SHERIFF APPEAL COURT

[2022] SAC (Civ) 24
GLW-F430-21

Sheriff Principal N A Ross
Appeal Sheriff T McCartney
Appeal Sheriff W A Sheehan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL N A ROSS

in the appeal in the cause

JENNY MAIREAD FLANAGAN

Pursuer and Respondent

against

AIDAN JOHN KENT

Defender and Appellant

Pursuer and Respondent: Counsel; Paul Hannah Solicitors
Defender and Respondent: Counsel; MTM Family Law

24 August 2022

[1] The parties were formerly in a relationship from around 2012 until March 2019 when the relationship broke down. They have a son, now aged 6, who resides with the pursuer. The defender has frequent contact with his son. Both parties reside in the West of Scotland. The pursuer now seeks to move permanently to the Republic of Ireland, taking the child. After hearing evidence, the court allowed her to do so. The defender appeals against that interlocutor.

[2] The sheriff heard evidence over three days. He produced a 53-page judgment which set out the details of the evidence. These include the following:

[3] The pursuer was born in Ireland, but moved to Scotland in 2013 to be with the defender. The child was born in 2016. Both parties have parental rights and responsibilities in relation to him. They purchased a family home and lived in family until the defender moved out in 2019. The pursuer has been the child's primary carer throughout his life. The defender has exercised overnight contact on a Monday and Wednesday evening, after the defender finishes work, and every second weekend overnight from Friday evening to Sunday afternoon, since November 2019. The child has a close and loving relationship with both parents.

[4] The defender works full-time. The pursuer was ordinarily employed as an IT and project manager. She earned more than the defender. Following maternity leave she worked full time until made redundant in May 2021.

[5] The defender's mother initially assisted with child care two days per week. Following the separation in 2019 her relationship with the pursuer has deteriorated. She was annoyed with the pursuer, and ceased to invite her into her home, and refused to speak to her for several months. She assisted with childcare until February 2021. Since then she has not spoken to the pursuer.

[6] In January 2021 the pursuer sought the defender's consent to move with the child to Dublin, to be near her family.

[7] The child has a chronic health condition which has required hospital treatment. He is successfully treated with medication, but requires fortnightly appointments at hospital for checks and adjustment of medication. Each visit takes approximately five hours in total. The pursuer has taken him to 10 of 11 appointments in 2020, and 27 of the 30 appointments in 2021. In 2020 the child was admitted overnight three times to hospital, and in 2021 four times overnight. When the child requires drug infusions the side effects include severe

headaches, high temperature, vomiting, blurred vision and inability to walk. On discharge from hospital he requires additional care for up to three days. The pursuer has dealt with this while working full time.

[8] The pursuer prioritised the child's needs over her employment, and as a result of this lost her employment. She was placed on leave in April 2021 and made redundant in May 2021. The defender has never attempted to change his employment to meet the child's needs. He proposes that his mother, who is 75, will take the child to hospital appointments.

[9] As a result of the pursuer's employment terminating, she is in financial difficulty and cannot afford to maintain the former family home. It is not certain where she and the child would live if they remain in Scotland.

[10] The pursuer has required medical treatment for deteriorating mental health since 2019. She has suffered stress, anxiety and panic attacks. She lacks social support, and her mother has required to travel from Dublin to support her on occasion for periods of weeks when the child is unwell. The pursuer's general practitioner opines that social support will be significantly beneficial to the pursuer's mental health.

[11] The child is well settled at school. The pursuer regularly updates his teachers and the school has adapted to manage his condition. The pursuer is a member of a UK and Ireland medical support organisation. She has made a video which was shown in school to allow the child to explain his condition, and to raise awareness of a shortage of blood plasma in hospitals. The defender has never discussed matters with the school. Due to the pursuer's financial difficulties, leading to loss of the former family home, it is not certain that the child would remain at the same school.

