SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

Process number F999/07

NOTE

on the objection taken on

8th April 2010

in causa

A.W.B..

PURSUER

against

J.P.

DEFENDER

Act : Mr. Gordon

Alt : Miss Seenan

[1] This family action has been raised by the father of the defender's son, L.A.W.P. pursuer seeks both an order granting him parental rights and responsibilities in respect of L and extensive, regular and recurrent contact to him both residential and non-residential in nature.

[2] After sundry procedure the action called before me for a diet of proof. At the outset the solicitor for the pursuer intimated that he was instructed to restrict the order the pursuer sought to a request for supervised contact in a contact centre. That was a significant restriction in what the pursuer craves. He did not insist at this stage in his crave for parental rights and responsibilities and what he did seek by way of contact fell comfortably within the first of the five separate elements of his crave for contact.

[3] As a result of that restriction in the scope of the proof, the parties agreed that the more appropriate mode of inquiry to deal with it was a child welfare hearing whose less formal structure could include whatever evidence the parties wished to lead. I agreed with that approach and the diet proceeded in that form.

[4] The pursuer gave his evidence and then closed his case. At the very outset of the defender's evidence and while she was being asked why she wished to withhold details of her present address from the pursuer, the solicitor for the pursuer intimated an objection to this proposed non-disclosure. The solicitor for the defender indicated that she opposed disclosure. I therefore heard their submissions for and against disclosure.

The submissions for the pursuer

[5] The solicitor for the pursuer submitted that a party to an action ought to be designed by reference to his or her name and address. In this case the defender was so designed when the action commenced, but since then she had moved to a different address. She had not amended her designation in the instance of the Initial Writ to reflect that change and she had not justified in her pleadings withholding her address or resorted to the use of an accommodation address. He relied upon the decision in the case of *Doughton v Doughton* 1958 S.L.T. (Notes) 34 for his submission that in these circumstances the defender was obliged to disclose her present address. He said that the ratio of the decision covered the situation where a party changed address as had the

defender but she had not complied with that requirement. Disclosure of her present address was necessary for any contact order that the Court might make. He understood that the defender conceded that she had no averments to justify the use of an accommodation address and that her solicitor would seek leave to amend the instance to give her present address.

The submissions for the defender

[6] The solicitor for the defender did not make the anticipated concession or motion. Instead she accepted that the instance gave the defender's former address but submitted that it was for the pursuer, as she described it, to "chase up" the issue of where the defender currently resided. Turning to the duty to disclose she said that her understanding of that duty was as in paragraph 16.40 of Macphail, Sheriff Court Practice: "Where necessary for the administration of justice, as where a witness is reasonably in a state of fear, these personal details, or some of them, may be written down at the discretion of the sheriff." The details in question are described in the preceding sentence as "full name, age, address, occupation and, where appropriate, rank and experience (as in the case of a police officer) or professional qualifications and experience (as in the case of a skilled witness)". The decision in the case of *Doughton* was not in point for three reasons: in the present case the defender's address in the instance was correct as at the date of warranting; the present pursuer was aware that the defender had changed her address but had done nothing towards asking the court to have her disclose it until now; and in any event on the matter of disclosure the court had a discretion but there had to be averments to support non-disclosure. She submitted that the defender's averments on record about the pursuer's conduct towards her were sufficient for this purpose but in saying that accepted that the most recent one averred dated from December 2006, making it of some antiquity. She then said that if I thought that the averments to support non-disclosure were insufficient she would move for leave to amend her pleadings to take account of that. She accepted that in the absence of disclosure of the present address for the defender there might be problems with enforcement of any court order relating to contact. Then, somewhat surprisingly, she said that if she withdrew from acting on behalf of the defender she would ensure that the court was aware of the defender's present address and the court could then intimate documents on her. She submitted that there were sufficient averments on record relating to the pursuer's conduct in the past to merit the defender keeping private her present address. The solicitor for the pursuer indicated that he did not wish to respond to what had been said on behalf of the defender.

The additional authorities

[7] I thought it right at this juncture to bring to the attention of parties the content of paragraph 9.79 of Macphail, third edition, and three of the cases referred to in one of the footnotes (number 36): *Murdoch v Young* 1909 2 S.L.T. 450; *Stein v Stein* 1936 S.C. 268; and *McColl v McColl* 1949 S.L.T. (Notes) 11. I gave the solicitors time to consider them all.

The additional submissions for the pursuer

[8] The solicitor for the pursuer submitted that all three decisions lent, as he put it, "grist to his mill". All three supported circumstances in which the court required disclosure of a present address. The argument that the pursuer could have moved the court for disclosure was neither here nor there. When the action was raised with a first order on 20 July 2007 the defender did not feel the need to withhold her address. In her defences, lodged on 19 December 2007, she stated that her correct address was flat 7/1 not flat 7/7. He cast doubt on where the defender's reasonable fear for her safety came from in light of what she founded upon for this purpose in her pleadings, and said that this question was unanswerable at present.

