SHERIFF APPEAL COURT

[2018] SAC (Civ) 5
EDI-AD6-16

Sheriff Principal Pyle
Sheriff Principal Murray
Appeal Sheriff Cubie

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in appeal by

ECC

Appellant

against

GD

Respondent

Appellant: Scott QC; City of Edinburgh Council
Respondent: Inglis; Lisa Rae & Co

8 March 2018

Introduction

[1] This is an appeal from the decision of the sheriff to refuse the appellant's application for a permanence order with authority to adopt in respect of a child who is four years old. It raises three important matters: 1, the application of the threshold test where there is a non-accidental injury to the child which has been inflicted by one or other of the parents but where the petitioning authority is unable to prove which one; 2, the correct construction of the phrase "is… seriously detrimental to the welfare of the child" within section 84(5)(c)(ii)

of the Adoption and Children (Scotland) Act 2007, which creates the threshold test for permanence orders; and 3, the legal consequences, if any, of a material change in the position of one of the parents late on in the process.

The relevant facts

[2] We discuss some of the evidence later in this judgment, but for present purposes the relevant facts may be summarised as follows:

1. The appellant's application was originally opposed by both parents. However, the mother's agent withdrew from acting during the course of the preparations for the proof and the mother failed to attend a subsequent peremptory diet. Accordingly, the only parties at the proof were the appellant and the father, GD.

2. The child, SD, was born in February 2014. He is the mother's third child. GD is not the father of the other two children, born in 2009 and 2012 respectively. The elder of those children was removed from the mother's care due to physical injury and neglect, while the younger was also removed, in 2012, due to the mother's inability to attune to her needs and priorities and prioritise them over her own. Both children have since been adopted and have no contact with their mother.

3. GD was born in India. He came to the UK on a student visa which has since expired. He does not currently have leave to remain here.

4. From birth SD was on the child protection register, but initially thrived in the care of his mother and GD, albeit with a high level of monitoring and support.

5. Following a visit to hospital to deal with a viral infection, a routine follow up appointment took place in May 2014. On examination of SD the doctors noted bruising on the child's face and a possible rib fracture, which was subsequently

confirmed. The injuries were non-accidental. SD was taken into care on a voluntary basis.

6. In July 2014 the parents were interviewed by the police and released without charge. Neither parent has ever explained how SD came by his injuries. Who caused them and in what circumstances remains unknown to the appellant.

7. Following a referral to the children's hearing, the parents eventually agreed that SD had been a victim of the offence of culpable and reckless conduct involving bodily injury, in terms of para 3 of schedule 1 of the Criminal Procedure (Scotland) Act 1995. SD was made subject to a compulsory supervision order in August 2015.

8. SD has been matched with prospective adoptive parents of the same dual ethnic heritage as the parents.

The appellant's position

[3] Throughout, the appellant's position on the long term future care of SD has been straightforward and consistent: in the context of an unexplained non-accidental injury, which by dint of the acceptance by the parents of the ground of referral before the children's hearing must have been inflicted by one or both of them and by their continued unwillingness to admit responsibility or otherwise to explain the circumstances of the injury, there would be no purpose in a parenting assessment. That position was supported by Sally Wassell, an independent social worker, and Dr Katherine Edward, a clinical psychologist who was jointly instructed by the parties as an independent expert, the curator-ad-litem and, albeit by implication, the advice panel of the children's hearing. In short, while the appellant considered there to be other difficulties with the parents, particularly the mother, it maintained that the injury itself meant that the threshold test had been passed.

The position of GD

[4] In contrast to the appellant, GD's position is neither consistent nor straightforward. In his answers to the appellant's rule 34A statement, it is averred as follows (para 4):

> "Admitted that on 22 May 2014 [SD] was found to have facial bruising and a fractured rib. Admitted that medical opinion is that the injuries were non-accidental in origin. *Quoad ultra* denied. Explained and averred that the parents were unable to offer a satisfactory explanation of how the injuries occurred however [*sic*] ultimately accepted grounds of referral which specified that on around 22 May 2014 [SD] was handled inappropriately and recklessly whilst in their care. There is no evidence, medical or otherwise, which suggests that the injuries… were caused deliberately or intentionally by either parent. Neither of the parents were [*sic*] charged with any criminal offence in respect of [SD]. No risk assessment of either parent has been carried out by the petitioners."

He then goes on to explain (para 5) that "the parents have consistently advised the petitioners that they are a couple and would wish to parent [SD] together" and (para 7) that "the parents have not been offered any services by the Petitioner's [*sic*] to address any perceived risk to the child nor to advance rehabilitation of the child to their care. The parents would be eager to engage with such services." He underlines that point in para 9: "The petitioners have failed to carry out a full and comprehensive parenting assessment of the child's parents to assess their abilities".

[5] Thus, GD's position prior to the proof was that he was living with the mother and wanted an assessment made of their parenting skills and any risk to the child if in their joint care. On the eve of the proof his position changed. He now said that he wanted to live apart from the mother and to have sole care of the child. This remained his position during the proof and before this court. His position on SD's injuries did not change. He continued to deny that he had caused them but, as the sheriff records in his judgment (para [78], he "appears to have a blind spot when it comes to the potential culpability of the first respondent".

