TJ v SB [2018] SAC (Civ) 15

- Sheriff Appeal Court case published in June 2018
- "recurring and vexed area" of contempt minutes in family proceedings.
- Father was the Purser in the initiating proceedings and appellant in the appeal
- Mother was the Defender in the initiating proceedings and respondent in the appeal

TJ v SB [2018] SAC (Civ) 15

- Child T was 11 at the time of the decision appealed against
- His parents had been litigating since just after his first birthday
- Case ran in Sheriff Court for seven years, settled by joint minute before Proof.
- Father to have contact with T each Sunday and on alternate Wednesdays. T to live with his mother.
- Contact happened for around six months when it stopped.
- No offer to reinstate contact by the mother and no minute to vary to nil – contempt proceedings raised

TJ v SB [2018] SAC (Civ) 15

- After Proof the sheriff found the mother in contempt of court.
- The Sheriff categorised the mother's contempt as "a flagrant disregard for the authority of the court".
- Several continuations followed
  - mother was given the opportunity to purge the contempt by complying with the contact order
  - Background reports
  - Mother refused to obtemper order
  - To await outcome of CM v SM

TJ v SB [2018] SAC (Civ) 15

- CM v SM [2017] CSIH 1 was an appeal case involving the same Sheriff and contempt proceedings where a contempt finding was made in 2013 with the mother not sentenced to imprisonment until 2015.
- CM v SM judgment issued January 2017 - it overturned the sentence which the same Sheriff had imposed upon another recalcitrant parent in a different contempt case.
- In June 2017 the Sheriff issued her opinion in TJ v SB. She considered herself bound by CM v SM and that in those circumstances made no further order in relation to the contemnor's contempt.
- Father appeals

TJ v SB [2018] SAC (Civ) 15

- The Sheriff had taken into account T's circumstances and the effect of the separation from his mother which imprisonment would bring around
- Those factors were special considerations and relevant in determining punishment. It was held that those factors alone were sufficient to explain the Sheriff's decision to make no order.
- It is strictly speaking impossible to ‘purge’ past contempt.
- Continuations to allow a party to mitigate their contempt are not ‘particularly objectionable’

TJ v SB [2018] SAC (Civ) 15

- Acting for contemnor
  - The contemnor cannot purge but **can** mitigate their contempt
  - If no intention to try to mitigate – is it better to move to submissions in mitigation at an earlier stage rather than allowing an impenitent parent to aggravate their contempt?
- Acting for parent with order
  - This case is a useful reiteration of proper procedure.
  - Continuation for mitigation allows contact to recommence
  - Provides the ammunition to ask the sheriff to make a quick decision.

K v K and W (Curatrix ad Litem) [2018] SAC (Civ) 24

- Heard by Sheriff Appeal Court in September 2018

- Considered various procedural aspects of a contentious contact/residence case

- Sheriff determined an application by the mother/respondent to vary the defendant/appellant's contact to nil during a period when proof had commenced but had not been completed.

K v K and W (Curatrix ad Litem) [2018] SAC (Civ) 24

- Three children – A, who was 17 at the time of the judgment, a son H aged 13 and a daughter N aged 10.
- During the course of the marriage the father assaulted not only the mother but also the older children A and H.
- Separated in 2009 and divorced in 2012; at that time they had agreed that the children should live with the mother with the father having residential contact, an order to that effect was made when divorce decree was granted.

K v K and W (Curatrix ad Litem) [2018] SAC (Civ) 24

- In April 2013 the mother lodged a minute to vary the divorce decree and to suspend the contact between the father and the older child A. The next month the mother intimated a motion (not a minute) to reduce the father's contact with the two younger children to nil. The father lodged a motion for residence of all three children.

- In December 2013 the Sheriff decides to resolve the "procedural guddle" by requiring the parties to prepare minutes and answers.

