

SCOTLAND / JUDGMENT

A v. B [2011] ScotSC 27 (11 May 2011)

[2011] ScotSC 27

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SHERIFFDOM OF GRAMPIAN HIGHLAND
AND
ISLANDS
AT
ABERDEEN
F181/10

JUDGEMENT

of SHERIFF PRINCIPAL SIR STEPHEN S T YOUNG Bt QC in the cause A Pursuer and Respondent against B Defender and Appellant Act: Mr Gavin M Bain, solicitor, Gavin Bain & Co, Aberdeen Alt: Mr Gareth A Masson, solicitor, Adam Cochran, Aberdeen Aberdeen : 11 May 2011 The sheriff principal, having resumed consideration of the cause, allows the appeal and recalls the interlocutor of the sheriff dated 3 September 2010; ad interim orders that the child S....., born on 2002, should continue to reside with the pursuer and respondent; reserves meantime the question of the expenses of the appeal and appoints parties to be heard thereon at Aberdeen Sheriff Court on 18 May 2011 at 3:30 pm . Note [1] The parties in this case are husband and wife. They have one child, a girl who was born in 2002. In this note I shall refer to her as "S". When the action was raised in March 2010 S was residing with the defender, and in terms of crave 1 of the initial writ the pursuer sought an order for contact between himself and S at certain specified times.

- [2] Defences were duly lodged on behalf of the defender and a child welfare hearing was assigned to take place on 21 May, 2010 . At that hearing the sheriff ex proprio motu ordained the defender to instruct Dr. Brenda Robson to prepare a psychological assessment and to be responsible for payment for this. The interlocutor does not record who was to be the subject of this assessment, but it appears not to be in dispute that it was to be S. The child welfare hearing was continued to 2 July, 2010 . The report by Dr. Robson was evidently not completed by then, and on joint motion the sheriff continued the hearing to 3 September, 2010 for the report to be lodged.
- [3] At the hearing on 3 September, 2010 the parties were present with their respective solicitors. Without giving them an opportunity to address her, the sheriff proceeded to pronounce an interlocutor in the following terms (I have edited the details of the child): The Sheriff, ex proprio motu Makes a Residence Order where the child S, born 2002, shall reside

with the Pursuer as from 10.34 am on 3 rd September 2010; Grants Warrant to Sheriff Officers to collect the said child from school on 3 rd September 2010 and deliver her to the Pursuer; in respect of the child welfare issues and the extreme concern for the safety of the child, and in terms of Rule 33.93 of the Ordinary Cause Rules 1993 and Section 52(2)(c) and Section 54 of the Children (Scotland) Act 1995, Refers same to the Children's Reporter; Ordains the Sheriff Clerk to intimate a copy of this Interlocutor to the Chief Social Worker, Aberdeen shire Council and the Aberdeen shire Reporter forthwith; Ordains the Defender not to attempt to interfere with the Sheriff Officers in terms of the warrant to collect the child, on the understanding that if she does so interfere, she will be apprehended. It will be seen that this was a final interlocutor. It appears from what I was told the hearing of the appeal that the sheriff gave no explanation for pronouncing an interlocutor in these terms other than to say that she was doing so on account of concerns that had been expressed to her regarding the welfare of S.

- [4] Not surprisingly the defender lodged a note of appeal against this interlocutor, and in her grounds of appeal she founded in particular on the fact that the interlocutor was a final one, that it had inverted the status quo in relation to the arrangements for the care of S, that it had been granted on the basis of information which had been available only to the sheriff and not to the parties and that they had not been afforded an opportunity to address her before she had granted the interlocutor. In short therefore it was said that the defender had been denied a fair hearing.
- [5] In response to the note of appeal the sheriff issued a note dated 1 October 2010 in the following terms: This was a Child Welfare Hearing continued from earlier dates to allow time for Dr Brenda Robson to complete and lodge her report. The hearing was subject to the rules set out at 33.22A of the Ordinary Cause Rules 1993 and in terms of Rule 33.22A(4)(a) it is open to the Court to order such steps to be taken, make such order, if any, or order further procedure as it thinks fit. The paramount consideration in all proceedings relating to children is the welfare of the child involved. (Section 11(7) of the Children (Scotland) Act 1995. On the day before the hearing the Sheriff Clerk Depute told me that Dr Robson had contacted her expressing extreme concern for the safety of the child in this case. I asked that Dr Robson put her concerns in writing, which she did. Dr Robson is a highly respected and widely experienced practitioner who is regularly of great assistance to the Court. I placed great weight on her concerns and formed the view that she would not have taken the unusual step of contacting the Court except in the most extreme circumstances. I was conscious that the legal system had, in the preceding month, patently failed to protect three children when court orders had not been acted on expeditiously. Bearing in mind that a parent always has the right to re-apply to the Court for a variation of an order on a material change of circumstance, I came to the view that urgent steps had to be taken to protect the child in this case. I was well aware that parties were not given an opportunity to address me, and were not in possession of all the information before me (which latter circumstance is not in itself unusual given that the views of the child may have been expressed to the Court in private and in confidence). However, I balanced the rights of the parties to be heard

against the welfare of the child and came to the view that the protection of the child from abuse or the risk of abuse as set out in Section 11(7A to E) of the Children (Scotland) Act 1995 had to be the over-riding concern . Accordingly, I pronounced the foregoing order which was implemented forthwith. Subsequently, Dr Robson has provided her full report which is available to parties. I understand that, albeit very late in the day, the Reporter is to convene a Children's Panel and the Social Work Department is preparing a report.

