SHERIFF APPEAL COURT

[2018] SAC (Civ) 24
SEL-F91-10

Sheriff Principal D C W Pyle
Sheriff Principal D L Murray
Appeal Sheriff P J Braid

OPINION OF THE COURT

delivered by Sheriff Principal D C W Pyle

in the appeal in the cause

K

Pursuer and First Respondent

against

K

Defender and Appellant

and

W (CURATRIX AD LITEM)

Curatrix ad litem and Second Respondent

Pursuer and 1st Respondent: Cartwright; Andrew, Haddon & Crowe
Defender and Appellant: Aitken; Livingstone Brown
Curatrix ad litem and 2nd Respondent: MacPherson; Melrose & Porteous

5 September 2018

Introduction

[1] This appeal is from a decision by the sheriff at Selkirk to grant a minute to vary a divorce decree by reducing to nil the appellant's contact to two of his children. The case is an unusual one due to the final decision of the sheriff to determine the application

notwithstanding that a proof had commenced and had not been completed. The short point which arises is whether he was entitled to do so.

The History

[2] The parties were married in 1998 in Pakistan. They have three children, a daughter A who is now 17, a son H aged 13 and another daughter M aged 10. During the course of the marriage the appellant assaulted not only the respondent but also A and H. The violence included hitting the respondent on her back for not changing the television channel quickly enough and dragging his son across the floor when he was 4 years old. The appellant was also verbally abusive to the respondent, including on one occasion threatening to throw her off Blackford Hill in Edinburgh. The parties eventually separated in 2009 and were divorced in November 2012. At that time the parties were agreed that the children should reside with the respondent and that the appellant should have residential contact with them. Orders to that effect were made in the divorce decree.

[3] The contact arrangements did not go well. In April 2013, the appellant's contact with A was suspended *ad interim*, she having lodged a minute to vary the divorce decree. The following month the respondent lodged a motion (not a minute) to reduce to nil the appellant's contact with the two other children. An evidential child welfare hearing was fixed, but did not proceed. The appellant lodged a motion for residence for all three children. Various sets of answers were lodged and eventually – in December 2013 – the sheriff took it upon himself to resolve the procedural guddle by, in effect, requiring parties to prepare minutes and answers. The result was three minutes: one by A to stop contact with her father, one by the respondent to reduce to nil the appellant's contact with the other children and one by the appellant for an order that all three children reside with him.

[4] A proof on all three minutes began in February 2014. Evidence was heard over nine days, the last being evidence of a witness at a commission. The sheriff produced a long and detailed judgment. During the course of it, he concluded that generally he found the respondent to be a credible and reliable witness. He reached the opposite conclusion about the appellant (para 42 et seq):

> "[42] The manner in which he gave his evidence was highly unsatisfactory. He exhibited a complete lack of objectivity in relation to the case… He repeatedly replied to questions when under cross-examination, by questioning the pursuer's agent, many put in personal terms…
> [43] many of his answers did not actually reply to the question, but amounted to statements of self-justification.
> [44] More strikingly there were times when he was simply caught out lying to the court."

The sheriff commented (para 86) that if "the decision were to be based solely on the conduct of the defender, without any more information, the scales might be balanced in favour of refusing contact" to H and M. However, he concluded, primarily because of H's view that he enjoyed contact with his father provided his father behaved himself, that contact to both children should continue, albeit on restricted terms. The appellant had already conceded that there be no order of contact with A unless she wished to see him.

[5] The respondent unsuccessfully appealed that decision to the Sheriff Principal. Thereafter, in March 2015 she lodged a second minute to reduce the contact to nil. The sheriff ordered answers and assigned two dates in the following month for a hearing on the minute and answers. He fixed a hearing on the interim orders sought by the respondent to suspend contact and at that hearing refused the orders. He also fixed a pre-proof hearing and appointed a *curatrix-ad-litem* to H in order to obtain his views. Before the pre-proof hearing date, the appellant lodged a motion to order a child psychologist's report in respect of H, on the basis that the instruction was a joint one by both parties. That motion was

