IN THE CHILD'S BEST INTERESTS?

When the Supreme Court describes a case as "deeply troubling" and makes "observations" the legal fraternity needs to sit up and pay attention. The case of *B v G* turned on some sad, but familiar, circumstances. A boy's relationship with his father was eroded in the course of a lengthy litigation, to the point where a sheriff decided it was no longer in the child's interests to have contact. The Justices of the Supreme Court go as far as to suggest that the proceedings themselves caused damage to the child by perpetuating and deepening the conflict between his parents.

The child's mother and father separated a few months after his birth. Litigation started when he was just three. A compromise of sorts was reached when he was four, but soon disintegrated. The parents came back to the court. Allegation and counter-allegation emerged over the next four years. The boy was eight when the court started to hear evidence. He was nearly ten when the sheriff issued his decision. The case was in court for 52 days. The decision covered 173 pages. Only a page or two at the most related to the best interests of the child. The rest was about the parents, their characteristics, attitudes and behaviour and the truth or falsehood of a range of allegations. The sheriff described both parents in unflattering terms, but refused the father's request for contact. The decision was appealed to the Inner House of the Court of Session in Edinburgh, and then appealed to the Supreme Court. The refusal of contact stands.

The pace of the proceedings in the sheriff court is acerbically described in the Supreme Court's judgment as "glacial". Undue delay is a violation of the right to respect for family life, set out in article 8 of the European Convention on Human Rights. The case went off the rails when the focus moved from the child to the parents. The Court merely stated the obvious when it said that proceedings of this kind should not embark on an exploration of "every byway in the relationship between the parents". But if parties start upon a game of allegation and counter-allegation there may be no clear way to rein them in. Anything that may possibly bear on the child's welfare can go into written pleadings. That in turn leads to evidence in court ranging over a wide spectrum of issues. The Supreme Court has handed down an encouragement to sheriffs to intervene to try and keep the focus on what will help to reach a decision on the welfare of the child. That encouragement is welcome, but in practice it may be hard to halt evidence in full flow without any appearance of bias.

Prolixity comes at a price. The cost of these proceedings was estimated at a staggering £1,000,000, and that was before the case went to the Supreme Court. The cost was born by legal aid. As the Supreme Court observed "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." The solution offered is to adjust the rules for payment of solicitors and counsel to discourage prolongation of proofs. Taken the wrong way that could be a retrograde proposition. It may discourage legal representation. On the other hand rules for payment could be adjusted to encourage advance preparation. The Supreme Court was keen

to encourage use of written material in the place of oral evidence. A payment structure that remunerated presentation of affidavits and reports has the potential to be helpful. A clear case strategy requires time and effort. It should be paid for.

When there is a risk of loss of focus on the child, the court may appoint a curator *a litem* to safeguard the child's interests. The present case exposes a lack of clarity about the role of curator. The curator in this case was a solicitor. He came to court, asked questions of witnesses, and then hopped into the witness box to give evidence. He was under the impression that he had to adopt this course in order to be paid. The Supreme Court clearly disapproved, but sent the problem back to Scotland for further consideration.

Our procedures, court rules and even the format in which sheriffs are required to write their judgments have been found not fit for purpose. The *Scottish Civil Courts Review* under the chairmanship of Lord Gill recommended active case management of family cases. Family business should be programmed to avoid delay. Curators *ad litem* should be told clearly what is expected of them. Even this will not be enough. The Supreme Court recognised that it is easier to change rules of court than to change a prevailing culture. Change is necessary if we are to prevent more children being damaged by the attempt to ascertain what is in their best interests.

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