CASE LAW ROUND-UP 2011

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Saturday morning family law

[1] Thirty or so years ago family lawyers would have convened on a Saturday morning for court. Family law was generally an occupation for junior members of the solicitors' profession and inexperienced counsel. Ann Mitchell[1] recorded her observations of cases in 1977/78. The following is an example of a proof which took place before Lord Kissen on 14 March 1978:

Counsel: Was your marriage happy?
Answer: No.
Counsel: What caused it to be unhappy?
Answer: He couldn't work.
Counsel: Did he give any reason?
Answer: No, he was just lazy.
Counsel: Was there any other reason that cause your marriage to be unhappy?
Answer: He was always assaulting me.
Counsel: Can you remember an occasion at Christmas 1975?
Answer: I remember an argument, I don't know what about.
Counsel: Did he hit you?
Answer: Yes.
Counsel: Do you remember another occasion in March 1976?
Answer: He assaulted me.
Counsel: How did he assault you?
Answer: He kicked and punched me.
Counsel: How did that assault finish?
Answer: I went back to him for a few months.
Counsel: How was the marriage then?
Answer: All right.

That was one of the longer cases recorded. Few seem to have gone on for more than ten minutes. The names of counsel included Mr Macfadyen, Mr Stein and Miss Morrison. Our elders on the bench are just old enough to remember those days.

Economy and restraint

[2] In more recent times family lawyers have clearly moved away from the brevity of the Saturday morning court and been subjected to certain judicial displeasure for the length of their cases. In *B v G* [2010] CSIH 83, 2011 SC 191, 2010 Fam LR 134 a father appealed the

[1] Author of *Children in the Middle: Living through Divorce* 1985.

sheriff's refusal of a contact order. The proof had lasted 52 days. The defender, who led at proof, and was the first witness was in the witness box for 18 of those days. Two days of legal argument were interposed in the middle of her evidence. She left the witness box on day 20 of the proof, 9 months after the case had commenced. The sheriff heard "expert" evidence. The pursuer gave evidence for 7 days. The cost of the proceedings were estimated at £1 million. The First Division had little sympathy with the appeal. They took the opportunity to express their dissatisfaction and to remind professional advisers of the need to reach an expeditious disposal, in the interests of the child or children. Proceedings may be emotionally charged, but there was a duty to take steps to identify and concentrate on, and only on, the issue, which is the welfare of the subject child or children. Exploration of every byway in the relationship between parents is to be avoided. Sheriffs were exonerated from blame for extended proceedings as all they can do is to rule on exceptions to questions or lines of evidence. There was a suggestion of practice notes and encouragement of the use of affidavits. It remains to be seen what the Supreme Court will make of this saga.

[3] An Extra Division took the opportunity to drive home the point in *B v Authority Reporter for Edinburgh* [2011] CSIH 39, 2011 Fam LR 96. That was a children's referral proof where mother, father, child, safeguarder for the child and reporter all appeared. The proof lasted 40 days. On the last day of the evidence the parties entered into a joint minute, which conflicted with some of the evidence already led. The reporter, who had required to take over part way through the proof when a previous reporter fell ill, had not understood the effect of the Joint Minute and frankly accepted she should not have signed it. The sheriff made certain findings that were contrary to the terms of the Joint Minute and the parents and child appealed. The Inner House were not amused. They indicated that Joint Minutes are designed to be used in advance of, or at an early stage in a proof, to avoid unnecessary expense and the inconvenience of calling witnesses to establish matters that are not in dispute. This Joint Minute was designed to deal with the evidence of the child, and that should have been addressed before the hearing commenced. The Court favoured the introduction of rules to expedite hearings. Some recognition of the difficulties is reflected at the end of the opinion, where it is suggested that the Scottish Legal Aid Board might wish to review the rules for payment of fees to encourage agreement of evidence and discourage prolongation of proofs. This reflects an increasing focus on case planning and strategy in family law.

