**SHERIFF APPEAL COURT**

**[2016] SAC (Civ) 12**
**ABE-F102-10**

Sheriff Principal I R Abercrombie
Sheriff P J Braid
Sheriff Principal B Lockhart

OPINION OF THE COURT

delivered by SHERIFF P J BRAID

in appeal by

H

Pursuer/Appellant

against

H

Defender/Respondent

**Pursuer/Appellant: Party**
**Defender/Respondent: Findlay; George Mathers & Co**

11 November 2016

**Introduction**

[1] Even measured against the average speed of a glacier, the progress of this action from inception to conclusion was unimpressive. The action was raised by the appellant in 2010, craving divorce, residence orders in respect of the parties' four children (A, B, C and D), interdict against removal of the children from the jurisdiction and delivery of the children. In her defences, the defender also sought residence and specific issue orders allowing her to take the children to her country of birth on holiday. At one stage, an *interim*

joint residence order was made in respect of all children, which lasted for only a brief period before being replaced by an *interim* residence order in favour of the respondent. The action throughout its history was characterised by frequent disputes between the parties over virtually every aspect of the children's upbringing including not only where they should reside, but which school they should attend and whether the defender should be allowed to take the children to her country of birth on holiday each year. The court's concern for the children was such that in April 2011, the court made a remit to the Children's Reporter in terms of sections 52(2)(c) and 54 of the Children (Scotland) Act 1995 ("the 1995 Act"), which resulted in a succession of Children's Hearings followed by a number of appeals. (For a fuller description of the history of the action, and the issues between the parties, if one is required, reference may be made to the judgment of Lady Paton following the earlier appeal in this action, referred to more fully in the next paragraph, reported as *H* v *H* 2015 CSIH 10.)

[2] After sundry procedure, which included numerous child welfare and procedural hearings as well as the children's panel proceedings, and following the preparation of no fewer than four social work reports and two bar reports, the case arrived at a child welfare hearing as long ago as August 2013. Mindful of the slow progress of the action even to that point, and of the onus upon sheriffs not to allow cases involving children to drag on at a glacial pace, Sheriff Garden sought to bring matters to a conclusion, in the interests of the children, by making final residence orders on the basis of the copious information then available to him. He declined to reinstate the joint residence orders which had previously been in force for a short period, but instead made orders that A, the parties' eldest child, should reside with the pursuer; and that B, C and D should reside with the defender. In making those orders he made clear that his task with regard to regulating the children's welfare was only partially complete and that a further child welfare hearing would be

required if contact could not be agreed in light of his decision on residence. Contact was not agreed. Instead, the appellant appealed to the sheriff principal. His appeal was refused as incompetent, inasmuch as the order, although final in the sense of being a final decision in relation to residence, was not a final interlocutor in the case and as such required leave to appeal, which had not been granted. He then appealed to the Inner House of the Court of Session. In the course of that appeal, the Inner House sought a further bar report from an experienced reporter. She produced a comprehensive report which, among other things, recorded at length the children's views. The Inner House upheld the sheriff principal's decision, refused the appeal and remitted the case back to the sheriff, observing that the sheriff should reappraise the issue of contact in light of the then prevailing circumstances as reported on by the Reporter.

[3] The case duly called again before Sheriff Garden in June 2015 for a further child welfare hearing to regulate contact in relation to all four children. Following a lengthy hearing, during which the sheriff heard extensive submissions from the appellant, he made no order for contact. He intended that to be a final decision in relation to contact. We observe in passing that there is in fact no crave for contact, nor indeed any pleadings, but we proceed on the basis that it was open to the sheriff to have made an order allowing contact, and, therefore, equally open to him to reach a final decision that no contact order should be made at that time, in relation to any of the children. It is perhaps germane to point out that no contact order was made in favour of either parent, since A of course was residing with the appellant and continues to do so. (It is a sad feature of this case that whereas both A and C are now residing with the appellant, and B and D with the respondent, none of the children apparently wishes to have contact with the non-resident parent.)

