

SCOTLAND / JUDGMENT

HJM v LS [2013] ScotCS CSOH_79 (28 May 2013)

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[2013] ScotCS CSOH_79, 2013 Fam LR 52,

[2013] CSOH 79, 2013 GWD 19-384 [New search] [Help] OUTER HOUSE, COURT OF SESSION

[2013] CSOH 79 P686/12 OPINION OF LORD BRAILSFORD in the Petition **HJM** Petitioner; against **LS** Respondent & Minuter: for An Order under the Child Abduction and Custody Act 1985

Petitioner: Party Respondent & Minuter: McAlpine; Aitken Nairn 28 May 2013

- [1] The minuter seeks variation of an interlocutor pronounced on 13 July 2012. The minute for variation was lodged with the court on 28 August 2012. There are three associated petitions on behalf of the petitioner in which he seeks findings of contempt of court against the minuter in respect of her failure to obtemper the said interlocutor of 13 July 2012. These petitions were lodged with the court on 22 August 2012, 29 October 2012 and 19 March 2013. After sundry procedure, which I will describe in more detail subsequently, I heard evidence in relation to both the minute for variation and the petitions in respect of contempt of court on 17, 18, 19, 24, 25 and 26 April 2013.
- [2] The background to this matter is relatively complicated. The minuter was born in Scotland and resided there until she met the petitioner in the summer of 2004 whilst they were both exchange students in Berlin. She has an undergraduate and a masters degree in architecture and is currently studying law at a leading Scottish university. The petitioner lives in Australia and is a national of that country. He is an architect by profession. After they met in Berlin, they formed a relationship and cohabited between September 2004 and August 2005 in Melbourne, Australia; between October 2005 and January 2006 in Scotland; between February 2006 and June 2007 in Melbourne and between June 2007 and December 2008 in Scotland and, for some time, in Cardiff, Wales. On 9 March 2007 they had a son, whom I shall refer to as "A". Contact with this child is the subject of the minute for variation. The

child has both Australian and UK nationality. In January 2009, the parties separated, the minuter returning with the child to Scotland and the petitioner returning to Australia. In May 2009 the minuter travelled with the child to Australia. Following her arrival in Australia, the petitioner had contact with the child. The petitioner made an application to the Family Court of Australia at Melbourne seeking a formal order for contact in relation to the child. His "primary application" was to "spend equal time on a fortnightly basis" with the child. There appears to have been a counter application by the present minuter. The "primary application" from the minuter was "to live with the child in Scotland". In the event that her "primary application" was unsuccessful she indicated to the court that she would live with the child in Melbourne. In the event that the present minuter's primary application was successful, the court was asked to consider consequential issues in relation to the time and communication the present petitioner would have with the child. A trial on these matters was heard in the Melbourne court over six days in November 2010. On 24 December 2010 the Australian Court ordered inter alia: "1. The mother and father have equal shared parental responsibility for the child...

2. The child lives with the mother.
 3. The mother be permitted to relocate the child's residence to Scotland from 1 May 2011." The court also regulated contact between the present petitioner and the child in the period between the date of the court order and relocation to Scotland and referred: "All other questions of time to be spent and communication between [the child] and the father be referred into court on a date to be fixed before [a named judge] for the calling of such evidence and the making of such submissions as may be necessary." That hearing was subsequently held and thereafter, on 4 March 2011, the Australian Court: "By consent between the Independent Children's lawyer and the mother, the father not opposing the orders..." made an order extending to 25 paragraphs regulating inter alia the present petitioner's contact with the child. The minuter left Australia with the child in May 2011. A provision of the said Australian court order of 4 March 2011 was to place an obligation upon the minuter to obtain "... orders in Scotland identical to the existing orders ... or identical in effect ..." to the orders pronounced by the Australian court. On her return to Scotland with the child in May 2011, the minuter took sundry steps, to comply with the provisions of the Australian order requiring that she obtain identical orders in Scotland but had not achieved that goal by July 2012 at which time the petitioner was due to exercise contact in Australia in terms of the said Australian court order of 4 March 2011.
- [3] Against that background, on 11 July 2012 the petitioner presented a petition to this court seeking an order under the Child Abduction and Custody Act 1985. In that petition, the petitioner sought an order for contact with the child A conform to the Australian court order of 24 December 2010 as amended by the court order of 4 March 2011. The detailed Australian Court order of 4 March 2011 comprised an appendix to that petition. On 13 July 2012, a motion was heard in that petition. Following that hearing, the Lord Ordinary pronounced the said interlocutor of that date, the terms of which incorporated the

