SHERIFF APPEAL COURT

[2020] SAC (Civ) 21
SEL/AD5-19

Sheriff Principal MM Stephen QC
Appeal Sheriff W Holligan
Appeal Sheriff AG McCulloch

OPINION OF THE COURT

delivered by APPEAL SHERIFF AG MCCULLOCH

in appeal by

SCOTTISH BORDERS COUNCIL

Petitioners and Respondents

against

SRZ

Respondent and Appellant

Petitioners and Respondents: Sharpe, adv; Scottish Borders Council
Respondent and Appellant: Barbour, adv; Murphy, Robb & Sutherland

1 December 2020

[1] This is an appeal by the mother of a child (Z), who is currently 10 years old, against the decision of the sheriff at Selkirk to grant a permanence order in respect of Z. The grounds of appeal relate, firstly, to whether there was sufficient evidence to allow the sheriff to determine that residence with the mother would be likely to be seriously detrimental to the welfare of Z; secondly, whether the absence of a parenting assessment allowed the sheriff to make the orders that he did; thirdly, whether the sheriff had properly considered

the alternatives to the permanence order; and fourthly whether the order made for contact was appropriate, in all the circumstances.

[2] The background is relatively straightforward. After Z was born, he lived with his mother and two older half-brothers. Z's father has had no participation in his upbringing. Since April 2014 all three boys have resided with their maternal grandparents, following upon an incident when Z was found alone in the garden, with the respondent drunk in the house. A compulsory supervision order regulating residence and contact has been in place since October 2014. The respondent moved away to north-east Scotland, where she remains, and is in employment. She has had issues with alcohol since 1995, with periods of sobriety. When sober she provided adequate care for the children. When drunk this was not the case. She suffered a serious bout of alcoholism from 2010-2014. She relapsed in 2015, 2016 and 2017. She was hospitalised in 2017 due to liver damage. Since September 2017 she has been supported by Community Mental Health and a drug and alcohol support group. She has not relapsed since 2017. She has been having contact for a few hours once every 4 weeks, supervised. Z has been living in a secure and nurturing environment with his grandparents, with frequent natural contact with his siblings.

The first ground of appeal (paragraphs 1, 2 and 5 of Note of Appeal)

[3] The relevant law is set out in sections 82-84 of the Adoption and Children (Scotland) Act 2007. In particular, section 84 sets out certain preliminary matters which must be overcome before a permanence order can be made. These have become known as "the threshold tests". Relevant to this case is the test in section 84(5)(c)(ii). Before making a permanence order, the court must be satisfied that there is no person with the parental right of residence, or where there is such person, (as here), the child's residence with the person is,

or is likely to be, seriously detrimental to the welfare of the child. It was argued for the appellant that the sheriff had insufficient evidence from which he could properly draw the inference of serious detriment. Reference was made to Lord Reed's dicta in *West Lothian Council* v *B 2017 SC (UKSC) 15* where at paragraph 29 he states

> "if the court finds that the threshold test is satisfied, it should be clear: (1) what is the nature of the detriment which the court is satisfied is likely if the child resides with the parent; (2) why the court is satisfied that it is likely; and (3) why the court is satisfied that it is serious."

This can be read as following on from the decision in *R* v *Stirling Council* 2016 SLT 689 which described the threshold test as being fundamental, in the sense that if not satisfied the court is not permitted to dispense with the parent's consent. Depriving a parent of a child of their parental authority at common law is a most serious matter and should only be done if strict criteria are established.

[4] The appellant pointed to the sheriff's findings in fact, and note. It was submitted that the sheriff had, at para [28] of his note listed factual issues to consider. These were (1) the mother's ability to care for the children; (2) the mother's alcoholism and the danger of future relapse; and (3) whether the removal of protective factors for the child are such that residence with his mother is likely to be seriously detrimental to his welfare. Reference was then made to the findings in fact. In regard to the mother's ability to care for the child, at finding [10] the sheriff found that "when not under the influence of alcohol, the respondent's care of the children was adequate." Thus, if now sober, the threshold test could not be made out on the facts. On the second factual issue, the sheriff made certain findings [11-24]. He dealt with the history of her alcohol abuse, her relapses, the support sought, possible triggers to relapse, and her current sobriety. The appellant sought to criticise these findings, particularly [21], that "the respondent had a problem with alcohol

