SHERIFF APPEAL COURT

[2021] SAC (Civ) 16
DUN-F190-14

Appeal Sheriff W Holligan
Appeal Sheriff T McCartney
Appeal Sheriff F Tait

OPINION OF THE COURT

delivered by APPEAL SHERIFF F TAIT

in appeal by

FBI

[Defender/Appellant]

against

MH

[Pursuer/Respondent]

Defender/Appellant: MacRae; GFM Law

11 May 2021

[1] This appeal is against the respective interlocutors of three sheriffs at Dundee dated 6 and 12 November 2020 and 2 February 2021 in relation to a Minute lodged under chapter 33.65 of the Ordinary Cause Rules 1993 (“OCR”). The Minute is number 8 of process.

[2] The Minute relates to a child born in May 2009.

[3] The Minute sought variation of decree granted 8 September 2015 and a residence order in favour of the respondent; interdict against the appellant removing the child out of the respondent’s care and control and furth of the jurisdiction of Tayside, Central and Fife

and interdict against the appellant removing the child from her primary school in St Andrews without the respondent's permission.

[4] The interlocutors complained of dated 6 and 12 November 2020 *inter alia* dispensed with intimation and the seeking of views in Form F9 of a child, aged 11, "due to her tender years".

[5] The interlocutor complained of dated 2 February 2021 was the granting of the respondent's unopposed motion for decree as craved and specifically:

i. varying the decree granted on 8 September 2015 and granting a residence order in favour of the respondent;

ii. interdicting the appellant from removing the child out of the care and control of the respondent and furth of the jurisdiction of Tayside, Central and Fife and

iii. interdicting the appellant from removing the child from her primary school without the permission of the respondent.

[6] The issues for consideration are threefold:

i. whether the sheriffs erred in dispensing with intimation and the seeking of the child's views;

ii. whether the interdicts were competently sought and, if so, whether they should have been granted on their merits and

iii. whether there was any deficiency in intimation of the Minute to the appellant.

Procedural History

[7] By decree dated 8 September 2015, a contact order was granted in the respondent's favour for residential contact.

[8] On 6 November 2020, the sheriff ordered intimation of the Minute on parties, dispensed with intimation and the seeking of views in Form F9 of the child "due to her tender years", granted warrant to intimate to the local authority as craved and granted interim interdicts against removal of the child from the respondent's care and control and furth of the sheriffdom jurisdiction and from her primary school without the respondent's permission. Any party wishing to oppose the Minute was ordered to lodge Answers within 14 days of intimation and a hearing on interim orders was assigned for 12 November 2020.

[9] On 12 November 2020, as there was uncertainty as to service of the Minute, a second sheriff granted warrant for re-service and granted interim orders in the same terms as the interlocutor dated 6 November 2020. He dispensed with intimation and the seeking of views of the child "due to her tender years". A hearing on interim orders was assigned for 10 December 2020.

[10] On 10 December 2020, a third sheriff considered written submissions and productions lodged on behalf of the respondent. She granted an interim residence order in favour of the respondent. She appointed a procedural hearing on the Minute and Answers and appointed the appellant to lodge Answers if so advised. The procedural hearing was assigned for 2 February 2021.

[11] On 2 February 2021, the matter was considered by the same sheriff as on 10 December 2020. No Answers for the appellant had been lodged and on the respondent's unopposed motion, the sheriff granted decree as craved, varying the decree dated 8 September 2015 and granted a residence order in favour of the respondent. She also

granted interdicts as craved, interdicting the appellant from removing the child from the care and control of the respondent and furth of the jurisdiction of Tayside, Central and Fife and interdicting the appellant from removing the child from her primary school without the respondent's permission and found no expenses due to or by either party.

[12] Each of the interlocutors gave notice that, in accordance with Part 1 of Schedule 4 of the Coronavirus (Scotland) Act 2020, physical attendance at court was suspended, any hearings would be conducted by electronic means and that matters may be determined without a hearing. Further, provision was made for written submissions to be lodged.

[13] In the event, each of the four interlocutors was granted without a hearing.

[14] It is now apparent that the Minute was served on the appellant by sheriff officers on 11 November 2020. It is not clear what information was before each sheriff in respect of service and intimation given that warrant for re-service was granted and Answers were ordered on a number of occasions.

[15] Notwithstanding the appellant's criticisms anent intimation, it is accepted on her behalf that the Minute and Form G7C were served upon her and she took no steps to oppose the Minute by lodging Answers as ordered or otherwise. The failure to take any steps is attributed to her poor health.

Grounds of Appeal

[16] The Grounds of Appeal are:

(i) The sheriffs erred by granting warrants for intimation of the Minute on 6 and 12 November 2020 as the respondent had failed to comply with OCR 33.44A(1) in that when lodging the Minute, the respondent did not submit a draft Form F9.