[12] On relocation to Ireland, the pursuer will have family support, including with accommodation. She will live in a village with broadly similar facilities to her present

location. The child has friends in the village and has regularly visited there throughout his life. A primary school is identified and a place confirmed. The school standard is broadly equivalent to his present school. The pursuer intends to support the child's education at the new school in a similar manner to his current primary school.

[13] The pursuer cannot return to her original employment if she remains in Scotland, due to a lack of social support and the support needs of the child. In Ireland, she will have family support sufficient to allow her to return to full-time employment. There are well-paid employment opportunities for her role and employment experience in Dublin. Her parents will take the child to medical appointments.

[14] The defender has no proposals to give additional assistance to the pursuer. He refused to assist when she was unwell with Covid. His mother refuses to speak to the pursuer, or to let her into her house. The pursuer was forced into a Covid bubble with them in order to facilitate contact. By contrast, the pursuer's mother stayed with her for periods of three weeks, and remains available to assist.

[15] The pursuer supports the child maintaining and strengthening his relationship with the defender. She is committed to his having regular and meaningful contact with the defender and his family. Her family are also supportive of this. Arrangements will be by discussion, and the sheriff was asked not to regulate contact. Viable practical arrangements can be made to overcome or at least minimise any difficulties associated with contact arrangements. Regular and meaningful direct and indirect contact can be maintained. The pursuer has proposed the defender cease paying her maintenance, to allow funds to be available for travel. Flights to Dublin are frequent and relatively inexpensive.

The first ground of appeal

[16] The first ground is that the sheriff failed to take proper advantage of hearing and seeing the principal witnesses, in two respects. Ground 1(a) alleges that the sheriff "erred in apparently ignoring" the pursuer's evidence about her ability to obtain employment. The ground seeks to contradict the sheriff's findings that the pursuer would remain unemployed in Scotland. It asserts that the pursuer accepted in evidence that she had not looked for work; that such jobs were available in Glasgow; that remote working would be possible; that she had requalified as a reflexologist and could work from home.

[17] That point is unsupported and unsupportable. It is an assertion only. As presented, it is no more than a subjective view elevated to a submission of fact. It is unsupported by any extract transcript of the evidence, so this court is unable to address the context and accuracy of the "evidence" referred to. Further, even if this evidence is correctly represented, no effort was made in submission to examine the sheriff's findings on these points, whether to demonstrate the point or to place the alleged facts in context. On reading the judgment, the sheriff narrates at paragraph [23] that the pursuer "believes she could not return to full time employment without the level of support available to her in Ireland" and that "IT managers and project managers are well paid in Dublin and their earning potential is higher than in Glasgow". He finds in fact (24) that "She may obtain employment in reflexology … She will be unlikely to earn the same levels of income in that field and will need to modify CAK's standard of living if she remains". The allegedly-ignored evidence does not meet or contradict those points, nor does it show the sheriff's conclusions to be wrong. This ground of appeal ignores the sheriff's view that working full-time in Glasgow would be impossible due to lack of support for the pursuer, in dealing with the child's complex health issues. These points do not contradict or meet that point. The hypothetical

availability of jobs in Glasgow is logically irrelevant where the pursuer is unable to take up such employment while looking after the child. Remote working is not a licence to take time off, and is irrelevant for the same reason. The point about ignoring evidence of reflexology is both false and misleading, as the sheriff made a relevant finding in fact (24) which records that this would lead to a lower standard of living. This point is therefore incomplete, undiscussed, lacks context or coherent argument and is no more than bald assertion.

[18] The next allegation of failure to take account of evidence, under ground 1(a)(ii), refers to evidence that the child had attended an after-school club, thereby showing that the pursuer could rely on this in obtaining employment in Scotland. It is a partial and uninformative point. It is unsupported by reference to transcript. It does not examine the effect of that alleged evidence in the context of the complex facts of the case, far less how it is allegedly inconsistent with the sheriff's discussion of those facts, or with his findings. It is a bare assertion, unrelated to any context, without explanation why it is of material importance, far less why it is sufficiently material to disturb the sheriff's findings. This ground also amounts to no more than assertion.