Australian order of 24 December 2010 as amended on 4 March 2011. Clause 6 of the Lord Ordinary's interlocutor, reflecting the Australian decree, found the petitioner entitled to contact with the child "for a period no less than four weeks in times to be agreed during the northern hemisphere July/August school holidays in the years 2012 and 2013" and further stipulated that for the purposes of that contact, the present minuter was required "... to travel with the said child to Australia, remain in Australia during the said period and travel with the child from Australia." The minuter did not obtemper that interlocutor, she did not take the child to Australia in July or August 2012. As aforesaid, she presented the minute with which the present proceedings are concerned to this court on 28 August 2012 seeking to reduce and alter the arrangements for contact. More or less simultaneously, the petitioner presented the petition for contempt of court to the court. In October 2012 this court ordered that contact be granted to the petitioner in Scotland for a period in October of that year during the autumn school holidays. There was a subsequent evidential hearing in relation to contact in Australia during the Christmas and New Year period of 2012 which was heard by the court in December 2012. As a result of that hearing the minuter was ordered to hand over the child to the petitioner on 23 December 2012 for the purposes of two weeks contact in Australia over the Christmas period 2012. I will return to the details of both those periods of contact subsequently. The whole matter then came before me for proof on the days I have already stipulated.

- [4] Before considering the evidence, I should give an indication of the conduct of the proof which was agreed in advance. In an attempt to ensure that the contentious matters were dealt with in an efficient and expeditious manner, I obtained the parties consent to a form of case management. Case management involved the disclosure and agreement of issues in dispute, preparation of and disclosure of outline witness statements in advance of proof, lodging of affidavits from witnesses in advance of proof and the use of these affidavits in lieu of evidence in chief. At the proof, the minuter was represented by counsel. The petitioner represented himself. He was in Australia and the proof was conducted with the aid of "livelink". The petitioners residence in Australia entailed the court requiring to sit unorthodox hours. Even allowing for that, the petitioner required to conduct a proof late into the evening and, on one day, into the early hours of the morning, Australian time. As part of the case management process, I had considered splitting the issues of contact and contempt and having two separate diets of proof. Parties were however, quite understandably, anxious to make progress as expeditiously as possible. Moreover, it seemed plain that there was considerable overlap between the two issues in dispute. It was accordingly agreed that, if possible, all evidence should be adduced in one diet. This, eventually proved impossible. During the course of proof, significant issues relating to the reliability and credibility of witnesses emerged. Counsel for the minuter moved (i) for leave to adduce additional witnesses and (ii) to formally split the proof into two parts. One part of the proof dealing with the issue of contact, he proposed be concluded in the time available, the other dealing with issues of contempt to be dealt with at a subsequent diet. Whilst the issues of credibility I have mentioned were, at least potentially something which could have

been anticipated prior to proof, I should make it clear that I exonerate counsel and his instructing agents from any responsibility for failing to see the issue in advance. The minuter had parted company with former agents and counsel in December 2012 and had no legal representation until 10 days or so before the proof. Counsel and agents who conducted the proof were only instructed before the proof commenced. Perhaps more importantly they had only received, and had not had time to consider fully, six volumes of papers produced to them by the former agents the evening before the proof commenced. Having regard to these factors and to the urgent need to resolve the contact issue before this year's school summer holidays, I ultimately acceded to these motions. The result is that in this opinion I am only concerned with the issue of contact.

