SHERIFF APPEAL COURT

[2020] SAC (Civ) 14
PER-F205-15

Sheriff Principal D L Murray
Sheriff Principal M W Lewis
Appeal Sheriff N Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in appeal by

BRIAN ARCHIBALD SPEEDIE DOUGLAS

Pursuer and Respondent

against

SHIRLEY MUNRO or FORRESTER or DOUGLAS

Defender and Appellant

Appellant: Wild, advocate; Thompson Family Law
Respondent: Stuart QC; Macnabs

17 March 2020

Background

[1] This is a divorce action in which the sheriff granted decree of divorce and made an award of financial provision. The appellant seeks recall of the sheriff's interlocutor, dated 13 November 2018 insofar as it provides for a pension sharing order in terms of section 8(1)(baa) of the Family Law (Scotland) Act 1985 ("the 1985 Act") requiring the respondent's interest in a Self-Invested Personal Pension ("SIPP") to be shared by debiting this scheme to the sum of £68,796, and crediting that sum to such approved pension

arrangements for the appellant as may be nominated by her, with any charges arising in connection with this transfer under section 41 of the Welfare Reform and Pensions Act 1999 to be borne equally by the parties in terms of section 8A of the 1985 Act. The appellant proposes an alternative order which will increase the sums she will receive.

[2] The appellant also appeals against the sheriff's award of expenses in terms of the interlocutor of 21 January 2019 in which he modified the respondent's expenses to nil.

[3] The respondent cross-appeals on the basis the sheriff erred in making an adjustment of only 50% in the respondent's favour in respect of items relating to aliment, payments of a deposit and monthly lease payments for a Volvo motor car used exclusively by the appellant, and child maintenance payments which were not paid to him by the appellant and resulted in his deducting these sums from the aliment paid by him to the appellant.

[4] In finding in fact 44 the sheriff lists the matrimonial assets and at finding in fact 45 the matrimonial debt. It is not disputed that the net matrimonial property amounted to £578,750.

[5] A critical matter of dispute in the proof was the approach to be taken to the respondent's SIPP. The sheriff found that the SIPP which had a Cash Equivalent Transfer Value of £519,566 was matrimonial property and that conclusion was not challenged on appeal. The sheriff also found that special circumstances in terms of section 10(6)(b) of the 1985 Act applied justifying an unequal division of the matrimonial property elements of the parties' pensions. The sheriff accepted that special circumstances existed in terms of section 10(6)(b) to all of the matrimonial property elements of the appellant's pensions, which amounted to £48,187. The sheriff also found that special circumstances existed in terms of section 10(6)(b) in respect of the SIPP and that there was justification for an unequal division. He concluded that a fair division should result if he restricted the part of the SIPP

to be retained by the respondent to £223,449 leaving £229,117 of the SIPP to be divided equally between the parties. As a consequence the sum of £307,114 was available before deduction of debts for division between the parties.

[6] In the course of the appeal hearing it became apparent that some of the pages of the joint minute had been omitted from the Appendix to the Appeal Print. When these were produced parties recognised that in paragraph 139 of his Note the sheriff had mistakenly recorded the figure paid for aliment as £23,393 and this should be £20,393 as agreed by the parties by joint minute. Parties were agreed that this overstatement of the sum paid in aliment should, on the basis of the approach to calculation taken by the sheriff, and without prejudice to the arguments to be made in the appeal, increase the pension sharing order made by £1500 reflecting half the overstatement of the aliment.

[7] In finding in fact 75 the sheriff found that the appellant was assessed as liable to pay £49.08 as child maintenance. In paragraph 144 of the Note he calculated that the respondent had deducted approximately £882 from aliment payments made to the appellant and concluded that one half namely £441 should be accounted for by reducing the appellant's share of the matrimonial property. Unfortunately this figure was transposed as £414 in paragraph 170(iv) of the note. Parties were also agreed that on the sheriff's methodology, but without prejudice to the cross appeal, this should increase the net adjustment to the appellant's matrimonial property by £28 and reduce the balancing payment to her by this sum.

[8] The net effect of these two corrections would result in the order being adjusted upwards from £68,796 by (£1500 -£28) £1472 to be in the sum of £70,268.

