SHERIFF APPEAL COURT

[2022] SAC (Civ) 19

Sheriff Principal A Y Anwar
Sheriff Principal N Ross
Appeal Sheriff A MacFadyen

OPINION OF THE COURT

delivered by Sheriff Principal A Y Anwar

in appeal by

M

Defender and Appellant

against

M

Pursuer and Cross-Appellant

Defender & Appellant: Ms Colledge, Solicitor; Colledge and Shields LLP
Pursuer & Cross-Appellant: Mr Dewar QC; Ms Cartwright, Advocate; Andrew Haddon & Crowe

30 June 2022

Introduction and background

[1] Three young children lie at the heart of this protracted family action; AM who is 10, BM who is 8 and CM who is 6. Their parents have been engaged in litigation for approximately five years. Both parents sought orders in terms of section 11 of the Children (Scotland) Act 1995 ("the 1995 Act"). Their mother, the pursuer, sought a residence order in respect of the children. Their father, the defender, sought a residence order, which failing an order for direct and indirect contact with the children and a specific issue order allowing

him to take the children abroad on holiday. The parties also sought divorce and various financial orders. The craves for financial orders were dismissed on 13 February 2019 on joint motion. Decree of divorce was granted on 20 February 2019. Further proceedings were thereafter restricted to the orders sought in respect of the children.

[2] Following a number of abortive attempts, a proof eventually took place at [redacted] Sheriff Court on 4 and 11 May, 8, 9 and 16 July 2021. The sheriff provided parties with an ex-tempore decision on 16 July 2021. The pursuer was found entitled to a residence order in respect all three children. The defender was found entitled to contact with BM and CM. No order for contact was made in respect of AM. There then followed a series of procedural hearings while contempt proceedings were commenced. The sheriff dealt with the expenses of this action on 12 November 2021.

[3] The defender has appealed the sheriff's decision to refuse to make an order for contact between the defender and AM. He also appeals the sheriff's subsequent decision to make an award of no expenses due to or by either party.

[4] The pursuer has cross-appealed the sheriff's decision to grant an order for contact between the defender and BM and CM.

[5] For ease of reference, the parties are referred to as pursuer and defender throughout this judgment.

The sheriff's decision

[6] Following delivery of the sheriff's ex-tempore decision, the defender requested a note from the sheriff in terms of OCR 12.3(3). Having regard to the grounds of appeal set out below, it is necessary to set out in full the sheriff's findings in fact and law:

"[1] After the parties' separation in May 2016 the defender enjoyed contact to the three children of the marriage.

[2] Prior to the parties' separation AM had witnessed the defender being violent to the pursuer on at least one occasion.

[3] On 27 April 2018 the parties entered into a Minute of Agreement in which they agreed that the defender would have both residential and non-residential contact.

[4] The contact arrangement did not progress smoothly. All three girls exhibiting a degree of resistance to contact. The eldest child of the marriage AM showing the greatest reluctance ultimately refusing to attend for contact.

[5] While the pursuer paid lip service to encouraging contact, the encouragement was neither wholehearted nor genuine.

[6] The defender exhibited frustration and impatience with the pursuer's approach to contact and the children's unwillingness to 'do as they were told'. On occasions the defender's frustration would result in him losing his temper while the children were present.

[7] Many contacts did not proceed as planned despite various handover locations being attempted.

[8] Notwithstanding the pursuer's lack of genuine support for contact on 27 January 2020 by way of a joint motion the parties agreed to a joint residence order in relation to the two youngest children BM and CM. This provided initially for three alternate weekend stays from Friday to Saturday and the alternate weekends from Friday to Sunday.

[9] The children were to be picked up from their respective school and nurseries.

[10] Three contact visits took place beginning on 7 and 21 February and 6 March 2020.

[11] In relation to the contact commencing 7 February 2020, BM was extremely reluctant to leave pick up point at her school. It took approximately 40 minutes to persuade her to leave with the defender.

