**SHERIFF APPEAL COURT**

**[2016] SAC (Civ) 16**
**XC4/16**

Sheriff Principal D C W Pyle
Sheriff Principal M Lewis
Sheriff N Stewart

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in appeal by

ZM

First Appellant

and

AM

Second Appellant

against

LOCALITY REPORTER

Respondent

**First Appellant: Aitken, advocate; Campbell & McCartney**
**Second Appellant: McCloud, advocate; Hunter & Robertson**
**Respondent: Guy; Anderson Strathern**

13 December 2016

**Introduction**

[1] The short point raised in this appeal is the meaning of the terms "close connection" and "significant contact" as contained in Section 67(2) of the Children's Hearings (Scotland) Act 2011 and their application to the facts as found by the sheriff.

[2] The parts of Section 67(2) relevant to the appeal are as follows:

> "(2) The grounds are that—
> (a)…
> (b)…
> (c) the child has, or is likely to have, a close connection with a person who has committed a schedule 1 offence,
> (d) the child is, or is likely to become, a member of the same household as a child in respect of whom a schedule 1 offence has been committed,
> (e)…
> (f) the child has, or is likely to have, a close connection with a person who has carried out domestic abuse,
> (g) the child has, or is likely to have, a close connection with a person who has committed an offence under Part 1, 4 or 5 of the Sexual Offences (Scotland) Act 2009 (asp 9),…
> (3) For the purposes of paragraphs (c), (f) and (g) of subsection (2), a child is to be taken to have a close connection with a person if—
> (a) the child is a member of the same household as the person, or
> (b) the child is not a member of the same household as the person but the child has significant contact with the person…"

**Findings in Fact**

[3] The parties had agreed what they considered to be the relevant facts which meant that no evidence required to be led before the sheriff. For present purposes we do not set out all of the findings in fact. But the facts relevant for the appeal may be usefully summarised as follows:

1. ZM and AM married in 2005. They physically separated in September 2012. They have not cohabited since then. They have one child, LM, who is now 9 years old. LM lives with ZM. Their present address has not been disclosed to AM.

2. The separation followed the reporting of a sexual offence committed by AM, being a sexual assault on another child by digital penetration in August 2012 in the then family home, being an offence under Section 19 of the Sexual Offences (Scotland) Act 2009.

3. In March last year ZM and AM entered into a formal agreement regulating all financial matters with a view to divorce. (Although not contained in the findings in fact, the parties may well have divorced – see p19 (last para) of the stated case.) These matters included agreement that the formal date of separation be 31 January 2013 as well as provisions on the sale and division of the former family home.

4. On the advice of the social work department no contact occurred between AM and LM from September 2012 to March 2013. But thereafter supervised contact took place for one hour each month (sometimes twice a month) during the remainder of 2013 and until May 2014. This contact was supervised by the social work department. In July 2014 the social work department asked ZM to supervise contact as they were unable to continue to do so. Sporadic contact occurred on that basis from then until January 2015 - in the former family home. In October and November 2014 ZM's solicitors twice wrote to the social work department for advice on the possibility of unsupervised contact, but received no reply. ZM allowed AM unsupervised contact on three occasions for between one and two hours between January and May 2015. In advance of such contact ZM discussed with AM where he would take LM.

5. On 1 June 2015 AM assaulted ZM in the former family home. LM was present when the assault took place.

6. On 20 May 2015 a child protection case conference took place after the social work department became aware of the unsupervised contact. Since then ZM has not permitted any contact, whether supervised or unsupervised.

**"Close Connection"**

[4] The sheriff held two grounds as established, namely Section 67(2)(c) (close

connection with a person who has committed a schedule 1 offence) and Section 67(2)(f) (close connection with a person who has carried out domestic abuse). The question which arose in this appeal was whether on the above facts the sheriff was entitled to hold that the "close connection" between AM and LM was established – and in particular whether either or both of the definitions contained in Section 67(3) – namely membership of the same household or significant contact – were proved. Specifically, the questions for determination by this court, as posed in the stated case, are these:

1. Did the sheriff err in concluding that AM and LM have a close connection by being members of the same household by virtue of his interpretation of that term as contained within Section 67(3)(a) of the Children's Hearing (Scotland) Act 2011?
2. Did the sheriff err in concluding that AM and LM have significant contact by virtue of that term as contained within Section 67(3)(b) of the Act?

