

Lady Paton

Lord Emslie

Lord Drummond Young

Defender and Appellant: J.M Scott, QC; Beveridge & Kellas

Pursuer and Respondent: Coutts; Simpson and Marwick

28 February 2012

I. Introduction

[1] The parties in this anxious and difficult Sheriff Court appeal were formerly husband and wife. They have been separated for almost four years, and were divorced in the course of 2010. B, the only child of the marriage, is now aged 6 and lives in X with his mother the pursuer as his principal carer. He is the defender's only child, whereas the pursuer also has an older daughter from a previous relationship who has recently moved into student accommodation elsewhere. Since about the time of the parties' separation the defender has had a new partner (KD), with whom he now plans to set up home. Both parties are employed at senior management level within major international companies providing services to the oil and gas industry. Each has transferable sector skills, and for people in their position the possibility of relocation to other sector hubs elsewhere in the world is an accepted fact of life. Friends and family in similar occupations have in recent times relocated to the USA and to the Middle East.

[2] Following separation, and despite the pursuer's continuing tendency to blame the defender for having been the one to leave home at that time, the parties made creditable efforts to work together in making appropriate arrangements for B's care and upbringing without the necessity for any court order. A striking feature of this case is the apparent strength and depth of B's relationship with both parties. The pursuer, as his mother and primary carer, is described by the sheriff as the "bedrock" of his life. Since the date of the separation she has taken responsibility for most of B's childcare, schooling and recreational arrangements. At the same time, the strength and depth of B's continuing relationship with his father, the defender, is reflected in extensive day and residential contacts and activities. These appear to cover a minimum of some 5 days in each fortnight together with extra assistance when required. Such arrangements have to date been reasonably flexible, with both parties being prepared to help the other out from time to time.

[3] Regrettably, the amicable environment for these arrangements in X has now come to an end. As narrated in the sheriff's findings of fact in the court below, the pursuer in about May 2011 was suddenly offered a significant promoted post at her employers' principal base in Houston, Texas. She had not envisaged or applied for any promotion at that time, and the approach came as a complete surprise. However, the promotion would represent a major step forward in her career, and on a strictly provisional and temporary basis she has been permitted to embark on her new duties without leaving X. In that connection, she has had to resign from her previous post in favour of someone else, and if the intended promotion cannot be brought into full force and effect she will be in the unfortunate position of having to seek alternative employment. That may be at a lower level in her current employers' organisation, but it may have to be with some other employer in the UK or elsewhere. Although still supportive, her employers' position is that the pursuer's move to Houston will have to take place reasonably soon, and that she cannot satisfactorily continue to perform her duties without relocating. For her own part, the pursuer has made it clear that if the court does not allow her to relocate to Houston with B, she would not contemplate relocating there on her own.

[4] The present proceedings reflect a deep division of opinion between the parties as to whether the pursuer should, in the event of a move to Houston, be permitted to take B with her. The dispute has already soured the parties' attitude towards each other; mediation and discussion have been to no avail; and eventually the matter came before the sheriff who heard evidence over a period of days in early November 2011. Regrettably, despite the pursuer's extensive efforts to ensure that B remained unaware of what was going on, the child has recently been told of his parents' diametrically opposed views and of the present appeal process. Not surprisingly, he is distressed and upset as a result.

[5] Given the relative urgency of the situation, and the desirability of securing an early decision in the interests of all concerned, matters proceeded at an accelerated pace in the court below with the sheriff eventually producing a closely typed judgment running to some 28 pages within a very short time of the conclusion of the proof. As might have been predicted in such circumstances, the judgment contains a number of factual inaccuracies, and by joint minutes reproduced at pp.1-5 of the Appendix (No. 10 of process) and at pp.29-30 of the Supplementary Appendix (No.13 of process) the parties have helpfully agreed appropriate revisions to the findings of fact in certain areas which, for present purposes, we acknowledge and accept. However, the need for expedition has apparently made it impossible to obtain transcripts of all of the evidence led at the proof, and the parties' competing contentions on appeal have, with minimal exceptions, had to be presented without access to the recorded or agreed evidence of either party or of any other witness personally familiar with B's character, attitudes and development. The principal evidence fully transcribed is that of BF, a chartered psychologist engaged by the defender, who in the time available before the proof had been unable to meet with B, speak face to face with the pursuer or consider any of the affidavits and documentary evidence lodged in court on the pursuer's behalf. As a result, his evidence was less specific to the present case than he might have wished, and in expressing conclusions he was dependent on the accuracy of such information as had been provided to him from the defender's side.