The sheriff's conclusions

[6] The sheriff held that the appellant had failed to pass the threshold test. He discussed the recent decision of the Supreme Court in *West Lothian Council* v *B* 2017 SLT 319. He derived certain principles from that case, including that the onus of proving past facts to support a prediction of future harm rested with the petitioning authority and that the threshold test required to be met in respect of *each* parent. He identified the crux of the matter as follows (para [89] of his judgment):

> "… there are unproved allegations of criminal conduct against the parents, based on proven non-accidental injuries that in themselves cannot identify the perpetrator or perpetrators. There was no evidence that the parents were sequestered together day and night; the evidence was to the contrary. Getting the parents to concede that the child must have been the victim of culpable and reckless conduct gets the petitioner no further."

Still in the context of the threshold test, he held that the appellant ought to have carried out a proper assessment of GD as sole carer. He excused GD's failure to come forward earlier with the proposal that he look after SD alone on the basis that this as the only likely possible option was brought home to him only at proof on the basis of Dr Edward's report which was lodged only shortly before it.

[7] As we discuss below, the sheriff did not make any findings in respect of the other conditions for an order to be granted on the basis that the appellant's case had fallen at the first hurdle.

The appellant's primary ground of appeal

[8] We have described this ground as the primary one, despite it being expressed in the appellant's note of argument as the alternative one. We do so because if we accept it the consequence would be that the other grounds of appeal become academic.

[9] The threshold test for the grant of a permanence order is contained in section 84(5) of the 2007 Act and is in the following terms:

> "Before making a permanence order, the court must…
> (c) be satisfied that…
> (ii)… the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child."

Senior counsel for the appellant submitted that the first alternative of the test, namely "is" rather than "is likely to be" seriously detrimental, has two possible and alternative purposes: first, it is to cater for cases where a local authority seeks a permanence order in respect of child who is living at home at the time of the application (an unlikely proposition because if there were concerns about serious detriment the child will have already been removed into care) or, secondly, it is to cater for children in respect of whom residence with the parent is seriously detrimental at the point of removal. That, said senior counsel, was the appropriate construction and was in line with the approach taken in England and Wales under the equivalent legislation (*In re M (A Minor) (Care Orders: Threshold Conditions)* [1994] 2 AC 424).

[10] In our opinion, senior counsel was correct in her submission that "is" refers to the state of affairs at the point that SD was removed from the care of his parents. In *In re M* the child's mother was murdered by the child's father. The child was immediately taken into care and placed with a foster carer. His three siblings were placed with a relative of the now deceased mother and subsequently a residence order was granted in the relative's favour. Two years later, the child was placed with the same relative and the issue before the court was whether the child remain there under a residence order or, perhaps, be made available for adoption under the terms of a care order. In the event, the House of Lords decided that the care order be restored but with no immediate plans to remove the child from the care of the relative. The threshold test in the Children Act 1989 was in similar terms to the 2007 Act,

namely "is suffering, or is likely to suffer, significant harm" – that is to say that it considered the present, however defined, and the future. The speciality in that case was that the "significant harm" was one event, namely the murder of the mother, there being no suggestion that subsequent to that the child had suffered harm or indeed in the future was likely to do so. In allowing the appeal, the House of Lords recognised that if the threshold test was not applied as at the date the child was taken into care the fact that the local authority had taken the appropriate steps to look after the child would by itself prevent the court having jurisdiction. Lord Templeman colourfully described the alternative construction as an illustration of the "tyranny of language" and emphasised the importance of construing a statute in accordance with the spirit rather than the letter (at p 438).

[11] Ultimately, the threshold test is a jurisdiction point, as was pointed out in *In Re M* (Lord Mackay of Clashfern at p 434; Lord Templeman at p 440). It does not mean that a permanence order will be granted, but it does have the effect of giving the sheriff the power to make the order if appropriate and after considering whether all of the other statutory conditions have been met.

[12] We discuss below the reasons why we consider that the sheriff fell into error in considering that the question of GD's parenting skills was a relevant matter in deciding whether the threshold test had been met in the context of "is likely to be" seriously detrimental, but for the determination of this appeal we consider that the test was met in that, as at the date SD was taken into voluntary care, his residence with GD "is" seriously detrimental to his welfare for the purposes of the sub-section. That in our view was the inevitable conclusion which the sheriff ought to have reached standing the undisputed evidence that as at that date SD was in the joint care of his mother and GD and that date was only a few days after the medical view on the injuries had become clear. In other words, it

was necessary for the appellant to establish, at least for the purposes of the threshold test, only the fact of the injuries coupled with no satisfactory explanation of their cause. It was unnecessary for the appellant to establish any more facts which might be pertinent to the likelihood of future serious detriment, including that GD was or was not the perpetrator.

[13] Counsel for GD did not deal directly with this ground of appeal either in his written submissions or at the hearing, but he did argue that there was a danger in considering English authorities on the construction of the Children Act 1989 in the interpretation of the 2007 Act. The crucial difference, said counsel, was that the 1989 Act is about the fact of significant harm rather than the person with whom the child's residence might be seriously detrimental. We do not agree, at least in the context of this primary ground of appeal, where the distinction to be drawn is between the same word and phrase, namely "is" or "is likely to be".

