SHERIFF APPEAL COURT

[2021] SAC (Civ) 1
LIV-F282-17

Sheriff Principal D C W Pyle
Sheriff A G McCulloch
Sheriff L A Drummond QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in

appeal by

LRK

Pursuer and Respondent

against

AG

Defender and Appellant

Appellant: Aitken, advocate; Caesar & Howie
Respondent: Burns; Bathgate Family Law Practice

14 January 2021

Introduction

[1] This action has had a chequered history. It concerns the application for an order for contact by the respondent to his daughter who is now aged seven years. A proof took place

over three days in the spring of 2019, at the end of which the sheriff pronounced an interlocutor *ex proprio motu* adjourning the proof to another date in order that interim contact could take place. That interlocutor was appealed and this court held (reported at 2020 SCLR 325; 2019 Fam LR 147) that the course the sheriff adopted was incompetent and that he should instead issue a judgment, which he duly did. It is that judgment which is now appealed. The sheriff's final decision was to award the respondent supervised contact to the child on a very restricted basis. The respondent has not seen the child for five years.

[2] The grounds of appeal contained a number of criticisms of the approach taken by the sheriff, but as the debate before us developed two grounds became the critical ones. The first related to the sheriff's approach to sec 11(7A-7E) of the Children (Scotland) Act 1995; the second to the requirement to obtain the views of the child in terms of sec 11(7)(b) of the Act.

Section 11(7A-(7E), Children (Scotland) Act 1995

[3] Sections 11 (7) and (7A)-(7E) of the Act are in the following terms:

"(7) Subject to subsection (8) below, in considering whether or not to make an order under subsection (1) above and what order to make, the court—

(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and

(b) taking account of the child's age and maturity, shall so far as practicable—

(i) give him an opportunity to indicate whether he wishes to express his views;

(ii) if he does so wish, give him an opportunity to express them; and

(iii) have regard to such views as he may express.

(7A) In carrying out the duties imposed by subsection (7)(a) above, the court shall have regard in particular to the matters mentioned in subsection (7B) below.

(7B) Those matters are—

(a) the need to protect the child from—

(i) any abuse; or

(ii) the risk of any abuse,

which affects, or might affect, the child;

(b) the effect such abuse, or the risk of such abuse, might have on the child;

(c) the ability of a person—
    (i) who has carried out abuse which affects or might affect the child; or
    (ii) who might carry out such abuse,
to care for, or otherwise meet the needs of, the child; and
(d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under subsection (1), would have) those responsibilities.

(7C) In subsection (7B) above—
"*abuse*" includes —
(a) violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress;
(b) abuse of a person other than the child; and
(c) domestic abuse;
"*conduct*" includes—
(a) speech; and
(b) presence in a specified place or area.

(7D) Where—
(a) the court is considering making an order under subsection (1) above; and
(b) in pursuance of the order two or more relevant persons would have to co-operate with one another as respects matters affecting the child,
the court shall consider whether it would be appropriate to make the order.

(7E) In subsection (7D) above, "*relevant person*", in relation to a child, means—
(a) a person having parental responsibilities or parental rights in respect of the child; or
(b) where a parent of the child does not have parental responsibilities or parental rights in respect of the child, a parent of the child."

[4] In his judgment the sheriff found in fact that the relationship between the parties was characterised by incidents of domestic violence and domestic abuse on the part of the respondent, including a conviction for assaulting the appellant for which he was sentenced to twelve months imprisonment and the subsequent breach of a non-harassment order for which he was sentenced to five months imprisonment. In discussing subsection (7A) the sheriff said this (para [27]):

"There can be little doubt that unfortunately the domestic violence and volatile behaviour which the [respondent] demonstrated, and some of which took place in front of [the child], must have affected her. It is a sad indictment of the [respondent's] behaviour that at the time the parties were living together he seems to have been utterly unaware of this, or simply did not care about this at the time. However, the parties have separated, and have no contact with each other, and therefore there is no question of [the child] being exposed to further domestic abuse. That was only a factor when the parties were living together. There

is, it seems to me, no longer any need, as a matter of fact in the present circumstances, to protect her from domestic abuse or the effects of it at the hand of the [respondent]. Some damage may have been done, and that is greatly to be regretted, but domestic abuse is no longer a factor in relation to [the child], and the historical abuse is not, in my view, sufficient to prevent an award of contact being made."

