

Client Copy

DAVID HENDERSON TARBETT V LINDA SIM GRANT ARCHER AND
OTHERS

A1091/97

DUNDEE. 18th October, 2002

The sheriff, having resumed consideration of the cause **FINDS IN FACT:-**

1. The parties are as designed in the instance.
2. On 22 June 1988 the first defender gave birth to [REDACTED]
[REDACTED]
3. On 23 November 1989 the first defender gave birth to [REDACTED]
[REDACTED]
4. On 9 July 1991 the first defender gave birth to William Tarbett (hereinafter referred to as "William"). William's father is the pursuer.
5. The pursuer and the first defender have never been married to each other.
6. The pursuer, the first defender, [REDACTED] and William were at the date of the raising of this action and at the date of the proof habitually resident within the Sheriffdom of Tayside, Central and Fife.
7. The pursuer and the first defender lived together from about 1986 until 1994. During that period they separated on a number of occasions but then reconciled. The separations were at least partly caused by the pursuer's violence towards the first defender.
8. During the period when they lived together both the pursuer and the first defender took part in the upbringing of all three children.
9. In March 1993 all three children were living with the pursuer, the first defender having left the family home. The children were referred to a children's hearing on 18 March *inter alia* on the ground that lack of parental care was likely to cause them unnecessary suffering or seriously to impair their health or development.



That ground was established by the sheriff in Dundee on 21 May 1993. On 15 June 1993 a children's hearing made a home supervision order in respect of all three children.

10. Thereafter the first defender returned to live with the pursuer, and the three children lived in family with them.
11. On 22 September 1994 a children's hearing by a majority decided to make place of safety orders in respect of all three children. As a result the children were taken into the care of the second defenders. The reasons for the making of these orders were stated as:-

- (1) the three children attended the hearing and their behaviour was seen to be violent, disruptive and completely out of control despite [the pursuer's] presence
- (2) [The pursuer] was point blank in his refusal to adhere to the conditions of the care order, or work with the social work and support agencies.
- (3) The two older children were disruptive and violent at school, and the headmaster stated that they were both very close to exclusion.
- (4) As the social workers were refused access to the children at home it was also felt they were probably at risk because of [the pursuer's] clear inability to exercise control.
- (5) Access arrangements with [the first defender] is (*sic*) still a problem area and has to be addressed in order to benefit the children.

The minority opinion was that the existing supervision order should be continued with the children remaining with the pursuer "in the hope that he would see sense and agree to work with the support agencies for the benefit of the children at some time in the future". The pursuer appealed against the making of these orders, but his appeal was refused.



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12. Following the making of these orders, all three children were placed with foster carers. They have not resided with either the pursuer or the first defender since then.

13. On 12 October 1994 a children's hearing made supervision orders in respect of all three children. These orders revoked orders dated 28 February 1994 (about whose terms there was not evidence) and provided that the children should reside in a named place. They further provided that the pursuer and the first defender should have supervised access to the children, the arrangements therefor to be at the discretion of the Social Work Department of Tayside Regional Council. The reasons for the making of these orders were stated as:-

- (1) Since being placed in foster care the behaviour of all three children has improved and they have calmed down.
- (2) [The pursuer] is still refusing to adhere to the supervision order and work with the social work or support services. [The first defender] at this time is unable to offer the children a home.
- (3) It was felt that [the pursuer] was totally selfish in his attitude towards the care of the children and was not meeting their physical and emotional needs. Therefore he was not offering them a stable and satisfactory quality of care, which they were receiving in foster care.

The hearing agree to allow supervised access "in order that the children should retain contact with their natural family and hopefully work towards rehabilitation".

14. Thereafter consideration was given by the Social Work Department to the possibility of rehabilitating the children with the pursuer, the first defender or both. On 23 February 1995 a decision was taken not to continue efforts to rehabilitate. The reasons stated for this were:-

- (1) Refusal by both parents to accept any responsibility for the children being received into care.