[6] Having heard the proof, and in particular having had the opportunity to see and hear both parties in evidence, the sheriff made a residence order in the pursuer's favour coupled with a specific issue order permitting her to relocate with B to the USA. In his view this was, on balance, the preferable outcome in the best interests of the child, bearing in mind that his relationship with the defender was already strong and well-established and could realistically be maintained in a variety of ways. Against that decision the defender now appeals to this court, contending that in his treatment of the relocation issue the sheriff erred in law and otherwise could be seen to have gone plainly wrong.

II. The legal background

[7] Disputes involving parental rights and child welfare issues are notoriously sensitive and difficult to resolve. As Lord Fraser explained in *G v G (Minors: Custody Appeal)* 1985 1WLR 647, at p.651:

"The jurisdiction in such cases is one of great difficulty, as every judge who has to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory."

[8] Important statutory guidance is now to be found in section 11 of the Children (Scotland) Act 1995. Subsection (1) clothes the court with jurisdiction to make a wide range of relevant orders. By virtue of subsection (2) these include *inter alia*:

"...

(c) an order regulating the arrangements as to -

(i) with whom

a child under the age of sixteen years is to live (any such order being known as a 'residence order')

(d) an order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living (any such order being known as a 'contact order');

(e) an order regulating any specific question which has arisen, or may arise, in connection with any of the matters mentioned in ... subsection (1) of this section (any such order being known as a 'specific issue order'); ..."

Subsection (7) then goes on to lay down important rules or principles to which the court must have regard. In particular, in considering whether or not to make an order under subsection (1) ... and what order to make, the court

"...

(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and

(b) taking account of the child's age and maturity shall so far as practicable -

(i) give him an opportunity to indicate whether he wishes to express his views;

(ii) if he does so wish give him an opportunity to express them; and

(iii) have regard to such views as he may express"

The foregoing statutory emphasis on the welfare and best interests of children reflects an international consensus which has developed over several decades.

[9] Before us, parties were agreed that the correct approach to these statutory provisions was reflected in the recent decision of this court in *SM v CM* 2011 CSIH 65. In particular, the welfare and best interests of the relevant child or children are paramount, and must be judged without any preconceived leaning or presumption in favour of the rights and interests of either parent. Unlike the position south of the border as discussed by the Court of Appeal in *K v K* 2011 EWCA Civ 793, this approach falls to be applied in all cases whether childcare responsibilities are shared between both parents or primarily undertaken by one.

[10] There was, it was suggested, no strict legal *onus* of proof in such cases, conform to the views expressed by the Lord President (Rodger) and other members of the court in *White v White* 2001 SC 689. That may

well be so, but as recognised by the House of Lords in *Sanderson v McManus* 1997 SC HL 55 and by this court in *SM v CM* at para 57, a party who seeks to alter the status quo must have some liability to furnish the court with material potentially capable of justifying the making of a relevant order. Even the Lord President in *White*, at para [21], acknowledged that in the absence of relevant material on which the court could properly take the view that it would be in the interests of the child for a given order to be granted, then an application must fail. What Lord Clyde had envisaged in *Sanderson* was an evidential, as opposed to a legal, burden on the person seeking an order from the court.

III. The role of an appellate court

[11] Where a judge of fact makes findings, or reaches conclusions, which are based on his having heard evidence from witnesses, these will not lightly be disturbed on appeal. As Lord Thankerton explained in the leading case of *Thomas v Thomas* 1947 SC HL 45, at p.54:

"(1) Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusion. (2) The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. (3) The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question. It will hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves ...".

Similar observations are to be found in the speech of Lord Macmillan in the same case at p.59. Clearly, if the judge of fact misdirects himself, or applies some wrong principle, or takes into account irrelevant considerations, or omits to notice relevant matters, or fails to give adequate reasons, an appeal will in the normal way be open on a point of law. But in the absence of any such failing, the ultimate evaluation of factual evidence is primarily a matter for the judge concerned.

[12] In child custody cases a comparable rule applies. In *G v G*, Lord Fraser in the House of Lords (at p.650) referred with approval to the judgment of Sir John Arnold P in the court below to the following effect:

"I believe that if the court comes to the conclusion, when examining the decision at first instance, that there is so blatant an error in the conclusion that it could only have been reached if the judge below had erred in his method of decision - sometimes called the balancing exercise - then the court is at liberty to interfere; but that, if the observation of the appellate court extends no further than that the decision in terms of the result of the balancing exercise was one with which they might, or do, disagree as a matter of result, then that by itself is not enough ...

... what this court should seek to do is to answer the question whether the court discerns a wrongness in the result of so striking a character as to make it a legitimate conclusion that there must have been an error of method - apart, of course, from a disclosed inclusion of irrelevant or exclusion of relevant matters".

