SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT DUNDEE

[2017] SC DUN 61

PO23/16

JUDGMENT OF SHERIFF S G COLLINS QC

in the application for a Permanence Order with Authority to Adopt

by

DUNDEE CITY COUNCIL

Petitioner

against

LT

Respondent

Act: Carena; Dundee City Council
Alt: MacKinnon; RSB Lindsays

Dundee, 27 June 2017

The Sheriff, having resumed consideration of the cause,

FINDS IN FACT:

Introduction

1. The subject of this application is AT. He was born on 20 December 2011 and is therefore now five years old.

2. The respondent is the mother of AT. She has parental rights and responsibilities in respect of him. Her date of birth is 21 November 1989 and she is accordingly now 27 years old.

3. No father is identified on AT's birth certificate. In the past the respondent has advised the petitioner's staff that she does not know who his father is. However she now thinks his father is most likely to be a KC. The respondent has provided the petitioner with information about KC with a view to tracing him, but his present

whereabouts are unknown to parties. In any event he has never had any involvement in AT's life.

4. AT is of white Scottish ethnicity. The respondent has not expressed any specific views in relation to AT's religious upbringing. There are no racial, cultural or linguistic considerations or religious views to be taken into account in respect of his upbringing.

5. AT has, of course, never been married nor had a civil partner. He is too young to express a view in relation to the present application.

6. The respondent has two other children. BT, date of birth 27 May 2009 and now aged seven, and CT, date of birth 4 December 2014 and now aged two. BT currently lives with his father, TT, and his paternal grandmother. CT is currently residing in a separate placement with his prospective adopter. The identity of CT's father is unclear, but is likely to be DB.

The respondent's background

7. The respondent was born and raised in the Dundee area. She was the middle of three children born to the relationship between her parents LR and DT. She has a number of additional half siblings. The respondent's parents' relationship was characterised by domestic violence and frequent separation and reconciliation. The family was known to social work, health, education and criminal justice services throughout the respondent's childhood. Concerns included domestic violence, parental violence, alcohol abuse, neglectful parenting, and the children's own aggressive behaviours.

8. The respondent was subject to compulsory supervision under the Children (Scotland) Act 1995 from the age of three. She and her siblings were accommodated and then returned to the care of either their mother or their father on several occasions during their childhood. The respondent was removed permanently from her parents' care at the age of six. Her experience of care was not a positive one during her teenage years, with a number of broken foster and residential unit placements. These were a result of the respondent's challenging behaviours which included frequent absconding, aggression, alcohol use, and being vulnerable to adult sexual exploitation.

9. The respondent's difficult early history has impacted adversely on her capacity to manage her emotions and her relationships. She has had a number of relationships, none of which has been sustained, and all have been characterised by domestic incidents and instability.

10. The respondent has a history of mild to moderate depression, first arising post natally after the birth of BT. She was first prescribed anti-depressant medication by her GP in 2010, namely mirtazapine. This was changed to citalopram in 2011, and then fluoxetine in 2013. The respondent's depression has sometimes affected her ability to regulate her own emotions and thus to understand and respond appropriately to the emotional needs of her children.

11. The respondent has mild Tourette's Syndrome. This still occasionally causes her to have physical tics, but is unlikely to contribute to her swearing. She was previously diagnosed with Attention Deficit Disorder as a child, but is no longer significantly affected by this condition.

12. The respondent has no formal educational qualifications and has rarely been in employment.

13. The respondent was involved in some vandalism at a young age but has no history of criminal offending as an adult.

The respondent's care of her children, 2009 - 2014

14. Shortly after BT's birth, in June 2009, the respondent was referred to Bruce Street Family Centre for Parenting Support.

15. In December 2009 the petitioner's social work department received a referral from the Child Protection Nurse Practitioner at Ninewells Hospital advising that TT had allegedly pushed the respondent whilst she had BT in her arms and he had sustained a bump to his head.

16. In March 2010 staff from the St Andrew's Mothers' Group reported that the respondent was observed to be "rough" in her handling of BT and would swear at him. She appeared to them to have little understanding of his development and needs despite the parenting support provided. There were allegations of further domestic incidents between the respondent and TT.