Submissions for the appellant

[9] Although the sheriff identified the applicable provisions of the 1985 Act he had fallen into error in the application of these principles to the circumstances of the case. The matrimonial property amounted to £578,750, this should be divided equally unless there were special circumstances. However the result of the sheriff's judgment was that the appellant would only receive 21% of the net matrimonial property. The sheriff had in paragraph 103 and 104 set out his reasoning for applying an unequal division of the parties' respective interests in their pensions, but had failed to make findings in fact or findings in fact and law to reflect his conclusions that special circumstances applied. Such an extreme result in the absence of supportive findings in fact and findings in fact and law demonstrated that the sheriff had exercised his discretion unreasonably and was plainly wrong.

[10] Paragraph 168 of the sheriff's note was without reasoning or reference to the principles set out in section 9 of the 1985 Act. Even if the sheriff was correct in his approach to the fair sharing of matrimonial property the "further deductions" made by him in paragraph 170 were an unreasonable exercise of discretion.

[11] The sheriff had erred in his approach to the payments which had been made of interim aliment. In terms of the joint minute it was agreed £20,393 had been paid as interim aliment. This sum was paid as a consequence of interlocutors pronounced by another sheriff in a separate process. The sheriff, in that action had required to apply the provisions of section 1, 4 and 6 of the 1985 Act. The decision to award interim aliment was made having regard to the respective needs and resources of the parties at the time the order was made. The sheriff had misunderstood the obligation to pay interim aliment, provided for in terms of section 6 of the 1985 Act. He had erred in his determination that the sums paid to the

appellant between 24 April 2015 and July 2017 of £20,393 as interim aliment, consequent to the interlocutors pronounced by another sheriff in a separate process, should be deducted.

[12] In paragraph 140 of his Note the sheriff characterised payment of aliment in the unusual circumstances of this case as: "akin to an advance payment to the [appellant] of part of her share of the matrimonial property". The sheriff was in error in assessing this interim aliment amounted to payment in advance of capital. The interim aliment was paid from income derived by the respondent as a consequence of the pension draw-down. Drawing down from the pension diminished the transfer value of the SIPP. The sheriff made no findings of fact that the resources of the respondent required to meet the capital sum were impacted as a consequence of the payment of the interim aliment. No principles of section 9 of the 1985 Act were relied on by the sheriff to justify his approach to the sums paid by way of interim aliment. No findings in fact were made which supported an order which had the effect of requiring repayment of sums legitimately awarded in a separate process. The sheriff's approach amounted to the review of the decision of another single sheriff on the award of interim aliment, which was incompetent.

[13] The sheriff fell into the same error when considering the question of child maintenance and school fees. There is no principle within section 9 of the 1985 Act which relates to the deduction of post-relevant date obligations from net matrimonial property. No case had been established by the respondent which warranted account being taken of factors post separation which was the relevant date as provided for by section 10(3) of the 1985 Act.

[14] In relation to expenses the sheriff had erred in the exercise of his discretion in modifying the respondent's expenses to nil having regard to the resources of the parties, conduct of the case and the generally applied principle that in family law cases that

expenses should not automatically follow success. His approach was outwith the band of the reasonable exercise of his discretion and was plainly wrong.

[15] In response to the cross appeal the appellant submitted that if the court did not uphold the argument made by the appellant in the principal appeal the court should find that the sheriff had, looking at matters in the round, exercised his discretion in making the adjustments for the post separation debt payments in the manner which he had in order to achieve a fair sharing of the matrimonial property. This struck a fair balance by taking account of some of the interim aliment paid to the appellant in reducing the sums otherwise payable to her.

Submissions for the respondent

[16] The sheriff had prepared a comprehensive judgment dated 13 November 2018 which included 91 findings in fact and extensive reasoning. On 21 January 2019 following argument the sheriff issued an interlocutor and Note which dealt with expenses and modification of the same.

[17] The appellant's identification that she received only 21% of the matrimonial property was misconceived. The obligation on the sheriff is to achieve fairness and a range of non-exhaustive factors are provided by section 9 of the 1985 Act to enable him to achieve that result. In this case the sheriff explains in detail the process which he has undertaken.

[18] The sheriff in making the pension sharing order was exercising a discretion given to him in terms of sections 8, 9 and 10 of the 1985 Act. He had made findings in fact and explained his reasoning. Contrary to the position as advanced by the appellant the sheriff's reasoning could be ascertained. It could not be said that he had taken account of immaterial

factors nor that he had failed to take account of material considerations. He was entitled for the reasons he explained to reach the conclusion which he did.