[4] Thereafter, more sundry procedure took place, including most notably for present purposes, a further child welfare hearing on 21 June 2016, when the sheriff made a specific issue order allowing the respondent to take two of the children (B and D) on holiday for four weeks in every year. Again, the sheriff intended that to be his final decision in relation to the specific issue order sought. His principal reasons for so ordering were that holidays were by their nature pleasant; that the children had expressed a wish to go; and that the pursuer's avowed position was that he would never give his consent to any future holiday, at least not unless he, too, could take these children on holiday. The sheriff concluded that it was not in the children's interests for this matter to be litigated year upon year and consequently that the order sought should be granted. That disposed of all disputed issues involving the parties' children. A proof in relation to the remaining craves – principally, the crave for divorce, but also a crave for interdict against the defender from removing the children from the jurisdiction of the court – took place on 21 July 2016. After hearing evidence from the appellant and the parties' eldest child, the sheriff granted decree of divorce but refused to grant interdict, no evidence having been led in support of it.

[5] This appeal is against the final interlocutor of 21 July 2016, at least insofar as the sheriff refused to grant interdict. The appellant also now wishes to appeal against the interlocutors of 13 September 2013, 16 June 2015 and 21 June 2016, as he is entitled to do.

[6] We have the benefit of extremely detailed notes from the sheriff in relation to each of the child welfare hearings to which those interlocutors relate, in addition to a briefer note from him following the proof on 21 July 2016.

**The appellant's submissions**

[7] At the appeal hearing, the appellant represented himself. We approved the attendance of a Lay Supporter, Mr Garret. After acknowledging in terms that the appeal hearing was not a "regurgitation" of arguments presented to the sheriff, which we took to mean that the appellant appreciated that the appeal was not merely a rehearing of the merits of the case, he proceeded to address us in relation to each of his seven grounds of appeal. In relation to the first ground of appeal, the appellant submitted that the sheriff's decisions were plainly wrong, incompetent and not in the best interests of the children. The sheriff, having at one stage in the proceedings ordered an evidential hearing (before the remit to the Children's Hearing) ought to have held such a hearing when the case returned from the Children's Hearing. The shared residence order ought not to have been removed. The sheriff erred in not taking the case away from the Children's Hearing. No proper evaluation was ever carried out. As far as the order in relation to contact was concerned, the sheriff ought to have ordered an up-to-date psychological report, although the appellant had admittedly not invited the sheriff to adjourn the case to allow him time to instruct his own report, because he could not afford to meet the costs of such a report. He argued that if a report were obtained and if it showed parental alienation had occurred, the children would require to be removed from the respondent. Contact had not been fully re-appraised. The specific issue order ought not to have been made as the sheriff had not established the children's up to date views. He simply adopted those elicited by Sheriff Napier at a hearing some weeks previously. Sheriff Napier had in any event erred in making his decision (that the parties' daughters, B and D, should be allowed to go on holiday with the respondent in April 2016). He should have asked D whether she agreed to her views being disclosed, as the bar reporter had done. The sheriff's decisions had all been made without fully

understanding the information before him. As for the interdict, it ought not to have been recalled unilaterally by the sheriff. It was related to the specific issue order, in terms of which the respondent had to seek the permission of the court to take these children on holiday. The sheriff had refused to allow the appellant to make a motion at the bar at the hearing on 21 June 2016, that he be allowed to take these children on holiday. If the respondent was allowed to take these children on holiday, so should the appellant.

[8] Having rehearsed the submissions in relation to the first ground of appeal in some detail, we need say little more in relation to the remaining grounds of appeal. As the appellant himself acknowledged, there was a significant degree of overlap. However, briefly, in relation to the second ground of appeal, the appellant submitted that the children's rights had not been properly acknowledged, in particular their rights for their views to be heard and taken into account and to be protected. In relation to his third ground of appeal he submitted that the sheriff had not accorded due weight to his rights as a father, complaining that the sheriff had prefaced the discussion at one of the child welfare hearings by saying: "It's not about your rights as a father, it's about the children." It had not been properly acknowledged that the appellant had rights in order that he could exercise his parental responsibilities. In relation to the fourth ground of appeal, the sheriff had not carried out the thorough re-appraisal of contact required by the Inner House. In relation to the fifth ground of appeal, an expert report ought to have been obtained. The sheriff had said that the respondent "might be the wicked witch from the west – I don't know." Even to raise that as a possibility was a concern, and further enquiry therefore ought to have been made. No submission was made in relation to ground of appeal six, other than that different sheriffs had made different and contradictory comments during the progress of the action. Finally, in relation to ground of appeal seven, there ought to have been an evidential

hearing, as there had been at one stage in the Children's Hearing proceedings. A different approach was taken by the court towards the parties. Allegations against the respondent were ignored, whereas allegations against him were taken to be true.

