**Easter Term**
**[2012] UKSC 21**
*On appeal from: [2010] CSIH 83*

# JUDGMENT

# NJDB (Appellant) *v* JEG and another (Respondents) (Scotland)

**before**

**Lord Hope, Deputy President**
**Lady Hale**
**Lord Clarke**
**Lord Wilson**
**Lord Reed**

## JUDGMENT GIVEN ON

## 23 May 2012

**Heard on 13 and 14 March 2012**

*Appellant*
Andrew Smith QC
John Halley
(Instructed by Jardine Donaldson Solicitors)

*Respondent*
Simon di Rollo QC
Stuart Buchanan
(Instructed by Virgil Crawford & Co Solicitors)

*Respondent*
Andrew Hajducki QC
Maggie Hughes
(Instructed by Campbell Smith WS LLP)

**LORD REED (WITH WHOM LADY HALE, LORD CLARKE AND LORD WILSON AGREE)**

1. This appeal concerns a child, S, who was born on 1 April 2000. His father is the appellant, and his mother is the first respondent. The second respondent is a solicitor who was appointed as curator ad litem to S in respect of these proceedings. The issue between the parties is whether the appellant should have contact with S.

2. The appellant and the first respondent began a relationship in 1997. It ended a few months after S's birth. The first respondent subsequently married BG. She has a daughter, Z, by a prior relationship. She also has a son, A, by her marriage to BG.

3. After the relationship between the appellant and the first respondent ended, the appellant had residential contact with both Z and S for some time. In October 2003 the appellant began proceedings in Alloa Sheriff Court in which he sought an order finding that he had parental rights and responsibilities in relation to both Z and S. He also sought a residence order in respect of each of them, or alternatively an order for residential contact with each of them. On 20 January 2004 the sheriff found the appellant entitled to parental rights and responsibilities in respect of both children, made no order meantime regarding contact with Z, and found the appellant entitled to interim residential contact with S. A diet of proof was fixed for July 2004. The proof did not however proceed: following negotiations, the appellant and the first respondent entered into a joint minute of agreement, to which the court gave effect in terms of an interlocutor dated 7 July 2004. That interlocutor granted the appellant parental rights and responsibilities in respect of S, made provision for the appellant to have residential and non-residential contact with S, and provided that the appellant was to be consulted by the first respondent on matters of importance relating to S's health, welfare, education and upbringing. The interlocutor failed however to specify when the contact was to begin.

4. Disputes began almost immediately over the implementation of the interlocutor. Residential contact nevertheless continued to take place. In December 2004 the appellant lodged a minute seeking the variation of the interlocutor of 7 July 2004 so as to grant him a residence order in respect of S. That minute initiated the proceedings with which this appeal is concerned. In response, the first respondent sought the recall of the interlocutor of 7 July 2004 and the withdrawal of all contact between the appellant and S. The appellant also lodged a second

minute, in which he sought to have the first respondent found in contempt of court by reason of her failure to comply with the interlocutor of 7 July 2004.

5. Protracted procedure then took place, during the course of which the sheriff made a number of orders regulating contact ad interim. He also appointed the second respondent as curator ad litem to S, and directed him to investigate and report to the court on the arrangements for contact. The second respondent carried out investigations and reported. He also entered the process as a party. In doing so, he conducted his own case. Pleadings were prepared on behalf of all three parties. In their final form, they were extensive, and covered in detail the history of the parties' dealings with each other in relation to S and Z. They contained a wide variety of allegations, including allegations relating to Z and A, which were said to cast light upon the characters and personalities of the appellant and the first respondent, and the suitability of the appellant to have contact with S. Allegations were also made concerning BG. The pleadings on behalf of the second respondent set out the history of his dealings with the other parties and with S, and his position in relation to the matters averred on behalf of the other parties. Unsurprisingly, given their scope, the pleadings took a considerable time to prepare and underwent frequent adjustment and amendment as incidents occurred during the course of the proceedings on which the parties wished to found. In October 2005 the sheriff eventually ordered that an open record be made up and intimated to BG.

6. Later in October 2005 the sheriff allowed BG to be sisted as a party to the proceedings, and suspended all contact between the appellant and S. The sheriff also at that stage allowed a proof on both the minute for variation and the minute for contempt. A diet was fixed for January 2006 but was discharged in December 2005 on the joint motion of the parties. BG withdrew from the proceedings at that stage. The minute for contempt of court was subsequently dismissed on the appellant's motion. On 2 February 2007, the sheriff allowed the parties a proof before answer on the pleadings as they then stood. No date was however fixed on which the proof was to proceed. Contact between the appellant and S continued from April 2006 until August 2007, since when it has not taken place.

