SHERIFF APPEAL COURT

[2018] SAC (Civ) 6
PAI-AC25-15
PAI-AC26-15

Sheriff Principal D L Murray
Appeal Sheriff W Holligan
Appeal Sheriff A M Cubie

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in appeal by

JA & TA

First & Second Respondents/Appellants

and

JC

Third Respondent/Appellant

against

MR and MRS AC25/15 and AC26/15

Petitioners/Respondents

First and Second Respondents and Appellants: Hayhow, advocate; Lee Doyle & Co
Third Respondent and Appellant: Cheyne, advocate; Livingstone Brown
Petitioners and Respondents: Dowdalls QC; JK Cameron

9 March 2018

Introduction

[1] This is the judgment of the court, to which each of its members has contributed. These are appeals against the decision of the sheriff on 28 June 2017 to make adoption orders in favour of the petitioners in respect of two children who are referred to as J and E. This

opinion relates to both appeals. The appellants are the children's paternal grandparents who we refer to as "the grandparents" or the "grandmother" or "grandfather" as appropriate. The children's birth mother did not enter the process and we refer to her as the "natural mother". The natural father also appeals and we refer to him as the "natural father". He has parental rights and responsibilities in respect of J but not of E as he is not named on her birth certificate as the father. There was a fourth respondent in the action who withdrew shortly before the proof and we refer to her as "the fourth respondent".

[2] The grandparents were represented by Mr Hayhow**,** advocate**;** the natural father was represented by Mr Cheyne, advocate and the petitioners by Ms Dowdalls QC. The Court was referred to the following authorities:

1. *S* v *L* 2013 SC (UKSC) 20 paras [34] – [46], [47]
2. *In re B-S (Children)(Adoption Order: Leave to Oppose)* [2014] 1 WLR 563, paras [42]-[45]
3. *TW* v *Aberdeenshire Council* 2013 SC 108 paras [29] and [30]
4. *S, Petitioner* [2014] CSIH 42 paras [29], [37] – [42], [68], [69] – [72]
5. *In re B (Care Proceedings: Threshold Criteria)* [2013] 1WLR 1911, para [42]-[47]
6. *M* v *R* 2013 SCLR 393, paras [64] – [77]
7. *YC* v *United Kingdom* (2012) 55 EHRR 33, paras [134], [135], [136] and [137]
8. *West Lothian Council* v *B* 2017 SC (UKSC) 67, paras [18], [22] – [25], [27], [28] and [29]
9. *Kennedy* v *Cordia LLP* [2016] UKSC 6 para [39] and [44]
10. *Midlothian Council* v *M* 2014 SC 168, para [24]
11. *Fife Council* v *M* 2016 SC 169, para [61] – [64]
12. *Principal Reporter* v *K* 2011 SC (UKSC) 91
13. *In re W* [2017] 1 WLR 889

Background

[3] The natural mother and father commenced a relationship in the course of 2011 and commenced co-habiting in the course of 2012. The first child born of their union was J, whose date of birth is 22 September 2012. E, their second child, was born on 26 January 2015. J and E are the only children of the natural mother. The natural father has four elder

children from previous relationships. The father was married to LP and his wife gave birth to a daughter in 1995. His daughter resides with her mother. In the course of 2000 he commenced a relationship with KS, and this union resulted in the birth of three sons, A, B and C. A was at the time of proof 16 years of age, B 14 and C 13. In the course of March 2009 A, B and C were placed on Inverclyde Council's Child Protection Register due to concerns held by the social work department in relation to the children's exposure to domestic violence, parental substance abuse, poor parental mental health and offending behaviour. The children thereafter were removed to the grandparents' care and their names removed from the Child Protection Register. The grandparents were granted a residence order and an order vesting parental rights and responsibilities in relation to A, B and C under section 11 of the Children (Scotland) Act 1995 at Greenock Sheriff Court on 29 September 2010. Argyll and Bute Social Work Services supported this action. The natural father supported A, B and C going into the care of their grandparents. A, B and C remain within the care of their grandparents and the natural father exercises contact with them under the supervision of the grandparents.

[4] The natural father has been known to the Criminal Justice Services since 1993 due to his persisting offending behaviour which has resulted in many convictions and numerous custodial sentences for his offending and the sheriff records that his schedule of previous convictions has 48 previous convictions. He has therefore spent a large proportion of his adult life either on remand or in prison and has a long history of illicit drug use, which continued following A, B and C being taken into the care of their grandparents.

[5] On or around 29 May 2012 the social work department of Inverclyde Council received a referral from the Special Needs in Pregnancy Services in relation to the natural mother's pregnancy. Upon presenting for antenatal care it was identified that the natural

mother had a long-standing history of drug misuse which informed the decision of the Special Needs in Pregnancy Service to refer the matter to the social work department.

[6] On or around 1 August 2012 a social worker from the Inverclyde Council was allocated to conduct a Pre-Birth Child Protection Assessment in relation to both the natural mother and the natural father in relation to their unborn child. A Pre-Birth Child Protection Case Conference was convened for 1 October but did not take place as a result of J being born five weeks prematurely on 22 September 2012.

[7] On or around 28 September 2012 the natural mother and natural father met with social workers NMc and SB to discuss departmental care-planning for J. Both parents were invited to sign an agreement under section 25 of the Children (Scotland) Act 1995 to allow J to become Looked After and Accommodated on a voluntary basis. Having sought legal advice, both parents refused to give their consent to J's accommodation and thereafter the social work department made an application for a Child Protection Order to Paisley Sheriff Court. The Child Protection Order was granted by the sheriff at Paisley on 28 September 2012. J was discharged from hospital on 1 October 2012 and received into local authority foster care. J remained with his foster carer from his accommodation on 1 October 2012 until his placement with the petitioners on 9 December 2015.

[8] A Children's Hearing convened on 2 October 2012 continued J's Child Protection Order, with provision made for contact between J and his parents for one hour, five days per week.

[9] The social work department of Inverclyde Council convened a Looked After and Accommodated Child Review on 2 October at which time it was identified that an assessment would require to be completed to assess both the natural mother and the natural father's parenting capacity with a view to informing future care-planning.

[10] A further Children's Hearing was convened as an Eighth Working Day Hearing on 10 October 2012. Grounds of referral had been formulated by the Scottish Children's Reporter Administration and were presented to both parents. Neither parent accepted the grounds of referral and as such the grounds were remitted to the Sheriff Court for proof and the Children's Hearing continued J's place of safety warrant. Contact was increased to two hours per day, five days per week on a supervised basis.

[11] A further Looked After and Accommodated Review was convened on 5 November 2012 to consider care-planning for J. It was agreed at the Looked After and Accommodated Review that a Parenting Capacity Assessment be undertaken in relation to both the natural mother and natural father.

[12] Between 13 November 2012 and 4 December 2012 there were 14 contact sessions arranged between J and his parents. Both parents attended all of these contact sessions with departmental records indicating good interaction between both parents and J.

[13] Grounds of referral in relation to J were established under section 52(2)(c) of the Children (Scotland) Act 1995 at Greenock Sheriff Court on 7 December 2012. The natural father was arrested on 16 December 2012 and charged with theft from a motor vehicle. He was remanded in custody with sentence deferred upon him until 9 January 2013 to enable a criminal justice social work report to be prepared. On or around 19 December 2012 a case review meeting was convened by the social work department. The social work department had concerns about whether the natural mother and natural father could meet the long-term needs of J.

[14] A Children's Hearing was convened on 4 January 2013 to consider J's care and he was made subject to a supervision requirement under the Children (Scotland) Act 1995. The terms of J's supervision requirement provided that he remain in the care of his foster carer

but the supervision requirement also provided for supervised contact on five occasions per week between J and his parents, each contact session to be for two hours duration.

[15] On or around 30 January 2013 a Family Support Core Group Meeting was convened by Inverclyde Social Work Department. At this time both parents were provided with a copy of the completed integrated assessment report which recommended a dual plan involving an assessment of the natural mother's and natural father's parenting capacity. It was understood that whilst this assessment was being undertaken extended family members, who could potentially provide long term care for J, would also be identified.

