SHERIFF APPEAL COURT

[2019] SAC (Civ) 35
PHD-F42-10

Sheriff Principal M Lewis
Appeal Sheriff A L MacFadyen
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by APPEAL SHERIFF N McFADYEN

in appeal by

MN

Appellant

against

ON

Respondent

Appellant: Mrs J Scott QC, Ms J Cartwright, advocate; Balfour and Manson LLP, Edinburgh, for Grant Smith Law Practice, Turriff
Respondent: Ms R Shewan, advocate; Turcan Connell, Edinburgh

29 July 2019

Introduction

Procedure

[1] This is an appeal by the pursuer and respondent in a minute to vary a decree of the Sheriff at Peterhead granted on 4 May 2010, brought at the instance, as minuter, of the defender in the original action, who is thus also the respondent in the appeal. For the sake

of simplicity we will refer to the parties as appellant and respondent throughout, unless the context otherwise requires.

[2] The appellant seeks to challenge the sheriff's decision in a judgment dated 4 February 2019, issued following proof on the minute and answers, effectively to vary the decree by making a contact order for residential contact in favour of the respondent in respect of the child AN, born in 2009. The sheriff decided that the order was to be suspended for three months to allow for rehabilitation work, during which supervised contact was to continue; and the sheriff appended to her judgment a letter intended to be issued by her to the child. The appellant also challenges the sheriff's refusal of the pursuer's motion, at the commencement of a case management hearing on 17 August 2018, that she recuse herself from hearing the proof on the basis of appearance of bias. Finally, the appellant challenges the sheriff's decision to award expenses in favour of the respondent, together with an unspecified uplift. This court suspended obedience to the final order made by the sheriff as regards contact with the child and granted interim suspension of delivery of the letter, pending appeal. To complicate matters further, contact has broken down and indeed had broken down during the period between the sheriff making avizandum and issuing her judgment, for reasons which, according to the appellant, relate to the central matter at the proof itself, namely the child's description of events during a holiday with the respondent in August 2017.

[3] We should start by observing that the sheriff has assisted no-one in the approach that she has taken to structuring her judgment. It is a lengthy document, running to 83 pages, including an appendix and 257 numbered paragraphs, and it is difficult to discern where the interlocutor starts and ends, if indeed there is an interlocutor. Aside from all else we were faced with repeated difficulty in locating essential elements within the body of the

judgment. Although there are findings in fact (appended to the main text of the judgment) there are no findings in law (or findings in fact and in law) as such. There are, however, passages in the section of the judgment headed "Decision" which use language which would be apt for findings in law (or in fact and in law), at least if more fully and pointedly expressed and properly located. The judgment does not deal clearly with the parties' craves – repelling the pursuer's "crave", where there were two craves, one of which (for residence) had already been granted, and being silent on parties' pleas in law.

[4] The Ordinary Cause Rules clearly envisage production of an interlocutor and note (rule 12.4), and in the case of a final order or decree proper practice is to deal with the parties' craves and pleas in law in the interlocutor. Best practice is described in *Macphail on Sheriff Court Practice*, 3rd edition, chapter 17. The formulation adopted by the sheriff was perhaps intended to be a more user friendly document to assist parties caught in a hostile dispute but the sheriff's approach has had the unfortunate effect of obscuring proper articulation as to her view on the applicable law, particularly in relation to the critical provisions in section 11 of the Children (Scotland) Act 1995.

Background

[5] The child was very young when the original decree was granted on 4 May 2010. Parties had agreed that she reside with the appellant and that the respondent would have agreed contact including residential contact. Further agreements concerning contact were entered into on 21 December 2012 and 5 February 2013. By the time the minute for variation was lodged circumstances had changed somewhat, with the child now being at school, the respondent having a work rotation and in particular issues had arisen after the respondent took the child on holiday in August 2017. The respondent (as minuter) was now seeking

residential contact reflecting his work pattern, as well as holiday and special occasion contact. The appellant's position in answer was that contact was not in the child's best interest, or at least what was proposed was excessive.

[6] Although the minute and answers were long and wordy, there was something of a focus on incidents which the appellant averred had occurred during the holiday.

