**Sheriff Principal Appointments 2014**

**Summary of Case Study**

This case study is based upon an appeal to the sheriff principal from a decision of the sheriff made at a continued child welfare hearing. His interlocutor is a final one on the issue of the appellant’s craves for residence to his son, aged 13, and for contact to his daughters, aged 11 and 7, and his other son, aged 10.

The appellant was unrepresented before the sheriff and remains so before you at the hearing of the appeal. The pleadings comprise the initial writ, which was drafted by the appellant’s previous solicitor, and the defences. Neither has been adjusted. The initial writ craves decree of divorce on the ground that the marriage has irretrievably broken down by reason of the respondent’s behaviour. The appellant avers that the respondent was unwilling to support the appellant in his work and in all issues in respect of the children; she preferred to live her life as a single person and not as part of a family with the appellant; she spent large sums of money on shopping channels, despite the parties being in financial difficulties; she refused to get a job. She left the appellant suddenly and with no warning. All four children went with her. The appellant does not know her whereabouts. She is a Swedish national and all her family live there. In the defences the respondent seeks residence of all of the children. She avers that the cause of the breakdown of the marriage is the appellant’s physical violence towards her; she left suddenly with the children because the appellant had assaulted her.

The sheriff’s interlocutor is produced.

The grounds of appeal are,

“1. The sheriff erred in finding that son A was being manipulated by the appellant and was a “Trojan Horse” in the respondent’s household without having first discussed the matter and also refused to hear evidence from the son who was present in court and who instructed his agent to inform the sheriff he was willing and competent to give contrary evidence;

2. The sheriff acted in an oppressive manner to the appellant, a party litigant, making personal remarks, discriminatingly questioning his character, parental ability and position and making unwarranted comparisons between his own and the appellant’s approach to family matters such as “discussing holiday plans with children”, rendering the proceedings unfair in terms of ECHR Article 8 read with ECHR Article 6, right to a fair hearing, and contrary to guidance in the Scottish judges’ bench book;

3. The sheriff did not give due weight to the actions of the respondent and their role in the proceedings, minimising the crucial event of her effecting an international child abduction and then removing the children to another location and school without the knowledge or agreement of the appellant, and represented in extended and personally critical terms the appellant’s reference to the effect these actions had caused as manipulative and unreasonable;

4. The sheriff dismissed the consideration of a shared residency arrangement with unreasonable prejudgmental comment, “If I granted a Shared Residency Order, you two would be back in court arguing about what cereal the children should have for breakfast.””

During the appeal, the appellant spoke for well over an hour complaining bitterly about the sheriff’s treatment of him. He referred at length to a Fatherhood Institute research report which explained why it was so difficult for fathers to get court orders for contact to their children. He did not understand why the sheriff was allowed to come to a final decision without hearing evidence under oath at a full hearing. He referred to *Thomas v Thomas [1947] AC 484* and *G v G [1985] 1 WLR 847*, but did not produce copies of the reports. He said that he thought that the court would know about these cases and as he was not legally qualified he preferred to leave it to the court to have a look at them. The respondent’s solicitor thought that the sheriff was entitled to pronounce final interlocutors at a child welfare hearing without evidence being led under oath but could cite no authorities in support of that submission. He relied upon the reasoning of the sheriff.

Please consider how you, as the sheriff principal hearing the appeal, would decide it and deal with the appeal generally. At your interview the judicial and legal members will discuss with you your understanding of the law and procedure relevant to the matters raised in the grounds of appeal and how you would apply them.

You may bring into the interview with you any notes which you have made for yourself in advance. You should consider whether there are any authorities or statutory provisions which bear upon the issues raised in the grounds.

|  |  |  |
| --- | --- | --- |
|  |  | **INTERLOCUTOR**  **in causa**  **AA** |
|  |  | **PURSUER** |
|  |  | **against** |
|  |  |  |
|  |  | **BB** |
|  |  |  |
|  |  | **DEFENDER** |
|  |  |  |
|  |  | **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** |

**Act: Pursuer**

**Alt: Smith (Defender present)**

**The Sheriff, having resumed consideration of the cause,**

1. Makes a residence order in terms of Section 11(2)(c) of the Children (Scotland) Act 1995 providing that Child A (born 18 March 2001), child of the marriage and under the age of sixteen years shall reside with the pursuer.
2. Makes a residence order in terms of Section 11(2)(c) of the Children (Scotland) Act 1995 providing that Child B (born 23 October 2002), Child C (born 15 November 2003) and Child D (born 3 December 2006) shall reside with the defender; Thereafter continues the cause to the procedural roll on 31 October 2013 to determine further procedure and reserves meantime the issue of expenses.

