SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2021] SC GLW 010

GLW-F426-15

NOTE IN RESPECT OF DECISION RELATIVE TO THE PURSUER'S MOTION FOR DISMISSAL OF A FAMILY ACTION

by

SHERIFF ANDREW M MACKIE

in causa

MK

PURSUER

against

SD

DEFENDER

NOTE:

(i) ***Relevant procedural history***

[1] The pursuer raised these proceedings in March 2015 seeking a residence order in terms of section 11(2)(c) of the Children (Scotland) Act 1995 (hereafter "said 1995 Act") in respect of parties' child, then aged around 14 months. In May 2015, the defender lodged defences containing a counterclaim in which he sought a contact order in respect of said child. The court regulated the interim contact arrangements during 2015 prior to parties

reaching agreement in respect of contact in November 2015. Parties' agreement is recorded in the court's interlocutor of 5 November 2015 at which time the court also granted an interim residence order in favour of the pursuer in respect of said child.

[2] At a child welfare hearing on 31 March 2016, the court varied said interim contact arrangements whereby, the defender was found entitled to interim contact with said child each Tuesday and Friday from 4.00 pm until 6.00 pm and each Saturday from 11.00 am until 4.00 pm. A further child welfare hearing was assigned for 23 June 2016 for consideration to be given to allowing residential contact between the defender and said child.

[3] Towards the end of April 2016, the pursuer relocated to Liverpool with said child where they have remained. The pursuer did not advise the defender of her intention to relocate with said child. She did not obtain his consent to same nor did she obtain an order of the court permitting such relocation. No order has been granted in these proceedings requiring the return of said child to Scotland. On 2 June 2016 the court varied the interim contact arrangements between the defender and said child to allow contact to take place in both Glasgow and Liverpool.

[4] In July 2016, the defender lodged a minute of amendment seeking to introduce a crave for a residence order into his counterclaim. Subsequently, the pursuer sought to amend her writ to introduce a crave for a specific issue order permitting the said child to relocate with the pursuer to Liverpool.

[5] A number of child welfare hearings then followed during which the interim contact arrangements were reviewed; the amendment procedure was completed; and said additional craves were incorporated into the pleadings. An options hearing was assigned

for 14 March 2017. A continued options hearing took place on 11 April 2017 when the Record was closed and a case management hearing assigned for 22 May 2017.

[6] The pursuer's agents subsequently withdrew from acting on her behalf. The pursuer instructed new agents but the case management hearing required to be continued on more than one occasion to enable the pursuer's new agents to obtain the pursuer's files from her previous agents. The case management hearing finally took place on 4 July 2017 at which time a diet of proof was assigned for 2, 3 and 4 October 2017.

[7] On 2 October 2017, on the unopposed motion of the pursuer, the diet of proof was discharged to enable a medical assessment to be carried out on said child and to enable a report to be produced in respect of same. A further diet of proof was assigned for 18, 19 and 20 December 2017. Said proof diet was discharged on the joint motion of parties and the cause continued to a procedural hearing on 13 February 2018 to enable final orders to be considered and further amendment of the pleadings to be effected.

[8] During the period between February and April 2018 parties advised the court that they were in discussions in respect of possible final orders and the amendment procedure continued. In early April 2018 the pursuer's solicitors withdrew from acting on her behalf. The pursuer has subsequently been self-represented. The pursuer enrolled a motion, number 7/8 of process, seeking dismissal of these proceedings which I considered at a hearing on 18 June 2018.

(ii) ***Pursuer's motion 7/8 of process***

[9] The pursuer's motion, number 7/8 of process, is in the following terms:-

> "(**MK) Pursuer** plea in Law, respectfully craves the court to allow a discharge of all proceedings under the best interest of the child being paramount for his welfare and safety below:"

Eight numbered paragraphs then follow, which I will deal with below, together with a letter from the pursuer addressed as follows: "FAO Sheriff Depute/Sheriff Principal, Glasgow and Strathkelvin Sheriffdom." There is little in said letter which is relevant to the said motion.

[10] In respect of the numbered paragraphs which follow said motion, paragraph 1 refers to the Family Law Act 1986 (hereafter "said 1986 Act") and sets out some of the text of section 7(c) of said 1986 Act. The quotation is partial and inaccurate. In any event, the partial definition quoted by the pursuer relates solely to Chapter 2 of said 1986 Act which applies only to England and Wales. I could not see the significance of this partial quotation in the context of the pursuer's motion.

[11] In said paragraph 1 the pursuer also states "crave for residence applied 26 July 2016 and interlocutor varied 4 August 2016". This may be a reference to the defender having lodged a minute of amendment in July 2016 in which he sought to introduce a crave for a residence order. I took the reference by the pursuer to an interlocutor dated 4 August 2016 to be a reference to the interlocutor of this court issued on 4 August 2016 in which, *inter alia*, the court varied the interim contact order, only to the extent that the defender should give the pursuer advance notice of where he and said child would be staying in the event of residential contact not taking place in Glasgow. I could not see the significance of these matters in the context of the pursuer's said motion.