(ii) The sheriff erred in dispensing with intimation and the seeking of views in Form F9 to the child. The child is not of tender years as averred in the Minute by the respondent. At the date of the warrant she was 11½ years old. The child was more than capable of providing her views by way of Form F9.

(iii) The sheriff erred by granting decree on 2 February 2021 and varying the decree of 8 September 2015 by making a residence order in favour of the respondent and by granting interdicts (a) in the absence of any evidence of intimation of the Minute on the local authority as ordered; (b) in the absence of adequate evidence of proper lawful service of the interlocutor dated 12 November 2020, the Minute to Vary, Form G7 and productions on the appellant; (c) in the absence of any evidence of intimation of the interlocutor dated 10 December 2020 on the appellant and (d) without taking the child's views.

(iv) The sheriff erred in law in granting interdicts in terms of craves 2 and 3 of the Minute. OCR 33.44(1) allows for an application after decree relating to a section 11 order for, or for the variation or recall of a section 11 order or in relation to the enforcement of such an order to be made by Minute in the process of the action to which the application relates. The interdicts sought are not section 11 orders nor for the enforcement of a section 11 order.

(v) *Esto* the interdicts sought could competently be sought in Minute proceedings, there was no basis in fact or law to allow the court to make the orders. A residence order regulating the child's place of residence rendered the granting of a perpetual interdict against removal of the child from the care and control of the respondent otiose. An order relating to the child's

education should have been made by way of specific issue order, which would be capable of variation rather than by way of perpetual interdict which would not.

(vi) *Separatim*, the interdicts granted were not justified on the basis of the pleadings, ex parte submissions or the productions lodged. As drafted the craves for interdict are wider than are necessary to curb the illegal actings complained of.

[17] In respect of Ground of Appeal (iv), it was accepted by Mr MacRae that the reference ought to be to OCR 33.65 and not to OCR 33.44(1) as the present Minute is lodged not in a divorce action but in an action in which section 11 orders were sought. The terms of OCR 33.65 are different to OCR 33.44(1) as will be apparent when set out below. Nonetheless OCR 33.44A applies to minutes lodged under both rules.

Motion

[18] The appellant's primary motion is for the appeal to be allowed; to recall the interlocutors dated 6 and 12 November and 10 December all 2020 and 2 February 2021; to refuse to grant warrant to intimate the Minute to Vary number 8 of process; to dismiss the Minute i*n hoc statu* and to find the respondent liable to the appellant in the expenses of the appeal procedure.

[19] Alternatively, her motion is to allow the appeal; to recall the interlocutor dated 2 February 2021; to recall the interlocutors dated 6 and 12 November 2020 insofar as they dispensed with intimation and the seeking of views in Form F9 to the child due to her tender years, *ad interim* interdicted the appellant from removing the child out of the care and control of the respondent and furth of the jurisdiction of Tayside Central and Fife and, *ad*

interim interdicted the appellant from removing the child from school, without the permission of the respondent until further order of court; to remit the matter to the sheriff; to direct the sheriff to refuse to dispense with intimation and the seeking of the child's views in Form F9 and to require the respondent to lodge a draft Form F9; and thereafter to appoint intimation of the Minute number 8 of process on the appellant and Fife Council and to give the child, an opportunity to indicate whether she wishes to express views; and if so, give her an opportunity to express them and have regard to such views as are expressed and to find the respondent liable to the appellant in the expenses of the appeal procedure

List of Authorities

[20] The appellant relied upon the following authorities:

1. Ordinary Cause Rules 33.19D and 33.44A;
2. Children (Scotland) Act 1995 section 11
3. United Nations Convention on the Rights of the Child (1989) (Art 12)
4. *LRK* v *AG* [2021] SAC (Civ) 1
5. *M* v *C* [2021] CSIH 14
6. S Scott Robinson's *The Law of Interdict* Butterworth's 1987 pages 1, 2, & 15.
7. The Family Law Act 1986 section 35
8. *Murdoch* v *Murdoch* 1973 S.L.T. (Notes) 13

Legislation

[21] Section 11 of the Children (Scotland) Act 1995 provides:

"11 Court orders relating to parental responsibilities etc.

(1) In the relevant circumstances in proceedings in the Court of Session or sheriff court, whether those proceedings are or are not independent of any other action, an order may be made under this subsection in relation to—

(a) parental responsibilities;
(b) parental rights;
(c) guardianship; or
(d) subject to section 14(1) and (2) of this Act, the administration of a child's property.

