SHERIFF APPEAL COURT

[2017] SAC (Civ) 18
[EDI-F797-11]

Sheriff Principal M M Stephen QC
Sheriff Principal D L Murray
Sheriff Principal M W Lewis

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M STEPHEN QC

in appeal by

R.F.

Minuter and Appellant;

in the cause

A.F.

Pursuer and Respondent:

against

R.F.

Defender and Minuter;

Act: Party Appellant
Alt: Party Respondent
Amicus Curiae: Miss Springham QC

2 March 2017

[1] This case is concerned with S (born 7 February 2008). The parties are S's parents. They married on 7 September 2007; separated on 25 July 2010 and were divorced at

Edinburgh Sheriff Court on 29 May 2013. S is the only child of the marriage and has resided with her mother since the parties separated. The appellant has contact with S.

[2] Litigation began in respect of the consequences of the separation and S's welfare in 2011. The case was allocated to the docket of an experienced family sheriff sitting in the family court at Edinburgh who heard the proof on divorce and ancillary craves in 2013 and issued a judgment on 29 May 2013 which divorced the parties and regulated matters relating to S such as residence and contact.

[3] The same sheriff has also dealt with two minutes (Nos 16 and 17 of process) lodged in the same process by the appellant. Both these minutes were disposed of without proof. The first of 18 November 2013 was disposed of by way of consent orders made on 5 December 2013. The second minute asked the court to make orders in respect of S's dental treatment including orders depriving the respondent of parental rights and responsibilities in relation to that dental treatment. The second minute was disposed of following a detailed written arrangement being agreed between the parties. This is attached to the interlocutor of 25 March 2015. A further matter arose relating to summer contact which was disposed of by interlocutor dated 28 April 2015.

[4] In this appeal S's father challenges the sheriff's decision to refuse Crave 1 of his third minute lodged following divorce in that process. That minute is No 19 of process. It was warranted on 11 November 2015 and answers have been lodged on behalf of S's mother. A child welfare hearing was assigned for 28 January 2016 when the sheriff, having heard agents for both parties, appointed Mrs Oswald as curatrix ad litem to S. The curatrix prepared a report dated 2 March 2016. On 8 March 2016 procedure in respect of the minute and answers was sisted until recalled on 5 May 2016. At a child welfare hearing on 15 June

2016 all matters save Crave 1 were resolved either by agreement or by the sheriff determining the issue.

[5] Crave 1 of the third minute is the focus of this appeal. The crave is in the following terms:-

> "1. To make a specific issue order finding the minuter and/or his family entitled to contact with the child S. S.F. born 7 February 2008 Mondays after school for the purpose of taking S to see Dr Jaclyne Di Croce, Child Psychologist, for as long as the court considers it appropriate to do so;"

In relation to this crave the child welfare hearing was continued until 19 July when the sheriff appointed the curatrix to report back on the remaining issue. A further child welfare hearing was fixed for 14 September. As the sheriff records, by this time neither party was represented and it appears no agreement could be reached as to the funding of Mrs Oswald's appointment. Nevertheless, Mrs Oswald did undertake further enquiries and reported to the court by letter dated 3 August 2016 specifically on Crave 1. That letter was available to the sheriff. It is clear that the sheriff attached particular weight to the material from the curatrix. The sheriff records at paragraph [7] of his note:

> "In the course of that letter Mrs Oswald recorded that she had spoken to both parties since the preparation of her previous report. The respondent recorded that S continues to be a happy child and doing well at school. She continues to receive good school reports. The minuter acknowledged that S was doing well at school but he still felt it was necessary for S to see a psychologist. His concern was that even if S was not exhibiting difficulties at this stage difficulties will manifest themselves when she becomes older. In discussing matters with the minuter, he accepted that the conflict between S's parents was what potentially poses a risk to S's wellbeing. Conflict arose because of direct contact between the parents and now that there was no direct contact there was no possibility of conflict. He said that S would be able to enjoy a relationship with each of her parents without any risk of exposure to conflict. Mrs Oswald recorded that as a consequence of the arrangement by which the parties will no longer come into contact with each other S would not have contact with the minuter during Easter, Summer and Christmas holidays. Contact may happen should S be visiting the minuter's family. Mrs Oswald was clear on her conclusion that there was no need for S to attend a psychologist. She concluded that there was adequate support in

> place at school should S need to speak to anyone and if there is to be no further direct contact between the parties there will be no further conflict. She recorded that the minuter is keen to have a proof because he has a 'mountain of evidence' that he intends to present to the court. When asked about the implications of court proceedings and the consequences for the family situation, he said that he would be representing himself and that there would be no cost to him. Mrs Oswald was of the view that it was in the best interests of S for there to be no ongoing litigation as it may only serve to further entrench positions."