7. In January 2008 the proceedings were transferred to Stirling Sheriff Court. Eventually, following further amendment of the pleadings, on 5 June 2008 the sheriff allowed parties a proof of their averments. By that stage, more than three years had passed since the proceedings had begun. An eight day diet of proof was fixed to begin on 10 September 2008. In the event, the proof ran to 52 days of evidence and took more than a year to complete. The appellant gave evidence for seven days. The evidence of the first respondent lasted for eighteen days. Evidence was also given by a number of other witnesses, including several expert (or supposedly expert) witnesses. The proof was eventually concluded on 23 November 2009. The sheriff issued his decision on 22 January 2010, more than five years after the proceedings had begun. His judgment ran to 173 pages, of

which 35 comprised his findings of fact (163 in number) and the remainder comprised his note.

8. In his interlocutor of 22 January 2010, the sheriff recalled the interlocutor of 7 July 2004 and withdrew all contact between the appellant and S. Following an appeal to the Court of Session, the Inner House varied the sheriff's interlocutor so as to restore the appellant's parental rights and responsibilities (which the sheriff, by recalling rather than varying the interlocutor of 7 July 2004, had inadvertently withdrawn), but otherwise refused the appeal. In the opinion of the court (reported at 2011 SC 191, 2010 Fam LR 134), delivered by the Lord President, it was noted that the cost of the proceedings, excluding judicial costs, had been estimated at about £1 million, of which by far the larger proportion had been borne by the Scottish Legal Aid Board. The present appeal is brought against the decision of the Inner House.

*Discussion*

9. It is important to note at the outset the limited nature of the jurisdiction exercised by this court in an appeal of the present kind. Where an appeal is taken to the Court of Session from the judgment of a sheriff or sheriff principal proceeding on a proof, the judgment of the Court of Session on any such appeal is appealable to the Supreme Court only on matters of law: Court of Session Act 1988, section 32(5). Counsel for the appellant accordingly accepted on the appellant's behalf the findings of fact which were made by the sheriff, and confined his submissions to three points. First, it was argued that the sheriff had failed to address his mind to the appropriate legal framework. In that regard, counsel founded upon the sheriff's failure to refer to the relevant statutory provision, namely section 11 of the Children (Scotland) Act 1995 as amended, or to the case law providing guidance as to its application. Secondly, it was argued that the sheriff's findings could not reasonably warrant the conclusion which he reached. In that regard, counsel submitted that most of the sheriff's findings, and most of his note, were concerned with matters whose relevance to the real issue was at best peripheral. Thirdly, it was argued that the sheriff had failed to act judicially, and that his decision should not therefore be allowed to stand. In that regard, counsel founded upon remarks made by the sheriff about the appellant and the counsel who represented him at the proof, which were said to betray a lack of objectivity and impartiality. Each of these arguments had been presented to the Inner House, which was said to have erred in law in rejecting them.

10. In relation to the first argument, it is common ground that the test which the sheriff required to apply in the circumstances of this case is set out in section 11(7)(a) of the 1995 Act:

> " … in considering whether or not to make an order under subsection (1) above [viz an order in relation to parental responsibilities, parental rights, guardianship or the administration of a child's property] 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 …"

As Lord President Rodger observed in *White v White* 2001 SC 689, para 14, this is merely the latest in a long line of similar provisions going back to the Guardianship of Infants Act 1925.

11. In the present case, it is apparent that the sheriff had in mind the correct test. His findings in fact, after dealing at length with the entire range of issues about which evidence had been led, finally turn to the central issue in the case in findings 160 -162:

> "(160) … If contact between S and pursuer were to occur, handovers would take place amid an atmosphere of hostility, assuming that S willingly attended for contact. Were a contact order to be made, S would be unwilling to attend. It is probable that he would refuse to attend. It would probably distress him and involve him again in the continuing conflict between the parties. There is no third party that would be prepared to take on the role of intermediary. It is not in S's best interests that he is exposed to such conflict.
>
> (161) Having regard to S's age, the history of these matters to date and the influences at work on S, he would not derive any benefit from contact in such circumstances.
>
> (162) Contact with his father is not consistent with S's welfare or best interests."

The sheriff's second finding in fact and law is as follows:

> "(2) That it is in the best interests of S that he does not have contact with his father".