The appellant's second ground of appeal

[14] We consider that the foregoing analysis is sufficient to allow the appeal to be granted, but out of deference to parties' submissions we now deal with the other ground of appeal, namely the likelihood part of the threshold test.

[15] Senior Counsel submitted (1) that the sheriff had misunderstood the task he was set and had conflated the first part of the threshold test, as discussed by Lord Reed in *West Lothian Council* v *B*, namely the ascertainment of facts about what has occurred in the past (an exercise of proof on the balance of probabilities) with the second part, namely the application of those facts to determine whether having regard to them there was a likelihood of serious detriment (an exercise not of proof but of prediction of future harm); (2) that as a matter of policy the sheriff's approach reached an absurd result, particularly when taking

into account the policy behind the 2007 Act; (3) that in any event it was sufficient for the appellant to have proved that GD was a member of a pool of people who inflicted the injuries, in this case a pool containing only him and the mother; (4) that, again in any event, the sheriff's approach to the evidence of GD was irrational; and (5) that he failed to take into account relevant evidence.

[16] Counsel for GD submitted (1) that the sheriff had correctly applied the threshold test, particularly the principles set out in *West Lothian Council* v *B* in respect of the requirement of the appellant to establish the perpetrator of the injuries; (2) that the English legislation did not require the establishment of the perpetrator, but that this was because the terms of the test were quite different from the Scottish one; (3) that the Scottish requirement of a causal link between the perpetrator and the harm meant that the establishment of a mere pool was insufficient; and (4) that on the facts of this case there was no danger of an absurd result because GD no longer intended to stay with the mother.

Discussion

[17] It is disappointing that the statutory scheme for permanence orders with or without authority to adopt continues to cause difficulties. That is a particular concern when the welfare of children is involved. Delay and uncertainty cause untold harm to looked-after children. Part of the problem is the order in which the statutory provisions are set out (a point made by Lord Drummond Young in *R* v *Stirling Council* 2016 SLT 689 (at p 694)) but the English statutory code, which is more straightforward at least in structure, has also caused major difficulties in interpretation. A recent example of that is the decision of the Court of Appeal in *In re W (A Child)(Adoption: Grandparents' Competing Claim)* [2017] 1 WLR 889 in which the phrase "nothing else will do" as first coined by Baroness Hale in the

Supreme Court decision of *In re B* [2013] 1 WLR 1911 to describe the necessity test required to be explained again (para [68] et seq). In that case, two experienced social workers, one a guardian the other independent of the local authority, fell into the trap of describing grandparents as having a "right" to bring up their grandchild – and indeed the judge at first instance failed to draw attention to this erroneous approach despite relying upon their evidence. No social worker or court should be in any doubt about the requirement to treat adoption or authority to adopt as a last resort. Indeed the threshold test itself predates the coming into force of the Human Rights Act (see *Lothian Regional Council* v *A* 1992 SLT 858), as does the principle that the court will not lightly authorise a very serious intervention by the state in family relationships (*S* v *L* 2013 SC (UKSC) 20, para [33]). Yet we detect that on a practical level it is by no means easy to apply what are on the face of it straightforward principles. That is a difficulty which faces social workers and legal practitioners alike.

[18] It is also a difficulty for the courts. The sheriff's judgment in this case has been carefully drafted. As was his duty, he prepared it within a very short period of time. Despite this court's reminder in *Edinburgh City Council* v *RO & RD* [2016] SAC (Civ) 15 (para [6]) that such judgments should not be treated like a conveyancing document, the sheriff knew that each line would be scrutinised by the parties to detect any failure properly to assess the evidence and to apply the law. That merely increases the pressure. It is a lengthy document, as is now the norm. Indeed, it would have been much longer if he had gone on, as we later say he should have, to consider in detail the other requirements of the Act. That an experienced sheriff who has approached the task before him with considerable care still falls into error is testimony to the complexities of this area of law.

[19] We have already pointed out (para [6] supra) that the sheriff's consideration of the evidence about the parenting assessment for GD was still in the context of the threshold test.

It seems that he did so because he looked at the evidence of the non-accidental injury, decided that the failure to prove the perpetrator meant that the threshold test was not passed and went on to consider likelihood of serious detriment in the context of the lack of other evidence, such as a parenting assessment of GD. The error which the sheriff made can be seen in his discussion of Dr Edward's evidence (para [94] et seq of his judgment):

> "In my view, Dr Edward's careful answer that the evidence was not there that [GD] could offer a safe, secure and appropriate home falls some way short of establishing that the petitioner has proved that the child's residence with his father, about whom many positive things were said, would be seriously detrimental to his welfare or that he had suffered harm at his hands.
>
> [95] Dr Edward acknowledged that there had not been an assessment of the second respondent as sole carer. A "continuous assessment" is not good enough, especially when it is quite clear that there is a preferred outcome on the part of the petitioner. Dr Edward's conclusion that a permanence order with authority to adopt is the best solution "… as the possibility of safe rehabilitation… to his parents is not an option for him" is premature as there is not enough evidence to justify it as yet. There requires to be a proper assessment of the second respondent as sole carer. The result of that assessment may or may not be to his liking, but a desire to make progress after years of delay *does not trump the need to cover every base before coming to such a serious decision* [our italics]."