[12] In paragraph 2 the pursuer refers to section 41 of said 1986 Act and submits that, on the basis of said section, this court no longer has jurisdiction to make any further

interim order for contact in respect of said child and should dismiss the defender's crave for residence. I will deal with this submission below.

[13] In paragraph 3 the pursuer submits that said child has lost his habitual residence in Scotland and that the English courts would now exercise jurisdiction on the basis that said child is now habitually resident in England, the relocation having taken place in April 2016. The pursuer submits that, by August 2017, the English courts had jurisdiction. I will deal with this submission below.

[14] In paragraph 4 the pursuer requests that this court be bound by "the guidance" of the Court of Session in the case of *B* v *B* 2009 SC 58 (reported as *RAB* v *MIB*).

[15] In paragraph 5 the pursuer makes a number of allegations in respect of the defender's conduct and indicates that a hearing in respect of a non-molestation order sought by the pursuer against the defender would be taking place in an English court.

[16] In paragraph 6 the pursuer states that:-

> "English court have now seized my applications for Contact Arrangements order where the child is habitually resident, to further any contact arrangements for the defender to continue for his Parental rights to be asserted".

At the hearing before me parties explained that the pursuer has now made an application to the English courts for determination of the residence and contact arrangements in respect of said child. The pursuer confirmed that she had made such an application on the basis of her submission that said child is now habitually resident in England. The English court had continued consideration of the pursuer's application pending the outcome of this motion.

[17] In paragraph 7 the pursuer states: "English court will on discharge of the above case apply for the Court Rolls for all previous paperwork". At the hearing before me the

pursuer explained that, in the event of her motion for dismissal being granted, the English courts would seek access to the process in this case.

[18] In paragraph 8 the pursuer confirms that she no longer has legal representation in Scotland and had not been aware of the interlocutor issued in these proceedings on 5 April 2018 assigning the peremptory diet and Rule 18.3 hearing on 1 May 2018.

(iii) ***Hearing on 18 June 2018 in respect of pursuer's motion 7/8 of process***

[19] When I asked the pursuer to clarify what she sought to achieve by her motion, she confirmed that she sought dismissal of these proceedings in their entirety. The pursuer confirmed that she would not wish her craves to be dismissed if the court would not also dismiss the craves for the defender.

[20] The defender's position was that this court retained jurisdiction and that it remained the most appropriate forum for determination of the issues in dispute between the parties. The defender has a crave for a residence order in respect of said child, failing which he seeks a contact order in respect of said child.

[21] The pursuer submitted that she understood (i) the defender had conceded the issue of residence and (ii) parties had agreed extensive contact between the defender and said child. The defender's agent submitted that there had been informal discussions between parties' agents about these issues around the time of the proof being discharged in December 2017. As part of those discussions the suggestion had been made that the defender would, perhaps, consider conceding the issue of residence if substantial contact could be put in place and if other matters were also resolved. The proof had been

discharged for these negotiations to continue. Since then the negotiations had not been concluded and agreement had not been reached in respect of these issues.

[22] Furthermore, prior to finalisation of the Scottish proceedings, the pursuer had raised proceedings in England. The defender was unclear what had prompted the pursuer to raise the proceedings in England. In seeking to explain her position the pursuer was critical of her previous solicitors and said that she had raised court action in England because her former agents had taken no action in the Scottish courts to seek protective orders in respect of the defender's conduct.

[23] The pursuer's position was that the English courts now had exclusive jurisdiction in respect of the residence and contact arrangements for said child on the basis that said child was now habitually resident with the pursuer in Liverpool. Furthermore, the Sheriff Court in Glasgow was *forum non conveniens*. The pursuer's witnesses were all based in Liverpool and included health professionals and school staff.

[24] I observed that, notwithstanding her submissions, the pursuer's witness list, number 19 of process, does not contain an extensive list of health professionals and school staff. Further, the defender's agent indicated that, if the pursuer sought to call witnesses such as health professionals and school staff, their evidence might well be capable of agreement and they would not require to travel to Glasgow. The pursuer responded by saying that, if such witnesses did not have to attend court, a delay of 4 to 6 months could be anticipated to afford sufficient time to deal with the formalities in respect of their evidence being given by way of affidavits. I remain unclear why this would be the case.

[25] The defender's agent confirmed that all of the defender's witnesses are based in Scotland and would be available for the proof diet. This was subject to one caveat. The

defender intended to call his father as a witness. His father had been involved in the contact handover arrangements. The defender's father is, however, seriously ill at present and may be unfit to attend court.