(2) The court may make such order under subsection (1) above as it thinks fit; and without prejudice to the generality of that subsection may in particular so make any of the following orders—

(a) an order depriving a person of some or all of his parental responsibilities or parental rights in relation to a child;

(b) an order—

(i) imposing upon a person (provided he is at least sixteen years of age or is a parent of the child) such responsibilities; and

(ii) giving that person such rights;

(c) an order regulating the arrangements as to—

(i) with whom; or

(ii) if with different persons alternately or periodically, with whom during what periods,

a child under the age of sixteen years is to live (any such order being known as a "residence order");

(d) an order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living (any such order being known as a "contact order");

(e) an order regulating any specific question which has arisen, or may arise, in connection with any of the matters mentioned in paragraphs (a) to (d) of subsection (1) of this section (any such order being known as a "specific issue order");

(f) an interdict prohibiting the taking of any step of a kind specified in the interdict in the fulfillment of parental

responsibilities or the exercise of parental rights relating to a child or in the administration of a child's property;

(g) an order appointing a judicial factor to manage a child's property or remitting the matter to the Accountant of Court to report on suitable arrangements for the future management of the property; or

(h) an order appointing or removing a person as guardian of the child …

(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…

(10) Without prejudice to the generality of paragraph (b) of subsection (7) above, a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view for the purposes both of that paragraph and of subsection (9) above ...

(13) Any reference in this section to an order includes a reference to an interim order or to an order varying or discharging an order."

Ordinary Cause Rules

[22] OCR 33.65 in respect of applications after final decree in an action in which section 11 orders were sought provides:

"**33.65**. (1) An application after final decree for variation or recall of a section 11 order shall be made by minute in the process of the action to which the application relates.

(2) Where a minute has been lodged under paragraph (1), any party may apply by motion for an interim order pending the determination of the application.

(3) Rules 33.44A (warrants for intimation to child and permission to seek views) to 33.44D (views of the child – craves relating to a section 11 order sought by both minuter and respondent) apply (with the necessary modifications) to the seeking of the child's views in relation to a minute lodged in accordance with this rule."

[23] OCR 33.44A in respect of warrants for intimation to the child and permission to seek views provides:

"**33.44A.**(1) Subject to paragraph (2), when lodging a minute under rule 14.3 (lodging of minutes)(c) which includes a crave after final decree for, or the variation or recall of, a section 11 order in respect of a child who is not a party to the action, the minuter must—

(a) include in the minute a crave for a warrant for intimation and the seeking of the child's views in Form F9;

(b) when lodging the minute, submit a draft Form F9, showing the details that the minuter proposes to include when the form is sent to the child.

(2) Where the minuter considers that it would be inappropriate to send Form F9 to the child (for example, where the child is under 5 years of age), the minuter must include in the minute—

(a) a crave to dispense with intimation and the seeking of the child's views in Form F9;

(b) averments setting out the reasons why it is inappropriate to send Form F9 to the child.

(3) The sheriff must be satisfied that the draft Form F9 submitted under paragraph (1)(b) has been drafted appropriately(d).

(4) The sheriff may dispense with intimation and the seeking of views in Form F9 or make any other order that the sheriff considers appropriate.

(5) An order granting warrant for intimation and the seeking of the child's views in Form F9 under this rule must—

(a) state that the Form F9 must be sent in accordance with rule 33.44A(6);
(b) be signed by the sheriff.

(6) The Form F9 must be sent in accordance with—

(a) rule 33.44B (views of the child – unopposed minutes relating to a section 11 order), where the minute is unopposed;

(b) rule 33.44C (views of the child – craves relating to a section 11 order sought by minuter only), where the minute is opposed and a section 11 order is sought by the minuter only; or

(c) rule 33.44D (views of the child – craves relating to a section 11 order sought by both minuter and respondent), where a section 11 order is sought by both the minuter and the respondent."

[24] OCR 33.19D in respect of the sheriff's role in relation to views of the child provides:

"**33.19D**(1) In a family action, in relation to any matter affecting a child, where that child has—

(a) returned a Form F9 to the sheriff clerk; or

(b) otherwise indicated to the court a wish to express views, the sheriff must not grant any order unless an opportunity has been given for the views of that child to be obtained or heard.

(2) Where the sheriff is considering making an interim section 11 order before the views of the child have been obtained or heard, the sheriff must consider whether, and if so how, to seek the child's views in advance of making the order.

(3) Where a child has indicated a wish to express views, the sheriff must order any steps to be taken that the sheriff considers appropriate to obtain or hear the views of that child.

(4) The sheriff must not grant an order in a family action, in relation to any matter affecting a child who has expressed views, unless the sheriff has given due weight to the views expressed by that child, having regard to the child's age and maturity.

(5) In any action in which a section 11 order is sought, where Form F9 has not been sent to the child concerned or where it has been sent but the sheriff considers that the passage of time requires it to be sent again, the sheriff may at any time order either party to—

(a) send the Form F9 to that child within a specified timescale;
(b) on the same day, lodge—

(i) a copy of the Form F9 that was sent to the child;
(ii) a certificate of intimation in Form F9B."