[6] The sheriff specifically asked the appellant what evidence it was he wanted to lead should proof be allowed. At para [8] of his judgment he records:

> "His response for me was that he would lead evidence from Dr Di Croce, a clinical psychiatrist; his wife; his former solicitor; himself and he was also clear that S should be called as a witness. The minuter wanted to lead evidence about what he said the respondent said to S. In his submission the respondent was emotionally abusing S."

Before the sheriff the respondent's position was that it was wholly unnecessary for S to see a psychologist. There was nothing wrong with S's behaviour. The problem relates to the contact arrangement between the parties. If the respondent had to call witnesses she would call the Head Teacher and S's former class teacher.

[7] The sheriff observes that Ordinary Clause Rule (OCR) 33.22A which regulates procedure at a Child Welfare Hearing provides that it is the duty of the sheriff to "*secure the expeditious resolution of disputes in relation to the child by ascertaining from the parties the matters in dispute and any information relevant to that dispute*". The sheriff may make any such order as he thinks fit. The sheriff concluded with reference, not only to the terms of the rule, but to *McCulloch* v *Sumpter* 1999 SCLR 159 and *Hartnett* v *Hartnett* 1997 SCLR 525, that proof is not obligatory and that he had sufficient material before him to come to a conclusion as to the disputed crave. The sheriff is obliged to have regard to section 11 of the Children (Scotland) Act 1995 as this is an order relating to the exercise of parental rights and responsibilities.

The sheriff's decision on the disputed crave and his reasons for refusing to make an order and dismissing the minute may be found at paragraph [11] of his judgment.

The Appeal

[8] S's father appeals the decision of the sheriff on 26 September 2016 to refuse the first crave of his minute. The grounds of appeal focus on (i) the sheriff's decision to deal with the matter at a child welfare hearing; and (ii) the sheriff's failure to act in the child's best interests as he did not take S's views into consideration, thereby dismissing the role and value of evidence and overlooking the significance of section 11(7B) of the Children (Scotland) Act 1995. The appellant wishes a proof so he can lead evidence in order to secure an order that would "protect the child from any abuse; or the risk of any abuse, which affects, or might affect, the child; the effect of such abuse, or the risk of such abuse, might have on the child" as outlined in that section.

[9] When the appeal called before a single appeal sheriff at a procedural hearing on 16 January 2017 neither party was legally represented. The appeal sheriff, with the consent of the parties, ordered that the appeal should proceed under standard procedure and appointed an *amicus curiae* to assist the court on the matters at issue. These are - firstly, whether the sheriff, in refusing to allow a proof, erred in law; secondly, whether the decision of the sheriff at a child welfare hearing absent further evidence was in breach of Article 6 of the European Convention on Human Rights and the Human Rights Act 1988; and thirdly, the extent of discretion open to the court to determine the issue where the giving of evidence by the child (aged 8) may of itself be prejudicial to the child particularly where examination and cross-examination may be by her parents, the opposing parties to the action.

[10] At the appeal hearing the parties presented their arguments without legal representation. Miss Springham QC appeared as *amicus curiae*. The role and function of the *amicus* was explained to the parties. We emphasised that the *amicus* is appointed to assist the court by presenting a neutral appraisal of the issues which require to be decided and by raising considerations that might not otherwise come to the court's attention. The *amicus* has no interest in the cause, and does not represent the view of one or any party. The *amicus* advises on points of fact or law purely for the information of the court or to correct a mistake. The *amicus* is not appointed to assist either party.

Appellant's Submissions

[11] In his submission to us the appellant referred to his recently revised and reformatted note of argument. His first and principal argument is that a sheriff requires either evidence or the views of the child when making a decision regarding the best interests of the child. It is errant in law to omit both. The appellant considered that the sheriff had erred in law by refusing to hear oral evidence in circumstances where the views of the child were not available to him. In the case of *McCulloch* v *Sumpter* the sheriff spoke to the children about residence and contact with their father and therefore had available to him the children's views. The sheriff did not have S's views here. In the case of *A* v *B* 2011 SLT (Sh Ct) 131 the sheriff had a psychological report, here there is none. The purpose of the minute is to ensure that S has the coping mechanism to deal with the effects of her parent's separation and animosity when she gets older. The input of a clinical psychologist will assist. The sheriff ought to have allowed evidence to be led at proof to establish the benefits to S of having professional input from Dr Di Croce.