[9] When we enquired of the appellant what course of action he wished us to take in the event that his appeal was successful, he initially seemed taken aback to be asked that question. Having acknowledged that circumstances had changed in a number of respects, he specifically told us that he would not seek any order in relation to B for so long as her view is that she does not wish to see him (which is her current position). In relation to the parties' younger son, C, there is no live dispute inasmuch as (contrary to the order in place) he is currently residing with the appellant, a position which the respondent has accepted. He had no submission in respect of A as there was an interlocutor in his favour. That leaves only the youngest child, D, in relation to whom there are live issues. The appellant said that he now sought sole residence of her, although his primary position as we understood it was that he wished this court to undertake further investigation by ordering a psychological assessment of her.

**The respondent's submissions**

[10] In responding to the appellant's submissions, Mr Findlay, solicitor for the respondent, submitted that the sheriff had not erred. The first issue was whether it had been competent for the sheriff to make final orders without hearing evidence, and it was settled law that he was. Rule 33A.23 of the Ordinary Cause Rules allowed the sheriff to make such order as he saw fit. Reference was also made to *Macphai*l, *Sheriff Court Practice (3rd Edition)*, at paragraph 22.32 and to the cases of *Hartnett* v *Hartnett* 1997 SCLR 525, *Morgan* v *Morgan*

1998 SCLR 681 and *McCulloch* v *Riach* 1999 SCLR 159 which supported the view that a sheriff could make final orders at a child welfare hearing without hearing evidence.

[11] It being competent for the sheriff to make final orders, the next question was whether he had sufficient information to make the orders which he did. The case had been through twenty four child welfare hearings and six hearings on motions for specific issue orders. The issues had been canvassed at length over many (more than twenty) hours. The sheriff was fully aware of the circumstances and the issues. He also had the benefit of four social work reports, two bar reports and (by the time of the contact hearing in June 2015) a further bar report from an experienced advocate. The reports were all comprehensive. There had been no need for a proof, or a further psychological assessment. No new information would have been elicited at a proof. The sheriff had set out his decisions in relation to residence and subsequently contact in considerable detail. He had correctly addressed the welfare of the children as the paramount consideration. As for the specific issue order, the sheriff had made a final order so that the issue did not have to come before the court year upon year (as it had done hitherto), since the appellant had made it clear he would never give his consent. Finally, there had been no circumstances (or indeed, evidence) justifying the continued existence of an interdict and the sheriff had been entitled to refuse that crave.

**Discussion**

[12] It has been settled for some time on the basis of cases such as *Hartnett* v *Hartnett*, *Morgan* v *Morgan* and *McCulloch* v *Riach*, all *supra* – which line of authority was cited with approval by the Inner House in the present case – that a sheriff is entitled to make final orders in relation to children without hearing evidence, provided he has sufficient information on which to do so and provided that there are no material questions of fact

which require to be resolved before a decision can properly be reached as to where the children's best interests lie. That line of authority is consistent with OCR 33A.23 which is in very wide terms, allowing the sheriff to make such order as he sees fit. It follows that the competency of the approach taken by the sheriff in the present case is not open to question. To the extent that the appellant challenges any of the decisions reached on the grounds of competency, therefore, that challenge is ill-conceived. The appellant did not refer us to any competing authority in support of his competency argument. We therefore proceed on the basis that each of the decisions made by the sheriff was competent.

[13] Of course, it remains open to the appellant to challenge each of the decisions to which he takes exception on its merits, as he has done. Before we turn to consider the grounds of appeal, and the appellant's submissions thereon, it is pertinent to mention the three overarching principles set out in section 11 of the 1995 Act, to which a court must have regard in reaching any decision involving the regulation of parental rights and responsibilities (including the regulation of residence and contact). The first of these is the welfare principle – namely, that the welfare of the child is the paramount consideration: section 11(7)(a). Second, there is the "no order principle" – that an order for residence or contact should not be made unless it would be better for the child that the order be made than that none should be made at all: section 11(7)(a). Third, the court must, taking account of the child's age and maturity, so far as practicable, give the child an opportunity to express his views (if the child wishes to do so) and have regard to such views as he may express: section 11(7)(b).

[14] Having made those preliminary points, we turn now to consider the appellant's grounds of appeal, which for convenience we propose to do slightly out of order.

