SHERIFF APPEAL COURT

[2021] SAC (Civ) 28
ABE-F380-20

Sheriff Principal A Y Anwar
Appeal Sheriff W H Holligan
Appeal Sheriff A Cubie

STATEMENT OF REASONS

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR

in appeal by

AND

Pursuer and Appellant

against

KWL

Defender and Respondent

Pursuer/Appellant: Innes QC; Grant Smith Law Practice Ltd
Defender/Respondent: Bell, Advocate; DJP Solicitors

22 July 2021

Introduction

[1] This appeal concerns a child who is 7 years old. The appellant is the child's mother. The respondent is the child's father. The appellant appeals against an interlocutor of 8 March 2021 in terms of which the sheriff refused the appellant's crave for a specific issue order permitting her to remove the parties' child from Scotland to reside with her in Istanbul.

[2] The appellant is a petroleum engineer working in the oil and gas industry. She was made redundant from her employment in Scotland in May 2020 and remained

unemployed until obtaining employment in the oil and gas industry in Istanbul in December 2020. At the time of the proof she remained resident in Scotland but intended to move to Istanbul to commence her employment.

[3] The sheriff explains at para [149] of his note that:

> "My decision to refuse the appellant's crave for a specific issue order was fundamentally based on my concerns about the feasibility of the appellant's proposals for [the child's] basic everyday care in Istanbul".

[4] In particular, the sheriff was concerned that the appellant had not visited the accommodation in Istanbul which she had arranged for herself and the child 10 days before the proof; that she had not visited the school in which she intended to enrol the child; and he held concerns in relation to the general viability of the appellant's plans to combine her professional life with her everyday responsibilities towards the child (para [149] to [167] of the sheriff's note). While the sheriff explained that there were other peripheral matters which were relevant to his decision, he formed the impression that the appellant's plans for relocation had been hastily assembled and he did not have the confidence that she could execute them. In those circumstances, he concluded that it was not in the child's best interests that the specific issue order sought by the appellant should be granted.

The procedural hearing before this court

[5] At a procedural hearing before this court on 8 June 2021, counsel for the appellant explained that circumstances had changed since the appeal had been lodged and thus if successful, the appellant would seek to have the case remitted to the sheriff to hear further evidence restricted to the change of circumstances. The appellant had now moved to Istanbul to commence her employment. She had not moved to the accommodation referred

to in the sheriff's note. Having moved to alternative accommodation, she now proposed to enrol the child in a different school, in the event that he was permitted to relocate with her. At the procedural hearing, parties were invited by the court to consider whether the appropriate course of action was to proceed by way of a Minute to Vary rather than this appeal.

The appeal hearing

[6] At the appeal hearing before us, senior counsel for the appellant explained that the appellant insisted upon the appeal. She invited this court to delete the sheriff's findings in fact and law and remit the cause to the sheriff to consider of new the appellant's application for a specific issue order on the basis of updated evidence.

[7] Senior counsel was again invited to explain why the appellant chose not to proceed by way of a Minute to Vary. She explained that this was an action for orders in terms of section 11 of the Children (Scotland) Act 1995 ("the 1995 Act") to which rule 33.60 of the Ordinary Cause Rules 1993 ("OCR") applied. OCR 33.65 sets out the circumstances in which a Minute to Vary can be lodged. OCR 33.65 presupposes that an order in terms of section 11 of the 1995 Act had been made by the court. As no such order had been made by the sheriff, there was no order capable of variation or recall. A Minute to Vary could not competently be presented. Senior counsel explained that her instructing agents had experience of courts refusing to accept a Minute to Vary in such circumstances. Were the appellant successful in the appeal, she would invite the court to remit the matter to the sheriff court to allow a renewed application for a specific issue order to be presented, that being the procedure adopted by the Inner House in *M* v *M* 2012 SLT 428. Were the appellant unsuccessful in the appeal, she would seek to lodge a new action.

[8] On behalf of the respondent, counsel submitted that circumstances having changed since the sheriff issued his decision, the appeal served no practical purpose and should not be entertained. The issue of whether the sheriff was correct in refusing the section 11 orders sought by the appellant was now academic. The courts should decide only live, practical questions and should have no concern with hypothetical or academic questions (*Macnaughton* v *Macnaughton's Trustees* 1953 SC 387, Lord Justice Clerk (Thomson) at page 392). It was inevitable that the appellant would require to amend her pleadings and that further evidence would require to be heard in light of the appellant's change of circumstances. That could be achieved by way of a proof in terms of chapter 23 of the Act of Sederunt (Sheriff Appeal Court Rules) 2015, by the appellant lodging a Minute to Vary or by the appellant commencing a fresh action. Mr Bell conceded that there had been a material change of circumstances which would justify a Minute to Vary being presented to the court. [9] Following an adjournment to allow senior counsel for the appellant to take instructions, the court was advised that the appeal was no longer insisted upon and that the appellant would proceed by way of a Minute to Vary.

