SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2019] SC EDIN 5

AD88-17

JUDGMENT OF SHERIFF KENNETH J MCGOWAN

in the cause

EAST LOTHIAN COUNCIL

Petitioner

for a permanence order with authority for adoption

in respect of

PJ, born 2 July 2016

Petitioner: Sharpe, Advocate; East Lothian Council
First respondent: Aitken, Advocate; Drummond Miller
Second Respondent: No appearance
Interested party: Rae, Solicitor; Lisa Rae & Co
Reporting Officer and Curator Ad Litem: No appearance

Edinburgh, 10 December 2018

NOTE

Introduction

[1] In this case, the petitioner as the relevant local authority seeks a permanence order with authority to adopt. The details of a number of people involved in this case have been redacted in this note in order to maintain confidentiality. The principal interlocutor pronounced by the court contains the full details of those involved. Since the identities of K and C must be kept confidential, a copy of that interlocutor with those details redacted will be issued to parties.

[2] The child is PJ. LM is his birth mother, the first respondent. P is his father, the second respondent. MW is PJ's half-sister, the interested party. K and C are PJ's current foster carers. MW Senior is MW's mother. VM is a trainee support worker; CD is a case worker; and CG is senior social worker.

[3] The application is opposed by LM. P has not sought to participate in the proceedings. MW participated in the proceedings in relation to contact.

[4] I was favoured with a joint minute which agreed much of the historical background.

[5] Evidence was given from the following witnesses by way of affidavits:

i. Paul Lawley;
ii. Fiona Maclean;
iii. Patricia Ronaldson;
iv. Rosalind McClements;
v. C;
vi. K;
vii. Susan Dudley;
viii. Alison Francois;
ix. LM;
x. MW, Senior;
xi. MW;
xii. Edward Conroy;
xiii. VM;
xiv. CD; and
xv. CG.

[6] Witnesses ii – x gave oral testimony in addition to their affidavits. Dr Katherine Edward, Clinical Psychologist, spoke to her report.

[7] I was referred to the following authorities/sources:

i. The Adoption Policy Review Group Report, *Adoption: Better Choices for our Children, 6 June 2005;*

ii. The Children Act 1989, Section 31(2);

iii. *City of Edinburgh Council* v *O and D*, 2017 Family Law Reports FAMLR 27;

iv. *City of Edinburgh Council* v *GD* [2018] CSIH 52;

v. *East Lothian Council*, Petitioners, [2012] CSIH 3;

vi. *Fife Council* v *M* [2015] CSIH 74;

vii. *Fife Council* v *KPM* 2018 SAC (Civ) 25;

viii. *R* v *Stirling Council* 2016 SLT 689;

ix. *Re B* (a Child) 2013 1WLR 1911;

x. *Re J* [2013] 1AC 680;

xi. *North Lanarkshire Council* v *KR* 2018 Family Law Reports 92;

xii. *NR* v *Roma Bruce Davies*, Scottish Children's Reporter Administration (2018) SAC (Civ) 13;

xiii. *S* v *L* 2013 SC (UKSC) 20;

xiv. *TW & JW* v *Aberdeenshire Council* 2002 [CSIH] 37;

xv. *West Lothian Council* v *MB* 2017 SC (UKSC) 67;

xvi. *West Lothian Council* v *M* [2014] CSOH 73; and

xvii. *YC* v *United Kingdom* (2012) 55 EHRR 33.

[8] Having considered the evidence and submissions (the latter being summarised below), I made the following findings in fact.

Findings in fact

Familial background

[9] LM and P are the parents of the child, PJ. PJ has a half sibling, MW, born 8 May 2000 with whom he shares a father. MW's mother is MW Senior.

Prior to PJ's birth

[10] LM and P have a history of illicit substance misuse. LM tested positive for heroin in November 2015 and January and May 2016.

[11] On 2 June 2016 LM was advised that should she continue to test positive for illicit substances, the Child Protection Core Group would recommend that an application be made for a child protection order ("CPO"). On 7 June 2016 LM tested positive for heroin. She continued to test positive for heroin and other illicit drugs up until July 2016.

PJ's first year

[12] PJ was born on 2 July 2016. LM and P hold all of the parental responsibilities and parental rights set out in sections 1(1) and 2(1) of the Children (Scotland) Act 1995 ("the 1995 Act") in respect of PJ. PJ began to show signs of neonatal abstinence syndrome ("NAS") the day following his birth. He suffered restless sleep, screaming and an outbreak of sores for a period of four weeks.

[13] A CPO was granted on 5 July 2016.

[14] LM tested positive for heroin on 12 July 2016. On 13 July 2016 an interim compulsory supervision order ("ICSO") was imposed with a measure of residency for the child with a foster carer. LM was permitted contact up to three times per week for two hours. P was not permitted any contact.

[15] Grounds of referral in respect of PJ were held established at Edinburgh Sheriff Court on 26 August 2016. PJ was referred to the children's hearing on the basis of the ground in section 67(2)(a) of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). The ground and statement of facts were accepted by LM and P: production 16/4. At that time, PJ was likely to suffer unnecessarily or his health or development was likely to be seriously impaired, due to a lack of parental care.

[16] In the weeks immediately following PJ's birth, P disengaged from working with social workers in respect of PJ. LM asserted to social workers that she had ended her

relationship with P but through to April 2017 she maintained that relationship intermittently.

[17] LM continued to test positive for heroin and cocaine. On 15 September 2016, PJ was made subject to a compulsory supervision order ("CSO") with residence with a foster carer. LM was permitted supervised contact three times per week for two hours. P was not permitted any contact. Contact was supervised by social workers but was based at LM's home and included activities in the community.

[18] Between August and November 2016, the petitioner's Social Work Department undertook a parenting capacity assessment in respect of LM. P refused to work with the social workers and, in consequence, he did not form part of the assessment. It was concluded that, at that time, LM could meet PJ's basic needs during contact with support and when she was not affected by drug use or withdrawal therefrom. The parenting capacity assessment concluded that LM was not able to protect and safeguard PJ from risk of possible harm associated with parental substance misuse. LM's inability at that time to cease using illicit drugs and to terminate relationships with drug using associates led to a recommendation that consideration should be given to seeking a permanence order with authority that PJ be adopted ("POA").

[19] On 1 December 2016, LM admitted that she was a longstanding victim of emotional and physical domestic abuse and control by P. LM advised that P would physically force his way into her home with illicit drugs and that she was left with no choice but to misuse those drugs with him. LM advised that she had failed to disclose this earlier through fear of repercussions from P. LM failed to advise Police Scotland, pursue a remedy through the civil courts or accept domestic abuse guidance and support offered by social services.

[20] On 6 December 2016, LM was reported as continuing to take illicit drugs and have regular contact with P. On the same date, it was recommended at a Looked After and Accommodated Child ("LAAC") review that planning for PJ's placement permanently outside the birth family should be progressed.

[21] On 1 June 2017 a meeting of the petitioner's Adoption and Permanence Panel recommended that a permanence order with authority for adoption should be sought in respect of PJ. This recommendation was subsequently confirmed by the agency decision maker.

[22] In July 2017, during a contact visit in the community, LM threw a tricycle. This resulted in PJ's contact with her being reduced to twice a week and a requirement that it take place at Homestart (a local authority resource).

PJ's move to K and C's care

[23] In the summer of 2017, PJ's then foster carer, CR, advised social workers that she could no longer commit to a long-term arrangement to care for PJ. PJ had formed an attachment to CR.

[24] On 2 August 2017, a children's hearing decided to change the measure providing that PJ reside with CR and varied this to provide that PJ reside with new carers, K and C. PJ commenced living with them on 24 August 2017.

[25] The transition of PJ from CR's to K and C's care was carefully planned with the latter being introduced to him gradually over a period of about two weeks. Even so, towards the end of the transition period, he began to show signs of confusion about his relationship with K, C and CR.

[26] In view of the attachment which PJ had formed with CR and her son, photographs of them were made available to PJ by K and C so that he could see that they still existed. This was part of meeting his need for reassurance.

[27] PJ coped well with the major disruption of moving from his placement with CR to that with K and C but did take time to settle in his new home. In his initial period with K and C, K lived a constrained lifestyle to support the development of PJ's attachment to her.

