SHERIFF APPEAL COURT

[2016] SAC (Civ) 15
XO55/16

Sheriff Principal M M Stephen QC
Sheriff Principal D C W Pyle
Sheriff N M P Morrison, QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in

appeals by

The City of Edinburgh Council

Appellants

against

RO

First Respondent

and

RD

Second Respondent

Appellants: Campbell, QC, JP Campbell
First Respondent: Scott, QC, Leighton
Second Respondent: Moynihan QC, Gilchrist

29 November 2016

Introduction

[1] These are appeals by a local authority from a decision of the sheriff to refuse applications for permanence orders with authority to adopt the children 'MG' and 'AO'. The sheriff's decision followed 34 days of proof. Later in this opinion we shall consider the particular merits of the appeal, but before doing so we should wish to make some general comments.

General Observations

[2] Sheriffs are aware of the heavy burden placed upon them in discharging their judicial function in this area of law and practice. Cases involving state intervention in family life which seek to bring about the severing of family ties are often the most important in a sheriff's caseload. The sheriff in this case is clearly aware of his responsibility when he observes at paragraph [179] "that this is as difficult and anxious a case as it is possible to find." Permanence order applications are therefore some of the most anxious decisions which a sheriff will make. That is not only because they involve children; it is also because they are, perhaps uniquely, an exercise in deciding not just what has happened but also what is likely to happen in the future. As Lord Nicholls of Birkenhead said in *In re B (A Minor) (Adoption: Natural Parent)* [2002] 1 WLR 258, para 16:

> "There is no objectively certain answer on which of two or more possible courses is in the best interests of a child. In all save the most straightforward cases, there are competing factors, some pointing one way and some another. There is no means of demonstrating that one answer is clearly right and another clearly wrong. There are too many uncertainties involved in what, after all, is an attempt to peer into the future and assess the advantages and disadvantages which this or that course will or may have for the child."

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[3] In dealing with these difficult issues it is not only the sheriffs who have to apply the law; social workers must also do so. They will doubtless derive assistance from their training and experience but they also must apply the detailed statutory provisions set out in the relevant legislation, particularly in the present context the various rules contained within the Adoption and Children (Scotland) Act 2007. And in doing that, it is insufficient for them simply to ask the question: "What is in the best interests of the child?" – the paramount consideration (2007 Act, sections 14(3) and 84(4)). They must also take into account the other statutory provisions and, crucially, the jurisprudence which has developed since the Act came into force. Accordingly, in their day to day work they must repeatedly ask themselves such questions as: "What is the minimum intervention we should make in the life of this child?", and the essential subsidiary question: "What else could we do to avoid a more drastic form of order such as adoption?" It would be an understandable reaction for a social worker to decide that the safety first approach is to sever the relationship between the child and the parent; it would be all too easy to conclude that a drastic consequence for a child is much more likely to become a reality if a child is left in the supervised care of a parent. But that would be a breach of duty and, from the particular perspective of a court, a gross failure to apply the law.

[4] We are troubled that in this case as in others which come before the courts the social workers decide to go down one path and appear unwilling to keep under continual review the objective of preserving personal relations between parents and children and to ask the questions which the law requires them to do, especially where options short of adoption would be sufficient intervention in family life. It is an obvious point that the taking of an appeal in itself together with the consequent delay have the potential to cause further damage to the child's welfare.

[5] We wish to reiterate that in considering an appeal, appellants must bear in mind that an appellate court will interfere with the findings in fact of a sheriff only if he or she can be said to be plainly wrong in the sense described by Lord Reed in *Henderson v Foxworth Investments Ltd*, 2014 SC (UKSC) 203, 220 at para 67. That is that, in the absence of some other identifiable error such as a material error of law or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable failure to consider relevant evidence, the appellate court will interfere with the findings of fact made by a trial judge only if satisfied that his decision cannot reasonably be explained or justified. That is a high test. In relation to appeals against decisions in applications for permanence orders, the appellate court will interfere with the decision of the judge at first instance in his or her consideration of the threshold test in section 84(5)(c) of the 2007 Act only if that judge was plainly wrong. This was the approach of the Inner House in *TW v Aberdeenshire Council*, 2013 SC 108. It was also the approach taken by the UK Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria),* [2013] 1 WLR 1911 in which a differently worded threshold test in similar proceedings in England and Wales was considered. The court held that the threshold test is not an exercise of discretion but of judgment, thus supporting the plainly wrong test. It is worth noting that this point was presaged by Lord President Rodger, as he then was, in *Osborne v Matthan (No.2)* 1998 SC 682, 688I to 689B in relation to custody or residence of a child in deciding what the welfare of the child requires. Lord Wilson (*In Re B*, at p1930, para 44) preferred the use simply of the word "wrong" without the adverb "plainly" (which is the word used in the English Civil Procedure Rules), but we think that the addition of the adverb makes it clear that it is not enough that the appellate court would have reached a different conclusion.