As we have already said, the essence of the threshold test is jurisdiction. The "need to cover every base" might be a laudable aim in some contexts but it should not be set in the context of the threshold test. Rather, it is something to take into account in assessing the welfare and proportionality tests in the context of the other provisions of the Act before deciding whether or not to grant the order. In our opinion, if the sheriff had properly directed himself on the threshold test, it would have been self-evident that a non-accidental injury to a three month old baby while in the care of two people one or both of whom by definition (and concession) must have been the perpetrator or perpetrators means that the threshold of the likelihood of serious detriment has been passed. We repeat: that does not automatically

mean that the permanence order will be granted; the other concerns of the sheriff, to which we have referred, should have been taken into account at the second stage.

[20] At para [12] of his judgment the sheriff states:

> "The onus of establishing that the child's residence with each is or is likely to be seriously detrimental to the welfare of the child is upon the petitioner and must be proved upon the balance of probabilities."

That statement is wrong in law: the task is to establish whether there is a real possibility of future serious detriment, rather than proof on the balance of probabilities. The task can be carried out only upon evidence and on facts which, so far as relevant, have been proved. It is only in the latter context that proof on balance of probabilities arises (*In re H* [1996] AC 563; *MA, SA and HA (Children, by their Children's Guardian)* v *MA, HA, The City and County of Swansea* [2009] EWCA Civ 853).

[21] There was much discussion before us about the potential problems which would arise if, as in this case, the sheriff required the petitioning authority to prove the perpetrator of a non-accidental injury where only one or both parents must have been responsible. Reference was made to a number of English decisions on this point: (*Lancashire County Council* v *B* 2000 2 AC 147; *In re O (Minors) (Care: Preliminary Hearing)* [2003] UKHL 18; *In re S-B (Children) (Care Proceedings: Standard of Proof)* 2010 1 AC 678; *In re J (Children) (Care Proceedings: Threshold Criteria)* [2013] UKSC 9). One passage from these authorities explains the point (*Lancashire County Council* v *B*, Lord Nicholls of Birkenhead at p 165):

> "As the present case exemplifies, the appellants' argument, if accepted, produces the result that where a child has repeatedly sustained non-accidental injuries the court may nevertheless be unable to intervene to protect the child by making a care order or, even, a supervision order. In the present case the child is proved to have sustained significant harm at the hands of one or both of her parents or at the hands of a daytime carer. But, according to this argument, if the court is unable to identify which of the child's carers was responsible for inflicting the injuries, the child remains outside the threshold prescribed by Parliament as the threshold which must be crossed before the court can proceed to consider whether it is in the best interests

> of the child to make a care order or supervision order. The child must, for the time being, remain unprotected, since section 31 of the Children Act 1989 and its associated emergency and interim provisions now provide the only court mechanism available to a local authority to protect a child from risk of further harm.
>
> I cannot believe Parliament intended that the attributable condition in section 31(2)(b) should operate in this way. Such an interpretation would mean that the child's future health, or even her life, would have to be hazarded on the chance that, after all, the non-parental carer rather than one of the parents inflicted the injuries. Self-evidently, to proceed in such a way when a child is proved to have suffered serious injury on more than one occasion could be dangerously irresponsible."

For England and Wales, the solution to this problem has been a construction of the Children Act which does not require proof of the perpetrator as an essential ingredient of the threshold test. (See, eg, *In re S-B*, at para [35].)

[22] Counsel for GD, however, submitted that the 2007 Act was materially different in its terms in that the identification of the person was required. It is indeed obvious that the statutory language used for the threshold test in Scotland is different from that used in England and Wales. We therefore accept that there may well be cases where the identification of the person will be critical. But we do not see the instant case as one of them. It is important to observe that the sheriff did not rule out the possibility that GD was the perpetrator of the injuries. The relevant finding in fact is as follows:

> "[23] Neither parent has ever explained how SD came by his injuries. Who caused them and in what circumstances remains unknown to the petitioning authority."

The ground of referral to the children's hearing was accepted by both parents (finding in fact [27]). The supporting facts for the ground, which were also accepted by the parents, explain that on or around 22 May 2014 SD "was handled inappropriately and recklessly whilst in the care of his parents" and that "[n]o-one else had care of [SD] on or around 22 May 2014". GD's position at the proof was confused. He declared that he was not the perpetrator but, according to the sheriff, was unwilling to blame the mother, despite the

acceptance of the ground of referral. During the course of his submissions, we pressed GD's counsel on the point and he quite properly accepted that only the parents were the possible perpetrators. But he, again quite properly, also said that he could go no further than his client's instructions which were the same as at the proof. The sheriff discusses this in his judgment (para [28]):

> "The second respondent gave evidence on his own behalf. As will be discussed further below, he seemed credible in asserting that he had not harmed his son but it is not possible to assess the reliability of that denial. The onus remains on the petitioner to prove the case against him."

