



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 72

F101/21

OPINION OF LORD STUART

In the cause

W

Pursuer

against

W

Defender

Pursuer: Scott KC; Balfour + Manson LLP acting on behalf of Moore Marshall Solicitors

Defender: Shewan; Burnett Christie Knowles McCourts

13 October 2023

Introduction

[1] This is an action for divorce and for further orders in relation to financial provision and the parties' only child. The parties agree that their marriage has broken down irretrievably and that there are no prospects of reconciliation. The parties have, by agreement, resolved matters relating to financial provision. The remaining issues in dispute relate to residence, contact and relocation in respect of their only child, a son, born on 8 March 2020. It is in relation to these issues that I heard a proof and in relation to which this opinion is concerned.

The applicable law

[2] Both parties to this action hold full parental responsibilities and parental rights in respect of the child. These responsibilities and rights are listed, respectively, in sections 1 and 2 of the Children (Scotland) Act 1995. Section 11(1) of the 1995 Act provides that the court, in circumstances such as those that arise in this case, may make orders in relation to:

- (a) Parental responsibilities;
- (b) Parental rights;
- (c) Guardianship; or
- (d) The administration of a child's property.

[3] The orders sought in this case are in terms of section 11(2)(c), (d) and (e), which provide as follows:

"...

- (c) an order regulating the arrangements as to –
 - (i) with whom or
 - (ii) if with different persons alternately or periodically, with whom and during what periods, a child under the age of 16 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 paragraphs (a)-(d) of subsection (1) of this section (any such order being known as a ‘specific issue order’);"

[4] The test to be applied by the court where any order under section 11 is sought is set out in section 11(7), which provides:

"... in considering whether or not to make an order under subsection (1) above 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;
- (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;
 - (iii) have regard to such views as he may express."

[5] The child is 3 years old. It is not reasonably practicable to take into account the child's views.

[6] Accordingly, the two elements of the test that must be applied in this case are (a) that the child's welfare must be the paramount consideration and (b) that I should make no order unless I consider that it would be better for the child to do so than making no order at all.

[7] Where both parents hold parental responsibilities and rights, the removal of a child habitually resident in Scotland to outside the United Kingdom is unlawful other than with a court order where the other parent does not consent (section 2(3) of the 1995 Act). Further, any person reaching a major decision involving his or her fulfilling a parental responsibility or exercising a parental right must also have regard, so far as practicable, to the views of any other person who has parental responsibilities or parental rights in relation to the child (section 6 of the 1995 Act).

[8] The applicable law governing the approach that courts in this jurisdiction must take to relocation is settled. In *M v M 2012 SLT 428*, at paragraph 9, Lord Emslie, giving the decision of the Inner House, confirmed that in relocation cases,

"the welfare and best interests of the child or children concerned are paramount, and fall to be judged without any preconceived leaning in favour of the rights and interests of others".

Thus, as has been observed on a number of occasions, the position in Scotland differs to the approach in England where the reasonable plan of a parent with sole primary care of a child, including the effect of the refusal of an application to relocate by that parent, has been a material factor (*Payne v Payne* [2001] 2 WLR 1826). Such an approach forms no part of the law of Scotland.

[9] The correct approach to applications of this sort was summarised by Lady Smith in the case of *Donaldson v Donaldson* 2014 Fam LR 126 at paragraph 27 as follows:

"Since the decision of this court in the case of *M v M* it has been clear that, on an issue of relocation, it is no part of our law that a judge requires to regard any particular factor as having greater weight than any other. It would, for instance, be wrong to proceed on the basis that there is a rule that the most crucial assessment required is as to the effect that a refusal of the relocation application will have on the applicant. This is often conveniently described as a 'presumption free' approach; it accords with the court's duty to regard the welfare of the child as the paramount consideration. That is not to say that, in an individual case, there may not be features which are of particular importance when considering the welfare of the individual child concerned. The availability in each jurisdiction of some particular medical treatment or educational provision that the child requires would be an example. Much will depend on the facts of each case."

[10] It has been acknowledged in cases such as *M v M*, cited above, that there are cases in which significant weight can be attached to a reasonable relocation plan of a parent with care of a child. Much will depend on the particular circumstances of the case, the advantages and disadvantages for the child of the proposed move together with the wishes and interests of each parent, each receiving no greater weight than they deserve in the circumstances.

