

SCOTLAND / JUDGMENT

B v. B [2009] ScotSC 37 (11 May 2009)

[2009] ScotSC 37

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- [2009] ScotSC 37, 2009 GWD 17-277 [New search] [Help] SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY F56/07 JUDGMENT OF SHERIFF PRINCIPAL BA LOCKHART in cause ALAN BROWN Pursuer and Respondent Against KERRY ANN BROWN Defender and Appellant Act: Mr G Robson, of Lambert & Co, Ayr Alt: Miss M Walker, of A C White, Ayr AYR : 11 May 2009 The Sheriff Principal, having heard parties, sustains the appeal and recalls the sheriff's interlocutor of 29 April 2009; remits the cause to the sheriff to reconsider the minute to vary (no 11 of process) and to hear solicitor for the defender and appellant thereon at Ayr Sheriff Court on 14 May 2009 at 10.00 am and thereafter to proceed as accords; finds no expenses due to or by either party in respect of the appeal. NOTE: 1 On 09 November 2007 the sheriff at Ayr issued the following interlocutor in this case "The sheriff, on joint motion makes a residence order in respect of the children Alan B, born [in] 1999 and EB, born 24 December 1999 and orders that the said AB and EB reside with the pursuer; makes a residence order in respect of the children LB, born [in] 2001, KB, born [in] 2004 and CB, born [in] and orders that the said LB, KB and CB reside with the defender; quoad ultra dismisses the action and finds no expenses due to or by either party." On 21 April 2009 the pursuer lodged a minute in Ayr Sheriff Court in the following terms : "(1) to vary the decree granted on 09 November 2007 in the proceedings between the parties under reference F56/07 in this court by awarding the pursuer and minuter residence of the children LB, born [in] 2001, KB, born [in] 2004 and CB, born 1[in] 2005 and for variation ad interim.
- (2) to order the defender and respondent to deliver the said children to the pursuer and minuter within such period of time as the court sees fit" 3 On 29 April 2009 the minute of variation came before the sheriff for a pre-service warrant since he was asked to make an interim residence order in respect of the three children and an order for delivery. The sheriff was addressed by solicitor for the pursuer and respondent. He records in his note what was said to him. He records that the solicitor had affidavits from the pursuer and family member or members which he had prepared but had not yet had them signed. I understand that various productions were available. Having considered the submissions on behalf of the pursuer

and respondent the sheriff granted a warrant for service and issued an interlocutor in the following terms: "The sheriff, having heard Mr Robson, solicitor, Ayr on the pursuer's and minuter's minute to vary, no 11 of process; varies the decree granted on 09 November 2007 in the proceedings between the parties under reference F56/07 in this court; makes a residence order in respect of the children, LB, born [in] 2001, KB, born [in], CB, born [in] 2005, requires that they live with the pursuer and minuter ad interim; orders the defender and respondent to deliver the said children to the pursuer and minuter within forty-eight hours; failing such delivery orders sheriff officers or their English equivalence to uplift the said children and deliver them to the pursuer and minuter; dispenses with intimation of the terms of this minute upon the children LB, born [in], KB, born [in] 2004 and CB, born [in]; assigns 14 May 2009 as a procedural hearing at 10.00 am." 4 A note of appeal was lodged in Ayr on 08 May 2009 against this interlocutor and I heard parties thereon in Airdrie Sheriff Court on 11 May 2009 . 5 A point of competency was taken by solicitor for the pursuer and respondent. He submitted that in terms of Section 27 of the Sheriff Courts (Scotland) Act 1907 an appeal to the Sheriff Principal was not competent in respect of an interim residence order. He conceded that an appeal was competent in respect of an order for delivery as it was an order ad factum praestandum. I was referred to the case of Black v Black SLT (Sheriff Court 5) which dealt with an award of interim access, and the case of Fergus v Eadie & Others 2005 SCLR 176 which dealt with an interim contact order. The Sheriff Principal, in both cases, opined that an appeal was not competent without leave. These cases in my opinion fall to be distinguished from the case of Thomson v Thomson SLT (Sheriff Court 11) where in an action of custody interim access to certain children was granted and, in implement of that right, the pursuer was ordained by the sheriff to deliver the children to the defender. It was held in that case that leave to appeal was not necessary. Sheriff Principal Reid stated at page 12 "the interlocutor is one which grants the defender a right of access to two of the children of the parties' marriage and, in implement of that right of access, ordains the pursuer to deliver the children to the defender at a prescribed place. I do not think it doubtful that the interlocutor is an order ad factum praestandum. It is an order upon the pursuer to carry out a specified act" I take the view that this interlocutor, proper construed as a whole, is an order ad factum praestandum in that, in implement of the interim residence order granted, the defender is ordered to deliver the children. Accordingly, appeal is competent in this case without leave. 6 The principal submission by solicitor for the appellant was that sheriff required to act in accordance with the Human Rights Act 1998. It was submitted that Article 6 of the Convention on Human Rights applied. The respondent had not been represented at the hearing on 29 April and had no notice of such to allow her to arrange representation. She had not received a fair hearing. It was submitted that the sheriff should not have made the orders without giving the appellant the opportunity to make representations. 7 It was submitted that, if that opportunity had been given to her, the sheriff would have been advised of the details of accommodation and schooling which the appellant had arranged for the children in Braintree . The sheriff would have been advised that the social work department in Ayr were fully aware of the appellant's move to Braintree which had taken place on 19 March 2009 . The sheriff would have been