granted and a report ordered from Dr Christopher Burke. In the event the hearing on the minute and answers was discharged and a further hearing fixed for June 2015, but that again was discharged – on the appellant's opposed motion. The *curatrix* was sisted as a party. She duly lodged answers. She supported the reduction of contact to nil. The sheriff also granted the respondent's motion *ad interim* to suspend the appellant's contact with the two children. A further hearing on the minute and answers was fixed for 10 August, but that was discharged on the appellant's motion. By that time Dr Burke's report had been lodged. The appellant lodged a report by another child psychologist, Dr Whitcombe, critiquing the first report in respect of M's contact with the appellant. The sheriff directed that both experts have a discussion about their respective views. Five days in November 2015 were fixed for the hearing on the minute and answers. On the first day of that hearing the sheriff appointed the two experts to meet three days later, 5 November, to discuss and to clarify their respective positions on contact to each of H and M, to advise what is meant by "therapeutic intervention" and to consider the possibility of mediation. On that date the appellant's agent intimated that he had withdrawn from acting and a peremptory diet was fixed. In the meantime the two experts were ordered to prepare a joint note of agreement. On 9 December 2015, the sheriff assigned a date in December for a child welfare hearing. Eventually, a further hearing on the minute and answers was fixed for five days in April 2016. In March 2016 the sheriff refused two motions by the appellant. The first was to discharge the hearing already fixed "to await receipt of expert reports" (p 2 of Agreed Chronology); the second was to ordain the respondent to make the children available to meet a psychologist. On 13 April, the sheriff again refused the appellant's motion to discharge the hearing, although he did allow the first date of the hearing on 20 April to be discharged due to the unavailability of the appellant's agent.

[6] The proof eventually began on 21 April 2016 when the respondent gave evidence. Her evidence was completed the following day when the evidence of a witness from Children 1st was also led. The next day's hearing was discharged due to the unavailability of the shorthand writer. There were then two further days of evidence, the second being on 13 May. Evidence was led of two further witnesses and, in part, of a Dr O'Malley. His evidence was that direct contact between H and his father should not happen, if it was to happen at all, until a course of treatment for post-traumatic stress disorder said to be suffered by H had been completed. He said that the treatment would take about 12 weeks and he hoped that H would make a recovery. The respondent intimated to the court that if H had recovered and Dr O'Malley recommended that contact with H's father was in his best interests, she would agree to contact subject to suitable conditions. In cross-examination, the appellant did not dispute the diagnosis but did not accept the cause. That evidence was led under reservation of its admissibility on which no ruling was made. His evidence was completed on 9 August after two abortive hearing dates. That was the last day of hearing of evidence in the action.

[7] There followed a long series of procedural diets of which the most notable were, first, the hearing on 2 September 2016 when on the *curatrix's* motion, which was opposed by both parties, the sheriff sisted the action for a period of three months, to enable H to undergo further treatment, which had the effect that previously assigned proof dates in September and November 2016 were lost (but with fresh dates being assigned for January 2017;) and, secondly, the hearing on 11 January 2017 when the sheriff both refused the appellant's motion to discharge the looming diet later that month and *ex proprio motu* discharged that diet and sisted the cause "until treatment currently being undergone by [H] had been

completed". For a variety of reasons that treatment was not, and still has not been, completed.

[8] The final step taken by the sheriff (other than dealing with an expenses motion) was to grant the crave in the respondent's minute and to reduce contact to nil in respect of both children. That was a decision reached following a child welfare hearing. It occurred in November 2017, nearly three years since that minute had been lodged, some 30 months since the first day fixed for a hearing and over 15 months after the last day of evidence,. From the interlocutors provided in the Appeal Print, we note that between February 2011 and December 2017 there have been well over 100 orders made by the court of which over 50 have been made since March 2015.

The Psychologists' Reports

[9] We have already recorded that in March 2015 the sheriff ordered a child psychologist's report in respect of H on the basis of a joint letter of instruction by the parties' agents. Dr Burke's report dated 10 June 2015 is item 3 in the Appendix. The instruction (para 1.01 of report) was to carry out an assessment of H's psychological wellbeing with consideration of the respondent's position that contact with his father was psychologically detrimental to H, whilst the appellant asserted that his being psychologically damaged was as a result of the respondent's actions. A recommendation was sought regarding future contact arrangements between H and the appellant. Dr Burke reached the following conclusions:

> "9.01 I have found [H] to be suffering from considerable psychological distress which has been caused and is being maintained by his father's abusive behaviour. [H] requires the burden of responsibility he feels to manage his mother and father's relationship to be removed from him.[The respondent] demonstrated the capacity to appropriately and sensitively look after [H].

> 9.02 I recommend that [H's] direct contact with his father be reduced to nil. I considered whether [H] might benefit from a form of indirect contact with his father. A monitored form of indirect contact would serve a function of allowing [H] and [the appellant] to keep in touch whilst ensuring [H's] welfare is not compromised. This would require correspondence from [the appellant] to be vetted by a third party, such as a Social Worker, to ensure its appropriateness before reaching [H]. I recommend monitored indirect contact at a frequency of twice per year."