**NOTE:**

1. This is an action for divorce which commenced some three and a half years ago. From the outset the principal issue between the parties has been that of the residence of their four children. The action has called in court no less than 37 times before calling before me for a Child Welfare Hearing on 16 August 2013. During the course of the proceedings, various matters have been vigorously contested between the parties but principally the issues of residence, contact, schooling and holidays. The action was complicated by a referral to the Children’s Hearing made by the court on 15 April 2011. Those proceedings were not concluded for a period of well over one year.
2. The historical situation is quite complex and I do not propose to summarise it at length. Initially, it appears that BB endeavoured to take the children out of the country and back to her home country of Sweden. That was prevented by AA and interim interdict was pronounced. Thereafter, for some time it appears that the children were resident with the defender at her home in B and attended B Primary School. After some period of discussion an interim joint residence order was pronounced in February 2011. It is the pursuer’s position that this order worked well, however, that is not a view shared by any other individual who has been involved in this case. It was not an arrangement which found favour with the Children’s Hearing or social workers. In April 2011 the pursuer gave an undertaking that he would allow the three younger children to reside with the defender pending consideration by the Children’s Hearing. The interim order was formally recalled in September of that year. From that point, all four children resided with the defender until mid-2012 when the eldest child, A, moved to reside with the pursuer. The other three children remained with the defender. Accordingly, for the vast bulk of the time during which this matter has progressed through the courts, the three youngest children have been resided with the defender and for a shorter period, and latterly, the eldest child has resided with the pursuer. Furthermore, since August 2011, the three youngest children have attended B Primary School. A, the eldest child, having returned to stay with the pursuer attends M primary school and has done so since April 2012. He is on the point of moving up to C Academy.
3. In coming to my decision, I have been informed by the content of the lengthy hearing on 16 August, principally taken up with AA explaining his position, and a number of reports comprising two bar reports and four reports from X Council Social Work Department.
4. It is clear from what is said both in the reports and by and on behalf of the parties that each party has a differing approach to the upbringing of their children. AA has a more structured and disciplinarian approach and BB a more relaxed and informal approach. The parenting abilities of the parties have been canvassed in the reports and at the Children’s Hearing. There is no suggestion in any report that BB’s care of the children is to their detriment or that there is any concern about their residing with her. There are, as in all cases, individual incidents which can be highlighted and, perhaps, unreasonably emphasised but I am entirely satisfied from the reports available and the submissions which I have heard that there is no reason for this court to take the view that it is not in the interests of the three younger children to remain in her custody. That having been said, I would confirm that I do consider that her initial attempt to take the children to Sweden and her unilateral decision, albeit with the support and encouragement of the social work department, to move the children’s schooling to B was inappropriate. AA ought to have been fully and properly consulted. However, I am not persuaded that the decision to remove the children to schooling in B where they were resident was necessarily incorrect and against their best interests. AA sees these decisions as wrongs against him which require to be righted, whatever consequence that might have for the children. Whilst I have some sympathy with his position, that approach is plainly wrong.
5. It is the corner stone of AA’s submission that the court should make a joint residence order. For him it is a matter of principle. He argues, quite eloquently at times, for such an outcome and is quick to point out that such arrangements do work elsewhere. It is his argument that for the brief period when joint residence did apply it was successful. He is the only person who is involved with this action who has actually taken that view. It is entirely clear that joint residence did not work for anyone other than AA. A major difficulty with his principled approach is that he only seeks to apply this principle to the three children who are currently residing with their mother and not to the eldest child who resides with him. If joint residence is truly a matter of principle then it should surely apply to each of the four children. When I raised this with him he was unable to supply any satisfactory explanation for this unbalanced approach.