Discussion

[26] The pursuer raised these proceedings in March 2015, averring that this court had jurisdiction to deal with her crave on the basis that said child was habitually resident in Glasgow. The defender admitted that this court had jurisdiction. Since then this court has regulated the residence and contact arrangements in respect of said child and numerous motions in respect of same have been made by the parties, both in writing and at the bar. The said child was around 14 months old at the commencement of these proceedings. He is now around 4½ years old.

[27] Parties are agreed that, towards the end of April 2016, the pursuer relocated with said child to Liverpool, without giving notice of her intention so to do to the defender and without the consent of the defender or order of the court. At the time of said relocation these proceedings had been ongoing for a period in excess of one year. At no stage has the defender consented to the relocation of said child to Liverpool where the pursuer and said child have remained since April 2016. Following said relocation the defender was unable to exercise contact with said child in terms of the aforementioned interim contact order granted by this court on 31 March 2016.

[28] After said relocation the pursuer amended her Initial Writ to seek a specific issue order from this court in terms of section 11(2)(e) of said 1995 Act allowing the relocation

of said child to Liverpool with the pursuer. Her crave for a specific issue order in these terms remains extant in these proceedings.

[29] The pursuer's position is that, notwithstanding the defender has not consented to the relocation of said child to Liverpool, said child's habitual residence has changed by virtue of the passage of time and by virtue of the terms of section 41 of said 1986 Act which provides as follows:-

> "(1) Where a child who—
> (a) has not attained the age of sixteen, and
> (b) is habitually resident in a part of the United Kingdom,
> becomes habitually resident outside that part of the United Kingdom in consequence of circumstances of the kind specified in subsection (2) below, he shall be treated for the purposes of this Part as continuing to be habitually resident in that part of the United Kingdom for the period of one year beginning with the date on which those circumstances arise.
> (2) The circumstances referred to in subsection (1) above exist where the child is removed from or retained outside, or himself leaves or remains outside, the part of the United Kingdom in which he was habitually resident before his change of residence—
> (a) without the agreement of the person or all the persons having, under the law of that part of the United Kingdom, the right to determine where he is to reside, or
> (b) in contravention of an order made by a court in any part of the United Kingdom.
> (3) A child shall cease to be treated by virtue of subsection (1) above as habitually resident in a part of the United Kingdom if, during the period there mentioned—
> (a) he attains the age of sixteen, or
> (b) he becomes habitually resident outside that part of the United Kingdom with the agreement of the person or persons mentioned in subsection (2)(a) above and not in contravention of an order made by a court in any part of the United Kingdom."

[30] On the basis of the foregoing the pursuer submitted that said child is now habitually resident in Liverpool and, accordingly, the English courts have jurisdiction in respect of the residence and contact arrangements for said child. I rejected that submission for the following reasons.

[31] Parties were agreed that this court had jurisdiction when the pursuer raised the proceedings. Parties were also agreed that (i) the pursuer had relocated with said child to Liverpool without the defender's consent and without any order of the court; and (ii) the defender had not subsequently consented to said relocation in respect of said child.

[32] Both before and after said relocation this court has regulated the residence and contact arrangements in respect of said child in advance of the diet of proof which requires to take place to allow those arrangements to be finally determined. The original dates allocated for proof in October 2017 were discharged on the motion of the pursuer for the reasons set out above. The subsequent dates allocated for proof, in December 2017, were discharged on the joint motion of parties as it appeared that matters were capable of resolution by negotiation. Parties were subsequently unable to agree the terms of a joint minute. The pursuer seeks a residence order in respect of said child. The defender has confirmed that he has not conceded the issue of residence and that he also seeks a residence order in respect of said child. I have proceeded to determine the pursuer's motion on the basis that residence of said child remains in dispute between the parties.

[33] The first issue which arises in the context of the pursuer's motion is whether there is another court of competent jurisdiction enabled to consider and rule upon the residence and contact arrangements for said child. For there to be such a court, the said child's habitual residence would require to have been changed by virtue of the pursuer's actions in relocating with said child to Liverpool without the consent of the defender and without an order of this court. This issue was one of the issues considered by the Court in *RAB* v *MIB*, *supra*.

[34] At paragraph 12 of the judgment of the Court in *RAB* v *MIB*, *supra* Lord Eassie, delivering the opinion of the Court, states-

> "At least in the sphere of international child abduction, the authorities to which we were referred are consistent in holding that unilateral change was not to be recognised as a competent ground of jurisdiction. Those authorities included, in Scottish terms, Dickson v Dickson 1990 SCLR 692 in which at page 703C the Lord President (Hope) said, following reference to R v London Borough Council ex parte Shah [1983] 2 AC 309:
> "A person can, we think, have only one habitual residence at any one time and in the case of a child, who can form no intention of his own, it is the residence which is chosen for him by his parents. If they are living together with him, then they will all have their habitual residence in the same place. Where parents separate, as they did in this case, the child's habitual residence cannot be changed by one parent only unless the other consents to the change. That seems to us implied by the Convention.""