It is plain from these findings that the sheriff treated the welfare of the child as the paramount consideration, and considered whether it was in the child's best interests that an order for contact should be made.

12. In his note, the sheriff again considered at length the matters about which evidence had been led, before turning in para 338 to the question: "So, what is in S's best interests?" In answering that question, he noted the "intensity of hatred and bitterness" between the parties, and the impossibility of their conducting themselves civilly towards one another in relation to contact. He also noted the absence of any realistic prospect of contact being facilitated by an intermediary. He continued:

> "[344] If I made a contact order … S would inevitably be exposed to a perpetuation of the conflict he has had to endure now for more than six years. He is only nine, so he has endured this conflict for two-thirds of his life. Exposure to conflict is not in a child's best interests. … There is the danger, of course, that if no contact order is made and S does not see his father now, there may be emotional consequences of a psychological nature as he reaches adolescence. He might resent his mother and consider her responsible for cutting his father out of his life…
>
> [345] In considering what is in S's best interests, it is a question of now balancing the disadvantages or risks against the benefits of contact. It is, in my view, almost certain and indeed may be inevitable, that if a contact order were to be made forcing S to see his father, not only would S be re-exposed to the conflict between his parents; he would also be asked to do something that is against his present wishes. … Contact simply would not work. It would, for S, deteriorate into nothing more than a focus of argument, contention and turmoil with his mother, father and step-father. The defender and her husband would continually suspect, with good reason, that the pursuer would be undermining S's relationship with his mother and step-father and would again seek to have S live with him. It is not in S's best interests that he should be exposed to that.
>
> [346] Since September 2007 when there has been no contact, he has not shown any sign of distress or that he has missed his father or wants to see him. He has thrived in his father's absence and is a happy, well-balanced boy who is performing satisfactorily at school. Two and a half years is a significantly lengthy period during which, if he were suffering from any internal emotional conflict because he

did not see his father, signs might conceivably have been expected to have emerged.

…

[349] In these circumstances, it is in the best interests of S that he should not have any contact with his father."

13. It is again apparent from these passages that the sheriff treated the welfare of the child as the paramount consideration, and considered whether it was in the child's best interests that an order for contact should be made. In those circumstances, the sheriff's failure to make any explicit reference to section 11 of the 1995 Act, or to authorities such as the case of *White*, is of no consequence. It is indeed scarcely surprising: the test set out in section 11(7) (a) is applied daily by sheriffs, and is one with which any sheriff could be expected to be familiar.

14. The second argument advanced on behalf of the appellant, namely that the sheriff's findings could not reasonably warrant the conclusion which he reached, must also be rejected. Given his findings that contact would involve the child in conflict between his parents, that he would be unwilling to take part in contact and would probably refuse to attend, that contact would probably distress him, and that he would not derive any benefit from contact in such circumstances, the sheriff plainly had a reasonable basis for his conclusion that contact would not be in the child's best interests. Indeed, in the light of the history set out in the sheriff's judgment, his conclusion appears to have been inevitable.

15. All that said, there is force in counsel's submission that the greater part of the sheriff's findings and note is concerned with matters which are by no means of central significance. The focus of most of the judgment is upon the adults rather than the child: their character, their attitudes and behaviour towards one another, and the truth or falsehood of the various allegations they have made against one another. This however reflects the evidence which was led on the basis of the pleadings, and the sheriff's obligation to make findings in relation to that evidence.

16. In support of his third argument, counsel submitted that the sheriff had made critical remarks about the appellant and the counsel who represented him at the proof which were expressed in inappropriate and intemperate language. The appellant's evidence in relation to certain aspects of the case, for example, was described variously as "pathetic", "weasel-worded" and "abhorrent, reprehensible and spineless". The appellant himself was described as "leech-like". The criticisms of counsel were also expressed in trenchant terms.

17. It is apparent from the sheriff's findings and note that in this case, as not infrequently occurs in the context of family law, the character, personalities and attitudes of the parties were relevant, to some extent at least, to determining whether the order sought would be in the best interests of the child. They were also the subject of a great deal of evidence. It was therefore appropriate for the sheriff to make findings in that regard. In such circumstances, however, a judge may have to strike a difficult balance between plain speaking and appropriate restraint. That balance may be particularly difficult to strike in the stressful circumstances of a tense, protracted and bitterly fought litigation. It is only exceptionally – if, for example, the tone of the judgment gives rise to a reasonable concern as to the judge's impartiality – that the language used by a judge in such circumstances can give rise to an issue of law which might vitiate his decision; and, as I have explained, this court's jurisdiction in an appeal of this nature is confined by statute to matters of law. In the present case, I cannot detect any error of law in relation to this matter. I note in particular that the sheriff appears to have been even-handed in his criticism, with aspects of the first respondent's evidence, and her character, also being castigated in robust terms.