[16] A Looked After and Accommodated Review in relation to J was convened by Inverclyde Council's social work department on 4 February 2013. The decision of the review was for J to remain with his foster carer. The review also arrived at the decision to explore the possibility of extended family members providing long-term care for J. On or about 26 February 2013 a further Family Support Core Group Meeting took place, at which time the natural father requested that his mother, the grandmother, be assessed as a potential long-term carer for J. On or around 19 March 2013 a representative of the local authority met with the grandmother at her home to discuss J residing with her. It was agreed on 21 March 2013 that a further meeting be convened on 10 April to give consideration as to whether J's long-term care needs would be met through a kinship placement with the grandparents.

[17] On or around 10 April the grandparents met with senior social worker TH and her colleague SB. The purpose of the meeting was to discuss the potential transition of J from foster care into the full time care of the grandparents.

[18] A Children's Hearing convened on 15 April 2013 to review J's compulsory supervision order. It was the decision of the Children's Hearing at this time to vary the

condition of contact to provide for contact between the natural mother and the natural father on a supervised basis three times per week for a maximum of two hours per contact session. It was a further decision of the Children's Hearing that J remained in the care of the foster carer with whom he had been resident since his discharge from hospital. The grandmother sought contact three days per week. Although this did not form part of the order, said contact commenced on 17 April 2013 within the grandparents' home. J exercised contact with his half-siblings at this time. Contact between J and his parents was also supervised by the grandparents at their home. The grandparents were also responsible for the return of J directly to his foster carers.

[19] Inverclyde Council's social work department convened a Looked After and Accommodated Child Review on 29 April 2013 to give further consideration to care planning for J. The decision taken at this review was that J would remain within his foster placement although the review endorsed the movement of J from his foster placement into the care of his paternal grandparents. The recommendation of the review was that a recommendation made to the Children's Hearing that J's supervision order be varied to provide that he reside with the grandparents with a view to the grandparents thereafter applying through the court for a residence order. The Looked After and Accommodated Child Review also endorsed the recommendation that a meeting be convened to agree a transition plan to support J's move from foster care into the care of the grandparents.

[20] In or around 5 June 2013 the grandparents indicated they were no longer in a position to act as kinship carers for J, although they continued subsequently to have contact with J. On or around 20 September 2013 a permanency planning meeting was convened by Inverclyde Council Social Work Department. It was the decision of the permanency planning meeting that permanence by way of adoption application should be pursued for J.

In the early part of December 2013 the natural father received a six month custodial sentence from which he was released on 14 February 2014. Over the period from March 2014 until August 2014 both parents' engagement with the contact process was observed to be positive with good engagement between both parents and J. On 13 August 2014 the social work department convened a legal service case review at which time it was the recommendation of the legal services department that the social work department should reassess both the natural father and natural mother in order to give further consideration to J being rehabilitated into their care. The recommendations from the legal services department were informed by the observations of the social workers who had been supervising contact together with feedback from the integrated drugs service who reported that both parents were stable with regards to their drug management. A Children's Hearing was convened on 26 August 2014 to review J's supervision order. It was the decision of the Children's Hearing to reconvene in approximately 12 weeks in order to review the progress of the reassessment of both parents.

[21] On or around 3 October 2014 the social work department received confirmation from the natural mother that she was pregnant, with her unborn baby due for delivery in the course of February 2015. A Special Needs in Pregnancy Meeting was convened on 23 October 2014 at which time social worker SS was allocated to undertake a Pre-Birth Child Protection Assessment in relation to the unborn child. On or around 20 November 2014 social worker LA completed the parenting assessment in relation to the natural mother and the natural father. It was the recommendation of LA that neither were in a position to meet J's needs, even at a basic level. On or around 26 November 2014 a further pregnancy planning meeting was convened to consider the long-term care planning for J. It was the recommendation of the permanency planning meeting that a permanence plan be pursued

for J. On or around 1 December 2014 an Adoption and Permanence Panel was convened by Inverclyde Council in relation to the long-term care planning for J. It was the decision of the Adoption and Permanence Panel that an adoption plan be pursued for J although the Adoption and Permanence Panel also recommended that external family members be identified and assessed as potential long-term carers for J. A Children's Hearing to review J's supervision requirement on 8 December 2014 decided to continue J's supervision order with a variation to the contact provisions. The Children's Hearing attached a condition of monthly supervised contact between J and his parents. On or around 18 December 2014 a Looked After and Accommodated Child Review convened to consider the care planning for J. At this time the parents were asked to provide the social work department with names of family members who could be considered as long-term carers for J. Contact between J and his grandparents and half-siblings continued. On or around late December 2014 and early January 2015 the grandparents contacted the social work department to provide the names of extended family members who could be considered as potential carers for J, with the fourth respondent being proposed as a prospective carer for J and MJ and SJ being put forward for the position of long-term carers for the as yet unborn E.

[22] On 9 January 2015 the Pre-Birth Child Protection Assessment was completed in respect of the unborn child E. It was the recommendation of the Pre-Birth Assessment that a Pre-Birth Child Protection Conference be convened to discuss the care planning for the unborn child. On or around 15 January 2015 social worker SS met with the fourth respondent to discuss the possibility of her being assessed as a long-term carer for J. A further meeting took place between SS and the fourth respondent on or around 19 January 2015 at which time the social worker SS discussed the social work department's proposal to have both J and E placed together should the recommendation of the Pre-Birth Child

Protection Case Conference be to have E accommodated. On or around 22 January 2015 social worker SS telephoned MJ, the natural mother's maternal aunt, to discuss the possibility of her being assessed as a potential carer for J and E. MJ confirmed she was willing to be assessed for the care of J and E on a long-term basis.

[23] E was born at the Royal Alexandra Hospital in Paisley on 26 January 2015. On the following day, a Child Protection Order was granted in relation to E by the sheriff at Paisley Sheriff Court. A Second Working Day Children's Hearing convened on 29 January 2015 in relation to E where it was decided to continue the Child Protection Order and to afford both parents unlimited contact with E whilst she remained in the hospital setting. It was understood that when E was discharged from hospital that the contact provision would alter to a minimum of four hours contact with both parents to be supervised by the social work department. It was the decision of the Children's Hearing that upon her discharge from hospital E would be placed in the same foster care placement as her brother J. Accordingly, when E was discharged from hospital on 2 February 2015 she was received into foster care in the same placement as J.

[24] A Children's Hearing was convened on 5 February 2015 to consider E's case. The grounds of referral which had been formulated by the Scottish Children's Reporter Administration were remitted to the Sheriff Court for proof on the basis of both E being too young to understand the grounds of referral and because both parents were unwilling to accept the statements of fact. The Children's Hearing made E the subject of an interim compulsory supervision order under the terms of which E was to remain in her foster placement with her natural mother being entitled to supervised contact with E for four hours per week. The terms of the compulsory supervision order provided for no contact between E and her natural father, this provision being inserted at the natural father's request

as a consequence of his being incarcerated and he did not wish E to visit him within the prison setting.

[25] On or around 3 February 2015 the fourth respondent and her partner attended a meeting with social worker SS and the senior social worker HO to discuss their application to have care of both E and J. The social work department decided not to proceed further with assessment in respect of the fourth respondent. On or around 16 February 2015 SS and HO met with Mr and Mrs J to advance the assessment of Mr and Mrs J as prospective kinship carers for E and J. It was the assessment of social work professionals that the proposed placements of J and E in the long term care of Mr and Mrs J was not a viable proposal which would meet the life-long needs of J and E. On 18 February 2015 the social work department of Inverclyde Council convened a preliminary permanency discussion to discuss the long-term care planning for J and E. The recommendation of the preliminary permanency discussion was that there were no better practical alternatives to adoption for J and E.

[26] On or around 17 March 2015 a Looked After and Accommodated Child Review was convened in relation to E. It was the decision of the Looked After and Accommodated Child Review that a permanency planning meeting be convened to consider long term care planning for E. A Children's Hearing was convened in relation to E on 18 March 2015. At this time E's interim compulsory supervision order was continued with the interim order providing for E's ongoing accommodation within foster care and further providing for four hours per week supervised contact between E and the natural mother with a no contact condition in relation to the natural father.