(2) [The pursuer's] refusal to acknowledge that there had ever been a problem with the way he cared for the children or that he needed to change this in any way.

(3) No commitment from either [the pursuer] or [the first defender] to maintain their relationship in a way which would allow them to care jointly for the children.

15. [REDACTED] remained with various foster carers until 12 November 1997. During this period his behaviour caused concern on many occasions. He was violent and disruptive. On 12 November 1997 a children's hearing varied his existing supervision order by requiring him to reside at Strathmore Cottages, Dundee. The order provided that [REDACTED] should have supervised contact respectively with the pursuer and the first defender once a month.

16. On 4 June 1998 a children's hearing varied [REDACTED] existing supervision order by requiring him to reside at Thornbrae Community Children's Home in Alnwick, Northumberland. The order provided that [REDACTED] should have supervised contact respectively with the pursuer and the first defender for a period of at least one hour once each month as agreed between the Social Work Department and Thornbrae staff.

17. [REDACTED] remained at Thornbrae until October 2000. On 25 October 2000 a children's hearing varied his supervision order by requiring him to live with foster carers, [REDACTED]. So far as contact with the pursuer was concerned the order provided that "the child's contact with [the pursuer] shall be supervised as arranged by the Social Work Department". The reason for [REDACTED] leaving Thornbrae was that he had made very good progress there. His education, which had been disrupted while he was in Dundee, had advanced considerably. His behaviour had improved.

18. [REDACTED] has remained with [REDACTED]. They are foster carers who have specialised experience in looking after young persons and troubled adults. They are able to devote their whole time to acting as carers. As a result of their help [REDACTED] has settled into the community and at school. He is

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doing well at school and is involved in after-school activities. He has made friends.

19. [REDACTED] is uncertain and anxious about his future. His placement with the [REDACTED] is theoretically not long-term, although the [REDACTED] have agreed that he may stay with them so long as they are able to meet his needs. The second defenders have no plans to seek to have [REDACTED] adopted.
20. [REDACTED] has supervised contact with the pursuer for one hour every four weeks. This contact is usually exercised in St Andrews. The pursuer and [REDACTED] go to shops and to a café. Both [REDACTED] and the pursuer would prefer that the contact was not supervised and that the periods of contact were longer.
21. [REDACTED] has supervised contact with the first defender for about one hour every four weeks. This usually takes place in Perth.
22. Any alteration in the conditions of contact between the pursuer and [REDACTED] would require to be approved by a children's hearing. [REDACTED] would have the opportunity to state his views to the hearing. If [REDACTED] were dissatisfied with the decision of a hearing he would have a right to appeal to the sheriff. The second defenders employ a children's rights officer who has the responsibility of acting as an advocate for children in their care. [REDACTED] could consult this officer. [REDACTED] would himself be entitled to employ a solicitor in any legal proceedings such as an appeal to the sheriff.
23. [REDACTED]
24. At about the beginning of 2000 [REDACTED]
[REDACTED]
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decided to proceed with an application. The petition for adoption is presently pending before Perth Sheriff Court. The second defenders are supporting the [REDACTED] application. [REDACTED] herself is very keen to be adopted. The first defender (who is a person whose agreement to [REDACTED] adoption must either be obtained or dispensed with) is not prepared to agree to her being adopted. The pursuer is not at present a person whose agreement is required. The pursuer is opposed to the proposed adoption.

25 [REDACTED] has supervised contact with the pursuer as she wishes but, in any event, for no more than one hour twice each year. [REDACTED] has not expressed any wish to have more contact with the pursuer.

26 [REDACTED] has supervised contact with the first defender as she wishes. This is normally approximately every six weeks.

27. William was with various foster carers between September 1994 and March 2000. Until [REDACTED] went to Strathmore Cottages he and William were with the same carers. At the end of March 2000 William went to live in Dundee with Mr and Mrs [REDACTED]. He has lived with the [REDACTED] since then, their home now being in [REDACTED]. This is hoped to be a permanent placement.

