SHERIFF APPEAL COURT

[2019] SAC (Civ) 33
LIV-F282-17

Appeal Sheriff Murphy QC
Appeal Sheriff Holligan
Appeal Sheriff McCulloch

OPINION OF THE COURT

delivered by APPEAL SHERIFF W HOLLIGAN

in appeal in the cause

LRK

Pursuer and Respondent

against

AG

Defender and Appellant

Appellant: Moir, advocate, instructed by Caesar and Howie
Respondent: Burns; Bathgate Family Law Practice

2 October 2019

[1] This appeal concerns an action in which the respondent (father) seeks contact with the child of his relationship with the appellant (mother). The child is a female child aged six ("C"). The record contains a number of very serious allegations of domestic abuse said to be perpetrated by the respondent against the appellant. Included amongst the averments is that the respondent was charged with domestic assault against the appellant, found guilty after trial and sentenced to 14 months imprisonment. That averment is the averment of the

respondent. The appellant avers a course of conduct on the part of the respondent amounting to a catalogue of harassment and disorderly conduct aimed at the appellant, again some of which is of a very serious nature.

[2] The appellant obtained an interdict in the usual terms against the respondent together with a power of arrest for a period of three years. The appellant's position on record was that she was opposed to any order for contact in favour of the respondent.

[3] The procedural history of this case can be summarised as follows. The action was registered at Livingston Sheriff Court in 2017 but the first substantive order was made by interlocutor dated 22 January 2018 whereby the preparation of a bar report was ordered; the issue was whether the respondent should be allowed contact. The case was continued to 12 March to await preparation of the report. The report was not available until 25 May 2018. The reporter concluded "with no hesitation whatsoever" that it would not be in the best interests of the child for the respondent to have contact with her. He went on to say that he believed that contact would be detrimental to the interests of the child. As we understand it, standing this unequivocal conclusion, the respondent no longer had the benefit of legal aid. The case was continued over the summer of 2018 in order for approaches to be made to the Scottish Legal Aid Board. The action continued with the respondent appearing as a party litigant. On 12 September 2018 a proof was assigned for 26 October with a further hearing assigned for 10 October. On 10 October the diet of proof assigned for 26 October was discharged, the date "not being suitable". 11 January 2019 was assigned as a diet of proof with 19 December as a pre-proof hearing. There were clearly difficulties in the respondent being in a position to lodge an up to date record and to instruct a shorthand writer. On 19 December the diet of proof assigned for 11 January was discharged and a procedural

hearing fixed for that date instead. The appellant's agent prepared an up to date record and progress was made as to the instruction of a shorthand writer. Another procedural hearing was fixed for 23 January, by which date the respondent had paid the shorthand writer's fee. The sheriff then assigned 1 March 2019 as a diet of proof with 25 February assigned as a pre-proof hearing. We understand it is not the practice at Livingston Sheriff Court to appoint diets of proof for longer than a single day. The case proceeded to proof on 1 March. It did not conclude that day. A further diet was assigned for 5 April. The interlocutor of 5 April records that the sheriff "continues the case to a further diet of proof on 17 May 2019… to allow for submissions to be heard". We understand that on 17 May the case called and submissions were made. Throughout the proof the respondent appeared as a party litigant.

[4] The sheriff issued two interlocutors on 17 May 2019. As the interlocutors are an essential element of this case it is appropriate that we record them:

> "The Sheriff having resumed consideration of the cause, and having heard evidence and the parties' submissions thereon, and having decided to make an award of interim contact in favour of the pursuer, adjourns the proof part heard to a date to be afterwards fixed; fixes a child welfare hearing to take place immediately after the adjourned proof hearing".

[5] The second interlocutor provides as follows:

> "The sheriff, having indicated in a separate interlocutor of today's date that an interim award of contact is to be made, and having heard the parties further as to the arrangements of interim contact, finds the Pursuer entitled to contact *ad interim* on 6 separate occasions, each session lasting for one hour, *ex proprio motu* appoints said interim contact to take place at a contact centre and said contact to be supervised, with the contact centre to provide a report as to the contact sessions; appoints each party to meet one half share of the expenses, if any, of said contact sessions and report in the first instance; continues the case to a date to be afterwards fixed in approximately 4 months time to call as a Child Welfare Hearing, said interim award is made on the basis that the Pursuer will enrol in an appropriate parenting class and provide written confirmation of same".

