OUTER HOUSE, COURT OF SESSION

[2018] CSOH 6

AD30/15, AD31/15, AD32/15, AD33/15

OPINION OF LORD BRAILSFORD

In the petitions

of

PERTH AND KINROSS COUNCIL

Petitioners

for

(1) A Permanence Order in terms of the Adoption and Children (Scotland) Act 2007, section 80 in respect of a child RSH and (2) Permanence Orders with authority to adopt in terms of the Adoption and Children (Scotland) Act 2007, in respect of children, CMH, MRH and AJH

Petitioner: Loudon; Digby Brown LLP
First Respondent: Sharpe; Balfour & Manson LLP
Second Respondent: Cartwright; Drummond Miller LLP

30 January 2018

[1] These were four petitions in which applications are made in respect of sibling children under section 80 of the Adoption and Children (Scotland) Act 2007 ("the 2007 Act"). The petitions were opposed and a Proof was heard on various dates in September and October 2016 and May 2017. On 14 July 2017 I issued an Opinion and by Interlocutor of even date, refused each petition and reserved all question of expenses. On 12 October 2017 I

heard motions in respect of expenses in each of the petitions. The motion in each petition on behalf of both respondents was (1) (a) to find the petitioners liable to them for the expenses of the action as taxed, and (b) for an additional fee under Rule 42.14(3) under heads (a), (b), (c) and (e); and (2) to certify a named consultant clinical geneticist as a skilled person. Counsel for the petitioners advanced submissions in support of opposition to the motion for expenses as a matter of principle. In relation to the second part of the first motion, that is the additional fee, the petitioners presented simply formal opposition. In the course of her submission she conceded that the cause was complex, raised difficult questions, required specialist knowledge of the solicitors involved, involved consideration of a significant volume of documents and was in respect of a matter of importance to the respondent.

[2] Having regard to the submissions of the petitioners it was plain that the primary argument requiring determination by the court was the issue of the circumstances in which it would be appropriate to make an award of expenses against a local authority petitioner in applications where a permanence order was sought. In terms of the submission of the petitioners, this question was presented as raising an issue of principle which had not been fully addressed by the court in any previous decision.

[3] The submissions advanced by counsel for the first respondent were adopted by counsel for the second respondent, with a number of additions. It is accordingly possible to state the arguments of the respondents in a unitary fashion. It was initially submitted that the question of expenses is always a matter within the discretion of the court. Notwithstanding this overriding principle it was however accepted that as a matter of practice, expenses were not ordinarily awarded against compearing parties in petitions where local authorities sought permanence orders. This argument was then developed by submitting that it would be appropriate to make an award of expenses against a local

authority petitioner in such an application if the conduct of the court process on the part of the local authority could be characterised as a matter of fact as being reprehensible or, in the alternative, it could be shown, again as a matter of fact, that the petitioners had adopted an unreasonable stance in the proceedings. These arguments were based upon two decisions in the UK Supreme Court in cases where English local authorities had instituted care proceedings under the Children Act 1989, a statutory provision which has no application in Scotland, and where cost orders had been made notwithstanding a general practice in English care proceedings of not awarding costs against any party. It was submitted that whilst there was no direct equivalent of permanence proceedings in English law, the proceedings in the cases relied upon were analogous thereto and in these circumstances the decisions in relation to costs should be treated as highly persuasive in any consideration of the underlying principles relative to awards of expenses in Scottish permanence proceedings. The relevant authorities were *In re (T) (Children) (Care Proceedings: Costs)* [2012] UKSC 35 and *In re (S) (a child*) [2015] UKSC 20.

[4] In the context of the motions before this court the relevant part of the decision in *In re T (supra)* is to be found in the judgment of the court delivered by Lord Phillips of Worth Matravers between paragraphs 42-44. Lord Phillips in this passage considers the nature of care proceedings under the Children Act 1989 and the role and function of local authorities in such proceedings. He notes the onerous nature of the duties upon local authorities in such proceedings, stating that:

> "... justice does not demand that the local authority responsible for placing the allegation before the court should ultimately be responsible for the legal costs of the person against whom the allegation was made." (At paragraph 42).

[5] The general practice of not awarding costs is noted but subject to the caveat that departure from this practice is justified in cases where "reprehensible behaviour or an

unreasonable stance" (at paragraph 44) can be shown. This decision was approved in the subsequent decision *In re S (supra)*.

[6] In the context of the present petitions, counsel for both respondents accepted that, as determined in my Opinion dated 14 July 2017, there was no conduct or behaviour on the part of the petitioners which could be categorised as falling within the category of "reprehensible". There was accordingly no attempt to rely on this ground as justification for an award of expenses, on the part of the respondents. It was however submitted that there was to be found in the facts as determined by the court material which demonstrated that the petitioners had adopted an "unreasonable stance" in the applications. In that regard my attention was drawn to paragraph 91 of my said Opinion where in conclusion I characterised the decision by the petitioners to proceed towards permanence as "precipitate and unjustified". It was submitted that such language was indicative of an unreasonable stance on the part of the local authority and as such justified an award of expenses in favour of the respondents.

[7] For completeness I should record that in relation to the motion for an additional fee, both respondents simply rested upon the factors outlined in the written notice in support of the motion.