between at least 1995 and September 2017 when she was referred to JN, (an addiction worker)". It was suggested that the sheriff was not entitled to make this finding given the evidence before him, which only covered alcohol abuse for certain periods in 1995, 1996, 1997 and several periods from 2011 to 2017. There was no evidence, according to the appellant, that she had been drinking to excess from 1997 to 2011. Thus it was unreasonable to have made this finding in fact. Further, dealing with the possibility of relapse, the sheriff set out possible triggers [23] and concluded [24] that due to the number of relapses from 1995 to 2017, and the variety of possible triggers, the risk of relapse was likely. The sheriff was criticised for not making any finding that the respondent had consistently sought support to address her drinking during relapses. He gave no indication of what he thought about the period from 1996-2011 when there was no evidence she was misusing alcohol. Various reports had been prepared by social workers and others. The sheriff gave no reason for preferring an assessment by Children and Families social workers over those of a Community Mental Health Team social worker and a drug and alcohol support group team leader. It was argued that the sheriff was not entitled on the evidence to come to the conclusion he did about the likelihood of relapse. In considering the future, as is necessary for the threshold test, the sheriff was of the view [112-113] that there was a risk that it would be seriously detrimental to Z to return to live with his mother due to her risk of relapse into alcoholism. To assess the future, following the guidance of Lord Hope in *In re J (Children) (Care Proceedings: Threshold Criteria)* [2013] UKSC 9, a prediction of future harm has to be based on facts that have been proved on a balance of probabilities. The appellant argued that the sheriff failed to have regard to the periods of abstinence between 1996-2011; and that he had no evidence before him to conclude that the triggers which had led to relapses in the past would predict future harm. There were no findings in fact about the current

position of the appellant. There was no explanation why the sheriff had preferred the assessment of one social worker over others. In summary, the sheriff was not entitled to find on the evidence that the risk of relapse was such that residence of Z with her is or is likely to be seriously detrimental to his welfare.

[5] The third factual issue related to removal of protective factors should Z reside with his mother, such that he is likely to suffer serious detriment. The sheriff made a number of findings in fact on this issue [28, 32-35, 37-40] and dealt with the evidence at paras [76-111] of his note, concluding with para [114] where he explained that he was satisfied that the removal of protective factors would likely cause Z serious detriment if residing with his mother. He had placed weight on the child's views and on the evidence of a Chartered Clinical Psychologist, Dr K Edward. The latter had been instructed to provide a report on the child's best interests. She was of the view that there was no clear clinical evidence that removing Z from his current care would be beneficial to him, which the sheriff recognised was not the legal test to be addressed. It was argued that Dr Edward had not considered rehabilitation to the respondent, if she moved to live in the Borders, near to Z's current carers and other family members. Nor had any assessment of issues about co-working between the respondent, her parents and her two older children been carried out; indeed a parenting assessment could have explored these issues, but one had not been carried out. There was no, or insufficient, evidence before the sheriff to support a finding that rehabilitation would be seriously detrimental to Z's welfare due to the loss of perceived protective factors. The sheriff could not assess the risk, as no assessment of rehabilitation had been carried out. The appellant was also critical of the sheriff's comment at para [27] of his note,

> "that removal of a child from a secure home and primary attachments and the likely damaging effects of that removal on the child may be a sole ground of serious detriment on the basis of which a permanence order may be granted, assuming the other conditions of the 2007 Act are met."

[6] The appellant then addressed the authorities that had been considered by the sheriff, starting with *West Lothian Council* v *M* [2016] CSOH 50; *East Lothian Council* v *LM* [2019] SC Edin 5 and *Fife Council* v *M* 2016 SC 169. It was clear, according to the appellant, that having regard to these authorities the test for removal of a child was very high, that all factors need to be considered holistically, and that in this case the sheriff had erred. In particular the sheriff did not find that the respondent's care of Z met the test of serious detriment; that the sheriff was not entitled on the evidence to find that the respondent's history of alcohol abuse supported a finding of future harm; and there was no evidence to assess what form rehabilitation could take, as no assessment of that had been carried out, which would have provided evidence of such matters.

