

SCOTLAND / JUDGMENT

AB v BB [2011] ScotCS CSOH_198 (02 December 2011)

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[2011] CSOH 198,

[2011] ScotCS CSOH_198, 2012 GWD 1-3 [New search] [Help] OUTER HOUSE, COURT OF SESSION [2011] CSOH NUMBER F112/ CS OPINION OF LORD BANNATYNE in the cause AB Pursuer; against BB Defender: ----- Pursuer: Mundy, s Solicitor / a Advocate; Anderson Fyfe Defender: Wild; Beveridge & Kellas Curator ad litem: Moir; Hughes Walkeer [Date of Issue] 2 December 2011

Background

- [1] This matter came out before me by order on 29 September 2011 following the issuing of my opinion dated 11 August 2011 in terms of which I advised that I wished to hear argument on certain subsidiary issues in light of the decisions I had reached in my opinion on the substantive issues.
- [2] The dispute between the parties upon which I had opined principally related to the issues of residence of and contact to their child C.
- [3] The action had been before the courts since October 2005. There was a part heard proof which commenced on 27 April 2010 . In the course of this proof an agreement was reached between parties that a residence order should be made in favour of the pursuer and an interim order regarding contact was made in favour of the defender (see: interlocutor of 29 April 2010). Thereafter following sundry procedure a continued proof in relation to the issue of contact required to be fixed (see: interlocutor of 23 December 2010). This proof was heard between 5 and 13 July 2011 .
- [4] As a result of this proof the court ordered that all direct contact between the defender and the child C should be ended. The reasons for this decision are as fully set out in the said opinion of 11 August 2011 . Motions at By Order hearing

- [5] Two of the motions made can be dealt with quite quickly as they were unopposed: first the pursuer moved that I direct that the curator ad litem should meet with the child C to explain the end of contact with her mother. It was the primary position of the defender that she should have one final opportunity to see the child and explain the position. Her fallback position was that the curator ad litem should speak to the child about this matter. Having regard to all that I said in my substantive opinion I do not believe that it would be in the child's best interest for such a meeting with the defender to take place. I accordingly direct that the curator ad litem should have a final meeting with the child to explain the above matters.
- [6] Secondly, it was moved on behalf of the pursuer that I should sanction Professor Chick as an expert witness and I grant this motion.
- [7] There were a number of other opposed motions made at this hearing: 1. Expenses
- [8] Ms Mundy, the solicitor advocate for the pursuer, made a motion at the bar that the defender should be found liable for the whole expenses of the action including the curator ad litem's remuneration in respect of his appointment which had been paid by the pursuer.
- [9] Ms Mundy accepted at the outset that in family actions the general rule appeared to be in relation to expenses that there should be a finding of no expenses due to or by either party.
- [10] However, her position was that in this case such a finding would not be appropriate. The broad thrust of her argument was twofold: first that the conduct of the defender had been such as to cause unnecessary expense. As I understood it she relied on three particular aspects of the conduct of the defender:
- (a) the unfounded allegations made by the defender regarding the conduct of the pursuer (which allegations were made throughout the course of the case and particularly at the proof) as are fully set out in the substantive opinion;
 - (b) her failure to co - operate, and
 - (c) her enrolling of unnecessary motions.
- [11] It was Ms Mundy's submission that this behaviour had caused unnecessary procedure in the court and lengthened both parts of the proof.
- [12] The second element in her argument was to point to the pursuer's total success in the action. She argued that it added material weight to her contention that the defender should be found liable for the whole expenses of the action.
- [13] In support of her submission that the behaviour of the defender could be a relevant factor when considering the issue of expenses in a family action, she referred me to *Stewart v Stewart* 2007 SC 451. In that case the Inner House considered the issue of expenses in a case involving a dispute over a residence order. In the opinion of the court at page 461 paragraph 32 the following observations were made: " T t he respondent has been wholly successful in

this appeal, as she has been in the two appeals before the Sheriff Principal, and as she was in the proof held by the Sheriff. The appellant has been constantly advised that the best interests of the child would be served if he brought any relevant new material concerning her welfare to the attention of the Court of First Instance at the earliest opportunity, that but he has without any reason given, consistently refused to do so. In all these circumstances we can see no reason to depart from the normal rule that expenses should follow success and we accordingly make an award of expenses against the appellant in favour of the respondent."

