SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2017] SC EDIN 70

F1452/16

JUDGMENT OF SHERIFF WILLIAM HOLLIGAN

In the cause

MRG

Pursuer

Against

MD

Defender

Pursuer: Stratford; Drummond Miller LLP
Defender: Mellor; Somerville & Russell

Edinburgh, 11 August 2017

The sheriff having resumed consideration of the cause finds in fact:

[1] The pursuer is the father and the defender the mother respectively of two female children, MA and MJ. MA and MJ are aged nearly 5 and 3.

[2] Both parties and children live within the jurisdiction of the court.

[3] The parties are not and never have been married to each other.

[4] The parties are Polish by birth.

[5] The parties were in a relationship for approximately 12½ years until their separation in September 2014.

[6] The parties lived together for 11 years in the United Kingdom.

[7] The parties separated weeks before MJ was born.

[8] Numbers 5/1/1 and 5/1/2 of Process are the birth certificates of the children. The names of the children were registered by both parties. They were each given the surname of the pursuer.

[9] Numbers 5/2/4 and 5/2/5 of Process are copies of the passports of the children. Their surname is that of the pursuer.

[10] Numbers 6/1/5 and 6/1/6 of Process are copies of statutory declarations sworn by the defender. The material parts of the declarations state that from 14 July 2015 each child has been known and referred to by the surname of the defender for all purposes and has not been known under any other name; and that the defender intends to enforce on all occasions and at all times, to use and call the children by her surname. Each of the statutory declarations is registered in the Books of Council and Session. They were sworn after the defender had taken legal advice.

[11] The defender is and has at all material times been the principal carer of the children. They have had their principal residence with the defender.

[12] By tradition, in Poland, a married spouse takes her husband's name. The children of the marriage do likewise.

[13] At nursery the children have or will be known by the defender's surname.

[14] MA will be introduced at school by the defender's surname.

[15] In the NHS, MA is known by the defender's surname.

[16] For the dentist, the children are registered under the pursuer's name.

[17] When in the pursuer's household the children are known by reference to the pursuer's surname.

[18] When in the defender's household the children are known by reference to the defender's surname.

[19] The children are currently too young to have an understanding of their surname.

[20] The pursuer intends to marry his partner and it is intended that she will take his surname. MA is aware of this proposal.

[21] MA recently received a diploma from her nursery with the defender's surname.

[22] In the past, the pursuer has exercised contact with both children. The parties have agreed regular weekly contact.

THEREFORE

Puts the matter out by order for agents to make such submissions as they may be advised in relation to authorities referred to and the terms of the final order to be made; reserves meantime making findings in fact and in law; assigns 10 am on 25 August 2017 at the Sheriff Court as a diet therefor.

Note

[1] The pursuer is the father and the defender the mother of two female children. The parties are not and never have been married to each other. The older child is nearly five years old; the younger child is nearly three years old. Both the parties and the children live within the jurisdiction of this court. There are two issues in this case: the surname of the children; Christmas contact.

[2] I heard evidence from four witnesses: the parties and their respective partners. There is also an affidavit lodged containing the evidence of the pursuer's sister. This is not a case in which there are any issues of credibility or reliability. The factual background is not much in dispute. There is a joint minute. The children reside with the defender. She is and has been their principal carer. That was not disputed by the pursuer. In terms of the joint

minute the parties have agreed that the pursuer shall have contact with the children each week from 8.00 am on Tuesday until 7.00 pm on Thursday. In addition, the pursuer will be entitled to have holiday contact on three occasions per year for a period of two weeks on each occasion.

[3] The parties are both Polish. They began their relationship in Poland and then moved to the United Kingdom. The relationship lasted for 12½ years, 11 years of which were spent in the United Kingdom. The older child (MA) was born when the parties lived together. The younger child (MJ) was born a matter of weeks after the parties separated in September 2014.

[4] Numbers 5/1/1 and 5/1/2 of Process are the respective birth certificates of the children. The children have the pursuer's surname. The parties agreed they should have such a surname. They went together to register the births. In the case of MJ, at the time, the defender entertained hopes that the parties would resume their relationship. They did not. Numbers 5/2/4 and 5/2/5 of Process are copies of the passports of each child. They have the surname of the pursuer. As I understand in the pursuer's evidence he was the person who organised for them to have passports. There is no evidence that the defender objected.