The second ground of appeal (paragraph 4 in the Note of Appeal)

[7] This relates to the absence of a parenting assessment. It was argued that the sheriff erred in law in concluding that a permanence order may be granted in circumstances where there had been no parenting assessment of the respondent carried out. The sheriff reached this conclusion in paras [20] and [21] of his note. The factual background to this is found at paras [140-143] of the note. An assessment was considered but rejected when the respondent was not sober. In late 2017 she agreed she was prepared to undertake one, but in 2019 she would not meet social workers alone. It was submitted that a parenting assessment could have looked at rehabilitation; future triggers and the risk of relapse; preventative steps; mediation with the extended family; issues around contact;

amelioration of the protective factors in place at Z's current placement; and the possibility of the respondent moving to the Borders area. The absence of such evidence did not allow the sheriff to make the findings and conclusions that he did.

The third ground of appeal (paragraph 3 of the Note of Appeal)

[8] It was argued that the sheriff erred in his application of section 84(3) and (4) of the 2007 Act in discounting a residence order as an alternative to a permanence order, in particular in concluding that such an order would not be a final order. The sheriff dealt with this issue at paras [51-53] of his note. He indicated that the grandparents could not make parenting decisions on their own as the respondent also had parental rights. He misdirected himself on the law, given the wide ranging powers allowed to a court by section 11 of the 1995 Act. Tailor-made orders are available to meet the needs of any child. The sheriff failed properly to consider the alternative orders available, and thus erred. In particular he could have removed the possible conflict between the grandparents' parental rights and responsibilities, and the mother's, by revoking or suspending those of the mother (other than contact). A permanence order was not the only possible outcome, and the sheriff thus erred.

The fourth ground of appeal (paragraph 6 of the Note of Appeal)

[9] The sheriff found that contact should be at the discretion of the local authority, having regard to its professional opinions and in the best interests of the child taking into account Z's views. It was argued that the sheriff was wrong to make the order regarding contact that he did, as there was no certainty that the local authority would use their discretion reasonably in respect of contact in the best interests of the child. There was no

evidence that the local authority had tried to advance contact over the last 3 years. There was no finding in fact that this was the best arrangement in Z's interests. An order providing for certainty was necessary.

Petitioners' response to first ground of appeal

[10] The petitioners opposed the appeal. In preliminary comments, their counsel referred to the role of appellate courts in reviewing a decision of a judge at first instance who has seen and heard the witnesses. The decision cannot be challenged unless it can be said to be "plainly wrong" or unreasonable, (see *Royal Bank of Scotland* v *Carlyle* 2015 SC (UKSC) 93). It was submitted that the sheriff here had not been plainly wrong, and so far as the appellant criticised the findings in fact and conclusions, as there was no transcript of the evidence, this court was confined by the sheriff's findings and reasoning. Turning to the first ground of appeal, it was submitted that the sheriff gave full and careful consideration to section 84 of the 2007 Act. There was ample evidence, which he chose to accept, that the legal test imposed by section 84(5)(c)(ii) had been satisfied. He had properly identified what he considered to be the important factual issues, at para [28] of his note. These were three matters: the appellant's ability to care for the child; her alcoholism and the dangers of relapse; and whether the removal of protective factors for Z were such that residence with his mother was likely to be seriously detrimental to his welfare. Each factor was considered fully and carefully by the sheriff. The appellant focussed on finding in fact 10 that when sober, her care was adequate. However the sheriff went on to comment, and find (11) that her care when under the influence of alcohol was a different matter, with the appellant admitting that she had failed then to look after the children satisfactorily. The sheriff had concluded (para [47]) that it could be said with certainty that, were the appellant to lapse

into alcoholism when Z was in her care, she would not be able to look after him. The sheriff went on to consider her alcoholism, and ongoing efforts to keep it under control. He noted her relapses, her periods of sobriety, and the length of time from the start in 1995 to 2017 during which she had a problem with alcohol. This does not mean that it was a daily issue, but there were not infrequent relapses into binge drinking. The sheriff also considered and weighed the evidence of the triggers into drinking. Ultimately, he came to the conclusion, on the evidence, that (para [74])

> "because of the number and variety of previous triggers, and the number of relapses over the years between 1997 and 2017, it cannot be said that the risk of a relapse is low. It seems to me that there is a real risk of a relapse, particularly if Z were to be back in the respondent's care. In my opinion a relapse is likely."