17. BT's attendance at the Bruce Street Family Support Centre nurture group was poor and inconsistent from towards the end of 2010 through into 2012.

18. By June 2011 the respondent and TT had separated. The respondent was by this time pregnant with AT. As stated, AT was born in December 2011.

19. The respondent subsequently formed a relationship with JC, but separated from him in the summer of 2012.

20. By this time BT's behaviour in the family home had become quite aggressive. The respondent became increasingly negative about him and his behaviour. No specific concerns were raised with the petitioner's social work department at this time concerning the respondent's care of AT.

21. In July 2012 the respondent's health visitor referred her family to Multi Agency Screen Hub ("MASH"), an inter-agency meeting that considers child welfare concerns.

22. In August 2012 the respondent introduced social work department staff to SF with whom she had formed a relationship.

23. In October 2012 the respondent experienced a miscarriage and notified the social work department of this.

24. The respondent moved address and her family were referred to the Douglas Family Support Centre. Pamela Mains, Family Support Worker, worked at this centre at the time.

25. On at least two occasions in 2012 the respondent left AT in the care of her mother, notwithstanding the family history set out above. The respondent dishonestly denied to Pamela Mains that she had done this.

26. In November 2012 the respondent had a house party where the police had to be called as a result of adults arguing and fighting. The respondent became involved in a physical altercation with a neighbour. Neither BT nor AT were present at the time. The respondent told the social work department of this incident shortly afterwards.

27. Throughout December 2012 BT continued to be regularly aggressive in his behaviour. On 13 January 2013 his paternal grandmother contacted the petitioner's

out of hours service alleging that the respondent had pulled BT. Social workers attended at the respondent's home. She denied hurting BT, but admitted shouting and swearing in front of him whilst arguing with his paternal grandmother, and that BT had been crying in response to this. The respondent also admitted pushing BT's maternal grandmother while he was present.

28. In early 2013, the respondent formed a relationship with RJ.

29. Through 2013 Douglas Family Support Centre continued to try to support the respondent in the care of her children.

30. On 18 April 2014 the petitioner received a police child concern referral in relation to an incident of domestic violence between the respondent and RJ. Both BT and AT were witness to this violence. The respondent was pregnant with CT at this time. RJ was subsequently charged with domestic assault and bailed subject to conditions preventing contact with the children and attendance at the home address. He was subsequently convicted of this charge and imprisoned. Given the respondent's pregnancy, her case was allocated to the petitioner's New Beginnings Service for a pre-birth assessment.

31. On 30 April 2014 social workers visited the respondent's home. Both BT and AT exhibited high levels of challenging, aggressive and violent behaviour. The respondent was unable to manage this behaviour, and was inconsistent in her responses to it. She repeatedly shouted at BT and blamed him for AT's behaviour. In front of both boys she discussed not feeling close to BT, being unable to cope with him and that she was considering sending him to live with his father.

32. On 15 May 2014 AT had a black eye. He had fallen over while running to witness an argument or fight between RJ and his sister's partner. In a meeting with a

family development worker on that date AT's behaviour was challenging and aggressive, even although BT was not present. The respondent was unable to appropriately manage AT's behaviour at this time.

33. By June 2014 the respondent had separated from RJ.

34. The home conditions in the respondent's house were generally satisfactory. It was always clean and tidy. AT and BT were always clean and well presented. Their physical needs were being adequately met by the respondent. She did not physically mistreat or neglect them.

35. However the respondent continued to struggle to manage both BT and AT appropriately. She shouted and swore at both children on occasions, and was particularly negative in her responses to BT. She continued to regularly blame BT for any difficult behaviour exhibited by AT. She struggled to set appropriate boundaries for her children as regards their behaviour towards her and each other. She struggled to meet their emotional needs. She did not always prioritise these needs before her own. For example she would often go out with friends, or to parties at friends' houses during the evening, and would take the children with her, returning late in the evening rather than establishing more consistent domestic routines for them.