We find this a confusing passage. The sheriff has a responsibility to determine whether witnesses are truthful and reliable – whether "they have accurately observed and remembered and truthfully related what occurred" (*Walker & Walker The Law of Evidence in Scotland 4th Ed*, p3). But the sheriff does not reach a conclusion on GD's evidence. Absent a conclusion on reliability, his observation about credibility is meaningless. The nature of these proceedings is such that GD has a stake in a particular version of events. His evidence is inconsistent with what is agreed – and is shown by other evidence – to have occurred; viz, SD was injured by one or both of his parents. GD must know whether or not he was the perpetrator. There is no middle ground.

[23] The sheriff comments further as follows (para [78]):

> "The second respondent presented as earnest, if somewhat naïve. He is an intelligent individual, who well realises that something must have happened but denies that he was responsible or knowing who was responsible. The sticking point as far as the petitioner is concerned is that GD will not give details of what happened to SD and simply cannot bring himself to believe that SA is a bad mother or responsible for the harm. He appears to have a blind spot when it comes to the potential culpability of the first respondent but his views may be influenced by his dependency on her… He is credible in his assertion that he was not responsible for the injuries, but how reliable that denial is cannot be assessed. However, his failure to explain what he might be unable to explain can only lead to a suspicion that he might be hiding something. It does not mean that the petitioner has proved to the required standard facts from which future serious detriment to the child's welfare can be predicted."

As always, it is important to remember that the fact-finding judge has the advantage of seeing and hearing the witnesses, which means that an appellate court should be slow to take a different view of the evidence. But, despite the advantage which the sheriff had, we are of the opinion that the sheriff was plainly wrong in his assessment of GD's evidence about the perpetrator. GD's position was at best contradictory, at worst disingenuous. He had accepted the ground of referral, which as we have said necessarily meant that only he or the mother or both of them caused the injuries. His evidence that he was not the perpetrator but that he was unwilling to blame the mother cannot be accepted as credible. Reliability is not the issue. But the position is clearer than that. In fact, GD's gave evidence that the mother did not cause the injuries. In examination-in-chief, he said the following (p 266-267 of the appendix):

> "Q: Are you able to provide an explanation of the injuries?
> A: I cannot just lie about it all I can say. I cannot just lie about it and say, because I have not done it and I know she has not done it also, of what I have seen, so I cannot say she has done it also."

And later in cross-examination (p 287 of the appendix):

> "Q: It was made quite clear to you a long time ago?
> A: I always thought there is a chance. She is not wrong she is a good mum.
> Q: Is that what you think?
> A: Yes, she is. I would still say that in front of a judge, she is an amazing mother.
> Q: Who has lost the care of three of her children?
> A: Yes, she is, she was to my son. I do not know about her past and how she has been with them but she was OK with my son.
> Q: It has been your consistent unwavering position for over three years now that you want [SD] back in your joint care with [the mother]?
> A: Yes I do.
> *Q: You do not believe either you or [the mother] have done anything wrong?*
> *A: Yes.*
> [our italics]"

We have already said that we can envisage a circumstance where proof of the perpetrator will be required. Indeed, the circumstances in *Lancashire County Council* v *B* might be such a

one. After the passage we have quoted above, Lord Nicholls discusses the disadvantages of the approach he was taking and, in particular, the risk of injustice to the parents or third party carers. Senior counsel advised us that none of the issues in this case was the subject of detailed discussion in the Scottish Parliament during the progress of the Bill which became the 2007 Act. It might well be that the drafters of the Bill had in mind that potential risk of injustice in deciding that the threshold test should refer to the person. But in our opinion that does not assist GD. The fundamental point is this: assuming that he was not the perpetrator, which for the reasons just given is a major assumption, his unwillingness to blame the mother and, indeed, his willingness to maintain that she did not cause the injuries despite what is admitted before the children's hearing, must logically result in the conclusion that at the date SD was taken into care the child's residence with him *was* seriously detrimental to the welfare of the child or at the time of the sheriff's decision *was likely to be* the same. It is a clear inference based upon the established fact of a non-accidental injury to the child while in the sole care of GD and the mother. Given that conclusion, it inevitably follows that for the purposes of the threshold test it is irrelevant that late in the day he expressed the wish to be SD's sole carer.

[24] Before we leave this discussion, we should deal with two other points made by senior counsel for the appellant. She submitted that there was an important distinction to be drawn between the Scottish system and that which operates in England and Wales. In the latter a care order allows both for child protection and for steps with a view to adoption. In contrast, in Scotland child protection is via the children's hearing system and permanence is through the court. A child who is the victim of an offence may be referred to the children's hearing without establishing the perpetrator (*Kennedy* v *F* 1985 SLT 22). Were it necessary to establish the perpetrator for the purposes of a permanence order a child would be left in

limbo. The child could be held under a compulsory supervision order where the children's hearing may not consider rehabilitation with its parent, but the court could not consider permanence. She also made reference to the Scottish Executive's Adoption Policy Review Group Report of Phase II (6 June 2005) and the aims therein expressed for the introduction of permanence orders.