As counsel for the appellant pointed out, the sheriff's conclusions were in the context of domestic abuse which included assaulting the appellant by trying to make her eat dog faeces and putting petrol through the appellant's door and threatening to set fire to the house, when incidentally the child was in residence.

[5] Surprisingly, the sheriff had nothing to say about the appellant's views on contact, other than simply to record that in her evidence she said that the respondent had never taken responsibility for the child, that the child did not need him, did not need to see him and could not face seeing him either (para [17]). The evidence of the social worker led by the appellant was similarly dismissed, including the sheriff's comment that the social worker's concerns about the respondent's behaviour remained "rooted in the past" (para [30]). The sheriff repeated *ad longum* substantial parts of the social worker's report from 2015, including the opinion that the appellant had informed the social worker that she was, at least at the time of the report, extremely fearful of the respondent. Whether that remained the position was not discussed in the evidence, other than the following exchange between the sheriff and the appellant (Transcript of Evidence, second day, p29):

> "He said he would accept any supervisor for contact, even you. Would you wish to supervise contact? – No
> Why not? – I can barely even face him standing here. It is really tough after everything he has done."

While we acknowledge that the sheriff's task was not helped by the respondent being unrepresented at the proof, it was still incumbent upon him to take into account all the

matters set out in section 11(7B), including in particular paragraphs (c) and (d), as well as the need for the parties to co-operate in terms of section 11(7D). On the latter, the sheriff is silent other than to require that the contact be supervised at a contact centre, that the respondent makes it a priority to attend and that the appellant ensures that the child is taken for the visits and is encouraged to go.

[6] In these circumstances the sheriff has failed to take into account relevant considerations, which entitles this court to interfere.

Views of the child

[7] Counsel for the appellant was critical of the sheriff's reasoning for his decision not to seek the views of the child. The sheriff deals with the issue as follows (para [28]):

> "… I must take into account the child's views, but I think it is agreed all round that [the child] is really too young to express views, and that it would be difficult in any event to try and ascertain what her views are. It is not really known what memory she may have of the [respondent], and while [his] behaviour may have had an effect on her, I do not think that there would be anything to be gained by seeking to try and ascertain whether she has views regarding contact, and I do not understand that it was suggested to me that I do so."

Counsel submitted that the sheriff misunderstood the duty upon the court: he was bound to ascertain the child's views unless as a matter of practicability it was impossible to do so. (*S v S* 2002 SC 246; *Woods v Pryce* 2019 SLT (Sh Ct) 115; *M v C*, Sheriff Appeal Court, unreported 25 August 2020)

[8] We agree with these submissions. The fact that neither party raised the matter does not discharge the obligation upon the court. The sheriff suggested that the child is too young to express her views and that it would in any event be too difficult to try and ascertain her views. However, he does not address the test of impracticability and does not explain what

the difficulty in obtaining the child's views is. The child was aged 6 years at the time and of an age where an opportunity to take views could, on the face of it, be given. As was said in *S v S*, there are many ways in which the views of the child can be obtained. Some may well be impracticable but others may not. It was the sheriff's duty to come to a view on that. In failing to do so he fell into error.

[9] During the debate there was a general discussion about situations where the statutory approach, as defined in the authorities, may cause unforeseen problems and we think it useful if we discuss those, albeit that they do not arise in the instant case.

[10] Any discussion of the provisions of section 11(7)(b) will soon become academic given the introduction of a new section 11ZB to the 1995 Act by the Children (Scotland) Act 2020, a provision not yet in force. But it may be that the same issues will arise in the future.