28. William is dyspraxic. He has undergone occupational therapy for this condition. He has had educational difficulties. Since going to stay with the [REDACTED] William has made very good progress. He is well integrated into the [REDACTED] family. He is doing well at school.

29. William has supervised contact with the pursuer for about one hour once each month. The contact usually takes place at Dundee Ice Rink. The quality of William's contact with the pursuer has improved over the last twelve months. William has not expressed a desire for more contact nor has he said that he wishes the contact to be unsupervised.

30. William has supervised contact with the first defender for about one hour once each month.

31. All three children acknowledge the pursuer as their father and wish to maintain contact with him. In the case of [REDACTED] the contact which she wishes to maintain is minimal.
32. The three children see each other reasonably regularly. They get on well together. There is an especially strong bond between [REDACTED] and William.
33. The pursuer has not had a good relationship with the second defenders' (or their predecessors') Social Work Department since the children were taken into care in 1994. Most of his contacts with the Department have been in order to make complaints. He resents social workers telling him how he should bring up his children. He is unable to accept that there is justification for the children having been removed from and remaining outwith his care. He is unwilling to meet with social workers.
34. On 7 February 1996 at Dundee Sheriff Court the pursuer was fined £200 for an offence under the Telecommunications Act 1994, section 43(1)(b) in respect that on 10 May 1995 he did "persistently make use of the public telecommunication system for the purpose of causing annoyance, inconvenience or needless anxiety to members of staff of the Social Work Department Office, Lothian Crescent, Dundee by making threats of violence towards said members of staff".
35. Because of difficulties between the pursuer and the Social Work Department the latter in 1997 referred the pursuer, the first defender and the children to Children 1st (the Royal Scottish Society for the Prevention of Cruelty to Children) for assistance in assessing contact and the possibility of rehabilitation between the children and their parents. In April 1998 Yvonne Jamieson, social worker with Children 1st, concluded her report (no. 6/16 of process) as follows:-

"It is my view that it is not feasible to consider a rehabilitation programme for any of the children to return to the care of either parent at this point in time. [The first defender] chose not to take part in the assessment at all therefore deselecting herself. [The pursuer] has attended three sessions but during that time gave no indication that he understood why the children were originally taken into care. He presented as a man who has limited ability to understand concepts and because of that was unable to accept the children's needs were

any different from his own. Unfortunately, until [the pursuer] can begin to understand that children require more from him than he is offering at present, no progress can be made.”

36. Since the children were taken into care the pursuer has been invited to and has frequently attended Social Work Department reviews for the children. At such reviews he has had difficulty in accepting the views of other persons which differ from his own. His attitude has not changed over the years.
37. The pursuer is not a “relevant person” within the meaning of the Children (Scotland) Act 1995, section 93(2)(b) but has nonetheless been invited to attend and participate in children’s hearings in respect of all three children. The pursuer has attended many hearings. At hearings, as at the reviews referred to in the previous finding, he has often been unwilling to accept the views of other persons which differ from his own. Hearings at which the pursuer has been present have been found to be stressful by the children. [REDACTED] is no longer prepared to attend any part of a hearing at which the pursuer is present.
38. If the pursuer were to be granted parental rights and responsibilities in respect of any of the children in terms of his second crave he would be a “relevant person” within the meaning of section 93(2)(b) of the 1995 Act. He would also be a person whose agreement would have either to be obtained or to be dispensed with in respect of an application to adopt the child in respect of whom he was granted rights and responsibilities.
39. There would not be any benefit to any of the three children if the pursuer were to be granted parental rights and responsibilities in respect of him or her.

FINDS IN FACT AND IN LAW:-

1. This court has jurisdiction.
2. The pursuer is entitled to have it declared that he is the father of [REDACTED] and William.

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3. The pursuer has not established that it is in the interests of any of the three children that any of the orders sought by him in terms of section 11 of the Children (Scotland) Act 1995 should be made.
 4. In respect of each of the three children it would be better for the child that none of the orders sought by the pursuer in terms of section 11 of the 1995 Act should be made than that any such order should be made.