[5] After separation, the defender wanted the children to be known by reference to her surname. As I have said, she was the main carer of the two children. She wanted them to have her surname. In her evidence she said it would be easier that way. Numbers 6/1/5 and 6/1/6 of Process are copies of statutory declarations sworn by the defender. The statutory declarations are identical in respect of each child. They are both registered in the Books of Council and Session. They were prepared after the defender took legal advice. The relevant part of the text is as follows:

> "… From 14 July 2015 my child has been known and referred to as [the defender's surname] for all purposes and has not been known under any other name. I intend to enforce on all occasions and at all times, to use and call my child by the name of [defender's surname]… I acknowledge that this declaration is not sufficient to allow a change in [the] birth certificate".

[6] At nursery school each child is known by the defender's surname. Number 6/1/2 of Process comprises copies of the invoices from the nursery referring to the children by name. Numbers 6/1/3 and 6/1/4 of Process are copy documents from the NHS referring to the older child (MA) by the defender's surname. In that respect there was a difficulty. During the time when the pursuer was exercising contact, he had occasion to contact NHS 24 in relation to MA. When he rang, NHS 24 was unable to trace MA under his surname; she was registered under the defender's surname. MA will attend school this year. Number 6/1/1 of Process is a document from her school calling MA by the defender's surname. In his evidence, the pursuer said he had contacted the school in relation to MA's surname and that no final decision had been made as to what surname would be used.

[7] So far as the state of mind of the girls is concerned, it was accepted by all the witnesses that MJ is too young to have any real understanding of the significance of a surname. On a day to day basis, the girls are known by their first names. The pursuer's position is that, when with him, when a surname is used, the girls are known by his surname and are so known by members of his family (in that he is supported by the affidavit of his sister). When with the defender, when surnames are used, they are known by the defender's surname. The unchallenged evidence of the pursuer is that, by tradition, in Poland when parties marry and have children the wife and children take the husband's name.

[8] The matter of a surname has arisen in one context. The pursuer and his partner intend to get married. MA was told of their intentions and that the pursuer's partner would

be taking the pursuer's surname. According to the pursuer and his partner, MA was excited at the prospect of his partner having the same surname as MA. The only other evidence is that MA had a conversation involving the pursuer's partner as to why her cousin had a different surname. Other than that the children have little real understanding as to their surname.

[9] In her evidence, the defender said that, when registering MA for school she wrote her name as "MA (father's surname) known as (mother's surname)". There is no documentary evidence to that effect but it is consistent with the terms of the statutory declarations. MA recently received a diploma from her nursery and did so under her mother's surname.

[10] The defender explained that whereas she does not seek to change the birth certificate particulars of either child, travelling overseas with the children presents certain difficulties. The passports of the children have different names from that of the defender. The defender requires to explain the reason for the difference to airport security and to have the birth certificates of the children with her to vouch her explanation. She was also concerned that, as the children grow older, they may be questioned which might be difficult and embarrassing for them. If the pursuer's partner assumes the surname of the pursuer she will likely have fewer problems than the defender. However, if the children have the defender's surname the pursuer and his partner may have similar problems to those experienced by the defender.

[11] The defender is in a new relationship. Should she and her new partner marry, they have agreed that he will take the defender's surname.

[12] The evidence of both parties is that there is currently a degree of confusion as to the surname by which the girls should be known. Both seem to accept that it is not in their interests for this confusion to endure.

[13] Although somewhat thin, I take the evidence to be that the pursuer has had regular contact with the children. In relation to Christmas contact I can be brief. Both parties acknowledge that, in Polish society, Christmas Eve is the principal day of celebration. It is an important festival, particularly for families. In principle, both parties accept that an alternating year arrangement would be equitable and in the interests of the children. The defender proposes that she should be able to travel to Poland with the children for a period of two weeks or thereby. She has no family in Scotland but does have a large extended family in Poland. Although the pursuer has said that he does not object to the defender travelling to Poland the defender says that he has in the past delayed giving his consent which had an impact on the defender's ability to secure less expensive tickets leading to no travel to Poland taking place. The pursuer does not believe it is in the interests of the children for them to be absent abroad for two weeks. He would be willing to accept Christmas contact year about but not of that duration.