K v K and W (Curatrix ad Litem) [2018] SAC (Civ) 24

- Proof in February 2014 – nine days.
- Mother felt to be credible and reliable but the father was not.
- If the decision had only been based on the father's conduct then there could have been an argument for refusing contact but the court also took into account H's view that he enjoyed contact with his dad provided he behaved himself.
- Order for contact on restricted terms with younger children
- The mother unsuccessfully appealed that decision to the Sheriff Principal

K v K and W (Curatrix ad Litem) [2018] SAC (Civ) 24

- Mother lodges a second minute to vary seeking to reduce the contact between the father and H and N to nil.
- *Curatrix ad litem was* appointed to H in order to obtain his views. A child psychologist was instructed jointly by the parties.
- The first psychologist concluded that H was suffering from "considerable psychological distress which has been caused and is being maintained by his father's abusive behaviour".
- Recommended H's contact with his father be reduced to nil but that a monitored type of indirect contact twice a year might be beneficial.

K v K and W (Curatrix ad Litem) [2018] SAC (Civ) 24

- A second psychologist was instructed solely by the father.
- Two psychologist experts ordered to discuss their views and prepare 'joint note of agreement'.
- Agreed - that the father had domestically abused the mother, that H had been psychologically distressed and that the mother had sought to appropriately protect H from exposure to his father's aggression.
- Recommended "therapeutic intervention" and agreed that if the father was unable to engage in the therapeutic process and acknowledge the abusive behaviour then direct contact would be inappropriate.

K v K and W (Curatrix ad Litem) [2018] SAC (Civ) 24

- Proof began on 21 April 2016
- Evidence heard from mother, an employee of Children First and Dr O'Malley a consultant locum psychologist who had diagnosed H as having PTSD caused by his father's conduct.
- Direct contact between H and his father should not happen if it was to happen at all until a course of treatment for PTSD said to have been suffered by H would be completed.
- The mother's position was that if H did recover and Doctor O'Malley recommended contact with the father she would agree to contact subject to suitable conditions.

K v K and W (Curatrix ad Litem) [2018] SAC (Civ) 24

- There followed a long series of procedural diets
- Cause sisted to allow H's treated to be completed which had (at the time of the appeal judgment) not happened.
- CWH then fixed.
- Sheriff’s view was that he could make a final decision at this child welfare hearing.
- Mother’s crave in her minute reducing contact in respect of both children to nil granted.

K v K and W (Curatrix ad Litem) [2018] SAC (Civ) 24

- Sheriff's reasoning - he had originally ordered contact because H wanted to see his father at that time. That position had now changed
- He had made findings in fact about the father and his conduct and character which coupled with H's view meant that he could come to a decision.
- He had allowed the younger child to have contact because her brother would be present which was no longer the position.

K v K and W (Curatrix ad Litem) [2018] SAC (Civ) 24

- Even if he found in favour of the appellant over the issues which the appellant said required to be determined it would make no difference to his decision

- A proof would have only been required if the appellant had offered to prove that he had "turned over a new leaf"

K v K and W (Curatrix ad Litem) [2018] SAC (Civ) 24

- Appeal court found procedure followed NOT competent
- Proof should only be required where the Sheriff has been unable to resolve the case in any other
- The rules do not provide for a Sheriff to bring a Proof to an end at his own hand by the device of making a final order at a child welfare hearing.
- Remember however that it is competent to fix a CWH at any time.

K v K and W (Curatrix ad Litem) [2018] SAC (Civ) 24

- Were there still outstanding material matters of fact?
- The Sheriff held effectively that even if he had conducted the Proof to its conclusion, he would not have determined in the appellant's favour.
- The court held that there were a number of factors in which the Sheriff could not make that decision without evidence having been led.
- The case was remitted back to a different Sheriff to fix a Proof Diet

F v R [2018] SC EDIN 51

- Sheriff Sheehan sitting in Edinburgh Sheriff Court.
- F (“the wife”) and R (“the husband”) who had a lengthy "on/off" relationship prior to their marriage.
- They meet in 1996 – are friends and flatmates.
- In 2007, ‘volatile’ and ‘on and off’ relationship.
- Become engaged in 2009 and separate again in 2010.
- August 2011 their relationship was committed.
- In 2013 they were married. A child was born in 2016 and the couple separate in 2017.