[28] PJ required predictable and consistent routines so that he felt safe with K and C and was able to develop a sense of trust and attachment with them. For a period after PJ's move to the care of K and C, he exhibited certain negative behaviour after contact sessions such as being quiet and withdrawn and looking unhappy and repeatedly banging his head on his highchair.

[29] For the first 12 weeks of PJ's placement with K and C care had to be taken to do things that would help him settle and feel safe. Routines were adhered to as much as possible. K and C kept him close and limited his interaction with others in order to help him become familiar with them and trust them and feel safe in his new home environment. PJ became more confident after an intensive time at home during Christmas 2017.

[30] In the spring of 2018 when K had an enforced absence abroad (due to family circumstances) PJ found that distressing as she had become his primary carer. He required a lot of re-assurance from C during that period. He would kiss K's picture and had difficulty with his sleep. PJ requires a lot of reassurance if his routine is disrupted.

[31] PJ has lived with K and C since and continues to do so. If authority is granted that PJ be adopted, it is likely that these carers shall apply to adopt PJ.

[32] The application by K and C to be considered as potential adopters was a strong one. K and C are well suited to meeting PJ's particular needs.

The nature of "attachment"

[33] The term "attachment" has a particular meaning in child psychology and is stronger than a bond. Children establish a relationship with a primary attachment figure, usually the mother. Attachment Theory has long emphasised the crucial nature of a strong secure base for a child to meet his developmental milestones and the damage that can be done by destruction of secure attachments.

[34] Attachments are formed for safety and security. If babies are unable to form attachments they feel anxious.

The lead up to the present proceedings and LM's entry to LEAP

[35] No other family members or relations of LM or P have been identified as being suitable to look after PJ. The present proceedings were commenced in August 2017. Intimation thereof was properly effected on P. He has chosen not to participate in them. At that stage there were ongoing concerns about LM's presentation and PJ's reaction after contact.

[36] Between the birth of PJ and September 2017, LM made attempts to cease using illicit drugs. She continued to intermittently use illicit drugs including heroin. While, on occasion, she provided drug tests which were negative for the use of substances, she also provided positive tests or failed to provide samples for testing when expected to do so.

[37] As at October 2017, there were significant concerns regarding LM and P's chaotic lifestyle, offending behaviour, abusive relationship and substance misuse. LM and P had both been unable to demonstrate an ability or willingness to change or to put PJ's needs first. They had been misusing drugs for many years, at times funding this through criminal

activity. LM admitted that she had worked in partnership with P, shoplifting to fund their drug habits and spending between £80 and £100 each day on heroin and other illicit or non-prescribed drugs. LM had served a short prison sentence. The relationship between LM and P was acrimonious with allegations of mental abuse, threatened physical abuse and coercion by P for LM to take illicit drugs supplied by him. Alcohol abuse resulted in domestic abuse incidents. P consistently failed to attend professional meetings or engage in any meaningful way.

After LM's entry to LEAP

[38] From November 2017, LM demonstrated an increased willingness to maintain a drug free lifestyle. She secured a place in the Lothians and Edinburgh Abstinence Programme ("LEAP"). She commenced a residential abstinence programme there on 23 November 2017. The programme consisted of a 12 week structured placement. During her 12 week placement, LM demonstrated a willingness to change her lifestyle and remain drug free. She completed the programme successfully.

[39] In the early part of 2018, LM had unrealistic expectations about how PJ might be returned to her care and over what period that would happen (if it did happen).

[40] During her period on the LEAP programme, LM was a "model student". 61% of people who graduate from the LEAP programme are completely drug free and sober four years after treatment. It is not likely that LM will return to using illicit substances.

Contact

[41] In the period between 23 November 2017 and 19 February 2018 when LM was in LEAP, contact between her and PJ took place on one occasion each week. Since LM left

LEAP, she and PJ have had contact with each other twice a week. The contact takes place in the community and is supervised by local authority employees.

[42] PJ has had direct contact with his half-sister, MW, since he was around six weeks old. Contact initially operated once per week. Since around August 2017, contact has operated once per fortnight.

[43] Both LM and MW have been consistent in turning up for contact. The quality of contact prior to LM resolving to enter the LEAP programme was inconsistent. It has improved substantially since then and is now generally of good quality. The contact takes place over a limited period (two hours) and is supervised. PJ is happy to go to contact with LM. He appears to regard the contact as "fun play sessions". PJ mentions LM and MW on his way to contact (having been told that is where he is going) and is happy to see them.

[44] The reduction of MW's contact to once fortnightly meant that the quality of LM's contact with PJ improved when MW is not there.

[45] Of itself, contact cannot provide strong positive evidence of an adult's parenting capacity, though it may provide negative evidence of such. Contact may provide the starting point for assessing parenting capacity.

Current position

[46] Children benefit from being brought up by their own parents when it is possible for them to do so.

[47] Both K and C provide a high quality of care to PJ.

[48] LM has been respectful of K and C's role and they of hers. There has been good and positive communication between them by means of a diary.

[49] PJ has never lived with LM. He continues to make progress. He has on occasions shown confusion about roles, relationships and names (e.g. use of the word "mummy" or "mum" in respect of different people).

[50] Given his age and stage of development PJ needs round the clock care.

[51] LM has cut ties with her old acquaintances. There has been no recent evidence of LM being under the influence of any illicit subjects and she has provided clean toxicology reports for over a year. LM has been living drug free in the community since February 2018. Despite the deaths of two of her friends, LM has not relapsed. She has committed to extensive aftercare and fellowship.

[52] PJ is aware of his home and recognises that when he returns shouting "home". When he gets home, he checks around the house to ensure that his toys are still there. He often kisses his toys when he returns home.

[53] PJ has gradually been introduced to K and C's extended family. He knows C's brother and sister and their partners and children well. He knows family members by name and speaks about them regularly.

[54] K and C are well able to meet PJ's emotional and developmental needs during his childhood. PJ is settled and happy with K and C. They are extremely well attuned to his situation and able to offer him a secure, loving environment in which it can be expected that he will reach his full psychological, social and academic potential.

[55] Given PJ's age and stage, it is very important for him to know who his primary carers are and his relationship with them.

[56] PJ has a bond with both LM and MW. He is too young to recognise the nature of his relationship with them. He does not have an attachment to either.

[57] Decisions about the long term care of Looked After Children need to be made quickly in circumstances such as where an attachment has already been broken.

[58] The petitioner has not carried out a new parenting capacity assessment in the period following upon LM leaving LEAP. Parenting capacity assessments are a large and significant piece of work. They are not carried out in every case.

Looking forward

Assuming return of PJ to LM's care

[59] LM left LEAP on 19 February 2018. Consistent with standard LEAP practice, she has undertaken fortnightly drug testing since then as a part of her ongoing involvement with LEAP.

[60] Although LM has completed the LEAP programme, the maintenance of an abstinent lifestyle remains ongoing. LM must remain concentrated on her recovery to minimise the risk of relapse. LM remains in aftercare which will last until at least February 2020.

[61] Every day presents a risk of relapse. LM will "never be off the programme". The recovery from addiction is an ongoing process. LM continues to put in work to avoid relapse. She has to keep her mind focussed and is presently doing as much as she can to avoid relapsing. LM will have to continue to work as she is doing to minimise the risk of relapse. This is all part of the "recovery journey" for addicts.

[62] She continues to attend several meetings each week which help with her recovery. She accesses support from friends, therapists and her sponsor. The meetings which LM attend take place variously in Haddington, Musselburgh, Dalkeith and at the Astley Ainslie in Edinburgh to which she has to travel from north Edinburgh by public transport.

[63] The return of PJ to LM's care would have to be managed and would create an additional stress for LM.

[64] An immediate return of PJ to LM's care is not practicable. There would have to be an assessment of LM's parenting capacity and the feasibility of possible rehabilitation. That would take time. It would involve PJ spending less time with K and C and more with LM. The duration of such a process is uncertain. That would be likely to be harmful to PJ.

[65] LM could be faced with difficult choices concerning prioritising PJ's care or attending meetings important to her own recovery. These pressures would increase if a decision was taken to undertake rehabilitation.