[6] The first interlocutor is not in the style of a standard judgment: it has no findings in fact, findings in fact and law nor is it, nor does it purport to be, a detailed note on the evidence which the sheriff heard. The sheriff appended a note. In summary, the sheriff stated he had little doubt that the respondent has in the past "behaved disgracefully" towards the appellant. The sheriff commented that the accounts of the parties as to their respective care of C were "diametrically opposite" and that it is "impossible to tell which is more accurate". The sheriff went on to say that he is not persuaded it is in the child's best interests for the pursuer to be cut out of her life altogether but "neither am I persuaded at this stage that a final order for contact should be made in favour of the pursuer". The sheriff goes on to say (page 32 of the appeal print):

> "Because of the way [the] action proceeded, with the pursuer's legal aid certificate being cancelled, no interim award of contact was ever made [in] favour of the pursuer. Had it occurred to me, I think it likely that I would have fixed an evidential child welfare hearing to determine whether any interim contact ought to be awarded. I am therefore going to treat this proof not as a final resolution of the matter, but effectively as an evidential child welfare hearing. On that basis, and having considered all the evidence and submissions, I have come to the conclusion that an interim award of contact ought to be made [in] favour of the pursuer. This will have to be occasional to begin with, and very importantly, measures will have to be put in place which will guarantee the safety of [C], the most obvious of which is that contact will have to be supervised. I also wish to have a report as to how [C] is reacting to seeing her father.
>
> Procedurally this slightly unusual course of action means that the proof will be adjourned part heard to allow some interim contact to take place.
>
> What this means for the pursuer is that I am giving him the chance to prove himself, and to prove that he can attend regularly for contact sessions. I also want the pursuer to prove that he is willing to make the effort to demonstrate that he can acquire, or has acquired, the skills to be a good father. I have in mind that the pursuer will have to voluntarily enrol in a parenting class and produce a report showing that he has attended regularly and that has the necessary attributes to be a positive influence in [C's] life.
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> This proof will now be adjourned, and a child welfare hearing will then take place so that the appropriate measures and safeguards can be discussed, together with the frequency of the interim contact. Once some interim contact has taken place this proof will have to be resumed in order that I can make a final decision as to whether

a final award of contact should be granted, or whether a different result is appropriate".

[7] It is against these interlocutors that the appellant now appeals. We were informed that contact has not taken place since the interlocutors were pronounced. The second interlocutor makes reference to the respondent enrolling in an appropriate parenting class which we are told has not been done. An issue of competency of the appeal arose. By interlocutor dated 26 June 2019 this court held that the appeal was competent. The sheriff, at his own initiative, prepared a further note received by this court on 8 July 2019. The preparation of the July note does not relate to any specific step of procedure which necessitated its production. The sheriff stated he hoped that it may assist this court in its consideration of the appeal, perhaps bearing in mind that the respondent was not then legally represented. The sheriff acknowledges that in deciding *ex proprio motu* to adjourn the proof as part heard he was "adopting a very unusual course of action". Nevertheless, he came to the conclusion that the procedure which he adopted was rendered necessary by the procedural history of the case with the welfare of the child being his paramount consideration. We do not propose to record at length all that the sheriff said but we do note that reference was made to a number of authorities touching on the procedure followed by him. These authorities are referred to by the parties.

Submissions for the appellant

[8] Mr Moir lodged a written note of argument and it is summarised as follows. The appeal should be allowed, the interlocutors of 17 May recalled and the case remitted back to the sheriff with a direction to issue a judgment in terms of OCR 12.4. There are two issues: (1) was it competent for the sheriff after hearing evidence and submissions to "treat

[the] proof not as a final resolution of the matter but, effectively as an evidential child welfare hearing" and to adjourn the proof; fix a child welfare hearing and award interim contact?; (2) *Esto*, it was competent to consider interim contact at the child welfare hearing, did the sheriff err in law by failing to have regard to the specific matters set out in section 11(7A) to (7E) of the Children (Scotland) Act 1995 ("the 1995 Act")?

[9] In relation to the first point Mr Moir made reference to the following cases: *K* v *K* 2018 SLT (Sh Ct) 418, particularly at paragraph [28]; *Ahmed* v *Iqbal* 2014 Fam LR 93; *M* v *M* 2012 Fam LR 14; *Perendes* v *Sim* 1998 SLT 1382 (which refers to *Harris* v *Martin* 1995 SCLR 580).