[12] In the course of the first contact visit an anonymous neighbour called the police expressing their concern about the apparent distress of BM and CM. When the police arrived the children were no longer upset and expressed no wish for the contact visit to be terminated early.

[13] As for the visit starting on 21 February both girls were reluctant to attend contact but less so than on the first occasion.

[14] On 6 March 2020 there was still a degree of reluctance on the part of the girls to attend contact but this was less than on the first two contact visits.

[15] All three girls have expressed a desire to have no contact with the defender to Dr Edwards [sic]. The children are currently aged 9, 7 and 5.

[16] As a consequence of the Covid 19 outbreak contact in accordance with the interlocutor of 27 January was stopped and has not been resumed since."

[7] The sheriff made the following findings in fact and law

"[1] In terms of the Children (Scotland) Act 1995 (the Act) it is better that an order is made than no order.

[2] In terms of Section 11 of the Act that it is in the best interest of the three children, AM, BM and CM reside with the pursuer.

[3] In terms of Section 11 of the Act it is in the best interest of the children BM and CM that they have contact with the defender."

Grounds of appeal

Appeal by the Pursuer

[8] The pursuer appeals the sheriff's interlocutor dated 12 July 2021 on the following grounds:

1. The sheriff erred in law by failing to have regard to sections 11(7A) to 11(7E) of the Children (Scotland) Act 1995 ("the 1995 Act");

2. Having made findings in fact in relation to the defender's violent conduct, the sheriff failed to have regard to the ability of the parties to co-operate in relation to handover arrangements in terms of section 11(7D);

3. The sheriff erred in law by failing to provide reasons for his rejection of parts of the evidence of a jointly instructed expert, Dr Edward.

Appeal by the defender

[9] The defender appeals the sheriff's interlocutor of 12 July 2021 on the following grounds:

1. The sheriff's decision was irrational. His reasoning in his ex tempore judgment was materially different to that set out in his subsequent note. He has erred in law in his approach to Rule 12.3(3) of the Ordinary Cause Rules 1993 ("OCR").
2. The sheriff has failed to have proper regard to AM's welfare as being the paramount consideration in terms of section 11(7)(a) of the 1995 Act;
3. The sheriff has failed to carry out a proper balancing exercise and in particular has failed to take account of the benefit to AM of contact with the defender, the potential harmful consequences for the child of her negative views of the defender which views were not justified and the harm to her wellbeing were she to have no contact with the defender;
4. The sheriff failed to make findings in fact on material matters led in evidence;
5. The sheriff's decision represented an unwarranted interference with the defender's Article 8 right to a family life;
6. The sheriff erred in law by treating AM's views as determinative of the question of contact between AM and the defender.

[10] The defender also appeals against the sheriff's interlocutor of 12 November 2021 on the grounds that (a) the sheriff had exercised his discretion to refuse to find the pursuer liable for expenses unreasonably and (b) in any event, he had failed to provide reasons for his refusal.

Submissions on the pursuer's appeal

Submissions for the pursuer

[11] The pursuer invited the court to recall the sheriff's interlocutor of 16 July 2021 and to remit the cause to a different sheriff to proceed as accords, failing which, to recall the sheriff's interlocutor and to consider the cause anew. Upon consideration of the matter anew, the court was invited to delete finding in fact 5, delete in part findings in fact 8, 13 and 14, make 35 additional findings in fact and make 2 new findings in fact and law. In relation to the proposed new findings in fact, counsel referred to various pages of the transcript of evidence which had been made available to the court.