[66] If PJ was rehabilitated to LM's care (or if steps were taken to "test the water" as to whether that was feasible), she would be entitled to support from Social Work and it is likely that she would cooperate with the supports offered.

[67] LM would seek support from LEAP and also be able to access some support from her renewed family relationships. The nature of that support and over what period it would be available is uncertain.

[68] A period of limbo whilst a possible move to LM's care was tested would mean continued delay in securing PJ's situation. That would not be responsive to his needs and best interests as he requires stability and security. If PJ were rehabilitated to the care of LM, that would lead to a severing of his attachment to K and C which in turn would lead to trauma. These detriments would be serious and unavoidable.

[69] PJ's attachment needs are such that he needs a settled and permanent home. Looking purely at his developmental needs, the optimum outcome is that he should remain living with K and C throughout his childhood.

[70] In the event of a permanence order not being granted, K and C would cooperate in attempts to rehabilitate PJ to LM's care.

Looking forward – assuming Permanence Order granted

[71] An abrupt cessation of LM's contact with PJ would have a negative impact on him.

[72] While post-adoption contact can bring benefits, it also brings risks.

[73] Ongoing contact with the birth family can provide a child with a sense of self, particularly as they grow older. Information about the birth family helps to prevent the growth of ideas among adopted children such as "fantasy figures" in respect of their birth family. This is particularly important during adolescence. On the other hand, direct contact can carry risks. If the birth parent has not provided the child with "emotional permission" to be part of the new adoptive family, that can undermine the placement. If authority to adopt were granted, and LM did not accept that changed situation, that could be problematic.

[74] Particularly in the early stages post-adoption, it is best to avoid the risk of problems which might arise of contact such as conflict of loyalty. This is best achieved by periods of uninterrupted care with the primary carers only.

[75] If PJ's contact with LM or MW was suddenly ended, that might cause him some upset but would not cause him trauma.

[76] Significant reduction or increase in contact would represent a change for PJ which would have to be managed.

Submissions for petitioner

[77] The petitioner's motion is that the prayer of the petition should be granted and a permanence order with authority to adopt should be made in terms of section 80(1) of the Adoption and Children (Scotland) Act 2007 ("the 2007 Act"). Thereafter to make a further order for biannual indirect letterbox contact between the child and his mother, LM and his half sibling, MW in terms of section 82(1)(e) of the 2007 Act; and to revoke the compulsory supervision order in respect of the child in terms of section 89 of the 2007 Act.

General approach to be adopted by court considering granting or refusing the permanence order with authority to adopt

[78] See *City of Edinburgh Council* v *RO*, paragraphs 7 and 8.

Conditions and considerations applicable to the making of a permanence order

[79] The first issue for the court was whether or not the "serious detriment" test was satisfied on the evidence led by the petitioner: section 84(5)(c), 2007 Act.

[80] In the present case the court would have to be satisfied that, there being a person who has the right to have the child living with her (LM) the child's residence with LM is, or is likely to be, seriously detrimental to the welfare of the child.

[81] The court should make a finding in fact on this issue. If the petitioner fails to satisfy the court that this test has been met the application as a whole fails: *TW* & *JW* v *Aberdeenshire Council*, Lord Bonomy, paragraphs 12-14; *KR* v *Stirling Council*, Lord Drummond Young, paragraphs 12-15; *ECC* v *JD*, Sheriff Principal DCW Pyle, paragraphs 9-12 and 20. The test was to be applied at the time of the court's decision. The approach taken was to be holistic: *City of Edinburgh Council* v *DD*, Lord President, paragraph 30.

[82] There was further judicial guidance in *Fife Council* v *KPM* at paragraph 21.

[83] Even if the threshold test is not met the court should still provide an answer to the welfare question: *Fife Council* v *KPM*, paragraph 27.

Welfare test: section 84(3)&(4) of the 2007 Act

[84] The correct approach was set out in *North Lanarkshire Council* v *KR*, paragraphs 62-74.

[85] The proper approach to the "necessity test" was set out in *North Lanarkshire Council* v *KR* at paragraphs 78-79.

[86] The questions of the child's views; the child's religious persuasion, racial origin and culture and linguistic background and the likely effect on the child of making the order are dealt with at paragraphs 84(5)(a) and (b) of the 2007 Act.

Ancillary provisions section 82 of the 2007 Act

[87] Consideration had to be given to section 82 of the Act.

Post-permanence order contact

[88] In considering the issue of contact there is no "harm" test. The issue is whether or not ongoing contact will safeguard and promote the child's welfare: *East Lothian Council,* Petitioners, paragraph 49.

Authority to adopt

[89] Guidance had been given in the *City of Edinburgh Council* v *GD* at paragraph 35.

[90] In making an adoption order, section 14 of the 2007 Act is engaged.

[91] These issues were a matter for the court's determination having regard to all the circumstances of the case taking a "holistic" approach to the evidence.

Is it necessary for a local authority to do a parenting capacity assessment every time there is a change in the parent's circumstances?

[92] There was no legal obligation to do so: *NR* v *Roma Bruce Davies*, paragraphs 2, 24 and 25; *City of Edinburgh Council* v *GD*, paragraphs 36 and 37.

Can the removal of a child from a happy and settled placement be a factor in considering whether it would be seriously detrimental to return the child to a parent?

[93] There should not be a narrow assessment of circumstances: *Fife Council* v *KPM*, paragraph 25.

[94] This type of approach was part of the holistic approach recommended in the present case. The question was how significant the inevitable disruption to the *status quo* would be.

[95] See also *Fife Council* v *KPM*, paragraph 28 and *The Law of Parent and Child in Scotland*, Wilkinson & Norrie, 3rd Edition 2013, paragraphs 20.15-21.52.

General evidential submission

[96] Adopting a holistic approach, at the date of proof, as commended by the Lord President in *Edinburgh Council* v *GD* at paragraph 30, the court should find that it would be seriously detrimental to the welfare of PJ to be returned to live with LM, notwithstanding the progress she has so far made in addressing her drug addiction.

[97] The court must have regard to all the circumstances of the case: section 14(2) of the 2007 Act. The court in considering serious detriment should not restrict itself just to whether the respondent can now, with further support from the local authority, care for the child.

[98] The court must consider the whole history of the case and the effect on the child of being returned to his mother which has been described as potentially "devastating" by his current carers.

[99] PJ has never lived with LM and has resided with his current carers, who have been approved and matched as prospective adoptive carers in the event the order is granted, since 24 August 2017. He is very happy and settled with them. LM's progress has just come too late in terms of the child's life and timeframe.

[100] The curator and reporting officer supports the granting of the application.

Submissions for respondent

[101] The respondent's motion was that the application should be dismissed.

Applicable law

The threshold test

[102] As a starting point, the court is not concerned with the best interests of the child but initially with the threshold test: section 84(5)(c)(ii) 2007 Act; *R* v *Stirling Council* paragraphs 13-15 and 19; *West Lothian Council* v *NB* paragraphs 11-17.

[103] Subject to what was said below in respect of *Fife Council* v *M* there was no authoritative decision concerning what is meant by "the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child". The court requires to consider whether that phrase is intended to capture a case in which the care of the child by the parent would not be seriously detrimental, but the impact of the removal of a child from an established placement would be so. It was submitted that the threshold test would not be

crossed in circumstances where the care to be given would not, itself, be seriously detrimental.

[104] The purpose of the threshold test is to guard against unwarranted intervention by the state. It balances the parent's Article 8 rights with a duty to protect children from "neglect and ill-treatment which they may suffer in their own home". "The threshold is designed to restrict compulsory intervention to cases which genuinely warrant it, while enabling the court to make an order which will best promote the child's welfare once the threshold has been crossed": *Re J*, paragraphs 1 and 2.

[105] The Adoption Policy Review Group Report, *Adoption, Better Choices for our Children*, 6 June 2005 set out the recommendations which resulted in the enactment of the 2007 Act: see paragraphs 5.2, 5.14 and 5.25.

[106] Section 31(2) of the Children Act 1989 sets out the comparative test in English proceedings. It was clear that in that jurisprudence there was a need for a deficiency in the actual care to be provided. The impact on the child of removal from a placement would be insufficient. In *Fife Council* v *M* the Inner House touched on the issue but did not determine whether the impact on the child of removal would be, in itself, sufficient for the test to be satisfied: paragraphs 18, 26, 28, 39 and 54. It was notable in that case that there was no relationship at all between the child and the father, there having been barely no contact between them during the child's life.