- [6] I have seen the report which Dr. Robson prepared for the sheriff's benefit before the hearing on 3 September, 2010 . It is in substantially the same terms as the report by her which was subsequently lodged in court and made available to the parties. Having read first through this later report, I was not at all surprised to read in her conclusion that Dr. Robson was "very concerned about the defender's mental and emotional stability at the present time". She went on to say that both a senior social worker who had had contact with the defender and S and the head teacher at S's then school had expressed concerns to her about the defender's mental health. She concluded her report in the following terms: The defender has specifically stated that she would abduct the child and disappear with her if she is backed into a corner, and feels that she has no alternative choice. I actually telephoned the primary school on 1 and 2 September to check that the child was in school and a secretary confirmed her attendance. I did not feel that I could put my findings and views in a report which would be available to the parties at that stage, as I was uncertain as to how the defender would react. I spoke to the sheriff clerk on 2 September and was then advised that Sheriff Cowan had requested that I send her an immediate letter outlining my concerns and she would deal with the matter the following day. When the case called in court, the sheriff ordered that the pursuer should have interim residence, the child was uplifted from her primary school by her father and grandfather along with sheriff officers and she is now residing with her father at her grandparents' home. I spoke to the sheriff after the case called last Friday and I was requested to draw up and submit a report outlining my findings in this case. I am sending a copy of this report directly to the social worker at Ellon as I feel that it will assist with her assessment. It will be observed that Dr. Robson mistakenly believed that the sheriff had granted an interim order at the hearing. The penultimate paragraph of the report which she submitted to the sheriff before the hearing on 3 September, 2010 was in the same terms as the first of the three paragraphs quoted above except that (i) it referred to the defender by name and omitted the final sentence about speaking to the sheriff clerk and being advised of the sheriff's request to send an immediate letter, (ii) the grammar was changed slightly to reflect the fact that the report was written before the hearing on 3 September, 2010 rather than after it, and (iii) specific reference was made by Dr. Robson to the case of the three Riggi children and her concern regarding the risk that the defender might pose to S and the need to handle the situation with the utmost delicacy. (In the final paragraph of this earlier report Dr. Robson provided details of how she could be contacted if the sheriff wished to discuss the matter further - which it appears she did not, at least before the hearing).

- [7] It will be recalled that the Riggi children had been killed by their mother at the beginning of August 2010 very shortly after a judge in the Court of Session had apparently raised concerns about their welfare. It was these three children whom the sheriff evidently had in mind when she referred in her note to the legal system having in the previous month "patently failed to protect three children when court orders had not been acted on expeditiously".
- [8] At the hearing of the appeal the defender's solicitor submitted that I should recall the interlocutor of the sheriff dated 3 September, in its entirety and remit the cause to the sheriff for a full and proper consideration of the issues surrounding S's welfare. He contended in short that the manner in which the sheriff had dealt with the matter and had granted a final order had deprived the defender of her right to a fair hearing under article 6(1) of the European Convention on Human Rights, and further that the fact that the defender would be entitled to apply to the court for a variation of an order in regard to the welfare of the child on a material change of circumstances did not afford a justification for the drastic step which the sheriff had taken in granting a final order there and then. He submitted too that the sheriff had been wrong to refer the matter to the Reporter in terms of section 54 of the Children (Scotland) Act 1995 since the ground of referral under section 52(2)(c) had at that stage neither been admitted nor proved.
- [9] In response the pursuer's solicitor explained that, if he had been given an opportunity to speak by the sheriff, he would have invited her to grant an order to the effect that S should reside with the pursuer. He said that he had been aware before the hearing began that sheriff officers would be in attendance at the court that day, and further that those in authority at S's school had been advised not to allow her to be removed from the school that morning. This was because there had been a serious concern that the defender might uplift the child from the school and flee. Bearing in mind that the child's welfare was the paramount consideration, and having regard also to the urgency of the situation, he submitted that the sheriff had been correct to grant a final residence order in favour of the pursuer there and then and to refer the matter to the Reporter. In the event, a supervision requirement had been made by the children's hearing on 5 November, 2010 with conditions that S should reside with the pursuer and that the defender should have supervised contact with her twice a week. In light of subsequent difficulties over the arrangements for this contact a review hearing had taken place on 17 March, 2011 . The outcome of this had been that the hearing, by a majority, had decided to appoint a safeguarder to S with a view to providing a recommendation to the hearing as to what future contact with the defender would be in S's best interests. (It appears that the dissenting member of the hearing was of the opinion that there was sufficient information available to allow the hearing to make an immediate decision in regard to the future arrangements for contact between S and the defender).
- [10] In my opinion the sheriff was wrong to have granted a final residence order in this case. That she did so without giving the parties an opportunity to address her before making the order and without letting them see the report which she had received from Dr. Robson, or at