[19] An appeal cannot be based on selective extracts of evidence, the unsupported assertions of the disappointed party, or an incomplete analysis of how that evidence relates to the sheriff's findings or the other evidence in the case. Perhaps for this reason, counsel indicated that she was focusing on the other ground of appeal. If any ground of appeal is not insisted in, the only appropriate course is to withdraw it. If it is insisted in, it needs more profound treatment than this. This ground has no merit and is repelled.

The second ground of appeal

[20] The second ground of appeal is that the sheriff erred in law in determining what weight he should attach to various factors. These include (i) the defender's very good relationship with the child; (ii) the significant level of contact; (iii) the certain reduction of contact, which was not properly analysed; (iv) the speculative nature of the pursuer's employment in Ireland; (v) the speculative nature of the timescale for obtaining a house thereafter. Further, the sheriff is claimed to have given undue weight to the pursuer's claim that her mental health would improve and that this would have a positive impact on the child.

[21] Counsel referred to the principles engaged: these included that the approach to relocation cases should be "presumption free" (*Donaldson* v *Donaldson* 2014 Fam LR 126, para 27); that there is a burden on the applicant to show that relocation would be in the interests of the child and that it would be better that a specific issue order be made than that no order be made (Children (Scotland) Act 1995 section 11(7)(a); *M* v *M* 2012 SLT 428); that there is an evidential burden on the applicant, who must provide material potentially justifying the order sought (*S* v *S* 2012 Fam LR 32, and cases therein cited); that the child's views require to be taken unless it is impracticable to do so (*Woods* v *Pryce* 2019 SLT (Sh Ct) 115). Further, a decision at first instance cannot be recalled or set aside on appeal unless it is shown to be tainted by some material error of law or approach, or unless the decision maker has gone plainly wrong in reaching their conclusions (*S* v *S*, above). These principles were not challenged and we accept them as correct. During the appeal, a further point arose about the requirement to take the child's views. We discuss this further below.

[22] It was submitted that the sheriff had inappropriately deflected his attention from where the best interests of the children lie, to the wishes of the respondent. In doing so, he

had failed to afford weight to other key factors, such as the drastic nature of the change to contact and the disappointment of the child as a result. He failed to give weight to the fact that 6 nights of 14 amounted to in effect a shared care arrangement. In addition, he did not recognise that the defender would have no base in Ireland, thereby forcing contact to be at hotels or similar. By contrast, the child had his own room and toys at the defender's house.

[23] A difficulty arises immediately in assessing these claims – we were not told what evidence was given to the sheriff about these factors, nor what submissions were made in these respects. The submissions on appeal did not attempt to link up with any evidence or submissions at first instance. The effect is that, even if correct, these points appear to be free-standing, new points. Only if they are more or less self-evident could we take them into account in addressing the relevant test – whether the sheriff's conclusion was plainly wrong. The purpose of an appeal is not to introduce fresh considerations or evidence. It is notable that during the proof parties did not seek regulation of contact, and the sheriff left this to be discussed (at paragraph [71]).

[24] The sheriff recognised that parties were both to some extent pursuing their own interests in this litigation (paragraph [70)]. He considered that the pursuer's motives were more rooted in the reality of the parties' present situation than those of the defender. He, however, "sought to focus very firmly on the [the child's] welfare … not the wishes and interest of [his] parents" (paragraph [68]). He dealt with matters under ten headings, namely accommodation, household, money, education, social, contact with the defender (stated "pursuer" *per incuriam*), contact with the defender's extended family, effect of relocation, and parties motives. He found that "The most important relationship [the child] has is with his mother as she is his primary carer. [The child's] interests and welfare are

strongly linked to his mother's … There is, therefore, likely to be an adverse indirect emotional impact on [the child] of the refusal of the order sought" (at para [64]).