18. So far as the criticisms of the counsel who appeared at the proof are concerned, this court was not invited to assess whether the criticisms were justified. The principal focus of counsel's concern was that criticisms which were liable to damage counsel's reputation and career should be made in a context which provided no opportunity for rebuttal or even for a hearing. If the sheriff had complained to the appropriate professional body, for example, then a fair procedure would have been followed before any adjudication was made as to whether the complaint was justified or not. If counsel had been provided with the judgment in draft, he could have requested an opportunity to address the court. Counsel however had no warning of the sheriff's intention to make such criticisms in his judgment.

19. There is no doubt that a judge is entitled to comment in his judgment on the conduct of counsel appearing before him. Some judges will express such criticisms more forcefully than others. It could only be in exceptional circumstances that such criticisms could give rise to an issue of law falling within the jurisdiction exercised by this court under section 32(5) of the 1988 Act. In the present case, the concerns expressed about the fairness of the procedure followed do not raise such an issue. If, under current practice, counsel may have neither advance warning of such criticisms, nor any opportunity to respond, that is however a matter which any fair-minded sheriff or judge will bear in mind. It should also be borne in mind by any third parties who read such criticisms; and, if they are minded to act upon them, they can consider whether they ought in fairness to give counsel an opportunity to respond.

20. For these reasons, the appeal must be dismissed. Before parting with this deeply troubling case, however, there are a number of matters upon which it is appropriate to make some observations.

21. The first matter is the length of the proceedings before the sheriff. I have explained that the proceedings for variation of the contact order began in December 2004, when S was four years of age, and ended in January 2010, when he was nine. The glacial pace of the proceedings was itself inimical to the best interests of the child. As I have explained, residential contact between the appellant and S was taking place when the proceedings began, and it continued during the first three years when the proceedings were before the court. It was only after that amount of time had elapsed that S refused to have further contact with the appellant. It is clear from the sheriff's judgment that the proceedings have overshadowed the life of this young child, perpetuating and deepening the conflict between his parents which has caused him such distress.

22. There is no need for a dispute over contact to take so long to resolve. It did so in this case only because the court allowed the parties to determine the rate of progress. The duty to avoid undue delay in the determination of disputes of this nature, in order to comply with the obligations imposed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, has been made clear many times by the European Court of Human Rights. As the European Court has explained, undue delay in such proceedings may have irreversible effects upon the child (*Bronda v Italy* (1998) 33 EHRR 81, para 61), and may in any event bring about the de facto determination of the issue (*H v United Kingdom* (1987) 10 EHRR 95, paras 89-90). Parliament has recognised, in section 1(2) of the Children Act 1989, that "in any proceedings in which any question with respect to the upbringing of a child arises … any delay in determining the question is likely to prejudice the welfare of the child". There is no equivalent provision in the 1995 Act; but even in the absence of such a provision, the principle is obvious, and is amply demonstrated by the present case.

23. The second matter is the cost of the proceedings, which is of course in large measure a consequence of their length. The cost of the proceedings before the sheriff, in particular, was wholly disproportionate to the complexity of the issues which had to be resolved. It is a cost which could only arise in proceedings of this kind where the parties were publicly funded: it is inconceivable that any reasonable person would expend resources on this scale on a dispute over contact if the money were coming out of his or her own pocket.

24. These matters might be of lesser concern if this case were exceptional. But the Lord President records that, as the judges of the First Division were informed,

in cases of this kind in the Sheriff Court such protracted proceedings are not uncommon.

25. In the opinion delivered by the Lord President, emphasis was placed at para 23 upon the duty of counsel and other professional advisers to concentrate on the issue, namely the welfare of the child, rather than exploring every byway in the relationship between the parents. It was observed that, under current arrangements, sheriffs were not best placed to control the scope of proceedings, since the scope of a proof was determined by the pleadings, and the pleadings were largely in the hands of professional advisers. It was suggested that it might be that the liberty which professional advisers enjoyed in this field should be curtailed. Similar observations were made by the Inner House in *B v Authority Reporter for Edinburgh* 2011 SLT 1194, 2011 Fam LR 96, para 21, where it was also suggested that the Scottish Legal Aid Board might wish to review its rules for the payment of professional fees to solicitors and counsel in such cases, with a view to discouraging the prolongation of proofs.