[25] We accept senior counsel's analysis, but we do not characterise the system as leaving the child in limbo. Many looked-after children remain within the children's hearing system until adulthood. That might be the least favoured option, but it is not uncommon. We do not see that as being a driver for a construction of the threshold test which does violence to the plain words used. Lord Nicholls in the passage quoted above expresses dismay about a child's future being hazarded on the mere chance of not being able to prove who caused the injury. But that is just as true for discovery of the injury itself. It is well known that the abuse of a child can be concealed by the perpetrator for many months, sometimes years. It can often be just chance, as here where the injuries were discovered in the course of a routine follow up medical consultation, which results in the authorities finding out about it.

[26] Senior counsel also complained that the sheriff makes no mention of the view expressed by the curator-ad-litem and the advice of the children's hearing in discussing his reasons for the decision he reached. While it might have been better that he had done so, we do not regard that omission as critical in the context of the threshold test which for the reasons we have given was always going to be passed no matter what the curator-ad-litem or the children's hearing might say. Their relevance is at the point when welfare and proportionality are under discussion.

[27] In passing, we make a further point: the appellant imperilled its case on the basis that the threshold test would be passed merely by the fact of non-accidental injuries to SD

coupled with the lack of explanation by the parents and the continued denial by GD of fault. This decision vindicates the appellant's position. However, the task for the sheriff might well have been made easier if in her affidavit Dr Kirk, the consultant paediatrician, had given an opinion on when she thought the rib fracture had occurred and whether a responsible parent who had not caused it would nevertheless have noticed it.

[28] For the reasons we have given the sheriff's interlocutor should be recalled. The next question is what else we should do about the application.

Next steps

[29] While we have expressed some sympathy for the sheriff, we *are* critical of his decision not to deal with the other conditions which are required to be met for the application to be granted. Even where a sheriff decides that the threshold test has not been passed, it is still his or her duty to deal with those matters when he or she has heard the evidence. Not to do so causes a problem for an appellate court if his or her interlocutor is to be recalled. One option would be to remit the case to the sheriff to come to a decision on the outstanding matters. We do not regard that as sensible given the views the sheriff has expressed. Another option would be to remit the case to another sheriff to hear the evidence of new. That is not an attractive option for several reasons, but the primary one is delay which may be considerable. A third option is that we assess the evidence and ourselves decide whether the orders sought should be granted. It is now over 10 months since SD was matched with his prospective adoptive parents. There is no guarantee that if this process is further delayed they will remain willing or able to adopt him. They as well as SD must be very anxious to know as soon as possible whether they are going to be allowed to adopt. SD has already had three foster placements. He has been in the care system for nearly the whole

of his life. In our opinion, this uncertainty cannot be allowed to go on. Fortunately in this case, unlike in *West Lothian Council* v *B*, the evidence is relatively recent. Nor were we told by counsel for either party, but particularly counsel for GD, that additional evidence would be required to reflect any possible events which might have occurred since the last day of proof in September 2017. (In saying that, we do of course still have in mind the lack of a parenting assessment of GD, a point which we discuss in detail later.) In these circumstances, we have decided to assess the evidence ourselves and come to a conclusion on whether the order sought should be granted.

[30] Fortunately, the sheriff has summarised much of the evidence in some detail. He has also made a number of findings in fact which are germane to the issue now before us. Given that he saw and heard the witnesses, we shall try to ensure that where possible we accept his assessment of the parole evidence. On the written evidence which was not spoken to by the authors of it at proof we are equally well placed as the sheriff to reach a view. Nevertheless, we will look at all the evidence through the prism of the sheriff's judgment and only depart from his findings if we find his conclusion to be plainly wrong and inconsistent with the evidence.

[31] Lord Reed's judgment in *West Lothian Council* v *B* is a useful reminder of the approach which ought to be taken. The first point is that we require to deal separately with the application for the permanence order and with the application for authority to adopt. The second point is that in deciding whether to grant the permanence order, one of the critical conditions is that we must consider that it would be better for the child that the order should be made than that it should not be made (section 84(3)) and that that decision must be made in the light of the requirement that the welfare of the child throughout childhood is to be the paramount consideration (section 84(4); *R* v *Stirling Council*, ibid, p 693, quoted

with approval by Lord Reed in *West Lothian Council* v *B* at para [16]) Added to that is the question of proportionality - or necessity as it is sometimes called - arising from the European Convention jurisprudence.

[32] At the stage of deciding whether to grant the permanence order, it seems to us that there are three choices. The first is that SD continues under the supervision order with a view to him being returned to the care of both of his parents. The second is the same as the first except the aim would be returning him to the care of GD alone. The third is to recall the supervision order and have the ancillary responsibilities and rights held by the appellant rather than the parents, subject to a decision on the level of parental contact.

[33] We do not regard the first option as a realistic one. The mother has no further interest in these proceedings. That was her decision. She has a history of being incapable of taking care of her children. She accepted the grounds of referral before the children's hearing. We readily accept that there might be several reasons why she decided not to continue her opposition to this application. She cannot be expected to understand all the legal complexities. Nevertheless, we consider that we have no choice but to accept her decision at face value. For that reason alone, never mind the other problems with her previous care of SD and her other children, we have discounted her as being an appropriate person to bring up SD. In our view, this option would not safeguard and promote SD's welfare throughout his childhood.