Submissions for the Pursuer

[14] The pursuer seeks a specific issue order in relation to the surname of the children. They already have the pursuer's surname on their birth certificates and passports. Giving a name to a child is a parental right and responsibility. Reference was made to sections 1(1) (a) and section 2(1) (b) of the Children (Scotland) Act 1995 ("the 1995 Act"). There is a dispute between the parties as to the exercise of parental rights and responsibilities. That dispute requires to be resolved in terms of section 11(2) (e). In effect it is the defender who

seeks to change the name of the children, not the pursuer. Reference was made to *M* v *C* 2002 SLT (Sh Ct) 82 and to passages in *The Law Relating to Parent and Child in Scotland*, Wilkinson & Norrie. (The passages to which I was referred are to an older edition. I shall refer to the third edition, paragraphs 7.44-7.46.) There was little in the evidence of the defender which went much beyond inconvenience. If the defender does not seek to change the names of the children on the passports it will not really alleviate her concerns about difficulties in travel. In Miss Stratford's submission the principal issue is what the defender really wants for herself. There is documentation which shows the pursuer's surname as being the name of the children. *M* v *C* provides that the consent of both parties is required to change a surname although Miss Stratford acknowledged the terms of section 2(2) of the 1995 Act. One parent acting unilaterally is, however, not acting in the child's best interests. There need to be exceptional circumstances before a parent could decide to call a child by another name. It was by agreement that the names of the children were registered in the way in which they were. The statutory declarations sworn by the defender were of no legal force. Miss Stratford also referred to the case of *Re B (Minors) [Change of Surname]* [1996] 1 FLR 791. Any decision made by the court in the present case is to be determined by reference to the welfare provisions contained in section 11(7) of the 1995 Act. The parties require a determination on this issue. The parties were agreed as to all contact, other than Christmas. Miss Stratford accordingly sought decree in terms of paragraph 2(a) and paragraph (b) of the joint minute; crave 1(c) and crave 2.

Submissions for the Defender

[15] For the defender Mr Mellor accepted that the welfare principle applies to determining matters of parental rights and responsibilities. The parties had had a lengthy

relationship. When the relationship came to an end, not that long after, the defender swore the statutory declarations. Those statutory declarations refer to the name by which the children are to be known. Mr Mellor also referred to the passages in Wilkinson & Norrie and in particular (in the earlier edition), at paragraph 8.61 where the learned authors say that, in Scots Law, the name under which a child has been registered is of little real significance; a person, generally, has the name by which he or she is known. The authors go on to say the presumption is that a child's welfare is served by his or her retaining the name by which he or she has hitherto been known, so that if there is no significance to the change the court will not authorise it. On the facts of this case it is the pursuer who seeks the change. The children have been known by the defender's surname during the time they have been living with her. As the younger of the two children has spent her entire life living solely with the defender that is the only name by which she is known. Registration of the name is of little significance. The past is significant in the sense that what the child is known as is relevant. There were genuine difficulties for the defender in travelling. Changing the name back to the pursuer's surname would lead to yet more confusion. It is really the pursuer who is insisting on the enforcement of what he considers to be his rights. The parents have the responsibility to provide the child with a name but that is not to say that they do not have the right to change that name. Mr Mellor referred to section 2(2) of the 1995 Act. The defender has exercised her rights. She sought legal advice before swearing the statutory declarations. As a matter of fact, neither party has sought the consent of the other in relation to the use of names. So far as Christmas is concerned, in principle, travel abroad seems not to be opposed. The defender wants to go to Poland. Her difficulty has been obtaining from the pursuer his consent in sufficient time to purchase airline tickets at advantageous rates. The pursuer has persistently delayed in giving a response to the

defender about this. The defender was perfectly willing to accept an alternating arrangement for Christmas. She accepted that Christmas is an important time of year in Poland.

Decision

[16] The pursuer seeks a specific issue order that the children "be known by the name recorded on their respective birth certificates": the defender seeks a specific issue order that the children "be known by the [defender's surname]". In my opinion, it is useful to begin considering this matter by reference to the position at common law. So far as adults are concerned, Scots Law has tended to look upon a surname as being something by which a party is known (see *Encyclopaedia of the Laws of Scotland (Greens);* "Name and Change of Name", Volume 9, paragraph 290; *Kinloch* v *Lowrie* 1853 16D 197). In general terms, an adult has a right to take any name he chooses. That name can be changed *(Robertson* (1899) 2F 127; *Johnston* (1899) 2F 75). The court will not usually become involved in any change of name (*Furlong* (1887) R 910). In the past there have been certain mechanisms utilised in relation to a change of a name although that appears to have been something more facilitative than compulsory. At common law, certificates as to a change of name were obtained from the Lord Lyon or the change was documented by a public advertisement (Greens, *supra*, paragraphs 308 and 310). By custom, rather than by law, married women in Scotland have, since the middle of the 19th century, taken the name of their husband but that was not always the case.