26. I would respectfully endorse those observations. A fundamental problem in the present case was that counsel, in the pleadings, made averments about everything which was arguably relevant to the question whether contact was in the child's best interests; and those pleadings were then treated as dictating the scope of the proof. It is not altogether surprising that counsel cast their net so widely, given the wide range of matters within the life of a child and his parents which can be said to have some relevance to a dispute over contact. Indeed, even if counsel for one of the parties had been prepared to focus upon the matters of the most immediate significance, the introduction by his opponent of allegations relating to less central matters might in practice have required him to respond in kind. Equally, there was little the sheriff could do to prevent counsel from pleading their case as fully as they chose, although the time allowed for the adjustment and amendment of the pleadings need not have been as generous as it was: as explained earlier, it was only three and a half years after the proceedings had begun that the pleadings were finally closed and the proof allowed. In the absence of any judicial control over the leading of evidence within the scope of the pleadings, it was inevitable that the proof would be of considerable length.

27. In the context of adoption proceedings, rules providing for a degree of judicial case management were introduced in 2009. They have been supplemented by valuable guidance as to good practice in the form of Practice Notes. More general judicial case management of family proceedings in the Sheriff Court has been recommended in the *Report of the Scottish Civil Courts Review* (2009), chaired by Lord Gill. Following the observations made by the Inner House in the present case and in *B v Authority Reporter for Edinburgh*, a working group was established by the Sheriff Court Rules Council in August 2011 to consider and report to the Council what rules of procedure, if any, might usefully be put in place

to expedite proceedings in cases involving the welfare of children. As we were informed, that work remains in progress.

28. It appears therefore to be accepted that the system by which such disputes are dealt with in Scotland is in need of reform. This case exemplifies the reasons why reform is necessary. In the circumstances, I would make only three observations.

29. First, I would question whether traditional pleadings are the best means of identifying the issues to be explored at a proof in such cases. As has become apparent in Scotland in other areas of practice, and as has been demonstrated in other jurisdictions in the context of family law, there are other possible means, which may be simpler, quicker and cheaper, of identifying the relevant issues and giving adequate notice of the matters about which evidence is to be led. This matter was considered in the *Report of the Scottish Civil Courts Review*, which recommended (in Recommendation 116) the introduction of an abbreviated form of pleadings, and of judicial control of any procedure for their adjustment or for the provision of further specification.

30. Secondly, further consideration might be given to the structure of a sheriff's judgment proceeding on a proof. The form of judgments received some consideration in chapter 10 of the *Report of the Scottish Civil Courts Review*, but the focus of the review in that regard was primarily upon the scope for greater use of ex tempore judgments. The traditional form of written judgments in ordinary causes was not questioned. Nevertheless, the form of judgment which has been prescribed for the Sheriff Court (but not for the Court of Session) since at least 1851, divided into findings of fact and law, and a note in which the findings are explained, has certain disadvantages, which are of particular importance in a case of the present kind.

31. There is in the first place a danger, which the present case illustrates, that the form of the judgment may distract the sheriff from what ought to be the principal focus of his attention. When the court is requested to exercise its discretion to make an order under section 11 of the 1995 Act, it is required, as I have explained, to regard the welfare of the child as its paramount consideration, and it must not make any 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: section 11(7)(a). The central issue in such a case is therefore the effect of an order upon the welfare of the child. In carrying out the duties imposed by section 11(7)(a), the court is required to have regard to a number of specified matters, including the need to protect the child from any abuse (defined as including any conduct likely to give rise to distress), and the need for the child's parents to co-operate with one another: section 11(7A)-(7E). In addition to the matters specified in the Act, the

court will also require to consider any other matters which bear directly upon the issues focused in section 11(7)(a), such as the child's needs and any harm which the child is at risk of suffering. The court is also required to have regard to the views of the child, so far as those may be ascertainable: section 11(7)(b). Against that background, a judgment will most clearly address the central issue in the case if it focuses directly upon the factors which are relevant to the court's exercise of its discretion, rather than concentrating primarily upon the myriad questions of fact which may be in dispute, many of which may be peripheral to that central issue. It is of course essential that the court's findings on any relevant matters of fact should be made clear, but that can be done within the ambit of a judgment whose primary focus is upon the central issue, and which in consequence demonstrates the nexus between that issue and the findings of fact.