[27] On or around 1 April 2015 a permanency planning meeting was convened by Inverclyde Council to consider long-term care planning for E. It was the recommendation of

the permanency planning meeting that an adoption application be pursued as a means of safeguarding E's welfare throughout her lifetime. On or around 8 April 2015 the local authority wrote to the fourth respondent and advised they were no longer considering her as a potential carer. On or around 9 April 2015 the grandmother called the local authority to put herself forward as a carer for J and was told to put the request in writing. On 10 April 2015 the social work department of Inverclyde Council received a letter from the grandparents expressing their interest in providing long-term care for J.

[28] On 8 May 2015 grounds of referral were established at Greenock Sheriff Court in relation to E under the terms of section 67(2)(a) of the Children's Hearing (Scotland) Act 2011 whereby it was established that the child was likely to suffer unnecessarily or have her health or development seriously impaired due to a lack of parental care.

[29] A Children's Hearing was convened to review J's supervision order on 8 May 2015. It was decided to continue J's compulsory supervision order under variation whereby a condition of no contact was inserted in relation to both the natural father and natural mother. The terms of J's compulsory order provided for fortnightly contact between J and his older half-brothers, A, B and C with this contact to be supervised by his grandparents. On or around 28 May 2015 the social work department of Inverclyde Council received correspondence from the fourth respondent's legal representative requesting that she be assessed as a kinship carer for E. An Adoption and Permanency Panel convened in relation to E on 15 June 2015 at which time it was the recommendation that an alternative permanent placement be sought for E outwith the birth family. On 14 July 2015 a Children's Hearing convened to consider E's case. At this time E was made subject to a compulsory supervision order. The terms of the compulsory supervision order provided for E to reside at her foster placement and provided for no contact between E and her natural parents. A condition was

also attached to E's compulsory supervision order providing for fortnightly contact with wider family members with this contact to be supervised by the extended family members. In practice this contact was supervised by the grandparents, other than one contact at the fourth respondent's house.

[30] The natural father appeared at Greenock Sheriff Court on 17 August 2015 at which time he pleaded guilty to a shoplifting charge against him. He was sentenced to six months' imprisonment with his earliest liberation date being 15 December 2015. On 8 September 2015 a linking meeting took place to consider the proposed link between J and E and the petitioners. The recommendation of the linking meeting was that the link be proposed to a formal match between J and E and the petitioners. On 21 September 2015 an Adoption and Permanence Panel convened in relation to both J and E. The recommendation of the Panel was that J and E be formally matched with the petitioners as a prospective adoptive placement.

[31] On 8 December 2015 an advice hearing convened at which time the Children's Hearing gave advice to the sheriff in support of the departmental recommendation that J and E be subject of adoption orders. The Children's Hearing that convened on 8 December 2015 also reviewed the compulsory supervision orders for both J and E. The respective compulsory orders for both E and J were varied to provide that they reside with the petitioners, and further removed the condition of contact that had been in place for contact between J and E and the extended family members. On 9 December 2015 both E and J were removed into the care of the petitioners. Both children have remained in the care of the petitioners since this time. The grandparents have had no contact with the children since they moved into the care of the petitioners.

[32] In August 2016 the grandparents raised a section 11 action for both children. This was prior to them becoming interested parties in the adoption petitions. At a pre-proof hearing in September 2016 the fourth respondent was represented and in October 2016 she made a section 11 application for E. This resulted in the proof being discharged with fresh dates fixed for January 2017; however on 23 December 2016 the fourth respondent withdrew from the proceedings.

[33] The sheriff dispensed with the consent of the natural mother and natural father in terms of section 31(3)(c) and section 31(3)(d) of the Adoption and Children (Scotland) Act 2007 in respect of J. He also dispensed with the consent of the natural mother as to the making of the adoption order in respect of E in terms of section 31(3)(c) and section 31(3)(d) of the 2007 Act. It was agreed by all parties in the appeal before us that the dispensation was granted in respect of section 31(3)(c) in relation to both children, and the reference to section 31(3)(d) was erroneous. The sheriff refused to make any orders in terms of section 11 of the Children (Scotland) Act 1995 in favour of the grandparents in respect of either J or E. He made an adoption order in favour of the petitioners in respect of both J and E in terms of section 28(1) of the 2007 Act in terms of the prayer of the respective petitions. He also made orders for post adoption letterbox contact between the children and the birth parents and separately the birth family on an annual basis supervised by the social work department and revoked the compulsory supervision orders currently in place with respect of both J and E.

Statutory provisions

[34] The statutory basis for adoption in Scotland is regulated by the Adoption and Children (Scotland) Act 2007 (the 2007 Act). The key provisions in relation to this case are

sections 14, 15, 28 and 31 of the 2007 Act. Sections 1, 2 and 11 of the Children (Scotland) Act 1995 are also of relevance.

Grounds of Appeal

[35] The grandparents submitted twelve grounds of appeal, but insisted on eleven. Grounds 1, 4, 5, 6 and 7 relate to the sheriff being said to have erred in law in granting the adoption order, such an order not being necessary as the grandparents were able and willing to provide a suitable alternative home for the children.

[36] Grounds 8 and 9 related to the sheriff's consideration of the children's welfare, in particular that they enjoyed a sense of permanence with the petitioners and specifically that separation from the petitioners would be "profoundly disruptive" and "emotionally devastating."

[37] Ground 10 relates to the sheriff's reliance on the *curator's* report in finding-in-fact 106 where the matter was contested that the court had not heard from the *curator*. Ground 12 relates to his reliance on the section 17 report prepared by DC. These grounds were advanced in support of the central proposition of the grandparents that the sheriff had erred in making the adoption orders by failing to properly consider the alternative kinship placement which was proposed after these reports were prepared.

[38] The remaining grounds relate to the order for post adoptive contact. Ground 2 being that the sheriff erred in law by not making an order for direct contact between the grandparents and J and E, and ground 3 that the sheriff erred by failing to adequately specify to whom the condition of letterbox contact relates.

[39] In addition the natural father appealed on the separate ground that the sheriff erred in law in his approach to the question of what amounted to the satisfactory discharge of

parental rights and responsibilities. He erred in finding that the natural father could not satisfactorily discharge his parental responsibilities to J.

[40] The natural father also appealed on the basis that the sheriff erred in law in his interpretation of the concept of "welfare" in terms of section 14 of the 2007 Act and in respect of the order for post adoptive contact, it being said the sheriff had erred in only making an order for letterbox contact or in the alternative if he were entitled to discount direct contact his decision as to the frequency and form of direct contact was arbitrary and not founded on adequate reasons.

Submissions for the natural father

[41] Mr Cheyne submitted that the sheriff fell into error in his approach to the dispensation of the natural father's consent under section 31(4) of the 2007 Act. The sheriff incorrectly approached the matter exclusively in terms of whether the natural father could play the role of primary carer, rather than considering the full scope of parental rights and responsibilities under sections 2 and 1 of the Children (Scotland) Act 1995. If the sheriff had directed himself correctly he would not have dispensed with the natural father's consent in relation to J under section 31(4). The sheriff erred in his approach to the question of what amounted to satisfactory discharge of parental rights and responsibilities. The sheriff approached that concept as "all or nothing". In the sheriff's analysis, the only way in which a person could establish they were satisfactorily able to discharge parental rights and responsibilities, now or in the future, was if they could demonstrate they could have primary care of the child. The sheriff ought to have approached the matter in the context that a person able to discharge certain parental rights and responsibilities (particularly where the person acknowledged their inability to discharge others) and delegated the

practical import of the discharge of those he could not discharge to another person should be found to be satisfactorily discharging their parental rights and responsibilities. The correct approach was to appreciate that each of the rights are to be regarded in an individual and discrete fashion rather than as an indivisible group. The rights are multi-faceted, with each parental right and responsibility having a different purpose. Support for that proposition was to be found in *Principal Reporter* v *K and others* 2011 SC (UKSC) 91 where the Supreme Court at paragraph 25 accepted that both parental rights and responsibilities are divisible.

[42] The natural father accepted he could not look after the child, but he was able to express a view with whom J and E should reside. The terms of section 2(1)(a) of the 1995 Act are: " have the child living with him or otherwise to regulate the child's residence." The sheriff was in error in concluding as he appeared to have done that because the natural father did not seek rehabilitation of J and E into his care that was the end of the matter as far as whether he could satisfactorily discharge his paternal rights and responsibilities.

