SHERIFF APPEAL COURT

[2023] SAC (Civ) 30

Sheriff Principal D C W Pyle
Sheriff Principal N A Ross
Appeal Sheriff W A Sheehan

OPINION OF THE COURT

delivered by APPEAL SHERIFF WENDY A SHEEHAN

in the appeal in the cause

ID

Pursuer and Respondent

against

KC

Defender and Appellant

Defender and Appellant: Allison, advocate; D'Arcy Price Law
Pursuer and Respondent: Sharpe, advocate; T Duncan and Co

Edinburgh 21 September 2023

Introduction

[1] The parties were in a relationship between October 2011 and June 2013. They have a daughter, G, born on 9 March 2014. Both parties have parental rights and responsibilities in relation to G. This is an appeal against the decision of the sheriff at Forfar on 31 January 2023, granting the respondent contact with G.

[2] The appellant alleged that the respondent had sexually abused G. Having carefully considered the evidence relating to certain statements and gestures made by G to the

appellant (when aged between 2 and 4) and during a joint investigative interview (when aged 5), the sheriff decided that the evidence was not of sufficient weight and quality to enable her to conclude that the respondent had sexually abused G. The sheriff also made no finding of risk of abuse (in terms of section 11(7B) of the Children (Scotland) Act 1995). The appellant does not challenge the sheriff's findings.

[3] The sheriff found that it was reasonable for the appellant to have been concerned that abuse may have occurred. On 30 January 2020, a joint investigative interview was undertaken with G. G did not make clear allegations of sexual abuse during the interview. The social worker who had undertaken the interview told the appellant that she believed that something of a sexual nature could have happened to G. The appellant's concerns deepened following that conversation.

[4] The first ground of appeal is that the sheriff failed meaningfully to address the appellant's alternative argument, namely that the appellant's strength of belief that the respondent had sexually abused G and her consequent anxiety about the risk which he posed to the child made contact unworkable. The proposition advanced was that when carefully weighing all the relevant circumstances (per *J* v *M* 2016 SC 835 at 840), the sheriff ought to have reached the conclusion that in such circumstances contact was not workable and would not promote the best interests of the child.

[5] The second ground of appeal relates to section 11(7D) of the 1995 Act, which requires the court to consider circumstances where "in pursuance of the order two or more relevant persons would have to co-operate with one another as respects matters affecting the child". It was submitted that the sheriff's analysis of this provision was superficial and focussed on the narrow issue of whether any order made would be complied with rather than the broader issue of whether (viewed through the prism of the appellant's firm view that the

respondent posed a risk to G and to her consequent acute anxiety) positive child-centred contact could not take place. In such circumstances, it was contended, it was not reasonable to expect the appellant to cooperate with the respondent.

[6] The appellant did not insist on her third ground of appeal, *viz* that the sheriff's decision was plainly wrong.

The appellant's submissions

Ground of appeal 1

[7] The sheriff failed to make adequate findings in fact, or otherwise to demonstrate that she had taken account of material issues which directly bore upon the appellant's second ground of opposition to contact. She failed to take account of material evidence. The appellant invited the court to make findings in fact, to the effect that the appellant was now convinced that sexual abuse had taken place, that she was anxious for G's safety, and that contact could therefore not successfully operate due to her distrust and animosity towards the respondent.

[8] The appellant accepted that an appellate court will interfere with findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified (*Henderson* v *Foxworth Investments Ltd and Another* 2014 (UKSC) 41) and that the sheriff's reasoning could have provided an adequate analysis of the application of the law to the established facts without the necessity of these additional findings in fact having been made. However, it was submitted that the sheriff had failed to demonstrate that she had taken into account this relevant evidence in her analysis. The sheriff could not meaningfully deal with the appellant's second line of opposition to a contact order being made without

expressly dealing with the issues (set out in the proposed additional findings in fact). Her failure to do so is sufficient to vitiate her decision.

Ground of appeal 2

[9] In terms of section 11(7D) of the 1995 Act, the sheriff required to have specific regard to the ability of the parties to cooperate with one another. The context to that is that parental rights and responsibilities can generally be exercised independently (and therefore without the consent of any other person possessing them). In the absence of an order for contact, there is no ongoing requirement for the parties to cooperate or otherwise interact with one another. It was self-evident that the order made by the sheriff required the parties to cooperate. There would be direct handovers and initial supervision of contact by the appellant or a member of her family. The parties required to communicate to make arrangements and to exchange information about G's wellbeing. The sheriff had misunderstood the ratio of *J* v *M (supra*), appearing to treat it as only applicable to scenarios of overt animus and hostility between parents. While each case is fact sensitive, the sheriff required to apply a more purposive interpretation to "cooperation" which goes beyond the likelihood of an order being obtempered and should encompass the operation of contact in the best interests of the child. The appellant's beliefs and apprehensions were an unsurmountable hurdle to effective communication and cooperation. The sheriff had erred in relying upon the parties' previously good relationship and track record of cooperation and instead ought to have focussed on the current context where the appellant now believes the respondent has sexually abused G.