The additional submissions for the defender

[9] The solicitor for the defender said that she had drafted the defences and then signed them. Due to an error on her part she had incorrectly averred the number of the flat but the rest of the address given for the defender was correct at the time. The pursuer had been aware of it because he had exercised contact there to their son after the parties had separated. It was when she drafted the Minute of Amendment for the defender

that became number 15 of process that she added the averments about the change in the defender's address. That Minute was lodged on 9 November 2009. She said that the pursuer did not choose to answer that Minute and as a consequence took no issue with the designation of the defender as residing at an undisclosed address. The solicitor for the defender then reiterated that she would provide the defender's present address to the court but not to the pursuer. As justification for this she relied on the sentence previously quoted from Macphail at paragraph 16-70 but in doing so accepted that it was not vouched by any authority. She submitted that the decisions in *Murdoch* and *McColl* were not in point but did not explain why, and that the decision in *Stein* was what she described as elderly but nonetheless relevant. She concluded by reiterating that she was willing to disclose the defender's present address to the court if the court were against her on non-disclosure. The solicitor for the pursuer said that he did not wish to respond.

Discussion

(i) The issue

[10] The issue in determination raised by the pursuer's objection was whether in the circumstances of this case the defender was justified in maintaining her non-disclosure of her present address. The pursuer submitted that she was not, the defender that she was. She wanted the Court to exercise its discretion in her favour on the basis of her averments on record regarding the conduct of the pursuer. Failing that, she was prepared to inform the Court, but not the pursuer, of that address.

(ii) The relevant facts

[11] In the course of the hearing on the objection there emerged a number of facts that both parties worked with. The parties had met in 2000, shortly after the defender had given birth to her daughter C.P., and began a relationship. A few weeks after L was born to them, the relationship had ended. Thereafter the pursuer had exercised contact to L under an informal arrangement between the parties on a number of occasions including regular weekly residential contact between February and November 2006, but that arrangement had broken down during that Christmas. Contact had been reinstated in April 2007 but had lasted for only a matter of weeks. The pursuer had not exercised contact since then.

[12] He commenced the present action on 20 July 2007. The defender resided then at the address given for her in incomplete form in the instance: a flat in the Gorbals, Glasgow G4 0BE. The pursuer effected service of the Initial Writ on her there. He was aware of that address because the parties had lived there together for some time along with L and his older half-sister C.P. the defender's pupil daughter by an earlier relationship. The defender's solicitors lodged defences on her behalf on 19 December 2007 in which they admitted her designation in the instance under explanation that her correct address was Flat7/1. In fact it was truly Flat 7/7. At some indeterminate point in time while the action was in dependence she moved from there to her present address. That occurred after 19 December 2007 and before 9 November 2009, the date on which her solicitors lodged with the Sheriff Clerk's department a Minute of Amendment for the defender which became number 15 of process. Its first paragraph sought to delete the averments in Answer 1 relating to her address and substitute for them two sentences in the following terms: "The Defender formerly resided at the address in the instance and is now resident at an undisclosed address. She does not wish the Pursuer to be aware of her current whereabouts." Its second paragraph sought to add at the end of Answer 2 the following in response to the pursuer's averment that L resided with the defender at the address in the instance, which was admitted, that this was: "under explanation the Defender was resident at the address in the instance when this court action was raised. She is no longer resident at the address in the instance." The rest of the Minute was almost entirely taken up with proposed averments that would increase the specification of her existing averments about incidents that happened during their relationship and prior to their separation which on any view (there was a dispute as to its exact date) occurred early in 2005 although there was reference to one subsequent incident in February 2006. None of these incidents was said to be linked to her wish to keep private her present address. By interlocutor dated 24 November 2009 the Court allowed her to amend her

pleadings in terms of the Minute without answer from the pursuer who was neither present nor represented. The Record was not further amended before the diet of proof.

[13] The averments on record that the defender founded upon to justify non-disclosure of her present address occur in Answer 4 and related to his conduct towards her. They included bare allegations of physical and verbal abuse and of having to act in self defence against his violent conduct, a charge of assault by him on her in 2002 that resulted in a verdict of not guilty, an allegation that he assaulted her on 19 February 2006 by dragging her by the hair. The most recent incident, involving an allegation of verbal abuse, was said to have occurred on 27 December 2006. In addition she averred that the pursuer had been abusive to her mother and her new partner but none of these incidents was ascribed to a period after December 2006. Beyond admitting that he was found not guilty of the alleged assault in 2002 the pursuer denied all of these averments of conduct on his part.