advised that the appellant had been contacted by the social work department in Braintree and continues to accept the support which they provide to her. The sheriff, it was submitted, had a duty to consider what was in the child's best interests. These matters had not been before him to allow him to make an objective consideration of this issue. 8 It was further submitted to me that the sheriff would have been advised that the respondent had only exercised his right of contact to the three children between 09 November 2007 and the present on three occasions, and on each occasion for a short time, in February 2009. The respondent had shown no interest in the children or their welfare during that period. It was submitted at no time had the respondent sought a residence order in respect of the three children in question. The issue of the defender's behaviour had been an issue at the time of the interlocutor making the residence order. The respondent had not voiced any concern at that time. It was said that the practices in which the appellant was said to have engaged had been enjoyed by both parties and that the respondent had been involved in this conduct. It was pointed out that the issue of the appellant's conduct had been investigated and was the subject of a report by Elizabeth Welsh, solicitor, in April 2007. 9 I was asked to excuse obedience to the interlocutor of 29 April 2009 in terms of Rule 31.9 of the Ordinary Cause Rules 1993. It was accepted by solicitor for the appellant that, if I was with her on her ground of appeal, I should remit the matter to the sheriff to allow her to be heard on the minute. 10 The solicitor for the respondent asked me to adhere to the sheriff's interlocutor and to refuse the appeal. In particular he emphasised that there had been a material change of circumstances in that the children had been removed from school, nursery and siblings to an address in England . I was referred to the affidavits where, contrary to the appellant's allegations, it was said that the children had regular contact with the respondent and the extended family. As far as the Human Rights Act was concerned, I was referred to Article 8 and in particular that there should be no interference with the protection of the rights and freedoms of others. There had to be proportionality between Article 6 and Article 8. The respondent submitted that the three children could be accommodated in his parents' house. It was of concern that, when social work were involved, even on a voluntary basis, the children should be taken to England . Of particular concern to the sheriff had been the fact that the children had been taken to Essex , the allegations that the appellant acted as an internet prostitute and that the children should be kept safe within the jurisdiction of the court while the matter was looked at carefully. If I was with the appellant, it was accepted that the proper course was for me to recall the sheriff's interlocutor and remit the same to the sheriff to hear the appellant on the minute to vary. 11 I understand the sheriff's concerns and why he acted as he did in this case. However, information has been placed before me which was not before the sheriff. That information requires consideration and, if necessary, further investigation. It is said that there is adequate accommodation available for the children, that schooling arrangements are in place and that the social work department locally are in contact with the appellant. There is no absolute rule which forbids a parent who has a residence order removing a child from their original address. 12 I am persuaded, on the basis of the information placed before me that it is appropriate that the appellant be heard and, if necessary, further information be obtained, before the question of variation of

the existing order is determined. As more than one hearing may be necessary and matters may require detailed investigation and monitoring, I consider that it is appropriate that the minute to vary should be determined by the sheriff. It is not, in my opinion, appropriate for a Sheriff Principal to effectively conduct the progress of a litigation. 13 I accordingly have decided that I should recall the sheriff's interlocutor and remit the minute to vary to the sheriff in order that solicitor for the appellant may be heard thereon on 14 May 2009 . Thereafter, taking into account all the submissions to him, the sheriff should proceed as he thinks fit. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotSC/2009/37.html>

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