SHERIFF APPEAL COURT

[2024] SAC (Civ) 32

Sheriff Principal Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL ROSS

in appeal by

LM

Pursuer and Respondent

against

GR

Defender and Appellant

and

JACQUELINE PRINGLE

Curator ad Litem

18 July 2024

[1] This case concerns the best interests of a child of the parties. The case was registered on 26 May 2014, when the child was 16 months old. Final decree was issued on 10 April 2024, when the child was aged 11 years, 3 months. There have been more than 70 court hearings. The extended duration of these proceedings is, by itself, detrimental to the best interests of any child (*NJDB* v *JEG* [2012] UKSC 21).

[2] The sheriff pronounced a final decree at a child welfare hearing on 10 April 2024. The pursuer and respondent (the "pursuer") by that stage sought only an order for

residence. The defender and appellant (the "defender") did not attend that hearing. The sheriff ordered that the child reside with the pursuer, and dismissed all of the other craves for both parties.

[3] The sheriff's note commences by noting the excessive duration of these proceedings. Against that background, the defender had not attended the hearing. He had previously failed to attend hearings on 17 October 2023 and 1 November 2023, despite attendance being required. The defender had, incongruously, opposed the appointment of the named psychologist whose report he now wished further time to receive. Further, the defender had previously refused an offer of non-residential contact, as he insisted that contact be residential. The sheriff granted decree for five reasons, namely: the excessive delay in resolution of the action; the support of the curator ad litem for residence to be awarded to the pursuer; the defender's previous refusal of contact; the likely delay before a psychological report was received; and the defender's continual non-attendance at hearings.

[4] The defender's grounds of appeal are short. They are (i) that the sheriff had not fully considered all the facts, because an expert psychologist report had been ordered by the court at the curator's request but had not been received, and (ii) the sheriff departed from previous intimation that the case would go to proof on receipt of that report.

The defender's submissions

[5] The defender submitted that decree was granted without evidence. He had been denied the opportunity to present his case adequately, which was a breach of his right to a fair trial. He had previously requested that the matter proceed to proof and the court was aware of this. He had made it clear that all evidence should be heard at a proof. He had evidence of a campaign of abusive parental alienation. He had only opposed the

appointment of the psychologist because he wanted an expert in parental alienation. He admitted not attending hearings, but had written to the court explaining he was at work. He had been ill when the hearing called on 10 April 2024. The court had not followed the correct process.

The pursuer's submissions

[6] The pursuer submitted that the proceedings had taken excessively long, spanning most of the child's life. They had overshadowed it. The defender had failed to attend on a number of occasions, and had not had contact since August 2023. He refused to attend at a non-residential contact on 8 September 2023 which had been ordered by the court, which had distressed the child. The views of the child had changed as a result and he no longer wanted contact.

The curator's submissions

[7] The curator's submissions supported the sheriff's decision and gave context to it. The court could make a final decision without going to proof, and was obliged to secure expeditious resolutions of disputes relating to children. In recent times, the child had several times run away from school in order to avoid going to contact with the defender. The court was aware of the curator's view that proof may not be the best way of resolving matters. The defender insisted in residential contact only, despite contact being offered. The defender opposed the appointment of a psychologist. The defender opposed counselling for the child at Place2B. The curator submitted to the sheriff that the defender was no longer meaningfully engaged in promoting the child's best interests, and a proof

would not assist. Contact had not operated on a regular residential basis since May 2023. All contact had been suspended following the defender's refusal to engage.

Decision

[8] The child's best interests have not been served by being subject to such a long dispute between his parents. The decree under appeal was issued almost 10 years after the action was raised. Despite the best efforts of a number of sheriffs at over 70 hearings, the matter remained a running sore. The question in this appeal was whether the sheriff, in awarding residence to the pursuer without conducting a proof, made any error of fact or law.