Submissions for the appellant

The child's views

[25] In terms of OCR 33.44A (1), it was submitted that the Minuter ought to have included a crave for a warrant for intimation and the seeking of the child's views in Form F9 and submit a draft Form F9. The rule is subject to the provisions of paragraph (2) which allows for a crave seeking to dispense with intimation. Paragraph (1) does not provide "except where paragraph (2) applies" the Minuter must include a crave and lodge a draft form. If there were no requirement to crave a warrant for intimation and to lodge a Form F9 when seeking to dispense with intimation, then OCR 33.44A(1) would read "except where (2) applies".

[26] It was submitted that the second sheriff was correct when he states in his note that the text of the question cannot determine whether the question should be asked at all. However, the requirement to lodge draft Form F9 and the sheriff's duty to approve the draft or not serve as a check of the nature and content of the form. Had a draft Form F9 been lodged as required, the sheriff may have been alerted to the fact that the child was not in fact "of tender years".

[27] OCR 33.44A(2) gives a clear example of when it might be inappropriate to send Form F9 to the child, that is where the child is under 5 years of age. In light of that, it was submitted to be difficult to understand how, in the absence of any reason other than age alone, it was felt appropriate to seek to dispense with intimation and the seeking of views of a child nearly 12 years old.

[28] There is no note from the sheriff who dispensed with intimation on 6 November 2020.

[29] It is submitted that in pronouncing the interlocutor of 12 November 2020, the second sheriff erred (i) in dispensing with intimation and seeking the views of the child due to her tender years given he later recorded in his note that she was old enough to receive such a form of intimation; (ii) in taking into account an irrelevant consideration by anticipating that the Minute would be defended and (iii) stating that the issues raised in the Minute were too complex for the child to understand.

[30] On approving the draft Form F9, it is not then intimated on the child. The Minute is served on the opponent and intimation on the child comes later. There are three possible scenarios that follow and provision is made for the possibility of the Minute being opposed. The Form F9 must be sent in accordance with:

(i) rule 33.44B (views of the child – unopposed minutes relating to a section 11 order), where the minute is unopposed;

(ii) rule 33.44C (views of the child – craves relating to a section 11 order sought by minuter only), where the minute is opposed and a section 11 order is sought by the minuter only; or

(iii) rule 33.44D (views of the child – craves relating to a section 11 order sought by both minuter and respondent), where a section 11 order is sought by both the minuter and the respondent).

[31] It is not for the sheriff to speculate about whether the case will be opposed or not when deciding whether to order intimation or approve a draft Form F9. Even if taking account of whether the Minute might be opposed or not was a relevant consideration, the sheriff made no provision for what should happen if the Minute were not opposed.

[32] As further reasoning for not ordering intimation, the sheriff refers to what he categorises as the complex issues. The issues were not complex and could easily have been framed into questions readily understandable by a child of almost 12 years of age.

[33] When a sheriff determines to dispense with intimation and taking of views by way of Form F9 in anticipation that the child's views would have to be addressed in a more purposive manner, perhaps by a child welfare reporter later, that decision should be recorded in the interlocutor in order that the reasons for the decision are known and that the matter is not overlooked later.

[34] Notwithstanding the previous decisions to dispense with intimation and seeking the views of the child, the sheriff on 2 February 2021 misdirected herself by considering whether she should obtain the child's views under rule 33.19D and in determining that ordering the respondent to serve a Form F9 would not aid her decision given the reason for varying the order.

[35] The sheriff was duty bound to ascertain the child's views unless as a matter of practicability it was impossible to do so in terms of *LRK* v *AG* [2021] SAC (Civ) 1 at paragraphs [7] and [8].

[36] The sheriff misdirected herself in failing to take the child's views on the basis that the requirement and purpose of doing so is in order to comply with the terms of 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."

[37] The correct issue is the right of the child to be heard and not whether the taking of the child's views would assist the sheriff in her decision.

[38] The sheriff failed to apply the correct test as laid out in *M* v *C* [2021] CSIH 14 at paragraphs [2] and [12].

[39] The only views of the child available were those contained in the Notes of the Update Meeting for the child which was held virtually on 6th November 2020 and the Proforma For Child Wellbeing Meeting held on 12 November 2020.

[40] The views of the child as available to the sheriff on 2 February 2021 were not capable of permitting the court to disregard the duty imposed on it in terms of section 11(7)(b) of the Children (Scotland) Act 1995.

[41] In the context of taking the child's views before making a section 11 order, the court maintains judicial oversight over how the child's views are taken, whether by approving the terms of the draft Form F9, by specifying the issues in Form F44 when appointing a child welfare reporter or by the sheriff speaking to the child directly. The court had no oversight over the views.