[6] In cases such as this the sheriff requires to produce the written judgment within a very tight timescale. There may be numerous findings in fact. Often such facts are contained in a joint minute of the parties, but the sheriff still requires to consider with care each proposed finding to ensure that it is accurate, correctly expressed and supported by evidence. He or she then has to set out the evidence of the witnesses in some detail, comment upon it and reach a reasoned conclusion. That task is made more difficult when care has to be taken not to make an unintentional error in expression which can in certain circumstances lead to the impression, which might be erroneous, that the sheriff has failed to apply the Act in the required manner. A judgment produced in such circumstances should not be subjected to the detailed scrutiny of a conveyancing document. That point was made in the *dicta* of Lord Hoffmann in an English case on financial provision on divorce (*Piglowski v Piglowski* [1999] 1 WLR 1360, at p 1372) in which he repeated what he had said in an earlier case:

> "… specific findings in fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made on him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance… of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

As Lord Wilson said in *In re B* at p 1929, Lord Hoffmann's remarks apply all the more strongly to an appeal against a decision about the future of a child.

[7] In permanence orders, the first question to consider is whether the section 84(5)(c) threshold test has been passed: *TW*, above, and *R v Stirling Council* 2016 SLT 689. That test is whether (i) there is no person mentioned in section 2(1)(a) of the Children (Scotland) Act

1995 to have the child living with him or her or to regulate the child's residence or (ii) "the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child". On "seriously detrimental", see *R v Stirling Council*, at para. [19]. The next question to consider is whether it would be better for the child that the permanence order be made than that it should not be made: section 84(3). In considering both questions the court must have regard to the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration (section 84(4)): see *TW*, above, at para. [13]. Where the application contains authority to adopt, the court, if the seriously detrimental threshold test has been met, will go on to consider whether it is satisfied that, where there is no consent or consent cannot be given, consent should be dispensed with under section 83(3), (4) or (2)(d). The sheriff is entitled to have regard to the same body of evidence in considering both sections 84(5) and 83(3)(b) and (c). The sheriff is entitled, in the absence of evidence demonstrating a change of behaviour, to base his or her assessment of the future on the evidence relating to the present and past: *S* v *City of Edinburgh Council* 2013 Fam LR 2, at para. [29]. In relation to section 83(3)(c) (likely to continue to be unable to discharge parental responsibilities or rights), what is required is a determination, at the time the application is considered, whether the inability of the parent to discharge parental responsibilities and rights satisfactorily is likely to continue in the foreseeable future: *TW*, above, at para. [16]. In considering section 83(2)(d) (that the welfare of the child requires dispensing of consent), the court would consider what Lord Reed said about the meaning of "requires" in *S v L*, 2013 SC (UKSC) 20, at paragraph [32] in relation to the similarly worded section 31(3)(d) of the 2007 Act (a high test meaning not merely desirable or reasonable but necessary).

[8] In reaching its decision about depriving a parent of parental responsibilities and rights, the court will have regard to Article 8 of the ECHR and in particular to what was said by the ECtHR in *Johansen v Norway* (1997) 23 EHRR 33 at paragraph 78 and *YC v United Kingdom* (2012) 55 EHRR 33 at paragraph 134, that family ties may be severed only in very exceptional circumstances, everything must be done to preserve personal relations and, where appropriate, to "rebuild" the family, and that it is not enough to show that a child could be placed in a more beneficial environment: see *TW*, above at para. [25].