36. Furthermore, the respondent was experiencing symptoms of depression through 2014. She was not eating or sleeping properly, was being over emotional, and was not able to focus on her children properly. The respondent's poor mental health accordingly impacted adversely on her ability to properly care for BT and AT. It affected her ability to regulate her own emotions and so react appropriately to their emotional needs and demands. She felt under stress, and continued to swear at

or in the presence of BT and AT. She sought assistance from her GP, and was prescribed anti-depressants.

37. AT's behaviour continued to be aggressive. He would swear and use aggressive language. On 10 July 2014 he was observed to hit the respondent and throw pillows at her. The respondent would sometimes make use of a 'naughty step' to manage this, but did not use this method consistently. When she did use it AT would react negatively and start screaming and banging doors.

38. During a home visit by social work on 17 July 2014 AT was again seen to be aggressive, repeatedly hitting and poking staff with a plastic gun before smashing it on the floor. The respondent tried to discipline both boys physically and verbally but without success. She repeated to social work staff that she felt unable to cope with BT and that she had no bond with him.

39. On 18 July 2014 BT's paternal grandmother contacted the social work department to advise that she had BT in her care. She said that the respondent had stated that she "hated" BT and did not want him. Social workers again visited the home. BT's behaviour appeared out of control. He became very aggressive, throwing things and used very abusive adult language. AT scratched the foot of a social worker, Rachel Scott, called her a 'fucking mongol', and tried to squirt juice at her. He was throwing things around the house, repeatedly swearing and pushing boundaries. The respondent was unable to control or manage this behaviour.

40. An arrangement was made whereby BT would reside with his father and paternal grandmother during the week and with the respondent and AT at weekends. This arrangement did not last more than a couple of weeks. It was clear that the respondent could not cope with caring for both children. BT began residing

full time with his father and paternal grandmother. He has continued to reside with them ever since.

41. On 30 July 2014 a referral was made to the Children's Reporter in respect of BT and AT. This was triggered, in particular, by the referral from the police in the light of the domestic incident involving RJ on 18 April 2014 and the respondent's apparent lack of parental control over both boys. On 6 August 2014 BT, AT and the respondent's unborn child were placed on the petitioner's child protection register.

42. Throughout July and August 2014 the petitioner's social work department supervised contact between the respondent, BT, and AT. BT and AT were often angry and violent towards each other during contact sessions and used adult abusive language. AT was violent and abusive towards the respondent. The respondent was unable or unwilling to effectively manage or restrain this behaviour. When the boys fought, the respondent would generally reprimand BT but not AT. AT appeared very fearful when the respondent told off BT for something. If AT was given one to one attention during contact, however, his behaviour would generally be acceptable.

43. Beginning in around August 2014 the respondent agreed to participate in the petitioner's Incredible Years Programme. This was a 12 week parenting programme, scheduled to run until November 2014, which was intended to support the respondent in understanding her children's needs and developing her parenting skills to meet these needs. The respondent attended and engaged reasonably well, and recognised that she had to change and improve her parenting. She began to try to put the strategies which she had learnt into place, but without success. The

respondent also attended the St Andrew's Project, a voluntary project for young parents, offering her the opportunity to meet other young mothers.

44. On 1 September 2014 Donna Ross, social worker, was allocated to AT's case. Her line manager was Lynne McBean, Team Leader.

45. On 10 September 2014 the family's GP contacted the social work department and informed it, correctly, that the respondent had attended at the surgery advising that she was depressed, indeed suicidal, albeit without intent. AT had been seen to hit the respondent. He had been running around the surgery, apparently out of the respondent's control. AT's social worker visited the respondent and asked her to consent to him being subject to voluntary accommodation. She was not willing to do so. The respondent, incorrectly, attributed AT's behaviour at the surgery to a lack of toys there for him to play with. She asked that he be assessed for possible ADHD. This was not done.

46. At a child protection core group meeting on 22 September 2014, convened by the social work department, the respondent stated that she felt no connection to BT and that her priorities were AT and her unborn child. She said that she did not want further contact with BT, and did not want contact between AT and BT. She accepted that this was because they were aggressive towards each other and that she could not cope with both of them.