[107] If the phrase "the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child" is to be determined having regard to the care the child would likely receive if resident with the parent, then a number of factors must be considered.

[108] The test is a high one and will not be satisfied by mere parental failings: *R* v *Stirling Council*, paragraph 67. Put shortly, even parenting which was "barely adequate" is good enough parenting to avoid the test being met.

[109] The court should consider whether the test is satisfied at the date of proof and not at any earlier point in time: *City of Edinburgh Council* v *GD*, paragraphs 30 and 31.

[110] Parental ability must be tested taking into account the likely support which a parent would receive from professionals: *Re J*, paragraph 105.

[111] The question is whether there is a "real possibility" of harm: *City of Edinburgh Council* v *GD* at paragraph 30. While facts must be established on a balance of probabilities, it is not necessary to find that it is more likely than not that harm would occur. This is explained by Baroness Hale in *Re J*: "'likely' in section 31(2) does not mean more likely than not; rather, it means likely in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case". In this case there was no real possibility of a relapse.

[112] In all the circumstances it was submitted that the threshold test was not satisfied. A permanence order could not be made and the petition should be dismissed.

Welfare assessment

[113] If the threshold test is crossed, the court must then consider whether it is better to make the order or not: section 84(3); and whether the order would safeguard and promote the child's welfare throughout childhood: section 84(4).

[114] When carrying out this analysis, the court must consider all the relevant options for the future care of the child and conduct the "global, holistic evaluation" of their benefits and

dis-benefits. In order to do that, it was necessary to consider whether adoption was a live option.

Parental consent to adoption

[115] Authority for the child to be adopted could only be granted if the parents either consented to that or parental consent was dispensed with for certain specified reasons: section 83 of the 2007 Act.

[116] The starting point was to consider section 83(3), the parental inability test and then if that was not satisfied, to consider the "fall back" provision in section 83(2)(d).

[117] The parental inability test in section 83(3) requires an assessment of facts rather than evaluation of welfare. It looks at the present and foreseeable future. The past is relevant only in so far as it is informative as to what may happen in the future. The test shall not be established if there have been past deficiencies which are no longer applicable.

[118] Although concerned with a direct adoption petition, *S* v *L* was instructive given the essentially mirror image provisions in section 31 (parental consent in direct adoption petitions) and section 83 (parental consent in authority to adopt cases). The court specifically noted that the circumstances of a drug addict who was in recovery may not fall within the parental inability test: paragraph 29. In the whole circumstances of the present case, the parental inability condition was not satisfied.

[119] If the court requires to rely on the "fall back" provision in section 83(2)(d) the whole ratio of *S* v *L* comes to bear as explained in paragraphs 30-43. Particularly in circumstances where it appears that the parental inability provision in section 83(3) does not apply, these paragraphs are of essential importance to the determination of this case and require to be considered in full. Put short, the ratio is to the effect that the welfare provision must be read

in a convention compliant manner and for it be required that the child be adopted; nothing else will do. What is required is a "global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare": *Fife Council* v *M*, paragraphs 59-64. The process was a developing one. It was necessary to keep matters under review as the time of undertaking the assessment is at proof. Improvements in the parents' circumstances must be considered both by the court and by the Social Work Department: *City of Edinburgh Council* v *O and D*.

[120] In the present case, there had been difficulties with the Social Work approach. Susan Dudley had not spoken to anybody from LEAP and there was no report from them. There had been a failure to properly consider the impact of the respondent's changed situation on the threshold and welfare tests. There had been no follow up on a parenting capacity assessment.

Coming back to section 84(4) and the welfare analysis

[121] Once it has been considered whether an adoption is a viable consideration, it will be known if it is one of the options on the table to be weighed up for the purposes of section 84(4). The approach to be taken by the court at that stage was set out in *North Lanarkshire Council* v *KR* at paragraphs 61-70.

Ancillary provisions – contact

[122] In terms of section 82, the court can attach ancillary provisions to a permanence order including the vesting of parental responsibilities and rights and the extinguishing of them in the birth parent.

[123] An ancillary provision concerning contact can be attached to a permanence order by way of section 83(2)(e). The relevant test is that in section 84(4) i.e. "the court is to regard the need to safeguard and promote the welfare of a child throughout childhood as the paramount consideration".

[124] This must be determined in a way which is compatible with Article 8 ECHR: *YC* v *United Kingdom*, paragraph 137. Essentially, any restriction on parental access must be "necessary". In other words, contact is presumed although the welfare of the child can defeat parental rights.

[125] In this case, the court is not making a decision about post-adoption contact. A permanence order (and with it any ancillary provisions in respect of contact) ceases to have effect on the subsequent making of an adoption order: section 102 of the 2007 Act.

[126] In many permanence order cases, the terms of post-adoption contact can be readily predicted allowing for a clear order to be made (usually no contact); this is not such a case.

[127] If adoption is to be authorised, there are aspects of future contact which remain subject to assessment, including whether LM can reconcile herself to her new role. In this particular case, the proper time to determine post-adoption contact is at the time of the adoption determination when a condition could be attached to the adoption order by way of section 28(3). The court making such a determination will be in a better position than the present court to make such an order. Meantime the court can make provision for contact in the period between now and the adoption order being made: *West Lothian Council* v *M*, paragraphs 69 and 80. There is an important issue which arises here in respect of intimation of any future adoption applications and in that case, West Lothian Council was ordered to intimate any such application on the birth mother.

[128] With reference to Rule 14 of the Sheriff Court Adoption Rules, it is unclear whether intimation of an adoption application would be made upon LM which would be essential if post-adoption contact is to be addressed. An order for intimation as was done in West Lothian Council is appropriate to ensure that justice is served.

Evidential considerations

In general

[129] The court must only take into account matters which have been proved on a balance of probabilities. Matters which are no more than speculation or suspicion cannot form the basis of any findings, and in turn cannot be relied upon in respect of any assessment of statutory test: *West Lothian Council* v *MB*.

[130] The petitioner had taken the unusual step of choosing not to cross examine any of the respondent's witnesses other than the respondent herself. The evidence in chief of those witnesses is before the court in affidavit form. The petitioner's decision not to cross examine is to be distinguished from the position of an affidavit being lodged and no opportunity to cross examine being offered. That is not the position in this case, all witnesses being available but the petitioner making a clear election not to cross. The petitioner seeks to challenge the terms of at least part of the affidavits. That is unsound. Having elected not to cross examine and thus, to have manufactured a situation whereby the witness did not require to come before the court in order for the court to directly consider the witness's credibility and reliability, the petitioner cannot now ask the court to disregard part of the affidavit. If it was to be challenged, the witness required to be cross examined. Any other approach would drive a coach and four through the approach to using affidavits as evidence in chief in cases such as the present.

Threshold

[131] In accordance with the terms of the joint minute of admissions and the admission in the answers to the petitioner's Rule 34 statement, much of the past history is admitted. It is not controversial that the test at section 84(5)(c)(ii) would have been satisfied at an earlier time. That is of little consequence in respect of the threshold as the time to consider whether the test is satisfied or not is now. Much of the background material is out of date.

[132] The unchallenged evidence of the respondent's witnesses (including the reports from LEAP adopted by Mr Conroy as part of his evidence) paints a picture of recovery. To use Mr Conroy's words "it is not likely that LM will return to using illicit substances". The court should make a finding to that effect.

[133] The petitioner had not led evidence which would allow the court to conclude that it would be seriously detrimental to PJ's welfare for him to reside with LM in consequence of an inability on the part of LM to providing him with appropriate care. The test is a high one. Both Susan Dudley and Dr Edward were open to the possibility of LM providing adequate care to PJ assuming no relapse. Such concessions sat inconsistently with any conclusion that it would be seriously detrimental for PJ to be resident with his mother.