[12] While three distinct grounds of appeal were advanced, counsel for the pursuer submitted that they all fell into the same broad challenge, namely, that the sheriff's decision was inadequately reasoned and failed to take into account the relevant considerations in terms of section 11 of the 1995 Act. Lord Emslie's observations in *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 at page 348, applied to a broad range of decision makers, including sheriffs; the sheriff was required to give proper and adequate reasons for his decision which dealt with the substantial questions in issue in an intelligible way. His failure to do so amounted to an error of law. While the welfare test in section 11(7) of the 1995 Act is fact and circumstance dependent, it remains presumption free (*Donaldson* v *Donaldson* 2014 Fam LR 126 at para 27). The welfare test does not permit a decision maker to simply make whatever decision he considers appropriate; he requires to consider all of the evidence and to weigh it carefully before reaching a decision on what the welfare of the child requires (*Osborne* v *Matthan* 1998 SC 682 per Lord President Rodger at pp688 to 689).

[13] The sheriff made two findings of "abuse" as defined by section 11(7C) of the 1995 Act (findings in fact 2 and 6). The findings are oblique and lack specifics. The first is framed

from AM's perspective only. The pursuer had given evidence of numerous occasions when the defender had been violent or abusive to her. There was considerable evidence from a number of sources about the defender's loss of temper and how it would manifest itself. The sheriff had made no attempt to reason the impact upon the pursuer of any domestic abuse nor how that abuse may affect pursuer's ability to co-operate with the defender.

[14] The sheriff had failed to provide any reasoning as to why, in light of the findings of domestic abuse, contact handovers should take place at the pursuer's home. There was considerable evidence that the children refused to attend contact. The sheriff has failed to reason why the children were unwilling to attend. The evidence of Dr Edward supported the conclusion that handovers were a significant problem when they had taken place at school.

[15] The expert witness, Dr Edward, had offered the opinion that contact between the children and the defender would not be successful while AM and BM held the view that he was a negative presence in their lives. She had concluded that she could offer no opinion on how contact could be reinstated as it was predictable that attempts to do so while AM and BM held such strong views would fail, which would cause distress, entrench their views and impact negatively upon them and upon CM. This evidence was highly relevant. While counsel accepted that the sheriff was entitled to accept or reject Dr Edward's evidence, he was obliged to explain why. He had failed to do so.

Submissions for the defender

[16] On behalf the defender, Ms Colledge accepted the legal principles set out on behalf of the pursuer. The sheriff had correctly applied these principles in relation to the orders

made in respect of BM and CM, however, he had failed to apply these principles in relation to AM.

[17] It was apparent from findings in fact 2 and 6, that the sheriff had in mind the duty upon him to consider the matters set out in section 11(7A) to (7E). Parties had entered into a Minute of Agreement in respect of their children in April 2018. Further orders were agreed in 2019 and 2020. Upon the discharge of a prior diet of proof in January 2020, the parties had agreed an interim arrangement for contact and residence. At a case management hearing, the sheriff had made it clear that the focus of the evidence required to be on the events post the agreement of January 2020. The sheriff had been correct to conclude that findings in fact 2 and 6 did not justify refusal of contact. There was no error of law in relation to BM and CM, however there had been an error of law in relation to AM (that being one of the grounds of the defender's appeal).

[18] The sheriff had been entitled to reach his own judgement as to the most appropriate handover arrangements. The context of the sheriff's decision included various failed prior arrangements for handovers. Significantly, handovers appeared to operate more smoothly when the pursuer was undergoing a Parenting Assessment by social workers. In the submissions at the conclusion of the proof, the pursuer made no suggestions as to how contact handovers would be facilitated. The defender would accept any alternative handover arrangements.

[19] In relation to the third ground of appeal, Dr Edward did not provide clear and unequivocal evidence to the court that an order for contact between the defender and the children would not be in their best interests. Dr Edward provided two reports. Following her first report, parties agreed an interim residence order in favour of the defender in respect of BM and CM. AM was thereafter to be involved in discussions on contact arrangements

between herself and the defender. Dr Edward was thereafter appointed by the court to take the views of the children. It was not her role to usurp the function of the court and to make recommendations on contact. The sheriff's error lies in his failure to include AM in the arrangements for contact. There was no error in the sheriff's treatment of the expert evidence as it pertained to the younger children.