47. At a children's hearing for AT and BT on 25 September 2014 the respondent disputed the grounds of referral and the matter was referred to the sheriff for proof. Meantime AT was made the subject of an interim compulsory supervision order, removed from the respondent's care, and placed with foster carers. The respondent was very emotional and upset as a result of this decision.

48. AT has not resided with the respondent since the making of the said interim order on 25 September 2014.

Background to the present application, 2014 - 2016

49. Following his placement with foster carers the respondent was initially allowed contact with AT for one hour, twice per week.

50. On 3 October 2014 AT was moved to a different foster carer in Edinburgh as a result of his aggressive behaviour towards another child in the initial placement. AT remained in this new placement until June 2016.

51. Following AT's move to the new placement, contact was reduced to once per week for two hours, standing the travelling distance involved and the fact that the respondent was then heavily pregnant with CT.

52. On 10 October 2014 grounds of referral were established before the sheriff. These were that AT was likely to suffer unnecessarily or his health or development was likely to be seriously impaired due to a lack of parental care and that he had, or was likely to have, a close connection with a person who had carried out domestic abuse.

53. On 30 October 2014 AT was made subject to a compulsory supervision order with measures to secure his residence with foster carers, for non-disclosure of his address, and for contact with the respondent to be arranged and supervised by the social work department.

54. AT has had no contact with BT since October 2014. BT was himself made the subject of a compulsory supervision order at this time with a condition that he have no contact with AT.

55. On 6 November 2014 AT's name was removed from the child protection register.

56. At a Looked After Children's ("LAC") review on 30 November 2014 the petitioner's social work department agreed to undertake a twelve week rehabilitation assessment with the respondent. She was asked to demonstrate that she could change her lifestyle, establish routines consistent with caring for her children, and show willingness to prioritise their needs. In particular she was asked to live her life as if AT was still in her care. She was asked to demonstrate a clear routine whereby she would keep normal hours and routines and not be away from home overnight. Unannounced and out of hours visits to her home were arranged.

57. CT was born on 4 December 2014. He was subject to a child protection order at birth and placed with foster carers the same day. He has never been in the care of the respondent.

58. Following CT's placement in foster care, the respondent was permitted contact with him. This was initially exercised as the same time as contact with AT.

59. By March 2015 the respondent had resumed her relationship with RJ. She became pregnant by him but had a miscarriage. She did not tell the petitioners about resuming this relationship before doing so, even though she had agreed to disclose any relationships as part of the rehabilitation assessment.

60. The respondent may have been manipulated by RJ into restarting their relationship. However she was unable to fully understand the significance of resuming this relationship insofar as it bore on the assessment of her ability to resume care for her children. However the relationship ended again soon thereafter, and on 20 March 2015 the respondent advised the social work department of this.

61. Social work staff attempted around 30 out of hours contacts with the respondent during the rehabilitation assessment period. She was in her home on only 10 occasions. On other occasions she had been out with friends or at their houses.

62. At an LAC review on 23 March 2015 a recommendation was made that AT was a child in need of permanent substitute care. The same recommendation was made in respect of CT. These recommendations were made in the light of the results of the rehabilitation assessment. The petitioner considered that this had shown that the respondent was unable to meet the emotional needs of these children, and had not changed her lifestyle as requested.

63. From 26 March 2015 the petitioner reduced contact between AT and the respondent to once per fortnight. On 16 April 2015 contact between CT and the respondent was reduced to once per fortnight.

64. On 21 April 2015 the respondent advised a children's hearing that she was not then able to look after her children or focus on their needs.

65. On 11 May 2015 the petitioner reduced the frequency of contact between the respondent, AT and CT to once per month, for one and half hours. The respondent's contact with AT has remained at this level since then.

66. At the petitioner's Adoption and Permanence Panel ("APP") meeting of 15 June 2015 a recommendation was made that applications for permanence orders with authority to adopt should be made in respect of both AT and CT. The majority recommendation was that separate placements should be sought for them. The panel's unanimous recommendation was that following the making of a permanence order there should be no on-going contact between AT and the respondent.