[134] Significant concern arises in respect of the evidence of Susan Dudley concerning her own assessment of matters. Despite her involvement at children's hearings and LAAC reviews, she had not secured up to date information from LEAP and had not asked for reports from them on LM's treatment. This was contrary to the duties incumbent on the Social Work Department: *City of Edinburgh Council* v *O and D*, paragraphs 3 and 4. The petitioner had refused to carry out an up to date parenting capacity assessment. This meant that there was no evidence of LM's current parenting abilities. The onus was, of course, on

the petitioner to prove serious detriment (and, for parental consent to adoption, parental inability).

[135] The issue for the threshold test is whether the court concludes that there is a real possibility (i.e. a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case) that LM shall relapse into drug use. It is accepted that if she did, it would be seriously detrimental for PJ to reside with her. By taking all of the evidence concerning her recovery and her now nine months of living in the community drug free, making new relationships, coping with traumas, accessing supports, etc., it is submitted that there is no real possibility of relapse. If that is the case, the threshold is not crossed and the petition must be refused.

[136] If the threshold is crossed, there is no evidence on which the petitioner can rely to allow the court to dispense with parental consent: section 83(3); *S* v *L*. LM cannot be said to be unable to discharge and exercise her parental responsibilities and rights and nor is she likely to continue to be unable to do so. It is of no consequence that she may have been so in the past.

Welfare

[137] The court requires to balance the evidence concerning PJ's settled life with his prospective adopters with the benefits of being brought up by his mother. Both as a general starting point from a clinical perspective (per Dr Edward) and as a matter of law: *YC* v *UK*, children benefit from being brought up by their own parents when it is possible for them to do so. The evidence now is that subject to a difficult process of transition, it is possible for PJ to be cared for by his mother. The case can be distinguished from one where the parent is at the start of a recovery process or one where there is limited contact with no positive aspects.

[138] LM has a close and loving relationship with PJ resulting from positive contact which is ongoing twice weekly. It is not suggested that the process of transition shall be easy. However, for the child to be brought up by his own parent and to have the benefits of that, it is appropriate to implement this. With reference to the demanding approach set out in *S* v *L* the evidence is not such that adoption is necessary as opposed to merely desirable. That is not enough to permit the making of this order.

Contact

[139] In the event of the petition being dismissed contact shall continue in line with the compulsory supervision order. In the event of it being granted, presumably with authority to adopt, then a transition process would be appropriate.

[140] As explained above, it would be appropriate for the decision in respect of post-adoption contact to be made at the stage of adoption. The court is focussed on post-permanence, pre-adoption contact.

[141] Dr Edward was clear that contact cannot stop overnight. That would be contrary to PJ's interests. This is not a case where the child needs to transition to a new carer. It is notable in this case that when he did so (from one carer to another) contact with LM was maintained to provide the child with security and routine.

[142] If the court is regulating contact, it should make provision for it to operate in the period between the permanence order and the adoption application. In circumstances where the petitioners' own lead witness gave a clear opinion to the court that contact should cease despite that being contrary to the opinion of the carers, their link worker and a psychologist, absent clear provision for contact to operate, the court could not be assured that it would happen. The carers would not yet be vested with the power to allow contact at

their own hand. It is essential that it happens in order to allow both for the transition from twice weekly contact to a much reduced level but also to enable proper consideration for new rules for the carers and LM. Taking Dr Edward's recommendation, the court can make an order for contact to reduce to weekly for a short number of weeks, then fortnightly and then monthly. That could remain the position until regulated by the adoption order. Given that the child is already settled in the care of the prospective adopters, the application for adoption could be commenced quickly. This is not a case where there is any likelihood of delay between permanence and an adoption petition being lodged.

Submissions for MW

[143] In the event that a permanence order with authority to adopt is granted the court was invited to make an ancillary provision specifying that there be direct contact between the child and his half sibling, MW, once per month and two-way indirect contact including photographs on two occasions per year, or at such other frequencies as the court deemed appropriate: section 82(1)(e) of the 2007 Act.

The relevant legislation

[144] The court is to make such arrangements for contact between the child and any other person as it considered appropriate and in the interests of the child: section 82(1)(e).

[145] The welfare of the child remained the paramount consideration: section 84(4). Determinations regarding contact had to be compatible with Article 8.

[146] The overall picture emerging from the evidence of all witnesses was that contact between MW and PJ was positive and appropriate. It was a fun and enjoyable experience for PJ. MW had been consistent and committed in her contact with PJ. She has never done

anything to stress him, no evidence had been led by the petitioner in respect of direct contact with MW having a detrimental effect on PJ. The evidence was to the opposite effect. There were fewer risks in respects of ongoing contact between MW and PJ on the one hand and PJ and LM on the other. The petitioner had failed to properly consider ongoing sibling contact and did not meet with MW to discuss this. The carers supported direct contact between MW and PJ once per year. The contact was more likely to be successful if the carers are supported.

[147] A sibling relationship was different to that between a parent and child. It was agreed that sibling contact was very important. Sibling relationships can be life-long. The sibling relationship can enhance the adopted child's life story and connection to their birth family. There was a pre-existing sibling relationship between MW and PJ which had been built upon since shortly after birth to regular, positive and appropriate contact. It was appropriate for sibling contact to be based on having fun together, forming a relationship and for the contact to be a "playdate" for the child.

[148] It was not in the child's best interests for the sibling relationship to be severed. It was in his best interests for the relationship with MW to continue and be maintained throughout his childhood. If the pre-existing relationship were to cease in terms of direct contact, PJ may later experience a sense of loss and miss out on the sibling relationship he currently enjoys and benefits from. The court should make an appropriate ancillary order under section 82 of the 2007 Act. Contact once per month would be an appropriate reduction at this stage. Any interim period between now and adoption could be used to assess the situation just as in respect of LM.

Grounds of Decision

Unchallenged affidavit evidence

[149] An issue arose in this case as to how the unchallenged affidavit evidence was to be treated. This arose in particular in relation to Edward Conroy, the LEAP psychologist. Mr Conroy provided an affidavit (and in the course of the affidavit made reference to certain documents which he adopted). It was also a matter of agreement that the record by Mr Conroy forming no. 38/1 of process was to be considered as part of his evidence and treated as equivalent to evidence which he would give if under oath: joint minute of admissions, no. 39 of process. As the petitioner had previously indicated an intention not to cross examine him, he was not called to give evidence.

[150] During the course of her evidence in chief, Susan Dudley was asked certain questions about matters to which Mr Conroy had spoken, in particular the risk of the respondent relapsing into drug use. That evidence was allowed under reservation.

[151] In their respective submissions, the parties differed as to how Mr Conroy's evidence should be treated. Put shortly, Mr Aitken's position on behalf of the respondent was that if the petitioner wished to challenge Mr Conroy's evidence, they could have asked that he be called. Having not done that, they could not now challenge his credibility and reliability and as such his evidence should be simply translated into findings in fact.

[152] On behalf of the petitioner, Mr Sharpe submitted that he was entitled to challenge the credibility and reliability of Mr Conroy and that Susan Dudley's evidence could be taken into account in that respect.

[153] While taking the point about the potential to undermine the use of affidavits in this type of proceedings (and the benefits which that brings in terms of limiting oral testimony and making hearings shorter), I am not prepared to go so far as to say that evidence given

by unchallenged affidavit could *never* be rejected by a court. For example, it might be that a putative inaccuracy in an affidavit could be immediately verifiable by some other reliable source (e.g. a death certificate).

[154] On the other hand, approaching the matter from first principles, where a witness has given evidence orally for one party; the evidence given – or parts thereof – is not challenged by the other party; but the other party then seeks to lead evidence from one of their own witnesses contradicting the unchallenged evidence of the first witness as incorrect or inaccurate, then in my view two things would ordinarily happen.

[155] First, there may be – as there was in this case – an objection to the evidence from the second witness being led at all on the basis that what that witness has said (or is expected to say) was never put to the first witness. Second, the party who has failed to challenge (in cross examination) the evidence of the first witness is likely to have difficulty persuading the court that much weight should be attached to such 'contradictory' evidence of the second witness as has been (allowed to be) elicited.

[156] Arguably, that applies *a fortiori* where evidence is given by affidavit because the court has been deprived completely of any chance to see, and thereby assess, the first witness at all.