[19] There was no substance to the appellant's criticism of the sheriff's approach to aliment. It was clear that the order for interim aliment had been made on the basis that the funds in the respondent's SIPP would be utilised to make the payments. That position fell to be distinguished from a situation where payment of aliment was funded from one party's income to support their spouse post separation. It was manifestly reasonable for the sheriff to conclude that the reduction in the value of the SIPP consequent on payments of aliment should be treated as a special circumstance. The joint minute provided that:

> "Between the relevant date and the date of the [appellant's] abandonment of her action for aliment (court ref F92/15) the [respondent] paid to the appellant £20,393 by way of aliment. Said sum was paid by way of withdrawals from the [respondent's] pension fund."

That agreement was recognised in finding in fact 83 although the sum paid as interim aliment was misstated as being £23,393, instead of the agreed figure of £20,393. But, subject to that there was no error in the sheriff's reasoning that the matrimonial property be reduced by the £20,393 paid as interim aliment, which had been funded by withdrawals from the SIPP.

[20] In paragraph 170 of the Note the sheriff set out adjustments to be made in the respondent's favour for "post separation debt payments". His approach had been to make adjustment in the respondent's favour for half of the debts due to Alastair Houston, Blacksmith's cottage debts post and pre separation and Oakwood debts post separation. He had also adjusted for half the aliment paid to the appellant, £8,202 being half the Volvo car payments and half the child maintenance payment deductions from aliment. The now agreed figures for half the aliment should be £10,197, and unpaid child maintenance £441. It

was submitted that as the aliment, child maintenance and car payments had directly benefited the appellant as opposed to being a payment to a third party, and in order to achieve fair sharing as required by section 9 of the 1985 Act, as evidenced by the final schedule which the respondent produced, for these three items the adjustment in the respondent's favour should have been for the full sums £20,393, £16,404 and £882. The sheriff had apparently failed to take account of the benefit to the appellant which warranted the intervention of this court.

[21] It is trite that appeals against expenses are discouraged, except where there is an obvious miscarriage of justice. The appellant has given no specification that the sheriff applied the incorrect test, or took account of a material fact or failed to take account of a material fact in modifying the expenses to nil. It was clear from the sheriff's Note that he had regard to the relevant sections of *Bell* v *Inkersall Investments Ltd (No2)* 2007 SC 823. Courts frequently modify expenses to nil. The sheriff explained his reasoning and there is no basis to say that this discretionary decision to modify expenses to nil should be overturned.

Decision

[22] We found parties' written submissions to be of assistance, and particularly the appellant's draft proposed order were her appeal to be successful and the respondent's revised schedule.

[23] Section 9 of the 1985 Act provides that the net value of the matrimonial or partnership property is to be shared fairly between the parties. Section 10(1) provides that the matrimonial or partnership property is taken to be shared fairly when it is shared equally or in such other proportions as are justified by special circumstances. Those special

circumstance are not restricted to the five examples provided in section 10(6)(a)-(e). In *Jacques* v *Jacques (No3)* 1997 SC (HL) 20 Lord Clyde at page 24 identified that the presumption was for equal sharing unless there were special circumstances which justified an unequal division, but he also made clear that even where special circumstances are found that of itself does not require a deviation from equal sharing; what matters is that a different apportionment is justified. The determination of whether such special circumstances exist and the weight to be given to them is a discretionary decision to be considered with a view to achieving the underlying objective of fairness.

[24] As an appellate court undertaking a review of what is a discretionary decision of the sheriff we must be satisfied that the decision of the sheriff is plainly wrong, or that he has misdirected himself on the law, has misunderstood or misapplied the evidence, or taken account of an irrelevant consideration or failed to take account of a relevant consideration, before overturning the decision at first instance.

[25] While it would have been preferable for the sheriff to have made a specific finding in fact and law that he found there to be special circumstances, the court in considering the judgment was readily able to ascertain the reasoning of the sheriff. We do not therefore accept the appellant's submission that the decision is defective, where the court, or in our view either party, can (subject to what we say below) readily comprehend the factors which the sheriff took into account and his conclusions.

[26] We reject the appellant's argument that the sheriff's note fails to give any reasoning for his approach to the parties' pensions. The judgment gives a full explanation for his methodology and it is plain that his conclusion, that special reasons existed and an adjustment should be made, was a reasonable exercise of his discretion.

[27] The terms of the joint minute reflect that the aliment paid to the appellant was funded by withdrawals from the respondent's SIPP. We accept that the sheriff was entitled on the facts of this case to treat that as a special circumstance which warranted his making an adjustment to equal sharing.