Submissions on the defender's cross appeal

Submissions for the defender

[20] The defender invited the court to allow his appeal, to recall the sheriff's interlocutor insofar as it related to the arrangements for contact between the defender and AM and to consider that matter of new. The defender had lodged an appendix to his note of argument containing 26 proposed additional findings in fact. At the appeal hearing, her agent departed from this and invited the court to (a) delete the final sentence of finding in fact 11; (b) delete the words "all three girls" from finding in fact 15 and substitute therefor the words "BM and AM"; (c) add the word "AM" before the words "BM and CM" in finding in fact and law 3; and (d) make three additional findings in fact as follows:

1. All three girls are not old enough or mature enough to understand the importance of maintaining a relationship with their father, or the damage to them as a result of no relationship with their father.
2. The views expressed by AM and BM are not based on anything that their father has said or done to upset or distress them.
3. The views of AM and BM as expressed to Dr Edward are not reasonably held.

Were the court to make these deletions and additions, AM would be included in the contact arrangements. It was submitted that by not including AM in the arrangements for contact

with her two younger siblings, the sheriff's decision had been plainly wrong; no reasonable sheriff could possibly have arrived at the same conclusion.

[21] The sheriff had issued an ex tempore decision on 16 July 2021. The sheriff's reasoning at that time focussed upon the pursuer's attitude and willingness to promote contact and included references to the potential adverse consequences of there being no contact between the children and the defender. The subsequent note produced by the sheriff provided entirely different reasons for not making an order for contact in relation to AM, namely, AM's views on contact. Even if the sheriff had been entitled to amplify his reasoning in a written note, it was not open to him to provide entirely different reasons. The sheriff had misdirected himself as to the terms of OCR 12.3(3). The defender does not understand why he has not been found entitled to contact nor what he requires to do in order to improve his relationship with the children.

[22] When delivering his ex tempore decision, the reasons provided by the sheriff for refusing to make a contact order in respect of AM had no obvious connection to her welfare; the reasons were entirely focussed upon the pursuer's position on contact. While the written note provided some further explanation, the sheriff had failed to properly reason his decision in a manner which demonstrated a focus upon AM's welfare. In particular, the sheriff had failed to consider the long terms effects upon AM, as spoken to by Dr Edward in her evidence.

[23] The sheriff had failed to carry out a proper balancing exercise. He had failed to have regard to the benefit to a child of contact with a non-resident parent; the importance of contact to the child's identity; the potentially harmful consequences to AM of a negative view of her father; the likely absence of contact throughout AM's childhood; and the consequent harm to her wellbeing. Dr Edward had opined that AM's refusal to attend

contact negatively affected her younger siblings. The absence of a contact order in respect of AM would lead to a situation in which her younger siblings would also refuse to attend.

[24] The sheriff had failed to make findings in fact on material matters. The sheriff appeared to suggest in his note that the obligation upon him to make findings in fact is less exacting under OCR 12.3(3) compared with OCR 12.4(2)(a). That is material error.

[25] As at the date of the judgment, the defender had an established family life with AM. The sheriff's decision had the practical effect of curtailing contact without identifying any prospect of resumption and amounts to an interference with his established family life (*M* v *K* 2015 SLT 469). Such an interference is only lawful if it is necessary in terms of Article 8.2. The reasons provided by the sheriff are insufficient to satisfy Article 8.2.

[26] AM's views were treated as determinative. In an earlier note, the sheriff had explained that the children's views would not be determinative. AM last had contact with the defender when she was aged 6. Dr Edward had cast doubt upon the reasonableness of AM's views on the question of contact and had raised the question of influence by the pursuer. Dr Edward had also considered and opined upon AM's age and maturity. In determining what weight should be attached to AM's views, it was incumbent upon the sheriff to scrutinise them in context, to consider how she had arrived at those views and to consider if those views were reasonably held having regard to her age and maturity (section 11(7)(1)(b); *Blance* v *Blance* 1978 SLT 74; *Cosh* v *Cosh* 1979 SLT (Notes) 72). He had failed to do so.