FINDS IN LAW:-

1. The pursuer being the father of [REDACTED] and William is entitled to declarator in terms of his first crave.
2. It not being in the interests of any of the three children that an order should be made imposing parental responsibilities on the pursuer and granting him parental rights in respect of that child, the pursuer is not entitled to decree in terms of his second crave.
3. It not being in the interests of any of the three children that an order should be made granting the pursuer the right and responsibility defined in section 1(1)(d) and section 2(1)(d) of the 1995 Act or the parental responsibility set out in section 1(1)(a) of the 1995 Act, the pursuer is not entitled to decree in terms of his third crave.
4. It being better for each of the three children that no order in terms of section 11 of the 1995 Act should be made than that any such order should be made, the pursuer is not entitled to decree in terms of his second and third craves

Therefore **SUSTAINS** the first plea-in-law for the pursuer and **REPELS** his second, third and fourth pleas-in-law; **SUSTAINS** the pleas-in-law for the first defender; **SUSTAINS** the second and third pleas-in-law for the second defenders and the second and third pleas-in-law for the *curator and litem*; **FINDS AND DECLARES** that the pursuer is the father of [REDACTED] [REDACTED] and of William Tarbett (born on 9 July 1991); *quoad ultra* **DISMISSES** the action; **RESERVES** meantime all questions of

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expenses and appoints parties to be heard thereon within the Sheriff Court House, 6 West Bell Street, Dundee at 10 a.m. on 19th November 2002.



NOTE

INTRODUCTION

This action has had a very chequered career. It commenced as long ago as 1997. Since then the craves have undergone various changes and there has been an appeal to the Sheriff Principal. When it finally came to proof before me three craves were still extant. The first, which was added by way of amendment at my suggestion in the course of the proof is for declarator of paternity of the three children who are the subject matter of the action. This was uncontentious. The second crave is in rather unusual terms it is "to make orders in terms of section 11(2)(b)(i) and (ii) of the Children (Scotland) Act 1995 imposing parental responsibilities on the pursuer and granting him parental rights in respect of" the three children. This crave was opposed by the mother of the children (the first defender), the local authority in whose care the children have been since 1994 (the second defenders) and Mr Jack Brown, solicitor, who was appointed by the court as *curator ad litem* to the children. The third crave, which is sought only if the second is not granted is "to grant to the pursuer (a) the right and responsibility defined in section 1(1)(d) and section 2(1)(d) [of the 1995 Act] viz to act as the children's legal representative or, failing such an order (b) imposing in the pursuer in respect of the said children the parental responsibility set out in section 1(1)(a) of the said Act". This crave too was opposed by the three parties who opposed crave 2. It is fair to say that this third crave was not pressed with any great enthusiasm on behalf of the pursuer.

The case proceeded to proof before me commencing on 19 June 2002 and continuing on, 16 August and 20 September. At the conclusion of the proof I heard very brief submissions. Thereafter fuller written submission were submitted on behalf of the pursuer and the second defenders. All parties submitted draft findings in fact, for which I am most grateful.



EVIDENCE FOR THE PURSUER

The only witness was the pursuer himself. He was aged 55 at the date when he gave evidence. I was not greatly impressed by him. He impressed as a man of limited intelligence and even more limited insight. He seemed to be almost incapable of accepting any point of view other than his own. He clearly considered that he had been very hard done by by the social workers who had had dealings with him and by the children's hearings which had taken decisions regarding the children. At one point in the course of his cross-examination by the *curator ad litem* the pursuer stated, "No one can tell me how to look after my children." This, I am afraid is typical of the pursuer's attitude. At no point in his evidence was it apparent to me that he had applied his mind to the question whether any of the children would benefit from my granting the orders sought by him. His purpose in seeking the orders appeared to be almost entirely centred on giving him more say in what should happen to the children.

The pursuer's whole evidence was tainted by the attitudes which I have described. For that reason I have grave reservations about both his credibility and reliability.

