SHERIFF APPEAL COURT

[2018] SAC (CIV) 10
DUM-F332-17

Sheriff Principal C D Turnbull
Appeal Sheriff W H Holligan
Appeal Sheriff N A Ross

OPINION OF THE COURT

delivered by SHERIFF W H HOLLIGAN

in the appeal by

X

Pursuer and Appellant

against

Y

Defender and Respondent

Pursuer and Appellant: Speir; Brodies LLP
Defender and Respondent: Colledge; Colledge & Shields LLP

20 February 2018

Introduction

[1] In this family action the appellant raised proceedings against the respondent containing a number of craves which include divorce on the grounds of unreasonable behaviour; a specific issue order ordaining the respondent to return the two children of the marriage, aged seven and four respectively, to the jurisdiction of the court; a specific issue order in relation to the children's attendance at school; a residence order; an order for delivery; interdict from removing the children from the care of the control of the appellant;

an alternative crave for contact; an order in relation to passports; an order to interdict the respondent from facilitating the interviewing of the children by employees or representatives of Women's Aid; and for warrant to intimate the initial writ to the children and to dispense with such intimation.

[2] The respondent has craves of her own: a residence order; a specific issue order entitling her to relocate out of the jurisdiction with the children; and for warrant to intimate "the defences to the children by way of Form F9".

[3] The initial writ was warranted on 19 December 2017. It is appropriate to note that the incident which is said to be the catalyst for these proceedings is alleged to have taken place on 28 October 2017. The respondent had lodged a caveat and, as interim orders fell to be considered, there was a hearing before the sheriff at which both parties were represented. There are further interlocutors of the court dated 21 December 2017, and 18 January, 29 January, 30 January and 31 January, all 2018. The sheriff has appended lengthy and detailed notes to the majority of his interlocutors. He also wrote an additional note dated 12 February 2018.

The Appeal

[4] The matter comes before the Sheriff Appeal Court on two separate appeals, both taken by the appellant, with the leave of the sheriff, against the interlocutors dated 21 January 2018 and 29 January 2018 respectively.

[5] The appeal against the interlocutor of 21 January 2018 relates to the decisions of the sheriff in relation to (a) interim contact; (b) interim interdict; and (c) a motion to recall the order contained in the interlocutor of 19 December 2017 directing the defender to intimate Forms F9 to the children.

[6] The appellant also appeals against certain parts of the sheriff's interlocutor of 29 January 2018, namely, (a) the assigning of a child welfare hearing at which evidence would be led; and (b) (again) against the order requiring the defender to intimate the Forms F9 to both children.

[7] There are four principal issues in these appeals: (1) the allowance of, and the procedure for, the hearing of evidence; (2) Forms F9 and the views of the children; (3) interim contact; and (4) interim interdict.

[8] As will be noted, we are asked to interfere with what are interlocutory decisions of the sheriff on matters in which he had a discretion. To do so, we must be satisfied that he misdirected himself in law, failed to take into account a relevant and material factor, had regard to some irrelevant factor or reached a result which was wholly unreasonable (see *Thomson* v *Glasgow Corporation* 1962 SC (HL) 36 per Lord Reid at 66).

The allowance of proof

[9] In his action the appellant seeks divorce on the grounds of unreasonable behaviour. The principal ground contained in the pleadings (which have not been finally adjusted) is that the respondent has made an unfounded and false allegation of criminal behaviour by him directed at the respondent (we will refer to this as "the allegation"). He avers that the allegation has destroyed the appellant's trust in the respondent. In her defences, the respondent says that the allegation is true and, what is more, the older of the children, was a witness to certain events relevant to the allegation.

[10] At the hearing before the sheriff on 21 December 2017, the parties disagreed as to further procedure. The appellant contended that it should be by way of an options hearing followed by a proof. The respondent maintained that it should be by what, for the purposes

of this opinion, we will describe as "an evidential child welfare hearing". We use that term for ease of reference and without endorsing the accuracy or appropriateness of such a description.

[11] The sheriff refused the appellant's motion to fix an options hearing and assigned a child welfare hearing for 29 January 2018, ordering both parties to lodge a statement of disputed issues in advance. From a reading of the note appended to the interlocutor of 21 December 2017, it would appear that the sheriff had in mind utilising a child welfare hearing as a method of taking evidence and giving detailed case management directions at the hearing on 29 January 2018. It is clear that the disputed issues identified by the parties comprise everything at issue in the pleadings thus far.