[27] On the issue of expenses, the sheriff had failed to provide any reasons as to why he made a finding of no expenses due to or by either party. He had, when delivering his ex-tempore decision expressed a preliminary view that there had been mixed success. While

awards of expenses are not normally made in such cases, the sheriff was addressed on the pursuer's unreasonable conduct.

Submissions for the pursuer

[28] The pursuer maintained that the sheriff's interlocutor should be recalled in its entirety in terms of the pursuer's appeal. The pursuer's primary position in broad terms was that while she maintained that the sheriff's decision insofar as it related to AM's contact with the defender was correct, the decision could not stand as a consequences of the sheriff's failure to provide adequate reasoning.

[29] In response to the particular grounds of appeal, it was not accepted that the sheriff's reasoning differed between his ex tempore delivery and his subsequent note. This court was not properly equipped to make determinations of disputed matters of fact. This court cannot accept the defender's version of the ex tempore decision. The note did not provide a different version of the children's view on contact. However, it was accepted that the absence of reasoning on the question of the reasonableness of those views and why they were held was sufficient to entitle the court to recall the sheriff's interlocutor.

[30] In relation to the ground of appeal directed at the sheriff's failure to properly address the issue of AM's welfare, while the pursuer maintained the decision was the correct one, she conceded that the sheriff had failed to record or take account of a large quantity of relevant evidence.

[31] The sheriff had not failed to carry out a balancing exercise. The sheriff required to have regard to effect upon AM of witnessing the defender being violent to the pursuer, and his loss of temper at handovers. It may reasonably be inferred that the sheriff formed the view that AM's perception of the defender are informed of by these experiences.

[32] It was conceded that if the sheriff had formed the view that the obligation to make findings in fact or to offer sufficient reasoning anent his findings is less exacting under OCR 12.3(3) compared with OCR 12.4(2)(a) then it would amount to an error of law.

[33] In January 2020, the defender had himself entered into an agreement the effect of which was to curtail his relationship with AM; he had agreed to contact with BM and CM only. Esto the defender had at the time of the sheriff's decision on 16 July 2021 an established family life with AM, any interference therewith was lawful as it was based on appropriate findings in fact and adequate reasoning.

[34] It was not accepted that the sheriff has treated the children's views as determinative.

[35] In relation to the appeal against the interlocutor of 12 November 2021, the sheriff had determined that there had been mixed success. The sheriff was not asked to produce a note of his reasons. The general rule is that expenses follow success (*Howitt* v *Alexander & Sons* 1948 SC 154). The sheriff determined that neither party had been wholly successful. For this court to interfere with the decision, it would require to be satisfied that no reasonable sheriff acting reasonably would have dealt with expenses on a no expenses due to or by basis (*Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203). That high test is not met.

Decision

[36] It is clear that the appeals must be allowed. While the appeal and the cross appeal consist of distinct grounds of appeal, properly understood each has its genesis in the sheriff's erroneous approach to OCR 12.3(3) which has led in turn to a decision which is inadequately reasoned and which fails to deal with the substantive issues. The sheriff has misdirected himself as to his obligations in terms of OCR 12.3. The sheriff may have been

influenced by a well-intended desire to secure the expeditious disposal of these proceedings. His approach has however had the opposite effect.

The ex tempore decision

[37] In terms of OCR 12.2(4), at the conclusion of any hearing in which evidence has been led, the sheriff shall either (a) pronounce an ex tempore judgment in accordance with rule 12.3; or (b) reserve judgment in accordance with rule 12.4. Rule 12.3 is in the following terms:

> "**12.3 Extempore judgments**
>
> (1) This rule applies where a sheriff pronounces an extempore judgment in accordance with rule 12.2(4)(a).
> (2) The sheriff must state briefly the grounds of his or her decision, including the reasons for his or her decision on any questions of fact or law or of admissibility of evidence.
> (3) The sheriff may, and must if requested to do so by a party, append to the interlocutor a note setting out the matters referred to in paragraph (2) and his or her findings in fact and law.
> (4) A party must make a request under paragraph (3) in writing within 7 days of the date of the extempore judgment.
> (5) Where a party requests a note of reasons other than in accordance with paragraph (4), the sheriff may provide such a note."