- [5] Against the foregoing background, counsel for the minuter's first submission was that the initiating petition presented by the current petitioner was incompetent. In making this submission counsel, for the minuter recognised that if correct, the implications of his submission were potentially very serious. The petition under the Hague Convention was he conceded, presented in good faith by the current petitioner. All the procedure that had followed thereon, essentially all the procedure with which this proof was concerned had been conducted in good faith. The purpose of both the minuter and the petitioner was legitimate in the sense that they both sought to regulate contact with the child. Counsel recognised it would not be in either parties best interest, nor would it be in the interest of the child if these proceedings had to be commenced afresh. He accordingly made a proposal which he submitted was capable of salvaging the case. His submission was that the correct order which was required to regulate the issue of contact was an order made in terms of section 11 of the Children (Scotland) Act 1995. This would require an action the procedure for which was stipulated by Chapter 49 of the Rules of the Court of Session. In order to resolve the competence issue, it was submitted that the court could treat the minute to vary and answers thereto as if they were a summons and defences in terms of an action under Chapter 49. Such an approach was said to be competent. Support for the competency of the suggestion was said to be found in *George Outram and Company Limited v Lees* 1992 JC 17. In that case, the complainers sought to challenge a finding of contempt of court by way of Bill of Suspension. The court decided that that procedure was incompetent but were prepared to allow the hearing to proceed as if the Bill were a petition to the Nobile Officium, which was the appropriate procedure. In other words, the court were prepared to permit the incorrect initiating document to be used as if it were the correct document. Similar leniency is permitted in the context of judicial review where in terms of rule 58.12 of the Rules of the Court of Session it is possible for a petition to be withdrawn from Chapter 58 procedure and for it to instead proceed as an ordinary action. In *Girvan v Girvan* 1998 SLT 866, a case which involved the custody of a child, proceedings had been raised in the sheriff court. They had been dismissed as incompetent by the sheriff because the initiating writ should have been a minute in earlier proceedings. On appeal to the Court of Session the First Division held: "The important point however is not the correct interpretation of rule 129, but the welfare of the child, Ryan. In a case such as this when the welfare of a child is the paramount

consideration procedural and legal niceties must give way to common sense and reality. In our opinion, with that in mind, and especially as both parties were content to have the question of access to Ryan regulated in the process initiated by initial writ, the sheriff should have acceded to their wishes in the interest of Ryan, and thus obviated the considerable delay which has taken place."

- [6] It was submitted that a similar approach should be adopted in the present case, thereby allowing the issue of contact which had been fully argued before me to be resolved in the interests of the child A.
- [7] There was no contradiction to these arguments by the petitioner who in fairness, as a party litigant could hardly be expected to respond to them in a detailed manner. I did however ascertain that it was his desire that the issue of contact should be resolved in the proceedings before me. He was not concerned to found upon any "legal niceties" which might delay a decision in relation to this important matter. I considered that the arguments advanced by counsel for the minuter were well-founded. It seems to me, with regret, that the order of 13 July 2012 was for the reasons advanced by counsel for the minuter incompetent. I am however entirely satisfied that it would be inimical to the interests of justice to require proceedings relative to contact with the child to recommence after all that has transpired since July 2012. I heard further submissions on the correct procedural approach to adopt.
- [8] I turn now to consider the substantive issue of contact which requires to be determined.
- [9] In the end of the day, the issue of contact narrowed considerably in the immediate prelude to the proof and during the conduct of the proof. As originally ordered by the Australian court on 24 December 2010 and reiterated in the interlocutor of 13 July 2012, the petitioner was entitled to contact with the child in Australia for a period of no less than four weeks at times to be agreed during the July/August school holidays in 2012 and 2013; for a period of two weeks in Australia at times to be agreed during the Christmas holiday period in 2012/2013; for a period of three weeks in either or both of the Easter and/or October school holidays each year, such contact to be exercised in the United Kingdom or Europe; for a period of five weeks at times to be agreed during the July/August school holidays commencing July 2014. In relation to cost of the necessary travel involved in these arrangements, it was provided in relation to 2012 and 2013 that the minuter was to take the child to Australia, remain there during the duration of contact and then take the child back to Scotland. All of this was to be at her cost. From 2014 cost of travel for the child were to be shared equally between the parents. In addition to those periods of contact provision was also made for contact by "Skype" and for the provision on a stipulated basis of photographs and DVDs of the child.
- [10] In terms of the minute for variation, the minuter sought to vary these awards of contact by reducing the lengths of periods of contact, requiring that contact be exercised in Scotland and imposing the financial costs of such contact upon the petitioner. Five days before the