[12] When the matter called on 29 January 2018 the sheriff, *inter alia*, made the following orders:

> "2. *Ex proprio motu* sists procedure in relation to Pursuer's crave 1 for divorce until further orders of court to allow for determination of the parties' craves in relation to the children as a matter of priority.
> …
> 5. Fixes a further Child Welfare Hearing for both 14 March 2018 and 15 March 2018 commencing at 10 am each day for proof in relation to disputed factual issues necessary for the determination of those craves and allows parties to lead evidence on those dates in accordance with initial case management directions appended to this interlocutor and further case management directions to be issued at a later date".

[13] The sheriff appears to have been of the view that there was a particular need for expedition and that, on a proper construction of rule 33.22A(4) and having regard to the decision of the Inner House in *CM* v *SM* 2017 SC 235, there is no exception thereto. The sheriff explained his decision to proceed in the prescribed manner in the following terms:

> "After considering the various procedural options I thought were available to me, I concluded that it was best to fix a child welfare hearing at which evidence could be led to enable the court to make findings in fact on the disputed factual issues. These findings will influence the court's future decision-making in this

> case. Further child welfare hearings may be needed…. In my opinion, it was best for the children for the court to make findings in fact on the disputed issues as soon as practically possible. Once the court has made those findings, it can decide how to proceed from there. That may include appointing a child psychologist as a child welfare reporter or some other appropriate form of enquiry".

[14] By interlocutor dated 30 January 2018 the sheriff then proceeded to make very detailed case management directions amounting to no fewer than twelve paragraphs with further provision to consider another nine issues in due course. Many of these provisions deal with the practical and procedural issues in relation to the taking and recording of evidence. In the note appended to his interlocutor of 30 January 2018, the sheriff said;

> "I think these two days will be taken up with evidence. Submissions are premature at this stage. The next step is for the sheriff to make findings in fact and fix a subsequent child welfare hearing to decide on further procedure in the light of those findings."

It is clear that the hearing assigned for March was not intended to be a proof in a conventional sense, but a child welfare hearing at which evidence would be led, assigned in terms of rule 33.22A.

[15] In his note of 18 January 2018 the sheriff records the motion of the appellant to sist proceedings as early as 21 December 2017. Before this court, in relation to the appeal against the interlocutor of 29 January 2018, the appellant sought recall of that part of the interlocutor allowing an evidential child welfare hearing. The appellant maintained that the action should be sisted or alternatively continued for three months for a procedural hearing.

[16] The explanation for this motion is that the allegation is currently being investigated by the police. The allegation concerns events said to have taken place at the end of October 2017. The investigation is at an early stage. For evidential reasons it is not appropriate for the appellant to have to give evidence about a matter which may give rise, in due course, to criminal charges. Issues of self-incrimination arise. The respondent wishes to continue with

the action. In her defences, she says that it was the incident which gave rise to the allegation that triggered her decision to leave the appellant and move elsewhere with the children.

[17] A number of issues arise from the foregoing. Firstly, it is the appellant who has raised this action. He alleges that the respondent has made false allegations about his conduct. What he now seeks to do is to inhibit the pursuit of these proceedings pending the outcome of the current criminal investigation, in other words for an unknown period to await an unpredictable result. The action is not just for divorce but contains a number of other issues outlined above which involve the welfare of the children. The allegation was allegedly witnessed by one of the children. It is said that the event has had an effect on the behaviour of the children. It is also said that the children do not wish to see the appellant. For practical purposes it is difficult to see how circumstances of the allegation cannot feature in a proof as to the remaining craves.

[18] The initial writ in this matter was warranted in December 2017. There has been no delay in the conduct of proceedings either by the court or the parties. The present case is markedly different from *CM* v *SM*, which involved a much less complicated action and one which proceeded to proof, having taken a number of years to do so. In *CM* v *SM*, at paragraphs [64] – [68], in a postscript to the opinion of the court, Lord Glennie gave helpful comments to assist in the management of contact cases. While rule 33.22A(4) and the decision of the Inner House exhorts all concerned in dealing with disputes concerning children to secure their expeditious resolution, the procedure must be appropriate to resolution of the particular dispute. This case is not a simple case in which one party seeks contact. There are a number of other issues. In our opinion, the action should not be sisted or continued to some future date to see what, if anything, follows from the criminal investigation. That is entirely uncertain. The appellant has raised his action and it is for him

to proceed with it. If he does not want to proceed the remedy lies in his own hands. The evidence on the non-divorce craves, will, for all practical purposes, comprise the evidence in the crave for divorce; we see little purpose in sisting that single crave (assuming that it is competent to do so). Between the parties, if the allegation is false the pursuer would have grounds for divorce; if it is true the defender would have grounds for divorce.