Based on the foregoing, it could not be said that the sheriff based his decision only on Z being removed from his current placement. The first proposition in the Note of Appeal is irrelevant and should be rejected. The second proposition is an attack on the sheriff's reasoning and the weight he attached to different pieces of evidence. In the absence of a transcript of the evidence, or being able to say the sheriff was plainly wrong, an appellate court must consider the sheriff's reasoning and balancing exercise across the whole judgement. This second proposition should be rejected.

[11] The issue of removal from his current placement is important. Z has been consistent in his view that he wishes to stay where he is with his grandparents. He has been clear on this to all who have asked him, prior to the proof. There has been a Compulsory Supervision Order in place since 2014, requiring him to live with his maternal grandparents. The sheriff heard evidence from Dr Edward, who had interviewed Z. She had not spoken to the appellant as she refused to be interviewed. She had also refused to allow Z to be interviewed by a different psychologist in 2014. There was a substantial amount of evidence

before the sheriff to entitle him to conclude that moving Z from his grandparent's care to his mother would be seriously detrimental to his welfare. He discussed protective factors, and their removal at paras [98-111] of his note. He accepted the evidence of Dr Edward in this regard. His conclusion cannot be said to be unreasonable. Further he considered whether the respondent moving back to the Borders would ameliorate the loss of the protective factors, but at finding in fact [40] he concluded that they would but would not be removed. He found that the risk of returning Z to his mother would be detrimental to his welfare. Overall, having regard to all the evidence, the sheriff was entitled to find that the threshold test had been met.

Petitioner's response to second ground of appeal

[12] The respondent noted that there was no requirement in the 2007 Act to obtain a parenting assessment. It is for the sheriff to determine the issues on the evidence presented to him. In *City of Edinburgh Council* v *GD* [2018] CSIH 52, a sheriff had refused to grant a permanence order due to the absence of a parenting assessment. This was overturned by the Sheriff Appeal Court and upheld on appeal to the Inner House of the Court of Session. The Lord President, Lord Carloway commented at paragraph 36

> "The sheriff's approach amounts to a postponement of a decision pending a parental assessment of the respondent by the petitioners. Quite apart from the significant delay which would then ensue, pending an assessment and a new petition process, there are two problems with this. First, the petitioners have already determined that this cannot be done by them; standing the respondent's position on the 'non-accidental' injury. Secondly, it was for the court to make that assessment based upon the evidence before it and not to delegate it to the petitioners."

The sheriff in this case dealt with the issue of a parenting assessment at paras [20, 21, and 140-143] of his note. He observes at para [141] "...it appears to me that social workers were regularly considering and trying to assess the respondent. As KO said, it was not

possible to do this when the respondent was not sober". In March 2019 the respondent objected to being assessed as she did not want to meet social workers alone. The sheriff went on to note that a parenting assessment was and is overtaken by the respondent's repeated relapses into alcoholism; the risk of future relapses; the length of time Z has been with his grandparents; and the loss, and effect of removal, of protective factors. The sheriff was correct in his approach, and this ground of appeal should be refused.

Petitioner's response to third ground of appeal

[13] The respondent's position was that the sheriff had fully and carefully considered the options available to him. Having found that the threshold test was overcome, he then had to look at what orders to make. There were three options, namely the status quo, a residence order in favour of the maternal grandparents, or the permanence order sought by the petitions. He made findings in fact at [53-56] on the possibility of a residence order, and explained his reasoning at some length in paras [162-170]. His approach cannot be faulted. In particular, the respondent had not suggested that her parental rights or responsibilities should be removed, indeed her suggestion of residence over permanence was precisely so she could keep her parental rights (see para [167]). The whole reason for the introduction of a permanence order was to remove the rights of parents who had neglected their children, as here. This ground should also be refused.