Fundamental fairness

[4] Scottish family law was under scrutiny this year in *Principal Reporter v K* [2010] UKSC 56, 2011 SC (UKSC) 91, 2011 Fam LR 2. The Supreme Court were asked to address the situation of the unmarried father who did not have parental responsibilities or parental rights, but who had enjoyed family life with his child. If the child was referred to the children's hearing the father did not have automatic access to the hearing. In order to secure access he had to apply to the sheriff court for parental responsibilities or parental rights. Meantime grounds of referral may well have been established, without his participation. This was one of the last hearings in which Lord Rodger participated and he contributed a graphic analogy,

comparing the situation to one where the train has left the station while the father was still waiting at the barrier. Lord Hope identified a fundamental issue of fairness. Baroness Hale, writing the second part of the judgment, held that the children's hearing violated the article 8 rights of the father, and indeed the child, and risked violating the rights of others in the same situation, because they were not afforded a proper opportunity to take part in the decision-making process. The result was a reading down of the Children (Scotland) Act 1995, so that "any person who appears to have established family life with the child with which the decision of a children's hearing may interfere" is a "relevant person" and entitled to participate in the children's hearing.

[5] Two general points emerge. The first is that the "fundamental issue of fairness" stands out in the judgment of the Supreme Court, but was not obvious to the Inner House. The second is that the issue was not obvious to the Scottish Parliament. The Children's Hearings (Scotland) Act 2011 has a restrictive interpretation of "relevant person" that expressly excludes persons with contact orders (section 200). There is a process that allows a person to be "deemed a relevant person" but only if he or she has, or has recently had, a significant involvement in the life of the upbringing of the child (section 81). *K* had been kept at a distance from the child, so would not have qualified as a "relevant person" in terms of the 2011 Act. The Act as it stands falls foul of the decision that this violates article 8. The Scottish Government are now consulting on secondary legislation to extend the definition of "relevant person" to all parents, unless their parental responsibilities and parental rights have been removed. This change will presumably be implemented before the 2011 Act comes into force. The question does however remain as to how the Scottish Parliament managed to pass the Act in its original form, given that measures that are incompatible with Convention rights are not within the competence of the Scottish Parliament (Scotland Act 1998, section 29(2)(d)). Was hindsight really required?

Difficult drafting

[6] The Parliament does not appear to be set on making family law legislation easy to understand and apply. We have now enjoyed two years experience of the Adoption and Children (Scotland) Act 2007 and the problems are emerging. The basic test for making of a permanence order (which is to the general effect that the child cannot live with his or her parents) was left out of the original Bill, and then introduced by way of amendment tucked into section 84(5)(c), where, perhaps unsurprisingly, it was overlooked by at least two sheriffs. There is one sheriff principal decision referring the matter back to the original sheriff (*East Lothian Council v S* 2011 Fam LR 80) and another holding that fulfilment of the test could in the circumstances of the case be implied (*Aberdeenshire Council v W* 2011 SLT (Sh Ct) 186). We await the views of the Inner House on the effect of such an oversight.

[7] The interrelationship between the children's hearing and the court, when an application for a permanence order is pending has been the source of some bewilderment. The hearing cannot vary the supervision requirement without reference to the court (sections 95 and 96).

The court may refer matters back to the hearing to act, or make interim orders that will prevail over any conflicting provision in a supervisions requirement (section 97). The interface between the court and the children's hearing is inevitably a difficult area. The latest decision in relation to permanence proceedings is Sheriff Holligan's judgment in *City of Edinburgh Council, Petitioner* 2011 Fam LR 83, where the sheriff took responsibility for interim contact, pending proof in relation to the permanence order. He took the view that where a permanence order is pending the court is the principal forum for decision-making (see also *City of Edinburgh Council, Petitioners (No 1)* 2010 Fam LR 89).

[8] There are fundamental issues arising in relation to the central question of how the provisions for dispensation of parental agreement to adoption are to be interpreted. This was another area where the Scottish Parliament struggled. The original recommendation to them was that parental consent should be dispensed with where this was required by the welfare of the child. This is the test in the Adoption and Children Act 2002. The Scottish Parliament rejected this test in favour of one involving deficiencies in the discharge of parental responsibilities and rights. At the last minute, just before the Bill was passed, they were persuaded that the measure they were looking at would have precluded most step-parent adoptions, many baby adoptions and the adoption of children who had put down roots with prospective adopters while their hitherto feckless drug-abusing parents had reformed. A catch-all provision was inserted to allow parental consent to be dispensed with where none of the other provisions applied but "the welfare of the child otherwise requires the consent to be dispensed with". Academic dispute followed as to the effect of the welfare clause (*Norrie* 2008 SLT (News) 213 *cf Scott* 2009 SLT (News) 17). The matter was debated on a devolution minute in *S v L* [2011] CSIH 38, 2011 Fam LR 106. The Inner House settled on the view that there may be situations where parents were in a position to exercise their responsibilities and rights but the welfare of the child nevertheless required the consent of the parent or guardian to be dispensed with. The welfare test in section 31(3)(d) of the 2007 Act had the connotation of the imperative, ie it was based on what welfare demanded, rather than what was merely desirable. Read in this way the test was consistent with the right to respect for family life in article 8 of the European Convention on Human Rights. The decision may yet be reviewed in the Supreme Court.