F v R [2018] SC EDIN 51

- Was the house which the husband had acquired prior to marriage matrimonial property?
- What is relevant is **intention** at the time of purchase.
- When the house was purchased, the parties were "not a couple" and R was not "contemplating any form of family life on 30 December 2010 when he acquired the house and furthermore that the pursuer (F) understood that".
- The entire value of the flat was excluded from the calculation of the net value of matrimonial property.

F v R [2018] SC EDIN 51

- What if the flat **had** been included in the net value of matrimonial property?
- R had purchased the house with non-matrimonial assets (his savings and a gift from his father), supplemented by a mortgage (which he had brought down by capital contributions from his non-matrimonial savings) would constitute special circumstances.
- The husband had spent significant sums renovating the house which increased its value by an almost equivalent amount.
- Relatively short marriage – 4 years.

F v R [2018] SC EDIN 51

- R had an investment portfolio which was worth around £154,000.
- Parties' pension benefits
  - Each party had contributed to pension provision prior to marriage. No contributions were made by either party to their pensions during the marriage.
  - The increase in the value of the pensions was only by virtue of membership during the marriage and was not as a result of either the income or efforts of the parties during the marriage.

F v R [2018] SC EDIN 51

- The wife had separate arguments for financial provision under 9(1)(b),(c) and (d).
- F had taken maternity leave after the birth of the child and returned to work part time. She had reduced earning capacity due to her requirement to care for the parties' child. The husband's earning capacity by contrast was around £80,000 gross.
- The wife wanted to acquire suitable accommodation but did not have sufficient borrowing capacity to fund the purchase of such a property.

F v R [2018] SC EDIN 51

- Given the child's age, any 9 (1)(c) argument was going to cover a period of approximately 13 ½ years. While the parties were sharing the care of the child, there was a loss of earning capacity for the wife who was going to be working part time for at least the next three years.
- The wife sought a capital sum of £180,000 from the husband under a 9(1)(c) argument to enable her to purchase a property to live in.
- Sheriff Sheehan ordered £82,000 to be paid to the wife under this head.

F v R [2018] SC EDIN 51

- The wife also had an argument under section 9(1)(d).
- The wife's earning capacity at this juncture is approximately 1/5th of the husband's. She had been substantially supported by him during the cohabitation and marriage. It was apparent by her use of capital to support herself post separation that there was a shortfall between the wife's income and expenditure.
- The Sheriff ordered periodical allowance at a rate of £600 per month for three years. As this is to meet revenue expenditure, it was not capitalised.

LV v IV [2018] CSOH 80

- Financial provision divorce heard in Outer House by Lord Brailsford
- Published earlier this month
- 18 year marriage
- The Pursuer was a UK national and the Defender a Dutch national.
- Two children of the marriage both of whom were over the age of 16 at the date of proof. Both were however in full time education at the date of proof with the eldest son being at university and the youngest daughter at a private boarding school.

LV v IV [2018] CSOH 80

- Parties had competing craves for financial provision
- Were agreed the matrimonial home should be sold, but not when
- Each sought a capital sum from the other
- Wife sought periodical allowance and other payments from husband

LV v IV [2018] CSOH 80

- Most valuations agreed. Issues to be determined following Proof:
  - The sums due to the Defender from his sister in relation to a loan;
  - The treatment of the Defender's Dutch pensions; and
  - The Defender's performance share awards/bonuses

LV v IV [2018] CSOH 80

Sums loaned to Defender's sister

- Sums were loaned to the Defender's sister and her husband during the marriage.
- £27,200 remained outstanding at relevant date.
- After the sums were advanced the sister and her husband were sequestrated in Belgium.
- As no claim had been made in that sequestration it was unlikely that the sums would be recoverable and excluded them from the calculation of matrimonial property.

LV v IV [2018] CSOH 80

Treatment of Defender's Dutch pensions

- The Defender had an interest in a defined benefit occupational pension fund ("SSPF"). It is administered in the Netherlands and subject to Dutch law.

- On the evidence available there was no means of directly comparing the division of the SSPF pension in terms of Dutch law with the sharing of a UK administered pension under Scots law.

