SHERIFF APPEAL COURT

[2019] SAC (CIV) 18
GLW-F1119-16

Appeal Sheriff N A Ross

OPINION OF THE COURT

delivered by APPEAL SHERIFF N A ROSS

in an appeal in the cause

GORDON WOODS

Pursuer and Respondent

against

LESLEY PRYCE

Defender and Appellant

Defender and Appellant: Gilchrist, advocate; Macnairs & Wilson Ltd
Pursuer and Respondent: Ardrey, advocate; David Kinloch & Co

18 April 2019

[1] When a court requires to decide where a child should live, and what contact they should have with a parent, the child has a right to be heard, unless obtaining their view is impracticable. A child who is capable of forming their own views has a right to express those views, and the court requires to give those views due weight in accordance with the age and maturity of the child (United Nations Convention on the Rights of the Child (1989); Children (Scotland) Act 1995 section 11(7)(b)).

The facts

[2] The respondent raised the present proceedings in about August 2016 seeking contact with child B, who resides with the appellant. Child B is now nine years old. The parties' relationship was volatile and after various separations ended about January 2015 when B was five years old. In late 2016 the court appointed a reporter who prepared a thorough and careful report dated 20 December 2016, and which reported on, amongst other matters, B's views on contact with the respondent.

[3] The reporter met B on two occasions in late 2016, for an extended period and outwith the presence of his parents. He presented as very confident and chatty. B said that the respondent was bad because of two previous incidents, but he had enjoyed going swimming with the respondent. There was no change in B's demeanour when discussing the respondent, he was not upset and did not express any reservations about seeing him again.

[4] On 22 December 2016 the court ordained interim non-residential contact with the pursuer for a maximum of two hours a fortnight. That contact was increased on 9 May 2017 to a maximum of two hours a week. It was further increased on 7 August 2017 to four hours a week. In about October 2017 the appellant made allegations about the respondent's conduct towards a step-child, and enrolled a motion for contact with B to be varied to nil. On 30 October 2017 contact with B was varied to nil. B was then seven years old. He has not had contact since with the respondent. The respondent enrolled a motion in August 2018 to reinstate contact but this was refused on an interim basis.

[5] The court heard proof about contact in October and November 2018. The sheriff heard evidence from the parties and witnesses, but not B. The sheriff's note dated 23 November 2018 discussed and analysed the evidence in detail and concluded that contact

between the respondent and child B should be resumed. By interlocutor of 23 November 2018 contact was reinstated as supported contact for two hours a week.

[6] The sheriff did not, however, give B a further opportunity to be heard during the proof proceedings. He did not seek his views on contact with the respondent. The most recent evidence about B's views was contained in the report of December 2016, almost two years before the decision. The sheriff noted that very little had changed in the parties' circumstances or relationship since separation. He noted the continuing acrimonious nature of the parties' relationship, the appellant saying that she "hated" the respondent. The appellant's evidence described the respondent as violent, aggressive and ill-tempered, but the appellant admitted that she was not a person given to stepping back or standing off from an argument. The sheriff noted that the appellant's submission came close to attempting to veto any contact between B and the respondent. The sheriff concluded that this should not and did not prevent contact from operating. He referred with care to the principles discussed by the Inner House in *J* v *M* 2016 SC 835 and in particular the statement of it "almost always being conducive to the welfare of a child that parental contact is maintained". That statement reflected earlier discussions in *Sanderson* v *McManus* 1997 SC (HL) 55 and *White* v *White* 2001 SC 689. The sheriff recognised that what the appellant sought, namely cessation of all contact between B and the respondent, was a grave and serious step, properly described as exceptional.

[7] The appellant has appealed the sheriff's decision of 23 November 2018 on the basis that the sheriff did not give B a further opportunity to express a view. The sheriff states that he did not do so because he already had B's views, expressed in December 2016, and that the concerns were essentially the same at the time of proof. His view was that ascertaining further views would have been upsetting for B.