**"Household"**

[5] Whether a child is a member of the same household as the person is a matter of fact and degree (*Cunningham v M* 2005 SLT (Sh Ct) 73, 79L-80A). The concept of a "household" is of a group of persons and not the location in which they live (*ibid*). The question is about the ties of affection and regular contact which hold the persons together as a group – a question of relationship rather than locality (*ibid*). That summary of the law reflects the views of the Inner House in three earlier decisions: *McGregor v H* 1983 SLT 626; *Kennedy v R's Curator* 1992 SC 300; *A v Kennedy* 1993 SC 31.

[6] The sheriff decided that LM is a member of the same household as AM. He acknowledged that the ties of affection were not between ZM and AM; rather, they were

AM's affection for LM and ZM's acknowledgement of that, and ZM's affection for LM. He noted that contact has taken place and that it "is likely that it will do so again in the future", given ZM's "willingness to facilitate said direct contact by her ex-husband as the agreed facts disclose she has done in the past" (p20 of the stated case).

[7] In our opinion, the sheriff was not entitled to hold on the agreed facts that LM is a member of the same household as AM. In reaching that view, we note that nowhere in the findings in fact is it expressly stated that ZM is willing to facilitate contact between AM and LM, but we accept that her willingness is implied, first, by there being no finding in fact that she is unwilling, secondly, by the finding in fact that following the child protection case conference the advice from the social work department was that only *unsupervised* contact should not take place (finding in fact 23) and, thirdly, that the social work department have recommended that LM has no *unsupervised* contact with AM for any period of time (finding in fact 25). The findings such as they are do not, on any view, justify the conclusion that the sheriff reached. The sheriff's reasoning in the note cannot supply the lack of proper findings in fact which might support the proposition that the willingness of ZM to facilitate sporadic contact creates a tie of affection which holds AM, ZM and LM together as a group. Nor do we accept, as was submitted before us and the sheriff on behalf of ZM and AM, that in answering the "same household" question we should disregard possible future contact or past contact between AM and LM standing the introduction in the 2011 Act of the alternative test of "significant contact". In our opinion, the regularity of contact is still to be regarded as one of the many circumstances which ought to be taken into account in determining the "same household" test. In practice the alternative test will arise only where the "same household" test has not been met.

[8] In any event, the appellants argue that the important question is whether ties of affection and regular contact which hold people together as a group will continue. In our view, there are no ties of affection between ZM and AM; instead, there are only discrete ties of affection between, on the one hand, ZM and LM and, on the other, AM and LM. Although the sheriff did find that AM left the family home in September 2015 following upon the reporting of the sexual offence, that the address at which ZM and LM currently reside has not been disclosed to AM, that AM and ZM decided to separate on 31 January 2013, that they have either divorced (supra) or, in March 2015, entered into a Minute of Agreement regulating all financial matters between them with a view to divorce and that ZM has to date followed the advice of the social work department not to allow unsupervised contact (indeed she has not allowed contact at all) and allowed unsupervised contact for a brief period only following unanswered requests for social work advice through her solicitors, (findings in fact 2, 6, 10-16, and 18), he failed to have regard to these factors when considering the existence of ties of affection. In *Kennedy v R's Curator* the court said that "It is necessary to examine closely the reasons given for the suggestion that the relationship has broken down". The reason for the breakdown in the relationship might be thought to be the reporting of the schedule 1 offence, but that is not mentioned in the findings in fact or in the sheriff's reasoning. In our view it is equally necessary for the court to examine closely the reasons given for the suggestion that the ties remain intact and again there are gaps in the findings in fact. In *A v Kennedy* the court considered that "a household" is fluid with members leaving and joining through marriage or death, which is part and parcel of family life. Significantly there is no mention in the sheriff's reasoning that the definition of "household" is fluid and wide enough to include alterations to the make-up of the household, as here, through separation and divorce as a result of a sexual offence

perpetrated on a child. Not only was the exercise that the sheriff undertook flawed in the foregoing respects, the sheriff made no findings in fact or in fact and law that the child has a significant contact with AM under section 67(3)(a). (In saying that, we observe that the sheriff's hands were tied to a large extent by the parties' position on the agreed facts and their view that no parole evidence was necessary.)