Petitioner's response to fourth ground of appeal (contact)

[14] At this point, counsel for the petitioners sought an adjournment to ascertain the exact and up to date position about what contact was actually taking place, there being some uncertainty. On reconvening, the court was advised that contact had moved to being

unsupervised, with the appellant collecting Z from his grandparents, and returning him there some 4 hours later. It was noted that the current Compulsory Supervision Order specified that contact should be for a minimum of 2 hours a month, unsupervised. The appellant sought an order in those terms from this court to replace the sheriff's order. The petitioner's counsel urged that the sheriff's order be left as it was; it was clear that the petitioner's social workers were listening to Z, and were working towards unsupervised overnight contact being established. The social workers had clearly taken on board what the sheriff had said in his judgment, and his order allowed for flexibility. Fixing a minimum requirement was more for the benefit and reassurance of a parent, rather than necessarily protecting the child's interests. Further, if a fixed period was stipulated by court order, and a variation was thought necessary, by increase or otherwise, the permanence order would require to be varied. Thus the present, flexible, order was appropriate and should not be interfered with.

Discussion

[15] This was clearly an anxious case, where the appellant appears to have, after some time, taken steps to improve her health, and reduce the risk of relapse into alcoholism. But it has taken time, to the extent that her son has resided with his grandparents for two-thirds of his young life. The law regarding the making of permanence orders has been the subject of considerable judicial scrutiny since the 2007 Act came into force. Careful regard must be had to the terms of that legislation, found in sections 80-86 of the 2007 Act. Section 80 introduces the concept of a permanence order, and notes that it consists of both mandatory and ancillary provisions. It also requires that the court must ensure that each parental responsibility and parental right in respect of the child vest in a person. Section 81 sets out

the mandatory provision which vests in the local authority, which read short is to provide guidance until age 18, and regulation of the child's residence until 16. Section 82 deals with the ancillary provisions, which vest such parental responsibilities found in section 1(1)(a), (b)(i), and (d) of the Children (Scotland) Act 1995, and such of the rights in section 2(1)(b) and (d) as the court considers appropriate; it vests in a person other than the local authority such of the parental responsibilities and rights as considered appropriate; extinguishes the parents responsibilities and rights where they have been vested elsewhere by this section, and deals with contact. Section 83 sets out certain conditions that must exist before an order can be made, such as the dispensation of parental consent, and section 84 sets out certain provisions as to the making of an order which must be satisfied before an order can be made. A child over 12 must consent to the making of the order. If any child is incapable of consenting, then further provisions come into play. First, an order can only be made if it is better for the child than not making the order. Second, the court is to regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration. Before making an order, a court must ensure that the child has the opportunity (if possible) to express a view, which the court then has regard to. The court must also (84(5)(c)) be satisfied that (i) there is no person who has the right mentioned in subsection (1)(a) of section 2 of the 1995 Act to have the child living with the person or otherwise to regulate the child's residence, or (ii) where there is such a person, the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child. This final provision has become known as the threshold test, and must be considered first in the present case, given that the child in question is under 12. Failure to satisfy the test would be fatal to the granting of a permanence order, regardless of the child's views, or

the inability of a parent properly to discharge parental responsibilities or rights in relation to the child.

[16] In the present case, it is clear that the main thrust of the appeal is that there was insufficient evidence before the sheriff to enable him to conclude that the threshold test was met, or that he failed to take account of evidence which would have led him to the view that the test could not be overcome. Dealing with these propositions, this court is hampered by the absence of the notes of evidence, and we must therefore rely entirely on the sheriff's findings in fact, and his note. Indeed no alternative findings of fact were proposed by the appellant. As was said in this court in *Galt* v *Inverclyde Advice and Employment Rights Centre* [2019] SAC (Civ) 24, and reaffirmed now:

> "As a preliminary matter, we note that the appellant sought to criticise some of the sheriff's findings and conclusions. An appellate court is only entitled to interfere with the sheriff's assessment and analysis of the factual material in question if it is able to conclude that the decision was 'plainly wrong' (*Royal Bank of Scotland* v *Carlyle* 2015 SC (UKSC) 93). No transcript of evidence was made available and as a result we are confined to considering the sheriff's findings and his reasoning."