The History of MG and AO

[9] The respondents are respectively the natural mother and natural father of the children. MG is now six; AO four. They have a sister, GD, who is two. The respondents now live in London, the first respondent in supported accommodation, the second respondent in rented accommodation. They spend three nights per week in the first respondent's home and some nights in the second respondent's home. Both are Nigerian nationals. The first respondent was Muslim but now adheres to a charismatic form of Christianity. The second respondent is now a Christian, formerly also a Muslim. The first respondent is an illegal immigrant having come to the United Kingdom from Nigeria 10 years ago. The second respondent also came from Nigeria to the UK 10 years ago. He is now entitled to remain here indefinitely. Two or three years after arriving in the UK the respondents met and began living together. In early 2010, the first respondent left to live on her own in Dublin where MG was born. They lived there for some 18 months. The first respondent lied about her HIV+ condition and registered MG's birth under a false surname to bolster her claim to remain in Ireland. She returned to live with the second respondent for a while in London.

[10] In October 2012 the first respondent came to Edinburgh with MG and while heavily pregnant with AO. She pretended that she was a recent arrival from Nigeria, fleeing domestic violence. Until she returned permanently to London in November 2013 (leaving her children in Edinburgh), she received social work support. In particular, after AO's birth in November 2012, the first respondent was provided with an intensive package of support for both her and AO. By then MG was, with the first respondent's consent, in foster care, albeit only for a few months. In May 2013 both children were taken into foster care when the first respondent was admitted to hospital suffering from an acute and transient psychotic disorder, and remained there until the following month when she left without telling the medical and social work staff. She returned to London albeit only for a few weeks. When she returned to Edinburgh she was again given social work support. She continued to move up and down to London, always without reference to her social workers. Her supervised contact with MG and AO was sporadic. Her third child, GD, was born in London in May 2014. GD was placed on the child protection register following a pre-birth child protection case conference under the auspices of the Royal Borough of Kensington and Chelsea.

[11] After sundry procedure, an adoption and permanence panel decided in March 2014 that MG and AO should be registered for permanent substitute care and that an application be made to the court for a permanence order with authority to adopt. Meanwhile in London the local authority were providing support for the first respondent and GD, including a period in a mother and baby unit in a hospital in Kent to assess the first respondent's mental health. She was also the subject of a parenting assessment in Croydon. She was difficult and uncooperative with staff, but the assessment did eventually conclude that she had the potential to meet GD's needs. After a period of assessment it was initially thought that GD should not be returned to the first respondent's care, but that decision was changed in

December 2014 when it was concluded that she had made positive progress. In January 2015 the Family Court in London made GD the subject of a 12 month supervision order but with the condition that GD reside with her mother. The court accepted medical advice that the first respondent had had only a transient psychotic disorder after delivery, rather than contrary medical advice that she suffered from schizophrenia. Meanwhile, MG and AO continued with foster carers and eventually with carers who were identified as prospective adopters. While the history of the first respondent's supervised contact with MG and AO was irregular and sporadic, the sheriff nevertheless concluded that she did demonstrate a strong commitment to attend contact. During the course of the proof before the sheriff, the first respondent displayed behaviour, both inside and outside the court, which suggested the need for a psychiatric assessment but she refused to undergo it.

[12] Meanwhile, the second respondent, whom the first respondent initially did not tell about the birth of MG, was in contact with the first respondent when she stayed with him after she returned to London in September 2012. During that time there was a disturbance involving the couple, which resulted in the police being called by neighbours. The first respondent did tell the second respondent about the birth of AO and took her to London three weeks after her birth when she saw the second respondent for the first time. He did not come to Edinburgh when the first respondent was in hospital in Edinburgh in May 2013. He did, however, visit her in July 2013 when GD was conceived. Since he became aware that his daughters had been accommodated, he has been in contact with their social workers about their care plan. It was hoped that the safeguarder for MG and AO would be able to assess his parenting but she was unable to contact him. Meanwhile, however, in London he was assessed as having the potential to meet GD's parenting needs. He was due to attend for supervised contact three times per week but attended only once per week during August

2014. However, he did eventually attend a contact centre in March 2015 and thereafter was involved in contact, both supervised and unsupervised, which the sheriff concluded as positive and with no concerns or difficulties. He has begun a degree course at the University of Greenwich. The respondents feel more comfortable living in London than in Edinburgh.