[7] The child initially reported to the appellant, some two days after returning from a holiday with her father in August 2017, that he had "poked his finger up my butt hole" and that she woke up one (other) morning with her pants at her knees. She had described both these episodes as weird. When the appellant asked her to repeat what had happened she did, but when she asked her a second time she said that the respondent had poked her on her bum cheek. The appellant spoke to her now husband and they spoke to the child the next day and she again stated it was her bum cheek. The appellant then challenged the respondent about what had happened; he responded angrily and said he wanted her to have the child checked out. Thereafter she involved social work and the police, but she told the police that she did not want to make a complaint and wanted to deal with the matter through mediation. (The foregoing narrative of the child's reporting of what happened during the holiday comes from the sheriff's judgment and in particular her findings in fact and the child welfare report, which also summarises the joint investigative interview which was conducted on 2 February 2018. This court was not shown the recording of that interview or a transcript, but we do not understand this narrative to be disputed.)

[8] In the meantime the respondent had, on 31 August 2017, served the minute for variation. When the case called, the court ordered non-residential contact and referred parties for mediation, but after one session (in January 2018) the appellant withdrew from mediation. That month the appellant spoke to the child again about the holiday and this

time she said that the respondent touched her on her back. The appellant then spoke to the child yet again, this time in the presence of her mother and put to the child the versions which she had given and asked her to choose an option: she chose the first option, that he had poked her up her butt hole. She then reported the matter to the police and the child was interviewed in a joint police/social work investigative interview. The child told the interviewers that she had woken up with her pants at her knees. She told them that her dad had poked her bum, between her bum cheeks, over her clothes. She told him to stop it, which he did. She said that he must have reached over the pillow between them to poke her. She became distressed during the interview. She said her dad was nice. When she was asked to tell the interviewers more about finding her pants around her knees, she said that she did not know what happened; her nightie was on and pulled down when she woke and she thought that she was wearing white pants.

[9] A child welfare report was instructed on 4 April 2018. The child welfare reporter herself spoke to the child about the holiday on 7 June 2018. In her report (dated 20 June 2018) the reporter notes the child as saying "One morning I woke up with my pants round my knees and that's never happened before". They had been sharing a bed. He had not been able to or willing to put the sofa bed up and she wanted to have a pillow between them "because I don't feel comfortable". When the bar reporter asked her why that was she said "Once he reached over the pillow and tried to poke my bum" and, when asked to show her where, pointed between her bottom cheeks.

[10] Although there were other issues between the parties, when the case called before the sheriff at a child welfare hearing on 27 June 2018 in order to consider the child welfare report discussion focused, in particular, on the holiday incidents. By this time the respondent was only exercising supervised non-residential contact. The sheriff refused the

appellant's opposed motion to reduce contact to nil and made an interim contact order in favour of the respondent for supervised contact on four specified dates, on a non-residential basis and assigned a diet of proof. Subsequent to that child welfare hearing it occurred to the sheriff that she should have fixed a case management hearing under OCR chapter 33AA and she did so. No issue was taken concerning that, although, since the proceedings in this case predated the introduction of chapter 33AA by the Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No. 2) 2013 (SSI 2013 No. 139) it may be open to question whether chapter 33AA and related provisions applied (see rule 6 of the 2013 Rules; cf OCR rule 14.10A).

[11] In any event, courts are encouraged to take an active role in case management of family cases and the sheriff cannot be faulted for deciding that there should be a hearing in the nature of a case management hearing in advance of proof. That hearing was fixed by a short formal interlocutor dated 10 July 2018, but which followed upon a note prepared by the sheriff which itself was confusingly headed up as "Note on Interlocutor of 17 June 2018", although it followed on from the interlocutor and, indeed, hearing of 27 June 2018 and was in fact dated 29 June 2018. Again, no issue is taken as to the competency of issuing the note. The difficulty is as regards its content.

[12] The note is, to a large extent, properly a note explaining the sheriff's decisions at the child welfare hearing and as regards allowing proof. It is not unusual for a sheriff to append such a note to an interlocutor, especially when there has been a substantive discussion, although it is unusual for that to be offered as a free-standing later-dated note. Again, that is not necessarily a problem of principle, but there is a difficulty in that the note is not confined to recording what was discussed and ordered at the child welfare hearing, but arguably at least goes beyond that, in expressing concerns that have subsequently arisen. The

interlocutor of 27 June simply allows a two-day proof and "ordains parties to lodge their evidence by way of affidavits".