The sheriff correctly appreciated that he had to first consider section 84(5)(c)(ii), and decide if the threshold test was satisfied. He identified a number of issues which he considered in light of the test. These were the appellant's ability to look after Z; her alcoholism and relapses, together with the risk of future relapses; and the effect on the child of a return to the appellant. He made significant findings in fact about each of these issues. At finding [10] he found that when not under the influence of alcohol, her care of the children was adequate. At finding [11] he stated that "when drunk, the respondent (appellant) was not capable of looking after the children". The sheriff agreed with the proposition that her care of Z, when sober, could not be a basis for serious detriment. Moving on to the second issue, at findings [12-21] he summarises the appellant's relapses, attempts at her own life,

attempts at treatment, hospitalisation, and referral to Community Mental Health in July 2017, and a drug and alcohol support group in September 2017. He concludes at finding [21] that "the appellant had a problem with alcohol between at least 1995 and September 2017". He accepted that since then she has been abstinent. In paras [48-75] of his note, the sheriff covers the whole issue of the appellant's alcoholism, its causes, the trigger factors, past relapses and the risk of future relapses. Considering the whole evidence he came to the view that the risk of relapse was present, and likely, particularly if Z were to be back in his mother's care (para [74]). The appellant argued that the sheriff appeared to have ignored the period of sobriety between about 1997-2011, a significant time. It had not been reasonable therefor for the sheriff to make finding [21]. Further the appellant criticised the sheriff for preferring one social worker (employed by the petitioner) over the two workers who had been recently involved with her. We are satisfied that the sheriff has properly set out his findings and explained in his note how he has come to them. It is a fact that the appellant has a problem with alcohol. She has periods of abstinence, some longer than others. She is currently in such a period. But the criticism of finding [21] is misconceived. It is not on that basis that the sheriff decided that there was a risk of relapse, but on the whole lengthy history of an alcohol problem. From his evaluation of the evidence led at proof, we consider that he was correct to do so. He also explains at para [44] why he had concerns about the evidence of one of the appellant's social worker witnesses (VH). Another, (N) at para [69] did not rule out the possibility of relapse. Neither of these social workers made reference to Z, or his welfare; their focus was on the appellant. The petitioner's social worker, (L) from Children and Families, had her focus on the child's welfare throughout. The sheriff thus found that there was a risk of relapse, and that when drunk, the appellant was not capable of caring for Z. He went on, correctly, to look at the effect on Z of a move to

live with his mother, with the consequent loss of protective factors, which factors he fully identified. He found that both the risk of relapse, and the loss of protective factors made it likely that residence with the appellant would be seriously detrimental to his welfare. We are of the view that the sheriff's approach and reasoning cannot be criticised. He followed the guidance provided by Lord Reed in *West Lothian* v *B* (*supra* para [3]). He set out at paras [111-114] the nature of the detriment, why it is likely to exist, and why it is likely to be serious. This ground of appeal fails.

[17] Having dealt with the threshold test, the court is obliged to consider sections 84(3) and (4), whether it is better for a child that an order be made than not made, with the need to safeguard and promote the welfare of the child as the paramount consideration. This the sheriff covered in paras [115-128]. No specific criticism of the sheriff's approach was made, other than in second ground of appeal - the absence of a parenting assessment. It is of course correct that there was no such assessment carried out. But in our view this is not fatal to the making of the order. The question for the sheriff was one of assessing the risk to Z were he to be returned to his mother. This he did on the detailed information available to him. That evidence came from several sources, both lay and expert. It also has to be noted that the reason that no parenting assessment was carried out was largely due to the appellant's own situation. She had a history of non-cooperation with everyone involved in the care of Z, from her own parents, to social workers, and Dr Edward. She only seems to have engaged, from late 2017, with professionals directly assisting her with alcohol issues. Reference is made to paras [140-143] of the sheriff's note. It is simply wrong to criticise the absence of a parenting assessment at this stage, when the main reason for there not being one was the appellant's own attitude. We note the Lord President's comments in *City of Edinburgh Council* v *GD* (*supra* para [12.]), which apply equally in this case.