[10] In essence, OCR 12.2(4) provides that at the conclusion of any hearing in which evidence has been led the sheriff shall either (a) pronounce an *ex tempore* judgment in accordance with OCR 12.3; or (b) reserve judgment in accordance with OCR 12.4. The sheriff did neither. The sheriff failed to adjudicate upon a number of disputed facts but proceeded to treat the proof, not as a final resolution of the matter, but effectively as an evidential child welfare hearing and to adjourn the proof. Paragraph [28] of *K* v *K* makes it clear that rule 12.2(4) mandates what ought to happen. In failing to follow the procedure laid down in OCR 12 the sheriff's interlocutors are vitiated. *Ahmed* is distinguishable in that it dealt with a situation where the sheriff had made avizandum and then issued a written judgment granting decree of divorce but purporting to continue consideration of contact to a subsequent child welfare hearing. Nevertheless, paragraphs [26] and [29] are relevant. The Sheriff Principal said that where a proof has been ordered a full enquiry into the facts and issues will achieve finality. The rules relating to child welfare hearings (OCR 33.22A) indicate that they are a feature of "front loading". It is plain from the terms of OCR 33.22A

(4) a child welfare hearing is normally intended to take place in advance of a proof. At paragraphs [46] and [47] Sheriff Principal Scott QC distinguished *M* v *M* and *Perendes* v *Sim.* Any procedure after the court has issued its judgment ought not to be adopted with a view to determining any aspects of the merits left undone. There must be a decision in principle; any further consideration by the court must be restricted to the practicalities associated with the decision it has already taken. It is far from clear that the sheriff in the present case has truly made a decision in principle. In the present case a decision in principle has been deferred pending the respondent proving himself to be worthy of contact. Nowhere in his discussion does the sheriff consider the benefits of contact in general. Deferring the crucial question of whether or not contact was in the child's best interests was not competent.

[11] *Esto* it was competent to do so the provisions of section 11(7A) to (7E) do not appear to have been referred to by the sheriff. These include an obligation upon the court to have regard to questions of abuse and the need for parties to be able to cooperate together. In expanding the written note of argument, Mr Moir pointed out that the sheriff had heard final submissions in the case and was therefore obliged in accordance with the rules to make a decision. The sheriff did raise the question of interim orders with parties to which the appellant was opposed. Neither party invited the sheriff to proceed in the way in which he did.

Submissions for the Respondent

[12] For the respondent, Mr Burns submitted that in terms of OCRs 12.2(4), 29.17 and 29.20, by adjourning the proof the sheriff was not required to "pronounce judgment". Even if he was required to pronounce judgment there is no requirement the judgment must

include final orders and that the first interlocutor pronounced on 17 May together with the note does constitute a judgment in terms of the rules. As to whether the sheriff was entitled to find the respondent entitled to interim contact at a subsequent child welfare hearing, OCR 33.22A(1)(c) allows the fixing of a child welfare hearing at any stage in the proceedings before final orders are made. *M* v *M* is highly persuasive. The sheriff in that case adopted a procedure very similar to the present case. After hearing evidence and submissions the sheriff decided to convert the proof to a child welfare hearing and found the pursuer entitled to interim contact at a contact centre, continued the proof *sine die* to see how the first three visits at the centre went. Lord Stewart held that the course of action adopted by the sheriff was competent (paragraphs [30] to [35]). In relation to *K* v *K*, it is distinguishable on the ground that the sheriff made a final order (to reduce contact to nil) at a child welfare hearing after part hearing a proof in which the evidence of the party seeking contact had still to be heard. That gave rise to a natural justice argument. In *Ahmed*, the sheriff made an interim contact order at a child welfare hearing after making avizandum and pronouncing a judgment which included findings in fact. Sheriff Principal Scott QC accepted that it may be competent for the court, having arrived at its decision on the merits of the case, to order further procedure, perhaps in the form of a child welfare hearing. The respondent in effect adopted what the sheriff in the present case said in his note of 8 July.

[13] In relation to the matters raised at section 11(7A) to (7E) the sheriff does not specifically refer to these sections in the 1995 Act but it is clear from his note that he fully understood that he was obliged to have regard to the abuse inflicted upon the appellant. There were other factors in existence which persuaded him to conclude that an interim contact order was in the best interests of the child. Mr Burns did not accept the proposition

contained in paragraph [27] of *K* v *K* that once a proof has commenced and ended the sheriff must pronounce judgment. Although the sheriff had not reached a final decision, the proof was not complete as the sheriff had adjourned the proof. In the present case the proof had not concluded because it was adjourned. *M* v *M* was effectively on all fours with the present case. The only ground of distinction is that of the procedure adopted in that case (suspension) but that is not material.