And (at p.652) his Lordship went on to express his own conclusion as follows:

"... the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible. The principle was stated in this House by my noble and learned friend Lord Scarman in *B v W (Wardship: Appeal)* 1979 1 WLR 1041, where ... he said, at p.1055:

"But at the end of the day the court may not intervene unless it is satisfied either that the judge exercised his discretion upon a wrong principle or that, the judge's decision being so plainly wrong, he must have exercised his discretion wrongly."

[13] There can in our view be no doubt that Lord Fraser's treatment of these issues has stood the test of time. His observations are frequently cited in court; they were cited and thereafter applied by the Inner House in *Osborne v Matthan* (No.2) 1998 SC 682; and in *Re W (Children) (Relocation: Permission)* 2011 2 FCR 261, Sir Nicholas Wall P took the trouble to set them out *ad longum* in the early part of his judgment. There may be room for argument as to how far a child welfare decision is truly an exercise of judicial discretion - on which point see the opinion of the Lord Justice General (Rodger) in *Osborne* (at pp.688-9) -, but it still seems to us that the general principles to be applied are clear and must be held to determine the proper role of an appellate court in a case of this kind.

IV. The sheriff's decision

[14] Ultimately the sheriff sought to weigh up the merits and demerits, from an objective view of B's future welfare, of two possible outcomes each of which was unsatisfactory in its own way. In the first place, leaving aside the inevitable loss of existing contact arrangements with the defender, the sheriff clearly thought that relocation to Houston with the pursuer might, on the evidence, potentially work out to B's material and other advantage. Among the positive factors which he took into account in that connection were (i) B's outgoing personality, and his ability to make new friends easily; (ii) the fact that he had already expressed interest in visiting Houston where his elder sister had enjoyed living at a similar age (Finding 45); (iii) the likelihood of a very high, and probably better, standard of living in Houston by comparison with X; (iv) the opportunity for B to experience a new culture where the pursuer already had friends and where excellent domestic, medical, educational and other arrangements and facilities would be available; and (v) the fact that, according to BF in particular, B was perhaps at an optimum age and stage for relocation. At 6 years old he was now beyond the stage of infant dependence, but at the same time he had not yet developed his own friendships and activities to a degree which would be difficult for him to leave behind. At worst, in the sheriff's view, there was no reason to think that the proposed move would do an outgoing child like B any harm. Against that background the real issue, to which the sheriff devoted the most careful and anxious attention, was whether alternative contact arrangements with the defender and others could sufficiently replace or compensate for the loss of what were currently very close and intensive - perhaps over-intensive - ties. The father/child relationship was clearly strong and well-established, and the question was whether, with appropriate parental planning, that could still reasonably be developed and maintained.

[15] In the second place, the sheriff considered how B might be affected if the pursuer's proposed relocation to Houston were not permitted to take place. Perceptively, he identified the reality of the situation in which the parties now found themselves. The old comfortable status quo, he realised, had gone and could never be regained, either as regards the pursuer's employment situation or as regards B's unquestioning reliance on his parents' joint promotion of a common goal. Tension and uncertainty had taken over from the peaceable co-existence of the past few years, and there was a risk that the pursuer would not even be able to find suitable alternative employment in the X area. Self evidently, any move away from X by the pursuer and B - even within the UK - would preclude the intensive local interactions on which the defender continued to insist. In all the circumstances, an important issue was whether that insistence was realistic, reasonable and/or in B's best interests.

[16] Returning to the relocation option, the major negative factor identified by the sheriff in that context was the inevitable termination of existing local contact arrangements between B and his father. In their current form, they could not possibly survive a move by B with the pursuer to Houston. As reflected in Finding 43 and at several points in the sheriff's note, this would represent a significant loss to B, especially having regard to the intensity of the defender's determination to play a major role in his life. Contacts between B and the defender were frequent and extensive; the relationship between them was plainly very close; the two of them regularly did "boys' things" together (such as hill walking, rugby, camping and working on cars) which were

not replicated with the pursuer; and in the event of relocation B would plainly lose this regular local face to face element of a loving father/son relationship. As the sheriff recorded in his note (at p.54 of the Appeal Print), there was no dispute that the maintenance of this relationship (which included contacts with the defender's partner KD) was fundamental to B's life and welfare.