[43] In relation to contact, in section 2(1)(c) and section 1(1)(c) of the 1995 Act the right and responsibility to maintain personal relations is set out in broad terms. This may be exercised in a variety of ways and it would be unlikely to be a sound basis to remove this right and the right under s 11(2)(a) because the parent did not exercise sufficient contact, particularly if their circumstances interrupted the regular exercise of contact. It was an important consideration that the father's ability to maintain personal relations with his children was impacted by prohibitive orders which prevented him from doing so. Finding in fact 96 implies the sheriff adopted a contrary approach. He does not however explain what he means by "consistent presence" nor does he make any finding that the limited contact with the natural father has been detrimental to the children. There was evidence

that A, B and C had benefited from contact with their father and no finding that they had suffered detriment as a result of their father's inconsistent participation in their lives.

[44] None of the sheriff's findings address section 1(1)(b) the provision of direction and guidance. The natural father's ability to discharge this responsibility has been materially impacted by the children having been accommodated from birth and no account appears to be taken of the participation by the natural father in Children's Hearings and in the adoption petitions. The section 2(1)(d) and section 1(1)(d) rights, from which the right to make important decisions about children is derived, have also been materially inhibited by the accommodation of J and E and the compulsory supervision order fettering direct contact. There is no finding-in-fact which identifies a discernible example of the natural father misusing or failing to exercise this paternal right. Reference was made to *M* v *R* 2013 SCLR 393 at paragraph 76 where Lord Glennie opined:

> "It seems to me, consistently with Mr Leighton's submission, that on this issue the court is required to take a broad view and to ask whether, looking at the matter in the round, it has been established that the parent is unable satisfactorily to discharge that package of duties and to exercise that package of rights. It should not conclude that the inability test is not satisfied simply because the parent can discharge one of the duties or exercise one of the rights."

It was submitted that in the context of the terms of section 31(4) Lord Glennie was making the point that discharge of one parental responsibility and exercise of one parental right should not automatically lead to a rejection of the dispensation.

[45] The sheriff was criticised for failing to adequately explain his reasons for his finding-in-fact-and-law 1 in which he concluded that the natural father is unable to exercise his parental rights and responsibilities

[46] This ground of appeal only affected J as the father was not named on E's birth certificate. Mr Cheyne however submitted that given the desire to keep J and E together,

which he did not challenge, if dispensation of consent was refused in relation to J welfare considerations would commend the same outcome for E and the petition in her case should also be refused.

[47] The sheriff erred in his approach to the concept of welfare for the purposes of section 14 which imposes the second stage of the two-stage test. He misdirected himself by failing to treat the threshold test as imperative. In so far as the sheriff suggests that he did approach the threshold test as being imperative he failed to reach that conclusion in the context of undertaking a comprehensive balancing exercise of the alternatives available for the children short of adoption and fell into error by considering adoption in isolation. In particular, the sheriff focused excessively on the perceived detriment from moving placement (finding-in-fact 104) without counterbalancing that against the positives of the child being in the care of the grandparents. The natural father associated himself with and commended the arguments made by the grandparents in this aspect of the appeal.

[48] The natural father's primary position was that direct contact with the natural father was appropriate. In the alternative if the sheriff was correct to refuse direct contact his decision as to the frequency and form of indirect contact was arbitrary. The sheriff had failed to justify with adequate reasons his decision as to the frequency and form of the contact despite those matters being at issue between the parties. The sheriff was criticised for failing to make a finding about the frequency of missed contact by the natural father. It was also submitted there was no meaningful evidence before the sheriff why letterbox contact be fixed at an annual level rather than the higher level which the natural father had sought. In the absence of a reasoned basis for the restriction of contact to annual letterbox contact the court was invited to increase the frequency of letterbox contact with the natural father to four times per annum in the form of the mutual exchange of a letter twice annually

between the natural father and both J and E and provision by the natural father to each of J and E of a card and gift each birthday and Christmas.

Submissions for the grandparents

[49] The grandparents did not dispute that the sheriff was entitled to hold that the children's parents were unable satisfactorily to discharge their parental rights and responsibilities in relation to J and E and that they were likely to continue to be unable to do so. It was also accepted that the sheriff had identified correctly the relevant statutory provisions and had sought to apply the two stage approach required by the legislation. The essence of the grandparents' appeal was that the sheriff erred in holding that the making of adoption orders was necessary in view of the suitable kinship alternative. That kinship alternative being residence with the grandparents and J and E's half-siblings A, B and C. It was said the sheriff failed to carry out the reasoned comparison of alternatives which he was required to undertake and that he gave undue weight to the difficulties which the children might face from a transition into the care of the grandparents. Thus the appeal court required to consider the sheriff's approach to both necessity and welfare.

[50] It was said that the sheriff erred in making the following findings-in-fact:

- the children were currently experiencing uncertainty regarding their place of residence;
- there had been inconsistency in the offers of members of the birth family;
- the grandparents had only just prior to proof sought care of both children after the fourth respondent withdrew from the application;

- the grandmother withdrew from the kinship plan in 2013 after stating to social work she would have difficulty in managing additional hours of contact and that she was concerned with the costs involved;
- the grandmother was advised the social work department did not want to separate J and E;
- the children were enjoying a complete sense of permanence with the petitioners;
- separation from the petitioners would have a profoundly disruptive impact and be emotionally devastating for the children.

The sheriff was also said to be in error in attaching weight to the section 17 report prepared by DC.

[51] The sheriff had expressly recognised that the making of an adoption order is an order of last resort to be made only when it is necessary and then having the children's welfare throughout their lives as the paramount consideration. On necessity the crucial finding-in-fact was:

> "107. There are no suitable alternatives to adoption orders. Rehabilitation is not an appropriate alternative. [The natural parents] are not in a position to meet the physical and emotional needs of each of the children. A residence order or compulsory measures of supervision would be subject to variation and would not provide the children with the lifelong commitment and security that the Petitioners can provide to both children together with adoption orders being made."

[52] Mr Hayhow referred to the judgment of Sir James Munby in *In re B-S (Children)(Adoption Order: Leave to Oppose)* 2014 1 WLR 563 at paragraph 42 in which he approved the observation of McFarlane LJ in *In re G (A Child)* [2013] 3 FCR 293, paragraphs 42-54 as an exposition of the requirements imposed upon the sheriff:

> "42. The judge must grapple with the factors at play in the particular case and, …. give 'proper focused attention to the specifics' …
> "49. …The judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of

> internal deficits that may be identified, with the result that, at the end of the line the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits with that option.
>
> 50. The linear approach … is not apt where the judicial task is to undertake 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. …
>
> 54. What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options…"

This places stringent requirements upon the sheriff to engage with all of the evidence as to the merits and demerits of all the options for the children's future care. He is required to not just merely approve or endorse the views of the local authority as to alternatives but consider the matter himself on the basis of the evidence. In evaluating the alternatives to adoption the greatest priority for the sheriff was to what he described as "inconsistency in the offers of placement" made by the family. In passages at both page 111 and page 120 of the Note which are in virtually identical terms he expressed the view that the grandparents' offer to accommodate the children was "a means to an end, no more and no less." It could therefore be inferred from the result that the sheriff concluded that the change in the grandparents' position prior to the proof in some way undermined the strength of the case which they made for having the children reside with them. The sheriff was to be criticised for having failed to explain how he reached that view.

[53] Reliance and considerable emphasis was placed, by Mr Hayhow, on the sheriff having stated at paragraph 57 on page 132 of the Note:

> "there was no suggestion that [the grandparents] were anything other than appropriate carers [for J and E]."

It was submitted that to discount the option of the grandparents' application the sheriff required to make a finding that the grandparents' application was not genuine or was merely a pretext for avoiding adoption and for splitting up the children between family members. It was also to be noted that there was no finding that the children's welfare would be prejudiced in any way in the care of the grandparents. Accordingly the sheriff must be inferred, from his conclusion, to have given undue weight to his concerns over his finding that the grandparents arrived at the view in December 2016 that residence with them provided the only realistic prospect of persuading the court not to grant adoption orders.