[25] The child's accommodation is inextricably bound up with that of the pursuer. The effect of events is the status quo cannot be maintained, because the pursuer can no longer afford their house. The child's accommodation is therefore unknowable. The household at present is two people; upon relocation the household will expand to include two grandparents and, temporarily, an aunt, with all of whom the child has good relationships. Under the heading of money, the sheriff found that the pursuer will likely remain unemployed as long as the child has to attend fortnightly hospital appointments. This is an arrangement that the defender has never made an effort to accommodate. His offer of his mother's help is inadequate and, in the circumstances of her not speaking to the pursuer for in excess of one year, unrealistic. This is in stark contrast to the high level of care and attention the child would receive in Ireland, which has the additional benefit of freeing up the pursuer to pursue a well-paid, full-time job, and the rewards that will bring. The sheriff found the pursuer to be "highly qualified, highly employable and determined to find work" (at paragraph [54]). He noted that all of this is in the child's best interests. Under the heading of education, the sheriff found that the child's school was good, but that there was an element of uncertainty about future education. He would have a good, identified, school in Ireland. The sheriff treated education as a neutral factor. Under social, he found it equally neutral, in that the child would enjoy a good social circle in either location. Under contact with the defender, the sheriff noted the limited contact during holidays since 2019, and the poor liaison by the defender. He accepted, contrary to the defender's present submission, that the pursuer would bring the child to Scotland for contact during the school holidays, and also bring him to Scotland every second month. The defender would gain

contact in Ireland as well as this arrangement. The sheriff records that he was expressly asked not to make a contact order, so this could be arranged by the parties themselves. There will also be regular video contact. The sheriff concluded that the child would have regular residential contact with the defender in both Scotland and Ireland, less than at present but sufficient to be meaningful and positive. That is in his best interests. Under contact with extended family, the sheriff concluded that, read short, the contact would be less often but still meaningful and regular. That was in the child's best interests. The sheriff, having discussed all the aspects, concluded that the effect on the parties was relevant to the effect on the child (at para [67]), and the making of the order was justified.

[26] These points, collectively and in some cases individually, amount to a strong justification for the sheriff's decision to allow relocation.

[27] The sheriff did recognise that the amount of contact with the child would be reduced (paragraph [69]). He recognised that the status quo could not be maintained. The defender's somewhat ineffectual suggestion, that his mother, who had a failed relationship with the pursuer, would take over responsibility for healthcare to allow her to return to work, was rejected as not reasonable.

[28] Against this background, what is to be made of the competing factors relied upon in the defender's submission? In our view, the sheriff's judgment answers all of these points. He did not deflect his attention towards the pursuer's interests. He decided that the child's interests were inextricably bound up with the pursuer's plans for employment and support for his hospital visits. That finding is justified on the evidence discussed, and the logic is unassailable. The sheriff recognised, in recording the defender's mother's evidence, that the defender had no base in Ireland. We are unable to regard this as an overwhelming factor, or that it was left out of account. The sheriff expressly dealt with this as set out above. In

relation to the present frequency of contact, we agree with the pursuer's counsel that 6 nights out of 14 does not by itself bestow the status or quality of "shared care". It is clear that the economic, social and support burden lies almost solely on the pursuer. Overnight respite does not help her at all with employment or hospital visits. In addition, to submit that the pursuer's accommodation in Ireland remains speculative is to ignore that her accommodation in Scotland remains speculative. She will at least in Ireland likely have a good income to allow her to improve matters, and has guaranteed accommodation with her parents in the meantime. The sheriff did not treat her prospect of employment in Ireland as speculative, as discussed above. To submit otherwise is simply to disagree with the findings. In relation to reduction in contact, the sheriff acknowledged that would occur, and cannot be said to have ignored matters. It is clear that he did not. It is not in any event possible to say that this factor was sufficiently significant to eclipse all of the other factors considered, none of which were addressed at appeal. The last point was that the sheriff gave undue weight to the pursuer's claim that her mental health would improve. How that assertion is to be weighed and considered by this court is far from clear. In any event, on the facts found by the sheriff, it is logical to conclude both that the pursuer's life will be considerably happier, wealthier and better supported in Ireland, and that the quality of life for the child, who depends on her for virtually everything and has lived alone with her for years, will improve as a result.

