SHERIFF APPEAL COURT

[2024] SAC (Civ) 33

Sheriff Principal Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ROSS

in the appeal in the cause

PL

Pursuer and Respondent

against

SD

Defender and Appellant

<u>19 July 2024</u>

[1] The parties have two children, aged 6 and 8. The relationship has broken down. The defender and appellant (the "defender") has been convicted of serious sexual offences including rape of the pursuer and respondent (the "pursuer") and a sexual offence against a 15 year-old. He received a custodial sentence in November 2022. This action, however, pre-dated that by 21 months, having been raised in February 2021.

[2] By the date of proof the only remaining dispute was the nature of the pursuer's contact with the children. Although he previously sought prison visits, by the date of the proof the pursuer sought only limited contact, namely direct contact by video link for up to 45 minutes, either fortnightly or monthly, contact to be supervised at his end. He sought

letterbox contact, with letters passed direct to the children. He submitted that these could not be passed via the defender, as she would not pass them on.

[3] The defender opposed this, and sought to restrict contact to letterbox contact only, on the basis that the pursuer could not be trusted not to abuse direct contact. She feared inappropriate conduct by him, or manipulation of the children. It was submitted that the reports showed him to be of poor character, manipulative and controlling. She was concerned about what he would say to the children. He did not accept responsibility and blamed his victims for false allegations. She accepted that indirect contact would be of benefit to the children. Her pleadings admit that the pursuer formerly played an active role in the care and upbringing of the children, until January 2020 when contact terminated.

[4] Having heard parties at the proof diet on 14 March 2024, the sheriff pronounced an interlocutor allowing monthly video contact between the pursuer and the children, contact to be supported at the pursuer's end by an individual authorised by the Scottish Prison Service, together with letterbox contact quarterly and a card each birthday.

[5] The defender appeals that interlocutor. The grounds of appeal include that the sheriff gave insufficient weight to the pursuer's convictions, the defender's mental health and possible effect on childcare, and the pursuer's minimisation of the offending, and gave undue weight to the relationship between pursuer and children and to the children's views.

Submissions

[6] For the defender, the submissions were very similar to those made to the sheriff. It was submitted that this court is entitled to interfere on the grounds that the sheriff did not give appropriate weight to the serious nature of the convictions, or to the fact that the pursuer is a convicted paedophile. It was feared that the circumstances may give rise to

mental injury in the children as such persons are manipulative and cunning. The expertise of any supervisor would be unknown. Further, the sheriff gave insufficient weight to the mental health of the defender, which might impact on the children. She may have to interact with the pursuer and this was likely to be highly distressing. It would be mentally injurious to her. Reference was also made to the social work report obtained in criminal proceedings. The pursuer continued to deny the offences, and this was given insufficient weight by the sheriff, who was said to have failed to weigh up and fully consider his comments on social media, which involve accusing the defender of lying about him.

[7] The defender's submissions referred also to the pursuer's relationship with the children. While he formerly did exercise contact, he was now in prison. The sheriff attached too much weight to the views of the children.

[8] The submissions for the pursuer pointed out other elements of the sheriff's judgment, including that she determined that denial of the offence did not indicate elevated risk, based on experience of similar cases. The sheriff required to balance the various interests, and in doing so had sight of affidavits, reports, pleadings and the views of the children.

Decision

[9] The starting point for the sheriff was to consider the best interests of the children. She did so. In doing so she recognised the points raised by the defender and balanced these against other factors. The appeal does not allege that the sheriff did not have regard to evidence, or took into account irrelevant factors, but rather that she failed to balance the merits of the evidence heard.

[10] Although this is a competent ground of appeal (see Macphail; *Sheriff Court Practice* (4th ed) at paragraph 18.161), formulae such as "insufficient weight" or "undue weight" are virtually meaningless by themselves. They do not justify an appeal which simply invites an appeal court to override the decision. An appeal is not a second opportunity to seek the same result. An appeal on this ground is only justified, and the appeal court may only intervene, where: "there has been an error in the balancing exercise, or that the sheriff's conclusion is so plainly wrong that there must have been such an error" (ibid).

[11] Mere assertion of error is not enough. An appellant must demonstrate either that the balance is wrong, or that the sheriff's conclusion is plainly wrong. To show that the balance was wrong it is necessary to discuss all, not merely some, of the balancing factors, both favourable and unfavourable to the appellant's position. To show that a decision is plainly wrong it is necessary to examine the reasons given for the decision. Contextual analysis is crucial. Merely restating one side of the argument does not demonstrate lack of balance. Presentation of only favourable facts does not demonstrate error.

[12] This appeal does not carry out that exercise. It is no more than a restatement of the arguments made to the sheriff, and disagreement with the result. It does not examine the soundness of the reasons which supported the decision, or test them against the overarching requirement to act in the best interests of the children.

[13] When the court's decision is considered, it is plain that the sheriff carried out the tasks required of her. She heard the motion for contact. The court had obtained a child welfare report dated some 2 months previously, and was aware of the reporter's concerns about the pursuer's denial of the offences. The reporter had spoken to the defender at length but had not spoken to the pursuer. The report noted that the children enjoyed contact with the pursuer, knew he had done "bad stuff", and that he was in prison.

The elder child wanted to see him because he might not get out. The younger child really missed him. While at liberty prior to trial, the pursuer had had direct contact with the children for 90 minutes once per week.

[14] The sheriff made her decision based on the correct legal test, namely the best interests of the children. She had regard to their views and concerns, and the need to protect them from the risk of abuse. She considered whether it was appropriate to make an order having regard to the possible need for the parties to cooperate with each other. An order was necessary as the parties were in dispute.

[15] She made the order for direct video contact for two reasons. The first was the views of the children. They had a lot of fun with the pursuer at contact. They know he is in prison. They both wanted to visit him there. She formed the view that the children like him and are worried about him. Seeing him would give them some comfort, and they wanted to see him. Seeing him in prison would show them the reality of his circumstances.

[16] The second reason was the inadequacy of written communication. It is a dying skill, and not easy for the children. Video communication is familiar, allows people to see each other and communicate spontaneously, and is much more natural for children.

[17] The sheriff provided for video communication to be supported by an authorised person provided by the Scottish Prison Service. That was designed to protect against the type of concerns voiced by the defender. A further protection was that the pursuer knows that video contact can be removed if it is abused. Indirect communication was by card. Again, inappropriate communication could lead to termination of this privilege.

[18] The foregoing does not demonstrate any error. It is balanced and discerning disposal. The sheriff took into account the factors relied upon in the submissions before her. This appeal appears to raise new assertions, including that the SPS staff monitor might not

be sufficiently qualified to oversee the contact, and that the mental health of the defender might suffer. To the extent that these are new points they are not competent grounds of appeal. To the extent they were enmeshed in what was said to the sheriff, which is not evident from submissions, they are in any event no more than part of the balancing exercise which the court carried out. They do not, either separately or collectively, demonstrate the decision was plainly wrong or based on an unbalanced assessment of evidence. The grounds of appeal do not demonstrate that the best interests of the children required no direct contact at all, or only monitored indirect contact. They do not recognise the principle that it is almost always conducive to the welfare of a child that parental contact is maintained (*J* v *M* 2016 SC 835 at paragraph 11).

Disposal

[19] The appeal is refused, and the court will adhere to the sheriff's interlocutor of 14 March 2024. Parties did not make submissions on expenses. They should attempt to agree these. If there is no agreement they should enrol the appropriate motions, and submission if so advised, within 21 days of issue of this decision.