SHERIFF APPEAL COURT

[2019] SAC (Civ) 19
HAM-AD68-17

Appeal Sheriff Cubie

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in appeal in the cause

AB and CD

Petitioners and Respondents

against

LM

Respondent and Appellant

Appellant: Simpson; Cartys Solicitors
Respondents: Thomson; JK Cameron Solicitors

25 April 2019

Introduction

[1] This is one of three appeals in relation to siblings, all giving rise to the same discrete point. It is argued that the sheriff erred in not making an order for indirect contact between the children and their mother, the appellant, in the context of the adoption orders granted.

[2] The appeals were heard together. The appellant was represented by Mr Simpson and the respondent by Mr Thomson. Each had prepared notes of argument and there was an agreed list of authorities. Parties were by and large content to refer to their written note, using the appeal hearing to emphasise particular points.

Appellant's submissions

[3] The appellant submitted that the sheriff had erred in his decision. He had failed to explain the concept of indirect contact (an obligation, it was argued, imposed upon him by para [67] of *Henderson* v *Foxworth Investments Ltd* [2014] UKSC 41. He should have explored the possibilities of indirect contact, even hypothetical situations, how it might and might not work, and then applied it to the specific facts in this case. In failing to describe these options, the sheriff had erred.

[4] The sheriff had compounded the error by failing to take a reasoned or balanced approach and in failing to describe the benefits and disadvantages of indirect contact. In restricting his observations to paragraph 79 of the judgment, the sheriff has dealt with the issue in a perfunctory manner; it was inconsistent with his approach elsewhere and, in the context of the judgment, demonstrated that he had not applied his mind properly to the issue.

[5] The appellant submitted that the Social Work Department was not just a letterbox but a conduit. They would have a responsibility to interpret the order of court so that it worked in the interests of the children. Even if the appellant's relationship with the Social Work Department was problematic, the children would be immune from that.

[6] The sheriff had failed to properly apply the whole life test. He erred in not trying to anticipate how indirect contact might work sometime in the future. He did not address the children's changing attitudes, awareness or appreciation of their situation.

[7] Fundamentally, the sheriff had failed to acknowledge that there was no legal mechanism for the children to enforce contact. The sheriff should have looked at the long term consequences.

[8] The sheriff was obliged to consider the children separately, as he did throughout the judgment. But he did not give separate reasons.

[9] The appellant submitted that the sheriff erred in reaching conclusions about the respondents' approach. The appellant submitted that the sheriff's consideration was plainly wrong, not balanced, and led to a conclusion that no reasonable judge could have reached. The thought process and reasoning was wrong.

[10] The appellant was asked about *B* v *C* 1996 SLT 1370 and the legal test for post adoption contact. It was accepted that *B* v *C* still represented the law. There was no entitlement to post adoption contact, but the decision has to be reasoned. There was no challenge to the facts found but the reasoning was flawed. Although there is no automatic or particular obligation to set out in detail the precise letterbox contact, there was a duty to explore it.

[11] The appellant argued that the child affected by this petition was in a different position to the two older siblings in that the child had not expressed any view given her age. The sheriff did not appear to take account of the fact that siblings had been separated and that letter box contact could provide a link, so that the child could learn about the two siblings. The child might want to know what is happening with the extended birth family; there may be curiosity. The contact could provide that link. (It was acknowledged that this particular matter was not raised with the sheriff, but it was submitted that he should have considered it.)

[12] It was agreed that there would be no expenses due to or by either party.

Respondent's submissions

[13] The note of argument was adopted. The respondent referred to sections 14 and 28 of the Adoption and Children (Scotland) Act 2007; the only basis on which the sheriff could make an order was 14(3) and 28(3) on terms and conditions which the court sees fit. The sheriff applied the correct test.

[14] Section 14 provides:

> "**Considerations applying to the exercise of powers**
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> …
> (2) The court or adoption agency must have regard to all the circumstances of the case.
> (3) The court or adoption agency is to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration.
> (4) The court … must, so far as is reasonably practicable, have regard in particular to—
> (a) the value of a stable family unit in the child's development,
> …
> (d) the likely effect on the child, throughout the child's life, of the making of an adoption order."