[157] Bearing those points in mind, I did not find anything Susan Dudley said about Mr Conroy's opinion (which I deal with more fully below) to carry sufficient weight to undermine what he said. It is clear in my view that in the particular area of treatment of addicts and risk of relapse, he has far more knowledge and experience both at a general and specific level than Ms Dudley has. No doubt she has picked up some relevant knowledge in the course of her work, but in my view that cannot substitute for Mr Conroy's opinion.

The threshold test - preliminary issues

The nature of the test: section 84(5)(c)(ii)

[158] It is now well settled that this is the first matter which has to be determined. While it is necessary to keep a clear focus on the terms of the legislation, there are a number of principles which have developed from the jurisprudence which must also be borne in mind when undertaking the exercise of deciding whether the threshold is satisfied. These can be summarised as follows:

i. this is essentially a question of fact;

ii. it does not require a proof on the balance of probabilities that there will be future serious detriment, but rather whether there is a real possibility of future serious detriment;

iii. that must be underpinned by facts which have been proved on the balance of probability;

iv. the test is to be applied at the time of the court's decision;

v. the detriment must be serious – it is not sufficient that the child might benefit by being brought up elsewhere;

vi. the test is a high test and will not be satisfied by mere parental failings;

vii. parental ability has to be tested taking into account the likely support which the parent receives from professionals;

viii. where the court finds that the threshold test is satisfied, certain matters should be clear, namely:

    a. what is the nature of the detriment which the court is satisfied is likely if the child resides with the parent;

    b. why the court is satisfied that it is likely; and

c. why the court is satisfied that it is serious.

What factors can be taken into account?

[159] While there was broad agreement as to what the law was, there was one issue where parties differed.

[160] While acknowledging the difficulty for him created by *Fife Council* v *M*, Mr Aitken submitted that the correct construction of section 84(5)(c)(ii) did not cover situations in which the care of a child by the parent would not be seriously detrimental, but the impact of the removal of a child from an established placement would be so. Mr Sharpe took the opposite view.

[161] In my opinion, there are a number of difficulties with the respondent's argument.

[162] First, on a plain construction, section 84(5)(c)(ii) does not require a causal connection between the child's residence with a person and the consequent detriment. It may be that the Adoption Policy Review Group had in mind detriment deriving from the home circumstances – although it does seem to me that at paragraph 5.25 of their report, the Group does acknowledge the possibility of other reasons. It may also be that the concept of detriment arising "at home" was at the forefront of the legislators' minds as being the most common scenario which the courts would have to deal with. But in my view, none of this means that the legislation cannot have broader application.

[163] I was referred to the English legislation and invited to conclude that such an approach was appropriate in relation to the Scottish legislation also. I am not inclined to do so.

[164] It is clear that section 31(2)(b)(i) of the 1989 Act appears to introduce a requirement that the 'significant harm' has a particular source, thus: "…attributable to…". But no such

wording appears in section 84(5)(c)(ii) and in my view its absence must be taken to mean that the lack of such a constraint is deliberate. In other words, its absence points towards a broader rather than narrower interpretation and it is not for this court to read into the 2007 Act words which it does not contain.

[165] It follows that the English cases which are dealing with the English legislation are not a good guide to the terms of the Scottish legislation.

[166] Second, as already noted, the approach to be taken at this stage is "holistic": *City of Edinburgh Council* v *GD*, paragraph 30. That appears to me to suggest that *all* relevant circumstances must be considered. The impact of removal if a child from current carers is a relevant circumstance.

[167] Third, there is existing judicial endorsement for the effect of removal of a child from a stable environment to be taken into account as part of the threshold test: *Fife Council* v *M*; *Fife Council* v *KPM*; *TW* v *Aberdeenshire Council*. That approach is also endorsed by the learned authors in *Wilkinson and Norrie*.

[168] Thus, on this point, I reject the narrow approach contended for.

The risk of relapse

[169] As I understood it, Mr Aitken submitted that I should conclude that there was no real possibility of LM relapsing and that being so, the threshold was not crossed and the petition must be refused. In my opinion, that is too narrow a view. The risk or otherwise of relapse is plainly *a* factor to be taken into account in the evaluation which I must undertake, but it is not the only issue which must be considered, nor is its absence (if such be found) a determinative factor.

Significance of effect on PJ's of removal from current placement to the care of LM

[170] The respondent's position appeared to be framed on the basis that the effect on PJ of his removal from his current placement to the care of LM was the *only* factor which could meet the threshold test (and it was argued that it did not).

[171] Again, my view is that that is not correct. It is *a* factor and no doubt in this case it is an important one. But it must not be forgotten that if PJ were returned to LM's care, that would not happen in a vacuum. Thus, it remains necessary to keep the statutory test in mind and take account of all the relevant circumstances.

The threshold test – consideration and application in this case

[172] The hypothesis here has to be: what would the effect be on PJ were he to reside with LM?

[173] Dealing firstly with LM's situation, it is clear that the changes which she has wrought in her own life are both remarkable and admirable. She is now drug free and has been for some time. I accept the evidence of Mr Conroy that she is not likely to relapse.

[174] But there is another aspect to LM's own position now and looking forward. In my opinion it is clear from the evidence that firstly LM is not "cured". If I may draw an analogy with a physical illness, people can become ill, get treatment and then be completely cured. Other illnesses mean that people become ill, get treatment but must then maintain treatment for either a long period of time (or even life) to maintain their healthy state.

[175] It is clear that LM falls into the second category. There is aftercare from LEAP which she is still in and will be in until at least February 2020. She attends a significant number of meetings in various places in Edinburgh, Midlothian and East Lothian on a regular basis. It

appears from the evidence that these supports are a very important part of her ongoing therapy.

[176] The ongoing nature of LM's recovery, the risks she faces and how these must be combatted are apparent from the affidavits of LM (no. 26 of process, paragraphs 19-22); Mr Conroy (no. 28 of process, paragraphs 13, 14 and 16; no. 38/1 of process, foot of page 2); VM (no. 29 of process, paragraph 5); and CD (no. 30 of process, paragraphs 4, 5, 10, 12 and 14).

[177] There was no specific evidence as to how long LM will need to continue to access the substantial number of supports she now utilises, but given (i) the duration of her history of misuse of illicit drugs and (ii) the statistic provided by Mr Conroy to the effect that 61% of LEAP 'graduates are clean and sober 4 years later, I infer that the period is not likely to be short.

[178] Accordingly, while I accept that LM is properly assessed as not likely to relapse, that must be seen in the context of the regime which she follows and which must be maintained, as it is crucial to LM's continued abstinence.

[179] Moving on, although the hypothesis to be considered here is PJ residing with LM, the reality is that there is no question of an immediate return to her full time care. So a process would have to be commenced whereby a possible return to LM's care was assessed.

[180] Looking at that scenario in the way most favourable to LM, there are two aspects which must be considered in such a process (whatever the details of it might be).

[181] The first aspect is that it even if a successful return of PJ to LM's care was achieved, that would end in the removal of PJ from K and C's care. Dr Edward's view was unequivocal: that would be harmful to PJ. Although I am not bound to accept Dr Edward's view as to whether that would amount to serious detriment, I do so for the following reasons. The formation and need for "attachment" is a powerful human instinct. Where it

exists, it provides a strong secure base for a child to meet his developmental milestones. PJ has already suffered a breach of one secure attachment. The effects of further breaches are cumulative. He now has a secure prime attachment to K and C. The breach of it would be likely to cause him harm, affecting permanently his emotional development and ability to form relationships.

[182] The second aspect is that the duration of any rehabilitation process is uncertain. That was not specifically explored in evidence, but in my view the appropriate inference to be drawn is that a combination of the need to assess the respondent's parenting capability, the nature of the assessment exercise and the potential constraints on her ability to move to a position of fulltime care because of her own therapeutic commitments combined mean that the process would be likely to be a long one. At best, it is unclear when – even in the broadest of terms – LM would be in a position to commit to the full time care of PJ.

[183] So pausing there, even on the most optimistic view of matters, there would be an extended period of limbo for PJ, followed by a transition to LM's care which would inevitably and unavoidably cause him serious detriment. On that ground alone, it appears to me that the threshold test is satisfied.

[184] It is true that work on assessing LM's parenting capacity and that the process could proceed at a relatively slow pace, but in my view that would have negative consequences for PJ. He is approximately two and a half years old. With every passing month, he becomes more aware of his surroundings and his relationships. To have him remain in limbo while LM's ability to look after him was put to the test would not be appropriate.