He also offered the following advice on the appellant's contact with M (para 9.03):

> "Whilst my assessment has not focused upon [M], it is my opinion that, although less directly, she is being exposed to the same psychological conflicts that [H] has endured. If contact is stopped for [H] this would intensify for [M]. [The appellant's] lack of personal awareness and denial of his behaviour means that his abusive behaviour will not change. The criteria applied above to [H's] contact experience might equally be applied to [M], particularly regarding containment of conflict and opportunities for reality testing. It is my opinion that [M] also needs to be protected from her father and it is my recommendation that her direct contact with him be reduced to nil. The monitored indirect contact arrangements would also be appropriate for [M]."

[10] The appellant was plainly disappointed with Dr Burke's conclusions. He therefore instructed a further report by Dr Whitcombe. She was instructed to carry out a critical review of Dr Burke's report. In her conclusions (para 6.1 et seq) she was critical of some of the methods used by Dr Burke and the evidence which he considered to be material for the opinion he reached. As we have said, the sheriff ordered both experts to discuss their respective reports. They produced an agreed minute of a telephone conversation (item 6 of Appendix). They summarised the agreement they had reached as follows:

> "Dr Burke and Dr Whitcombe agree that citing [H] to attend court is not in the interests of his psychological wellbeing.
>
> They agree that [the appellant] has domestically abused [the respondent] and that [H] has been psychologically distressed by the ongoing acrimony between his parents.
>
> They agree that [the respondent] has sought to appropriately protect [H] from exposure to his father's aggression.

> They have recommended therapeutic intervention which would facilitate [H's] psychological wellbeing and which includes the potential for future contact between [H] and his father.
>
> They agree that if [the appellant] is unable to engage in the therapeutic process and to acknowledge his abusive behaviour, direct contact would be inappropriate."

[11] As the sheriff later recorded (note dated 30 September 2016, para 2 – item 4 of Appeal Print), there was no suggestion that at that stage the appellant was prepared to acknowledge his abusive behaviour or express a willingness to engage in the therapeutic process. He also recorded that as a consequence of the position adopted by the two psychologists and the appellant's stance, the appellant's agent withdrew from acting. The appellant wanted a further expert to be instructed. As we have said, the sheriff refused two motions by the appellant in respect of that instruction. Eventually, however, the appellant produced a report by Dr Lorraine Johnstone. On 30 September 2016, the sheriff refused the appellant's motion to allow her report to be received late. In his note to the interlocutor the sheriff set out his reasons (Item 4 of Appeal Print *supra*). The sheriff refused the motion, not because it was late but because, under reference to the Supreme Court decision of *Kennedy* v *Cordia (Services) LLP* [2016] UKSC 6, first, the question of assessing risk associated with contact, which was the substance of the report, was one which sheriffs do on an almost daily basis, secondly, the assessment of risk in the context of contact disputes was not an established area of expertise and, thirdly, there was a need to avoid unnecessary proliferation of expert reports when there were already two reports in the general field of psychology.

H's Treatment for Post-Traumatic Stress Disorder

[12] Dr O'Malley was a consultant locum psychiatrist who had diagnosed H as having post-traumatic stress disorder caused by the appellant's conduct. His evidence, which as we

have said was concluded on 9 August 2016, was that direct contact between H and his father should not happen, if it was to happen at all, until a course of treatment for the disorder had been completed. He said that the treatment would take about 12 weeks and he hoped that H would make a recovery. The respondent intimated to the court that if H had recovered and Dr O'Malley recommended that contact with H's father was in his best interests, she would agree to contact subject to suitable conditions. The appellant did not dispute the diagnosis but did not accept the cause. On 17 August 2016 the sheriff fixed a further five days of proof for various dates through to 25 November 2016. On 2 September 2016, on the opposed motion of H's *curatrix*, the sheriff discharged the proof dates and sisted the cause until 4 January 2017 and reserved four days for proof for that month to avoid delay.

[13] By January 2017, H's treatment had not been completed as anticipated. Nor was it clear when it would be completed. Accordingly, on 17 January the sheriff *ex proprio motu* sisted the cause to allow it to happen. The sheriff did that because he was advised, as he had previously been told, that H did not want to see his father and because of Dr O'Malley's evidence (sheriff's note – item 2 of Appeal Print). In April 2017 the appellant lodged a motion to recall the sist and for further procedure. The motion was continued for various reasons, not least due to the unavailability of the appellant's agent on at least three occasions. Eventually, the respondent lodged a motion to have a child welfare hearing fixed with the purpose of having the respondent's minute finally determined without any further process. By interlocutor dated 21 September 2017, the sheriff granted the motion. He set out his reasons in a note (item 2 of Appeal Print).