The respondent's submissions

Ground of appeal 1

[10] An appellate court should be slow to interfere with a decision of a court of first instance where the judge has seen and heard the witnesses unless it can be said that the decision was "plainly wrong" or that the judge made a "material error of law" or that the "decision cannot reasonably be explained or justified". (*Henderson* v *Foxworth Investments Ltd, supra,* per Lord Reed at paragraphs 62, 63 and 67). The decision was one which the sheriff was entitled to make on the evidence. Her consideration of the issue of contact, when her judgment is looked at as a whole, was detailed, measured and balanced. She neither misunderstood nor misapplied the law. There was no failure in the balancing exercise required of her. Her findings in fact supported her findings in law. A judgment should not be "subjected to the detailed scrutiny of a conveyancing document" (*AB & CD* v *LM* (2019) SAC [Civ] 19 at paragraph 18).

[11] To succeed in an appeal on the sheriff's findings and facts it is "absolutely necessary for an appellant to clearly explain, and then demonstrate by reference to the whole of the evidence, why the court's decision was not justifiable on the evidence" (*PB* v *LM* (2023) SAC 12). The appellant had failed to meet that test.

[12] The sheriff did address the appellant's beliefs. She made findings in fact regarding the circumstances underpinning them and specifically that the social worker who had undertaken the joint investigative interview had intimated concerns about sexual abuse to the appellant. At para [100] of her note, the sheriff found that the appellant would remain concerned and worried, would not be reassured by a negative finding, but had nonetheless indicated that she would abide by the decision of the court. The sheriff was in no doubt about the appellant's strength of feeling that G had been sexually abused by the respondent.

[13] The sheriff referred to the appellant's evidence that she was not "an overly anxious parent". There was no evidence of the appellant having a history of anxiety. The sheriff recorded the appellant's evidence of panic attacks, sleepless nights and of her being bad tempered with the children. The appellant's evidence was also summarised at para [116], which referred to the appellant's distress and panic attacks and the strain which would be put upon the appellant and her family life were contact to be ordered. The proposed additional findings in fact amounted to no more than alternative suggestions. The appellant has failed to explain, not merely assert, why she considered that the sheriff could not properly have reached the conclusions, which she did on the evidence.

Ground of appeal 2

[14] Based on the facts the sheriff found established, she was entitled to conclude that the parties would cooperate with the contact order which she made. The appellant had already facilitated contact at a Relationships Scotland Contact Centre. The sheriff gave careful and measured consideration to the issue of cooperation (paragraphs 251-260 of her note). There was no failure in the balancing exercise.

Decision

[15] The sheriff decided that the evidence was of insufficient weight and quality to enable her to conclude that the respondent sexually abused G. The appellant failed to discharge the burden of proof. The court's decision on whether contact with the respondent is in G's best interests then correctly proceeded upon the basis that sexual abuse had not occurred (*In Re B (Children)* [2008] UKHL 35, per Lord Hoffman at para [2]). The sheriff also did not conclude

that the evidence pointed to any objective need to protect G from the risk of abuse in terms of section 11(7B) of the 1995 Act. Those findings are not challenged in this appeal.

[16] In determining whether contact between G and the respondent is in G's best interests, the sheriff started from the general principle that contact with a parent is ordinarily "conducive to the welfare of children" (*White* v *White* 2001 SC 689 at p 697D). Applying that general principle, the sheriff went on to consider the dictum of Lord Malcolm in *J* v *M* ,(at p 839):

> "Before refusing an application for parental contact, a careful balancing exercise must be carried out with a view to identifying whether there are weighty factors which make such a serious step necessary and justified in the paramount interests of the child (sometimes referred to as 'exceptional circumstances')."

[17] The respondent had an established relationship with G. During the first 4½ years of G's life, he exercised regular unsupervised contact, often on a residential basis most weekends. He exercised holiday contact in Bulgaria for 2 weeks in 2018, enabling him to introduce G to her paternal grandparents and extended family. Contact continued to operate on a non-residential basis supported by a family member, until January 2020. In March 2020, the court made an order for interim contact. The operation of that order was thwarted by the closure of contact centres as a result of COVID-19 restrictions. Between May and June 2020, the appellant facilitated 30-minute video contacts. On 10 November 2021, a further interlocutor was pronounced ordering direct contact in a contact centre. Visits took place on 18 June, 25 June, 2 and 9 July 2022. Despite a 2-year gap in contact, G showed no uneasiness and was relaxed during contact, which was a positive and enjoyable experience for her.

[18] Section 11(7)(b) of the 1995 Act required the sheriff to have regard to G's views. G's views were that "she missed him (the appellant) so much" and that "she would love to see

him again". The appellant's evidence was that G had been "heartbroken" by contact stopping and that she "missed her dad". G was approaching her 9th birthday at the date of proof. Her views required to be accorded due weight when assessing her best interests.