scheduled commencement of the proof, the minuter presented a without prejudice letter to the court and to the petitioner in which an offer to be founded upon, was made as a compromise proposal in relation to contact. In this letter, it was conceded and accepted that it was appropriate for the petitioner to exercise contact in Australia. The proposal was for two weeks residential contact in Australia in the summer of 2013 and three weeks residential contact in Australia in the summer of 2014. It was provided that residential contact in the Christmas period should be in Australia and Scotland on alternate years. It was stipulated in the letter that when contact was to be exercised in Australia the petitioner should, at his own expense, travel to Scotland to collect the child and take him to Australia with the same process in reverse at the end of contact.

- [11] On the basis of the said compromise offer, it is plain that there is no longer any dispute as to the appropriateness of the petitioner exercising residential contact to the child in Australia. The sole issue upon which I require to adjudicate is the length of such periods and the financial arrangements necessary to facilitate them. Essentially, there is no outstanding area of principle and the court is being asked to arrange the details and mechanics of contact arrangements. Whilst this is undoubtedly a legitimate function of the court, it is very unfortunate that particularly with litigants who are professional persons, it is necessary to leave such matters for determination by a judge.
- [12] The minuter and petitioner are highly intelligent persons. I have already noted that both have degrees in architecture and that the minuter is currently undertaking a law degree at a leading Scottish University. The petitioner is the principal in his own architectural practice in Australia and teaches part time in three of Australia's foremost academic institutions. Throughout these proceedings, the minuter's principal objection to the exercise of contact by the petitioner has been based upon the child's alleged unwillingness to leave her and go with his father on contact visits. She maintained and has maintained throughout the proof, that whenever the child is required to prepare for contact visits, he becomes distressed and upset, sometimes to the point of hysteria. I heard evidence from both the minuter and her sister that the child would cry, cling to his mother and on occasion lock himself in a bathroom rather than go voluntarily with his father. The petitioner denied the allegation that the child was reluctant to go with him and maintained that whilst the child was initially a little diffident with him when he first saw him in October 2012, at which time he had not seen the child for over a year, he soon settled and was comfortable and happy in his company. He gave broadly similar evidence in relation to the contact at Christmas 2012, there being of course only a two month or so gap since he had seen the child in October of that year. In support of his position, the petitioner produced to the court two photographic booklets, being essentially scrapbooks compiled on a day to day basis illustrating and showing the two contact periods, first in Scotland in October 2012 and then over the Christmas/New Year period 2012/2013 in Australia. These were supplemented by three short video films of the child taken on his camera during these contact visits. These short films were shown to the court. These productions were impressive. They showed a well cared for small boy plainly at ease in a variety of domestic situations with his father, his father's

friends and extended family in Australia. Photographs were obviously taken at all times of the day and evening and at no time was there any trace of upset or distress. Looked at as objectively as one can view evidence of this sort, they showed a close and happy relationship between father and son. The petitioner further adduced the evidence of his girlfriend, JH. Miss H cohabits with the petitioner. She was accordingly present in the household with the petitioner and the child throughout the Christmas contact period. She spoke in positive terms of the warm and happy relationship between father and son. She gave no indication of anything other than a good relationship between them. It is significant that there was no attempt in cross-examination to discredit this evidence. All this is powerful evidence in favour of the petitioner's position.