[12] The second leg of the appellant's argument appeared to be that he was denied or would be denied an appeal or a right of appeal by virtue of the sheriff's failure to allow

evidence to be led. He could not challenge the sheriff's findings. Reference was made to *JA* v *JJH* [2016] SAC Civ 002 and *Hartnett* (*supra*). This point was not persisted in following discussion which indicated to us that the appellant, who was without legal representation, misunderstood the distinction between the giving of oral evidence and the making of a submission. At the child welfare hearing on 14 September 2016 the sheriff considered the written material available to him and the oral submissions made by both parties at the hearing. The appellant's core argument is best confined to the first ground of appeal which attacks the sheriff's decision firstly, to determine Crave 1 at the child welfare hearing and secondly, to refuse proof.

[13] The appellant's third point related, in effect, to what he described as change in circumstances. The respondent's partner had now been convicted of an assault on him perpetrated when S was present (the complaint is page 486 of lever arch file no 2). This may impact adversely on S. S had not had the option of art therapy as suggested by the curator in her report. He refuted the suggestion that S had support at school and he ought to be allowed to lead evidence about that. Finally, due to the physical assault on him and the respondent's emotional abuse of S section 11 (7)(B) of the Children (Scotland) Act 1997 applies. The sheriff ought to have had regard to that important consideration. Had he done so he would have allowed a proof. In all these respects the sheriff erred and the appeal should be allowed.

Respondent's Submissions

[14] The respondent considered that the sheriff was correct to refuse to make a specific issue order requiring that S attend a psychologist. The sheriff had sufficient material to make his decision. The sheriff had the curatrix's report. The respondent agreed with the conclusion of the curatrix that there was no evidence whatsoever that her daughter required

psychological input. She agreed that there had been difficulties between the parties however she had always supported and encouraged S to have a good and ongoing relationship with her father. S has a good relationship with both her parents and their new families.

Amicus Curiae

[15] The amicus referred to her note (no 8 in the appeal process). She concluded that the court can make a final decision at a child welfare hearing without oral evidence under reference to the authorities of *Hartnett* v *Hartnett* and *McCulloch* v *Sumpter* (*supra*). The question for this court was whether the sheriff had sufficient material to make a decision. The sheriff had significant knowledge of the family background having heard proof in the divorce action. The subsequent post decree procedure and minutes had been heard in the main by the same sheriff who had case managed proceedings and conducted the child welfare hearings. That sheriff had the report by the curatrix and the supplementary letter. The sheriff had a brief letter from Dr Di Croce dated September 2015 but no further notes of medical examination, interview or treatment. The sheriff's decision attached particular weight to the curator's report. OCR Rule.33.22A gave the sheriff wide powers to reach a decision. The *amicus* was unable to detect any error of law in the sheriff's approach.

[16] The sheriff's approach is consistent with the right to a fair hearing under Article 6 of the European Convention on Human Rights. Article 6 does not specify the type of hearing to which persons are entitled. Reference was made to *Friend (Whaley)* v *The Lord Advocate* 2008 SC (HL) 107 and *BLCT* v *J Sainsbury PC* [2003] EWCA Civ 884. Arden LJ at para 37 states:

> "in my judgment, the true principle is that, in order to determine whether an oral hearing is necessary for Article 6 purposes, the nature of the application must be examined to seek whether an oral hearing is required."