[9] Professor Norrie in Children's Hearings in Scotland (3rd edition at p47) says this:

> "So, a continuing relationship is important for the continuation of a household, but a relationship, even of blood and affection, will not in itself be sufficient… "Household" involves more than simply a relationship and requires, it is submitted, some living together either presently, or in the past with the possibility of re-establishing the cohabitation."

We agree with that analysis, at least in circumstances such as the instant one. (It would not apply to the hypothetical example of the eldest child leaving home to get married as described by Lord Justice-Clerk Ross in *A v Kennedy* (at p135G).)

**"Significant Contact"**

[10] The term "significant contact" is not defined in the 2011 Act; nor has it been the subject of judicial determination. We agree with the approach taken by Professor Norrie (op cit, p43):

> "A person who commits a Schedule 1 offence, which are nearly all serious offences against children, is nearly always, therefore, a risk to children, and any child who has a close connection with such a person might require, for his or her protection, guidance, treatment or control, to be made subject to a compulsory supervision order in order to minimise or remove that risk. Of course such an order might not be necessary, but the very existence of the offence, together with the connection between the offender and the child, justifies the raising of the question, which the children's hearing must answer… "[S]ignificant contact" is intended to cover the situation where the source of the potential danger does not live with the child but nevertheless is regularly present in the child's family circle – the typical example will be the boyfriend of the child's mother who lives apart from the mother and the child but who regularly visits… "Significant" means regular, or at least frequent."

[11] It is a peculiarity of this case that the sheriff was not invited to hear evidence from ZM about her present attitude to allowing AM future contact, even if supervised. In terms of Section 67(3)(b) the reference to significant contact is in the present tense. But that has to be read in the context of Section 67(2)(c) which covers both the present and the future. Thus, "close connection" in the future is where – in the future – there *is* significant contact. In dealing with that point, the sheriff has reached a conclusion on the likelihood of future contact between AM and LM on the agreed facts about the past conduct of ZM and AM. We agree with his conclusion on what factors to take into account (at p21 of the stated case):

> "I had regard to the volume of the contact and its regularity as set out in the Joint Minute of Admissions and reiterated in my Findings in Fact. I also had regard to the nature and purpose of the contact. It was not incidental but in furtherance of a father/daughter relationship and the father's wish to maintain personal relations and direct contact with his daughter. No individual factor on its own, in the circumstances of this case, led me to conclude that the child has or is likely to have significant contact with her father. When taken together, however, in the circumstances of this case, I am satisfied that the child has or is likely to have a close connection with [AM] in the sense provided for in Section 67(3)(b)…"

[12] For completeness, we should add that we agree that Section 67, to be ECHR compliant, has to be construed on the basis that there is a "pressing social need" for the state to interfere in the family life enjoyed by a child and his or her parents (Baroness Hale in *In Re J, (Children: Care Proceedings) (Threshold Criteria)* [2013] UKSC 9, (2013) 2 WLR 649, as cited by Sheriff Principal Scott in *M v Children's Reporter* 2015 SLT (Sh Ct) 215). While the sheriff does not deal with this directly, we consider that his conclusion and the factors he took into account in reaching it are consistent with that approach to construction.

**Conclusion**

[13] Parties were agreed that only questions 1 and 3 in the stated case need be answered. Accordingly, we shall answer question 1 in the affirmative and question 3 in the negative.

We shall direct the sheriff, in terms of Section 108(2) of the Act, to direct the Principal Reporter to arrange a children's hearing.

[14] No issue of expenses arises.