[42] As craved, neither of the interdicts were section 11 orders and so the sheriffs do not appear to have concerned themselves with the question of whether to take the child's views. As matters affecting the child, then the child had the right to be heard on them. The right to be heard is not limited to being heard on applications for section 11 orders.

[43] The child was denied her right to have an opportunity to indicate whether she wished to express views (and if so, an opportunity to express them) on where she should reside (crave 1); whether the appellant should be interdicted from removing her out of the respondent's care and control and furth of the jurisdiction of Tayside Central and Fife or

whether the appellant should be prevented by interdict from removing her from her primary school without the permission of the respondent.

Interdicts

[44] The sheriffs erred in granting the interim interdicts as craved on 6 and 12 November 2020 and then perpetual interdict on 2 February 2021.

[45] Final decree was granted on 8 September 2015. In terms of OCR 33.44A an application after final decree for, or for the variation or recall of, a section 11 order or in relation to the enforcement of such an order shall be made by minute in the process of the action to which the application relates.

[46] In relation to the interlocutor dated 12 November 2020, the sheriff referred to the previous sheriff's consideration of the Minute and that he had granted certain interim orders that protected and maintained the *status quo ante*.

[47] It is submitted that an order granting the respondent interim residence would have protected and maintained the *status quo*. In the absence of a residence order in favour of the respondent, the granting of interim interdicts as craved could not be said to be orders in relation to the enforcement a section 11 order.

[48] The craves for interdict sought by the respondent in the Minute to Vary were common law interdicts. The sheriff has treated them as such and applied the test in *Bailey* v *Bailey* 1987 SCLR 1 when determining them.

[49] As the interdicts craved were common law interdicts they were not for, or for the variation or recall of, a section 11 order or in relation to the enforcement of such an order and as such interim or perpetual common law interdict could not competently be sought in terms of a minute in a closed process.

[50] An order in relation to the enforcement of the residence order would be an order for the delivery of the child not an order subjecting a person to possible breach of interdict proceedings in the event of a failure to continue to comply with it. Notwithstanding that the sheriff states the interdicts "were necessary to ensure enforcement of the residence order" the only reasonable explanation for the orders is that they were made to seek to ensure continued compliance with rather than enforcement of the residence order.

[51] Interdicting the appellant from removing the child out of the care and control of the respondent and furth of the jurisdiction of Tayside, Central and Fife does not assist in the enforcement of a residence order. Given its plain English reading the appellant would be required not only to remove the child from the respondent's care and control but also furth of the Sheriffdom in order to breach the interdict.

[52] Similarly interdicting the appellant from removing the child from school (for any rather than a specific reason) without the permission of the respondent does nothing to enforce the residence order.

[53] Interdict is an equitable remedy. As such it should be excluded where some alternative process to remedy the alleged wrong is available (S Scott Robinson *The Law of Interdict* 1987 at page 15).

[54] Read as a whole the messages relating to a move to the Faroe Islands are no more than speculative of an opportunity rather than indicative of any intention. If the respondent had a reasonable apprehension that the appellant may move to the Faroe Islands then that was the time to seek protective measures and not in November 2020 by which time the child was in his care and the Minute to Vary seeking a warrant and interim orders was lodged. There was therefore insufficient information from which the sheriff could conclude on 2

February 2021 that there was a reasonable apprehension that the appellant was going to move to the Faroe Islands with the child.

[55] In any event there were other remedies open to the respondent such as a section 11 order interdicting the respondent from removing the child to reside outwith the jurisdiction of the court except with the respondent's permission or order of court or an order under section 35 of the Family Law Act 1986 granting interdict or interim interdict prohibiting the removal of the child from the United Kingdom or any part of the United Kingdom except by order of Court.

[56] On reading the pleadings and the productions, it seems that the interdict sought at crave 3 is an inelegant attempt to regulate the child's schooling and as such the appropriate order would have been a specific issue order in terms of section 11.

[57] The opinion of the court in *Murdoch supra* at page 13 states:

> "Interdict, as is well known, is an equitable remedy designed to afford protection against an anticipated violation of the legal rights of the pursuer. In all cases, however, where interdict is granted by the court the terms of the interdict must be no wider than are necessary to curb the illegal actings complained of, and so precise and clear that the person interdicted is left in no doubt what he is forbidden to do."

[58] If it were competent for the court to grant the interdicts, the orders sought went far beyond what could be said to be necessary and as such decree should have been refused.

Intimation

[59] Finally, it was submitted that an issue arose in relation to what was termed inconclusive service of the Minute on the appellant and the lack of intimation on the local authority.

[60] The hearing on 12 November 2020 was assigned as a hearing on interim orders. In written submissions lodged in advance of the hearing, the Minuter advised of difficulties

with service and sought a continuation of two weeks to allow for service. The sheriff granted a fresh warrant to intimate.