Sheriff's Note of 21 September 2017

[14] The sheriff records that both parties accepted that it was competent to determine matters on a final basis at a child welfare hearing and indeed that there would be no purpose in adopting such a course if he did not think that the matter was at least capable of such final determination (para 2). He records that by that date there was no clear idea when H's treatment would be completed, the problem having been that Dr O'Malley had moved on and that treatment by his replacement had been delayed by her own ill health. He also notes that the *curatrix* had told him that H, who was by then 12 years of age, did not want to see his father until his treatment is complete and only then will consider the matter again – and that H wanted the proceedings brought to an end. The sheriff was advised that if further evidence was allowed it might take another ten days. In the light of the amendment of the pleadings, it would be necessary for witnesses to be recalled. To avoid repetition, it is convenient to set out the sheriff's reasoning under reference to this note and the sheriff's later one.

Sheriff's Note of 16 November 2017

[15] By interlocutor of 16 November 2017, the sheriff granted the respondent's minute, varied the interlocutors of 3 and 23 July 2014 and reduced to nil the appellant's contact with both children. Subject to the issue of expenses, that was intended to be a final order. The sheriff gave the following reasons: first, the reason he had allowed contact in his original judgment was because H wanted to see his father, that position having now changed, bearing in mind that H was now nearly 13 years of age; secondly, he had already made findings in fact in his judgment about the appellant and his general conduct and character, which coupled with H's views meant that he could come to a decision no matter the

diagnosis of post-traumatic stress disorder and the terms of the psychologists' reports which were of interest but that it was unnecessary to rely upon them; thirdly, he had allowed contact to M because her brother would be present, which was no longer the position; fourthly, even if the sheriff found in favour of the appellant over the issues which the appellant said were requiring to be determined before the sheriff could decide the case, it would make no difference to his decision; fifthly, proof would have been required only if the appellant had offered to prove that he had turned over a new leaf, had undergone counselling or had taken some course in anger management which negated the sheriff's original finding in his judgment about the appellant's character; and, lastly, that it was competent to make a final order even where evidence was only part heard.

Appellant's Submissions

[16] Counsel for the appellant submitted that it was incompetent for the sheriff to make final orders, without the consent of the parties to consider such a course, where he had not heard all of the evidence particularly the evidence of the appellant and his witnesses. In any event, there was before the court a motion about the admissibility of Dr Burke's evidence which purported to trespass upon the function of the court. None of the authorities on the sheriff's powers during a child welfare hearing concerns a circumstance where the hearing was assigned during the concurrence of a proof. Such hearings are intended to take place prior to proof and as a 'front-loading' exercise to secure the expeditious progress of an action to the stage of proof (*Ahmed* v *Iqbal* 2014 Fam L-R 93). There is no power in the Ordinary Cause Rules which allows a sheriff to halt a proof before the end of the evidence. Indeed rule 29.20 provides that "at the close of the proof … the sheriff *shall* hear parties on the evidence".

[17] *Esto* the sheriff's order was competent, he erred in so doing when there were material questions of fact which required to be resolved (*H* v *H* [2016] SAC (Civ) 12). The sheriff erroneously over-simplifies his original judgment in stating that his decision was reached only because of H's views. The appellant intended to explore at proof the views of the children, such as how determined those views were, the weight to be given to them, how those views had changed since the earlier decision, why they may have changed and when. The sheriff failed to realise that the views of the children were a matter of dispute. Moreover, there was a considerable number of other material matters in dispute. These were as follows:

1. The assertions of undue influence in discussions with the children on three dates in 2016;
2. The general assertion that attempts have been made to influence H positively in favour of seeking greater contact;
3. The assertion that H feels unsafe during contact (in respect of which there has been no evidence to date);
4. The assertion that the appellant has emotionally abused H;
5. The averment that the appellant forced the children to write a letter in February 2017 setting out their views in relation to contact;
6. The admissibility of the reports by Dr Burke (such evidence to be heard under reservation);
7. The accuracy of the factual content within the report;
8. Without prejudice to the admissibility, the cogency and weight to be attached to the opinions expressed by Dr Burke, in respect of which the appellant has a competing expert who gives an entirely contrary opinion;

9. The factual averment that the children were upset by the appellant's family approaching them in December 2015 and January 2016;

10. The diagnosis of post-traumatic stress disorder;

11. The causation of that disorder (and in particular the implication that it has been caused by behaviour on the part of the appellant, rather than behaviour on the part of the respondent or indeed by the litigation and associated procedures which have impacted upon the children since 2010);

12. The evidence of Dr O'Malley, which was given under reservation and in respect of which there remains a challenge as to admissibility;

13. The factual averment that the treatment of H cannot commence until the legal proceedings are at an end;

14. The contention that the appellant had perpetrated abusive behaviours against the respondent, save insofar as findings in fact have been made in the previous judgment of the sheriff;