32. In addition, the traditional form of judgment can involve substantial duplication, as the present case demonstrates. In a case where a large amount of evidence has been led, that element of duplication is liable to add considerably to the work of the sheriff, and thus to the time necessary to produce the judgment. It is questionable whether it confers a corresponding benefit upon the parties or upon an appellate court. Generally, in relation to this matter, I respectfully agree with the judgment of Lord Hope.

33. The third observation I would make is that it is easier to change rules of court than to change a prevailing culture. The introduction of procedural rules providing for judicial case management is no guarantee that proactive and effective case management will become a reality. In that regard, the court was referred to another dispute over contact which came on appeal before the Inner House during 2011, in which the proof had been even more protracted and expensive than that in the present case, although it had been preceded by numerous hearings before a specialist sheriff for the purpose of case management. As the Inner House indicated in *B v Authority Reporter for Edinburgh*, financial discipline may also have a role to play.

34. In the meantime, there are measures which the courts themselves can take in order to set their house in order. One obvious step is for sheriffs to exercise their existing powers to ensure that proceedings are conducted with reasonable expedition. Those include powers in relation to time limits for the lodging and adjustment of pleadings, the allowance of amendments, the fixing of proofs and the leading of evidence. In particular, contrary to the impression conveyed by some of the submissions in the present case, the sheriff's role at a proof is not confined to ruling on objections and otherwise sitting impassively in silence. He possesses the power to intervene to discourage prolixity, repetition, the leading of evidence of unnecessary witnesses and the leading of evidence on matters which are unlikely to assist the court to reach a decision. Equally, he can encourage the use of affidavits and other documents (such as reports) in place of oral evidence, or

as the equivalent of evidence in chief. These are only examples of measures which can be taken.

35. The final matter upon which it is appropriate to comment is the role of the second respondent as curator ad litem. A curator ad litem is an officer of the court, appointed to safeguard the interests of the ward so far as they are affected by a particular litigation. In the present case, it appears from the relevant interlocutor that the appointment of the second respondent as curator was intended to enable the court to be provided with information by means of a report. The sheriff subsequently allowed the second respondent to become a party to the proceedings. The second respondent then lodged extensive pleadings covering all aspects of the case, and attended every day during the proof, cross-examining witnesses and giving evidence himself. As this court was informed, this involved his questioning witnesses about events and conversations in which he had been personally involved, and later removing his gown and entering the witness box in order to give his own account of the same events and conversations.

36. As this court was not fully addressed on the legal issues arising from the second respondent's appointment and subsequent conduct, I shall confine myself to two brief observations. First, it is difficult to avoid the impression that there may have been a lack of clarity as to the role of the curator ad litem, in particular (but not only) at the proof. Secondly, it was inappropriate in the circumstances of this case for the second respondent to conduct the proof in person, given that it concerned matters in which he had been personally involved and in relation to which he might require to give evidence. I note that certain of the Ordinary Cause Rules concerned with curators ad litem, such as rules 33.16(9)(b) and 33A.16 (9)(b), are drafted on the basis that a curator who becomes party to proceedings will instruct representation. That reflects the fact that he is the dominus litis: he is not acting on behalf of a client, and he may himself require legal advice and assistance. The court was told that the reason for the second respondent's personal conduct of the proceedings was that the Scottish Legal Aid Board would meet his professional charges only if he acted as a solicitor. This was taken to mean that he was compelled to conduct the proceedings as a party litigant. That explanation again suggests a lack of clarity as to the curator's role. A curator ad litem is in principle entitled to be remunerated for professional services which he renders in the course of his duties as curator (*Pirie v Collie* (1851) 13 D 841), but that principle tells one nothing about what the scope of those duties may be in any particular case. If they do not include the professional conduct of proceedings in court, the fees which might be charged by a solicitor conducting such proceedings on behalf of a client do not fall within the ambit of his remuneration.

37. The *Report of the Scottish Civil Courts Review* noted concerns about the appointment and remuneration of curators (and other persons appointed to safeguard a child's interests), their qualifications and training, the standards of

their work, and a lack of clarity and consistency about what is expected of them. A number of recommendations were made in relation to these matters. The present case highlights the need for these matters to be addressed.

## LORD HOPE (WITH WHOM LADY HALE, LORD CLARKE AND LORD WILSON ALSO AGREE)

38. I agree with Lord Reed, for all the reasons that he gives, that this appeal must be dismissed. Counsel for the appellant said all that could properly be said on the appellant's behalf, given that the judgment of the Court of Session was appealable under section 32(5) of the Court of Session Act 1988 only on matters of law. But I do not think that it is possible to detect an error of law in the way the Court of Session disposed of this case.