[35] In paragraph 13 of said judgment Lord Eassie goes on to narrate examples of other Scottish cases in which the notion that the habitual residence of a child cannot be changed unilaterally has been adopted. His Lordship also refers to passages in Wilkinson & Norrie on Parent and Child (2nd Edition) at paragraph 11-21 (now contained at paragraph 11.03 in the 3rd Edition) in which the authors express the view that a change in the habitual residence of a child requires the consent of both parents. [36] His Lordship goes on, in paragraph 14 of said judgment, to say that the position in England and Wales appears to be similar. His Lordship quotes from paragraph 6-129 of the 14th Edition of Dicey Morris & Collins on Conflict of Laws where the authors, having referred to the provisions of section 41 of said 1986 Act, say:-

> "This has been held to apply only to cases in which the child is removed to, or retained in, another part of the United Kingdom, but the courts have adopted a more general proposition that a child's habitual residence cannot be changed by the unilateral action of one parent and remains unchanged unless circumstances arise which quite independently point to a change in its habitual residence."

[36] In this case the pursuer relocated with said child without the defender's consent and without an order of the court, despite the existence of these proceedings and despite the interim contact order granted by this court on 31 March 2016. The pursuer thereby prevented the defender from exercising contact in terms of said interim contact order. In my view her unilateral action in this regard, in these particular circumstances, could not and did not change the habitual residence of said child, notwithstanding the period of time during which she has remained resident in Liverpool since said relocation.

[37] I have concluded that the habitual residence of said child has not been changed by the unilateral action of the pursuer in this case. The English courts do not therefore have jurisdiction to deal with the residence and contact arrangements for said child. This court continues to have jurisdiction to deal with said arrangements.

[38] Accordingly, I could not be satisfied that there existed another court of competent jurisdiction. For the reasons set out in paragraphs 10 to 16 of the case of *RAB* v *MIB supra*, the pursuer was unable to satisfy this court of the existence of another court of competent jurisdiction.

[39] On the basis that I am not satisfied that the English courts have jurisdiction in these circumstances to determine the issues of contact and residence in respect of said child and negotiations between the parties in respect of those matters having broken down, there will require to be a proof to determine which, if any, orders would be in the best interests of said child. I have accordingly assigned further dates for such a diet of proof.

[40] Even if I am wrong and the English courts do have jurisdiction to determine the aforementioned issues and there is therefore another court of competent jurisdiction, it is clear that, in this case, there are witnesses of importance in Glasgow and elsewhere in

Scotland, as well as in England. Further, the defender's agent is willing to cooperate with the pursuer in seeking to agree the evidence of the health professionals and school staff whom the pursuer may seek to call and who are based in England.

[41] However, when considering a plea of *forum non conveniens*, these are not the only issues. The question for this court is whether the alternative forum contended for by the pursuer is one in which "the case may be tried more suitably for the interests of all the parties and the ends of justice" (per Lord Eassie at paragraph 23 of *RAB* v *MIB supra*). I was not satisfied from anything set out in the motion or supporting letter or any of the pursuer's submissions that the English court is clearly or distinctly the more appropriate court and the one with more connecting factors to the parties and the welfare of said child. Glasgow was the location of the habitual residence of both parties and said child prior to the end of parties' relationship in August 2014. The proceedings in this court have been ongoing since March 2015. This court has been asked on many occasions to regulate the interim position in respect of the residence and contact arrangements for said child and there is extant before this court a crave seeking the permission of the court for the relocation of said child to Liverpool. In my view this court is clearly the more appropriate court and the one with more connecting factors to the parties and the welfare of said child.

[42] For the foregoing reasons, I concluded that the plea of *forum non conveniens* should not be upheld. I refused the pursuer's motion and issued this interlocutor:-

GLASGOW, 18 June 2018.

The Sheriff, having heard from the pursuer personally and from the agent acting on behalf of the defender, on the pursuer's opposed motion, number 7/8 of process, to dismiss all craves for both parties on the basis that (i) parties' child is now habitually resident with

the pursuer in Liverpool, (ii) the English courts have jurisdiction on that basis and (iii) the sheriff court in Glasgow is forum non conveniens, the defender not consenting to the dismissal of his craves, Refuses the pursuer's motion to dismiss the defender's craves for residence and contact orders in respect of parties' child; thereafter, the pursuer having confirmed that she does not seek dismissal of her craves for a residence order and for a specific issue order (allowing the said child to relocate to Liverpool) in the event of the motion to dismiss the defender's craves being refused, Allows the pursuer to withdraw her motion in respect of the dismissal of her craves.

A M Mackie

SHERIFF