[17] A complication here is that the sheriff in his note was highly critical of the defender's position in several respects, and even went so far as to question the credibility and reliability of his evidence on oath. Finding 36 (at p.38 of the Appeal Print) criticised the defender for a lack of cooperation in devising suitable contact arrangements in the event of relocation taking place. This criticism was repeated and expanded elsewhere, notably at pp.51-2, where the sheriff also deplored the defender's over-emotional and essentially negative response to the relocation proposal. The sheriff's clear impression, as may be seen from Findings 11, 12 and 13 and from his note (at pp.50-51), was that the defender had unnecessarily allowed parenthood to dominate his own life. Several examples of this were given, and indications of over-concern had also been expressed by the pursuer, by her older daughter and even by B himself. Conversely, the defender appeared not to recognise the substantial primary role which the pursuer played in B's life, and on the evidence the sheriff came to regard the defender as an over-anxious father who had lost objectivity and tended to confuse B's best interests with his own:

"...The depth of the Defender's love for his son has led him to completely ignore whether relocation could benefit B. Instead, he has concentrated only on the negative aspects of that possibility. He knew the pursuer's successful career in X with a US based company made relocation a possibility. Instead of planning for that possibility or confronting it rationally when it came along, he buried his head in the sand. He maintained that state of denial for as long as possible. He refused to countenance any other possible outcome."

"...in contrast to the Pursuer, little the Defender said in evidence gave me the impression he is someone who is capable of seeing both sides, a person who can always objectively consider the best interests of his son."

"It is tempting but superficial to regard him as a father who dotes too much on his son. ... I have rarely come across a parent who devotes so much time to planning things to do with a child. However, the evidence showed his love for his son can blind him to the extent that he loses objectivity. When that happens, the evidence disclosed he confuses B's best interests with his own, in particular by failing to see that if he does not see B frequently it does not automatically mean that is not in B's best interests."

[18] In addition it was a source of concern to the sheriff that many assertions made by the defender to BF were ultimately demonstrated and accepted to be entirely unfounded, raising the possibility that his engagement of an expert advisor (coupled with certain procedural moves) might be seen as "...delaying tactics designed to thwart the Pursuer relocating". With evident disapproval the sheriff further noted how, at the end of the proof, the defender's counsel had maintained on his behalf (i) that due to holiday time restrictions he could not travel to Houston (as the pursuer had hoped) to help B settle into his new surroundings; and (ii) that the start of his new holiday year would not be disclosed to the court.

[19] In fairness to the defender, however, the sheriff recognised that sudden disclosure of the relocation proposal in what might be characterised as a corporate "work-mode" telephone call had come as a great shock to him. Given the intensity of the defender's involvement with B, the matter might have been more sensitively handled by the pursuer, and it was self-evident that "...a rapidly progressing, bitterly fought family action is a hard place to find an objective or a reflective side in one's nature". But in the end the defender's "...failure to countenance anything other than B staying in X", and in that context his lack of cooperation in devising suitable alternative contact proposals, had caused the sheriff real difficulty in determining what weight to attach to the potential effect of relocation on the father/son relationship. Although earning a relatively high salary, the defender had at one point cited financial difficulties as precluding even short visits to Houston to see B (BF report, paras 61 and 103), and latterly restricted holiday entitlement was also cited in a negative way. When cross-examined, the defender was only prepared to concede that if relocation took place he would "...speak to BF about that".

[20] Ultimately, however, in answer to the sheriff's own direct questions, the defender had conceded on oath (i) that he *would* be prepared to assist the pursuer and B to find accommodation in Houston and to help B settle in there; (ii) that most of his 29-day annual holiday entitlement *could* be used to enable meaningful contacts with B to be maintained; (iii) that it *would* be possible for him to see B for 5 weeks each summer and for further periods at Easter, Thanksgiving and Christmas/New Year; and (iv) that (as confirmed by his sister in evidence) assistance with childcare *could* be available on such occasions. Admittedly face to face contacts were clearly better than any other form, but the defender "...if he tries" could in the sheriff's view be expected to supplement these through regular and frequent communication by letter, telephone, video, Skype and other internet-based means. All in all, the sheriff concluded, a great deal could be achieved by the defender in these areas if he put his mind to it:

"Perversely, the defender's commitment to planning contact with B marks him out as someone who is well suited to maintaining a strong bond with B if he does relocate. The Pursuer thought this was a good time for relocation. BF's evidence was that this was a good time for B to relocate, in so far as there was one."

"I turn to such evidence as was obtained from the Defender about contact if relocation takes place. I accept the Defender and BF's evidence that face to face contact is better than any other form. I accept letter, telephone, Skype or other internet based forms of communication are less effective. However, I also accept that they all enable relationships to be maintained at least, and possibly developed. That issue cannot be looked at in isolation. The Defender shows no little ingenuity organising his time with B at present. Were he to display that quality after relocation, at worst, any detriment to their relationship would be reduced. It was suggested by the Pursuer that a blog could be set up, that in due course B and the Defender could e-mail one another...and that they could use scrapbooks and video footage to keep one another up to date. These are all, to my mind, positive, sensible suggestions. There are, I am sure, many others the Defender could come up with if he tries".