[28] We also accept that the sheriff was entitled to make adjustments in the respondent's favour in relation to post-separation debt payments. The sheriff has not explained in any detail, in an otherwise full and careful judgment, why he has only made adjustment in the pursuer's favour for one half of the agreed sum paid as aliment, £10,197, half the costs relating to the Volvo, £8,202 and £441 being the correct figure for one half of the child maintenance. The respondent argued that the appellant had the benefit of these monies, and an adjustment should be made of the whole sums. Some explanation for the sheriff's approach to post separation debt payments is to be found in paragraphs 128 and 129 of the Note and it is not clear that the distinction which the respondent sought to draw in respect of these payments was made clear to the sheriff. The sheriff has looked correctly at matters in the round and sought to make adjustments with a view to achieving a fair division (paragraph 129). Having given consideration to various items in paragraph 170 of his Note he makes an adjustment in the respondent's favour of one half of the "post separation debt payments". We accept that the sheriff was entitled to make an adjustment to reflect that interim ailment was funded by withdrawals from the SIPP and the judgment must be looked at as a whole. The respondent in the cross appeal seeks to challenge a very specific component of the sheriff's accounting. As is made clear in *Jacques* v *Jacques* at 22, where Lord Jauncey approved what was said by the Lord President in *Little* v *Little* 1990 SLT 785 at 787:

> "…the matter is essentially one of discretion, aimed at achieving a fair and practicable result in accordance with common sense. It remains as important as it always has been that the details should be left in the hands of the court of first instance and not opened up for reconsideration on appeal"

We are not therefore inclined to interfere with this component of the sheriff's decision. To further increase the adjustment in the manner proposed by the respondent would be unduly favourable to the respondent and not achieve a fair sharing. We shall therefore refuse the cross appeal.

[29] The appeal also seeks to challenge the decision of the sheriff on expenses. An appeal on expenses alone is highly unlikely to be entertained unless there has been an obvious miscarriage of justice or the expenses have become markedly more valuable than the merits or indeed a question of principle is involved. We find that none of these factors are applicable in the instant case.

[30] It is important to stress also that in making an award of expenses a sheriff is making a discretionary decision. We repeat again that an appellate court will be slow to interfere with a discretionary decision unless it may be shown that the judge did not exercise his discretion at all, or that in exercising it he misdirected himself on the law or misunderstood or misused material facts before him, or took into account an irrelevant consideration or failed to take account of some relevant consideration, or if his conclusion is such that although no erroneous assumption of law or fact can be identified he must have exercised his discretion wrongly and reached a conclusion which is plainly wrong.

[31] A Note was annexed to the interlocutor of 21 January 2019. The sheriff recognised the normal rule is that expenses follow success, but with reference to authority, that this might not always be applied with its full rigour in family actions. The sheriff very properly expressed disappointment that there was:

> "apparently so little attempt at negotiation of a settlement prior to litigating a nine day proof in the case, with experienced counsel on both sides, and when both parties were legally aided. This rather reflects the repeated failure of agents and counsel to communicate effectively in the course of the proof itself…."

He explained that he found the appellant successful on what he identified as the most important issue in the case - that the respondent's pension fund was matrimonial property but that on other matters there was mixed success. We find no basis to interfere with his decision that the respondent be found liable to one half of the expenses of the proof.

[32] The thrust of the appellant's submission on the award of expenses was to challenge the sheriff's decision to modify the expenses to nil. We again accept that the sheriff exercised his discretion in a manner which was reasonable in all the circumstances. He had regard to the leading case of *Bell* v *Inkersall Investments Ltd (No2)* 2007 SC 823. He correctly identified that was authority that an assisted person has no automatic right to modification of an award under section 18(2) of the Legal Aid (Scotland) Act 1986. Such a decision is a matter for the discretion of the court, but is not unfettered. It is clear that the sheriff had regard to the relevant factors, did not leave a factor out of account and reached a conclusion which falls within his discretion. Accordingly we shall refuse the appeal against the interlocutor of 21 January 2019 and adhere to the sheriff's interlocutor.

[33] Given the errors in the decision which have been identified we shall modify the interlocutor of 13 November 2018 to substitute the increased figure of £70,268 for the £68,796 specified by the sheriff to be credited as a pension sharing order in favour of the appellant.

[34] In relation to the expenses of the appeal we shall accede to the joint invitation of the parties to sanction the employment of counsel and to find no expenses due to or by either party for the appeal or cross appeal.