- [14] Ms Mundy accepted that the behaviour of the appellant in that case was different from the behaviour of the defender in the instant case, however, she took from this case the general principle that behaviour could be a relevant factor when considering in the circumstances of a family action whether expenses could be awarded to a successful party.
- [15] In reply the defender's counsel Ms Wild, as I understood it, moved that so far as the expenses were concerned the court should follow the normal rule in family actions and should make a finding of no expenses due to or by either party. It was her broad position that the defender's behaviour had first not been of such a nature as to attract an adverse award of expenses and further and in any event her conduct had not caused extra procedure or lengthened the proof. She also submitted that the defender could not meet, due to her financial position, any award of expenses.
- [16] The curator's counsel made no submissions on this issue. The curator's counsel's position generally in relation to the issue of expenses was a neutral one. His position was that as long as the curator's position regarding payment was secure he had no submissions to make.
- Discussion
- [17] I accept that in a family action the normal finding regarding expenses is one of no expenses due to or by either party. However, the awarding of expenses is a matter for the discretion of the judge in each case: see *Howitt v Alexander & Sons* 1948 SC 154 per Lord President Lord Cooper at 157.
- [18] In the exercise of my discretion I have concluded that first a finding of no expenses due to or by either party would not be appropriate nor do I believe it to be appropriate for the defender to be found liable to the pursuer in the whole expenses of the action. However, I believe that it would be appropriate that she be found liable for a proportion of the said expenses.
- [19] In reaching this conclusion I have had regard to the whole circumstances of the case and parties' submissions. In particular I have taken account of the pursuer's complete success in the action: he was in particular awarded, as he sought, residence of the child and, secondly, as he sought, contact between the child and the defender was ended.
- [20] Secondly, I am of the clear view that the defender has caused unnecessary expense as a result of her behaviour.

- [21] The defender has made, what I found in the course of my substantive opinion, to be very serious and wholly unfounded allegations about the pursuer and his family. Further, there were serious and wholly unfounded allegations made against the curator and the experts led on behalf of both the pursuer and the curator. In my judgment a material amount of time in the course of the proof was taken up with the pursuer seeking (successfully) to counter these allegations which were made by the defender. It also seemed to me that time would have been required to be spent at the stage of preparing for the proof in order to meet these unfounded allegations.
- [22] In addition, the defender's lack of cooperation caused further expense. The defender was unwilling to be medically examined by the pursuer's psychiatric expert. Nor would she agree to the release of medical records relative to her which were held in Australia . This failure to co - operate, again in my view, extended the length of the proof. There was in my judgment no good reason why she could not have cooperated. In my view if she had cooperated this would have shortened in particular the second section of the proof.
- [23] Lastly, it appeared to me that certain of the motions enrolled by the defender were wholly unnecessary, for example, motions in relation to financial matters, where no financial conclusions were made and motions seeking publicity in relation to the case, which were clearly entirely inappropriate in a case of this type.
- [24] Overall I believe that the defender's behaviour resulted in extra expense being incurred and applying a broad axe (there is no way I am able precisely to calculate the extent of this), I believe that approximately one-third of the expenses in the case were wholly avoidable.
- [25] When the pursuer's complete success in the action and the defender's behaviour as above described are taken together, I do not believe it would do justice to the positions of the parties for expenses to be dealt with on the basis of no expenses due to or by. In my judgment the pursuer is entitled to have an award made in his favour and I believe that an appropriate award would be as follows: that the defender should be found liable for one third of the pursuer's expenses, I recognise that the defender's financial position will make it very difficult for her to meet such an award. However, that I believe is not a relevant consideration. That matter can be considered in terms of modification. I will deal with the issue of the curator's expenses, which formed the subject of a separate argument before me, later in this opinion.