"Balancing all evidential factors against one another, I attach most weight to B continuing to spend most time with his mother. I attach slightly less weight to maintenance of his relationship with his father and conclude that whilst relocating will diminish that relationship, the extent of diminution can be reduced by a number of steps being taken. The parties can prepare and implement a relocation plan. The Defender can assist B to settle and both parties can reassure him to see relocation positively. Perhaps most importantly, the Defender can make non-face to face contact something new for himself and B to enjoy. Similar considerations apply to B's relationship with KD".

[21] With such considerations in mind, the sheriff clearly proceeded on the basis that significant alternative contact arrangements between the defender and B could realistically be achieved, and that this would go some way to enabling the father/son relationship to be maintained and developed in the future. For her part, and to her great credit, the pursuer was willing to facilitate and even pay for the widest continuing contact arrangements on both sides of the Atlantic, and a further point of some significance was that, on the evidence, relocation would not diminish the extent of existing contacts between B and other family members or friends. What really mattered, in the sheriff's opinion, was that the key relationships in B's life could realistically be maintained and developed following relocation, even if the form and frequency of direct and indirect contacts had to undergo some degree of change.

[22] On the other side of the coin, the sheriff was clearly concerned about the likely consequences if the proposed relocation were to be refused. As previously indicated, these included significant uncertainties affecting the pursuer's future employment and earning capacity. While she might find suitable alternative employment in X, that was not necessarily the case, and she might require to follow opportunities elsewhere in the UK or possibly in Europe. By the same token, even the defender's continued employment in X could not necessarily be guaranteed. Like the pursuer, he worked in the oil and gas industry service sector, and it was by no means impossible that at some point he too would require to contemplate relocation. In addition, the intensity of the parties' disagreement was a significant adverse development. Without his parents' concerted reassurance B might harbour feelings of guilt for what was happening, and in that context BF (at

pp.145-146 of the Appendix) expressed the view that if the pursuer's application were to be refused she would be bitterly disappointed and that it would be very hard for her not to show some of that feeling at some stage. Her disappointment, he thought, would be intense, and with the best will in the world it would be hard to hide that from B. As the sheriff put it at pp.55-56,

"I think it is appropriate to attach weight to the pursuer's wish to relocate and the effects that remaining in X would have on B, that being the alternative to relocation. Both have an effect on his welfare - I have found his time with his mother is his bedrock; if his mother cannot relocate, having approached the issue very sensibly and is then unsettled or unhappy, it may affect B's welfare even if the Pursuer's ability 'to cope' is taken into consideration. If B stays in the UK, his life may change anyway - the pursuer may have to relocate in the UK with (*her present employers*), or find employment with another company. If she has to change employer, she will give up 20 years experience...and (her) earning potential at an important time of her life would be compromised. B's welfare will always be to some extent linked to his parents' finances. It follows that some weight requires to be attached to the negative and positive aspects of remaining."

[23] As recorded at p.56, the sheriff concluded that the end result was clear; that the evidence was in favour overall of relocation; and that having regard in particular to the defender's stance and conduct since May 2011 it would be better (from the point of view B's welfare and best interests) for relevant orders to be made than none at all. These conclusions were reached with the benefit of having seen and heard, not only the parties themselves and the defender's psychologist BF, but also a number of other witnesses whose contribution to the case was based on personal familiarity with B and his situation. However, given B's young age and the fact that by the time of the proof he still knew nothing of the relocation proposal, the sheriff clearly attached little, if any, weight to the oblique attempt to ascertain his views which is recorded at Findings 33-35. As he put it at p.46, "...B's views, such as they are, have been obtained", but a detailed evaluation of these views would not in the circumstances be appropriate.

V. The present appeal

[24] In moving for the sheriff's determination to be recalled, senior counsel for the defender advanced three main criticisms which may be summarised as follows:

1. In repeatedly misquoting the language of section 11(7)(a) of the 1995 Act (at pp.45, 46 and 47), the sheriff had clearly applied his mind to the wrong statutory test. B's welfare had to be the "paramount" and not the "primary" consideration. Dictionary definitions showed that these terms were not interchangeable, and in *P v Lothian Regional Council* 1999 SC 200 this court had held a sheriff's use of "paramount" rather than the statutory "first" to have been an error of law. *Ex concessu* the sheriff might still have demonstrated, in his opinion read as a whole, that the correct approach had in fact been followed. However, that had not happened here. Indeed the sheriff had compounded the problem by attaching weight to the pursuer's wish to relocate to Houston (without identifying any attendant benefits there for B), and also to what was at best an entirely neutral factor, namely the closeness of B's relationship with his mother which would be maintained whether relocation occurred or not. Conversely, the sheriff had erroneously understated the extent of current contact arrangements which would be vital to any balancing exercise, and (as was agreed relative to Finding 40) had overlooked what were described as the defender's "proposals" for future contact. According to senior counsel, there was no proper assessment of the likely effect on B if the father/son relationship were to be diminished, and in the result the sheriff's attempt at a balancing exercise had been inappropriately skewed in the pursuer's favour.