[61] A certificate of service by sheriff officers was lodged on 12 November 2020, certifying personal service on the appellant on 11 November 2020. The certificate confirms that OCR 14.4.(1) was complied with insofar that form G7C, the Minute and interlocutor were served but there is no confirmation that the mandatory provisions of 14.4(1)(b)(iii) were complied with and that copies of the documents referred to in the minute were intimated. Some of the documents were referred to as incorporated into the Minute. As such failing to intimate them is no different to failing to intimate the whole of the Minute.

[62] The appellant at least had intimation of the part of Minute (but not the documents incorporated *brevitatis causa*) and of the interlocutor giving her 14 days to lodge Answers from 11 November 2020. However, on 12 November 2020 the Sheriff granted a new warrant ordering intimation of that interlocutor and allowing 14 days from that intimation to lodge Answers and assigned a hearing on 10 December 2020.

[63] Despite the interlocutor dated 12 November 2020 requiring intimation of the Minute, "this interlocutor" and form G7 on the appellant "forthwith" it was not until 7 December 2020 that anything was intimated and all the certificate of intimation records is that the agent intimated a "copy of the court interlocutor enclosing date of continued Interim Hearing on 7 December 2020." It appears that only the interlocutor of 12 November 2020 was intimated. There was nothing before the sheriff to indicate that, as required by the interlocutor of 12 November 2020, the Minute was re-served along with form G7C and the productions referred to in the Minute.

[64] The written submissions lodged by the respondent for the hearing on 10 December 2020 refer to service of the interlocutor only. The appellant being aware of the proceedings

is submitted not to be the same as lawful intimation. The interlocutor of 10 December 2020 made an interim residence order, assigned a procedural hearing for 2 February 2021 and ordered Answers to be lodged within 21 days if so advised. The interlocutor is silent on intimation of the Minute or the interlocutor itself.

[65] The submissions lodged in advance of the case calling on the 2 February 2021 stated that "Matters have been served on the Defender and Respondent and a Certificate of Service has been provided". They do not say what matters were served or when or which certificate of service is being referred to.

[66] When the sheriff dealt with matters on 2 February 2021 all that was available to her was a certificate of service from sheriff officers in respect of the (by then superseded) warrant of 6 November 2020 and proof of intimation on 7 December 2020 of the interlocutor dated 12 November 2020. There was no proof of intimation of the interlocutor dated 12 November 2020, along with Form G7C or the Minute to Vary or the productions on the appellant. Nor was there any evidence that the interlocutor dated 10 December 2020 had been intimated on the appellant. It is submitted that the appellant may have only herself to blame as she certainly had service of most of the required papers on 11 November 2020 albeit too late and she had intimation of the interlocutor of 12 November 2020.

[67] Of greater concern is the fact there was no indication of service on the local authority at any stage. The respondent's agent ought not to have moved for decree in the absence of intimation and the sheriff, before granting decree, should have sought a certificate of intimation and should have declined to grant decree until intimation had been effected.

Conclusion

[68] It is submitted that the failings are numerous and can broadly be set out as:

i. the respondent's false premise that the child was too young to understand proceedings;

ii. a failure to lodge a draft Form F9;

iii. a lack of focus on the procedure to be followed;

iv. the piecemeal service of some papers on the appellant;

v. a lack of clarity of what was served;

vi. the failure to intimate on the local authority, despite having specifically craved that;

vii. a motion for interim orders being made for common law interdicts which were not orders sought to enforce a section 11 order;

viii. a lack of clarity in those interdicts sought; and

ix. moving for decree when there had been no intimation or at least no proof of intimation on the local authority.

[69] The present Appeal could be allowed on any one of the three grounds, namely:

i. the failure to seek the child's views;

ii. the obtaining of interim and perpetual interdicts in a Minute to Vary which were neither section 11 orders themselves nor orders to enforce a section 11 order and which lacked clarity and precision resulting in them going way beyond what might be necessary; and

iii. the failure to intimate properly to the appellant or at all to the local authority as ordered (or certainly the failure to lodge certificates of intimation when moving for decree in order that the sheriff could satisfy herself that intimation had been effected).

[70] As a consequence of the *cumulo* effect of these three failures the appellant submitted that the appeal should be allowed and all orders recalled. That would return the respondent to the position he was in on 5 November 2020 by which time the child had been living with him for nearly a month. It would be open to him to lodge a fresh Minute.

[71] The secondary position of the appellant as set out at paragraph [19] above would leave an interim residence order in place but otherwise reset matters requiring the respondent to lodge draft Form F9 and re-intimate on all parties.

Expenses

[72] Given the repeated failures set out at paragraph [68], there was submitted to be no reason why expenses should not follow success. This is not a case where a single inadvertent
mistake at the outset had a catastrophic effect on everything that followed. The procedure adopted by the respondent has been beset by failure after failure.