[13] The note suggests that proof was only allowed in respect of cross-examination (and presumably re-examination) of the respondent "on the whole matter" (although from context that appears to mean the whole holiday matter). That is difficult to square with allowing a two-day proof and is also quite difficult to square with the last section of the note (headed "Procedure at Proof/ additional evidence") where the sheriff appears to record a process of internal deliberation concerning what was to be addressed at the case management hearing as regards affidavits and oral evidence, before again concluding that evidence at proof "will be restricted to the cross examination of the [respondent]", although she indicated that she would hear parties on that matter and whether additional evidence was to be led. Much of the confusion in the note could have been eliminated by confining it to a record of what was discussed and ordered at the child welfare hearing on 27 June and appending a separate brief explanatory note to the interlocutor fixing a case management hearing.

[14] As we have mentioned, contact between the child and the respondent has broken down. According to the appellant, this was triggered by the appellant telling her, during contact on 11 November 2018 that nothing had happened during the holiday. She asked to be taken home from the next contact, but had refused to go for contact since.

Sheriff's refusal to recuse herself

[15] It was the sheriff's note dated 29 June 2018 that provided the basis for the motion (which she refused) that she recuse herself from proof and it is convenient to consider the relevant ground of appeal in the first place.

Submissions

Appellant

[16] Senior counsel for the appellant submitted, under reference to *Stubbs* v *The Queen* [2018] UKPC 30, [2018] 3 WLR 1638, that a fair-minded observer would conclude that the sheriff was not impartial. There was reasonable cause to believe that she had pre-judged the case. The appearance of bias included a clear indication of a prematurely closed mind or anything other than an objective view.

[17] We were also referred to *In re Q (Children) (Fact-finding Hearing: Apparent Judicial Bias)* [2014] EWCA Civ 918; [2014] 3 FCR 517, a child care case where the judge had expressed himself at a case management hearing in terms which made clear that he accepted the account given by the father and rejected allegations made by the mother, in circumstances where the mother had not yet given evidence. McFarlane LJ (as he then was) observed (at paras [53], [54] and [57]) that there was a thin line between case management and premature adjudication.

[18] Senior counsel compared some of the sheriff's remarks in the note dated 29 June 2018 to those of the judge in that case. In para [3] she talked about her communication to parties of "the view that I had reached on matters, based on the evidence before the court at the hearing". She had gone on to state (at para [5]) that she was:

> "of the view that contact between the Defender and the child should continue with a move towards re-instating unsupervised and residential contact."

In response to a submission that it was imperative that the court make a finding as to whether the allegations made by the child were true or not she said (para [9]):

> "I do not accept that the information was initially conveyed by the child as a disclosure of a concerning event from which the child was seeking protection".

She went on to state that she:

> "was not persuaded that [the child's reactions] arose from any untoward behaviour of the defender but rather were more likely to be the result of the increasing pressure being brought to bear on the young child and the very negative things being said to her about all aspects of her father's behaviour" (at para [10])

and later observed:

> "It appears that sexual interpretations have been placed on what appear to be common family behaviour between an adult and child" (at para [11]).

[19] Finally, she allowed a proof with obvious reluctance, saying:

> "I asked that Counsel confirm again what evidence could be led which could feasibly assist the court in coming to a determination on this issue. Counsel did in fact made (sic) the valid point that at a Proof the Pursuer would have the opportunity to cross-examine the defender on the whole matter… I accepted that if the Pursuer wished to cross-examine the Defender she should be allowed that opportunity." (para [13])

[20] In *In re Q (Children)* the judge had expressed what were described as concluded views at a case management hearing and was also criticised for expressing views on conclusions to be drawn from evidence when significant evidence had still to be presented.

[21] It was submitted that the sheriff's conduct of the proof reinforced the submission that she had prejudged the central issue as to whether the child's allegations were to be believed. We were, somewhat surprisingly given such a broad claim, provided only with one very short excerpt from the transcript of proceedings. It was submitted that the sheriff interrupted cross-examination of the respondent in relation to the critical point (day 2 p61, page 29 of the appendix). The exchange is recorded in the extended shorthand notes as follows:

> "I put it to you A was telling the truth and you did poke her in the butt hole and when she asked you to stop, you stopped? – I didn't touch my daughter.
> Which means A must have been lying.
> SHERIFF: Well, I'm not sure that's an appropriate question. What Mr. N said is, "I was sleeping" and "I didn't touch my daughter."