15. The fact of H's views;

16. The reasons for H's views;

17. The fact of M's views;

18. The allegations relating to the appellant's honesty and conduct added by amendment;

19. The allegations introduced by amendment relating to A.

[18] The sheriff erred in failing to appreciate the importance of Dr Johnstone's evidence. While he had decided that her report was inadmissible, he had not excluded her as a witness. No motion to that effect had been made by the respondent. Her evidence would have been relevant in deciding whether in fact the appellant had turned over a new leaf, had

undergone counselling and so on, as described by the sheriff in his reasoning. That is confirmed by the remit set out in her report (item 9 of the Appendix, para 19). The sheriff misunderstood the purpose of the report, being primarily a psychological assessment of the appellant as a potential risk to his children. The appellant's personality was an essential issue and required a psychological assessment which the sheriff plainly could not do. Moreover, there is contained within the report a critique of Dr Burke's reports.
Dr Johnstone's area of expertise was an established one. The sheriff was plainly wrong about that.

Respondent's Submissions

[19] Counsel for the respondent submitted that the sheriff was entitled to fix a child welfare hearing. Moreover he was entitled to make a final order. No issue of competency therefore arose.

[20] The overriding duty of the sheriff was to secure the welfare of the children as the paramount consideration (section 11(7) of the Children (Scotland) Act 1995; *Sanderson* v *McManus* 1997 SC (HL) 55; *Osborne* v *Matthan* (No 3) 1998 SC 682). The sheriff had plainly discharged that duty.

[21] Due to motions to discharge four diets of proof made by the appellant throughout 2015, there had been a delay in the progress of hearing evidence. By August 2016, again partially due to motions by the appellant to discharge diets of proof, only five days of evidence had been heard despite the sheriff having assigned numerous diets. The facts upon which the sheriff's determination had been sought when the respondent's minute was first lodged had shifted as a consequence of the passage of time, including the diagnosis of H's post-traumatic stress disorder and the treatment for it, the views of H and the

involvement of the two psychologists who agreed that until the appellant acknowledged his behaviour and undertook therapeutic interventions direct contact was inappropriate. The need for expedition in cases concerning children has been long recognised (*G* v *G [Minors: Custody Appeal]* [1985] 1 WLR 647, p 651 B-C).

[22] The hearing in November 2017 was the first occasion when the appellant said that he did not accept the diagnosis of H's condition.

[23] The sheriff did not place undue weight upon the views of the children. In any event, the issue of weight of any particular piece of evidence was for the primary fact finder (*G* v *G*). The sheriff could not be said to be "plainly wrong".

[24] Dr Johnstone's report even if allowed (and evidence led by her) is being inaccurately summarised by the appellant. Its conclusions are dependent upon the appellant undergoing treatment, which is similar to the joint position taken by the other psychologists. To refuse to lodge the report was a reasonable decision by the sheriff, with which this court is not entitled to interfere.

Submissions for the *Curatrix-ad-Litem*

[25] Counsel for the *curatrix* adopted a similar line to the one adopted by counsel for the first respondent. He also reported that the *curatrix* had spoken to H on 8 February this year. H told her that he was strongly against contact with his father, that before he had wanted to be an adult and appear as an adult in the court process, but that now he does not want anything to do with the whole court process, wants the *curatrix* to deal with it and is upset that his father has taken this appeal in the first place.

Discussion

The first issue - competency

[26] Turning to consider the first issue, competency, at the very least we have severe doubts as to the competency of bringing a proof, once begun, to an end as the sheriff did. The structure and ethos of the sheriff court rules is that a child welfare hearing should take place at an early stage in the case. In terms of rule 33.22A(1)(a) and (b), such a hearing should be fixed on the lodging of a notice of intention to defend where a section 11 order sought by a pursuer is to be opposed or where the defender seeks such an order. Rule 33.22A(1)(c) provides for such a hearing to be fixed in any other circumstances in a family action where the sheriff considers that a child welfare hearing should be fixed (which would obviously include the lodging of answers to a minute to vary). Rule 33.22A(4) provides that at the child welfare hearing the sheriff shall seek to secure the expeditious resolution of disputes by ascertaining from the parties the matters in dispute and may order such steps to be taken, make such order, if any, or order such further procedure as he thinks fit. If a proof is required, the sheriff also has the case management tools open to him, in terms of chapter 33AA. Accordingly, the whole thrust of the rules is that the sheriff is to try to secure at an early child welfare hearing the expeditious resolution of the case, by ascertaining what is in dispute, and what the issues are. It is open to the sheriff to decide the case without fixing a proof if he considers it appropriate to do so and if there are no material facts which require to be resolved (*H* v *H*, *supra*). Alternatively, if a proof is required the sheriff has a panoply of case-management tools open to him. In the context of minutes to vary, it is not mandatory for a sheriff to fix a case management hearing, but he is empowered to do so: see rule 14.10A, which expressly applies to an opposed minute including a crave for a section 11 order (and, in our view, by implication to an opposed

minute which seeks to vary such an order) and which entitles the sheriff to have regard to chapter 33AA in making such orders as he considers appropriate.