1. I do not doubt that AA would like what is best for his children but only as long as it is entirely on his terms. His idea of consultation and compromise is that everyone else should agree with his approach. Anyone who does not is acting unreasonably. When I requested that he draw to my attention any single area or issue involving the present action where he had compromised his position he was quite unable to do so.
2. It is entirely clear from reading the reports and listening to AA that throughout this process he has, whether intentionally or not, placed each of his children under enormous pressure. He has “family meetings” to discuss the children’s reactions and repeatedly questions them about their wishes with regard to the parent with whom they want to reside. The children are currently aged 12, 10, 9 and 6. This pressure has been applied to each of them over the entire period of the action. It is entirely inappropriate that a parent should place pressure on his children in this way. It is clear that AA wishes to alienate the children from their mother. I have little doubt that were he to achieve a joint residence status for the three younger children he would then continue to exert pressure and work on them with a view to achieving full residence at a later stage. He has succeeded in turning the eldest child, A, against his mother. A responsible parent would not have done so. He uses A as a “Trojan horse” to infiltrate the family setup in B, report back to him and spread disaffection amongst the other children. He has repeatedly sought to persuade the children that they should move back to M Primary School, irrespective of where they reside. His determination in that regard can be illustrated by the simple fact that he arranges for his son, Child C, to continue his football activities at Cx, where he will not mix with children from his own school rather than at B where he would. This is another example of behaviour designed to disrupt the present situation. His relationship with his daughter, Child B, appears to have broken-down and I have no doubt that this is as a result of the wholly unreasonable pressure under which he has placed her and the other children. It is, of course, his position that his conduct could not possibly have resulted in such a situation and that this must be due to the defender’s counselling against him.
3. That AA sees this action as a conflict between him and his wife can be adequately demonstrated by his approach to the divorce element. Although he professes to be quite relaxed about being divorced he has made every effort to frustrate that outcome. He has declined to progress the divorce element and when BB has sought to raise her own proceedings has taken steps to frustrate that outcome. It was, I thought, of significance that at the start of this Child Welfare Hearing he was at pains to produce a letter from the Legal Aid Board confirming that BB’s application for legal aid to raise divorce proceedings had been terminated. This document had no relevance to the issues under discussion at the hearing and he could neither explain properly why he had thought it appropriate to produce this nor why he was seeking to frustrate divorce proceedings.
4. He has consistently maintained that all those who have formed an unfavourable impression of his actings throughout the course of these proceedings, whether they are police officers, social workers, teachers or the court are entirely wrong. I was aware that throughout the Children’s Hearing procedure, AA had instigated a number of appeals. In certain of these he had been technically successful without evidence being led. He was, however, very reluctant to admit that the one appeal which proceeded to an evidential hearing had been decided against him. He did concede that the sheriff at that hearing had found him to be unreasonable.
5. There are a number of reports in this case all of which I have considered. The purpose of a report to a Child Welfare Hearing is to inform the court of the factual issues which ought to be taken into account when making the final assessment. Many reporters make recommendations which can be helpful but are not formed in a court setting and are not binding on the court. AA has found the terms of most of the reports before the courts to be unacceptable. He does, however, commend to the court certain of the terms of the latest bar report, particularly where it suggests that a shared parenting arrangement would be the best arrangement for the children. It is of significance AA does not accept many other parts of that report. I neither agree with nor intend to follow that recommendation. The bar reporter is an experienced reporter and his opinion is persuasive. He sets out a number of possible options and indicates that he makes his recommendation with hesitation. Having made his recommendation he sets out three positive elements and five negative elements. He specifically rules out mediation because he considers that “AA’s assertive character would result in BB feeling intimidated”. I noted that AA stated that he did not regard that as a criticism but that he considered being assertive was an asset, much encouraged in the commercial world. He appeared to imply that, in his view, it was appropriate to adopt a commercial attitude and approach towards his wife and children. This demonstrates a lack of proper insight into the correct approach to be taken when dealing with young children. For the record, I do accept certain of the criticisms levelled at the report by BB’s agent. In particular, it appears that the reporter has formed a view on BB’s parenting skills largely based on AA’s stated opinions. There is, I think, a slight lack of balance as a result. Further, given that the reporter’s view is that the children’s schooling should not change he does not appear to have taken full account of the difficulties which the children would have when they were resident in M and being schooled in B.