2. Modification of expenses

- [26] It was Ms Wild's motion, that if I were to make any award of expenses against the defender, then in terms of section 18 of the Legal Aid (Scotland) Act 1986 I should, given the defender's financial circumstances, for the periods when she was covered by legal aid (she was not covered by a legal aid certificate for the whole of the proceedings) modify her liability to nil. The defender's financial position it would be fair to say was not a good one and it was clear that she would find it very difficult to meet any material award of expenses made against her. It was on this basis that I was moved to modify to nil. This motion was opposed on

behalf of the pursuer under reference to the already made submissions regarding the defender's conduct. Discussion

- [27] Section 18(2) of the said Act is in the following terms: "The liability of a legally assisted person under an award of expenses in any proceedings shall not exceed the amount (if any) which in the opinion of the court or tribunal making the award is a reasonable one for him to pay, having regard to all the circumstances including the means of all the parties and their conduct in connection with the dispute".
- [28] But for the defender's conduct to which I have earlier referred I would on the basis of her financial circumstances on their own have modified to nil her liability. However, I am entitled in terms of the said section to have regard to all the circumstances and these include in particular the legally aided party's conduct in connection with the dispute.
- [29] Having regard to the defender's conduct to which I have earlier referred I believe it is only appropriate to modify to one-third her liability for the period while she was legally aided. Curator's expenses
- [30] The curator ad litem's counsel's position as I have said was that as long as the curator was paid he took no particular position in relation to the various issues of expenses. As I have said earlier it was the position of the pursuer's solicitor advocate, Ms Mundy, that the curator ad litem's remuneration, which to date had been paid by the pursuer, should be paid by the defender and that this should form part of the award of expenses which I made against her. This was opposed on behalf of the defender.
- [31] I have considered whether the award of expenses which I have made against the defender should include the curator's personal remuneration.
- [32] The appointment of the curator in this case was not on the motion of either of the parties but was at the instance of the court. At the stage at which the curator was appointed, the parties were not legally represented and it appeared to the court that they were entirely at loggerheads in relation to the various issues then before the court. They could agree almost nothing.
- [33] Having regard to the above factors and the whole circumstances of the case, the court took the view that an independent person should be appointed to represent the child and to present through counsel, if necessary, evidence regarding the best interests of the child.
- [34] Having regard to the circumstances of the curator's appointment, I regard the curator as being in a somewhat peculiar position in respect to the issue of expenses. It does not seem to me in these circumstances to be appropriate that the defender should be found liable for the personal remuneration of the curator. I have decided that it is appropriate that the curator's remuneration should be paid as an outlay in terms of the child's legal aid certificate. I have been informed through Ms Mundy that the Legal Aid Board accept that this is a competent course of action.

- [35] As regards the curator's other expenses, namely: instructing solicitors and counsel to represent him in the course of this case, it is my view that for the same reasons as I have outlined above, these should be met in terms of the child's own legal aid certificate. In - direct contact
- [36] The final matter before me at the By Order hearing was a motion made by the defender for indirect contact.
- [37] The pursuer's position regarding this was that a clean break in the whole circumstances would be the best solution. However, the court was assured that, if in the future the child expressed an interest in seeing or hearing from her mother, the pursuer would facilitate this. It was the pursuer's broad submission that there was no necessity for any order in relation to indirect contact to be made.
- [38] I believe that limited indirect contact would be in the child's best interests. On the whole evidence led before me at proof though direct contact was not in her interests it did appear that some form of limited indirect contact could be beneficial, so that the child did not lose touch entirely with her African background and heritage. I believe that an order in relation to indirect contact would be necessary in order for this to work given that the parties remain wholly estranged and entirely at loggerheads. I believe that indirect contact should be exercised as follows: that the defender be allowed to send three e-mails per annum (to a dedicated e-mail address which the pursuer stated that he had available). These e-mails should be at or about the end of each school term. The child should be given sight of these if suitable. If the child wishes to reply then she should be allowed to reply to each of these e-mails. If she is unwilling to reply then the pursuer should advise the defender of this and on advising her by e-mail of this should set out some details of how the child is progressing and what major events have occurred in her life since the previous e-mail.
- [39] There were two other minor connected matters and they were that the defender wished to be advised of any significant medical difficulties which the child may experience and if the pursuer and child intended to leave the country for good she wished to be informed. I do not think either of these requests is unreasonable or in any way contrary to the child's best interests. I therefore direct that if the child does suffer from any material medical problem then the defender should at once be informed. In addition, if the pursuer and the child are to leave Scotland for good then no later than two months before they are to leave the defender should be informed of this decision. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2011/2011CSOH198.html>

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