[11] Finally, in questions of relocation there is an evidential burden of proof on the parent seeking to relocate the child. That parent must show (1) that relocation would in fact be in

the best interest of the child concerned and (2) that from the child's perspective it would be better to allow relocation than to make no order (*M v M*). It is neither instructive nor appropriate to try to formulate any preconceived list of applicable factors as relocation cases are fact sensitive and scrutiny of the particular circumstances of the dispute and the child is what matters (*Donaldson v Donaldson; GL v JL* 2017 Fam LR 54).

The undisputed facts

[12] In terms of a joint minute of evidence entered into by the parties it is agreed as follows. The pursuer was born in Scotland on 17 March 1980. He is habitually resident in Scotland and lives in Larbert. The pursuer's parents, brother and sister are Scottish and reside in Falkirk (a town adjacent to Larbert). The defender was born in France on 30 October 1983. She has lived and worked in the UK since 2010, initially in Bournemouth. In April 2011 the defender moved to Edinburgh for work. The defender's mother lives in Bayonne in France. The defender's wider family lives in France. The pursuer and defender met in 2015. They became engaged in 2016 and married on 29 April 2017. The pursuer purchased a house in Falkirk in August 2016. The parties cohabited at this address from the date of purchase until 1 December 2021 when the defender left the address. The pursuer has continued to reside at the address. Since December 2021 the defender has not disclosed to the pursuer where she has lived. The child resided with the parties until 1 December 2021, when the defender left the family home taking the child with her. The pursuer had no contact with the child until 17 December 2021. The pursuer exercised contact with the child until late January 2022. That contact generally involved non-residential contact for a period of two hours during the week and residential contact for one night at the weekend. In late January contact ceased but resumed again in terms of various court interlocutors. In

June 2022 the parties agreed to shared care of the child until the summer of 2023 when the defender would relocate to France with the child. Since June 2022 the parties have operated a shared care regime on a two weekly cycle. In May 2023 the pursuer withdrew his consent for the defender to relocate to France with the child.

[13] Beyond the joint minute of admissions, at submissions counsel were also at one on a number of further factual matters about the child. The child has a devoted family in Scotland and a devoted family in France. Each of his parents is attuned to his needs and he receives an excellent standard of care from each parent. He attends nursery, which is a positive experience for him. He is thriving, happy, healthy, well-adjusted and is meeting his milestones.

Submissions

[14] Counsel were also at one on the applicable law, which is as set out above. Thereafter their respective submissions focused on the question of relocation and the evidence insofar as relevant to this.

[15] Ms Shewan, for the defender, submitted that when the issues of education, housing, financial stability through employment and living environment were considered it was in the child's best interest to move to live in Bayonne with the defender. It was accepted that whilst there would be an overall reduction in the amount of time the child would spend with the pursuer, time spent together would be in holidays allowing for more activities together and this would maintain the relationship between the child and the pursuer. Such an arrangement would also maintain the child's relationships with the pursuer's wider family. The defender was isolated in Scotland without significant support. The defender's current housing was unsuitable. In contrast, in France the child would initially live in his

maternal grandmother's flat until the defender rented her own accommodation. Although the defender had worked in Scotland before going on maternity leave and then being made redundant she had not, since separation, looked for employment as she believed that she would be relocating to France. The defender believed that she would be well qualified to obtain professional employment on returning to France. It was accepted that the defender would take steps to obtain employment in Scotland if relocation of the child was not permitted but she faced the difficulties of the absence of family support for childcare and the need for paid childcare. Currently the child was entitled to free nursery care but that might change should the defender take employment with a need for longer hours of private nursery. There might be a statutory allowance but that would be for a longer daily period over term time or a shorter daily period throughout the year. Shift work and weekend work might complicate matters. Whilst it was put to the defender in cross-examination that the pursuer or members of his family might be able to assist with weekend child care, the defender's position was that this would leave less time for the child to be with the defender. In contrast, the defender's position was that should she be allowed to relocate to France, the maternal grandmother could provide childcare whilst the defender was working and the child was not at school. The agreement reached between the parties demonstrated that the pursuer had accepted that it was in the child's best interest to relocate to France. Albeit not determinative, the court could take into consideration a reasonable relocation plan of a parent with care of the child.

