SHERIFF APPEAL COURT

[2024] SAC (Civ) 36

Sheriff Principal A Y Anwar

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in the appeal in the cause

JM

Pursuer and First Respondent

against

KB

Defender and Appellant

and

EH

Third Party Minuter and Second Respondent

Pursuer and First Respondent: Anderson, sol adv: Lesley Anderson Law Ltd
Defender and Appellant: Party
Third Party Minuter and Second Respondent: Allison, adv: Millard Law LLP

1 August 2024

Introduction

[1] Annie (a pseudonym) was born in 2008. The appellant, KB, is her mother. The first respondent, JM, is her father. The appellant and the first respondent separated shortly after Annie was born. The appellant was Annie's primary carer; however, her relationship with Annie deteriorated significantly in 2020. In September 2020, Annie moved to reside with the first respondent. She refused to have contact with the appellant.

[2] The first respondent raised proceedings seeking: (i) a residence order for Annie to live with him; and (ii) a specific issue order for Annie to continue to be enrolled at her school. The appellant counterclaimed and sought: (i) a residence order for Annie to live with her; failing which (ii) an order allowing for contact between her and Annie. The second respondent was appointed as curator *ad litem* for Annie. Annie's views throughout the proceedings remained consistent; she did not want to reside with the appellant nor have any contact with her. The matter proceeded to a diet of proof. By the time it began, Annie was 15 years and 3 months old.

The sheriff's judgment

[3] The sheriff made: (i) a residence order in favour of the first respondent in respect of Annie; and (ii) a specific issue order providing that Annie shall continue to be enrolled at her school for the remainder of her secondary education. She refused the appellant's craves for residence and contact.

[4] The sheriff noted that during the proceedings, a number of unsuccessful attempts had been made to arrange contact between the appellant and Annie. The second respondent was appointed in December 2020. At various times during the proceedings, the second respondent, a social worker, and a psychologist met with Annie and sought to facilitate contact. The first respondent and family members sought to persuade Annie to have contact. Family mediation was attempted. A forensic and clinical psychologist was appointed by the court in January 2022 who did not recommend the granting of a contact order in favour of the appellant. By the time of the diet of proof, the appellant had not had any contact with Annie for 3 years. The sheriff considered that she no longer had any insight into Annie's needs. Annie had been clear and consistent in her view that she no

longer wished to live with her mother, nor have any contact with her. Annie had made repeated allegations of being assaulted by the appellant. The appellant had made many serious and false allegations against the first respondent and had sent emails and messages to Annie, the first respondent's former partner, his family, friends and his employer in highly derogatory terms. Annie reacted badly to the appellant's conduct and was protective of the first respondent. The sheriff concluded that Annie's rejection of the appellant was as a direct result of the appellant's behaviour towards Annie and that the appellant had no insight into the inappropriateness of her behaviour. The sheriff considered there was a risk of abusive behaviour towards Annie if she granted the appellant's craves for residence and contact. Annie's needs were met while she was in the first respondent's care. Annie's views, in light of her age, required to be accorded due weight.

Competency of appeal

[5] The sheriff issued her interlocutor on 6 November 2023. Following further procedure, she issued an interlocutor dealing with the expenses of process on 29 May 2024. The appellant subsequently lodged this appeal on 31 May 2024. Annie turned 16 a few days later in June 2024.

[6] Both respondents referred a question about the competency of the appeal in terms of Rule 6.9 of the Act of Sederunt (Sheriff Appeal Court Rules) 2021.

Submissions for the appellant

[7] The appellant was assisted by the court to articulate her position on the competency of the appeal and to clarify what orders she sought. Within her Note of Appeal, the appellant invited this court to "order that additional proof be taken" for further evidence to

be heard and thereafter for the appeal to be considered. In oral submissions during the hearing on competency, her position changed; she asked for the appeal to be allowed and for the action to be remitted to a different sheriff for a new diet of proof.

[8] The appellant did not accept that her parental rights and responsibilities expired on Annie's 16th birthday. She submitted, without reference to any authority, that parental rights and responsibilities could continue to be held by a parent in respect of an individual between the age of 16 and 18 if the individual in question suffered from a disability. The appellant contended that Annie had autism and was neurodivergent. She asserted that this was supported by the evidence of three expert witnesses during the diet of proof.