[38] OCR 12.3 was introduced in 2012 as part of a series of reforms designed to address inefficiencies in the civil courts following recommendations made in Lord Gill's Report of the Scottish Civil Courts Review. The new rule is designed to ease the burden upon sheriffs and to provide parties with a swift determination by not requiring a written note following proof in every case. Ex tempore decisions pronounced in relation to simple disputes need only address the central contentious issues.

[39] In paragraph 4 of his note which, while undated, bore to have been issued in August 2021, the sheriff set out his approach in the following terms:

> "OCR 12.3 requires me to do two separate things. Firstly, it requires me to set out what I said in terms of OCR 12.2. However in addition I require to set out my findings in fact and law. The form of an ex-tempore judgement, at least in this case, does not mirror exactly that of a conventional written decision. Accordingly to comply with the terms of OCR 12.3 the note will come in two parts. The first part will be the ex tempore judgement itself, the second the specific findings in fact and law, which are either express or implicit in [sic] ex tempore judgement. To be clear the findings in fact will not be extensive as they would be in a full judgement. For example in the judgement issued after avizandum I would normally make detailed findings on specific events. In this case findings will be more general to reflect the form of the ex tempore judgement."

[40] The sheriff appears to equiparate an ex tempore decision in terms of rule 12.3(2) with a note produced in terms of rule 12.3(3). They are not the same. An ex tempore decision is one which exists in oral form only and is not reduced to writing. If a sheriff is requested to provide a note following an ex tempore decision, it is not enough to provide the ex tempore judgment in written form – Rules 12.3(2) and 12.3(3) are quite distinct. The former requires the sheriff to "state briefly the grounds of his or her decision, including the reasons for his or her decision on any questions of fact or law or of admissibility of evidence"; whereas the latter requires the sheriff's note to set out those matters referred to in paragraph (2) and his or her findings in fact and law. Brevity is not mentioned in rule 12.3(3). A note produced in terms of rule 12.3(3) is essentially the same as a note produced after judgment has been reserved in terms of OCR 12.4 and must take the form of an adequately explained decision, complete with findings in fact, findings in law and the reasons for the decision.

[41] At paragraph 5 of the sheriff's note, he explains that "to avoid any future dispute about what was said in the course of [his] decision", he sent a draft of his note to parties inviting comments. Having received limited proposed adjustments from parties, he accepted these and incorporated them into his note. We require to express our concern about the procedure adopted which has no basis in the Ordinary Cause Rules. The sheriff's

note has no procedural status. It is not a stated case. There is no mechanism for the resolution of any dispute between the parties as to what is recorded in the sheriff's note.

Inadequacy of reasons

[42] The terse style in which the sheriff has expressed his decision, no doubt informed by his approach to rule 12.3(3), gives rise to both concern and challenges for this court. It has left the parties and this court questioning why the sheriff made the orders he did. The sheriff heard evidence from eight witnesses including the pursuer, the defender and an expert witness. In addition, several affidavits were lodged by both parties. The proof lasted five days. The sheriff's note consists of five pages, two of which set out his findings in fact. His decision is summarised in 25 very short paragraphs. He has made only 16 findings in fact. His decision is brief to the point of obscuring his reasoning.

[43] Lord Emslie's observations in *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 (at page 348) apply equally to the decisions of a sheriff:

> "The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it".

[44] As noted by Lord President Rodger in *Dingley* v *Chief Constable, Strathclyde Police (No 1)* 1998 SC 548 (at page 555):

> "parties who come to court are entitled to the decision of a judicial tribunal … such a decision must be reasoned … an oracular pronouncement will not do."