[54] The sheriff considered and distinguished the position of A, B and C, who resided with their grandparents, from the position of J and E. In doing so, he appeared not to have regard to the preservation of personal relations and family ties and in particular J and E's relationship with their grandparents and their half siblings, nor of the potential benefits to J and E of continuing direct relations with their grandparents, or A, B and C. He appeared to take no account of the potential benefit to J and E of continuing direct relations with their parents, regulated by their grandparents, and in particular he appeared not to take account that such contact, appropriately regulated by the grandparents, took place in relation to A, B and C. The sheriff made no attempt to compare and contrast the relative merits and demerits of adoption and residence with the grandparents. This was an example of a linear approach deprecated in the authorities. As a result the sheriff failed to properly evaluate the evidence, and failed to carry out the stringent analysis of the alternatives which is required.

[55] The sheriff endorsed the views of the adoption panel dated 21 September 2015 and the advice of the Children's Hearing dated 8 December 2015. In doing so he failed to observe that the reports do not, and could not because of their respective dates, contemplate the proposal that a residence order made in respect of the children in favour of the

grandparents, because that proposal which the sheriff faced at the proof was not extant at the time of these reports.

[56] In relation to the children's welfare the crucial finding-in-fact was said to be:

> "104. Separation from the Petitioners would have a profoundly disruptive impact on each of [J and E] and it is more likely than not that this would be emotionally devastating for each of [J & E]."

But given the reference quoted above the sheriff accepted the grandparents would be appropriate carers for J and E, as he found the petitioners to be. The central welfare distinction drawn by the sheriff between these two care options appeared to relate to the effect on the children of their removal from the petitioners' care. It was recognised that the sheriff had heard evidence from the social workers and the female petitioner that such a move would be emotionally disruptive for J and E. This evidence was said to be necessarily speculative and that the sheriff placed too much weight on it. The extent of the impact on the children of moving to the care of the grandparents could not be reasonably known without expert psychological evidence. No such evidence was led and there was no suggestion in the evidence that either child suffered any emotional vulnerability. The evidence in the case supported the conclusion that J and E had adapted well to a previous change in residence. Further, there was evidence notwithstanding their opposition to kinship placement with the grandparents; the transition to their care would be sensibly supported both by the petitioners and the social work department. Thus although assessment of the evidence was primarily a matter for the sheriff, he had erred in concluding that a move to residence with the grandparents would be "emotionally devastating" for the children. Without expert psychological evidence the sheriff had inadequate evidence to entitle him to reach such a conclusion.

[57] The sheriff was criticised for having placed undue weight on the evidence of DC. It was the role of the sheriff to be the primary decision maker – *West Lothian Council* v *B* 2017 SC (UKSC) 67. Not only had he given undue weight to the evidence of DC he had failed to address the submission that she was not an expert and in so far as she was giving expert evidence she was not qualified to give an opinion of psychological matters. A proper application of *Kennedy* v *Cordia LLP* [2016] UKSC 6 meant that opinion evidence other than from a skilled witness cannot be admissible. The sheriff was in error to consider her evidence in the context of relevancy rather than admissibility.

[58] There was a lack of clarity about the family members who were to be involved with the annual letterbox contact and this required to be clarified by a more precise order. It was also submitted echoing the submissions of the natural father that letterbox contact should be more frequent.

[59] In concluding Mr Hayhow explained the grandparents' goal was to allow the reintroduction of J and E to their grandparents and half siblings under the supervision of children's hearings with guidance from a clinical psychologist with the eventual goal of J and E residing with their grandparents and half siblings.

Submissions for the petitioners

[60] It was submitted that the sheriff was entitled having heard the proof to reach the conclusions set out in his judgment. Assessment of the evidence was a matter for the sheriff who had seen and heard the witnesses. The appellate court may not interfere with the findings-in-fact made by the sheriff unless it is demonstrated that the sheriff has erred in a material respect and it is concluded that the decisions are plainly wrong. It could not be said in the present appeal that the sheriff had so erred.

[61] The sheriff correctly approached the task in deciding whether to dispense with the consent of the respondent to the adoption of J as a fact-finding exercise. In response to the argument that the sheriff ought to have had regard to the natural father's ability to discharge certain parental responsibilities and rights, in circumstances where it was acknowledged he was unable to discharge others: there was overwhelming evidence that the natural father's past failures in relation to the discharge of parental responsibilities and rights. This included findings about the lifestyle choices of the natural father, which rendered him unable to satisfactorily discharge his parental responsibilities. The sheriff had proper regard to this evidence and was entitled on that evidence to make findings that as a result of his drug use and offending behaviour, including substantial periods of imprisonment, the natural father had not been capable, since J's birth, of satisfactorily discharging his parental responsibilities or exercising his parental rights. The extent of the findings-in-fact about the natural father made a sound foundation for the sheriff's conclusion that the father had been unable to satisfactorily discharge his parental responsibilities and exercise his parental rights.

[62] In *S* v *L* 2013 SC (UKSC) 20 Lord Reed discussed section 31 and provided guidance as to how the section was to be read. It was made clear that the section should be read along with sections 14 and 28 and with sections 1 and 2 of the Children (Scotland) Act 1995. Although in *S* v *L* the court was primarily concerned with section 31(d) of the 2007 Act, the Supreme Court's decision is strongly supportive of the proposition that consent to the adoption should be dispensed with only where the making of an adoption order is necessary. There must be an overriding requirement for the adoption to proceed for the sake of the child's welfare and the court's interference in the parents' rights must be proportionate. In deciding whether the requirements of section 31(3)(c) and (4) are met the

sheriff must assess the relevant facts. The consideration of section 14 and the rights available in terms of ECHR Article 8 do not come into focus when the court is determining whether simply as a matter of fact the parent was unable to discharge parental responsibility and exercise parental rights and is likely to continue to be unable to do so.

[63] The sheriff discussed the basis on which he dispensed with the consent of the natural father at paragraphs 32 – 35 of the Note. What the natural father sought to do was to persuade the court that it was sufficient for him to discharge his responsibilities and exercise those rights that did not relate to full-time care of the child, and his exercise of those rights and responsibilities was satisfactory. Having regard to the findings-in-fact made by the sheriff and the evidence in relation to the father's persistent failures, the sheriff was entitled to conclude that he had not been capable of, and was unlikely to be capable of, discharging his responsibilities and exercising his rights in relation to J and E in a satisfactory manner. There was no authority for the proposition advanced by the natural father that a parent able to discharge parental responsibilities and exercise parental rights at times, or in part, should result in a finding that their consent could not be dispensed with. That was not a proposition which could be inferred from Lord Glennie's decision in *M* v *R* 2013 SCLR 393. If that were indeed the case it was wrong. Senior Counsel also indicated that she was aware of no case where it had been argued that Lord Glennie's decision provided a basis for the argument which Mr Cheyne advanced. Such an approach was contrary to what is required of a parent with capacity, namely to discharge his or her responsibilities and exercise his or her rights in a manner cognisant of and consistent with the needs of the child. The argument that findings in terms of sections 31(3)(c) and 31(4)(b) can only be made for those parents who exercise all the parental rights and responsibilities and the comparisons drawn with section 84(5)(2)(c) of the 2007 Act was misconceived.

[64] Section 84(5)(2)(c) is directed at permanence applications and provides at the threshold stage that a permanence order may not be made in circumstances where it cannot be proved that residence with the parents is, or is likely to be seriously detrimental to the child's welfare. The question in adoption is whether it is necessary that the child be cared for by a new family and ties with the birth family severed. The consequences for a child being subject to a permanence order are quite distinct and subject to different considerations from those that will result from adoption.

[65] Analysis of the evidence to determine whether consent should be dispensed with was a matter for the sheriff having seen and heard the witnesses. The conclusions reached by the sheriff are justified by the evidence. The sheriff explains in the note the basis on which he was satisfied that the making of the order for adoption of both children was necessary and proportionate.