[29] Even if this assessment were wrong, and the sheriff had not dealt with the points, the defender still requires to demonstrate that the sheriff's decision was "plainly wrong". The appeal does no more than place emphasis on certain factors which, even assuming the evidence was before the sheriff, is not a sufficient exercise to support the appeal. We would require to be persuaded that these factors were so important that they effectively

demonstrated that the sheriff's decision was the wrong one. This appeal falls far short of that. It is not enough to show the decision is arguably wrong. The grounds of appeal amount to assertions only. Assertion is not a sufficient basis for appeal. This ground of appeal will be repelled also.

Taking the child's views

[30] There remains a further point (unheralded in the grounds of appeal) that the sheriff failed to take the views of the child. The point was not raised in the grounds of appeal and so we have no report from the sheriff on this. Counsel informed us that at conclusion of evidence the sheriff *ex proprio motu* raised the issue of the views of the child and raised the possibility of him speaking with the child himself. Parties were allowed overnight to consider the issue. The sheriff notes in his judgment that parties were agreed that it would be inappropriate to seek to ascertain the child's views. Parties agreed that relocation and its consequences involve consideration of concepts beyond the comprehension of a child of his age and the confusion and distress potentially occasioned to him by being asked about relocation rendered the need to seek his views impracticable. It is startling that in those circumstances the defender now seeks to advance an appeal on the ground that the sheriff erred in not taking the views of the child.

[31] We recognise the duty imposed by section 11(7)(b) of the 1995 Act. It is a duty on the court, independent of any submissions made by the parties. We have required to consider this aspect very carefully. Each case will turn on its facts. In the large majority of cases it will be practicable, even if distressing, to take the child's views (*Woods* v *Pryce*). We note that the sheriff found, after proof, that the wellbeing of the child was closely bound up with that of the pursuer. In our view there were two interlocked factors here which allowed the

sheriff to consider it impracticable to take the child's views. These were, primarily, the age of the child (5 years old) taken together with the secondary, but significant, point that the parties both stated that the exercise should be dispensed with. These parties were in a knowledgeable position to comment on the practicability of taking the child's views. The sheriff was already well aware that the child had a close and loving relationship with both parents and that continuing contact with the defender required to be meaningful and positive. In these circumstances, we consider that the sheriff's decision was justified. In any event, even if this was an error, there was no suggestion by the appellant that it was sufficiently material, given the basis of the sheriff's reasoning and the fact that relocation and its consequences involve consideration of concepts beyond the comprehension of a child of his age, to render the decision plainly wrong.

[32] This last appeal point inevitably raises the question of the position of solicitors and counsel as officers of the court. Because this point did not feature in the grounds of appeal it could not be fully argued before us, so we do not embark on any wider discussion. All counsel and solicitors are officers of the court, and owe it a duty which is higher than that owed to their client (Macphail; *Sheriff Court Practice* (4th ed) at paragraph 16.42; *Ian Watson (Harrison's Exr)* v *Student Loans Company Limited* [2005] CSOH 134 at [8]). One component of that duty is the requirement to alert the court to any question of competency of orders made. If either party considered that any order of the sheriff was potentially in breach of a statutory duty, such as dispensing with the views of the child under section 11(7)(b) of the 1995 Act, they were required to bring this forthwith to the court's attention, *a fortiori* not to actively invite the order. To do so, and then use it as a ground of appeal, shows no recognition of this duty.

Disposal

[33] The appeal is refused. Parties should attempt to agree any question of expenses and contact the clerk, failing which a hearing on expenses should be arranged.