[185] Turning to PJ himself, he has already suffered the breach of one attachment. He is now strongly attached to his current carers. He has a bond with LM and MW in the sense that he knows who they are (albeit that he does not understand his physiological

relationship with them) and he enjoys his contact with them. But if he were to be returned to reside with the respondent, there would be an inevitable rupturing of his attachment to K and C. As already noted, attachment is a very important part of a child's psychological development. PJ is at a crucial stage. The effect of a second breach of attachment could have an impact on him in terms of his ability to develop emotionally and form proper relationships, even if the process were to be carefully managed.

[186] It should be emphasised that the foregoing scenario proceeds on the assumption that LM did not relapse.

[187] Although the risk of relapse was not covered in detail in evidence, LM is not in the position of, for example, a new parent on maternity leave who can commit fulltime care to an infant. Put colloquially she already has a lot on her plate and there would be very difficult choices to be made about prioritisation. If she failed to (be able to) prioritise her own regime because of the pressures of looking after PJ, I infer that such would increase her risk of relapse. That would be a disaster for all concerned.

[188] I note here that there was reference in the course of the hearing to people who have completed the LEAP programme having a 64% abstinence rate five years later, but Mr Conroy's own affidavit says "our statistics at LEAP suggest that 61% of people that graduate from the programme are completely drug free and sober 4 years after the treatment": no. 38 of process, paragraph 15. That is a material difference. In particular, it suggests that 39% of LEAP graduates do relapse. In my opinion, it appears to me that although LM is not likely to relapse, there is a real possibility that she may do so.

[189] So to summarise, the nature of the detriment which will be suffered if PJ resides with LM is that he will be removed from his present secure placement; that there will be an inevitable breach of his attachment to K and C; that is likely to be harmful to him in the

sense of damaging his ability to form emotional attachments, that occurring at a crucial stage of his development and likely to affect him throughout his childhood; and that that will be exacerbated by the significant risk that there will be a period of transition from the care of K and C into the care of LM which, even assuming that there is no relapse, the timing of which is uncertain; and that given the nature and likely duration of that detriment (the impact on PJ's emotional development), it is serious.

[190] For these reasons, I am satisfied that the threshold test is satisfied.

Welfare test for permanence order: section 84(3) and (4) of the 2007 Act

The nature of the test and how it should be applied

[191] There is an interesting point about whether the correct approach is to (i) consider first whether a permanence order *only* should be granted and then go on to consider whether authority to adopt should be granted (i.e. a two-step approach: *Wilkinson and Norrie*, paragraph 21.60); or (ii) treat the question as to whether authority to adopt should be granted as an integral part of the welfare test (as appears to have been done in *North Lanarkshire Council* v *KR*, para 61 *et seq*, especially paras [65] and [66]).

[192] I think that the answer to which approach should be taken may depend in part on what grounds are being relied on in respect of (i) the threshold test; (ii) the welfare test; and (iii) dispensation with consent respectively, but in the present case I think it is best to approach it the second way.

[193] That has several effects. First, in applying the welfare test, regard must be had to the (a) relevant parts of the legislation regulating adoptions and (b) jurisprudence derived from cases concerning adoption. Second, the question of 'dispensation with consent' must be

specifically dealt with as part of that exercise. Third, when coming to consider the various options for the child's care, adoption must be considered.

1(a) – The legislative principles

[194] An order for authority for adoption may be granted in respect of a child only if the conditions in section 83 of the 2007 Act are met: section 80(2)(c).

[195] The conditions to be satisfied in terms of section 83 are that:

i. the application includes a request for an order granting authority for the child to be adopted: section 83(1)(a);

ii. the court is satisfied that the child has been, or is likely to be, placed for adoption: section 83(1)(b);

iii. the consent of parents has been given or dispensed with: section 83(1)(c); and

iv. the court considers that it would be better for the child if it were to grant authority for the child to be adopted than if it were not to grant such authority: section 83(1)(d).

[196] The section 83(1)(a) and (b) conditions are satisfied.

[197] As the granting or otherwise of authority to adopt is a decision relating to the adoption of a child, section 14 of the 2007 Act is engaged.

[198] In the present case, the following parts of section 14 are relevant:

i. the court must have regard to all the circumstances of the case: i.e. there must be a holistic or global evaluation: section 14(2);

ii. the need to safeguard and promote the welfare of the child throughout the child's life is the paramount consideration: section 14(3);

iii. the court or adoption agency 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: section 14(4)(a);

b. the likely effect on the child, throughout the child's life, of the making of the order: section 14(4)(d).

1(b) – Principles derived from the case law

[199] The dispensation with consent is afforded a special status in the analysis and introduces additional elements into the welfare test: *S* v *L*. Looking at the welfare test (including the issue of dispensation with parental consent) the overall approach to be taken may be summarised as follows:

i. the exercise involves a holistic, global evaluation;

ii. care should be taken in paying lip service to these terms and phrases such as 'nothing else will do';

iii. it is to be assumed that the child will not be returned in the near future to live with the person who has parental rights with regard to him or her;

iv. what must be considered are, looking to the future, the various options available for the care of the child;

v. these having been identified, an assessment of the proportionality of each of them must be undertaken;

vi. this will involve, in relation to each option, an assessment of the practicality and possible benefits and dis-benefits to the child's welfare;

vii. the assessment of what the future may hold must be based not on hope or speculation, but must be grounded in findings-in-fact of what has and is happening;

viii. the test for severing the relationship between parent and child is very strict but it is not insurmountable;

ix. the phrase 'nothing else will do' is no more than a useful distillation of the proportionality and necessity test as embodied in the Convention and reflected in the need to afford paramount consideration to the welfare of the child throughout its lifetime;

x. it is the ultimate order which the court is proposing to make which falls to be evaluated against the yardstick of necessity, proportionality and 'nothing else will do';

xi. where a court has identified all the available options for the care of a child, and carefully assessed the merits and demerits of all of these, and concluded that a permanence order with authority to adopt is the option which best safeguards and promotes the welfare of the child throughout the child's life, then that is the order which the court must make;

xii. a relevant factor is the need to reach a decision which avoids unnecessary delay, particularly where there are suitable adoptive parents who are ready to give a child a stable and caring upbringing; and

xiii. a decision which results in further protracted procedure being necessary will seldom promote the welfare of the child throughout the child's life; unnecessary delay in reaching a final decision should be avoided.

(2) Dispensation with consent

[200] Consent has not been given and sections 83(2)(a) and (b) and 83(4) do not apply in the present case.

Section 83(3)

[201] The consent of a parent with responsibilities or parental rights in relation to a child can be dispensed with if, in the opinion of the court, the parent is unable satisfactorily to discharge those responsibilities or exercise those rights, and is likely to continue to be unable to do so.

[202] In my view, in the present case, the petitioner has not established that LM is unable satisfactorily to discharge those responsibilities or exercise those rights. Put shortly, that has not been put to the test in any meaningful way since her position became more stable.

[203] As an aside, I do not accept the criticism made of the petitioner or Susan Dudley in respect of the lack of a further parenting capacity assessment. There is no legal obligation as such to do so in every case. It must always be a question of circumstances. LM did not complete the LEAP programme until February this year. A parenting capacity assessment is a significant exercise, requiring commitment of time and resources. Before such are committed, it seems to me that there should be some solid basis for considering that rehabilitation of PJ to LM's care was at least a realistic possibility. Given her long history of drug addiction and abuse, her (still) relatively short period of complete abstinence and the other circumstances, including the possible impact on PJ of a further move and the advice concerning that provided by Dr Edward, it cannot be said that a further parenting capacity assessment was an obvious step which required to be taken in this case.

[204] The absence of such an assessment does, nevertheless, mean that there is no evidence to establish a positive case under section 83(3).

Section 83(2)(d)

[205] Parental consent may be dispensed with on the grounds that "…the welfare of the child otherwise requires the consent to be dispensed with."

[206] The use of the word "requires" makes it clear that this is a high test.

[207] But in my opinion it is important to look carefully at what this entails. As Lord Reed said in *S* v *L*, the court must be satisfied that nothing less than adoption will suffice. But the comparison to be made is with the other alternatives. In the present case, the threshold test having been satisfied, an immediate return to the care of LM is excluded.