- [13] The minuter's position in relation to contact, and more particularly the issue of handover, was of course supplemented by evidence from her sister. Her sister gave evidence in chief by way of affidavit and was thereafter cross-examined by the petitioner. In that affidavit the minuter's sister spoke to seeing the child distressed prior to handover on a number of occasions and also spoke to seeing the child upset in the presence of his father. The first observation in relation to that evidence, is, as was conceded by the witness in cross-examination, that she saw the petitioner for no more than five minutes throughout the entire contact visit of two weeks in October 2012. This short exposure to direct contact between the petitioner and the child in my view seriously limited the value of the view she expressed on that subject. Further, the witness was loquacious, found it difficult to answer questions directly, strayed in answer into indirect areas and so far as I am able to determine, seemed intent on giving answers designed only to assist the position of the minuter. I formed the clear view that she did not like the petitioner and was of the view that he should see as little of the child as possible. Against this background, the minuter sought a substantial reduction in the petitioner's contact. No persuasive evidence for such a reduction was presented.
- [14] Having regard to the aforesaid features in the evidence, I have not found it difficult to conclude that the petitioner's evidence in relation to the attitude of the child to contact is to be preferred to that of the minuter.
- [15] On the basis of the foregoing, I conclude that in relation to the amount of contact, no basis or reason for varying the order made by on 13 July 2012 has been established. There is one qualification to be made to that statement. During the course of the proof, the petitioner conceded that by virtue of professional and business reasons he would be unable to exercise contact in the Easter and October vacation periods of 2013. Whilst this concession was only in relation to 2013 it did appear to me to be consistent with fairness that after this year it would be more equitable to allow the petitioner contact in one of these periods only. I am accordingly prepared to, in so far as length and extent of contact is concerned, to allow contact in one of those periods each year. I consider that the election between whether contact should be exercised in Easter or October should be for discussion between the parties, which failing the choice should rest with the petitioner. He should however give

good notice in advance of which time he wishes to exercise contact. I will make an order that in the event of there being no agreement as to which period contact should be exercised, the petitioner must give notice by 31 December in the year preceding of which period he intends to exercise contact. That does not however end the issue of contact. I still require to address the mechanics of how contact is arranged and the issue of payment for travel. As a matter of principle, it seems to me that parents should share both the cost and effort in facilitating contact. This principle is no doubt relatively easy to implement when parents live in relatively close proximity. The issue is far less easy when parents live as very far removed as do the present parties. Notwithstanding that, I do consider that there is a very high onus on the parties to do all that is reasonably possible to ensure that contact is made possible and works as smoothly as practicable. I heard considerable evidence relative to the minuter's financial circumstances and to a somewhat lesser extent, the petitioner gave me details of his financial circumstances. Broadly, the minuter is a student and will be until at least the summer of 2014, dependent upon benefits. She produced documentation which vouched that her income was both modest and to a very large extent inadequate to cover her outgoings. The shortfall between her outgoings and expenditure was funded by generosity in providing accommodation on the part of her mother and in paying school fees by her sister. The petitioner's financial position was somewhat better. He is the principal of his own architectural practice, albeit he has just completed his first year in business and understandably profits are tight. In addition, he has part time employment at three universities. He said that on the basis of his most recent accounts, he had made between 38,000 and 42,000 Australian dollars in the past year. He anticipated that his income would rise in the current financial year to something in the region of 45,000 Australian dollars. I did not have evidence as to his outgoings. He paid 175 Australian dollars per month as support for the child, this in terms of an order made by the Australian equivalent of the Child Support Agency. That sum was based on his income as per his tax returns and was reviewed annually. I consider it has been proved that at the present time, the minuter is not financially able to fund travel for either herself or the child to Australia. Whilst I accept that the petitioner is far from wealthy, his financial circumstances are, again at the present time, better than those of the minuter. I would observe in passing that he has funded two trips to the United Kingdom in the past year. I have concluded that notwithstanding the principle that parties should bear the cost of contact as near equally as possible, at the current time there is no alternative but to impose the burden of paying for the child's travel to Australia upon the petitioner. I further consider that the obligation to accompany the child to and from Australia must at the present time rest with the petitioner. I will only make this stipulation in relation to 2013 and the summer of 2014. After the summer of 2014, the minuter should commence full time employment. Her financial circumstances should accordingly improve. At this time I consider there should be a sharing of these costs commensurate with each party's ability to fund them. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2013/2013CSOH79.html>

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