EVIDENCE FOR THE FIRST DEFENDER

The only witness was the first defender herself. She was aged 33 at the date when she gave evidence. She made a much better impression on me than did the pursuer. She accepted her own limitations as a parent. I am satisfied that she was defending the action because of a genuine desire to do what was best for the children rather than because of any wish to take revenge on the pursuer by whom she considered that she had been very badly treated.

On the whole I found the first defender's evidence both credible and reliable. However, it was of only limited value in resolving the issues in this case.

EVIDENCE FOR THE SECOND DEFENDERS

I heard evidence from three witnesses, two present members of the second defenders' Social Work Department and one former member.

The first witness was Mrs Margaret Leslie. She is a social worker who has been a member of the permanency team since 1994. Her dealings were with [REDACTED] and

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She became involved with [REDACTED] in March 1996 and with [REDACTED] in October 1998. She was particularly concerned with arranging contact between the children on the one hand and the pursuer and first defender on the other. She confirmed that [REDACTED] had said he would like more contact with the pursuer and that he would prefer it to be unsupervised. One problem about this was that the pursuer refused to have any discussion with social workers. She dealt fully with the history of both children. She stated that she found it difficult to see what benefit it would be to the children for the pursuer to be granted parent rights and responsibilities. As a social worker of considerable experience in working with children, her opinion on this point, in my view, carried considerable weight. She struck me as a careful, thoughtful witness. I have no hesitation in giving her a certificate of credibility and reliability.

The second witness was Mrs Ingrid von Arnim. She too is a member of the permanence team. She has been responsible for William since September 1998. She was able to deal fully with his history. She too was a careful and thoughtful witness, who was generally credible and reliable. However, she appeared to be under some misconception as to what exactly the pursuer's legal status was. As I understood her, she thought that the pursuer was already a "relevant person" for the purposes of attending children's hearings. This was clearly an error on her part. She did, however, give it as her opinion that she could see William gaining nothing by the pursuer's being given parental rights and responsibilities. She accepted that there might be some benefit if the pursuer exercised these responsibly but considered that past events suggested that this would not be the case. To grant the pursuer rights and responsibilities might result in conflict between the pursuer and the first defender. She conceded that her own contact with the pursuer had been very limited as he had not responded to her invitations to meet. She was able to state that from the information available to her it appeared that the quality of contact between the pursuer and William had improved over the last twelve months. She supported the Social Work Department's position that there should be no change in the *status quo*. Her opinion, as that of an experienced social worker, is entitled to respect.

The final witness was Robin Duncan. He is now a social worker with Angus Council, but from March 1997 until November 2001 he was a member of the permanence team of the Social Work Department of the second defenders. He had attended many of the

children's hearings involving [REDACTED] and some involving William. He spoke to the pursuer's confrontational behaviour at children's hearings. He gave it as his opinion that the pursuer had little understanding of the children's needs. He spoke to the progress which the children had made during the period when he was concerned with their cases.

EVIDENCE FOR CURATOR AD LITEM

The *curator ad litem* led no evidence.

SUBMISSIONS

For the pursuer Mr Jack relied on his written submissions. These have been lodged in process and are referred to for their terms.

For the first defender Mrs Scott founded strongly on the terms of section 11(7)(a) of the 1995 Act to the effect that no order should be made unless the court is satisfied that it is better to make an order than not to do so. She submitted that it had not been established that there would be anything to be gained by making any order in this case. The children were all well settled and happy. The first defender wanted what was best for the children and that was a preservation of the *status quo*. In the past the pursuer had failed to co-operate and had been obstructive. This attitude was likely to continue and it would be detrimental to the children.

Mr Brown, the *curator ad litem*, concurred with Mrs Scott's submission. He emphasised the evidence which there had been about the pursuer's obstructive attitude and the effect which this had had on the children. He referred me to No. 33 of process, a report prepared by him for the court in June 2001, in which the children's views were stated. The pursuer had brought no evidence before the court to show that the making of the orders sought would be in the interests of the children. Looking to what had happened in the past, he would not be likely to safeguard or promote their health, development and welfare. Regard should be had to the future of the children. Looking to the welfare principle it was clear that the orders should not be granted.