LV v IV [2018] CSOH 80

- The Pursuer submitted that the Defender's entitlement to pension subject to Dutch law should be left out of the schedule of matrimonial property but the division of the pensions according to Scots law should be taken into account in determining the overall issue of financial provision.
- The Defender's position however was that division of the Dutch pension according to the law of that country would effectively be in equal proportions and would provide the Pursuer with a pension share that was more advantageous than she would receive if the division were under Scots law

LV v IV [2018] CSOH 80

- The Pursuer will enjoy the “standard division” of the Defender's retirement fund on the date of registration of the parties’ divorce in the Netherlands.
- The court could not compel the wife to adopt an option that she had quite legitimately already rejected.
- The court could not reach any conclusion that the Dutch pension provision was either superior or inferior to a situation where the pension funds were governed by Scots law.
- The court excluded the value of the Dutch pensions but they were to be taken into account in calculating overall fairness.

LV v IV [2018] CSOH 80

The Defender’s performance share awards

- Share awards which were paid after the relevant date.
- Pursuer argued awards were made during the marriage and therefore acquired during the marriage. The level of award was made at least in part on the Defender's work performance up to the date of the award.
- The Defender's position was that the awards vested after the relevant date and therefore had not been acquired at that date nor was the amount and value of them known at that time. They could not be sold or transferred.
- Evidence led by Pursuer from chartered accountant Alan Robb

LV v IV [2018] CSOH 80

- Held that as at the date the present proceedings were instituted the Defender's interest **had** been determined.
- Whilte the Defender's interest in the scheme was at the relevant date contingent, it was known by the time these proceedings were instituted that the interest had ceased to be contingent.
- The asset was earned or accrued through a period when other than for 3 months the parties were living together in the course of the marriage.
- Share bonus for the period valued at £19,773 following Alan Robb's methodology

LV v IV [2018] CSOH 80

- Each party had competing arguments for uneven division.
- Wife argued:
  - That she had suffered economic disadvantage in interest of the Defender and the family;
  - That she had been substantially financially dependent upon the financial support of the Defender and required to adjust the loss of this support;
  - That the sale of the former matrimonial home should be deferred until the younger child completes school;
  - That a second flat should be transferred to her with payment of a sufficient capital amount to allow her to repay the outstanding mortgage

LV v IV [2018] CSOH 80

- The Defender likewise sought uneven division, and advanced an argument about the detrimental impact on his career of staying in certain posts for longer than he might for ‘family reasons’.
- Lord Brailsford considered that he could "relatively easily" come to the conclusion that the Pursuer’s submissions were preferable in this regard.

LV v IV [2018] CSOH 80

- The Pursuer departed from her career course permanently on marriage and primarily because she knew that as a result of the nature of the Defender's employment she would be living abroad on a long term basis.
- She also discontinued an MSC course to assist the Defender complete his PHD and she provided some financial support to the Defender at the time of his PHD studies.
- She stayed at home to care for the children which was accordance with the Defender's wishes but detrimental to her career prospects.

LV v IV [2018] CSOH 80

- The Pursuer had a number of jobs since separation but they were short term duration and did not form a reliable guide for her ability to obtain well renumerated employment following divorce.
- The Pursuer had devoted time in assisting the parties daughter to develop her sporting talent, with both parents wishing to encourage the daughter's talent.
- Contrasted with Defender's position –
  - Since their return to the UK in 2008 he continued to enjoy his employment with his multinational employers. He had a safe and stable position and was able to undertake further overseas work between 2014 and 2016.

LV v IV [2018] CSOH 80

Financial provision awarded by the court

- The parties had already agreed that the former matrimonial home should be sold but could not agree when
- Deferred sale with Defender meeting monthly mortgage repayments.
- Competing arguments re house in Stonehaven. Fairness was best served by requiring the sale of the property.

LV v IV [2018] CSOH 80

- Pursuer sought unequal division in proportions of 80% to Pursuer and 20% to the Defender.
- An uneven division of the pot of matrimonial property was justified and required.
- 60% split in favour of the Pursuer with 40% to the Defender.
- The Defender to pay the child's school fees in their entirety
- Pursuer to receive £4,500 per calendar month until the former matrimonial home was sold and then reduced to £3,000 for a further year

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