Decision

[14] This case highlights clearly the clash between two competing issues: (a) procedure (and its policy) and; (b) the need for flexibility when dealing with the interests of a child.

[15] In relation to the first issue in cases involving children, the direction of procedure has, over the years, moved towards expedition and the avoidance of delay (*NJBD* v *JEG* [2012] UKSC 21). There are procedures such as mediation, child welfare hearings, bar reports and case management, which are all designed to bring disputes involving children to an early resolution. For those cases which cannot be resolved by such methods a proof is available. The introduction of case management rules is intended to bring expedition and focus to cases which require to proceed to proof. The standard litigation model for a proof is adversarial, binary and conclusive. The sheriff requires to reach a decision on disputed matters and reach a conclusion as to the remedies sought. Rights of appeal assume that a decision has been made and a judgment issued in a particular format which permits appellate scrutiny.

[16] By contrast, cases involving the interests of children often do not admit of a single determination. Sometimes a particular decision cannot, by its very nature, produce a

conclusive result; At best it is contingent and unavoidably so. Nowhere is that clearer than in cases (such as the present) where the issue is whether there ought to be contact at all; often there is no recent pattern of conduct or there may indeed have been no contact in the past at all. The success of any future award of contact involves a degree of speculation. Such cases involve a two stage process: (1) should there be contact; (2) if so, how can it be done? The second stage is yet further complicated because experience shows contact may be incremental. Sometimes professional input is required to examine how best to introduce contact; it may be followed by contact in a contact centre; outwith a contact centre; no centre and then residential contact. This model can be accommodated before a proof but, as the authorities referred to show, the law has struggled to accommodate such flexible and seemingly open ended processes within the standard litigation model. For example in *Ahmed* it was difficult for the sheriff to sustain the standard plea in law for contact in circumstances where the operation of contact was yet to be tested. *Ahmed* also highlighted the procedural implications to the disappointed party of an incomplete judgment. If the decision is that "in principle" there should be contact or, more awkwardly, that contact should be tried, the opposing party is entitled to know why and, if so advised, have the opportunity, as of right, to challenge such a conclusion by conventional methods of appeal.

[17] The authorities to which we referred extend over a period of almost 35 years (*Harris* being the first). They deal with particular aspects of the problems we have outlined above and have done so against a background of significant changes in the law, both in terms of procedure and of substance.

[18] We have considered carefully the various authorities to which we have referred. We think it fair to say that none of the cases deals comprehensively with the issues we have

outlined above. The case of *Harris* involved a crave for access. The sheriff had decided in principle to grant access. However, he was concerned that the father might not have had sufficient training in how to manage the child's asthma and therefore fixed a child welfare hearing for that issue to be addressed. The decision as to access having been made by the sheriff the matter was one of method. There is no suggestion from the opinion of the Inner House that the issue of competency was ever argued before it and it was also a case in which the sheriff had issued a full judgment. *Perendes* was also a case about access. Again, the Lord Ordinary decided in principle that there should be access but that he required to put the matter out by order for submissions as to the practicalities of its implementation. A detailed judgment was issued. The case of *M* v *M* is unusual in that it involved an action of suspension and interdict against the decision of the sheriff that there ought to be a contact between a child and its father. The procedure before the sheriff was somewhat unusual. Proof had been allowed and indeed heard. During the course of the proof the sheriff "converted" the proof into a child welfare hearing and made orders for interim contact. He also, *ex proprio motu*, adjourned the proof *sine die*. The matter was further complicated by the absence of any evidence from the mother which raised arguments as to whether there had been a miscarriage of justice. At the end of the day the Lord Ordinary held that the interlocutors of the sheriff should not be suspended and allowed the matter to proceed further. The Lord Ordinary (at paragraphs [30] and [31]) accepted that it was competent to order a child welfare hearing after evidence has been led at proof; he did so by reference to *Perendes* and *Harris,* which as we have said, both involved child welfare hearings made after decisions in principle had been made. The Lord Ordinary also held that it was competent for the sheriff to have adjourned the proof *sine die*. The case of *M* v *M* and the other authorities