[13] Ultimately, the sheriff found in fact that the first respondent would be able to cope with another two children in her care only with the second respondent's assistance, that MG had a significant attachment to her mother and AO only a limited one, but that there was no good reason to separate MG and AO and that all three children would benefit from the sibling bond being developed and maintained.

The Sheriff's Judgment

[14] In considerable depth and with some care the sheriff set out the evidence presented before him and explained in detail his assessment of each witness. But in giving the reasons for the conclusions he eventually reached, the sheriff was brief. Looking at the anticipated level of care which the respondents could provide, despite its limitations, the sheriff decided that the seriously detrimental threshold test had not been passed. He commented (para [185]) that "the State is not in the business of engineering better placements for children who have parents with deficits". He expressly noted that he had borne in mind the need to safeguard and promote the welfare of the children throughout childhood and that he was not satisfied that it would be better for the children for the orders to made than not. If he had been required to add an authority to adopt provision to a permanence order he would not have considered that the respondents were unable satisfactorily to discharge their parental

responsibilities or exercise their rights and likely to continue to be unable to do so, or that parental consent otherwise required to be dispensed with.

The Grounds of Appeal

[15] Senior counsel recognised the high test which the appellants had to meet before this court could interfere with the sheriff's decision as being plainly wrong. That was, as senior counsel accepted, particularly so when there was no suggestion that the sheriff had misapplied the 2007 Act or, in the particular circumstances of these applications, had incorrectly recognised that he had first to consider whether the seriously detrimental threshold test had been passed.

[16] It was submitted that the sheriff had erred in four ways: first, that he had failed to take into account that there was no evidence that the respondents had a clear plan for or were able to give a "coherent indication" of stable accommodation being available for the children if in their care; secondly, that he had failed to take sufficient recognition of the fact that where, as here, there would require to be a reintroduction of the children to their parents there was a history of parental mistrust of and non-cooperation with social workers and other professionals, particularly when the sheriff had been so critical of the parents in his assessment of the evidence; thirdly, that the sheriff had failed to take due account of the stability and security of the children's present care arrangements; and fourthly, that he had failed properly to explain his conclusion that the second respondent would be able to make up for the shortcomings in the first respondent's parental care capacity.

Decision

[17] In our opinion, the grounds of appeal have no merit. The sheriff adopted the correct approach to the decision whether to make a permanence order. He first of all required to address the seriously detrimental threshold test. The sheriff's conclusion on that matter may be found in finding in fact and law 165 and in his reasoning in paragraphs [183] and [184] of his note. As senior counsel for the second respondent pointed out, the appellants' criticisms of the sheriff's conclusion fail to take into account that the sheriff accepted the evidence of the Edinburgh social work witnesses insofar as it gave the historical context but that it had been superseded by the generally positive experience in London where, after various ups and downs, the first respondent had satisfactorily cared for GD. While the sheriff records that he would have preferred to hear from the London witnesses by oral evidence rather than just by way of affidavits (para [44] of his note), it is plain that he took greater cognisance of their evidence in that it dealt with the first respondent's child caring ability in the present and recent past. That was a matter for him. We see no error in such an approach.

[18] The sheriff preferred the evidence of Dr Stein that the first respondent's mental health problems were not an underlying long term condition but a transient one immediately after delivery of her children (see finding 40 and his note at paras [142], [146], [147] and [151]). As the sheriff pointed out, Dr Stein's expert evidence was uncontradicted (his note at para [151]). The second respondent was a stabilising influence and his involvement altered positively his assessment of their joint parenting capabilities. The principal expert witness in support of the appellants' position was Elspeth Kemp. The sheriff clearly had grave reservations about her evidence and the conclusions she reached. That was a matter for him. In any event, senior counsel for the appellants did not directly criticise the detailed observations the sheriff made about her evidence. We note, in

particular, that the sheriff records (para [100] of his note) that Ms Kemp's first report was written with a view to the children "maximising their potential" in adoptive care, rather than in the context of the seriously detrimental threshold test. It is self-evident that children should have proper accommodation arrangements, but the sheriff dealt with that in para [184] and concluded that, whatever the difficulties, the children could go to live with their parents in the foreseeable future.