> MS. CARTWRIGHT: My Lady, he didn't say that, to be fair, he has suggested he may have touched her whilst he was sleeping.
> SHERIFF: So, why does that mean A is lying?
> MS. CARTWRIGHT: He said he may have touched her.
> SHERIFF: Why does that mean A is lying?"

[22] The sheriff explained in her judgment (para [140]) that:

> "I interjected at this point to state that the [respondent] is not necessarily saying that [ie that A is lying]"

and she returned to the point at para [217] to say that she:

> "did not find this line of questioning enlightening at all"

and:

> "Our higher courts have deprecated this general line of cross examination and I found it particularly unhelpful in a case involving what a child may or may not have said to her parents."

It was submitted that the sheriff's interruption, and attempted justification, reinforced the impression of lack of impartiality.

[23] It was submitted that the same impression was further reinforced by the sheriff's willingness to believe the respondent in respect of the principal allegations, while finding he had lied in another part of the case (about about a statement he made to the child to the effect that the appellant was not her "real mum").

Respondent

[24] In response, counsel for the respondent submitted that the sheriff had not predetermined the issue to be heard at proof, but had recorded the decision at the child welfare hearing, the reasons for it, and the reasons why she had allowed a proof to be fixed, as well as setting out the need for a case management hearing prior to the proof, that having previously been overlooked. She had set out her concerns about whether further evidence

could be produced regarding what happened during the holiday, beyond what had been considered at the child welfare hearing, but she had taken on board the position of the appellant that the respondent should be cross examined at proof. Her refusal of the appellant's motion to reduce contact to nil at the child welfare hearing did not mean that she had made a premature decision in relation to her decision at proof, but rather she had dealt with the sort of matters that a child welfare hearing should determine.

[25] There was no requirement – and it would be particularly impractical in a small court – for a different sheriff to deal with proof. This was in certain respects consistent with Court of Session practice. It was clear from the detailed judgment produced by the sheriff that she based her ultimate decision on the evidence which she heard at proof. Unlike the judge in *Stubbs* the sheriff had not made decisions in a previous final evidential hearing. It was expressly held there that:

> "the fact that a judge had previously made a decision adverse to the interests of a litigant was not, of itself, sufficient to establish the appearance of bias on a later hearing in the same proceedings".

Decision on recusal

[26] We do not consider that this is a case involving actual bias, but that is not the test: rather it is one of perception. Would

> "the fair-minded and informed observer, having considered the facts, …. conclude that there was a real possibility that the tribunal was biased"? (per Lord Hope of Craighead in *Porter* v *Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103])

[27] The line is a thin one, but just as the Board in *Stubbs* and the Court of Appeal in *In re Q (Children)* concluded, in this case we conclude that the line was crossed by the sheriff at the child welfare hearing and in particular in her note dated 29 June 2018. In our opinion in the remarks already set out above (at [22]) she has, when they are taken cumulatively, made

statements which would lead the fair-minded, informed bystander to conclude that there was indeed a real possibility of bias if she were to proceed to determine the matter after hearing evidence. Quite apart from her comments on the significance of the evidence, it is difficult to understand why, when she knew there was an issue between the parties which was still to proceed to proof, she would have offered the comment in para [5] of her note about moving towards re-instating unsupervised and residential contact. That has the plain appearance of pre-judging the outcome of the proof.

[28] A sheriff dealing with section 11 orders has a broad measure of discretion in determining the appropriate procedure and perhaps particularly so in a minute for variation where he or she:

> "may make such orders as the sheriff considers appropriate to ensure the expeditious resolution of the issues in dispute" (OCR rule 14.10A(2)).

[29] If the sheriff fixes a child welfare hearing, in terms of rule 33.22A, at that hearing

> "(4)……the sheriff shall seek to secure the expeditious resolution of disputes in relation to the child by ascertaining from the parties the matters in dispute and any information relevant to that dispute, and may–
>
> (a) order such steps to be taken, make such order, if any, or order further procedure, as he thinks fit….
>
> (6) It shall be the duty of the parties to provide the sheriff with sufficient information to enable him to conduct the Child Welfare Hearing."