were reviewed by the Sheriff Principal in *Ahmed*. That was a case in which there was a final interlocutor pronounced but with a further child welfare hearing in order to monitor contact. The Sheriff Principal accepted the ratio of *Harris* and *Perendes* meant that it was competent to have a child welfare hearing where a decision in principle as to contact had been made. However, one of the difficulties in *Ahmed* was that there was a proof with a judgment but it did not appear that the sheriff had in fact made a decision in principle at all. Given the equivocal nature of the sheriff's view as to contact he was unable to sustain, at that stage, the plea in law in support of contact. The Sheriff Principal also went on to comment that the expectation of parties is that there would be a judgment issued where there had been a proof. As we have said, the Sheriff Principal also commented upon the consequences as to appeal in cases where there were child welfare hearings held after a proof. The case of *K* v *K* involved a minute to vary. That was a case in which evidence was heard on the minute to vary. The sheriff brought the matter to an end mid proof without concluding the proof procedure. It was held it was not competent for him to do so. The decision is of more importance as to the general observations made by the Sheriff Appeal Court in paragraphs [26]-[28]. Sheriff Principal Pyle noted that the thrust of the rules is to try and bring matters to an early conclusion. The rules of court (OCR 12.2 (4) and OCR 29.20) anticipate the production of a judgment after proof. The Sheriff Appeal Court had "severe doubts" (paragraph [26]) as to the competency of summarily bringing a proof to an end once it had begun. It does not follow that because the sheriff has the power to decide a case at a child welfare hearing as an alternative to fixing a proof he may do so part way through a proof which he has decided is necessary in order to resolve the matters in dispute between the parties.

[19] Returning to the present case, on the key issue as to whether there should be contact between the respondent and C, the sheriff came to the view that the only way to resolve that issue was after proof. Standing the averments on record and the appellant's opposition to contact proof was the only way to resolve the issue. Evidence was led. 17th May 2019 was assigned as a date on which the sheriff was to hear submissions from the parties. The parties prepared upon the basis that the judgment of the sheriff would follow. The sheriff did not issue a judgment. We do not consider that either the first or second interlocutor pronounced on 17th May constitutes a "judgment" as the same is prescribed by the rules nor does the note of 9th July. Mr Burns conceded, correctly in our view, that unlike *Harris* and *Perendes*, the sheriff had not reached a decision in principle that there should be contact. He had yet to make such a decision and would not do so until after the respondent had attended parenting classes, shown commitment and attended for interim contact. We have some sympathy for the sheriff in dealing with what was a difficult and anxious matter in which one of the parties was unrepresented. The sheriff characterised the course he took was unusual and he was right to do so. It was not a course he was invited to follow by either party nor was it a course of action mandated by the rules of procedure. In our opinion, it was not competent for the sheriff to follow the course of action which he did. Proof had been allowed because it was necessary to resolve the case. Issues of principle required to be decided, including decisions upon major issues of fact. OCR 12.2(4) and OCR 29.20 assume a judgment by the sheriff, set out in conventional terms with findings in fact and findings in fact and law. Such a judgment enables the parties to see what conclusions the sheriff has reached on the factual and legal issues and his reasoning therefor. The judgment enables parties to consider whether they wish to appeal against the sheriff's decision and gives to the appellate court a

judgment in a form which can be scrutinized in accordance with conventional rules for an appeal. In the present case there was no decision in principle and no judgment but there was an award of contact. That the award is an interim award does not matter. Furthermore, it is the sheriff who adjourned the proof at his own hand thereby depriving the parties, and in particular the appellant, of the judgment which would otherwise have followed. The appellant's secondary argument as to consideration of sections 11(7A) to (7E) highlights the problem. It is not possible to know whether the sheriff has taken these matters into account and, if so, what weight has been attached to them. Accordingly, we shall recall the sheriff's interlocutors of 17th May and direct that the sheriff issue a judgment in terms of OCR 12.4.

Postscript

[20] We set out at paragraph [15] above the nature of the problem of which this case is an example. The problem is a recurrent one. In cases where the issue is whether, in principle, there ought to be contact the procedural problem which this and other similar cases highlight could be avoided by dividing consideration of whether there should be contact from what the mechanics of contact might be. Separate inquiries on specific matters such as liability and quantum in reparation matters; date of separation in divorce actions; and whether parties were cohabiting between particular dates are far from uncommon. The two issues in this case (the principle of contact and its implementation) could be focused with discrete pleas in law supported by specific averments. A proof could be ordered upon the particular plea or pleas and averments. A judgment would follow which on such a fundamental matter would be open to appeal. If not appealed, further interlocutory procedure would be available to the sheriff to give effect to the decision, including child

welfare hearings and interim awards of contact. The sheriff would have available to him or her the full range of options without falling foul of procedural complexities. The foregoing approach would avoid many of the procedural problems which this and the authorities referred to highlight.