[27] It follows that a proof should be required only where the sheriff has been unable to resolve the case in any other way. The case management powers are there for the very purpose of ensuring that the proof is conducted efficiently. The rules do not cater for the notion of the sheriff both allowing a proof and thereafter deciding the case at a child welfare hearing, because by definition a proof will have been fixed because it is necessary to resolve the case. Turning to the rules insofar as they govern the conduct of proofs, rule 29.20 provides that at the close of a proof, the sheriff "shall" hear parties on the evidence and thereafter shall pronounce judgment with the least possible delay. Rule 12.2(4) provides that at the conclusion of any hearing in which evidence has been led, the sheriff shall either (a) pronounce an extempore judgment or (b) reserve judgment. In the latter event the sheriff must provide the sheriff clerk with an interlocutor giving effect to the sheriff's decision and incorporating findings in fact and law; and a brief note of reasons. The rules are therefore as clear as they could be that once a proof has begun and evidence has been led, the sheriff must pronounce a judgment in the manner provided by rule 12.2(4). Even applying the maxim that where children are concerned the wisdom of Solomon is that ordinary procedures need not always apply, it is hard to see that the rules provide in any way, shape or form for a sheriff to bring a proof to an end at his own hand by the device of making a final order at a child welfare hearing.

[28] In expressing that view, we are conscious that it has not been argued by the appellant that it was incompetent to fix a child welfare hearing after the proof had commenced. He was no doubt correct to adopt that approach, standing the width of rule 33.22A(1)(c) which does not restrict the times or occasions at which the sheriff may

order a child welfare hearing. Nonetheless, that begs the fundamental question as to whether final orders may competently be made at a child welfare hearing which takes place after the commencement of a proof and without concluding the proof. It does not follow that, because a sheriff has the power to decide a case at a child welfare hearing *as an alternative to* fixing a proof, he may do so part way through a proof which he has previously decided is necessary in order to resolve the matters in dispute between the parties. It runs counter to a basic principle of natural justice that an action should be decided after a court has heard evidence from one party, but not the other. While the first branch of the appellant's appeal is based on competency rather than on an assertion that natural justice has been breached, it is not unreasonable to assume that the ordinary cause rules do proceed on an assumption that a hearing with evidence, once begun, will be concluded in accordance with natural justice and that it is indeed incompetent for a sheriff to bring the proof to an end at his own hand.

[29] It is also perhaps pertinent to have regard to a sheriff's inherent case management powers as explained by the Supreme Court in *NJDB* v *JEG* [2012] UKSC 21 (at para [34]):

> "The sheriff's role at a proof is not confined to ruling on objections and otherwise sitting impassively in silence. He possesses the power to intervene to discourage prolixity, repetition, the leading of evidence of unnecessary witnesses and the leading of evidence on matters which are unlikely to assist the court to reach a decision. Equally, he can encourage the use of affidavits and other documents (such as reports) in place of oral evidence, or as the equivalent of evidence in chief. These are only examples of measures which can be taken."

Even though these are said only to be examples, it is impossible to take from that passage any hint of a suggestion that the Supreme Court considered that the sheriff's powers extended to the power summarily to bring a proof to an end without giving one party the opportunity to lead evidence and without proceeding to judgment.

[30] For these reasons we conclude that the provision of the ordinary cause rules which requires the sheriff to proceed to judgment once a proof has begun trump the provisions of the rules which entitle him to make a final order, in some circumstances, at a child welfare hearing, and that the course adopted by the sheriff was incompetent.

The second issue – were there outstanding material matters of fact?

[31] Lest we be wrong in that, we now turn to consider whether the sheriff was correct in concluding that there were no outstanding matters of fact on which evidence was required. Although 19 outstanding factual matters were listed by the appellant as being relevant, it was necessary for him to establish only that at least one of those was a material matter which required evidence to be heard for him to be entitled to a proof on that issue (or those issues, if more than one). The sheriff has, perhaps, not expressed himself very happily where he states that "…most of the questions to be decided are criticisms of the [appellant]… None of them cast any positive light on the [appellant]". One might think that if assertions have been made which do not cast the appellant in a positive light, then he would be entitled to lead evidence in order to rebut the assertions. It appears, however, that what the sheriff meant was that even if the appellant had rebutted the assertions, and those assertions were therefore simply left out of account in deciding contact, that would not have made any difference to his ultimate decision. While we agree with the sheriff that at least some of the 19 matters fall into that category, it is difficult to categorise them all in that way. On any view, the sheriff has clearly placed some weight on H's diagnosis of post-traumatic stress disorder and the averment that treatment cannot commence until proceedings are at an end, on the fact of H's views and the reasons therefor and the fact of M's views. In our opinion, these are all matters on which evidence could and should have been led.