2. The sheriff had also failed to take proper account of having seen and heard the witnesses in this case, notably the psychologist BF who gave evidence on the defender's behalf. In particular, it was said, the sheriff had failed to appreciate or give weight to BF's evidence as to the seriousness of the risk to B's health and happiness if his close relationship with the defender and KD were to be compromised. BF's evidence had, in effect, been disregarded, and in consequence the sheriff's decision could not be allowed to stand.

3. In any event, the sheriff had failed to discharge his duty under section 11(7)(b) of the 1995 Act in connection with the ascertainment of B's views. Procedurally, the situation was not satisfactory. Although the pursuer had craved dispensation with any ascertainment of B's views, no relevant order to that effect had been made. An application to have BF ascertain B's views on various matters had been opposed by the pursuer and refused. And at a late stage, again on the defender's motion, the court had remitted to PB, a person skilled in the conduct of child-related investigations, to see whether any worthwhile ascertainment of B's views could be achieved. As recorded in the sheriff's findings, PB's report was duly lodged in court, but nowhere in the sheriff's note was there any reference to its terms. In short, according to senior counsel, B's views had been obtained, and yet the sheriff did not appear to have had regard to them as required by the Act.

[25] On all or any of these grounds, it was said, the matter was now at large for this court. However, before any conclusion could properly be reached, it would be essential to ascertain B's actual wishes *vis-à-vis* (i) relocation and (ii) the consequent loss of contact with the defender, family members and friends. For that purpose a remit should be made to a member of this court to hear evidence from BF on these matters, followed by renewed submissions from the parties themselves. Given the serious criticisms which had been voiced in the course of the appeal, a remit back to the sheriff court would be unsuitable.

[26] In a succinct response, counsel for the pursuer contended that there was no substance in any of these criticisms. Approaching these, for convenience, in the same order,

1. On any fair reading of the sheriff's opinion, he had clearly treated B's welfare as the paramount consideration. Submissions by both parties to that effect, based on the authority of *SM v CM*, were recorded and apparently accepted at p.45; in several places B's welfare was described as the sole criterion for decision (for example at pp.46, 53 and 56); any leaning in favour of the wishes or interests of either parent had been expressly disclaimed; and in the whole circumstances there was no question of the sheriff having been guilty of any error of law in his approach to this case. Moreover, no undue emphasis had been given to factors in the pursuer's favour. From B's point of view, the pursuer as his primary carer was deemed the "bedrock" of his life, and in the context of a potentially beneficial move to Houston the sheriff had been entitled to regard that factor as of relatively greater importance than the maintaining of existing contact arrangements with the defender. As regards future contact arrangements, the defender's "proposals" were essentially negative, and as the sheriff recognised had been designed to obstruct rather than facilitate relocation. Recourse to alleged financial difficulties, holiday restrictions and the difficulty of obtaining unpaid leave were all symptomatic of the defender's negative and unhelpful approach.

2. On a fair reading of the sheriff's decision, taken as a whole, he had in fact paid very considerable regard to the evidence of BF. Copious references appeared in the discussion at pp.48-56; many of the findings of fact were based on BF's input; and at p.49 in particular the sheriff had noted BF's balanced view to the effect that relocation did not need to be unsuccessful, and that although B would lose some elements of the relationship currently enjoyed with his father this might be partly or wholly addressed by (i) a parental plan designed to ensure B's successful adaptation, and (ii) the pursuer's capacity to develop and maintain a wide social network in the USA.

3. As regards B's views, such as they were, these had been ascertained by means of the PB exercise, and the sheriff had committed no error of law in according them little or no weight. B was still only 6 years old; at the time of the proof he had no knowledge of the proposed relocation and thus no basis on which relevant views might be expressed; and even now, having been distressed by being told of his parents' bitter disagreement, he was in no position to judge the implications of what was proposed. More importantly, PB had clearly felt it inappropriate (in B's interests) to seek his views directly on any aspect of the dispute, and BF had given compelling evidence as to the likely harm to B if he were led to feel guilt or responsibility for the eventual outcome. The sheriff had fallen into no error in dealing with this sensitive matter as he did.

[27] For all of these reasons, in counsel's submission, the appeal should be refused. On no view should there be a remit for further evidence, either to the sheriff or to any member of this court, since it would inevitably

increase B's present distress if he were in effect asked to choose between the parties' irreconcilable wishes. Moreover, any further recourse to BF was opposed. The pursuer had concerns about his previous involvement; his judgment was already influenced by the substantially one-sided information on which his evidence had been based; and it would therefore be appropriate for any further inquiry into B's state of mind to be conducted by someone else.