Submissions for the first respondent

[9] An order to regulate where a child is to live can only be made in respect of a child who is under the age of 16 years: section 11(2)(c) of the 1995 Act. An order regulating the arrangements for maintaining personal relations between a child and a person with whom the child is not living can only be made in respect of a child under the age of 16 years: section 11(2)(d) of the 1995 Act. Annie turned 16 in June 2024. The parental rights and responsibilities of both parents were extinguished upon her 16th birthday.

[10] Even if the appeal were to be allowed, no interlocutor could now be issued regulating Annie's residence or with whom she had contact. She was of the age of legal capacity. There was no matter existing which was a live issue between the parties. There being no order that the sheriff could now grant, the appeal should be dismissed: *Ainsbury* v *Millington* [1987] 1 WLR 379.

Submissions for the second respondent

[11] The second respondent adopted the first respondent's submission; the sheriff's interlocutor ceased to have effect on Annie's 16th birthday.

[12] To engage an appellate jurisdiction, an appeal must involve an issue in controversy which is a live issue between the parties: *Sun Life Assurance Co. of Canada* v *Jervis* [1944] AC 111. The parties must have an interest which is affected by the outcome: *Ainsbury* (*supra*). Appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so: *R* v *Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450.

[13] There is no longer any live issue. The orders made have lapsed. No new order can be made in respect of Annie as she has attained the age of legal capacity. The appeal was, accordingly, incompetent.

Decision

[14] The orders made by the sheriff on 6 November 2023 are no longer extant; they are unenforceable and ceased to have effect when Annie reached 16 years of age.

[15] Parental responsibilities and rights enjoyed and exercised by parents in relation to a child are set out in sections 1(1) and 2(1) of the Children (Scotland) Act 1995 ("the Act"). The effect of sections 1(2) and 2(7) which each define a "child" by reference to age, is that save for the parental responsibility to provide guidance in terms of section 1(1)(b)(ii), parental rights and responsibilities are extinguished when a child reaches the age of 16.

[16] Orders may be sought in terms of section 11 of the Act in relation to parental rights and responsibilities. The orders specified in section 11(2) generally either confer parental rights and responsibilities upon those who do not hold them or restrict the exercise of those

rights and responsibilities by those who do hold them. In terms of section 11(2)(c) the court may make a residence order regulating with whom a child "under the age of sixteen years is to live". In terms of section 11(2)(d), the court may make a contact order regulating the arrangements for maintaining personal relations and direct contact "between a child under that age" and a person with whom a child is not, or will not be living. Plainly, any residence or contact orders granted by the court expire when a child reaches the age of 16. The court cannot competently grant such orders after a child reaches 16. A specific issue order granted in terms of section 11((2)(e) regulating a child's attendance at school, is an order restricting the exercise by one parent of his or her parental right in terms of section 2(1)(d). It too is exercisable only until a child reaches the age of 16 (section 2(7)).

[17] This appeal was lodged a matter of days before Annie turned 16. The appeal was competent when it was lodged. However, the appellant invites this court to allow her appeal and either hear further evidence or remit the cause to a different sheriff for a new diet of proof; she wishes to insist upon her craves for a residence and a contact order. The orders the appellant seeks can no longer be competently granted by this court or by the sheriff court. As Annie is now 16, neither the appellant, nor the first respondent have the parental rights or responsibilities which the appellant seeks to assert or restrain. Accordingly, this appeal falls to be dismissed, the orders sought being incompetent.

[18] At one stage in her submissions, the appellant indicated that she merely sought recall of the sheriff's interlocutor of 6 November 2023 and dismissal of the action. She later changed her position. Recall and dismissal are orders which this court could competently grant if satisfied that the sheriff had erred. However, having regard to Annie's age, there can no longer be any live issue between the parties; it would be an improper use of judicial time and parties' resources for this appeal to be entertained when there is no longer any

dispute to be resolved between the parties (*Ainsbury* v *Millington (Note)* [1987] 1 WLR 397; *Sun Life Assurance Co. of Canada* v *Jervis* [1944] AC 111). As observed by Lord Brodie in *JM* v *Taylor* 2015 SC 71 (at paragraph 36), "Litigation should have a purpose". Here, that purpose ought to be to obtain orders which are necessary and in Annie's best interests. It is clear that during the proceedings before the sheriff and before this court, the appellant had lost sight of that purpose.