The decision of the sheriff principal in *A* v *B* (*supra*) is consistent with that approach. In that case the sheriff had made a decision based on a psychologist's report without allowing the parties sight of that report or indeed allowing parties to make submissions. In these specific and unusual circumstances the sheriff principal considered there had been a breach of Article 6. In this case there had been an oral hearing. The sheriff had documentary evidence and oral submissions. The question whether the sheriff ought to have allowed a proof with oral evidence to allow the appellant to call witnesses including S was a question which the sheriff required to determine having regard to the circumstances of the case. In this connection *In re W (Children)* [2010] UKSC 12 may be of assistance. In that case the court considered the right to a fair trial in terms of Article 6 in the context of child welfare proceedings following complaints of sexual abuse by a child of 14 against her stepfather. The essential test where a child is to give evidence is "whether justice can be done to all the parties without further questioning of the child." In this case the sheriff assessed the issue he required to determine and concluded that he had sufficient evidence to come to a decision. The giving of evidence by a child may of itself be prejudicial to the child particularly where examination and cross-examination would likely be by her parents who are not legally represented. This situation has been considered in *M* v *B* 2016 SLT (Sh Ct) 279. The sheriff concluded that it would not be conducive to S's welfare for this matter to go to proof. The *amicus curiae* was unable to identify an error of law in the sheriff's approach.

Decision

[17] The issue which the sheriff required to decide is whether a well adjusted happy child who enjoys a good relationship with each of her parents and their new families, should require to undergo pre-emptive medical intervention by a psychologist primarily on account of the parties' difficult relationship with each other. It is not disputed that at the heart of this

case lies the parties' inability to get on with or communicate with each other. The sheriff, who has had longstanding involvement in this family's significant and acrimonious litigation, acknowledges this in paragraph [11] of his judgment:

> "There is no dispute that the relationship between the parties is acrimonious and has been for many years. The passage of time has done nothing to reduce the mutual antipathy. That is a major issue".

The appellant himself recognises as much when he seeks the specific issue order. In correspondence with his ex-wife which is available to the court the appellant states:

> "I have arranged for S to see a child psychologist. This is to help her cope and work through the difficulty of having two households that do not get along. I'm concerned for her mental health and emotional wellbeing."

However we detect an absence of any independent evidence which raises any concern about S's emotional wellbeing. The brief letter from the psychologist Dr Di Croce identifies no reason or underlying purpose for S attending for therapy or how S would benefit from that therapy. On the other hand, the curatrix who is an officer of the court appointed to safeguard the interests of S in so far as affected by these proceedings, is independent. Her function is to represent S's interest to the court and she has done so in the form of written reports. She identifies no need for S to attend a psychologist.

[18] The sheriff attached particular weight to the material from the curatrix as he was entitled to do. The sheriff was able to draw on his own experience of hearing the proof and having dealt with previous minutes. The *de quo* of the sheriff's decision is as follows:

> "S is, by all accounts, happy and content. There is no evidence of a present necessity for psychological intervention. The problem is the relationship between the parties. It seems to me to be entirely wrong to insist that S attend a psychologist because the adults cannot put their differences aside. It is up to the adults to act in a responsible way. It is not in S's interests to be the centre of yet more litigation. This is the third minute in this process. There is also insufficient material to show what benefits S would receive from psychological involvement. A lengthy and complicated proof, conducted by party litigants, with the child called as a witness, and a speculative outcome

> is not in S's interests. Taking all of these considerations together, I am satisfied that I can and should decide the matter on the basis of the material before me and that it would not be conducive to S's welfare for this matter to go to proof. I shall accordingly refuse the crave and dismiss the minute."

[19] We look at the sheriff's duty when he requires to determine whether to make the specific issue order which the appellant seeks. A specific issue order relates to parental rights and responsibilities in terms of section 11 of the Children (Scotland) Act 1995. The sheriff must have at the forefront of his mind the paramount consideration of S's welfare. The sheriff cannot make an order unless he considers that it would be better for the child that the order be made than no order at all (section 11(7)). We are satisfied that the sheriff applied the statutory welfare test and that he conducted a careful assessment of the material before him together with the submissions of the parties. It is clear to us that he regarded S's welfare as the paramount consideration and refused the minute firstly, as he could find no basis on the material before him which points to the necessity for psychological intervention in S's interests and secondly, that a "lengthy and complicated proof, conducted by party litigants, with the child called as a witness, and a speculative outcome is not in S's interest" We do not accept the submission that the sheriff erred in his overall approach to his decision making process.