Competency issues

[10] As concern had been expressed in relation to the practice in some sheriff courts of refusing to accept Minutes to Vary lodged in terms of OCR 33.65 as incompetent where a section 11 order has been refused, we consider it important that we set out our views on this matter.

[11] Orders in relation to parental rights and responsibilities are sought in terms of section 11 of the 1995 Act. Section 11(1) of the Act is the following terms:

"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"

[12] Section 11(2) describes the type of orders the court may make:

"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.

(2A) An order doing any of the things mentioned in subsection (2) is to be regarded as an order in relation to at least one of the matters mentioned in subsection (1)."

[13] An application for an order under section 11 of the 1995 Act in a family action other than an action of divorce, separation or declarator of nullity of marriage is made in terms of Part IX of chapter 33 of the OCR. OCR 33.65 applies to applications by way of minute after final decree. It is in the following terms:

"(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."

[14] While a strict interpretation of OCR 33.65 may lead to the conclusion that such applications can only be made when an order under section 11 of the 1995 Act has been granted in the sheriff court, in our view, such a narrow and literal interpretation is unwarranted. It must be borne in mind that the court rules are designed to provide the machinery by which orders in terms of section 11 may be sought. Section 11(2) is without prejudice to the generality of section 11(1). A refusal to grant a section 11 order is nevertheless, an order made "in relation to" parental rights and responsibilities. A refusal has the effect of regulating the arrangements or the specific question which were the subject of the application.

[15] The purpose of the Minute to Vary procedure in a family action is clear. The procedure enables actions which have at their heart the welfare of a child, to be dealt with in one court process. It allows the sheriff to consider what previous decisions have been made by the court in relation to the child and the family, why such decisions have been made and what, if anything, has changed in the child's or the parties' circumstances which might warrant further involvement of the court. The Minute to Vary process is an expeditious means by which to seek orders upon such a change of circumstances. Were OCR 33.65 to be read such as to exclude the possibility of a minute in proceedings where a court had considered and refused an application for a section 11 order, parties

would be left with the expense and delay which would inevitably result from a new, separate action. Such an outcome would be undesirable, unduly cumbersome and inimical to the expeditious resolution of cases involving children. Moreover, it cannot reasonably be maintained that the legislature intended those who are granted an order under section 11 should have access to the minute procedure, but those who are refused an order under section 11 should not. The courts should be slow to take a legalistic or mechanical approach to procedural rules in issues involving the welfare of a child.

[16] We are fortified in our view by an analysis of the circumstances in which a minute may be presented after final decree in Part IV of chapter 33 of the OCR. OCR 33.38 provides that Part IV of chapter 33 of OCR applies to an action of divorce, separation or declarator of nullity of marriage. OCR 33.44 which deals with applications under section 11 of the 1995 Act after final decree in such actions in the following terms:

> "(1) 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."

[17] The language used in OCR 33.44 is different from that used in OCR 33.65. The latter refers to "an application after final decree for variation or recall"; the former refers to "an application after final decree *for, or* for the variation or recall" (emphasis added). We are not persuaded that where a court has refused to grant a section 11 order, the differing language in these court rules was intended to provide parties in an action of divorce, separation or declarator of nullity of marriage with a more expeditious means of seeking a section 11 order after final decree, than those parties in an action which originally only sought a section 11 order. The use of the words "for, or" simply reflects

the reality that in many actions for divorce, no section 11 orders are sought, arrangements for the care of children having been agreed between the parties.

[18] Indeed, in the present case, the parties were, as a matter of fact divorced in March 2019. No order relating to the child was sought in those proceedings. It is unclear to us why these proceedings were not in fact presented to the court as a Minute to Vary in the divorce action (in term of OCR 33.44) rather than a separate, new action.

[19] Where a change of circumstances is asserted during an appeal, the proper course of action is to proceed by way of a Minute to Vary and not to invite an appellate court to engage in an academic exercise and thereafter remit the matter back to the sheriff to hear evidence based on out of date pleadings. The observations made by Lord Hope of Craighead in *Sanderson* v *McManus* 1997 SC (HL) 55 (at page 58) in a case where an appeal was sought in relation to a sheriff's refusal to grant access to a child, apply equally to this case:

> ". . in almost every such case it is likely to be preferable, rather than pursuing a succession of appeals through the courts, to make a fresh application for access to the judge at first instance on the ground of a change in circumstances."

An appeal in such circumstances represents delay and expense which must be avoided.

Decision

[20] Counsel for the respondent conceded that there had been a material change of circumstances. He submitted that the question of the appellant's accommodation, the proposed arrangement for the child's schooling and the arrangements for taking the child to and from school "went to the root of the sheriff's decision". In our view that concession was properly made. Following consideration of the issues discussed at the appeal hearing, the appellant withdrew the appeal and intimated her intention to proceed by way of a Minute to

Vary.

[21] Accordingly, we refuse the appeal as no longer insisted upon. We will grant the expenses of the appeal in favour of the respondent and sanction the appeal as suitable for the employment of junior counsel, both of which were conceded on behalf of the appellant.