[19] In our opinion the sheriff has fallen into error in making the order he did in relation to an evidential child welfare hearing. We cannot see how proceeding by way of an evidential child welfare hearing in the manner proposed by the sheriff will secure the expeditious resolution of this matter. The status of such a hearing is somewhat uncertain and can give rise to procedural complexities (see *A* v *H* 2016 SLT (Sh Ct) 277); that is apparent from the battery of ancillary orders which the sheriff considered necessary for the conduct of the March hearing. We were informed that there may be as many as twenty-four witnesses for a two day hearing. Even with case management it is inconceivable that the evidence of twenty four witnesses could be heard within two days.

[20] More fundamentally, the sheriff appears to contemplate making of findings in fact without hearing submissions, followed by further, yet unspecified, procedure. The former is wholly inappropriate; and we have grave doubts about the latter, both procedurally and practically. There is no good reason why all the necessary enquiries could not be dealt with as part of one proof, which has the clear benefits of certainty in procedure and results. In our opinion, the present case is one in which conventional methods of fact finding and decision making should be followed. That requires an options hearing, a closed record and thereafter a case management hearing in terms of chapter 33AA. In particular a case management hearing will allow the sheriff to consider a minute lodged pursuant to rule 33AA.3(2) which is an integral part of the case management process.

[21] As a general observation, in our opinion it is difficult to see how evidential child welfare hearings can be appropriate for anything but the most straightforward of cases; perhaps cases in which there is a clearly identifiable single issue capable of easy and final resolution. On any view it is not appropriate for a case such as the present. Furthermore, we do not approve of a "rolling procedure" in which, after the two days of evidence, there would be a series of unspecified enquiries. It seems to defeat every aim of efficient case management. It is in everyone's interests, and in particular the interests of the children, that the matter should be brought to a head and all issues dealt with in so far as that is possible to do so.

Forms F9 and the views of the children

[22] The defender lodged a caveat. When the pursuer sought a warrant (and certain other orders) the issue arose as to whether the children should receive an F9. In his writ, the appellant sought to dispense with intimation, given the ages of the children and the issues between the parties. The defender however sought intimation (which appears to include intimation of the defences). The sheriff made an order for intimation. On 21 December 2017 the appellant enrolled a motion to recall the order for intimation. The sheriff refused the motion but granted leave to the appellant to appeal that decision. The sheriff then made a further order dated 29 January 2018 ordaining the defender to intimate Form F9 to the children.

[23] The appellant was opposed to intimation because he considered that in the case of the younger child, she could not yet read or write and was simply too young. A Form F9 was not a suitable means of obtaining the child's view. The respondent's agent submitted that it was appropriate for intimation to be made. The older child had already expressed a

view by way of a drawing – said to be adverse to the appellant. Both children were articulate and had spoken to adults spontaneously about their views. The appellant's counsel submitted that the children's views might be manipulated by the respondent. The sheriff decided to order the defender to intimate by way of Form F9.

[24] On the basis of the submissions made by the respondent's solicitor, the sheriff was of the view that the older of the two children was capable of forming and expressing a view and that Form F9 would be a suitable means of obtaining that view. In relation to the younger of the two children the sheriff acknowledged that she may be too young, however, he accepted the assurance by the solicitor for the respondent that she is articulate and capable of forming a view. He was satisfied by the assurance by the respondent's agent that the Form F9 would be drafted appropriately. The sheriff was of the view that, even if she could not write, she might be able to draw. Similar arguments were advanced before this court.