For the second defenders Mrs Evans addressed me briefly to the effect that the pursuer had failed to establish that it was in the interests of the children to grant the

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orders sought. It had been demonstrated that the pursuer had been unable to separate his own needs from those of the children. The first defender was co-operating well with all those concerned with the children's welfare. She had parental rights and responsibilities. There was no need for any other person to have them. These submissions were subsequently supplemented by written submissions, which have been lodged in process and which are referred to for their terms.

DECISION

The starting point in this case must, in my opinion, be the fact that Parliament has determined, for whatever reason, that a man such as the pursuer, who is the father of a child but who is not and has not been married to the mother, has *prima facie* no parental rights or responsibilities. A father in that situation may achieve parental rights and responsibilities only either by entering into an agreement with the mother in terms of section 4(1) of the 1995 Act (which has not happened in this case) or by being granted them by the court. In the latter case it is implicit in the legislation that the onus on establishing that an order should be made rests on the father. As I read section 11(7)(a) of the 1995 Act he must satisfy the court (i) that the welfare of the child would be advanced by the granting of the order and (ii) that it would be better for the child that the order should be made than that it should not be made.

In my opinion, the pursuer has failed to establish either of these requirements and his application must therefore fail.

The pursuer's desire to achieve parental rights and responsibilities, as expressed in his evidence, seemed to me to be almost entirely motivated by his wish to have more say in what should happen to the children. His view was that because he *was* their father he should be entitled to decide how they should be brought up. Unfortunately for him, that is not the law as it presently stands. Nothing emerged in the evidence to show that any of the children would benefit in any way from the pursuer's having a greater say in what should happen to him or her. Indeed almost the whole thrust of the evidence from the first defender and on behalf of the second defenders was to the effect that further involvement by the pursuer would be detrimental to the future welfare of the children. Looking to the past history of all three children, I found that evidence compelling.



It is true that the pursuer appears to have a better relationship with his sons than he does with [REDACTED]. I have given careful consideration to the possibility of granting the orders sought in respect of the boys only even though this was not suggested on the pursuer's behalf. However, I have reached a clear conclusion that, even in the case of the boys, there is no evidence that their welfare would be advanced by the granting of orders.

In my opinion, the welfare of all three children is amply safeguarded by a preservation of the *status quo*. The first defender has parental rights and responsibilities. She is exercising these in a way which is consistent with the welfare of the children.

It was suggested on behalf of the pursuer that it would be to [REDACTED] benefit if, at a children's hearing, the pursuer were able to make representations about contact. I do not find this argument convincing. [REDACTED] is of an age himself where he should be able to tell the hearing what he wants, and the hearing would, I am sure, have regard to his wishes. As I have stated in the findings in fact, [REDACTED] could consult with the children's rights officer. It would also be possible for him to employ a solicitor on his own behalf. I do not consider that [REDACTED] position is in any way prejudiced by the fact that the pursuer is not a "relevant person" at a children's hearing.

In the submissions made on behalf of the pursuer stress was laid on the fact that the pursuer had been persistent in maintaining contact with the children and in seeking to achieve parental rights and responsibilities. This may indeed be the case, but I am not persuaded that these factors in any way advance the pursuer's case. The fact remains that he has, in my opinion, singularly failed to produce evidence of any advantage which the children would gain by his being granted the orders which he seeks.

I have no hesitation in holding, with respect to all three children, that it is clearly better for them that I should make no order than that I should make any order. I have accordingly repelled the appropriate pleas-in-law for the pursuer.

EXPENSES

I was not addressed on expenses. I was at first minded simply to find no expenses due to or by any party, but, on reflection, have decided to put the case out for a hearing on

expenses. Apart from any other consideration, there may be a question of whether the case is suitable for the employment of counsel.

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