[8] In response to these submissions, the petitioners indicated that they accepted that the decisions in the Supreme Court, *In re T (supra)* and *In re S (supra)* concerned care proceedings in that jurisdiction which could fairly be regarded as analogous to permanence proceedings in Scotland. Having regard to that consideration it was accepted that in relation to the issue of circumstances where costs could and should be awarded against a local authority, these cases could be regarded as both useful and persuasive.

[9] Beyond that counsel for the petitioners informed me that she had sought to identify all Scottish cases where the issue of expenses in the context of statutory applications concerning children by local authorities had been considered. In that context my attention was drawn to the cases of *Dumfries and Galloway Council*, *Petitioners* 2003 Fam LR 95, *City of Edinburgh Council* v *WX* and *YZ* [2014] SCLIV 23, , *City of Edinburgh Council* v *RO* and *RD* 2007 Fam LR 278 and , *City of Edinburgh Council* v *S* 2015 SLT (Sheriff Court) 69. In consideration of these authorities it appeared to me that all could be distinguished with the exception of *City of Edinburgh Council* v *WX* and *YZ (supra),* a decision of Sheriff Kinloch. Sheriff Kinloch was considering the issue of expenses following his determination of a Proof in an application for a Permanence Order made by a local authority. He considered the issue as a matter of principle but in so doing does not appear to have had the English authority *In re (T)* the Supreme Court cited to me drawn to his attention. His conclusion was that the local authority petitioners in the matter before him had not acted irresponsibly in raising the petition and therefore found no expenses due to or by either party.

[10] On the basis of that authority and the already noted English authorities where the test was that local authority should only be found responsible in the costs of care proceedings if their behaviour had been reprehensible or they had adopted an unreasonable stance in the conduct of the proceedings, it was submitted that neither test could be met in the present case. My attention was drawn to the fact that since 2013 the children had been subject to compulsory supervision orders made by the Children's Hearing and that a safeguarder who reported in October 2015 had agreed with the conclusions of the petitioners that the children were in need of permanent alternative care. It was further submitted that the petitioners' actions in seeking permanence were informed by views expressed in reports prepared by an independent consultant clinical psychologist. In my

Opinion, I was critical of these reports and ultimately concluded that because of methodological defects, I could not rely upon them and accordingly declined to find the psychologist reliable or credible. It was submitted that the petitioners were not responsible for the reports of the psychologist and that any defects on his part could not constitute behaviour which would justify an award of expenses against the petitioners.

[11] Having regard to the foregoing considerations, I was invited to make a finding of no expenses due to or by any party in the present petitions.

[12] In the absence of any statutory or regulatory requirement to the contrary, expenses are a matter for the discretion of the court. In ordinary causes the general rule is that a party put to the expense of vindicating his rights is entitled to recover the expense from the person by whom it was created (*Howitt* v *Alexander & Sons Ltd* 1948 SC 124). Permanence Orders were a statutory innovation created by the 2007 Act. Whilst there is no authoritative decision, it is clear that as a matter of practice the general rule regarding expenses applicable in ordinary actions has not been followed in relation to Permanence Orders. It seems clear that the normal practice in such applications is that awards of expenses are not made. This accords with both practicality and common sense. Applications are made by local authorities who are pursuing duties in relation to the care of children that are imposed upon them by statute. A further consideration is, no doubt, that parties to permanence applications are in the overwhelming majority of instances, entirely funded by the public purse, by local authority funds in the case of petitioners and by legal aid in the case of respondents. All these considerations point to the utility and justice in a practice where expenses are not normally granted in favour of any party. That practice does not however, in my opinion, exclude the discretionary right of the court to consider the award of expenses in an appropriate case. The question therefore arises, what would constitute an appropriate

case in which an award of expenses should be made? Whilst I have little doubt that it would be impossible, and certainly of no practical value, to attempt to define all the circumstances where an award of expenses might be justified in a permanence petition, it does appear that some broad conclusions could be drawn. In that regard, I would observe that the care proceedings at issue in the Supreme Court English cases put before me provide useful analogies. The categories identified in these cases were where the conduct of the party, in particular a local authority, could be characterised as reprehensible or where it might be said a party took an unreasonable stance in the conduct of the proceedings. I would consider that similar categories could usefully be applied in the context of permanence applications in Scotland.

[13] Sheriff Kinloch, whom I repeat did not have the benefit of citation of the English authority *In re T* used slightly different language in concluding that a local authority which raised proceedings irresponsibly could be found liable in expenses. I would take no issue with this characterisation.

[14] It follows that in the present case, where it is not suggested that the petitioners have acted reprehensibly, I would require to find that they had adopted an unreasonable stance or had been irresponsible in their conduct of the proceedings before I could make an award of expenses. I am not satisfied that that has occurred. On the basis of the findings of their officials, the local authority in the present case instructed a report from a consultant clinical psychologist. Permanence proceedings were instituted at least in part upon the findings in that report from a consultant clinical psychologist. Permanence proceedings were instituted at least in part upon the findings in that report. The fact that the report was, following proof, discredited cannot be a fault on the part of the authority. I consider that the authority

were entitled to rely upon the report and that such reliance instructed their conduct of the proceedings.

[15] Having regard to the following, and in respect that parts 1(b) and 2 of each motion flow from my decision in respect of expenses, I shall refuse the motions, and find no expenses due to or by either party in each petition.