[15] Section 28 provides:

> "**Adoption orders**
>
> …
> (3) An adoption order may contain such terms and conditions as the court thinks fit."

[16] The respondents were not aware of any authority which imposed a responsibility on the sheriff to conduct an exercise in discussing, in a theoretical context, post adoption order contact. Nor was there any obligation to weigh up the benefits or disadvantages of different theoretical modes of contact.

[17] There had been evidence about different modes of post adoption contact. While there had been some evidence that there can be benefits of post adoption contact, it was to the effect that benefit was not likely to accrue to these children.

[18] The respondents referred to a decision of the Sheriff Appeal Court, *BH & EH* v *CH & SM* [2019] SAC (Civ) 7 para [38] – where in dealing with the nature of a written judgment, the court said:

> "[38] We repeat what was said by this court in *City of Edinburgh Council* v *RO, RD* 2017 Fam LR 27:
>
> '[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 (*Piglowska* v *Piglowski*, at p. 1372) in which he repeated what he had said in an earlier case:
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> > "…specific findings in fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made on him by of 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."'
>
> We also note what was said by Lord Wilson in *In Re B* [2013] 1 WLR 1911 at p. 1929:
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> > 'Lord Hoffmann's remarks apply all the more strongly to an appeal against a decision about the future of a child.'"

[19] It was clear from the findings in fact that, on the evidence of the appellant herself, there was a clear concern about contact. The note of argument detailed examples. The sheriff did not need to narrate at length every aspect of the evidence. The sheriff found the appellant to be a poor witness. In sending letters and cards he was entitled to find that she would prioritise her own interests. She had a long history of hostility towards social workers and a long standing inability to take advice and guidance on board.

[20 The court also heard evidence that it may be damaging for a child for a condition of contact to be made when it does not take place either by non-compliance or because contact material sent is thought to be inappropriate in its terms, necessitating support to the appellant; the sheriff felt that the likelihood of conflict between the appellant and Social Work Department still existed despite advice and support. The sheriff had effectively determined that the contact would not operate at all, or not for the benefit of the children, so was of no value anyway.

[21] Although there was no direct evidence from the petitioners, the material available to the sheriff allowed him to draw conclusions about them, being the evidence from the social workers who had worked closely with the petitioners both before and after the placement. The sheriff was satisfied about the petitioners' ability to meet the needs of the child; although the child might have a different view from the petitioners, the sheriff had taken the view that the petitioners could protect the child throughout their lifetime. The clear inference was that the petitioners could make the appropriate decisions.

[22] No legal mechanism was required to regulate the future contact. If the child were to express a desire to have contact, the petitioners were best placed to seek guidance and support from appropriate agencies. The sheriff was satisfied that they would.

[23] The respondents briefly commented on the law. *B* v *C* still had currency; it had been approved recently in *Mr and Mrs P* v *LD and Others* XO131/16, an unreported decision of the SAC. Reference was made to *Henderson* v *Foxworth Investments Ltd* [2014] UKSC 41; *S* v *L* 2013 SC (UKSC) 20; *S, petitioner* 2014 CSIH 42 and finally to *Mr and Mrs P* v *LD and Others*.

[24] The point of adoption is to head off future interference which would impact on stability and security. Each case turns on its own facts. There is no presumption against, or for, contact nor any onus; there are just factors to be weighed up. The 2007 Act was

promulgated in the knowledge of *B* v *C* and did not innovate on the concept of contact, leaving it to be regulated by sections 14(3) and 28(3). Contact is more likely to be considered where circumstances support it and the children can accrue a benefit from it. The sheriff was not plainly wrong.

[25] The respondents agreed no expenses to or by either party.

Appellant's response

[26] The appellant submitted that the risk of non-adherence to any contact regime was balanced by the risk of the children's expectations being let down; the Social Work Department could be expected to handle it properly and professionally. They would not pass on anxieties. The sheriff did not explain enough; he devoted only one paragraph to rejecting contact. There was a cumulative failure; as a whole the sheriff's judgment couldn't stand.

Basis for decision

[27] There are no extended notes of evidence. The court proceeds on the basis of the sheriff's findings in fact and the inferences to be drawn from these findings. I accept the analysis in *BH & EH* v *CH & SM,* that judgments produced in cases such as this should not be subjected to the detailed scrutiny of a conveyancing document – it is inherently an incomplete statement of the impression which was made on him.