[19] We agree with senior counsel for both respondents that there was an obligation upon the appellants to have considered a plan for the children to be returned to their parents, which plan would have taken into account the prospects of securing accommodation. That is consistent with what was said in *YC v United Kingdom* (2012) 55 EHRR 967 at para 134 quoted by Lord Wilson in *In Re B* (p 1925 at para 33): "…everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family" or, as Sir James Munby put it in *In Re B-S* (p 572 at para. 29), the "local authority cannot press for a more drastic form of order, least of all press for adoption, because it is unable or unwilling to support a less interventionist form of order". Strictly speaking, the stability and security of the children's current care arrangements are more relevant once the seriously detrimental threshold test has been passed, notwithstanding the overall welfare test in section 84(4). But in any event the sheriff deals fully with the issue at para [184] of his note. We cannot fault his reasoning, which is consistent with the authorities.

[20] Nor do we think that the criticisms of the manner in which he assessed the role of the second respondent are justified. It is plain that the sheriff was well aware of the shortcomings of the respondents. He is not sparing in his criticisms of them. But he also recognised, subject to appropriate reservations, the generally favourable view of the second respondent, which was reached by Ms Georgiou, a senior practitioner within the mother and

baby unit in the hospital in Kent (para [176] of his note). If the appellants regarded their concerns to be so critical, it was open to them to enter into discussions with the London local authority and directly to seek expert evidence, if necessary, expressly to ask whether with the second respondent's help and other support the first respondent might be able properly to take care of all three children. There was criticism by the appellants that the evidence (see para [147] of the sheriff's note) that the second respondent could provide stability and security, and that together the respondents might afford the children adequate care, did not support the sheriff's conclusion in paragraph [184] of his note that the respondents will be able to provide settled and secure care. This overlooks the many positives that the sheriff found in his findings in fact (for example, 103, 104, 108, 134 and 149), what he says about the respondents in paragraphs [180] and [181] of his note and his correct approach to the seriously detrimental threshold test. The sheriff could come to his conclusions only on the evidence before him. Again, we cannot fault his approach or reasoning.

[21] Ultimately, the complaints of the sheriff's reasoning are little more than concerns about the weight which he attached or did not attach to adminicles of evidence. That is not the proper approach. None of the criticisms can be described, to follow Lord Reed's non-exhaustive list in *Henderson* (para [67]), as a material error of law, the making of a critical finding in fact which has no basis in the evidence, a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence. In his written argument senior counsel for the appellants relied upon the approach taken by the court in *Fife Council, Petitioner*, paras [63]-[69], in support of his submission that the sheriff's conclusions at para [180] of his note are inconsistent with his findings in fact. The passages in that case deal with its particular facts and circumstances; they do not lay out another basis in law for interfering with a decision of a fact finding court. Senior counsel set out in some

detail what he regarded as the relevant findings in fact which, he submitted, supported the sheriff's conclusions that each parent on his or her own would be incapable of looking after the children, as well as justifying the sheriff's reservations about their credibility and reliability. But the sheriff's judgment requires to be considered as a whole and, to adopt the words of Viscount Simon in *Thomas v Thomas* 1947 SC (HL) 45 (at p 47), we are satisfied that the whole evidence as contained in the findings in fact can reasonably be regarded as justifying the conclusions arrived at by the sheriff.

[22] We do not find it necessary to say much about whether the findings in fact would have supported the ancillary condition of authority to adopt, that being a matter to be determined only in the event that we had overturned the sheriff on his decision not to grant the permanence order. The sheriff did, however, deal expressly with that question, albeit briefly, at para [187] of his note. Without discussing the evidence in detail, we are satisfied that the findings in fact and the sheriff's assessment of them would well justify his conclusion that the statutory test for the making of such a condition was not met.

Expenses

[23] Expenses have already been dealt with in our last interlocutor.