Discussion

Child's views

[73] Section 11(7)(b) imposes a duty on the court, when considering whether to make a section 11 order, to give a child an opportunity to indicate whether he wishes to express his views, so far as practicable. The court requires to take account of the child's age and maturity.

[74] In the recent decision of *M* v *C supra,* Lord Malcolm, delivering the Opinion of the Court, stated at paragraph [12]:

> "Both section 11(7)(b) and article 12 of UNCRC place great weight on the right of a child to be heard in proceedings such as this. That right is not unqualified, but it will

> rarely be correct to conclude that seeking the views of a child will cause unavoidable and material harm to the child. "

[75] Further at paragraph [12], it is stated:

> "If children are of sufficient age and maturity to form and express a view, their voices must be heard unless there are weighty adverse welfare considerations of sufficient gravity to supersede the default position."

[76] The present Minute is an application after final decree for variation of a section 11 order. It proceeds under OCR 33.65. OCR 33.65(3) applies OCR 33.44A (warrants for intimation to child and permission to seek views) to such a Minute.

[77] OCR 33.44A provides the mechanism for intimation and the taking of views in Form F9. The provision for dispensation in OCR 33.44A(2) relates to whether it is "inappropriate". It does not refer to practicability which is the language of section 11(7). In our view the inappropriateness must refer to the Form F9 procedure rather than the taking of views.

[78] OCR 33.19D sets out the sheriff's role in relation to views of the child and, in particular, makes provision at paragraph (5) where a Form F9 has not been sent previously.

[79] This court does not have the benefit of a note from the sheriff who granted the interlocutor dated 6 November 2020. However, there is nothing before us to indicate that the child was not of sufficient age and maturity to form and express a view; that it was not practicable to consult her or that there were weighty adverse considerations of sufficient gravity to supersede opportunity being given to express a view.

[80] In seeking to dispense with intimation, crave 5 refers to the child's tender years and article 2 of condescendence refers to her being too young to understand the nature of proceedings.

[81] In his note to this court the sheriff, who granted warrant for re-service of the Minute and who again dispensed with intimation and the taking of views in Form F9 on 12 November 2020, accepts that the child was old enough to receive such a form of intimation.

He explains his decision to dispense with intimation and the taking of views in Form F9 by anticipating that the Minute would be opposed and by assessing the subject matter of the Minute as too complex for the child to understand.

[82] The sheriff who granted an order for interim residence in the respondent's favour on 10 December 2020 and subsequently granted the Minute as craved on 2 February 2021 did not give the child an opportunity to express her views. In her note to this court and under reference to OCR 33.19D, the sheriff explains that she determined that ordering the respondent to "serve" Form F9 would not aid her decision given that the reason for varying the decree was because the child was deemed unsafe in the appellant's care and that she had an indication of the child's views from an independent source in the form of the head teacher's input to the school update meeting.

[83] In the present action, the child was aged 11 years at the date of each of the interlocutors pronounced. She was not on any view "of tender years" as averred by the respondent in seeking to dispense with intimation and the taking of her views in Form F9 and as referred to by the sheriffs on 6 and 12 November 2020 when dispensing with intimation.

[84] The Minute discloses no averments to suggest that the child was not capable of forming a view, that it was not practicable to consult her or that she was not of sufficient age and maturity to form and express a view. The reference to "tender years" and "unable to understand" are suggestive of a formula rather than of any particular consideration given to the individual child. It may well be the case that a child will not understand the full import of proceedings but that ought not to inhibit completely their participation in the making of decisions affecting them and does not reflect the statutory test. Similarly, there is nothing to suggest adverse welfare considerations of sufficient gravity to supersede the default position

of giving an opportunity to express a view. As such, we conclude that having regard to the duty imposed on the court under section 11(7)(b) of the 1995 Act, there was no basis for the sheriff to dispense with intimation and the seeking of the child's views in Form F9 on 6 November 2020 and certainly not on the basis that the child was of tender years.

[85] In relation to the interlocutor dated 12 November 2020, again there appears to be no basis for dispensation of intimation and the seeking of views. We acknowledge that the sheriff on that date in effect granted warrant for re-service in identical terms to that granted on 6 November 2020. The sheriff in his note accepts that the child was old enough to receive such intimation and explains that he anticipated that the Minute would be defended, thereby providing an opportunity to revisit the issue of the child's views. In the event, the Minute was not opposed and there was nothing in the interlocutors dated 6 or 12 November 2020 to alert any later sheriff that the taking of the child's views remained outstanding.

[86] In the absence of any such indication, the sheriff who considered the Minute and interim orders on 10 December 2020 may have lost sight of the court's duty under section 11(7)(b) of the 1995 Act and may have given undue weight to the decisions of the two sheriffs dated 6 and 12 November 2020. It is appreciated that these were interim orders sought on the basis of averments of child protection concerns and while opportunity was being given for the now appellant to enter proceedings by lodging Answers.