[18] The sheriff decided that a residence order would not suffice, and explained his reasoning for this, and why Z's best interests were met by a permanence order. It is of course reasonable to argue, as the appellant did, that it would have been open to the sheriff to consider not just the granting of parental responsibilities and rights to the grandparents, but also the removal, or suspension, of some or all of the appellant's own rights and responsibilities. This court is not aware whether this was advanced to the sheriff. From his note it does not seem that the appellant was prepared to concede any of her parental rights. The sheriff deals with the making, or otherwise, of a residence order at paras [162-170]. He concluded that a residence order was not a viable option, and not in Z's best interests. We consider that he was correct in his analysis, save in one respect. He viewed a residence order as not final, as it can be varied. In so far as any order involving a child can be varied, none can be said to be final. This applies equally to a permanence order, under the provisions of sections 92-94 of the 2007 Act. The main difference to a parent in seeking to vary a residence order as opposed to a permanence order, is that in the latter, the parent must seek the leave of the court, which is granted only on a material change of circumstances, or other proper reason. Be that as it may, the sheriff has properly considered what order best suits the child's needs, and has properly explained how he has exercised his discretion in doing so. This ground of appeal also falls to be refused.

[19] The final ground of appeal related to contact. The sheriff granted an order, which left matters very much to the discretion of the petitioners, taking account of the child's wishes. The appellant wanted a fixed period, mirroring the terms of the Compulsory Supervision Order. An award of contact is ultimately a question of judgement, and in the present case, we cannot say that the sheriff was plainly wrong. He sets out the reasoning at paras [178-181]. His reasoning is sound. We are reassured that the petitioners have taken

the sheriff's views on board already, notwithstanding the appeal. Contact has increased in duration, is unsupervised and there are plans to move to overnight contact. For as long as the appellant remains sober, this can only be of benefit to Z.

[20] Thus the appeal is refused. Parties were agreed that there ought to be no award of expenses, and we are content that the interlocutor reflects this. We also certify that the cause is suitable for the instruction of junior counsel.

[21] We should add that we were urged to find that as a general proposition, a move back to a parent after some time settled elsewhere and with the resultant loss of protective factors, (which for convenience we will refer to as "the removal effect"), would of itself be sufficient to meet the threshold test. As a matter of construction the provisions of section 84(5)(c)(ii) focus on the acts and omissions of the parent and the consequences for the child. That is not to say that the terms of the section are so limited. As the sheriff in this case observed, there is nothing in the section to prevent consideration of the removal effect. There may very well be cases where such a move could be said to be likely to cause serious detriment to a child, without other factors being present (eg *East Lothian Council* v *LM*), but the approach of the court should always be to consider all aspects of the evidence when deciding the serious detriment test. Factors such as the length of rehabilitation, and the risk of relapse also need to be considered. At one end of the spectrum there may well be cases where the threshold test can be passed only on the basis of serious detriment resulting from the removal from a safe secure placement and its effects. At the other end, there could be a myriad of factors in play. Indeed courts must be careful not to encourage delay on the part of local authorities in coming to a decision about a child's future. As was said in *Fife Council* v *M* 2016 SC 169, at para [54]

> "The sheriff laid considerable stress on the settled, happy, loving and enduring environment in which the child was being brought up by X. That arrangement provided the child with long-term security and stability which would safeguard and promote her welfare throughout childhood. He was entitled to take that into account in assessing the question of serious detriment to her welfare by removing her from that security and stability. We do not, however, consider that that was the only basis on which the sheriff came to his conclusion on serious detriment. We reject the contention that the sheriff failed to have regard to all the circumstances in the case. His conclusion at para 41 must be read in the light of the findings in fact and the note as a whole. In our view the sheriff was entitled on the factual material before him to come to the conclusion that residence with M or F would be likely to be seriously detrimental to the welfare of the child".

These comments apply equally to the present case. The sheriff concluded at paras [112-114] that the serious detriment test was satisfied on account of the risk of relapse into alcohol misuse and the removal effect. It is wrong to compartmentalise issues; the court should consider them all as holistically as possible, in coming to a decision about the threshold test, and the welfare test.