[66] The decision whether to make any provision for contact post-adoption and what form that contact should take was also a matter for the sheriff's judgment, having evaluated the competing evidence. In *S, Petitioner* [2014] CSIH 42 paragraph 73 the Inner House accepted that the concerns about the natural mother's failure to accept that the prospective adoptive parents were acting in the child's best interests was a proper basis on which a formal contact order should not be made. The sheriff at paragraphs 70 – 72 of his Note explained his reason for refusing direct contact on his finding-in-fact 111. He found there to be a risk post-adoption of the grandparents undermining the placement. He particularly noted in the discussion of the evidence of the grandmother her criticism of the female petitioner with regard to the safety of the children. His conclusion also accorded with the view expressed to him by HO, the senior social worker with responsibility for the children from December 2014. His professional opinion was that direct contact would expose the

children to the risk of transmission to them by the grandparents of the message they ought not to be in an adoptive placement. The sheriff's finding that, having regard to the paramount consideration of the welfare of the children, that contact should be limited to letterbox contact was both reasonable and proportionate. The European Court of Human Rights in YC v *United Kingdom* (2012) 55 EHRR 53 at paragraph 134 made clear that the best interests of the child are paramount. The maintenance of family ties could be restricted where this might harm the child's health and development. The case also accepts there may be no contravention of the Article 8 rights for parents (and by implication for grandparents) provided the reasons for interfering in family life are relevant, sufficient and the decision-making process is fair and gives necessary respect to the parents' or grandparents' rights under Article 8. Those requirements having been met in the present case there is no unlawful violation and there is no basis for the appellate court to interfere with the sheriff's decision.

[67] In relation to the order for indirect contact it was accepted that finding-in-fact 112 lacked some precision by the use of the term "birth family." There was however no ambiguity on the sheriff's view of the nature of the contact or its frequency. It was suggested to add clarity the interlocutor should be modified to provide for annual two way letter-box contact, manged by Inverclyde Social Work Department, to occur contemporaneously between J and E and the grandparents and the natural father.

Decision

[68] We recognise and appreciate that adoption cases like permanence orders are some of the most challenging and vexed to be adjudicated. Evidence in the two petitions was heard by the sheriff over 7 days with a further day for submissions. He then wrote a judgement

extending to one hundred and forty pages. We have set out the background facts here in some detail. We observe that this was a case which had been effectively case managed by the sheriff, who was docquetted to hear the case and appropriate use was made of affidavit evidence with witnesses only being cross examined. We commend this approach.

[69] The issues for the court were; dispensation with the consent of the natural father; if consent was properly dispensed with, whether the list of factors contained in section 14 and section 28 of the 2007 Act were addressed by the sheriff; considerations of necessity and proportionality; the challenges to the sheriff's findings-in-fact; the decision to limit post adoptive contact to annual letter-box contact and the nature and extent of such contact.

The consent of the natural father

[70] An adoption order may not be made unless one of the five conditions specified by section 31 of the 2007 Act is satisfied. This is an adoption where the natural mother and father did not consent. In the instant case the grounds to be considered were in terms of section 31(3)(c) that section 31(4) applies – that he or she is, in the opinion of the court, unable to satisfactorily discharge his or her parental rights and responsibilities and is likely to continue to be unable to do so. Or the welfare of the child requires that consent be dispensed with under section 31(3)(d). The natural father challenges the sheriff's decision to dispense with his consent.

[71] The correct approach to section 31(4) was considered in *S, Petitioner* [2014] CSIH 42. Lady Smith giving the judgment of an Extra Division explained that when considering whether the incapacity ground applies the court is engaged in essentially a fact-finding exercise; what facts are established by the evidence, and on those facts does the court conclude the relevant parent or guardian is unable to satisfactorily discharge the rights

and/or responsibilities referred to and are they likely to continue to do so? The Extra Division followed the reasoning of Lord Neuberger at paragraph 62 of *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 that at the stage of deciding whether or not the incapacity ground applies Article 8 has no part to play. The test whether or not a parent can discharge their parental rights and responsibilities is an objective test.

[72] We accept the proposition on behalf of the natural father that a parent's ability to discharge their parental rights and responsibilities may vary over time and it is not necessary that such discharge is undertaken to a "gold" standard. We do not however accept the proposition that the court should consider that, because a parent can express a cogent view as to where their child or children should reside, the court should as a consequence be satisfied that the parent is satisfactorily exercising a parental right to the extent that the consent should not be dispensed with.

[73] The exercise which the court is required to undertake in terms of section 31(4) of the 2007 Act is to evaluate whether, looked at in the round, the parent is unable satisfactorily to exercise parental rights and responsibilities and in terms of sub section (c) "is likely to continue to be unable to do so**."** Section 31(4) refers to the parental rights and responsibilities enumerated in sections 1 and 2 of the 1995 Act, other than sections 1(1)(c) and 2(1)(c) which both refer to contact. Sections 1(4) and 2(5) make clear that the statutory provisions as to parental rights and responsibilities are intended to comprise the plenitude of parental functions. (It is important to remember that the rights are conferred in order to enable a parent to exercise the responsibilities imposed.) Put another way sections 1 and 2 specify what it is to be a parent. It is therefore not surprising that an inability satisfactorily to discharge the responsibilities through utilising the parental rights should be a ground which founds the basis for the making of an adoption order. The test is whether the

discharge or exercise can be effected satisfactorily in the best interest of the child or children. In our opinion the intention of Parliament is clear: if a parent is unable satisfactorily to fulfil the role of a parent and is likely to be unable to do so then the parent is not discharging his parental function. As noted above this has been held to be a fact finding exercise which is entrusted to the court. Given the purpose of the provision we do not consider that satisfaction of the statutory tests is frustrated by the exercise or retention of individual components of parental rights and responsibilities. It is not difficult to conjure up circumstances in which particular aspects of certain parental rights and responsibilities may be available to an absent, indifferent or chaotic parent. In this case there are referral proceedings. It is sometimes said that a compulsory supervision order suspends the exercise of parental rights and responsibilities. As an abbreviation that is no doubt correct. However, read short, section 3(4) of the 1995 Act provides that a person holding parental rights and responsibilities may not act in any way which is incompatible with an order of the Hearing. It is not a blanket suspension. Accordingly, where there are parental rights and responsibilities and an order of the Hearing, supremacy is afforded to the order of the Hearing to the extent of any inconsistency. We do not consider that a parent may invoke any inhibition on the exercise of their parental rights and responsibilities consequent upon the operation of section 3(4) to their advantage by saying that they cannot exercise their rights because of the order. An order of the Hearing is there to safeguard the welfare of the child. It may be in place, as here, because of the deficiencies of the parents in fulfilling their function as a parent. In coming to a conclusion on the fact finding exercise imposed upon it the court requires to look at the evidence as a whole in order to reach its conclusion. The mere failure to exercise parental rights and responsibilities while an order is in place will not of itself inevitably result in an order being made. That is because the court must

additionally be satisfied that the parent is also likely to be unable to do so in the future. In reaching its conclusion as to the future the court is entitled to have regard to past conduct.

[74] Contrary to the submissions on behalf of the natural father we conclude that Lord Glennie's reference in *M* v *R* to "in the round" reflects a need to look at the various rights and responsibilities and weigh them *all* (our emphasis) up and reach a view. For example the exercise of the right *simpliciter* to direct residence is not exercising the parental functions when looked at in the round. The corollary is that even if there is one right which a parent is unable to exercise satisfactorily that does not automatically mean that the court must dispense with that parent's consent, this too must be looked at in the round.

[75] There was ample material, as seen in finding-in-fact 96, identifying the natural father's persistent criminal conduct, drug misuse, frequent periods of imprisonment and intermittent engagement with the Integrated Drug Service which prevented any rehabilitation plan. The consequent reality as found by the sheriff was that the natural father had substantially failed to discharge his parental rights and responsibilities. This cannot be characterised as a situation where the interference with his exercising his rights caused his failure to exercise his rights. Rather it was his ongoing criminal conduct and misuse of drugs which resulted in that outcome, and which provided the basis on which the sheriff found that the natural father was not able to exercise and discharge his parental rights and responsibilities. In his findings-in-fact the sheriff set out in some detail the factual background. It is correct that there is no finding by the sheriff of the frequency of the natural father missing contact. The sheriff did however find at finding-in-fact 11 that the natural father had custodial sentences imposed on 18 occasions post the grandparents' residence order for A, B and C. He also found at finding-in-fact 63 that the natural father had insisted that no contact order be made in relation to E as he was serving a custodial

sentence. Reading the judgment as whole there are multiple findings-in-fact which record disengagement or periods of custody which resulted in inconsistent contact. We reject any suggestion that the sheriff did not find, or was not entitled to find, that the natural father was not a consistent presence in J's life. We accept that taken in the round the findings-in-fact identify that the natural father was and will be unable in a meaningful way to exercise satisfactorily parental rights and responsibilities. Given the findings on his historic lack of engagement with support services and no evidence suggesting a significant change, there is no flaw in the sheriff's reasoning which renders his conclusion that the consent of the natural father be dispensed with, to be susceptible to interference.