[20] Of course, it is contended that the sheriff erred in determining the matter at a child welfare hearing. OCR 33.22A sets out the sheriff's powers and duties at such hearings. The rule enjoins the sheriff "to seek to secure the expeditious resolution of disputes in relation to the child by ascertaining from the parties the matters in dispute and any information relevant to that dispute". The parties come under a duty to provide the sheriff with sufficient information to enable him to conduct the child welfare hearing and the sheriff may make such order as he thinks fit. The sheriff is entitled to reach a decision and pronounce a

final interlocutor at a child welfare hearing providing there is material before him which enables him to reach a decision which in this case is whether or not to make the specific issue order. There requires to be sufficient material which bears upon the paramount consideration of S's welfare. Crucially, the sheriff here had the benefit of a report and a supplementary report from the curatrix who was able to convey S's own circumstances and views. We say this as a generality it being unnecessary and indeed inappropriate for the court to have S's views on the specific question of whether she should undergo pre-emptive psychological treatment. That is a question for the sheriff whose judgment is based on the submissions and material before him. This sheriff, in particular, is well placed to come to a judgment as he has a significant knowledge of S's and the parties' circumstances and dynamics since the date of the divorce.

[21] In our opinion the sheriff's determination of the matter at the child welfare hearing and the terms of OCR 33.22A are consistent and compatible with the parties' Article 6 rights. It is settled law that it is competent for a sheriff to make final orders at a child welfare hearing (*Hartnett* v *Hartnett* and *McCulloch* v *Sumpter supra*). Article 6 does not require a specific type of hearing or specifically a hearing with oral evidence. The type of hearing will depend on the nature of the issue which the sheriff has to resolve (BLCT (*supra*)). The sheriff had available to him ample material on which he could determine the matter; and the parties made oral submissions. By contrast, in *A* v *B* the sheriff made a decision as to the welfare of children without allowing parties to make submissions and without permitting the parties sight of a crucial psychological report. That constituted a contravention of Article 6. *A* v *B* is correctly decided on its facts which are far removed from the circumstances of this case.

[22] The question remains whether the sheriff erred in refusing proof. The appellant wishes to call witnesses, including S, at proof. Baroness Hale in *re W* (*supra*) [para 24] stressed when the court is considering whether a child should be called as a witness the court will require to make an assessment whether justice can be done to all the parties without further questioning of the child. The court will have to weigh two considerations namely the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of the child. That case involved child welfare and care proceedings following allegations of serious sexual abuse perpetrated by the stepfather who was a party to the cause. The child witness may have been required to give evidence to assist the court in the determination of the truth of these serious allegations. By contrast this case is solely directed to the welfare of S herself. There is no clear evidence as to what benefit S would gain from attending a psychologist. All agree that S is a happy well adjusted child. The sheriff has conducted an assessment and could find no advantages in calling the child, but could clearly identify that a lengthy and complicated proof, conducted by her parents as party litigants, with at best a speculative outcome would not be in S's interests. Not only do we agree with that conclusion but we consider that there would be a real risk that a continuation of this litigation with S at its centre would be damaging to her welfare. Accordingly, we do not accept the submission that the sheriff erred in refusing proof. In these circumstances we consider that the sheriff could be criticised had he allowed proof at large standing the appellant's intention to call S and present a "mountain of evidence", the relevance of which was not explained to the sheriff.

[23] In his argument before us it became clear that the appellant's intention was to lead evidence to discredit the respondent, S's mother, and her partner. The respondent, of course, has been S's principal carer since she was born and S has lived with her mother since

the parties separated. The appellant suggested that the respondent emotionally abuses S and that he will bring evidence to support that assertion. S would give evidence about that. He also addressed us on the physical assault perpetrated on him by the respondent's partner who has now been convicted in the JP Court. He argued that section 11(7B) of the 1995 Act applied and the sheriff ought to have had regard to that important provision. We agree with the sheriff when he concludes at [para 11] "It is not in S's interests to be the centre of yet more litigation". Section 11(7B) was not raised before the sheriff who heard no submission on the matter of abuse. The allegation of assault was made in March 2016 and was therefore well known when the sheriff was deciding this matter. It is also known that S was present. There is no material to suggest that S was affected adversely or otherwise by the incident. The matter which the sheriff required to determine was whether to make the specific issue order relating to S's attendance at a psychologist rather than wide ranging inspecific allegations of abuse. We do not accept the submission that the sheriff erred, either in his approach to the decision making process or in the decision which he made. The sheriff did not fall into error in refusing proof. He was entitled to determine this specific issue crave on the material he had available to him at the child welfare hearing. The sheriff was in our opinion correct in his assessment that it would not be conducive to S's welfare for this matter to proceed to proof. We therefore propose to refuse the appeal.