[87] However, by 2 February 2021 when the case called in chambers, the unopposed motion was for decree in terms of the craves, namely for a residence order, interdict against removal from the respondent's care and control and from the sheriffdom and removal from the child's school. The orders sought were of significance in respect that the child had resided *de facto* with the appellant until 10 October 2020 albeit she had resided with the respondent since then. From her note, the sheriff is clearly reluctant to embark upon an

exercise of seeking the child's views and considers that she can ascertain the views to an extent from school and social work records. Nonetheless, a residence order is now in contemplation and a child almost aged 12 years has not been given an opportunity to express a view. There are no circumstances which would militate against the opportunity being given in terms of maturity, practicability or welfare.

[88] It follows that an opportunity not having been given to the child at each stage when decisions were taken that any views which she may have wished to express were not taken into account.

[89] In such circumstances, we conclude that in dispensing with intimation and the seeking of views of the child and in granting the interim residence and residence orders, the respective sheriffs failed to comply with the duty imposed on the court by section 11(7)(b) of the 1995 Act. As such, we consider that the present appeal should be allowed and that the residence order and interdicts should be recalled and the matter should be remitted to the sheriff for consideration afresh in respect of intimation and the seeking of views of the child.

[90] As referred to above OCR 33.44A provides the mechanism for intimation and the taking of views in Form F9, having regard to the requirement of section 11(7)(b) of the 1995 Act. Form F9 provides the opportunity for the child to express a view or to indicate that she would like to express a view in a different way.

[91] There may be circumstances where the court determines that consideration as to how best to give the child an opportunity to express views should be deferred pending further procedure. That may arise having regard to the particular child's maturity, issues of practicability or potential welfare concerns. There may be concerns that the issue of a Form F9 may cause distress or anxiety to the child; there may be other ways of securing views such as the appointment of a child welfare reporter. The court may require more

information and may welcome input from both parties on how best to engage the child in the process. However, such consideration does not negate the duty imposed upon the court by section 11(7)(b). Any such deferral ought to be recorded in the warrant or interlocutor to ensure that the issue remains extant.

[92] Standing our decision to grant the present appeal in respect of the child's views, it becomes unnecessary to address in detail the issues of the interdicts and intimation. Nonetheless, we make the following restricted observations.

Interdicts

[93] In relation to whether it was competent to seek the interdicts in the present Minute lodged under OCR 33.65 (and not OCR 33.44 as erroneously referred to in the Grounds of Appeal), interdicts could be sought in terms of section 11(2)(f) of the 1995 Act. We accept that the sheriff presiding on 2 February 2021 appears not to have considered the interdicts in terms of section 11 orders. It is, however, important to note the scope of orders which may be sought under section 11 and that that those orders specified in section 11(2) are not exhaustive.

[94] The appellant contends that an interdict under section 11(2)(f) or any other interdict is not a variation or recall of a section 11 order in terms of OCR 33.65. It seems to us that the first consideration is whether the Minute was competent under OCR 33.65 in respect that it sought variation of the section 11 order granted on 8 September 2015. We consider that the Minute was competent in that respect. Notwithstanding any criticism of the width and appropriateness of the interdicts, they were arguably necessary to maintain the *status quo* pending consideration of any section 11 order after due notice. That being the case, it would be unduly cumbersome for such interdicts not to be sought in a competently presented

Minute as opposed to in a distinct initial writ which would proceed under distinct rules and a distinct timetable. That cannot be the intended purpose of OCR 33.65.

Intimation

[95] It was fairly conceded by Mr MacRae that he could not address the court with certainty as to precisely what had been served upon the appellant. In such circumstances, we cannot make a determination in relation to any potential deficiency in intimation. The terms of OCR 14.4(1) are clear in terms of what requires to be intimated.

[96] Clearly, any certificate of intimation ought to specify precisely what has been intimated.

[97] With respect to the apparent failure to intimate the Minute to the local authority in terms of the warrant craved and granted, we consider that the sheriff considering the undefended Minute on 2 February 2021 ought either to have continued consideration for intimation or for a certificate of intimation to be lodged. In the event that she considered such intimation unnecessary on the basis of the available information, including information from the social work department, she ought to have recalled the warrant.

Decision

[98] Accordingly, we allow the appeal; recall the interlocutor of the sheriff dated 2 February 2021; *ad interim* grant a residence order in favour of the respondent in respect of the child and remit to the sheriff to determine further procedure, such procedure to include consideration of the seeking of views of the child. We grant an interim residence order so that there is no change in the child's current residence as a consequence of the outcome of the appeal.

[99] Having regard to the appellant's failure to take any steps in response to the Minute which was served personally upon her, we find no expenses due to or by either party in relation to the appeal.