[76] Having dealt with the issue of consent, the court has to consider the application of, in this case, certain of the provisions contained in sections 14 and 28 of the 2007 Act as these require to be interpreted in order to be compatible with Article 8 of the Convention. In the course of argument reference was made to the words "necessity" and "proportionality" which derive from Article 8. Given the multi-faceted nature of Article 8 particular care is required in applying the words to the process of adoption; there is ample authority to act as a guide in relation thereto. The authorities, both domestic and European, all stress that, in applying Article 8 the essential consideration is the welfare of the child (paragraph 37 of Lord Reed's judgement in *S* v *L*) which also includes the child's right to a safe and secure environment (paragraph 134 in *YC* v *UK*). Severing the link between a child and his family is an exceptional step but, again as Lord Reed pointed out, at paragraph 44, exceptionality is not a legal test but an observation as to the circumstances in which a compulsory severing of family ties will be in accordance with Article 8 – and he gave a statistical analysis in support of this. The dicta in the various authorities emphasise to the courts at first instance the gravity of the making of an adoption order and the need to ensure that, amongst the options

available to secure the welfare of a child, it is regarded as very much the last resort. So much is easy to summarise but the application of general injunctions must depend upon the particular matrix; each case is fact specific; the needs and interests of each child will vary from case to case; the weight to be given to the facts will vary. Welfare has long been recognised as a matter of judgement for the court rather than a matter of scientific analysis (*Osborne* v *Matthan* 1998 SC 682 at 692).

Findings in fact

[77] In relation to the criticisms of the sheriff's findings-in-fact, the Supreme Court in *Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203 and *McGraddie* v *McGraddie* 2014 SC (UKSC) 12 reinforced the long established principles that in the absence of some other identifiable error which is a material error of law, or the making of a critical finding-in-fact with no basis in the evidence or a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence, an appellate court will only interfere with the findings-in-fact made by a trial judge on the basis that he has gone plainly wrong and it is satisfied his decision cannot be reasonably explained or justified. We are satisfied that there was substantial evidence before the sheriff which entitled him to reach the findings-in-fact which he made.

[78] We have considered the evidence and explanation of HO about the grandparent's position (page 1037 of the appendix). He recounted that as early as 30 January 2015 the grandparents had asked why the children needed to be placed together. He stated that the grandmother was a strong advocate and able to express her views. He further stated that the grandparents did not make an offer to look after both J and E until December 2016. These were all matters where the sheriff was entitled to accept his evidence.

[79] In relation to ground of appeal (v) of the grandparents that the grandmother withdrew from the kinship plan in 2015 after stating to social work that she would have difficulty in managing additional hours of contact and that she was concerned with the costs involved, we conclude that the sheriff was, on the evidence, entitled to prefer the evidence of the social workers to this effect, to that of the grandmother. Neither do we find that the sheriff erred in finding that the grandmother was advised that the social work department did not want to separate J and E (ground of appeal vi). The sheriff as fact finder was best placed to reach a view and we find no basis to suggest that he could be said to be plainly wrong in reaching the conclusions which he did. On the evidence of the grandmother the sheriff states at page 111 of his Note:

> "I did not accept her evidence about the family not being aware that the Social Work Department wished to have the children remain together and to be placed together. On the evidence that I have accepted, that position was known by the family from at least January 2015. Further there was an inconsistency in the offers for placement of the children."

In the remainder of that passage the sheriff gives cogent reasons why he did not find the grandmother's evidence convincing and why he reached the view that her objective was to seek to have the court not grant the adoption orders. There is no basis for this appeal court to interfere with those critical conclusions.

[80] In relation to ground of appeal (vii) finding-in-fact 88 reflects the terms of paragraph a352 of the section 17 report which was adopted by DC in her affidavit paragraph 6.

[81] We also accept that the sheriff was entitled to make the finding that the children J and E were enjoying a complete sense of permanence with the petitioners, challenged in ground of appeal viii. PC deponed in her affidavit paragraph 21:

> "I am satisfied that we have a very positive placement for these children with the Petitioners. I have observed a growing sense of belonging in the children with the Petitioners and wider family and I am satisfied that the children are absolutely thriving in the care of the Petitioners. My overall assessment of the placement is that things couldn't be progressing any better…. The warmth and love between the children and the petitioners and the closeness of relationship is such that you would not know that these children were in a pre-adoptive placement."

Likewise we hold that the sheriff was entitled to find that separation of J and E from the petitioners would be emotionally devastating for them on the basis of the evidence of HO and PC to which we refer subsequently at paragraph [90]. We should make clear that we reject the proposition put to us by Mr Hayhow that no such finding could be made where there is an absence of any psychological evidence. We also accept that the sheriff was entitled to rely on the *curator's* report in finding-in-fact 106. It appears to us that the conclusion of that report is reflected in the conclusion which the sheriff himself drew on the evidence and that he had no reason not to accept it. The grandparents are correct when they assert that the report was completed in advance of their seeking residence for both J and E, but the sheriff himself reached a view as he is required to do and we accept he was entitled to have regard to the section 17 report and the evidence of DC. As noted above DC in her affidavit adopted the conclusions of her report, even if it had been drafted substantially by her predecessor, and she had not changed the recommendation of the report. This does not invalidate her evidence and we accept that the sheriff was entitled to accept it. Neither do we accept that the *curator's* report can be said to be invalidated because the grandparents' position had changed following the fourth respondent withdrawing her application to care for E two weeks before the commencement of the second proof, the first having been discharged on her joint motion with the grandparents to allow more time for preparation and because legal aid applications were outstanding. The grandparents had changed their approach and were now seeking residence of both J and E.

[82] Accordingly, we find there to be no substance in the arguments of the grandparents and as adopted by the father that the sheriff was not entitled to make the findings-in-fact which he did.

Proportionality and necessity

[83] It was accepted that the sheriff had correctly identified the applicable law, the two stage test. At paragraph 45 the sheriff expressly recognised that the making of an adoption order is an order of last resort to be made only when it is necessary and then having the children's welfare as the paramount consideration, and at paragraph 46 he identified that section 14(3) required that the welfare of the children be considered throughout their lives. The challenge advanced on behalf of the grandparents in the appeal is whether the sheriff correctly and adequately "considered and excluded any alternative" offered.

[84] The authorities also stress the importance of a clear process of reasoning when considering the options open to the court in considering the welfare of the child. The guidance given by the Court of Appeal in *B* v *S* was approved by the Extra Division in *Fife Council* v *M* 2016 SC 169. Lord Bracadale who gave the judgment of the Court at paragraph 63 emphasises the particular form of reasoning to be undertaken and how that that analysis should be set out in the judgment:

> "First, there was a requirement for proper evidence which must address all the options which were realistically possible and must contain an analysis of the arguments for and against each option. Secondly, there must be an adequately reasoned judgment. At para 43 the court drew attention to what had been said by McFarlane LJ in Re G (A Child) (para 50): the judicial task was to undertake 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'."

At paragraph 64 the Court also endorsed what was said by the Court of Appeal that the decision at first instance in *B* v *S* was vitiated by the judge's conclusion being a choice of one option over another that was neither reasoned nor supported by evidence.

[85] We have given very careful consideration as to whether those criticisms are apposite in the instant case. As a precursor, a critical question which we have identified to be answered in order to determine this aspect of the appeal is whether we are satisfied that there was evidence before the sheriff in support of, and against, each of the available options. The grandparents' complaint is that the sheriff did not carry out the reasoned comparison of alternatives which he was required to undertake and gave undue weight to the difficulties which J and E might face in a transition to the care of the grandparents.