VI. Discussion

[28] As has been observed on countless occasions in the past, disputes of this kind present any court with problems to which there may be no satisfactory solution. Such problems are no less acute where a case is taken to appeal, and there is then the added complication that the sensitive and fluid issues tending to characterise child welfare disputes are peculiarly within the province of the judge who has had the advantage of seeing and hearing the witnesses. Moreover the passage of time, however short, between initial decision and appeal is liable to throw up changes of circumstances which were not the subject of evidence or submissions in the court below. It is no doubt with such considerations in mind that the proper role of an appellate court in such matters has been defined in the relatively narrow terms apparent from the discussion of *G v G* and other cases in chapter III of this opinion. In particular, a decision at first instance cannot be recalled or set aside on appeal unless it is shown to be tainted by some material error of law or approach, or, failing that, unless the decision-maker, in reaching his conclusions on the evidence before him, can be said to have gone plainly wrong.

[29] There is perhaps no harm in recalling, at this point, some of the observations which were made by Lord Fraser in *G v G*, at pp.650 and 652:

"... what this court should seek to do is to answer the question whether the court discerns a wrongness in the result of so striking a character as to make it a legitimate conclusion that there must have been an error of method - apart, of course, from a disclosed inclusion of irrelevant or exclusion of relevant matters".

"... the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible. The principle was stated in this House by my noble and learned friend Lord Scarman in *B v W (Wardship: Appeal)* 1979 1 WLR 1041, where ... he said, at p.1055:

"But at the end of the day the court may not intervene unless it is satisfied either that the judge exercised his discretion upon a wrong principle or that, the judge's decision being so plainly wrong, he must have exercised his discretion wrongly."

[30] With that guidance in mind, we have carefully considered the sheriff's findings and note in light of the various grounds on which senior counsel for the defender sought to persuade us that this appeal should be sustained. Having also taken account of the pursuer's position on these matters, and more generally of the whole relevant circumstances of this case, we have reached the conclusion that the high threshold for appellate intervention has not been met and that the appeal must therefore fail. Our reasons for this decision are set out briefly in the paragraphs which follow.

[31] *First*, on the question whether the sheriff properly applied the statutory test under section 11(7)(a) of the 1995 Act, we acknowledge that at first glance his triple misquotation at pp.43-45 may seem a little surprising even if, in some reference works, "primary" and "paramount" are both treated as synonymous with terms such as "overriding" or "supreme". Nevertheless, on a fair reading of the decision as a whole, we are in no doubt that the sheriff did in fact approach his task from the correct standpoint and treated B's welfare as his paramount consideration throughout. Of all the indications which in our view point in this direction, we attach particular significance to (i) the sheriff's apparent acceptance of counsel's submissions as to the correct legal test (at p.45); (ii) his disavowal (at pp.45-46) of any presumptive rule or guideline in favour of parental interests; (iii) the positive assertion at p.46 that on the authorities he must consider the case from the

perspective of B's welfare; (iv) the treatment of B's interests as the sole criterion for decision at pp.43 and 53; (v) the terms of the important Findings in Fact and in Law which appear at p.41; and most importantly (vi) the very obvious predominant focus on B's relationships, interests and welfare which characterises the later findings in fact and the whole of the 'Discussion' section of the sheriff's note. Paramount consideration was, as it seems to us, given to B's welfare at every stage of the exercise, and we are unable to regard the necessary analysis of other factors along the way as detracting from that statutory imperative.

[32] In the same context, we do not consider that any of the lesser criticisms voiced by senior counsel on the appellant's behalf was satisfactorily made out. We can see nothing wrong, for example, with the sheriff's conclusion that the preservation of B's current relationship with the defender was overall of lesser importance than the maintenance and development of his primary relationship with the pursuer as the "bedrock" of his life. Equally, we have no criticism of the sheriff for having sought to ascertain, as part of the wider picture, how far a move to Houston *per se* might either positively or negatively impact upon B's future welfare. Nor would we take issue with the sheriff's treatment of what were alleged to be the defender's "proposals" for future contact in the event of relocation taking place. In our judgment the sheriff was entitled, on the basis reflected in his findings and note, to conclude that such "proposals" were essentially negative and resistant rather than constructive, and instead to place reliance on what the defender, under oath, conceded to be capable of achievement when questioned by the sheriff himself. It was, in the end, for the sheriff to evaluate all aspects of the evidence before him in judging where B's best interests might be thought to lie, and even though our attention was drawn by counsel to a number of agreed errors, we would not regard any of these as sufficiently material to affect the validity of the decision under appeal.