least advising them of the contents of the report, constituted in my view a blatant infringement of the defender's right to a fair hearing under article 6(1) of the European Convention on Human Rights. Moreover, while rule 33.22A(4)(a) of the Ordinary Cause Rules undoubtedly afforded the sheriff a very broad discretion in dealing with the case, and in particular allowed her to grant a final order at the conclusion of the hearing provided that there was sufficient material before the court to justify this (see *Hartnett v Hartnett* 1997 SCLR 525 and *Morgan v Morgan* 1998 SCLR 681), I do not think that she was entitled to grant a final order on the basis only of the contents of the report which she had received from Dr. Robson and nothing else, in particular since these contents were not known to the defender and she had had no opportunity to challenge their accuracy. It might perhaps have been a different matter if these contents had been admitted by the defender. But of course she never had an opportunity to do this before the order was made by the sheriff. It is true too that the defender would have been entitled on a material change of circumstances to apply to the court for a variation of the order which the sheriff had pronounced. But in my opinion this would not have begun to address the fundamental unfairness to the defender of the procedure adopted by the sheriff in this case.

- [11] I also think that the sheriff was wrong to have referred the matter to the Principal Reporter in terms of section 54(1) of the Children (Scotland) Act 1995. I say this since section 54(3) provides that where the court has referred the matter to the Principal Reporter under subsection (1), he shall (a) make such investigation as he thinks appropriate; and (b) if he considers that compulsory measures of supervision are necessary, arrange a children's hearing to consider the case of the child under section 69 of the Act. In this event section 69(1) is to apply as if the condition specified by the court under section 54(1) were a ground of referral established in accordance with section 68 of the Act. The condition specified by the sheriff in this case was that set out in section 52(2)(c), namely that the child was likely (i) to suffer unnecessarily; or (ii) be impaired seriously in her health or development, due to a lack of parental care. The effect of the sheriff's order was that it allowed the children's hearing to proceed to make a supervision requirement in respect of S without a ground of referral having either been accepted by the defender or established in accordance with the provisions of section 68 or otherwise admitted or proved. I scarcely think that, if the Principal Reporter had been directed by the children's hearing in terms of section 65(7) or (9) of the Act to make an application to the sheriff for a finding whether a ground of referral based on section 52(2)(c) was established in respect of the child, the sheriff would have been willing in the absence of any admission to find such a ground established on the basis only of the contents of a report which had not even been seen by the parties and without hearing any evidence at all. Yet it was on just such a limited basis that the sheriff saw fit to refer this particular matter to the Principal Reporter in terms of section 54(1).
- [12] Having said all this, I should say that I can readily understand why, in light of the contents of the report which she had received before the hearing from Dr. Robson and in light also of the terms of section 11(7A) of the Act, the sheriff thought it necessary in the interests of S's safety to take immediate and decisive action to remove her from the care of the defender

without giving the latter any warning of what was about to happen. For better or for worse I did not hear a full argument on how this might have been achieved consistently with the defender's right to a fair hearing under article 6(1). So I do not think that it would be right for me to express a concluded opinion on this question. I will only say that I am inclined to think (and indeed at one point in his submissions the defender's solicitor suggested as much) that it might have been a very different matter if, instead of proceeding at once to grant a final order and make a referral under section 54(1), the sheriff had granted an order on an interim basis only to the effect that S should reside with the pursuer, with warrant to sheriff officers to collect her from her school that day and deliver her to him. The sheriff could then have fixed a further child welfare hearing to take place a few days later at which the parties could have addressed her on the whole matter having seen Dr. Robson's report. Bearing in mind that the requirement in article 6(1) for fairness applies to the proceedings as a whole, I think that this might have been an acceptable solution to the dilemma faced by the sheriff of reconciling on the one hand what appeared to her to be the urgent necessity to protect the child from the risk of harm at the hands of the defender and, on the other hand, the latter's right to a fair hearing under article 6(1).

- [13] It will be seen that I have recalled the sheriff's interlocutor in its entirety. Once I have dealt with the question of expenses I shall remit the cause to her to proceed as accords. The recall of the referral under section 54(1) of course raises some difficult questions about the validity of the proceedings before the children's hearing and the supervision requirement which was made on 5 November, 2010 . Since I was not addressed on these questions I think that I ought to say no more about them in the meantime. But in order to be sure that S continues to reside with the pursuer in the meantime, I have granted an order to this effect ad interim pending a final determination by the sheriff of the question where the child should reside. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotSC/2011/27.html>

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