[86] The sheriff's analysis and reasoning is set out in paragraphs 55 to 68 of his Note, but his judgment should be looked at in the round. In relation to the option of the children residing with their grandparents, we conclude that there is sufficient material to demonstrate that he adequately considered that option in the light of the prevailing circumstances as he found them. The factual positon is of particular importance here. As was recognised by the sheriff, J and E had been living with the petitioners since December 2015, their family life was with the petitioners and by the time of the proof there appeared to be no challenge to the view of the social work department that they should remain together. The impact of this former factor was noted in *YC* v *UK* at paragraph 141:

> "… once K was placed with a prospective adopter, he began to establish with her new bonds and his interest not to have his de facto family situation changed again became a significant factor to be weighed in the balance against his return to the applicant's care".

We also observe that consideration of their residence with the grandparents had to be predicated on how such a transition would be manged remembering the welfare of the

children is the paramount consideration. The absence of evidence of how the welfare of J and E would be supported, initially in the context of reintroduction to grandparents who they had not seen since December 2015, and subsequently if this were to be followed by a move to live with their grandparents, may in part be explained by the very late stage in which that became the grandparents' proposition to the sheriff. It is also of note that the sheriff concluded the family's position was "a means to an end, no more and no less" (paragraph 59 of the Note). That end being to avoid placing the children for adoption.

[87] As Ms Dowdalls pointed out, had the grandparents not withdrawn from their proposal that they have care of J in June 2013, we would not be here now. The kinship placements which had been diligently and properly explored by the social work department were not seen by them as realistic options following the birth of E. In the course of his submissions Mr Hayhow proposed that if the appeal was to be allowed the next step should be for input from a clinical psychologist to explore and advise how best a transition for J and E to live with their grandparents be achieved; in doing so he correctly recognised that such a transfer presents clear and obvious difficulty. Given the repeated expressions in decisions that cases such as this should be progressed expeditiously it is highly unattractive for the appellants to suggest that if we were to uphold the appeal the next step should be for input from a clinical psychologist to explore and advise how best a transition for J and E to live with their grandparents can be achieved.

[88] Implicit in that proposal is an acceptance that the options which the sheriff had truly to adjudicate between were the making of the adoption orders in favour of the petitioners or the refusal of the petitions which would result in the Children's Hearing being required to determine the future care arrangements for J and E.

[89] The sheriff discounted residence with the grandparents and was concerned about the impact on J and E of being uprooted from the stable environment with the petitioners. Mr Hayhow proposed that expert evidence was required to properly consider the consequences of such a move. The evidence which the sheriff did have was that of HO who stated that to move the children from the petitioners' care with whom they had lived since December 2015 would be "nothing short of a catastrophe" (Note page 74-75) and maintained in his answers in cross examination (page 1047 appendix). PC also gave evidence (paragraph 25 of her affidavit) that to move the children from the care of the petitioners to the care of their grandparents would be "absolutely devastating" for them. (For similar conclusions see Lord Justice Jackson's observation in *In re W* [2017] 1 WLR 889 at paragraph 92.)

[90] We accept it to be self-evident that there would be difficulties in uprooting the children from living with and being cared for by the petitioners with whom they had lived since December 2015. This reflects the point made by Sir James Munby in *In re B-S* [2014] 1 WLR 563 at par 74(vii):

> "… the older the child and the longer the child has been placed the greater the adverse impact of disturbing the arrangements is likely to be."

Those observations were made in the context of a parental application for leave to oppose an application for adoption under the Adoption and Children Act 2002 but are applicable to the present case. The courts are familiar with judging what may or may not be in the best interests of children; absent some underlying or suspected psychological condition, or some unusual or exceptional factual matrix, the courts are generally well equipped to analyse and consider the likely reaction to or adjustment to a change in their circumstances, without the need for evidence from, in this case, a clinical psychologist.

[91] It was submitted that it could be inferred that as long as a kinship or family alternative would keep a child safe and well such an arrangement is to be preferred to the severing of family ties by the making of an adoption order. It was not necessary to consider the closeness of the relationships with the grandparents and the children. The aim should be to preserve family relationships and the necessity test was not satisfied where there was a less draconian kinship option. In essence the proposition of the grandparents was that they would provide a good enough care option for J and E and that being less draconian than the making of an adoption order it should be preferred. The outcome sought by the grandparents if their appeal was allowed would be for the adoption orders to be refused and the supervision requirement cast off by the sheriff's decision reinstated. Proceedings before the Children's Hearing would resume and it would be for the Children's Hearing to determine what care arrangements should be in place for J and E. This was also an outcome which the sheriff should have addressed.

[92] The sheriff's reasoning is found at paragraph 55 onwards of his Note. At paragraph 65 he makes reference to the other possible options which he discounts as being:

> "variable and revocable and would almost inevitably result in further and ongoing litigation with the consequent uncertainty and insecurity that would be likely to cause."

The sheriff identified that this would not promote the long term welfare of J and E. We accept that to be a valid conclusion which also addresses further procedure before the Children's Hearing or a residence order in favour of the petitioners. He was correctly focused on the welfare of the children. He was faced with a situation where the children had been placed with the adoptive parents since December 2015 and had evidence that this was a successful placement within which the children were thriving. Kinship arrangements had been explored by the social work department and rejected and the sheriff was not

satisfied on the evidence that the proposals of the grandparents would indeed be in the best interests of the children. Accordingly we accept he has adequately demonstrated consideration and analysis of the issues before him. Given the alternatives he was faced with we are satisfied that he was correct in making the orders for adoption. Nothing else would do.

Post adoption contact

[93] An adoption order is made under section 28 of the 2007 Act. Section 28(3) provides that an adoption order "may contain such terms and conditions as the court thinks fit", giving the court a wide discretion as to the nature of the terms and conditions which might be attached to the order and empowers the court to make an order for post adoptive contact. As with the making of an adoption order in making an order for post adoptive contact the court must have regard to section 14(3):

> "the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration."

and 14(4)(d):

> "the likely effect on the child, throughout the child's life, of the making of an adoption order."

In this case whether an order for post adoptive contact was in the best interests of the children included consideration of a balancing exercise between securing finality and security for the children on the one hand, and maintaining some link with their birth family. The sheriff had evidence from PC who had considerable experience as a social worker within the adoption and fostering team of the benefits of letterbox contact. She was of the

view that supervised letterbox contact would assist the children to gain a sense of identity and to receive a coherent narrative of their background and life story.

[94] The grandparents submitted that the sheriff had incorrectly discounted direct contact with them. We find that the sheriff reached this conclusion on the basis of the evidence which he heard. The sheriff was entitled to accept the evidence of PC. She rejected direct contact but supported supervised annual post adoptive letterbox contact. We are satisfied that the sheriff was entitled to accept her view and provided an adequate explanation of his reasons for doing so. At paragraph 72 of his Note he stated:

> "There is, on the evidence which I have accepted, a significant and real risk of [J and E's] placement with the Petitioners being undermined by the [father and the grandparents] either directly or indirectly."

He approached the matter having regard to what was in the long term best interests of J and E and we find no basis to interfere with his decision that post adoptive contact should be indirect contact.

[95] Parties were in agreement that there was a lack of clarity in the terms of the sheriff's interlocutor of whom should be involved in letterbox contact. We conclude that in using the phrase "the birth family" the sheriff intended that the letterbox contact would apply to the natural father, grandparents and the half siblings A, B and C. We note that the contact is to be supervised by the social work department and consider that such supervision is appropriate, particularly in relation to the communications from A, B and C where the social work department can support this to allow for age appropriate communication.

[96] We are not persuaded that we should deviate from the sheriff's conclusion that annual contemporaneous contact reflects an appropriate frequency for such contact to take place. Such annual contact will maintain a link between the children J and E and their natural father, grandparents and A, B and C. To give effect to the court's decision we shall

recall the sheriff's interlocutor of 28 June 2017 in so far as it relates to post adoptive contact and substitute the following: "Makes provision for post adoption contact between J and E and (a) their grandparents (b) their natural father and (c) their half siblings A, B and C, all by way of indirect contact by letterbox once per year such contract to be facilitated and supervised by the social work department of Inverclyde Council."

[97] Parties were agreed that we should make no award of expenses.