[33] *Second*, we do not accept that, on a fair reading of the sheriff's decision, he can be said to have failed to appreciate or give weight to BF's evidence on the risk to B if the closeness of his current relationship with the defender were to be diminished. On the contrary, it seems to us that BF's contribution as a skilled witness finds ample reflection in the critical later findings of fact and also in the sheriff's accompanying note. Repeated direct references to that contribution are included; many important findings and conclusions obviously draw force from BF's evidence which we have had the opportunity to read for ourselves; and in our view the fact that, at pp.48-49 in particular, the sheriff gives reasons for regarding BF's input as less telling than it might have been does not in any way equate to a disregard of relevant assistance from that quarter. The inevitability of *some* loss to B should the frequency of father/son contacts be diminished was plainly at the forefront of the sheriff's thinking, and it is to our mind simply a misreading of Finding 45 and of the conclusions at p.54 (ignoring in the former case the introduction "Otherwise", and in the latter the qualification "Leaving aside B's relationship with the Defender...") to suggest that that factor was in some way overlooked in the balancing exercise which the sheriff carried out. On a fair reading of his findings and note the potential for loss to B was not in dispute, and it may be that the defender's real complaint is that, again in line with BF's evidence, the sheriff was able to identify, not only factors capable of mitigating that loss, but also factors which might prove detrimental to B's welfare if the pursuer's promotion were thwarted and she had to remain for the time being in X. At the heart of the defender's presentation, in our view, was the unrealistic belief that a return to the parties' former harmonious co-existence - "the status quo" - might still somehow be achieved. For the reasons discussed at paragraphs [15] and [22] above, however, it seems to us that the sheriff justifiably took a different view.

[34] *Third*, we are not moved by the submission that the sheriff failed to comply with his statutory obligations under section 11(7)(b) of the 1995 Act. Findings 33-35 record the pre-proof exercise which was conducted by PB. The defender acquiesced in this initiative after first marking an appeal against the court's remit, and it is now a matter of agreement that Finding 35 should record that "B's views *are found* in PB's report" (emphasis added). While the general approach to be taken by PB was apparently discussed in court, it was left to her to decide how a 6-year-old child, unaware of the relocation proposal, should most appropriately be handled. From her experience she elected for an oblique approach, couching questions in terms of the hypothetical feelings of an imaginary animal rather than those of B himself. Where, however, certain questions were asked from both angles (for example in connection with attitudes to school), B's

responses were contradictory, giving rise to a suspicion that his answers to other questions might not necessarily have related to his own situation.

[35] For his part the sheriff, at p.46, confirms that "B's views, such as they are, have been obtained", and even without reference to any potential uncertainties affecting PB's report we can well understand why the sheriff should have introduced that important qualification. Even now B is only 6 years old. At the material time he knew nothing of the relocation proposal, nor of its implications for his relationship with the defender, nor indeed of the likely consequences if relocation did not take place. In such circumstances, there was no reason to attach material significance to any views which B might be thought to have expressed, and the sheriff in our view committed no error of law insofar as he declined to do so.

[36] Taking all of these considerations into account, we are unable to conclude that the sheriff was guilty of any error of law in his approach to this case, nor that in reaching conclusions on the evidence before him he otherwise went plainly wrong or exceeded the reasonable ambit of his discretion. Furthermore, we are not persuaded that it would be in any way conducive to B's present and future welfare to expose him at this stage to additional pressures concerning a parental dispute by which he is already distressed and for the outcome of which, in BF's estimation, he must not be allowed to feel personally responsible. Even if, in other words, we had thought that the statutory duties under section 11(7)(b) of the Act had not yet been adequately complied with, and even if (somewhat improbably) the risk of partisan influences could have been discounted, we would not have thought it appropriate to burden an already distressed child with further inquiries, the potential value of which could only be a matter of speculation. For the defender, senior counsel maintained that practicability was the only test here, founding in that regard on the case of *S v S* 2002 SC 246, but to our mind the subsection is also clearly concerned with what is appropriate having regard to the age and maturity of a given child. It would, we suggest, be most unsatisfactory if considerations of physical practicability obliged this court to follow a course which risked causing further distress, and perhaps lasting harm, to a young child.

V11. Decision

[37] In the result, we shall refuse this appeal and (subject to the parties' agreed revisions to Findings of Fact 11, 12, 15, 22, 33, 34, 35, 39, 40 and 45) affirm the sheriff's interlocutor dated 18 November 2011. It is to be hoped that a line can now be drawn under this unfortunate dispute, that any further protraction of legal proceedings can be avoided, and that in B's interests the parties may again feel able to provide him with the *joint* love, support and encouragement which he so obviously needs at this important stage of his young life. In his evidence BF spoke of the beneficial opportunities which relocation might bring, especially for the pursuer and for B, but to our mind this is a situation in which very real opportunities must also arise for the promotion and development of B's relationship with the defender in what may be new and inspiring directions.