[25] In our opinion, the starting point in relation to this matter is section 11(7)(b) of the Children (Scotland) Act 1995 ("the 1995 Act") which, read short, provides that taking account of the child's age and maturity, the court shall so far as practicable, give the child an opportunity to indicate whether he wishes to express his views, and, if he does, so give him an opportunity to express them and have regard to such views as he may express. This statutory provision was considered by an Extra Division in the case of *S* v *S* 2002 SC 246. It is clear from that decision that Form F9 is but one mechanism to secure compliance with the provisions of section 11(7)(b). *S* v *S* makes clear that, so far as affording a child an opportunity to express a view is concerned, practicability is the only proper and relevant test (see paragraph [11]). The Form F9 is not necessarily the only mode of compliance with

section 11(7). There are other methods. The obligation to take the views of the child applies to the court at the time an order is made (see *S v S* at paragraph [10]).

[26] In our view Form F9 has been given undue significance by the parties. Forms F9 are purely procedural mechanisms to give effect to the duty of the court pursuant to section 11(7)(b). Arguments as to the effectiveness of Forms F9 are far from uncommon. If disclosed to parties, the "losing" party will often complain that the views of the children recorded in the Form have been adversely influenced by the other party, particularly when the children are in that party's care. Consideration often has to be given to other ways of securing the views of a child. Also, the taking of views at a very early stage in proceedings may not be appropriate. The sheriff may know nothing or little about the personal circumstances of the child; there may be concern that an F9 may upset a child (see *S* v *S* at paragraph [11], page 250 D-E). The sheriff may reserve intimation of a Form F9 or reserve generally the question of taking views until he or she has more information at which point a view can be taken as to the most appropriate method for the case.

[27] Both parties now accept that views should be taken. Although the children are young, it appears that the elder child wants to express a view and the younger child may, or may not, be capable of doing so. On the facts of this case, it is highly unlikely that the Form F9 is likely to provide a great deal of useful information to the court; in particular, we have considerable doubt as to the efficacy of serving a Form F9 on a child as young as four years old. It appears to us that, in the circumstances of this case, the result reached by the sheriff was arrived at by attaching inappropriate weight to the submissions made to him by the respondent's solicitor. Having heard the arguments in relation to this matter, it is clear that service of the Forms F9 is likely to give rise to further dispute and be productive of further delay. Having regard to the view we have reached as to further procedure in this matter, we

have taken the additional step of directing the sheriff to appoint a reporter to seek the views of the children. This will supersede the issue of Forms F9. Appointing a reporter to take views now should also coincide with further procedure.

Interim contact

[28] On 21 December 2017 the appellant sought an award of interim contact. In particular, he sought interim non-residential contact supervised by his mother with whom he said the children had a good relationship. In his note produced for this appeal the sheriff explained his reasons for refusing contact. The sheriff acknowledged that he had only limited information. He concluded that it was not in the best interests of either child for there to be interim contact at that stage. He considered it was likely to be highly disturbing to both children and disruptive of their current routine to introduce the appellant back into their lives at such an early stage. In the course of his note, the sheriff seemed to suggest that the court has an obligation to obtain the child's views, so far as practicable, before making a decision affecting welfare. In this case, views had not formally been taken by any method.

[29] By reference to *J* v *M* 2016 SC 835, counsel for the appellant submitted that the sheriff had failed to carry out the careful balancing act required with a view to identifying whether there were weighty factors which made such a serious step of preventing contact necessary. However, counsel for the appellant accepted that the decision was a discretionary one and, as such, the basis upon which this court can interfere with such a decision is limited.

[30] In deciding motions for interim contact, it should be remembered that, at a very early stage in proceedings, the sheriff is, as here, faced with competing submissions as to the true factual position, including the relationship between the individual parents and their children. Interim orders may have to be made without the views of children having been

taken simply because their welfare demands it should be so. In general terms, at the stage of interim orders, the terms of section 11(7) of the 1995 Act apply as do those of sections 11(7A)-(C) and section 11(7D) (there is no mention in any of the numerous notes written by the sheriff that he considered section 11(7A); on any view of the pleadings the allegation satisfies its terms). Interim orders will often fall to be reviewed as the case progresses and as more information comes to light. A reporter will often provide useful background. Sometimes, interim orders, properly managed, can lead to the resolution of the case. In other cases, such as the present, the interim orders are part of the process leading to a proof. *J* v *M* was a case decided after proof at which point the analysis set out by the Inner House applies. It is often impossible to demand such a detailed consideration of all matters at an early stage in proceedings at which point the factual position is unclear. The present order was made at a very early stage in proceedings. Given the nature of the allegations and the limited information before the sheriff, we are unable to detect any error on his part at the stage at which he made his decision which would justify our interfering with his discretion.