[32] In relation to post-traumatic stress disorder, the appellant has an outstanding challenge to the admissibility of Dr O'Malley's evidence, which the sheriff has not adjudicated upon. Although the point has been made that apparently, at the proof, the appellant did not challenge the diagnosis of post-traumatic stress disorder, the fact remains that it would have been open to the appellant to lead a contradictor. Moreover, Dr Johnstone did not unconditionally accept the diagnosis. Further, it is conceivable that the cause of the disorder may be a relevant factor in deciding whether or not contact to H should continue. It is incontrovertible that the sheriff has to some extent relied on evidence which he heard at the proof, since he has proceeded on the basis that H does indeed suffer from the disorder.

[33] Turning to the children's views, these were of crucial importance because the sheriff in effect, founded his decision on what the *curatrix* said their views were. That might have been a legitimate course of action had the *curatrix's* role been confined to acting as an officer of the court and reporting to the court as to what the views were. By the time of the proof, however, that was no longer her role. She had entered the arena by choosing to enter the process as a party. She was actively advocating for the cessation of contact. She had directly influenced the conduct of the proof, since it was her motion which had led to proceedings being sisted in 2016. The sheriff states in his note of 16 November 2017:

> "The *curatrix* is [an] experienced agent who has met with H[K] on many occasions and I have no reason to doubt anything she has said."

It may be inferred that he placed weight upon her views *because* she was an experienced agent. That was not something he was entitled to do. In the circumstances he should not have accepted the *curatrix's* account of the children's views without giving the appellant the

opportunity to test those views in cross-examination, and to explore the reason for the change.

[34] Had the sheriff originally been of the view that H's views were solely determinative, he would not have required to fix a proof at all. He would simply have instructed an up-to-date report and then made a decision accordingly. The fact that he did find it appropriate to fix a proof suggests that there were other matters which, potentially at least, were of relevance. We consider that he was correct in that since a child's views alone will rarely be determinative, although we do not rule out the possibility that in some cases the court may need little more. In those circumstances it was not in our view open to the sheriff unilaterally to bring the proof to an end, absent the agreement of the parties, without having heard all the evidence and made findings in fact, however difficult or time consuming that process might be. We must also not lose sight of the fact that insofar as M's views were less firmly expressed and attracted less weight, due to her age, it is hard to see that on any view that some further evidence was not justified in relation to her.

[35] In our view it is unsatisfactory that the sheriff has referred to the psychological reports as being "of interest" but then states that he has placed no reliance on them. That they are of interest suggests that he has had regard to them to some extent. Further, we do not consider that all of the remaining 19 points relied upon by the appellant can simply be brushed aside as the sheriff has done, particularly in light of the findings and comments in his 2014 judgment. Can it really be said that the assertions of undue influence and of emotional abuse are of no relevance? If those are not true, then there is at the very least room for an argument that the reasons which led the sheriff to award contact in 2014 still apply with sufficient force to outweigh any weight to be attached to the children's views.

[36] A further factor which may point towards the need for further evidence is the state of the pleadings. We were assured by counsel for the appellant that the minute of amendment and answers were still being adjusted among parties at the time of the child welfare hearing in November 2017. Our own perusal of the process has not borne that out, since it is clear that in January 2017 the record was amended in terms of the minute of amendment and answers; and no subsequent minute or answers have been lodged in court. We accept that it is possible that adjustment was taking place among parties on an informal basis, but it is difficult to identify whether all the averments in the amendment and answers have found their way into the record which this court has. Certainly counsel for the appellant appeared to refer to averments which we have been unable to identify in the pleadings, and counsel for the respondents did not challenge the assertion that amendment was ongoing. But perhaps the more general point to draw from this is that the sheriff made no attempt to have regard to the pleadings in reaching his view that it was possible to decide the case without hearing further evidence. Given our pleadings-based system, that was not a course he was entitled to take, albeit that we recognise that in family cases the pleadings are often historic, with averments which have been overtaken by events. At the very least, the appellant was entitled to expect that the sheriff would consider the pleadings as they stood at the time of the child welfare hearing and to state which averments were material and which not, before then deciding that it was not necessary to hear evidence on any of them before reaching a decision. If the sheriff considered that certain averments were irrelevant to the issue at hand, he should have said so, with reasons. The issue which would then have arisen and which would have been clearly focussed would have been whether proof was required on the remaining averments and what facts were in dispute, or whether he had sufficient

material from sources other than the evidence which he had heard at the proof, to enable him to reach a decision.