39. The argument that the sheriff failed to address his mind to the requirements of section 11(7)(a) of the Children (Scotland) Act 1995 did, at first sight, have something to commend it. It was not easy, in working through a judgment of such extraordinary length (see para 7, above), to detect the passages that could be relied upon to show that he did have regard to S's welfare as the paramount consideration. Only three out of the 163 findings of fact in his interlocutor deal with this issue, and it is mentioned in only four paragraphs at the very end of his note. It is the duty of a judge in every case to set out clearly the grounds for his decision. The appellant was entitled to be told why the sheriff reached the decision that contact with him was not in S's best interests, and the reasons ought to be plainly set out so that they can be easily found and readily understood by the ordinary reader. The imbalance between the sheriff's treatment of the other issues in the case and the one issue which, in the end of the day, was of crucial importance to his decision is as striking as it is unfortunate. But I am satisfied that there is enough in the passages which Lord Reed has set out in paras 11 and 12, above, to show that the sheriff did address his mind to that issue in the way the law requires.

40. Like Lord Reed, however, I think that lessons must be learned from the way this case has been conducted. I would give my full support to all the points he makes, especially as it seems that proceedings of such length in cases of this kind are not uncommon. Much can, no doubt, be achieved by means of increased powers of case management and reforms to the system of pleading in family proceedings. But there is room for reform in the form and style of the written judgment too. I should like to say a little bit more about that aspect of the problem.

41. The sheriff was obliged in this case to make findings of fact in relation to all the evidence that was led before him. Rule 12.2(3) of the Ordinary Cause Rules 1993 (SI 1993/1956) provides:

> "In any cause, other than a family action within the meaning of rule 33.1(1) or a civil partnership action within the meaning of rule 33A.1(1) which has proceeded as undefended, where at any stage evidence has been led, the sheriff shall –
>
> (a) in the interlocutor, make findings in fact and law; and
>
> (b) append to that interlocutor a note setting out the reasons for his decision."

That rule, which replaced rule 89(1) of the Ordinary Cause Rules 1983 (SI 1983/747), can be traced back to rule 82 of the First Schedule to the Sheriff Courts (Scotland) Act 1907 (7 Edw 7, c 51), which provided:

> "To all interlocutors, except those of a formal nature, the sheriff shall append a note setting forth the grounds upon which he has proceeded and in his final judgment on the merits he shall set forth his findings in fact and in law separately."

That rule can its turn be traced back to an Act of Sederunt of 15 February 1851.

42. Rule 82 did not state in terms that the findings in fact had to be set out in the interlocutor itself. But it had for a long time been understood that this was what was required. In *Glasgow Gas-Light Co v Working Men's Total Abstinence Society* (1866) 4 M 1041 the sheriff pronounced an interlocutor which contained no findings of fact, although he appended a note to his interlocutor. There was an appeal to the Court of Session. The Inner House refused to proceed with appeal because the interlocutor did not contain any findings of fact as required by the Act of Sederunt. Dobie, *Law and Practice of the Sheriff Courts in Scotland* (1952), p 247 states:

> "The findings in fact, as well as the findings in law, must be in the interlocutor itself, and not in the note, and it has been indicated that the findings in fact should include not only the bare facts upon which the judgment is based, but all the relevant facts material to the contentions of either of the parties."

The indication referred to in the latter part of that sentence was in the speech of Lord Herschell in *Little v Stevenson & Co* (1896) 23 R (HL) 12, 15 where he said that it would be extremely desirable that all the facts material to the contentions of either of the parties, even though not material to the point on which the judgment proceeds, should be found in the interlocutor.

43. Lord Herschell was commenting in *Little* on the fact that the interlocutor of the Court of Session against which the appeal to the House of Lords had been brought did not contain a finding of fact on the question which the appellant sought to raise. This was contrary to the provisions of section 40 of the Court of Session Act 1825 (6 Geo IV, c 120), which required the Court of Session in the case of appeals from the sheriff or magistrates courts to specify distinctly in its interlocutor the several facts material to the case which it found to be established by the proof: see Maclaren, *Court of Session Practice* (1916), p 986. That requirement has been preserved by section 32(4) of the Court of Session Act 1988, which provides with regard to appeals to the Court of Session from the judgment of the sheriff principal or sheriff:

> "Where any such appeal is taken to the Court from the judgment of the sheriff principal or sheriff proceeding on a proof, the Court shall in giving judgment distinctly specify in its interlocutor the several facts material to the cause which it finds to be established by the proof, and express how far its judgment proceeds on the matter of facts so found, or on matter of law, and the several points of law which it means to decide."