Role of appeal court

[28] The "plainly wrong" test for appellate interference – as explained by Lord Reed in *Henderson* v *Foxworth Investments Ltd* – continues to be applied in Scotland. The matter is put neatly in this context by Professor Norrie ("Appellate deference in Scottish child protection cases" Edin. L.R. 2016, 20(2), 149-177):

> "Because judgment requires to be exercised, and the law has conferred the power to make that judgment on the first instance tribunal, an appeal court ought never to overturn a lower court decision for no better reason than that it disagrees with the judgment made at first instance: appeals are not second chances to argue the same case."

[29] The appellant argues that the sheriff's decision is plainly wrong and criticises the sheriff for failing to "explain the concept of indirect contact". That proposition seems to arise from *Henderson* (emphasis added):

> "67. It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

[30] The appellant's submission misunderstands the meaning of the paragraph, where the appellant takes the word "explained" out of context. It does not impose an obligation on the sheriff to explain each and every possible outcome or each and every advantage or disadvantage of a possible outcome.

[31] It is the sheriff's function to apply the law to the facts which the parties have established from the evidence that they chose to bring before the court; the role of a judge in an adversarial system is to adjudicate between the cases which the parties chose to present and to explain how that decision has been reached. The sheriff is criticised for not analysing

the potential role of the Social Work Department as a conduit. The appeal suggests that the sheriff should have considered all options; the obligation is on the parties.

[32] In *Fife Council, Applicants*, 2016 SC 169, an Extra Division endorsed the approach taken by the Court of Appeal in England in the case of *In re B-S (Children) (Adoption: Leave to Oppose*) [2014] 1 WLR 563 as follows:

> "[63] The court in In re B-S went on to identify two essential requirements in a case in which a court was being asked to approve a care plan for adoption or make a non-consensual placement order or adoption order. First, there was a requirement for proper evidence which must address all the options which were realistically possible and must contain an analysis of the arguments for and against each option. Secondly, there must be an adequately reasoned judgement."

[33] So the obligation to present proper evidence, address realistic options and analyse the arguments for and against falls on the parties, with the obligation on the sheriff to produce an adequately reasoned judgement, based upon the respective parties' approaches.

[34] It does not impose an obligation on the sheriff to explain all and any options which might theoretically or hypothetically arise; it requires an assessment of the evidence presented to him.

The law regulating post adoption contact

[35] Any analysis begins with *B* v *C;* an order for post adoption contact was made at first instance and was the subject of an appeal. The Lord President said at 1377 G:

> "We wish to emphasise, before parting with this case, that we consider it to be an exceptional one, and that we should not like it to be thought that we are offering any encouragement to the court as a matter of course to add conditions about matters arising after the making of the adoption order, especially if they may require variation by the court. The guiding principle is that adoption provides complete security to the child by making the child part of the adopting parents' family. Conditions expressed in favour of third parties, which might make it necessary for the court to become involved in the making of further orders with a view to the child's welfare, will not be appropriate except in the very rare cases where the child's welfare might be prejudiced if a condition to that effect were not to be made. As

> Lord Ackner observed in *Re C* , in normal circumstances it is desirable that there should be a complete break from the child's natural family. But each case must be considered on its own facts, and we are in no doubt that the highly unusual background to this case makes such a condition desirable in order to provide support and guidance to all those involved, and above all to the petitioners, in the very difficult decisions which now lie ahead if the child's welfare is to be safeguarded throughout her childhood."

[36] In the normal course there will be no such contact. In each case where the matter is put in issue, the court must determine the matter in the best interests of the child concerned considering whether such contact will safeguard and promote the welfare of the child throughout the child's life.