The law

[8] Section 11(7) of the Children (Scotland) Act 1995 (the "1995 Act") provides:-

> "Subject to subsection (8) below, in considering whether or not to make an order under subsection (1) above and what order to make, the court—
>
> a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and
> b) taking account of the child's age and maturity, shall so far as practicable—
>
> (i) give him an opportunity to indicate whether he wishes to express his views;
> (ii) if he does so wish, give him an opportunity to express them; and
> (iii) have regard to such views as he may express."

[9] This provision was discussed in the Inner House in *S* v *S* 2002 SC 246, in circumstances where a nine year-old was not consulted before a possible move abroad. Intimation of the action to him had been dispensed with as inappropriate 18 months beforehand. The court held, even where dispensation had previously been appropriate, the passage of time alone amounted, at least in that case, to a material change in circumstances. In such circumstances, the court required to discharge a duty towards the child, if necessarily at its own hand, to give the child an opportunity to be heard. The only test is one of practicability. The duty on the court was one which continues until the relevant order is made, and is a continuing duty.

Decision

[10] The sheriff erred in not discharging the duty under section 11(7)(b) to ascertain the views of B.

[11] As *S* v *S* sets out, it is not enough that no obvious change in circumstances has taken place, because the passage of time in itself is capable of amounting to a material change of circumstances. Contact between B and the respondent was limited between late 2016 and October 2017, non-existent between October 2017 and November 2018, and is set to resume. B was seven years old when he last expressed his views to the court, and is now nine. The background is one of acrimony and conflict between the parties. The two years since B was last interviewed is a considerable proportion of his life. The outlook of a nine year-old is likely to be considerably more developed than that of a seven year-old. B has a right to be given an opportunity to indicate whether he wishes to express a view. It is unlikely to be fair to regard a nine year-old's rights as having been fully exercised by his seven year-old self. It is unknown whether he holds the same view. As *S* v *S* states, it is a continuing duty on the court to know the child's view.

[12] While there will always be some lapse of time between consultation and decision, it will be a matter to consider in each case whether the court can be satisfied it has a correct understanding of the child's view. In the present case, two years in the life of a nine year-old is too long for the court to be confident it has an understanding of B's current views. It is not enough that approaching the child might be distressing, or that nothing seems to have changed. The only test is one of practicability. It is not a discretion. The sheriff does not identify why giving B an opportunity to comment is impracticable, and in 2016 the reporter did manage to obtain B's views, apparently without causing distress.

[13] It was unhelpful that neither party made reference during the proof to B's views, or sought to obtain them, or suggested a further report. They left this to the court. It is now an appeal point. Regrettably, it is a sound point. The duty on the court is a statutory one.

Disposal

[14] Time is an important consideration in decisions about families. It is necessary in the best interests of B to resolve matters as efficiently as possible, and therefore to consider what disposal will be the most efficient. The court in *S* v *S* discussed several possible disposals in similar circumstances. It is neither necessary nor appropriate to compel further proof procedure. The sheriff has heard evidence and has carried out a detailed and careful analysis of the evidence. That analysis was incomplete only because he did not seek to ascertain whether B wished to express a view, and thereafter observe the statutory provisions.

[15] Because the requirements under section 11(7)(b) have not been observed, the decision of 23 November 2018 cannot stand and must be quashed. The appeal will be allowed, the interlocutor of 23 November 2018 recalled, and the matter remitted to the sheriff. It is appropriate to remit the matter to the same sheriff (and this was discussed with and approved by both counsel), with a direction to ascertain the child B's views in terms of that section and thereafter to make a fresh decision in relation to contact between B and the respondent. The interlocutor will not direct any specific practical measure, because the sheriff has heard parties and he, rather than this court, is better placed to decide which local resources, such as reporters, child welfare hearings, or contact centre resources, would be the best method of taking the view of B.

Further issue

[16] Counsel for the appellant also made submissions under reference to section 11(7D) of the 1995 Act that the sheriff had failed to take into account the acrimonious nature of the parties' relationship, to the point that contact was unworkable. However, it is plain that the sheriff had exactly that in mind, and counsel did not press the point. The sheriff expressly

discussed the approach of the appellant to maximising conflict between the parties with the intent of making contact unworkable. The sheriff did not lose sight of the central importance of the best interests of the child. His reasoning on this point cannot be faulted.