67. On 2 July 2015 the petitioner's Agency Decision Maker ("ADM") considered the APP recommendation. He noted that MT, a maternal uncle, had attended the APP and indicated that he would wish to be assessed as a kinship carer for the children. He decided that the APP should reconvene, *inter alia*, to provide an opportunity for a full assessment of MT.

68. MT subsequently failed to respond to attempts by the social workers to contact or meet with him.

69. On 21 September 2015 the APP repeated its recommendation of 15 June 2015. On 5 October 2015 the ADM did not approve this recommendation. He noted that there had been no full assessment of MT, but also that:

> "a key barrier to [the respondent's] parenting is [her] mental health and she is attending counselling and psychiatric appointments but there is no information on the prognosis."

70. The petitioner sought information from the respondent's GP. On 11 November 2015 the respondent's GP wrote to confirm, correctly, that the respondent had long standing depression, but advised that her medication had been changed (to Sertraline) on 9 October 2015, due to worsening mood. The GP also noted that the respondent had expressed "passive suicidal thought but there is no intent. She states she just wants her kids back". The respondent had told her GP on 9 October 2015 that she was drinking a 70cl bottle of vodka every day but stated to him that she was "trying to reduce this and eat better". Finally, the GP advised that the respondent had attended counselling at the surgery on 8 October 2015 but failed to attend for a follow up appointment.

71. On 30 November 2015 the APP unanimously recommended that both AT and CT required permanent substitute care and by a majority recommended that the children should be placed separately.

72. The respondent advised the petitioner that she would not oppose the application for a Permanence Order in respect of CT as she felt that she had no bond or attachment with him, having never parented him nor had him in her care. She indicated that she would oppose the application in respect of AT.

73. On 14 December 2015 a children's hearing varied contact between CT and the respondent to nil, with the exception of an arranged farewell visit.

74. On 15 December 2015 the ADM approved the APP recommendation in respect of AT. In particular this decision was made in the light of the information in the GP's letter of 11 November 2015. The ADM stated that attempts at rehabilitation had failed:

> "because she is inconsistent and/or dishonest with information; says she can only care for one child in AT while also seemingly wanting BT to return to her; appears to have a marked alcohol problem; has had her medication increased to match symptoms/levels of concern; has missed an appointment with a 'counsellor'; and still seems chaotic at worst and unsettled at best. Also, AT requires a high level of care and activity."

By implication the ADM approved the APP's earlier recommendation that there should be no on-going contact with the respondent after permanence and adoption. However the ADM remained unconvinced that AT and CT should be placed separately, and directed that they should have 3 months contact with each other, separate from the respondent.

75. The respondent had her final farewell contact with CT on 12 January 2016. She has continued to have contact once a month with AT since then, for a maximum of one and a half hours.

76. On 25 January 2016 the respondent's mental state was reviewed by her GP following her attendance at the surgery. Her mood was assessed as normal and she was noted to be feeling well. The respondent had responded well to the change of medication in October 2015. She had also attended and completed a 'Beating the Blues' course, which she found helpful. Indeed she had substantially recovered from the symptoms of depression which had been recorded in the GP's letter of 11 November 2015. There was no suggestion that the respondent continued to have an alcohol abuse problem, such as had also been suggested by the terms of that letter.

77. At a children's hearing on 14 March 2016 a measure of no contact between AT and CT was imposed. AT had been assessed as showing little interest in CT.

78. At a further APP of 4 April 2016 it was again recommended that both AT and CT were in need of permanent substitute care and that they should be placed separately. The ADM approved this recommendation on 14 April 2016, while still urging a full sibling assessment to be finalised.

79. At a children's hearing on 6 June 2016 AT's supervision order was varied so as to move him to a new carer. This placement lasted less than three weeks, the foster carer being unable to prioritise and meet AT's needs. He was moved to live with Elaine Tait, foster carer, from 24 June 2016.

80. The children's hearing on 6 June 2016 also provided advice to the Court which supported the petitioner's present application in relation to AT.

81. A further children's hearing on 15 September 2016 made no change to the supervision order in respect of AT. The respondent did not formally seek a variation of that order, but was clear, as she has been throughout, that she wanted AT to be returned to her care.