[30] It is open to the sheriff to determine any application for section 11 orders at that hearing, in particular if the sheriff concludes it is unnecessary to hear oral evidence in respect that there are no material facts which require to be resolved (*H* v *H* [2016] SAC (Civ) 12, at [12], *K* v *K* [2018] SAC (Civ) 24, 2018 SLT (Sh Ct) 418 at [26]). In this case it seems clear that at the child welfare hearing the sheriff had initially been of the view that there was no purpose in hearing oral evidence at a proof and that she could decide the case on the material available to her, including the very full child welfare report. In discussing

that view with the representatives of parties the sheriff was entitled, indeed required, to take a managerial report and to convey to parties any concerns she had about oral evidence and the value thereof; and she was entitled to point out to them, for example, how difficult it would be to establish that the episodes described by the child as occurring during the holiday had happened in any particular way or amounted to some form of abuse carried out by the respondent.

[31] We are satisfied that the sheriff's comments, especially as expressed in her note, went further than that; but we stress that in so concluding, we would not wish to be seen as discouraging robust case management and challenge in such a case. Indeed, had the sheriff concluded that there was no value in a proof she may well have been entitled to reach the conclusions which she did on the available material.

[32] Further, it is perfectly acceptable for the sheriff who has made decisions on applications for *interim* orders under section 11 to go on to hear a proof in the same action. Decisions on *interim* awards are often made against a background of allegations by one parent against another which later have to be determined as true or otherwise at proof. When making such *interim* decisions the sheriff is often weighing up the allegations made, the experience of the parties and the children since the date of any alleged misconduct and, if appropriate, assessing the need for protective measures, such as supervised contact. However in such a situation the sheriff must take care not to express a concluded view on what may be hotly contested allegations of misconduct, without hearing evidence. In this action, having conceded there should be a proof, it was important that the sheriff did not say anything that might indicate that her mind was closed to the appellant's position as regards what happened during the holiday, its significance and its implications for any section 11 order.

[33] It is the combination of factors which persuade us that the sheriff has fallen into error. Having issued the note of 29 June 2018, and given its terms and her decision to allow a proof, the outcome of which was going to turn on the sheriff's assessment of what had taken place during the holiday, she ought to have granted the motion to recuse herself from hearing that proof.

[34] On the other hand, we reject entirely the submission that the sheriff's conduct of the proof demonstrated any prejudging of issues. In the first place, the sheriff had by this time, and following submissions at the case management hearing, moved from the position that she expressed at the child welfare hearing that evidence at proof should be limited to cross-examination of the respondent. In the second place, the only passage for which a transcript was provided, as already set out at para [21] above provided no evidence of lack of impartiality. On the contrary, the sheriff's intervention was an entirely proper one to an unhelpful attempt to challenge the respondent to call his daughter a liar; an approach to cross-examination which is indeed to be deprecated in proceedings of this nature. We repeat that no other part of the transcript was provided to this court and we were given no evidence of any remotely improper behaviour by the sheriff at the proof.

[35] Our decision as regards the appearance of bias would be sufficient to determine the appeal, the only remaining question being whether the sheriff's interlocutor be recalled with no further order made or the case should be remitted to another sheriff to proceed as accords, but we did hear submissions on the other branches of the appeal and in deference to these submissions we consider that we should deal, albeit more briefly, with the remaining grounds of appeal.

Did the sheriff go plainly wrong on the evidence?

Submissions

Appellant

[36] Senior counsel for the appellant maintained that the sheriff had gone plainly wrong. Her reasoning in relation to contact was inconsistent and incoherent in relation to the central question of whether serious allegations made by the child about the behaviour towards her of the respondent were established. This vitiated the sheriff's decision. We were referred to *EM* v *AM* 2016 Fam LR 2 at para [29] and *J* v *M* 2016 SC 835.

[37] It was contended that the sheriff had accepted that the child had made serious allegations about the respondent, but she had proceeded on what were said to be the irreconcilable propositions – (1) that the child was telling the truth about what she said happened to her and (2) that the child did not know what happened to her. The sheriff believed the evidence as to what the child had said. It was also clear that the sheriff accepted she was telling the truth. That was expressed most clearly in the proposed letter, where she stated, *inter alia*

> "I can tell you that I know you were telling the truth and were not making things up. I also know it must be hard for you to understand what did happen.
>
> When your daddy says nothing happened he does not mean that you are making up stories. He has told me that he was asleep all the time and did not know anything had happened. He had no idea at all until your mum told him that when you woke up your pants were at your knees…."