[17] Put very broadly, there is a statutory obligation upon parents to secure the registration of a child's birth; the child requires to have a name (Registration of Births, Deaths and Marriages (Scotland) Act 1965 ("the 1965 Act")). The 1965 Act permits

applications to be made to change the registration which is done by way of an entry in the Register of Corrections; where both parents have parental rights and responsibilities both must register (section 43(9A)). The common law procedure to which I have referred is acknowledged in section 43(6) of the 1965 Act.

[18] There appears to be little if any modern authority dealing with this matter. Clearly the social background has changed significantly since the nineteenth century. Many parties, as in the present case, choose to cohabit rather than marry. There is often, again as in this case, a change in relationships, step siblings and new family units. Furthermore, it is within judicial knowledge that, for practical purposes, a name is of far greater importance than it used to be. The use of technology and questions of security, particularly in relation to the use of the internet, means that identity is of much greater importance than was previously the case. The word "identity" is said to be an important factor. In my opinion, it has two practical aspects: (1) identity as meaning, quite literally, who the person is; (2) what I might describe as the psychological aspect for the individual concerned, the way in which a name gives a child a sense of belonging. In relation to a child, again by convention rather than as a matter of law, in Scotland a child will take the surname of the father. The evidence in this case is that the same principle applies in Poland.

[19] The present matter is ventilated as a specific issue order, all in terms of section 11(2)(e) of the 1995 Act. However, as the subsection provides, a specific issue order is not a freestanding order; it must relate to the matters referred to in section 11(1) (a) to (d). (I can leave out of account section 11(1) (c) and (d)). It follows that I am asked to deal with this matter as an aspect of parental rights and responsibilities as these are defined in the 1995 Act. In the present case I need not concern myself with the initial obligation to give a child a name. That has been done. I am concerned with the use of a name. Read short, parental

responsibilities include the obligation "to safeguard and promote the child's health, development and welfare" and also "to provide in a manner appropriate to the stage of development of the child (i) direction; (ii) guidance". As section 2 makes clear, parental rights are conferred upon parents in order to enable them to fulfil the responsibilities imposed upon them in section 1. Section 2(1) (a) and (b) are cast in similar terms to those in section 1(1) (a) and (b). In my opinion, the dispute between the parties as to the name by which the children should be known is a matter engaging sections 1 and 2 of the 1995 Act. Section 11(7) provides that in considering whether or not to make a section 11 order the court must regard as its paramount consideration the welfare of a child. It is accepted that the children are too young to express a view.

[20] Section 2(2) expressly provides that where two or more persons have a parental right as respects a child each of them may exercise that right without the consent of the other unless any decree of deed conferring the right or regulating its exercise otherwise provides. There is no such deed or decree in the present case. It follows that, in terms of section 2(2) there is nothing to impede either parent changing the surname of the children. Section 43 of the 1965 Act provides, as I have said, a mechanism for changing the name by which a child is registered. If the change of a surname does engage parental rights and responsibilities then either parent is at liberty to seek a specific issue order, in advance of any change in terms of section 11(2)(e) and also seek an interdict in terms of section 11(2)(f). Section 11(2)(f) relates to an interdict against the fulfilment of parental responsibilities or the exercise of parental rights. It is not concerned with a wrong. (I note that the procedure in England appears to be different: in *Re B (supra)* the award of custody of the children in favour of the mother contained "the usual prohibition against her taking any step which would result in them being known by a new surname except with the father's consent or leave of the court".