44. In practice the Court of Session finds it convenient to adopt the findings in the sheriff's interlocutor, with such alterations or modifications as it finds to be necessary in the light of the evidence. In *Calderwood v Magistrates of Dundee* 1944 SC 24 Lord Fleming said that it would be greatly to the convenience of the courts of appeal, and also of counsel, that the usual practice of numbering the findings in the interlocutor should be followed. An example of how this practice works its way through to the ultimate court of appeal is to be found in *Robb v Salamis (M & D) Ltd* [2006] UKHL 56, 2007 SC (HL) 71 where the appeal was directed to the sheriff's findings in fact and law in the light of his numbered findings of fact as set out in para 6. The House allowed the appeal and altered the Inner House's interlocutor by substituting new findings in fact and law to give effect to its decision in the manner contemplated by the statute.

45. It can be seen from this brief history that the practice which the sheriff was following in this case is of very long standing. But it was developed when the conditions under which cases were dealt with in the sheriff courts were very different from what they are today. Judicial training of the kind that now exists

was unknown, and it seems unlikely that there was the same emphasis on merit as the basis for selection when appointments to the shrieval bench were being made many decades ago under the control of the Lord Advocate. The practice is a Rolls-Royce system, which in the right hands and in the right circumstances will provide the appeal courts with a secure factual foundation on which to base their judgments. But it is a practice which is unique to the sheriff courts. Judges sitting in the Outer House of the Court of Session are not, and never have been, required to follow the same practice. Nor are tribunals, which have as important a fact-finding function as sheriffs in the cases that fall within their jurisdiction.

46. The form and presentation of judgments was one of the issues considered by the review of the provision of civil justice by the courts in Scotland that was conducted between 2007 and 2009 by the Rt Hon Lord Gill: *Report of the Scottish Civil Courts Review* (September 2009), Chapter 10. The current system for judgments in the sheriff court was summarised in paragraph 4 of that Chapter. Reference was made to rule 12.2(3) of the Ordinary Cause Rules 1993. The point was made that the function of the sheriff's note is to explain the findings of fact included in the interlocutor, and that the need for a sheriff to state the reasons for his decision is an important part of the sheriff's duty in every case. Reference was made to *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] AC 729, where Lord Fraser of Tullybelton said, at p 734, that the need for a judge to state the reasons for his decision is no mere technicality, nor does it depend mainly on the rules of court. It was not suggested that there were any grounds for unease, or that the practice ought to be changed or modified.

47. It can, of course, be said that there is value in the discipline that following and applying the practice gives rise to. In cases of damages for personal injury, of which *Robb v Salamis (M & D) Ltd* provides an example, one can feel reasonably confident that it is not an obstruction to doing justice between the parties. In skilled hands the process of setting out succinct findings of fact, although time-consuming, is unlikely to cause undue delay or to divert the sheriff's mind from the essential issues. But I question whether that can be said of the situation in which the sheriff found himself in this case. The inquiry that he allowed was far-ranging and long drawn out. It went into great detail on matters that were really only of peripheral importance to what was in the best interests of the child. He cannot be criticised for finding it necessary to make findings on all these matters, although he ought to have done more to strike an appropriate balance between the facts which were key to his decision about the child's future and those which were not. I suggest, however, that the message which his treatment of the case conveys is that the practice which he was required to follow is ill-suited to cases of this kind.

48. The principle that is set out in section 11(7)(a) of the 1995 Act requires paramount consideration to be given to the welfare of the child. The proper

application of that principle is at risk of being impeded if the sheriff has to devote so much time and effort to the content of the findings of fact in his interlocutor in the way Lord Herschell's dictum in *Little* requires as well as to the detailed reasons which must be set out in the note attached to it. If the practice is to be changed thought will, of course, have to be given to the provisions of the 1988 Act regarding appeals as well as to the content of the Ordinary Cause Rules. These are matters which might usefully be considered by the working group which the Sheriff Court Rules Council has set up to consider how cases involving the welfare of children might be expedited. Consultation with the Court of Session Rules Council may also be necessary. I hope that the opportunity will be taken to do this as soon as possible.