[16] Mrs Scott, on behalf of the pursuer, submitted by reference to the evidence, that it was for the defender to show that the child's welfare requires him to be removed from his current environment to live with his mother in France. Treating the child's perspective as paramount there is no requirement to uproot him. It might be said, albeit unnecessary to go

so far given the section 11(7) test, that the evidence indicated that relocation would have adverse effects on the child. The diminution of the child's relationship with his father and the role his father played in his life was the most significant disadvantage to the child. This was a "shared care" case. The child experienced equal care from his mother and father. The child had a strong relationship with his father, who put considerable thought and care into looking after him. There were considerable uncertainties associated with the defender's plan in connection with relocation, which ought to be weighed against the established regime. The decision did not turn on questions of the countries' respective education and healthcare systems. These factors were of little weight in the overall balancing exercise. The prior agreement reached between the parties carried little, if any, weight. The matter was now in the hands of the courts to decide what was in the child's best interest. Likewise the historical care regime of the child carried little weight. There might have been a difference of opinion about respective responsibilities and input but both parties were in agreement that the child was doing well under the shared care regime. There was no merit in the accusations made against the pursuer in respect of either the defender or the child and any such evidence should be disregarded.

The evidence in connection with the issues before court

[17] The principal issues before me relate to (i) divorce and (ii) the care arrangements for the child, including relocation of the child to France. Divorce was not opposed and having considered the evidence before me at proof, I am satisfied that the parties' marriage has broken down irretrievably. I will therefore grant decree of divorce as first concluded for by the pursuer.

[18] The significant dispute before me was relocation of the child, which involves a comparison between the child's current circumstances (shared care in Scotland) with what his life would be like should he relocate to France with his mother. Having heard the evidence at proof and considered the affidavits lodged, it seems to me that the evidence fell into five broad areas that bear upon the question of whether the defender can show (1) relocation would in fact be in the best interest of the child and (2) that from the child's perspective it would be better to allow relocation than to make no order. These areas are:

1. Relationship with parents, including maintenance of contact.
2. Wider family relationships and childcare, including family support.
3. Employment.
4. Accommodation.
5. Education.

[19] I do not intend to narrate at length the evidence heard at proof and contained in the affidavits lodged. In preparation of this opinion I have reviewed the affidavits and my notes of evidence. What I will do is consider the evidence within these five areas and explain how I have assessed that evidence in considering the test for relocation identified above.

[20] Dealing first with credibility and reliability, in relation to the witnesses who gave evidence about the child's circumstances, I accept that all were doing their best to tell the truth. It was obviously apparent that all loved and cared for the child deeply. However, I did have some concerns arising out of parts of the evidence of the defender and the defender's mother. The defender's desire to return to "her home" as she described France and the security of her family there following the breakdown of her marriage is entirely understandable. The isolation she appears to have experienced as a result of the loss of her relationship will, I have no doubt, been compounded by a belief that she was, by agreement,

to relocate to France with the child and a consequential reluctance to put down new roots in Scotland, for example in relation to employment and accommodation. But in relation to some elements of her evidence, I was left with the impression that this sought to justify her own desire to return to France rather than be from a perspective of what might or might not truly be in the best interests of the child, for example in relation to the importance of time spent together between the pursuer and the child and the child's ability to benefit from his wider relatives.

[21] In relation to the defender's mother's evidence, again for entirely understandable reasons, I was left with the impression that the defender's mother downplayed any concerns raised with her in evidence and overplayed issues that she thought might be supportive of her daughter's return to France. For example when asked about the support for her daughter and the child in France, she suggested that maybe [one] should not focus on lack of opportunities and that nothing was impossible and when giving evidence about the pursuer and his family she suggested that they did not have knowledge of life and that whilst they might not want any harm to the child, they will harm [him] because you cannot live in a tiny village any more (which I took to be a metaphor for life). The latter particularly struck me as being entirely contrary to the position both counsel advanced in submission on behalf of the parties that the child was thriving under the care of the pursuer and his family.

[22] The starting position in this case is that since June 2022 the child has benefited from a shared care arrangement between his parents. Both parents are actively involved with the child's life and the child is thriving under the arrangement. That is an important consideration when approaching the questions (1) whether relocation to France would be in the best interest of the child and (2) whether that from the child's perspective it would be better to allow relocation than to make no order.