That is not the practice in Scotland.) At the end of the day to say that one parent cannot change the surname of a child unilaterally may not amount to much. As a practical matter, if one parent has the majority of the care the name by which a child is known may evolve rather than undergoing a sudden change. In all editions of *Wilkinson & Norrie*, it is said that section 43 of the 1965 Act constitutes an "implicit qualification to section 2(4) of the 1995 Act so that renaming, at least, is a matter that requires the agreement of both parents" (paragraph 7.44 – 3rd Edition.) That conclusion was approved in *M* v *C*. With great respect, I have my doubts as to whether, as a matter of statutory interpretation, that conclusion is correct. The statutes have different functions. It is also not clear to me what, in practical terms, it actually means: I doubt that a unilateral change, of itself, confers a cause of action in itself. That is not to say that a unilateral decision to change a surname is appropriate. If such a course of action is anticipated it should be done by agreement which failing by order of court. In any event, on the facts of this case I am not convinced that this is really a change of name. On one view of the evidence both surnames are being used; it is more a case of settling a dispute as to by which surname the children should be known.

[21] In my opinion, the craves reflect the approach of the common law as to the function of a name ("be known as"). In relation to a child it is the adult who has the de facto control over how the child is known. That applies both formally (for example, at school and in medical documents) and informally (friends and family). There are, or may be, long term consequences for the child, the future implications of which may be uncertain. Also, it is difficult to see that any order can be enforced beyond the age of 16 (see the judgment of Wilson J in *Re B*). When a child grows up he or she must have the right to determine the name by which he or she will be known. There is very little Scottish authority on this point – *Flett* v *Flett* 1995 SCLR 189, referred to in *M* v *C*, deals with earlier legislation. There has

clearly been a great deal more litigation in England but, as *Wilkinson & Norrie* point out, correctly in my view, the English statutory background and the significance of registration is very different to the law in Scotland. The English authorities are useful only to illustrate some of the issues and the ways adopted to resolve them.

[22] In the present case there are several factors: (1) the parties registered the births using the pursuer's surname; (2) the passports have the pursuer's surname; (3) within a year of separation the defender sought advice and used the statutory declaration procedure in order to change the name of the children; (4) the defender is the main carer of the children; (5) the pursuer has, and continues to have, regular and generous contact with the children; (6) the pursuer proposes to remarry and his partner will take his surname; (7) the defender is in a relationship but intends to retain her own surname should she and her partner marry; (8) for medical and educational purposes the children are known by the defender's name; (9) in relation to the dentist, the children are known by reference to the pursuer's surname; (10) the children are known by different surnames at their respective homes.

[23] I have to say that I do not find resolving this an easy matter. It is not a case in which either option is axiomatic. I do not regard the registration or the statutory declarations to be determinative. They are factors to weigh in the balance. Each case is fact specific. Both children are too young to have any real understanding of the significance of a surname. The welfare test requires that the court should look at the matter from the perspective of the children, not the parents, but beyond that it adds little of real substance to the making of a decision. Both names are in currency at different times. That leads to confusion and uncertainty and cannot be in the interests of the children, particularly as they grow older. Both parents play a significant role in the daily lives of the children and that will continue. There is a clear biological connection against a background of new parental relationships. In

relation to difficulties in travelling, such problems will continue whichever name is adopted: it is a case of who has the problem. The defender did say in evidence that she was prepared to consider the use of both surnames. That was not put to the pursuer. I am of the opinion that on the facts of this case there is much to recommend such a solution. The use of both surnames recognises the involvement of both parents in the lives of the children and will give some certainty in this matter. It is also a solution commended by the Court of Appeal in *R (a child)* [2001] EWCA Civ 1344.

[24] That leaves the matter of Christmas contact. In my opinion, alternating contact year about is an appropriate model. As both parties have links with Poland, it is appropriate that they should have the opportunity to visit Poland for the festive season and for the children to experience a Polish Christmas. The grant of permission will allow plans to be made. Given the cost, the time of year and the season I do not consider that a two week period is unreasonable, particularly as the arrangement will work equally for both parties. It is open to parties to make alternative arrangements by mutual agreement. The order is subject to the giving of the usual information before the visit (*A* v *B* 2016 SLT (Sh Ct) 389*)*.

[25] I am conscious that I have referred to more authority than was submitted to me. I shall accordingly put the matter out by order should either wish to make submissions on the law. I make clear I do not intend to reopen the matter on the evidence. I should also like to be addressed on the precise terms of the order to be made. I intend that the surname be the pursuer's name followed by the defender's surname. Any such order can only endure until the children attain the age of 16. It is better that orders be made than not made at all.