[38] In her judgment the sheriff explained her position thus:

> "… The child believes something happened and she requires to be reassured that she has been listened to and believed and that what she has said has not simply been ignored"(para [252]).

However, she contradicted herself as regards the truthfulness of the child's account, when she stated

> "The court is of the view that the child does not know what happened and the [appellant] is aware of that" (at para [223]).

This was repeated when the sheriff added that, by the time the child talked to the child welfare reporter, it was not clear whether the child was "adding in stuff in an attempt to satisfy the adults questioning her" (at [236]).

[39] At finding in fact [30] the sheriff found:

> "by the time of the [child welfare] report interview the child had been questioned about what happened [during the holiday] 7 times. The child does not know what happened but has been told that her father did something bad to her…"

It was submitted that it was difficult to reconcile this finding with finding [18] where the child was found to have given her account to her mother shortly after her return from the holiday.

[40] The sheriff found in terms that the respondent had not abused his child (at para [252]) and yet the sheriff immediately went on to say:

> "but that is not the end of the matter. The child believes something happened and she requires to be reassured that she has been listened to and believed and that what she has said has not simply been ignored".

[41] Senior counsel submitted that this was either incoherence or amounted to the sheriff asserting that it is it was acceptable for the court to deceive a child by telling her that she was believed ("telling the truth and not making things up") while at the same time making a finding that "the child does not know what happened to her but has been told that her father did something bad to her". If the child was telling the truth, the sheriff was required to consider whether what the child has said was innocuous or insidious, and apply the result of her decision to the question of whether the contact order sought by the defender

would safeguard and promote her welfare – she did not. If the child did not know what happened but made serious allegations, the sheriff should have considered the effect of the fact that the allegations had been made on whether contact could operate in the best interests of the child (as in *J* v *M* 2016 SC 835) – she did not.

Respondent

[42] In reply, counsel for the respondent submitted that the sheriff had not gone plainly wrong. The sheriff produced a lengthy and detailed decision. She had provided clear reasoning for her decision and applied the relevant case law: *White* v *White* 2001 SC 689, *Sanderson* v *McManus* 1997 SC (HL) 55 1997, *In Re W* 2010 UKSC 12. The findings that the child was telling the truth and that the respondent had not been abusive to the child were not irreconcilable. The narrative was not one where either the child or the respondent must be lying. It was entirely possible that the respondent did poke the child on the bottom or the bottom of her back, as she said on one occasion, when they were sharing a bed, and without him being aware of it at all. It was entirely possible that the child had wriggled her pants down to her knees when she was in bed and asleep or half asleep, given that she was on holiday in a hot country and had suffered some mosquito bites. She did not speak to her father about these two matters, and she and her father's evidence were as one on that. These two events could have happened without there being any sexual or abusive aspect to them. That was what the decision of the sheriff, after hearing evidence, reflected.

[43] The events had puzzled the child. The child's views by the time she spoke to the child welfare reporter had changed. By then the child had been told by her mother "that what her father had done to her was bad" (para [246] of the judgment). At para [252] the

sheriff recorded that the child's comment that she did not want to be alone with her father "has been caused by what has been said to her by her mother."

[44] There was no inconsistency in the reasoned decision produced by the sheriff: there was no inconsistency in finding firstly, that the child told the truth and secondly, that no abuse occurred. These two propositions can be reconciled. The letter composed by the sheriff sought to communicate to the child that she was believed, that her daddy was asleep at the time, and that her daddy should speak to her about it. It was not inconsistent with the decision which the sheriff had reached, and the decision itself was not internally inconsistent.

Decision

[45] We can deal shortly with this ground of appeal, especially since the matter may have to be revisited in further procedure. We do not accept that the sheriff has gone plainly wrong as regards her treatment of the holiday incidents or that there is any real inconsistency in her position. It is no doubt possible to identify phrases that might have been more felicitously worded – and we will have more to say about the letter – but the clear sense which is conveyed by the sheriff is that the child was telling the truth as she saw it, that there were two incidents which she found puzzling at the time and over (and in part as a result of) repeated questioning the child has herself been left uncertain as to what happened. Much of that repeated questioning was by the mother and, even on her own account, unsatisfactory: eg in confronting a young child with different accounts given by her and demanding that she choose one of them. The sheriff was entitled to accept that the child was being truthful and that incidents had happened, but equally that the respondent had neither assaulted nor abused her, as she finds in finding in fact [31]:

> "The defender did not assault the child. The child did not accuse the defender of assaulting her. The defender has not been abusive to this child."