[15] Dealing first with grounds 2 and 3 together, which refer, respectively, to the children's rights not having been properly heard, and to the father's parental rights having been "refused and ridiculed", these grounds can be disposed of in short compass. The second of those grounds, in particular, proceeds upon a misconception as to the task facing the court. It is of course true that the appellant has parental rights in respect of all four children, and we accept that the law confers parental rights to enable the corresponding parental responsibilities to be fulfilled. However, the rights are not absolute, and where there is a dispute as to the operation of parental rights and responsibilities it is for the court to regulate the exercise of those rights and responsibilities. In doing so, the court must have regard to the three over-arching principles to which we have referred, including, most importantly, that the welfare of the children is the paramount consideration (and therefore more important than the right of a parent to fulfil any of his parental responsibilities, including that of contact). If the sheriff made the remark attributed to him by the appellant, that the case was about the children, not the appellant, that was a neat encapsulation, in layman's language, of the approach to be taken by the court. As regards the children's rights, we accept that the children do have the right to have their views heard and taken into account, but it is clear from the material before us that their views have been canvassed; indeed, they have been canvassed at some length. Not only were the children seen by the bar reporter(s), they have been heard (by Sheriff Napier) in relation to at least one of the specific issue orders previously granted. Accordingly, there is no merit in grounds 2 and 3.

[16] In relation to ground of appeal 4, it likewise plainly has no merit in that the sheriff did conduct a thorough re-appraisal of contact. He did so at the child welfare hearing on 16 June 2015, at which the appellant made lengthy submissions, including a submission that he should have contact for 6 days out of 14, which in substance is tantamount to shared

residence, an approach which the sheriff had previously expressly eschewed and which it was not open to the appellant to re-open. It is noteworthy that the sheriff records that despite being given the opportunity of an adjournment to allow the appellant to obtain further evidence, the appellant did not avail himself of that opportunity. We simply do not accept the appellant's submission that what took place on 16 June 2015 did not amount to a thorough re-appraisal of contact such as was contemplated by the Inner House. There is nothing in the Inner House's judgement to support any argument that what they had in contemplation was a proof in relation to contact, particularly when they had re-affirmed the sheriff's entitlement to reach a decision on residence without hearing evidence. What Lady Paton actually said (page 115 of Appeal Print) was:

> "The whole question of contact should now be reconsidered by the sheriff court, taking into account the information contained in Ms Loudon's report"

and that was precisely the task which the sheriff undertook.

[17] That leaves us with the remaining grounds of appeal, which do merit some further discussion, inasmuch as they raise relevant issues which are at least arguable. Ground 1, leaving aside the competency point which we have dealt with above, is that the sheriff's decisions are plainly wrong and not in the children's best interests. This ties in to ground 6, at least insofar as that ground states that the sheriff has omitted to take into account relevant information. Grounds 5 and 7, read together, amount to an assertion that the sheriff ought to have fixed a proof rather than proceed to decide residence, contact and the holiday contact overseas (the specific issue order) without the hearing of evidence. Paraphrasing the grounds of appeal, the appellant argues that evidence could have been led from "qualified and experienced professionals" to investigate parental alienation.

[18] Neither in the appellant's note of arguments, nor in his oral submissions to us, has the appellant said anything to persuade us that there is any merit in those potentially relevant grounds of appeal. In particular, he has said nothing which persuades us that the sheriff's approach at any of the child welfare hearings in question was in any way wrong (let alone "plainly wrong"). The sheriff manifestly did have regard to the welfare of the children as the paramount consideration on each occasion. For example, at page 6 of the note appended to the interlocutor of 11 September 2013 (page 80 of the Appeal Print) he states in terms:

> "This case cannot be dealt with on the basis of [the appellant's] perception of unfair treatment, some of which is grounded in reality. What is required is that the best interests of the children are properly served."