(iii) The relevant law

[14] The relevant law is as set out in a succession of cases decided in the Court of Session. The ones referred to in the hearing were: *Murdoch v Young* 1909 2 S.L.T. 450; *Stein v Stein* 1936 S.C. 268; *McColl v McColl* 1949 S.L.T. (Notes) 11; and *Doughton v Doughton* 1958 S.L.T. (Notes) 34. I consider that all are in point for present purposes.

[15] The cornerstone of the law is the observation of Lord Justice-Clerk Inglis in the case of *Joel v Gill* (1859) 22 D. 6 at page 12: "I would state it as a general rule that the proper designation of any person is a statement of his present occupation and residence." That observation is quoted with approval in both *McColl* and *Doughton*, both decisions of the same judge, Lord Guthrie. It also receives the more recent support of Macphail *Sheriff Court Practice*, 3rd edition (2006) at paragraph 9.79 subject to the observation that the practice of stating the party's occupation appears to have died out (note 35). For present purposes that posed no problem because attention was focussed purely upon the defender's present place of residence, or address as it is now more commonly described. Although the case of *Joel* was concerned with an aspect of the law of sequestration, Lord Justice-Clerk Inglis made his observation in the part of his opinion in which he considered what was meant by the designation of a party. In context it was apt to have an application that went beyond the facts of the case, and must be held to have been intended to have that purpose. That is the interpretation that it has received subsequently as shown by its adoption with unqualified approval in the decisions in *McColl* and *Doughton*, and also in Macphail.

[16] I took it as settled law that in general the proper designation of the present defender should narrate her present address. It was accepted that she had not complied with that legal requirement and had not done so since moving from the address that was still given for her in the instance of the Initial Writ but departed from in her averments.

[17] In light of that acceptance, the focus of attention shifted to whether the law allowed her to keep her present address to herself and her advisers.

[18] In *Murdoch*, an action of damages for seduction, the female pursuer had moved address while the action was depending before the Court of Session. Nothing in the report suggests that she advanced any reason why she should not disclose her address. The Outer House judge, Lord Cullen, ordered her to disclose it.

[19] *Stein* involved a petition to the *nobile officium* under the Trusts (Scotland) Act 1921, section 16 in relation to a trust-estate in which the respondent enjoyed the liferent and her issue the fee. The respondent separated from her husband, leaving him with the responsibility of caring for their two children, then still in pupillage. He petitioned the Court on behalf of the children for an order in their favour authorising an advance out of trust funds in which the interest of the children was as yet contingent. When she lodged her answers to the petition, the respondent designed herself care of her law agent, whereupon the petitioners asked the court to direct her to state her proper address. When she failed to do that, they enrolled a motion for

an order upon her to disclose her private address and also the address of a business where she was employed, because it was alleged her private address was liable to change. She countered by saying that she had left her husband on account of his ill-treatment of her and she was afraid of further molestation if she disclosed her address. She offered to disclose her address to the Court without disclosing it to her husband and children. The First Division of the Inner House gave their decision in the form of an interlocutor. They did not deliver opinions. That interlocutor required her to disclose her private address but not her business address. The mode of disclosure was directed to be by amendment of her answers.

[20] In *McColl* the wife pursuer in an action of divorce designed herself as care of the firm of solicitors whom she had consulted. In her averments she said that she and her husband were not residing together. When the action was enrolled by her for an allowance of proof, Lord Guthrie refused the motion *in hoc statu* in order that the instance of the summons might be amended to the effect of stating the actual place of residence for the time being of the pursuer.

[21] *Doughton* was also an action of divorce, this time at the instance of the husband. Both he and his wife were designed in the summons at addresses that were care of their respective solicitors and stated this was because when they separated each declined to disclose his or her address to the other. The Lord Ordinary, Lord Guthrie, before whom the proof was led, stated that a summons in which the parties were not correctly designated was not in proper form and should not be received in the offices of the Court. The extract from His Lordship's opinion quoted in the report states:

"I wish to make it clear that a summons in which the parties are not correctly designated is not in proper form and should not be received in the offices of the Court. If it is received in error, the action cannot be allowed to proceed until the rules of procedure have been complied with. In McLaren's *Court of Session Practice* page 293, the author, when dealing with the instance of a summons, says: 'Care must be taken that parties to an action should be designed by their proper Christian and surnames in full and their present address'. In *Joel* v *Gill* (1859) 22 D. 6 at page 12, Lord Justice-Clerk Inglis said: 'I would state it as a general rule that the proper designation of any person is a statement of his present occupation and residence.' When the true address of a party is not given he is not properly designed, and accordingly the summons is not properly framed. The Court will not allow parties to use an accommodation address in a summons in order to conceal their whereabouts. Counsel and solicitors should not prepare a summons in which the addresses of parties are not truly stated. The public disclosure in the rolls of Court of the correct designation of the parties is a safeguard against abuse of process and may enable an interested person to intervene. There are circumstances in which the Court will dispense with the necessity of disclosing the address. For example, where a wife has been subjected to persistent cruelty, and it is a reasonable inference from the circumstances that if her address were made known to her husband she would suffer further molestation, the Court will not insist on her address being disclosed. But where this privilege is sought, the facts must be fully stated in the summons. The Court has frequently drawn attention to the necessity of compliance with correct procedure in this matter, and I regret that I have again to do so in this case."