[34] We come now to the second option, namely GD as the potential sole carer of SD. Reaching a decision on this option has caused us the most difficulty. The arguments for or against it are not clear cut. On the positive side, SD's allocated social worker, Sarah Sutherland, considered that there were positive aspects to the current formal contact between SD and his father, such as "warmth, affection and play" (sheriff's judgment,

para [41]) That was confirmed by Elizabeth McDonald, the social work assistant who supervised contact from June 2014. She described the parents as "loving with SD". She also commented that GD is "markedly more competent and playful", that "SD seems to prefer his father" (ibid, para [48]), that "SD gets on well with GD and calls him 'dada'. SD has developed well, is settled and is happy most of the time in contact" and that "SD enjoys contact. This is not a case where the child refuses to go, hates to be there, or is frightened of going" (ibid, para [53]). Sally Wassell and Dr Edward more or less reached the same conclusion when they observed contact during June and July of last year (ibid, paras [64], [74] and [76]). We have reservations about GD's sincerity in stating that he was prepared to cease living with the mother despite his affection for her (eg, transcript of evidence, p 276 of appendix). (Indeed, we were advised that he continues to live with her.) The sheriff accepted his evidence that his change of heart came late in the day. We recognise in the context of the welfare of a child, particularly one so young, there is always the possibility that circumstances can change quickly and take unexpected turns. But given the background here we cannot accept that it was only on consideration of Dr Edward's report that the question of seeking sole care of SD *should* have been contemplated. Late changes of position have the potential to cause delay and introduce yet more circumstances to be weighed in the balance. Sometimes they are for good reason, such as when relatives become aware of the family situation only at a very late stage, but any change such as in this case, where GD should have contemplated a role as sole carer well in advance of the proof, is to be deprecated.

[35] In our opinion, if the above factors were the only ones which fell to be taken into account, we would have readily concluded, despite GD's late change of position, that the appellant should have conducted a parenting assessment of GD. Indeed, we suspect that the

appellant's social workers would have concurred in that (transcript of evidence, Sarah Sutherland, p22-23 of appendix). But that would be to ignore the most troubling aspect of this case, namely the non-accidental injuries and GD's position on them.

[36] We agree with the sheriff (para [57] of his judgment) that Sally Wassell was asked the wrong question by the appellant, namely whether it had acted reasonably and appropriately. As he records, that approach falls squarely within the concerns expressed by Lord Reed about the Lord Ordinary's approach in *West Lothian Council* v *B*. But we do not think that if she had been asked the correct question, which would take into account the terms of section 84(3) and (4) of the Act, the substance of her answer would have been different. That, put plainly, was that it would not be possible for the appellant to return SD to his parents' care (or to GD's sole care) in the absence of any explanation for the injuries – "any parenting assessment in circumstances such as this would take as a starting point an exploration of the circumstances of the injuries" (para [61] of the sheriff's judgment).

[37] Dr Edward took the same view. In her report, she makes the following comments (p 36-38 of appendix):

> "To date neither parent has accepted responsibility for the injuries and they suggest they do not know how they occurred. This may be true or not, but either way for parents to be responsible for such injuries or to have had care of an infant and been unaware the injuries of that type were occurring raises very significant child protection and parenting capacity concerns.
>
> I understand that the viewpoint of the Social Work Department was that in the absence of an explanation of the injuries, rehabilitation to his parents' care could not be considered. This view was reinforced by the independent assessment carried out by Sally Wassell…
>
> Whilst it may be that the birth parents do not actually know what caused [SD]'s injuries, what remains lacking to date is an acceptance from both of them that the injuries must have occurred whilst he was in their care and a sustained commitment to improving all aspects of their parenting to ensure that such an incident could confidently be assumed to never occur again. From my own meeting with the parents I found that [GD] could express shock and concern about the injuries but

> maintains a view that he was not present when they occurred and does not believe either of them are responsible in any way…
>
> In the light of these concerns I could not suggest that consideration of rehabilitation to his parents for [SD] would have been possible at any point since May 2014, and I would suggest that the Local Authority has been appropriate in ruling that out as an option for [SD]."

In the course of Dr Edward's examination-in-chief, the possibility of GD being the sole carer was put to her for the first time. She said that this would not alter her above conclusions. In particular, she was asked if the injuries were still a factor. She said that they were and went on (transcript of evidence, p 317 of appendix):

> "The difficulty with regard to the injuries is I understand that both parents have said that they do not know how these injuries occurred. Both myself and Sally Wassell had the same experience of speaking with [GD] and his partner in relation to the injuries and found that their acceptance that the injuries had happened and therefore their ability to consider what they may need to change in their parenting and to empathise with the experiences [SD] must have had, their ability to do that was extremely low and that would cause concern about their ability to safeguard him in the future."