[23] Considering first the child's relationship with his parents, I agree with the defender when she said in evidence that she and the pursuer were the principal persons who had responsibility to care for the child and to raise him. In support of her desire to relocate to France with the child, the defender suggested that whilst relocation would lead to an overall reduction in the amount of time the child and pursuer spend together, the time they did would be in the child's school holidays (around 90 days according to the defender) and would allow for more activities together, which would maintain the relationship between the child and the pursuer. I disagree. The suggestion misses the fundamental importance to the child of the pursuer's presence in the child's life on an ongoing basis, including the pursuer's direct involvement in the child's social, cultural and emotional development, his schooling and his extra-curricular activities. It was a matter of agreement that the child is thriving in the care of both parents. Further, the evidence from all witnesses who knew the child was that the child enjoyed and responded positively to physical contact with those around him, whether his parents, grandparents or aunt and uncle. Relocating the child as sought would fundamentally undermine both the important and beneficial presence of the pursuer in the child's life and the child's apparent, innate desire for physical contact with the pursuer. Indirect contact, irrespective of issues of whether it would or would not be appropriately facilitated by the defender, is a poor substitute, if indeed a substitute at all. When asked in cross-examination whether she agreed that it was important for the child to have a father figure in his life, the defender, it seemed to me, sought to justify the inevitable absence her proposed plan would entail by replying that she did not have a father, her father having left the family home. That is not an answer that focuses of the child's best interest. I agree with Mrs Scott's submission that the diminution of the child's relationship with his father and the role his father plays in his life would be the most significant

disadvantage to the child. I am very clear that the care arrangements suggested by the defender insofar as the relationship between the pursuer and child – father and son – would not be in the child's best interests.

[24] In relation to wider family relations and childcare, including family support, I accept that if the child was to relocate to France he might very well see more of his maternal grandmother. The other side of the same coin is that he would almost certainly see little of his paternal grandparents. The evidence before me suggests that the maternal grandmother has visited Scotland on a number of occasions whereas the paternal grandparents have never visited France. It is clear that both the paternal and maternal grandparents are willing to assist when asked. Whilst the pursuer's father felt hurt by events between his son and the defender and said in evidence that he would find it difficult to support the defender, as opposed to the child who he would support, the pursuer's mother was clear that she would support both the child and the defender if asked to do so. Having seen her be cross-examined about this, I do not doubt her evidence. I also note the evidence of the pursuer's sister who said that she thought her father's attitude might change in time. It was also clear from the evidence that the pursuer's brother and sister have both provided support for the pursuer and the child and that they are prepared to continue to do so. It was not disputed that both have developed a strong relationship with the child and both play a positive role in the child's life. The pursuer's sister and brother made it clear they too would assist the defender if asked to do so.

[25] The defender raised in evidence the issue of nursery childcare and working. She suggested that her employment opportunities in Scotland might involve shift or weekend working, which in turn might require more nursery childcare and/or difficulties with informal childcare. When it was suggested to her that, if she had such work patterns, the

pursuer or his family could assist, the defender responded that if that was so she would see the child less. However, in support of her argument for relocating to Bayonne the defender suggested that to allow her to obtain and sustain work she could draw on the help of her mother to provide childcare. It seemed to me that the defender took an inconsistent position to support relocation. Whilst children benefit from the learning experiences and interactions they have in more formal nursery settings, it seems to me that having an extended family available to assist with childcare when the defender was working would provide a balance of formal and informal childcare and, in any event, irrespective of whether it was the pursuer or a maternal or paternal grandparent/family member who provided childcare whilst the defender worked, the outcome would be the same, she would see the child less.

[26] The evidence regarding the benefits of interactions with the defender's wider family in France was an area that caused me some concerns in respect of reliability. The tenor of the defender and her mother's evidence was that they had a strong family network around them and that this would provide a benefit for the child, particularly, as was emphasised by both, the child's ability to play with his cousins. In cross-examination it became clear to me that this family network was not as portrayed. The extended family appeared to be located close to Paris, some eight hours away by car, and in answer to a direct question about the number of times the child had seen his cousins in the last year the defender's mother said once at least but beyond that she could not be certain. The impression I was left with from the evidence was that, contrary to the picture painted by the defender and her mother, extended family life in France was not and was unlikely to be as interactive as suggested, whereas the child appeared to be very much integrated with his wider family in Scotland. That might well, I suspect, be as much a matter of geography as anything else. There was no basis in the evidence to suggest that relocation of the child to France would significantly

change matters with his extended French family, whereas the evidence clearly suggested that relocation of the child to France would significantly reduce the benefits to the child derived from his interactions with the pursuer's extended family.

[27] Turning to the issue of employment, as the defender acknowledged in her evidence, which I accept, her current position is not indicative of any longer term position in Scotland if the court refused the order for relocation. She has been in limbo, first believing she was to return to France by agreement, then awaiting the outcome of the court case. Whilst, as the defender said in evidence, there might be some challenges around working and childcare, if the defender was to remain in Scotland with the child she would find employment. The undisputed evidence regarding the defender's work history and seeing her give evidence suggests that the defender is an able individual who would find employment in Scotland. Having come to that view, it is, I think, inevitable that were the defender to relocate to France she would find employment there also. Beyond that, there is little else I can conclude from the evidence. Although the defender and her mother suggested that the defender might, given her French qualifications, be able to secure professional employment in France, there was no independent evidence put before the court to support that assertion and, in any event, given the significant passage of time it is difficult to conclude what, if any, advantage the defender would get from any qualifications.