[22] From all these case I induced the following eight propositions: -

- The general rule is that the present address of a party to an ordinary cause action must be disclosed.
- Should a party change address while such an action is in dependence then that party is under an obligation to inform the court of that fact.
- If that party does not wish to disclose his present address, then he must set out why in his pleadings.
- The reasons to support that departure from the general rule must be stated fully. An averment that one party was not residing with the other is insufficient to justify the non-disclosure of a present address (*McColl*).
- In deciding whether to allow a party to preserve the requested anonymity, the Court hearing the cause exercises a discretion.
- The discretion is wide. It can extend to denying to the party who wishes to maintain their anonymity of residence the right to proceed with the action at least until the issue of disclosure of present residence

has been addressed to the satisfaction of the Court (*McColl*). It could involve requiring disclosure in a way that inevitably brought the address of the party to the knowledge of the other parties to the action (*Stein*).
- The discretion has to be exercised on the basis of the information supplied to the Court at the hearing when the issue is being debated.
- The discretion can involve whether to allow the party to disclose the address to the Court alone.

(iv) The application to this case

[23] Applying those propositions to the present case, I decided as follows. The general rule applied to this case. It applies to ordinary cause family actions with the same rigour as it does to all other classes of ordinary cause actions where the designation of parties is governed by the common law.

[24] The defender changed address during the course of the action. She did not give her present address in her pleadings and to that extent they departed from the general rule. She had the opportunity afforded by the Minute of Amendment to state her reasons fully in support of that non-disclosure but she did not take it. Beyond that she did not do so prior to the proof diet.

[25] The obligation to disclose or explain fully why there should be no disclosure rested upon the defender. It did not rest on the pursuer to come to court and ask the court to order disclosure. The submission to that effect was misconceived for it inverted the law and inverted the obligations imposed by the law. The mere fact of the change of address was insufficient to entitle her to refrain from disclosing it.

[26] What she averred on record came nowhere near satisfying me in the exercise of my discretion that I should sanction her departure from the general rule. She founded upon her concerns over the conduct of the pursuer towards her, but the last example founded upon dated from late December 2006. She conceded, rightly, that this made it of some antiquity. I agreed. In fact they all pre-dated the raising of the current action. She was unable to point to any conduct that was more recent in either her defences or her subsequent Minute of Amendment. The antiquity of those averments, practically all of which were in any event denied, taken together with the unspecific nature of many of them, robbed them of any value for the purpose of justifying the non-disclosure of her present address. I accordingly sustained the objection that in principle she ought to disclose it.

[27] But to whom ought she to make that disclosure? This will always depend upon the facts and circumstances of the individual case and, as observed in the quotation from Macphail that the defender founded upon, the consideration of what was in the interests of the administration of justice.

[28] What the pursuer seeks in the hearing is contact. Arguably if that is to take place only at a contact centre, where the parties are kept apart from each other and contact is supervised by members of staff of the centre, then the pursuer does not have much need to know her present address than if contact were being exercised elsewhere. But that is not conclusive. The pursuer seeks orders in this action for far more than supervised contact in a contact centre: he seeks an order granting him parental rights and responsibilities and contact that in nature and scope go far beyond what I have to deal with in this evidential child welfare hearing. The requirement to disclose attaches to the action as such and not just to the hearing on which the court is currently engaged.

[29] The onus to disclose rests upon the defender. If she wished to restrict disclosure she must adduce reasons in support of that restriction that satisfy the court as to its justification on the facts and having due regard to the proper interests of the administration of justice. The defender adduced nothing that made me conclude that she should be entitled to restrict her disclosure to intimating it to the Court. Indeed I saw force in the concession made by her solicitor that continued non-disclosure might result in problems with the enforcement of any order for contact. Any such order would be in favour of the pursuer and if the anticipated problems arose it would be for him initially to take steps to enforce the order rather than have the court take

that initiative. In all the circumstances I concluded that she was required to disclose her present address by amending her pleadings and that it was insufficient for her to hand a note of that address to the Court alone.

The consequence

[30] After I gave my decision the solicitor for the defender moved to amend the designation of the defender in the instance of the Initial Writ by deleting her former address and substituting her present one. There was no opposition to that motion, and I granted it. The hearing thereafter proceeded.