[9] The most notable drafting shocker is the Adoption and Children (Scotland) Act 2007 (Commencement No 4, Transitional and Savings Provisions) Order 2009, SSI 267/2009. This order gave the commencement date of the 2007 Act as 28 September 2009. It allowed applications for orders declaring children free for adoption that had been commenced before that date to continue (regulation 18). Freeing orders would continue to have effect until 28 September 2010 (regulation 16). On that date all existing freeings would be treated as a species of permanence order with authority to adopt (regulation 17). There is no mention of what should happen were freeing proceedings to conclude after 28 September 2010. The sheriffs were divided. Some thought that a freeing order granted after that date would be effective to allow an adoption to take place (*eg Dundee City Council, Petitioners* 2010 Fam

LR 85). Others refused to grant freeing orders because they would be ineffective (eg *Aberdeenshire Council, Petitioners* 2011 Fam LR 16). The Second Division came to the rescue and held that there was an obvious drafting error that could be corrected by the Court. A child freed for adoption after 28 September 2010 should be treated as subject to a permanence order with authority to adopt. Lord Hardie went out of his way to deliver a stern rebuke for the practice of including transitional and savings provisions in commencement orders that were not drafted by skilled parliamentary draftsmen. So that's all right. Or is it? Is this judicial legislation? The order did not actually receive the approval of Parliament (cf section 117(5)). Is the status of children adopted on reliance of such an order secure? We may yet find out from the Supreme Court.

The Supreme Court in Scots family law

[10] It cannot escape notice that there is a great deal about the Supreme Court here. In the twenty years before 2010 there were five family law cases in the House of Lords. Two were financial provision cases, *Wallis v Wallis* 1993 S.C. (H.L.) 49 and *Jacques v Jacques* 1997 S.C. (H.L.) 20. There were three children's cases, *D v Grampian Regional Council* 1995 S.C. (H.L.) 1, *Brixey v Lynas* 1997 S.C. (H.L.) 1 and *Sanderson v McManus* 1997 S.C. (H.L.) 55. The last of these (*Sanderson*) was heard in December 1996, with judgment in February 1997. Why now are there so many cases heading for London?

[11] The next case for scrutiny by the Supreme Court is *Gow v Grant* [2011] CSIH 25, 2011 SC 618, 2011 Fam LR 50. This was the case where the Inner House had the opportunity to tell us how the provisions relating to financial provision for cohabitants should be interpreted and applied. As the Second Division noted the cases disclosed varying and contradictory approaches to the construction of section 28 of the Family Law (Scotland) Act 2006. The Inner House then declined to express any view on construction, save to say first that the Family Law (Scotland) Act 1985 had no bearing on the matter. Financial provision for cohabitants derives nothing from financial provision on divorce, despite the similarity of the test in section 28 to the test in section 9(1)(b) of the 1985 Act. Second we have been told that the objective of the section is limited in scope. It is intended to correct any clear and quantifiable economic imbalance that might have resulted from cohabitation. The Division went on to apply the section narrowly. Economic disadvantage in the interests of the relationship did not qualify for an award. The pursuer had sold her house partly in her own interests. Her award was not justified.

[12] This is in contrast to the decision of Sheriff Principal Dunlop in *Mitchell v Gibson* 2011 Fam LR 53, who held that economic disadvantage need not have been suffered solely in the interests of the defender. The court required to approach matters in two stages. The first was to apply the tests in section 28(3). It should consider whether (and, if so, to what extent) the defender had derived economic advantage from contributions made by the applicant and the extent to which any economic advantage derived by the defender from contributions made by the applicant was offset by any economic disadvantage suffered by the defender in the

interests of the applicant. It also involved considering whether (and, if so, to what extent) the applicant had suffered economic disadvantage in the interests of the defender and the extent to which any economic disadvantage suffered by the applicant in the interests of the defender was offset by any economic advantage the applicant had derived from contributions made by the defender. If there is an imbalance in either of these areas then the court should "have regard" to this in making an award, which involved an exercise of discretion. This is not the approach adopted by the Second Division and it remains to be seen whether it appeals to the Supreme Court.