6. This case cannot be dealt with on the basis of AA’s perception of unfair treatment, some of which is grounded in reality. What is required is that the best interests of the children are properly served. I also fully agree with the reporter when he states that the four children in this case require stability and certainty about their future. I am entirely satisfied that a shared care arrangement would have precisely the opposite effect. It would, it appears, involve the children’s place of residence being changed on a weekly basis. It would involve them travelling from M to B every second week for schooling or, on AA’s preferred option, from B to M every second week for schooling. They would be subjected to different home regimes. I strongly suspect that they would continue to be subjected to pressure from AA, seeking to undermine BB’s periods of care and control and very possibly a similar or although perhaps more subtle approach from BB. It is obvious from reading the reports that the children suffer from being placed under pressure, principally by AA. It is entirely clear that this must stop. Both parents, but particularly AA, require to acknowledge the damage which is being done to these children by this continuing battle between them. The children should not be questioned or asked about where they wish to stay. They should not be questioned about or made to prefer either parent. They should be treated as children and not as adults.
7. It is, with due respect to AA, necessary that the reality of the situation is accepted. The children are not in a family situation. They need to know their situation to the extent of being told that they will reside with one parent or the other and that they will have contact their non-resident parent. They need to be made to feel that they are valued children of each parent not mere pawns in a parental chess match. Each parent requires to encourage the roll of the other in the children’s upbringing and to cease any campaign designed to undermine the roll of the other parent.
8. I agree with the reporter that the children should have reasonable levels of contact with the non-resident parent. The caveat to that position is that the non-resident parent has to cease any undermining behaviour. In particular, AA should, when he has contact with his children, entirely refrain from discussing what he refers to as family issues. He should simply enjoy his time with his children and they will enjoy their time with him. In my respectful opinion it is undoubtedly the case that AA has a manipulative and controlling personality. He will no doubt disagree with that assessment but he requires to conquer that personality trait, to accept the reality of the situation, to accept this decision and to work towards making his children’s lives happy and fulfilled.
9. AA has repeatedly raised the issue of schooling. At the end of the hearing he indicated that there was an outstanding motion seeking an order for the children to be moved from B primary school to M primary school. At the outset of the hearing he was keen to present to me a letter confirming that he had established that there were places for them at that school should they be enrolled there. This approach appears to be yet another example of his obsessive behaviour. He is rightly concerned that the children were moved to B without his being consulted. He dHe doHe He dH He does not appear to understand, however, that such a wrong does not require to be righted by reversal of the decision. The issue is whether or not it is in the children’s interests to return to M. In his report, the bar reporter indicated that he did not favour that approach. I do not favour that approach. The children are to reside in B and should attend their local school. AA should endeavour not to continue to undermine that decision. He should endeavour to make the children’s schooling as beneficial as possible. He should not persistently attempt to alienate the children from that school and he should encourage their undertaking activities with their school mates rather than elsewhere. There is no outstanding motion in this regard. A motion made by AA in October 2012 was then refused by me.
10. I am in absolutely no doubt that the best interests of the three younger children is that they reside with their mother. It would be best that all the children reside together but I think that the situation here has gone beyond that and that the only realistic option for A is that he remains with his father. I would hope that his father would now try to encourage A to resume a normal relationship with his mother. I would hope that he would now cease to use A to influence his younger children.
11. I am in no doubt that the residence orders should now be made final. Interim orders have simply fuelled the levels of uncertainty which have clearly damaged the children. This can now be repaired in the way I have described above. This requires full co-operation by both parents.
12. I have not dealt with the issue of contact as that was not discussed in detail. I understand that BB is prepared to offer generous contact arrangements for the three youngest children and consider and hope that as a first step towards a better approach to the welfare of the children both parents could now agree on appropriate reciprocal contact arrangements. Those arrangements should be inclusive of generous facilities for A and his three siblings to meet and interact. As I have indicated, contact should be used properly. Were one parent to be found to be using contact to attempt to influence, pressurise or manipulate the children then, in my view, it may be necessary for that parent’s contact to cease altogether.
13. The residence orders which I have pronounced are final orders. I have continued the case to a procedural roll hearing to enable parties to discuss agreement on the issue of contact. If that can be agreed the only remaining issue in the case would be that of divorce and as the pursuer professes to be agreeable with such an outcome, I would hope that agreement could be reached on that aspect also to prevent further conflict.
14. Finally, I will reserve the issue of expenses meantime until the procedure roll hearing.