[9] The premise upon which this appeal proceeds, namely that the sheriff had insufficient evidence, or did not consider the available evidence, is wrong. This sheriff, along with several others over the long history of the case, had previously heard parties and the curator at child welfare hearings, and had access to all of the reports prepared by independent court reporters over the years. Most recently, the sheriff had a report from the curator dated 22 June 2023, and a supplementary report dated 7 September 2023.

[10] The sheriff also had direct access to the child's views, taken and reported separately by the curator, which are of considerable significance in applying the test of the best interests of the child. These are in a confidential envelope dated 7 September 2023. They were taken by the curator at meetings with him on 20 June 2023, 29 August 2023, 30 August 2023 and 6 September 2023. They represent a careful, insightful and balanced exercise in taking the child's views. Without giving details here, these views give, at the very least, no support to the defender's position on appeal. They justify the curator's position before the sheriff and on appeal.

[11] The defender places particular reliance on reports by Ms Polson, the court's reporter, dated 2014, 2018 and 2020. He claims these were not considered. However, these reports were available to the court, and formed part of the background to subsequent hearings. Apart from any such reports being hopelessly out of date in the context of a child, the defender does not state what difference this evidence would have made. They were in any event superseded by a further detailed report by Ms Polson dated 6 May 2021. If the defender's claim is one of parental alienation, that report gave no support to such a claim. In any event, the court had sight of much more recent reports from the curator. These, too, give no support to any suggestion of parental alienation. There is accordingly no basis for submitting that the court was unaware of any material evidence relating to the child's welfare.

[12] The defender gives some limited justification for his own lack of cooperation. It does not, however, mitigate his repeated failures to appear and refusal to co-operate on previous occasions. He refused to have contact except on his own terms. On occasions when the court attempted to introduce contact, the defender refused to attend. Such conduct is commented on in Ms Coulson's report of 6 May 2021, and the curator's own reports. Most recently this occurred following the court interlocutor of 8 September 2023 which permitted non-residential contact, which the defender refused to attend. The defender refused to allow his child counselling at Place2B. He refused to agree the appointment of the psychologist: although he subsequently changed his mind, his initial refusal meant a delayed remit and a delayed timetable, as psychologist had since accepted other work. The defender's conduct appeared to pay no attention to the best interests of the child. His conduct on occasion actively distressed the child, who was looking forward to contact.

[13] The defender's position is that the sheriff was obliged to fix a proof. His reasoning is that the sheriff indicated that the matter was proceeding to proof, and also that he had made clear he wanted one. These are not sound reasons. Every action is designed to proceed to a proof, unless previously resolved. In family actions such as this, however, proof should be required only where the sheriff has been unable to resolve the case in any other way (*K* v *K and anor* [2018] SAC (Civ) 24 at para [27]). It is open to the sheriff to decide the case without fixing a proof if she considers it appropriate to do so and if there are no material facts which require to be resolved.

[14] In this action, proof would not have assisted the court in coming to a decision. There were no further material facts which required evidence. The issue of delay had become a significant factor, and awaiting both a psychologist's report and a proof date would significantly add to that. The defender had actively thwarted the early receipt of a psychological report. His engagement was patchy. He was controlling about the basis for contact, in opposition to the court's efforts to promote contact. The child was in a state of apparently endless distress. The defender's position appeared to be based on parental alienation, but this was an assertion only and not supported by any material before the court. Indeed the child's views were eloquent that there was none - he was attempting to balance the interests of both parents, but getting nowhere.

[15] Against that background, there was every reason for the sheriff to bring these proceedings to a close. It is difficult to anticipate, and the defender does not explain, what difference the psychologist's report would have made. Even if it supported his theories, there remained a strong body of evidence that residence should be awarded to the pursuer, not least that of the child and of the curator who represents the child.

[16] There was no error in fact or law. Possibly the most significant point is a short one: the defender cites his Article 6 ECHR rights to a fair trial, and refers to his own demands to the court for proof. Not once does he refer to the best interests of his son.

Decision

[17] The appeal is refused. Given the nature of these proceedings, there may be no motion for expenses. If any party wishes to make a motion, they should contact the clerk within 14 days, failing which no awards of expenses will be made.