[11] As was pointed out by the Inner House in *S v S*, the starting point is article 12 of the United Nations Convention on the Rights of the Child, which provides:

> "1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child; and
>
> 2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

We respectfully agree with the court in *S v S* that section 11(7)(b) conflates in a rather unsatisfactory manner the provisions of article 12. Nevertheless, it is clear from the authorities, with which we agree, that the only proper and relevant test is one of

practicability. In *S v S*, the child was 9 years of age. In *Woods v Pryce* the child was the same age. In *M v C* the age of the child is not given although he is described as very young. In *Stewart v Stewart* 2007 SC 451, in respect of a child aged only 2, the court held (at p 457) that "it was clearly within the sheriff's discretion to take the view that to seek the views of a child of that age would be wholly impractical". In *M v C*, this court commented that 'impracticable' and 'impractical' are not synonymous and that the use of the latter word in *Stewart v Stewart* was at a time of the early stages of the recognition of the need for children effectively to participate in decisions about residence and contact. That may be so, but it is perhaps more realistic to view the comment in *Stewart v Stewart* in the context of a decision on grounds of appeal presented by a party litigant and without proper focus. In any event, the court was not referred to *S v S*. It might be said that 'impracticable' means that something is unable to be put into practice, while 'impractical' is often used where something is neither sensible nor useful. In other words, 'impracticable' means in the present context that the views of the child must be obtained unless it is impossible to do so, while 'impractical' would leave the court with a discretion about the appropriateness of doing so, no matter a practicable method being available. We have a concern that taking the word 'impracticable' in its strictest sense runs the risk of acting contrary to the interests of the child. To make an order by whatever means to obtain a child's views is not a neutral act, particularly if the child is of a young age. During the course of the debate, we invited counsel to consider a hypothetical case where the identity of the father became known only after a DNA test in respect of a child who has spent her whole life under the misapprehension that someone else was her father. Indeed, the mother might be under the same misapprehension. If, for example, a report was available from a child psychologist expressing a concern that to tell the child of the existence of her father and to ask whether

she wishes to see him might have a detrimental effect on her mental health, it would be stretching the definition of impracticability to breaking point to conclude that the court should not obtain the child's views. Looking at the matter from the perspective of the Convention, the only qualification to the obligation upon the state to obtain the child's views is that the child has to be "capable of forming his own views". But article 3 of the Convention provides, *inter alia*, that "the best interests of the child shall be the primary consideration" which in our domestic law is expressed as the paramount consideration. To allow the obtaining of a child's view in a circumstance where it was practicable but on professional advice was not in her best interests would be unfortunate, unless it can be said that impracticability has to be construed in light of the overriding consideration expressed in article 3 or section 11(7)(a) of the 1995 Act, which in turn would mean that the sheriff does indeed have a discretion no matter that it is possible, for example, for the child to be interviewed by a reporter, curator or the sheriff.

[12] Nor do we consider that the problem will be resolved by section 11ZB which is in the following terms:

"(1) In deciding whether or not to make an order under section 11(1) and what order (if any) to make, the court must—

(a) give the child concerned an opportunity to express the child's views in—
  (i) the manner that the child prefers, or
  (ii) a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child's preference, and
(b) have regard to any views expressed by the child, taking into account the child's age and maturity.

(2) But the court is not required to comply with subsection (1) if satisfied that—

(a) the child is not capable of forming a view, or
(b) the location of the child is not known.

(3) The child is to be presumed to be capable of forming a view unless the contrary is shown.

(4) Nothing in this section requires a child to be legally represented in any proceedings in which the child's views are sought, if the child does not wish to be."

Thus, it can be seen that the test of impracticability has been swept away. Indeed, the only qualification is the capability of the child forming a view, which is more in line with article 6 of the Convention. It is difficult to see how the overriding best interests test could be engaged to avoid the child's views being obtained in the hypothetical situation we describe above. (A better reason for the decision by the court in *Stewart v Stewart* might be that a child under three years would not have formed a view.)

Decision

[13] For the reasons we have given, we are satisfied that the sheriff's interlocutor should be recalled. We do not consider it appropriate that the case be remitted back to the sheriff. Nor do we consider that we are in a position to come to a conclusion ourselves on the merits. It therefore follows, unfortunately, that the cause should be remitted to another sheriff. Parties helpfully agreed that we should simply remit the cause to that sheriff to proceed as accords and leave it open for any procedure which is identified as in the best interests of the child and in the interests of justice, including, if considered appropriate, proceeding by way of a child welfare hearing.

[14] Counsel for the appellant proposed changes to the findings in fact and additional ones. In the light of the decision we have reached we do not consider it appropriate for us to make any changes to the sheriff's judgment.

[15] Parties were agreed that there should be no award of expenses.