[28] In relation to the issue of education, I accept the evidence that the child has a place at a school in Bayonne and that the school will offer opportunities for the child. I am also prepared to accept that the identified school in Bayonne might offer different opportunities but there is no evidence to suggest that the school in Bayonne will, overall, offer the child better opportunities. Both parties gave evidence about the benefits to the child of being bilingual. I accept that this would be a benefit to the child. The defender suggests that when

in France outwith school the child would speak French and when in school the child would receive English lessons. This, the defender suggested, was the better arrangement. I do not agree. With the child in Scotland he will speak French with his mother and maternal grandmother when she visits. He will also speak French when he visits France. I suspect that lessons in French at school will add little. But the child will also speak English with his paternal family and at school. In Scotland the child will have a much fuller immersion in both English and French than he would in France. Overall, on the evidence before me I find the issue of education largely neutral. I reach the same conclusion regarding healthcare.

[29] On the issue of accommodation, there is no suggestion that the pursuer's house is not suitable for the child. The child is clearly familiar with the house, having spent a significant part of his life there. In France the defender suggests that, on relocation, she and the child would reside with her mother, in the short term, for around 6 to 8 months and thereafter the expectation is that the defender will then be working and be able to afford her own accommodation. On that basis the issue is at best neutral. That said, on the basis of the evidence before me, the maternal grandmother's flat is not particularly suited to the child's needs. The flat is on the fifth floor, and has a balcony. Photographs of the flat were lodged. The child is 3 years old. A degree of supervision would be required at any point the child had access to the balcony. As the defender acknowledged, if she remains in Scotland, once she obtains employment here she will be able to address the issue of more suitable accommodation.

Other issues

[30] Parties made reference to two other particular issues during the course of the evidence. These were (i) the criminal proceedings in which the pursuer was the accused and

the defender the complainer and (ii) the prior agreement between the parties that the defender and the child would relocate to Bayonne. In relation to the criminal proceedings, at submission both counsel appeared to accept that the issue had little bearing on the issue of relocation. I agree, subject to one observation that I will come back to. In relation to the prior agreement in respect of relocation, this also has little relevance to the issue of relocation, again subject to the same observation. It is clear that the criminal proceedings have created a lack of trust between the parties. Both said so in evidence. That lack of trust caused the pursuer to re-evaluate the agreement in relation to relocation. He gave evidence that he had concerns the defender would seek to exclude him from the child's life and that with the child in France he would be disadvantaged if he had to resort to the courts. I accept that the pursuer's subjective experience of the criminal proceedings provide him with an objectively rational basis to form the concerns he has and thereby withdraw his consent to relocation of the child. I do not accept that the pursuer's initial consent to the child's relocation should be taken as an implied indication that such relocation would be in the child's best interest. That is a question for the court.

[31] Drawing the above threads together, the single, most significant factor, by some margin, is the very likely adverse effect of relocation on the relationship between the pursuer and the child and thus the welfare of the child. There would need to be clear evidence of significant benefits to the child in other areas before the court could conclude that the negative effect on the relationship between the pursuer and the child was sufficiently offset to demonstrate relocation was in the child's best interests. The evidence in these other areas falls well short of doing so. In these circumstances, I am very clear that having regard to the welfare of the child as the paramount consideration, it would not be better for the child that the order be made than that none should be made at all.

Accordingly, I refuse the defender's conclusion seeking an order permitting the child to relocate to France.

Orders and further procedure

[32] Given these conclusions, I shall (1) grant decree of divorce as first conclusion for by the pursuer, (2) as per the joint minute of the parties, dismiss conclusions 12 and 13 for the pursuer and conclusions 6, 7, 8, 9, and 10 for the defender, (3) refuse to make the order for residence and the specific issue order sought by the defender as first and second concluded for by her and (4) as per the joint minute of the parties, find no expenses due to or by either party in respect of matters relating to financial provision.

[33] Thereafter I will put the case out by order to be addressed on (1) the precise terms of orders regulating the care arrangements for the child, including contact (it might be possible for parties to agree matters now that the principal issue of relocation has been determined) and (2) expenses insofar as not already dealt with.