[46] We do not accept that this was a case where the sheriff had failed to address the question whether what the child had said was innocuous or insidious, as was complained by senior counsel for the appellant: the sheriff has essentially concluded that it was innocuous. It was also complained, under reference to *J* v *M* 2016 SC 835, that the sheriff has not considered the effect of the fact that the allegations had been made on whether contact could operate in the best interests of the child. *J* v *M* was a wholly different case, where,

> "Contrary to the position adopted by the pursuer, the sheriff had no doubt that there were reasonable grounds for suspicion that the pursuer abused his daughter."

Here the sheriff does not conclude that there were such reasonable grounds and she has concluded that the parties could cooperate to make the contact order work.

The letter

[47] Clearly the letter cannot now be sent, since the appeal is to be allowed, but we do not in any event consider that a letter such as was prepared by the sheriff was an appropriate way of communicating the sheriff's decision to the child. We consider that the sheriff does adequately explain her decision to believe both the child and the respondent in her judgment, but that is a matter which requires much more careful consideration if converted into a letter to a child. Moreover, we do not consider that the offer to answer questions or to meet was one which was appropriate. Whether a letter should be sent by the sheriff to the child in due course is a matter which will depend to some extent on future procedure, but we would urge a degree of caution.

Expenses

[48] Given our decision on recusal, the sheriff's decision on expenses of the proceedings at first instance cannot stand. We will recall that order. The appropriate order in respect of the procedure at first instance is that there should be no expenses due to or by either party. Had we upheld the decision of the sheriff we would have been inclined to regard the decision on expenses as one properly within her discretion, as submitted by counsel for the respondent. The decision on uplift is incompetent in respect that it does not specify a percentage increase in taxed expenses as was required by paragraph 5(b) of the General Regulations in Schedule 1 to the Act of Sederunt (Fees of Solicitors in the Sheriff Court) 1993/3080. While counsel for the respondent invited us to remit the question of percentage increase to the sheriff we are not convinced that the criteria for uplift properly arise in this case.

[49] We were invited to reserve the question of the expenses of the appeal, but senior counsel for the appellant also asked us to certify the appeal hearing as suitable for the employment of senior and junior counsel. While questioning whether the matter required the employment of senior counsel, counsel for the respondent submitted that such certification ought properly to be addressed at the time of consideration of the expenses of the appeal, neither of the parties being publicly funded.

[50] We will reserve the expenses of the appeal and the question of certification of senior and junior counsel. We do, however, note again the obvious point that the decision of this appeal turned not on the strength of the case of either party, or indeed the conduct of parties, but rather on the particular course which the sheriff had taken in respect of declining to recuse herself and we would invite parties to reflect on that as regards any

motion for expenses and related certification; we will leave it to parties to enrol any relevant motion if expenses are not agreed.

Further procedure

[51] Senior counsel for the appellant invited us to recall the sheriff's orders and to make no further order in the cause, which would effectively bring the minute procedure to an end, leaving it open to parties to raise a further minute for variation of decree if so advised. Counsel for the respondent invited us, if we refused the appeal, to remit to the sheriff to consider family therapy, given that contact had broken down, or, if the appeal was successful, to remit to a different sheriff to proceed as accords.

[52] We do not consider it satisfactory to leave the matter unresolved and think the preferable course is to remit to another sheriff to proceed as accords. It will be for that sheriff to determine what further enquiries or measures are necessary including as regards the views and interests of the child and whether proof requires to be fixed of new and it would not be helpful for us to say any more.

Disposal of the appeal

[53] We shall allow the appeal and recall the sheriff's interlocutors dated 4 February 2019 and 6 March 2019, find no expenses due to or by either party in respect of the procedure in the sheriff court and remit to another sheriff to proceed as accords; and reserve consideration of the expenses of the appeal and certification of the appeal as suitable for the employment of senior and junior counsel.