[37] Had the powers available under rule 33AA.4 been utilised to identify the issues, it would have focused minds as to whether there remained factual matters to be determined.

[38] The final factor which in our view vitiates the sheriff's decision is that he did not have sufficient material before him to entitle him to reach a final decision without hearing further evidence. Usually where that course is taken at a child welfare hearing, the sheriff will have some extraneous material, normally in the form of a child welfare report. Here, although there were reports the sheriff expressly tells us that he did not have regard to them. All he had were the children's views, as communicated by the *curatrix* who was a party to the action and who wished to secure an outcome of no contact. In our view, that was not sufficient material.

[39] For all these reasons, we do not consider that the sheriff was correct to conclude that there were no material facts which required to be proved in order for him to reach a decision; and even if the course he adopted was competent, in our view he erred in reaching the decision he did. He ought to have fixed further proof dates, exercising such case management powers as he considered to be appropriate.

Dr Johnstone's report

[40] Since in our view the case must be remitted back, it is necessary to consider whether the sheriff erred in his treatment of Dr Johnstone's report. We agree with the submission for the appellant that a distinction falls to be drawn between its admissibility on the one hand and the separate question as to whether, from a case management perspective, Dr Johnstone should be permitted to give evidence on the other. The sheriff has conflated those two

issues. In our view, for the reasons submitted by the appellant, the report was admissible. Dr Johnstone, if permitted to do so, would give evidence about matters which were not within the knowledge of the court, requiring, as they do, psychological assessment of the appellant, and she did so by applying established methodologies, under reference to relevant texts and research. Whether the appellant is permitted to give evidence at any future proof, will be a matter for the sheriff entrusted with that proof.

Decision

[41] We shall therefore remit the case back to a different sheriff to proceed as accords, and recall the interlocutors of 30 September, 16 November and 15 December 2017. We would suggest that a case management hearing be heard as soon as possible to identify what further amendment needs to be made to the pleadings; which issues are relevant and which are not; what expert evidence, if any, is to be permitted; and whether any evidence can be given by affidavits.

Post script

[42] In *NJDB* v *JEG*, as Lord Reed noted (para [22]), the dispute over contact took so long to resolve "only because the court allowed the parties to determine the rate of progress". In this case the sheriff allowed the motion for recall of the sist by the appellant to be postponed on at least three occasions because of the unavailability of the appellant's agent. He also discharged the hearing on 20 April for the same reason. These are regrettable delays. Agents should be prioritising family cases where children are involved and be diligent in ensuring that they have the capacity to focus on the expeditious progress of cases. Likewise, sheriffs should be most reluctant to allow delay as a result of the unavailability of an agent.

[43] It is impossible to avoid the conclusion that, at least in part, the difficulties which arose at the proof would not have arisen had the sheriff engaged in more effective case management from the outset. Some discussion took place at the appeal as to whether the provisions of chapter 33AA which apply to proceedings commenced after 3 June 2013 applied in the present case, where the action was raised before that date but the minute presented after it. We accept however that reference in the transition and saving provisions in paragraph 6 of the Act of Sederunt (Sheriff Court Rules)(Miscellaneous Amendments) (No.2) 2013, which refer to "proceedings raised but not determined prior" to 3 June, must for the purposes of minute proceedings relate to the commencement of proceedings in relation to that minute. Thus rule 14.10A applies and provides the sheriff with the case management tools available in terms of the chapter. In particular it empowered him to require parties to provide the information to enable him to ascertain the matters set out in rule 33AA.4 before a hearing was fixed. We recognise that this requires parties to be well prepared to fulfil their obligations but the court is entitled to expect that they will be, and should be reluctant to allow new aspects of dispute which are not identified at a case management hearing to be explored at a subsequent hearing or proof. If the sheriff was of the view that none of the factual matters raised by the parties was of any significance, and the matter turned solely on H's views, then he should have said so. A case management hearing provides a forum for this to be done. The time to case-manage an action is before the proof, so the parties (and the court) are clear, before evidence begins, as to what the issues are and which evidence has to be led; what evidence has to be led on each of those issues; and what expert evidence, if any, is to be allowed. Thus there was no doubt, in our view, that the sheriff did have the power, and the necessary tools, effectively to case manage these proceedings and that he

ought to have considered, at the very least, whether or not to exercise those powers and if so which ones. Had he done so then the problems which later arose might never have arisen.