[19] The sheriff correctly identified the legal framework for her decision. She required carefully to weigh the evidence in terms of which it was contended that the serious step of refusing to make a contact order in favour of the respondent may be justified. She would have required to have identified weighty factors to support such a decision against the history of the previous contact and the child's clearly expressed views in this case.

[20] The first ground of appeal asserts that when undertaking this careful balancing exercise, the sheriff failed adequately to address and give due weight to the appellant's reasonable and genuinely held belief that abuse had occurred, together with her consequent anxiety about the risks posed by future contact. The appellant is G's primary carer. G is significantly dependent upon her to meet her physical, emotional and developmental needs. The court was asked to make the additional findings in fact and to consider the impact which court ordered contact might have on the appellant and in turn on G's welfare.

[21] The sheriff found that the appellant's view of whether sexual abuse had taken place shifted as a result of her conversation with the social worker who undertook the joint investigative interview. She did not make further findings in fact in relation to the appellant's genuinely held apprehensions, to her anxiety or to her having suffered panic attacks. However, scrutiny of her judgment as a whole makes it clear that the sheriff took these matters into account in her reasoning. At para [93] of her note she summarised the evidence regarding the appellant's stress, anxiety and to her having suffered from panic attacks. At para [100] the sheriff noted that the appellant would not be reassured even if the court decided no sexual abuse had occurred, but that she would remain concerned and

worried and that she would find further contact distressing. The sheriff also noted the evidence of the appellant's mother regarding the appellant's distress and the strain put upon her and her family life by contact. The sheriff clearly took this evidence into account in reaching her decision notwithstanding the absence of specific findings in fact.

[22] The appellant invites this court to make further findings in fact that "that there is a real risk that ordering contact (and in particular unsupported contact) will lead to a serious and substantial impact on the defender's health and wellbeing" and that "there is a real risk that such an impact would have a material impact on G's welfare." Those proposed findings are not supported by the evidence. No medical or psychological evidence was led. The appellant has no diagnosed mental health condition. She did not consider herself to be a particularly anxious person. The evidence of anxiety, stress and strain during these proceedings fell a considerable way short of a "serious and substantial impact on the defender's health and wellbeing". Furthermore, the evidence as analysed by the sheriff was that the appellant was a mature adult who demonstrated her ability to act reasonably and to do what was asked of her by the court to the best of her ability. She had done so despite her beliefs, facilitating both video and in person contacts. Her evidence was that she would accept the court's decision. The appellant's beliefs and her anxiety did not present a substantial impediment to the successful operation of interim contact.

[23] The sheriff's decision clearly identified her consideration of the pertinent evidence regarding the appellant's genuinely held belief and her anxiety relating to contact. She gave appropriate weight to it. Given the factual matrix in this case, the sheriff was entitled to reach the conclusions which she did on the basis of the evidence. The sheriff's task was not to assess the impact of contact on the appellant but to assess the best interests of G. The

evidence did not point to a finding that the appellant's beliefs or her anxiety had negatively impacted on G's welfare. The appeal on this ground must fail.

[24] The second ground of appeal contends that the sheriff failed properly to apply section 11(7D) of the 1995 Act. It was submitted that the sheriff focussed on the narrow question of whether the order would be complied with by the appellant as opposed to whether her beliefs and apprehensions were an unsurmountable hurdle to effective communication and cooperation. The general proposition, that the concept of cooperation (in the context of a contact order) should be looked at more broadly than a party undertaking the bare minimum to obtemper an order, is uncontroversial. Each case turns on its own facts and circumstances. As the sheriff correctly identified, the factual matrix of this case is quite different from those in *J* v *M*, which involved overt parental animus and hostility which was a major obstacle to the successful operation of contact and would have involved placing a 5 year old child (who had not had contact with her father for over a year at the date of proof and whose views had not been ascertained) in the middle of a "maelstrom". In undertaking the careful balancing exercise required of her in this case, the sheriff took account of G's age, her views and, crucially, the relatively recent successful operation of interim contact. The parties had cooperated in implementing the interim order, enabling successful, child-centred contact to take place. The sheriff rejected the submission that the ratio of *J* v *M* required her to conclude that the parties would be unable to cooperate with one another. She concluded that this was not borne out by the evidence. The appellant's evidence was that she would agree with whatever decision the court made in relation to contact and that if an order was made she would cooperate with the respondent. The appellant volunteered that G is a bright and articulate child who was desperate to see her father. The sheriff's reasoning cannot be faulted. The effect of the appellant's position

would be to allow the appellant to veto contact by the respondent, based on nothing more than a strongly-held opinion. We do not accept that section 11(7D) of the 1995 Act required the court to permit such a veto.

[25] The sheriff was justified on the evidence in concluding that there were insufficient weighty factors to justify the serious step of refusing contact, and that, having regard to G's welfare as the paramount consideration, it was better for G that a contact order be made than that none should be made.

Disposal

[26] This appeal is refused. Expenses are not sought by the respondent. Accordingly, no award of expenses is made.