Considering the options

[208] In the present case, no issues arise as to the child's views, given his age; or to his religious persuasion, racial origin and cultural and linguistic background.

Hypothesis 1: No order granted

[209] PJ would remain a looked after child falling within the jurisdiction of the Children's Panel. In the short term, it seems likely that he would remain in the care of his current carers and continue to have contact with LM and MW.

[210] LM's parental rights would not be terminated. The window of opportunity for PJ to grow up with his birth family, with the natural advantages that has been identified as giving, would remain open meantime.

[211] This would enable LM and MW to maintain direct contact with PJ. LM would have more time to demonstrate that she could continue without relapse. A parenting capacity assessment could be undertaken. The possibility of PJ's rehabilitation to LM's care would remain open and could be more fully assessed, potentially leading to such.

[212] On the other hand, the foregoing process would involve PJ spending more and more time away from his current carers. It would introduce uncertainty and delay of unknown, but probably fairly lengthy, duration into the equation. It would delay a final decision about PJ's future. PJ would continue to grow and would become increasingly aware of his primary attachment to K and C, but his relationship with them and theirs with him would be overshadowed by uncertainty. As K and C wish to adopt, it is possible that PJ's foster placement with them could be imperilled.

[213] The outcome of a process aimed at testing out rehabilitation is unknown and would give rise to delay. There is a risk that such a process would be unsuccessful, either because LM had relapsed or for some other reason.

[214] Assuming that such a process ended with successful rehabilitation of PJ to LM's care, there would inevitably come a point when PJ had to leave the care of K and C, leading to a breaking of the attachment which he has formed with them.

Hypothesis 2: Permanence order with authority to adopt granted

[215] PJ would remain in the care of K and C until a further order was made. It is likely that an adoption petition would be presented fairly soon and that PJ would in due course be adopted by K and C. This would mean that his future was permanently settled. He would officially become part of K and C's family.

[216] PJ would have a secure home with people who are attuned to his needs and who would be likely to care for him in a loving and affectionate way. The risk of harm to PJ caused by his removal from their care (or his placement with them breaking down) would be likely to be eliminated or at least substantially reduced.

[217] LM's parental rights would be terminated with the result that the opportunity for PJ to grow up with his birth family would eliminated permanently, therefore depriving him of the natural advantages that that has been identified as giving. The loss of that family connection could be ameliorated by measures in relation to contact between him and LM and MW which could continue at an appropriate level both before and after adoption (see below).

The relative advantages and disadvantages

[218] Hypothesis 1 introduces uncertainty and delay against, on the most optimistic view of matters, the *possibility* that at some unspecified future stage, PJ may be rehabilitated to LM's care. That outcome does not eliminate the (eventual) breach of PJ's attachment to K and C.

[219] Hypothesis 2 greatly minimises the uncertainty over PJ's future and increases the chances of a settled childhood for him. It provides the only route to a settled future childhood for PJ achievable in the short term. It avoids harm to him through breaching his attachment with K and C.

[220] In my view it is clear that hypothesis 1 entails risks (e.g. delay, uncertainty, risk of serious detriment) whereas hypothesis 2 reduces those risks and increases the chances of a stable future for PJ. In particular, the making of a permanence order with authority to adopt avoids unnecessary delay, particularly where, as here, there are suitable adoptive parents

who are ready to give him a stable and caring upbringing. The making of no order would result in further protracted procedure being necessary.

[221] Accordingly, it would be better that the order sought be made than not, in that it is required to safeguard and promote PJ's welfare throughout his childhood and his life; and the dispensation with parental consent to the making of such an order is necessary and proportionate in the sense that there is no other scenario in contemplation which can secure his welfare.

Ancillary provisions – contact

Preliminary

[222] In the petition, the petitioner craves ancillary provisions vesting the parental responsibilities and rights under sections 1(1) and 2(1) of the 2007 Act respectively in K and C.

[223] At the close of the case, I was invited not to make those orders, but to proceed on the basis that if I was making an order as to contact, to do so under section 82(1). I understood it to be agreed that that was an appropriate mechanism.

The issue

[224] The issue is how contact, if permitted would safeguard and promote the welfare of the child throughout childhood.

[225] I am concerned at this stage with post-permanence order/pre-adoption contact. That being so, and given the view I have reached about direct contact, I do not think I need say anything further about indirect contact.

[226] As far as direct is concerned, it is clear that that cannot and should not be stopped suddenly. On the other hand, given the change in position wrought by my decision in this case and the likely future procedure in relation to adoption, I consider it appropriate that there is a managed reduction in direct contact.

[227] In my view, there is a valid and potentially useful purpose in contact continuing meantime. Put shortly, it may provide solid evidence of how well LM has adjusted to her altered status in relation to PJ and that in turn could help inform a decision as to what should happen post-adoption, potentially rendering that decision more robust.

[228] For the same reason, I think that PJ's contact with MW should continue on a similar basis. Accordingly, I shall make an ancillary provision as set out in detail below.

[229] Before dealing with the terms of the order to be made, there is one further matter that I should deal with.

[230] I am not persuaded that it is appropriate for me to make any order in respect of intimation of the adoption petition. I doubt whether an order by me in this case could competently bind a different sheriff in different proceedings brought by a different party. That said, I note the concerns over Rule 14 of the Sheriff Court Adoption Rules. Accordingly, my expectation is that LM and MW's potential interest in the matter of contact is drawn to the attention of the court by those representing K and C when the adoption petition is presented, so that the matter can be appropriately considered.

Disposal

[231] I shall make a permanence order under section 80 of the Adoption and Children (Scotland) Act 2007 ("the 2007 Act"), in relation to PJ, born 2 July 2016 ("the child") including the mandatory provision, namely to provide guidance appropriate to the child's

stage of development (section 1(1)(b)(ii) of the Children (Scotland) Act 1995 ("the 1995 Act") and the right to regulate the child's residence (section 2(1)(a) of the 1995 Act); with the following ancillary provisions:-

(i) vesting in the petitioner, the parental responsibilities mentioned in section 1(1)(a) (to safeguard and promote the child's health, development and welfare), (b)(i) (to provide direction) and (d) (to act as the child's legal representative) of the 1995 Act;

(ii) vesting in the present foster carers, C and K, the parental rights mentioned in section 2(1)(b) (to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing) and (d) (to act as the child's legal representative) of the 1995 Act;

(iii) granting authority for the child to be adopted;

(iv) dispensing with the consent of LM ("the first respondent") and P ("the second respondent") on the ground that the welfare of the child requires the consent of the first and second respondent to be dispensed with, in terms of section 83(2)(d) of the 2007 Act;

(v) extinguishing

a) the parental responsibilities of the first and second respondents to safeguard and promote the child's health, development and welfare, to provide direction, to provide guidance appropriate to the child's stage of development, to maintain personal relations and direct contact with the child on a regular basis and to act as the child's legal representative, as contained in section 1(1)(a), (b)(i), (b)(ii), and (d) of the 1995 Act; and

b) the parental rights of the first and second respondents to have the child living with them or otherwise to regulate the child's residence, to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing, to maintain personal relations and direct contact with the child on a regular basis and to act as the child's legal representative as contained in section 2(1)(a), (b) and (d) of the 1995 Act;

(vi) the Child's Compulsory Supervision order ceases to have effect, in terms of section 89 of the 2007 Act, the conditions of said section being satisfied; and

(vii) under section 82(1)(e) of the 2007 Act as follows:

i. from the date of this order until 13 January 2019, supervised contact between PJ and LM shall take place twice per week for 2 hours;

ii. from 14 January 2019 until 10 February 2019, supervised contact between PJ and LM shall take place once per week for 2 hours;

iii. from 11 February 2019 until 10 March 2019 supervised contact between PJ and LM shall take place once every two weeks for 2 hours;

iv. from 11 March 2019 until further regulated by an order of court, supervised contact between PJ and LM shall take place once per month;

v. from the date of this order until 13 January 2019, supervised contact between PJ and MW shall take place once per fortnight for 2 hours;

vi. from 14 January 2019 until further regulated by an order of court, supervised contact between PJ and MW shall take place once per month.