taking of the child's views impracticable (*M* v *C*). By the time that the order was made on 10 March 2023, the sheriff had fixed a Child Welfare Hearing and ordered a Child Welfare Report to include taking the views of the child.

Failure to allow the appellant to be represented

[34] F recognised in his written submissions that urgent orders may be made, and that the taking of a decision on the basis of ex parte submissions for one parent without affording the other the right to be heard is a step open to the court where there are cogent and compelling reasons that make that necessary, in the sense of Article 8.2. Whether such reasons exist is matter of judgment.

[35] The sheriff was faced with an application based on a failure to obtemper an order of court, a failure that had been maintained over a number of days, and now extending in to the weekend, with no application being made by F to vary the existing decree. The decision to proceed as a matter of urgency was not taken in a vacuum but informed by the existing decree, by the material before the sheriff and by M's wish to reinstate the existence of a status quo that had been agreed and reflected in the decree. These are in our view cogent and compelling reasons for the sheriff's decision to proceed on 24 February 2023 in the

absence of F. To do so creates no presumption about where the best interests of the child would lie in future.

Insufficient information to a make a decision

[36] The appellant argues that the sheriff, having ordered a Child Welfare Report, should not have made any decision pending receipt and consideration of that report; in the absence of the child's views, he had insufficient material to allow him to intervene. We disagree. For the same reasons which we have addressed in relation to the absence of H's views, we consider that the sheriff was entitled to make the order which he did.

The suspension of contact

[37] The sheriff suspended contact; that is an order under section 11(2(d)). F submitted that this was punitive, but having considered the material available to us and the submissions made we prefer M's analysis, that this order was protective of H. The position was:

- There was a court order, reflecting arrangements agreed by the parties.
- In spite of that, the appellant did not return the child to the respondent when he should have done.
- He did not return the child despite an order for delivery.
- Sheriff Officers reported him as being unhelpful saying in their report "In our officers opinion, there was no attempt, nor any willingness … to obey the terms of the interlocutor" and "H showed no sign of distress or anxiety. He appeared to be slightly nervous…".

- The appellant in his affidavit appeared not to recognise the obligations imposed upon him and limitations on his ability to act by the order, saying:

  > "I appreciate that there is an order for return of H to his mother. I think that H will simply refuse to return to her. I would prefer if the Sheriff was given an opportunity to understand what is going on with H and that someone takes H's views before any big decisions are made".

- The disruption to the contact regime was capable of upsetting H.
- The sheriff suspended the operation of the contact order; he did not vary the contact to nil.

[38] We do not accept F's characterisation of a variation and suspension as being interchangeable. A variation of contact to nil carries with it the need for the party seeking reinstatement of contact to demonstrate a change in circumstances; suspension of the exercise of contact is a holding exercise pending additional or new information sought by the court. Importantly, it gives rise to no presumption against the reinstatement of contact or the status quo.

[39] In that context and pending the preparation of the Child Welfare Report, we consider that the sheriff was entitled to suspend the contact. By the time that the contact was suspended the sheriff had already made provision for H's views to be taken.

Expenses

[40] F made reference to *Perth and Kinross, Petitioners* as authority for the (uncontroversial) proposition that in certain family actions expenses should not be involved. These considerations apply with force at first instance; we consider that in an appellate situation the same considerations do not apply. F elected to appeal. He has been unsuccessful in relation to all matters and we consider that there is some force in the

observation by the respondent that the purpose of this appeal was to vindicate F's action in retaining H, contrary to the terms of the order for contact. M is entitled to her expenses.

Postscript

[41] The consequence of taking this appeal was that F precluded any application that he sought to make for contact; the first instance proceedings were put on hold pending the appeal.

[42] In *JM* v *Taylor* 2015 SC 2015 SCLR 143 the court said at paragraph [36]: "Litigation should have a purpose. In the present case we would see that as having been lost sight of."

[43] The court continued at paragraph [42]:

> "Thus, by appealing to this court, rather than acquiescing in the decision of the sheriff … the appellant has delayed the possibility of obtaining the outcome she wishes by something of the order of six months. Another way of expressing that is to say that the appeal to this court, with all its consequences for the allocation of resources, financial and otherwise, was entirely futile..."

[44] These words might have been written about his appeal.

[45] If there had been no appeal, on 2 May 2023 there would have been a Child Welfare Hearing, informed by a report which included H's views; that opportunity was lost and now four months have passed since the report and six months since there was last contact.

[46] Nothing that this court could have done, whatever the outcome of the appeal, would have advanced the appellant's quest for residence or contact. We do not accept that any decision would have informed further procedure. The sheriff regulated the interim position by restoring the status quo and maintaining the base line of residential contact for the variation procedure.

[47] F argued that this court could uplift the suspension; we consider that the matter is properly regulated at first instance.

[48] We will refuse the appeal; find F liable to M in the expenses of the appeal; remit the matter to a family sheriff at Glasgow Sheriff Court to fix a Child Welfare Hearing, *quam primum*; and order a supplementary report taking H's views.