He then gives cogent reasons for not accepting the reporter's recommendation of joint residence, and for the children remaining at their existing Primary School. He was fully entitled to conclude, not only that there was no scope for any further inquiry, given the material which he already had, but that a shared residence order was not in the interests of the children and that the children B, C and D should reside with the respondent. (To pick up on one point made by Mr Findlay, the sheriff was not so much exercising a discretion, as Mr Findlay submitted, as making an evaluation, based upon the material before him: see *J* v *M* 2016 CSIH 52; 2016 Fam LR 124, paragraph 11 of the Inner House's opinion, citing with approval Lord President Rodger in *Osborne* v *Matthan (No 3)* 1998 SC 682. However nothing turns on that distinction in this case since in our view the decision reached was one which the sheriff was entitled to reach on the material before him). Further, in declining to make any order for contact, the sheriff had regard not only to the welfare of the children, but to the no-order principle. He also had regard to the views of the children. Moreover, the sheriff had ample information in the form of bar reports on which to base his decision. It is

clear from the authorities to which we have referred above that in a family action such as this a sheriff is not bound to fix a proof, and need only do so if there are issues of fact which require to be resolved before a decision can be reached. The appellant did not identify, to the sheriff or before us, any factual matter on which evidence could usefully be led, then or now, before a decision in the interests of the children could properly be reached. Nor is there any merit in the appellant's suggestion to the sheriff, at the child welfare hearing on 16 June 2015 (dealt with by the note of 23 June 2015) that there was some sort of obligation on the court to order a psychological report (for which the appellant was not willing to meet the cost and against the recommendation of the Reporter). In any event, the sheriff again gives cogent reasons for his decision not to obtain a further report, and we find it impossible to fault his reasoning in any way. On the contrary, having regard to the desirability of reaching speedy decisions in relation to the arrangements for caring for children, the sheriff is to be commended for seeking to finalise residence and contact in the manner he did.

[19] Further, insofar as residence is concerned, the final decision was reached in 2013, more than three years ago. The appellant could have sought leave to appeal that decision but did not do so. The appeal which he did mark was incompetent, but we observe, for what it is worth, that the sheriff principal observed that he could detect no fault in the sheriff's reasoning. That accords with our view. Moreover, and in any event, the factual matrix in 2016 is unlikely to be as it was in 2013 as indeed the appellant has acknowledged. If the appellant wished to have a proof in relation to residence his remedy is to seek to vary the award which was made, on the basis of a material change of circumstances if it is his position that there has been such a change, and not to appeal an award made more than three years ago.

[20] The same reasoning, albeit with slightly less force, can be applied to the decision made in relation to contact, approaching 18 months ago. The additional but compelling points which can be made on contact are that the appellant sought a level of contact which was wholly unrealistic and he did not offer any alternative suggestions. Additionally, there were no pleadings in relation to contact on which the court *could* have fixed a proof. Again, any review of the final decisions reached could only sensibly be done by means of variation procedure, which at the very least would require to set out the up to date factual position and aver a material change in circumstances since June 2015.

[21] Even had we been minded to order further inquiry ourselves into the issue of contact, which we are not, as we have just pointed out, there are no pleadings which would justify that. The appellant has raised the issue of parental alienation but has no pleadings directed towards that contention. Taking into account the lack of any pleadings whatsoever related to contact, the appellant's continued contention that contact should be at the level of six days per fortnight and his acknowledgement that circumstances have changed mean, put simply, that there is no up to date material before the court on which any proof could competently and sensibly take place. As it is, we detect no error in the sheriff's interlocutor of 16 June 2015.

[22] Turning to the interlocutor of 21 June 2016, when the sheriff made a specific issue order, again we can find no fault in the sheriff's reasoning. Indeed it would be intolerable were the respondent to be compelled to come back to court year upon year to seek permission to take the children on holiday, when the appellant has made clear that he will never consent (unless he is allowed to take the children on holiday). The appellant's position on this issue is a perfect illustration of his preoccupation with his own perceived

rights as opposed to the welfare of his children. Again, we detect no error in that interlocutor.

[23] Turning finally to the interlocutor of 21 July 2016, insofar as it is challenged, this can be dealt with briefly. The appellant led no evidence in support of the crave for interdict. Moreover the sheriff was entitled to conclude on the basis of the information he already had that the interdict was no longer required.

[24] For completeness, insofar as the sixth ground of appeal is concerned, the appellant has made reference in his Note of Argument to a series of comments allegedly made by sheriffs in the course of this case. Even if those comments were made, they were of no relevance to the issues to be determined by the sheriff at the various different child welfare hearings at which final decisions were made.

[25] Accordingly there is no merit in grounds of appeal 1, 5, 6 and 7.

**Decision**

[26] There being no merit in any of the grounds of appeal, the appeal is refused.

**Expenses**

[27] The parties having been unable to agree how expenses should be dealt with, we have assigned a hearing thereon for Thursday 22 December 2016 at 9.30am.