[31] It is unfortunate and undesirable that the order for interim contact has been appealed, and that the sheriff was persuaded to grant leave for such an appeal.

In our view, this type of appeal is to be keenly discouraged. All it has done is create further expense, delay and distraction from preparation of the evidence. Counsel for the appellant could not identify any clear error. All he sought was for this court to exercise its discretion to different effect, based on the same material, without presenting cogent reason why the sheriff's exercise of discretion was plainly wrong. In our view, this matter should have been dealt with at the stage when leave to appeal the interim contact order was sought. Had the sheriff conducted a robust enquiry as to the grounds of appeal, it would quickly have become plain that such motion was not justified.

Interim interdicts

[32] The appellant sought two interim interdicts against the respondent: (1) from facilitating the interviewing of the children by representatives of Women's Aid; (2) from facilitating the completion by the children of the Forms F9 issued by the defender's agents on or about 6 February 2018.

[33] At the end of the day the appeal against the refusal of the interdicts was not pressed strongly. At the outset, the legal basis for the grant of these interdicts was not made clear. Reference was made to section 11(2)(f) of the 1995 Act. That relates to an interdict against the fulfilment of parental responsibilities and rights. It is not obvious which parental right and responsibility could be said to be engaged in this matter.

[34] The argument for the appellant was that, by allowing the children to be further interviewed by Women's Aid workers, this would contaminate or reinforce false allegations made to them by the respondent. For the respondent, it was said that the children had been traumatised by the events in October 2017. They had obtained support from Women's Aid workers. Not surprisingly, the sheriff took the view that it was in the best interests of the children to allow them to express themselves freely to professional support workers.

[35] It seems to us that, apart from anything else, it is difficult to make sense of the first interdict as it is currently phrased. Exactly what is meant by "facilitate" is not clear. The matter was one for the sheriff's discretion and we see no basis upon which to interfere. In relation to the second interdict, this arose purely as an *ad hoc* measure pending determination of the appeal (see the interlocutor of this court dated 13 February 2018). As the appeal has been determined, and the order not renewed, it will simply be allowed to lapse.

[36] We shall accordingly allow the appeal but only to a limited extent. We shall:

(1) recall the interlocutor of 19 December 2017 in so far that it orders the defender to intimate Forms F9 to the children;

(2) recall the interlocutor of 21 December in so far as it refused to fix an options hearing in relation to the pursuer's craves in terms of section 11 of the 1995 Act;

(3) recall the first part of the interlocutor of 29 January 2018, parts (2) (sisting the divorce); (4) (finding it unnecessary to fix the case management hearing); and (5) (fixing the child welfare hearing on 14 and 15 March 2018);

(4) recall the second part of the interlocutor of 29 January 2018, parts (1) (ordering the intimation of Forms F9) and parts (3)-(9) inclusive (continuing consideration of the motion to appoint a child welfare reporter and making orders ancillary to the evidential child welfare hearing).

(5) recall the initial case management directions contained within the interlocutor of 29 January 2018;

(6) recall the interlocutor of 30 January 2018 (making further case management directions and assigning a procedural hearing);

(7) recall the interlocutor of 31 January 2018 (supplementing the interlocutor of 30 January 2018).

Quoad ultra the appeals will be refused. We shall also direct the sheriff clerk at Dumfries to assign an options hearing for the first suitable court date after 19 March 2018. The parties will have the usual period within which to adjust prior to the options hearing. In the circumstances of this case, it is appropriate that all further procedure is before a different sheriff. We shall remit the matter to a different sheriff at Dumfries, directing him or her to

appoint a child welfare reporter *quam primum* to seek the views of the children and to report any views expressed by the children to the court all in accordance with rule 33.21. As there has been divided success we will find no expenses due to or by either party.

Postscript

[37] This case has already generated a great deal of procedure, much of which has served to add complexity and delay. Appeals relating to consideration of discretionary matters are to be discouraged. They do not assist in the expeditious resolution of cases of this nature. We do not fault the industry of the sheriff in producing very lengthy notes attached to the interlocutors, but the length and complexity of the notes have had a tendency to obscure the key issues at stake.