[13] By way of footnote, section 28(8) requires any application to be made not later than one year after the day on which cohabitants cease to cohabit, but according to Sheriff Principal Dunlop that is a limitation provision that requires to be plead. If the point is not taken, the claim may proceed despite the expiry of the period of one year before commencement of the claim (*Simpson v Downie* 2011 Fam LR 145). The Inner House may have views on his interpretation of section 28(8).

[14] Continuing with the theme of possible Supreme Court cases, the latest family law decision from the Inner House is *M v M* [2011] CSIH 38. This is a relocation case where a mother wanted to move from Scotland to Berkshire to live with her new partner. The sheriff was unimpressed with her, but refused orders that would have required her to remain in Scotland. His decision was overturned by the Extra Division. They detected more than a whiff of the English relocation decision *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473 which decided that in most relocation cases the most crucial assessment and finding for the judge was likely to be the effect of the refusal of the application on the mother's future psychological and emotional stability. This, we are told, forms no part of the law of Scotland. Instead we are to apply *Sanderson v McManus* 1997 S.C. (H.L.) 55. The welfare of the child is the paramount consideration and there should be no order unless the applicant demonstrates that the order is better for the child. This was the first Scottish relocation case to be decided in the Inner House. It is a matter of considerable concern that the resulting guidance conflicts with another Inner House case. The Division seem to have overlooked that *Sanderson* was a decision on the application of the law before the Children (Scotland) Act 1995. It was superseded by *White v White* 1997 S.C. (H.L.) 55, where the notion that there is any *onus* to be applied is expressly rejected. Further, *M v M* was a case of internal relocation within the United Kingdom. The mother had to be expressly prevented from removing the children from Scotland, rather than requiring leave to move to Berkshire. The Inner House were perturbed that no contact regime had been determined. There is no mention in their decision of the fact that the court would have been able to make contact orders that could be enforced in England under the Family Law Act 1986. There is scope to seek review by the Supreme Court.

The challenge of family law

[15] We have come a long way since the Saturday morning divorce court. Family law is no longer a place for junior advocates to cut their teeth. A family lawyer may now be called upon to engage in international considerations, litigate about fabulous wealth, and present novel arguments that break out into other areas of law. All these and more featured in *M v M, W Estate Trustees Ltd and Another* [2011] CSOH 33, [2011] Fam LR 24, which was finally decided in February 2011. The wife in this case was confined to a wheelchair in Scotland. The husband had made fabulous wealth from a base in the middle east. He had also, unknown to his wife, fathered three children with one woman and then started a family with another. He had set up a trust for the benefit of his children, which had purchased a substantial Scottish Estate. His business then collapsed. When the wife commenced divorce proceedings in Scotland, the husband commenced divorce proceedings in Dubai, leading to a jurisdiction race. This was won, narrowly, by the wife, but at the expense of taking decree on the basis that financial provision would be determined after the divorce and within a specified time. By the time the matter came to court there were only two assets in contention, the trust for the children and the husband's occupational pension. The wife received a £200,000 pension share, but the case is remarkable for an order setting aside the husband's transfer of funds to the children's trust, to the extent necessary to pay the wife nearly £800,000. This was a significant application of section 18 of the Family Law (Scotland) Act 1985 (the first since *Tahir v Tahir (no 2)* 1995 SLT 451 where a purported loan was set aside to allow the wife to receive financial provision).

Conclusion

[16] This has been a busy year for family law. On the one hand we have seen cases argued at the highest level, and have engaged in remarkable issues. We have challenged some of the remaining stereotypes of family lawyers. On the other hand there are still occasions where we appear to struggle to catch the attention of the court to assist in the problematic areas thrust upon us by difficult drafting of new legislation. There is still a whiff of Cinderella. As a profession we need to take a grip on our litigation, to be more focused and strategic in planning cases. We are however moving in the right direction.

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