[38] As we have pointed out, Dr Edward was appointed jointly by the parties. There was no evidence led by GD which contradicted her evidence or indeed the evidence of Sally Wassell. The sheriff makes reference to a different view being held by the children's reporter but she was not led in evidence (paras [66] and [67]) of his judgment). Counsel for GD reminded us that even uncontested expert evidence is not bound to be accepted (*Davie* v *Magistrates of Edinburgh* 1953 SC 34). But in our view the evidence of both witnesses is compelling. We therefore accept it. It follows that there is no purpose in either refusing this application (or continuing it) for a parenting assessment to be done for GD. Nor is there any evidence to suggest a reasonable prospect of a change of heart by him which might open that door. Without such a change of circumstances it is plain, in our view, that it would be

better that the permanence order is made than it should not be made. We also conclude that the making of the order will safeguard and promote SD's welfare throughout his childhood.

[39] The child is obviously too young to express a view (section 84(5)(b)(i)). The child has a Scottish mother and an Indian father. There is in our view nothing to be taken from that which would prevent the order being made (section 84(5)(b)(ii)). The effect of the order will be that the child will come out of the children's hearing system, but will still have the protection provided by the appellant's social workers. We refer to contact later. We now turn to the application for authority to adopt.

[40] Happily, the appellant has been able to find a match for adoptive parents for SD. Their ethnicity mirrors that of his parents (section 14(4)(c)). On the evidence it is clear that they will offer SD a stable and loving family unit. Their personal circumstances are fully explained in the affidavit of Joan Reade, a social worker with Barnardo's Scotland Adoption Placement Service. While SD is thriving in his present foster placement, there is no suggestion that the placement is regarded as a long term option. He has been in the care system for nearly all of his short life. That would end if an application for adoption is granted in due course. We have already set out in detail some of the authorities relating to the threshold test. For the purposes of this appeal, we do not set out in full the now well-known dicta on the necessity test, except to recognise that necessity has been variously described as "a last resort" or "nothing else will do". The English authorities are usefully summarised in *Fife Council* v *M* 2016 SC 169 at para [62]. The Inner House in that case also cited with approval the opinion of Lord Reed in *S* v *L* (an adoption case), which reinforces the point. We have already set out our reasons for concluding on the evidence that a permanence order be granted. We do not repeat them here. Suffice it to say that we conclude that the test of necessity has been met and that it would be better for SD that we grant

authority for him to be adopted than if we were not to grant such authority (section 83(1)(d)). We are also satisfied that the parent's consent to the making of the order should be dispensed with (section 83(1)(c)(ii)) on the ground that the parents are unable to satisfactorily discharge their parental responsibilities and exercise their parental rights (except on contact with SD, for which see below)) and are likely to continue to be unable to do so for the reasons set out in this judgment in respect of the similar provision in section 84 (section 83(3)(b) and (c) (the threshold test for authority for adoption)) It is already clear that SD is likely to be placed for adoption (section 83(1)(b)).

[41] Turning to the remainder of the conditions set out in section 14, we are satisfied that we have had regard to all the relevant circumstances (section 14(2)). We have already considered the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration (section 14(3)). An adoptive placement should offer a stable family unit; SD is too young to express a view; the prospective adoptive parents align to SD's ethnic background (section 14(4)(c)) and for the reasons given an adoptive placement should be of benefit to SD throughout his life (section 14(4)). Section 14(5) requires, so far as practicable, the views of the parents to be taken into account. His continued opposition to this application evidences GD's view. For the reasons we have already stated (para [33] supra), we take the mother's position at face value. We see only delay and no utility in continuing these proceedings in order to obtain her current views. In any event, no matter what those views might be we would discount them – and those of GD – for the reasons already expressed in reaching our decision. In our opinion, there is no better practical alternative and, other than SD being in the sole care of GD, his counsel did not suggest that there was one. In particular, we do not see any place in this case for a residence order in terms of section 11(1) of the Children (Scotland) Act 1995. The

circumstances of this case are very different to the ones which the Inner House considered in *LO* v *N & C* [2017] CSIH 14.

[42] We note that the curator-ad-litem supports the conclusions we have reached albeit that when she submitted her report the proposed adoptive parents had yet to be found. We also note that the advice from the children's hearing was in favour of the application being granted.

[43] We should also record that we were advised by senior counsel for the appellant that the mother recently gave birth to a second child of her relationship with GD. That child is now in the care system. Absent any further information we do not think that this is a relevant factor for the purposes of this appeal. We did consider whether to remit to the sheriff to allow this issue to be explored. It might, for example, be material to consider keeping the two siblings together. But adopting such a course would cause more delay and would have an uncertain outcome, all of which might be detrimental to SD's welfare. We therefore do not think it is a wise course to adopt. In any event, we assume that the appellant will be alive to the issue and there is the further safeguard that any adoption petition requires the order of a sheriff.

Contact

[44] Parties were agreed that if we granted the orders sought we should include an order for indirect contact two times per year for both GD and the mother. The latter was of course not a party to that agreement. She may or may not comply, but on a practical level this order will at least give her the opportunity, which we regard as potentially important for SD's welfare.

Expenses

[45] Parties were also agreed that if we granted the orders we should make a finding of no expenses due to or by either party. It is therefore unnecessary to sanction the employment of senior or junior counsel, although we should record our appreciation to them for their submissions in what has been an anxious case.