[45] Exactly what is required for an adequately reasoned decision will depend on the circumstances of each case. Lord Brodie's observations in *MacLeod's Legal Representatives* v *Highland Health Board* 2016 SC 647 (at paragraphs 93 to 96) are apposite. In cases involving craves for orders in terms of section 11 of the 1995 Act, it is incumbent upon the sheriff to

identify and resolve the relevant material issues of fact, provide a clear and intelligible explanation as to what facts have been found to be established and why, and thereafter to explain how the law has been applied to the facts. Importantly, it is incumbent upon the sheriff to consider and apply the terms of section 11(7) and (7A) to (7D) of the 1995 Act.

[46] Viewed in light of these considerations, the sheriff's decision falls short. One example is finding in fact 2, where the sheriff found that "AM has witnessed the defender being violent to the pursuer on at least one occasion." This finding does not explain the degree, the time frame, or the frequency of the violence, or the effect upon either AM or the pursuer. There is no qualitative or quantitative analysis of the incident or incidents referred to. Nor is there any discussion as to whether the sheriff accepts that this finding, together with finding in fact 6, amounts to "abuse" in terms of section 11(7C). There is no link with the effect this may have on the parties' ability to co-operate with each other in terms of section 11(7D). That omission is striking when considered in light of the sheriff's decision to order contact handovers to take place at the pursuer's home. There is scant analysis of the evidence of the expert witness and no explanation of which parts of that evidence were accepted or rejected. There is insufficient analysis of the children's views or of the weight to be attached to the same having regard to their age and maturity.

[47] At appeal, to address these gaps, the pursuer invited the court to make 35 additional findings in fact and the defender invited an additional 26 findings in fact. We do not consider we are in a position to do so.

[48] Accordingly we are satisfied that the sheriff has misdirected himself as to his obligations in terms of OCR 12.3 and has failed to provide adequate reasons for his decision addressing the matters set out in section 11(7) and 11(7A) to (7D) of the 1995 Act. We will grant the appeal and the cross appeal. We do not find it necessary to address each ground

of appeal, the distinct grounds all having the same broad theme, as we have explained at paragraph [36] above.

What next?

[49] Having determined that the appeals must be allowed, we require to consider what should happen next. The parties were divided; the pursuer sought to have the matter remitted to another sheriff to allow the evidence to be reheard, the defender wished this court to make various findings in fact on the basis of the transcript of the evidence, the documentary evidence and such additional evidence, including the children's up to date views, as may be necessary and appropriate.

[50] We are mindful of the need to secure the expeditious disposal of proceedings involving children. There are however a number of difficulties with the approach advocated by the defender. First, the evidence is somewhat stale and historic; the proof was heard almost a year ago. It is likely that events in the intervening period are relevant; the parties have been engaged in contempt proceedings since and no doubt the court will require to be addressed on the extent to which contact has operated in the interim. The children's views may have changed. More importantly, this is a case in which there is likely to be a significant benefit in seeing and hearing the evidence. The sheriff found the parties' evidence wanting, noting that he doubted the reliability of both (paragraph 3 of his note). He gained little from the evidence of the parties' witnesses whom he regarded as "not truly independent" and "far from objective" (paragraphs 7 and 8 of his note). In those circumstances, reading the transcripts is unlikely to assist this court in making findings in fact in relation to highly contentious matters such as the extent and nature of the allegations

of abuse, its effect or lack thereof upon the pursuer and the children and the underlying reasons for the children's reluctance to attend for contact with the defender.

[51] Regrettably, the most sensible way forward is for this court to recall the sheriff's interlocutor of 16 July 2021 and remit the cause to another sheriff to proceed as accords.

[52] In light of the decision we have reached, it follows that the sheriff's interlocutor of 12 November 2021, which dealt with the expenses of the cause requires to be recalled. Those expenses fall to be determined upon conclusion of the proceedings. We were not addressed on the expenses of the appeal. A hearing will be assigned on the question of the expenses of the appeal, unless the parties are able to agree the position.