[19] The action was raised in November 2020. Within a month of raising proceedings, Annie had completed a Form 9 expressing her views, a curator *ad litem* and a psychologist had been appointed. Various unsuccessful attempts at contact with the appellant were made. The appellant's agent withdrew from acting in August 2021. A diet of proof was assigned. That was discharged on the appellant's motion. The appellant insisted that Annie should give evidence at the proof. The court ordered evidence on commission. That was assigned for November 2022. The appellant then decided she did not wish Annie to give evidence. The commission was discharged. By then the first respondent's circumstances had changed and he had separated from his partner. Further enquiries into the arrangements for Annie's care were considered necessary. The second diet of proof was discharged. A diet of proof was then assigned for September 2023. The appellant found conducting the proof as a party litigant challenging. She lodged 120 inventories of productions. She sent over 7000 emails and messages to the clinical psychologist. She sent thousands of messages to the respondents' agents and to the court staff. She requested numerous reasonable adjustments and claimed she suffered from ADHD, was possibly autistic and that she suffered from anxiety and PTSD. No medical vouching was provided. Her behaviour towards those representing the respondents was such that they requested the proof be conducted by remote means. The appellant opposed this on the basis that she had

issues with internet connectivity. A hybrid proof required to be arranged with the appellant sitting in a separate room within the court building accompanied by a lay supporter, only entering the court room to put questions to witnesses or make submissions. The appellant insisted on calling witnesses and then either failed to elicit any evidence from them or asked few questions of them.

[20] The sheriff issued her decision in November 2023. A hearing on expenses was assigned for 25 January 2024. The appellant lodged a medical certificate on 18 January 2024 stating that she was unfit to attend court. The hearing on expenses was discharged. The first respondent indicated that he was prepared for the issue of expenses to be considered on written submissions. The appellant sought a hearing but stated she was unable to attend court for 3 months. She enrolled a motion for access to the recorded evidence of the hybrid proof and insisted that the motion be determined before the hearing on expenses. She then dropped her motion days before it was due to be heard. A hearing on expenses finally proceeded on 2 May 2024. The sheriff issued a written decision on 29 May 2024 finding the appellant liable to the first respondent in the expenses of the action. By the time of the appeal, the appellant was subject to bail conditions not to approach or contact the curator *ad litem* and various professionals involved in the proceedings.

[21] Rather than seek the expeditious resolution of the sheriff court proceedings while Annie was under the age of 16 by focussing on what was in Annie's best interests, the appellant caused repeated unnecessary delays and unnecessary procedure. She used the proceedings to make irrelevant accusations and allegations. She has behaved inappropriately towards the professionals involved in these proceedings and has repeatedly lodged unfounded complaints. She delayed a decision on the question of expenses by some 6 months during which no appeal could be lodged. She has sought to pursue an appeal, the

outcome of which will be of no moment and the pursuit of which is futile. The appellant bears a large measure of responsibility for the protracted nature of the first instance proceedings and the late stage at which this appeal has been presented. The court has an inherent power to prevent misuse of its procedure (*Hunter* v *Chief Constable of the West Midlands* [1982] AC 529, per Lord Diplock at p536; *Shetland Sea Farms Ltd* v *Assuranceforeningen Skuld* 2004 SLT 30). Such a power must be used sparingly; every litigant must be afforded the opportunity to prosecute his or her case. Had the appellant insisted only on recall and dismissal, having regard to the delays caused by her conduct of proceedings at first instance and the futility of the appellate proceedings, the court, in exercise of its inherent power to prevent misuse of its procedure, would have dismissed the appeal.

[22] The court was invited to grant the expenses of the appeal in favour of the respondents. As a general principle, in certain family actions, questions of expenses do not arise. The sheriff departed from that general principle in light of the appellant's conduct. She had been correct to do so. As observed by Appeal Sheriff Cubie (as he then was) the same considerations do not apply on appeal: *F* v *M* 2023 SCLR 630, at paragraph 40. The appellant chose to appeal. She had been informed by those acting for the respondents that if she insisted on her appeal, they would seek an award of expenses against her. The appellant was aware of the futility of her appeal, having regard to Annie's age. The respondents are entitled to their expenses.

Disposal

[23] I shall refuse the appeal, the disposal sought by the appellant being incompetent. The appellant is found liable to both respondents in the expenses of the appeal. The appeal

is sanctioned as suitable for the employment of the first respondent's solicitor advocate and the second respondent's counsel.