[37] The respondents referred to *Mr and Mrs P* v *LD & Others* [2016] SC GLA 56; there are some very helpful observations in the first instance decision, approved by the appeal court. Having reviewed a number of authorities Sheriff Anwar made the following observations:

> "[108] ... In my respectful judgment, the Inner House in *B* v *C* was not laying down a threshold test for post adoptive contact as being whether there exist 'exceptional circumstances' but was rather emphasising the need for the decision maker to have at the forefront of his or her mind, the guiding principle that 'adoption provides complete security to the child by making the child part of the adopting parents' family'. The court was seeking to emphasise that conditions should not be attached to adoption orders as a matter of course. Each case must be decided on its own facts and it is clear, in my judgment that a departure from the "normal circumstances" in which it is desirable that there should be a complete break from the child's natural family, will be justified only where it established that it is in the best interests of the child to do so.
> …
> [111] Whether an on order for post adoptive contact is in the best interest of a child requires a balancing exercise between securing finality and security for the child on the one hand, and maintaining some link with his/her birth family, where that is considered appropriate, on the other. Indirect or direct post adoptive contact can assist the adopted child to understand more about this/her background; it can provide the adopted child with reassurance that the birth family continues to take an interest in his/her welfare and in turn enhance the child's feelings of self-esteem and self-worth; it can allow a link with the birth family to be maintained; and it can allow the child to reconcile conflicting loyalties and feelings of guilt and overcome feelings of rejection, anger and hurt. Such an order however carries with it a risk that the child will feel disappointed and confused and even hurt and rejected, if the child develops an expectation that such contact will continue and it does not. If the birth family use the contact as a means of undermining the adoption process, that is likely

to have a significant impact upon the child's sense of security and emotional well-being. If the birth family is not able to communicate appropriately, or to heed advice on the contents of any indirect or direct communication with the child, it will serve very little purpose; inappropriate communications by way of letterbox contact are unlikely to be made available to the child. It is also undesirable to leave a legal avenue open for further litigation in the event of disagreements between parties as to non-compliance with any post adoption order, or in the event of a change of circumstances.

[112] Having considered all the relevant authorities and the basis upon which orders for post adoptive contact have been made or refused in the past, the following factors are in my judgment, relevant to any decision on the issue, namely:

(a) the nature of the child's bond with, and attachment to, the members of the birth family seeking contact;
(b) the age and if appropriate, the views, of the child;
(c) the level and nature of the contact currently enjoyed by the birth family, if any;
(d) the benefit derived by the child from such contact, if any;
(e) the risks to which the child may be exposed during such contact, if any;
(f) the ability, or otherwise, of the birth family to commit to contact and to heed the advice of professionals in relation to how to manage such contact;
(g) the ability, or otherwise of the birth family to accept the terms of the adoption order, to be fully supportive of it, and to refrain from undermining the adoption process or engaging in future litigation; and
(h) the views of the adoptive parents to such contact."

[38] This provides a very useful, authority based, analysis of the approach to be taken.

Application of law to this case

[39] The appellant's description of the note as perfunctory in its dealing with post adoption contact is an unfair representation of the sheriff's approach. To focus on paragraph 79 as the only reference to the issue of post adoption contact is to overlook the various findings in fact which led to the conclusion in paragraph 79 – for example, the previous failures to cooperate or to recognise that any fault at all arose, the blaming of one of

the children. All of the findings fed into the finding in para 79. The sheriff recorded the submissions made in relation to post adoption contact.

[40] The sheriff has both explained and justified the decision reached in refusing the award of indirect contact; his rationale for rejecting the contact is intelligible. The child had contact until terminated in October 2017 when the child was 18 months old. There was no evidence of any lasting memory (para 79). She is too young to express any view. Any reinstatement of contact would be likely to cause some confusion, with no evidence of benefit to the child. The appellant had opposed the adoption, characterised a number of those involved as liars, and will not cooperate with Social Work Department.

[41] While there may be some force in the observation that post adoption contact would provide a means for the child to be kept up to date with siblings, this was not argued before the sheriff so he can hardly be faulted for failing to consider that matter; in any event the sheriff found that the petitioners could be trusted to act in manner which best met the needs of the child and was satisfied that they would seek guidance and support from professionals. Although that observation related to contact with the appellant, there is no reason to think that a different approach would be taken if the child expressed curiosity about siblings.

[42] The sheriff has produced a reasoned judgment and not considered any irrelevant factor or excluded a relevant factor or otherwise gone plainly wrong.

[43] The appeal is refused with a finding of no expenses due to or by either party.