AT's placement with Elaine Tait, June 2016 to January 2017

82. AT's placement with Elaine Tait began on 24 June 2017. Initially things went well. AT appeared a little shy on arrival, but engaged well with Mrs Tait and her two adult sons throughout the summer of 2016. During this time he took part in family outings and attended a local children's club without significant adverse incident. He ate and slept well. He behaved well.

83. Mrs Tait's care of AT was quite strict. She set clear behavioural boundaries for him from day one of the placement, and would not give into him.

84. About six weeks into the placement AT was taken on a short family holiday to Blair Atholl, to attend a horse show. Without warning his behaviour deteriorated. He began screaming, and tried to run away. He started pushing other people at the show and knocking over stalls. He continued such behaviour though the day and into the evening. On returning home the next day his behaviour deteriorated further. He refused to put his toys away in preparation for bed. He started kicking, punching and lashing out at Mrs Tait, screaming that he hated her.

85. Thereafter AT had more and more tantrums. These occurred particularly when he was in public places. He repeatedly kicked and punched Mrs Tait in the course of these tantrums. There were no obvious triggers to these episodes of bad

behaviour, other than AT not getting Mrs Tait's sole attention, and/or not getting his own way. He would repeatedly tell her and her family that he hated them.

86. These displays escalated in frequency, and by the end of 2016 were happening almost every day. AT's behaviour included purposefully knocking over his juice when he thought that Mrs Tait was not looking, destroying a paperback book that she was reading, intentionally urinating and defecating in his pants, smearing his faeces over the family car, and punching Mrs Tait on the face and body. When questioned, AT laughed and said that he wanted to be bad.

87. AT appeared happiest just sitting by himself watching a DVD. However Mrs Tait and her family often wanted to be outdoors, for example, to go for walks on the beach, and AT's behaviour would deteriorate if made to take part in such activities.

88. AT started school in August 2016. His behaviour in school was increasingly a cause for concern. He initially made friends, but due to his behaviour other children came to distance themselves from him. He was boisterous and pushed other children around. He took huffs. His teacher reported tension, fearing that he would lash out in class. He was abusive to the teacher, repeatedly telling her that he hated her and hated school. He was put on a misbehaviour diary, and assigned to a 'time out' area.

89. Towards the end of 2016 AT was increasingly being heard to make loud animal roaring sounds when in his room at Mrs Tait's house, his face contorted as he did so. This happened on daily basis in the morning and sometimes at night. When asked, AT has said that he knows that he is doing this but is unable to stop. In the light of this, on 8 December 2016, Mrs Tait took AT to his GP, who made a reference

for specialist psychological and behavioural assessment at Rainbow House. He remained on the waiting list for an appointment at the time of the proof.

90. AT increasingly demonstrated violence towards Mrs Tait's two German shepherd dogs. He repeatedly tried to hit and kick them, particularly the smaller of the two. Mrs Tait bought a small pony for AT, but he started hitting it with his fists. She asked him why he was behaving like this, and told him that it was cruel and bullying. AT responded by laughing and screaming at Mrs Tait and telling her that he was doing it because he wanted to.

91. When not exhibiting the said disturbed, abusive and violent behaviour AT presented to Mrs Tait as a great, loveable little boy. However by Christmas 2016 this presentation manifested itself for only around 10% to 20% of the time.

92. In summary, AT's behaviour became increasingly disturbed from about six weeks into the placement with Mrs Tait. His behaviour was such as to merit urgent assessment by specialist child psychological services. In the absence of such assessment the cause of his behaviour is unclear, albeit that it appeared to be triggered in particular by AT seeking Mrs Tait's full attention and challenging the behavioural boundaries set by her. It was, however, not prevented by Mrs Tait strictly applying such boundaries and by then not giving in to him.

93. On or around 17 January 2017 AT made an allegation that he had been scratched on the face by Mrs Tait. This allegation was denied by Mrs Tait. In the light of it, however, AT was removed from her care and placed with new foster carers. Police and social work investigations into the allegation were initiated.

Contact between AT and the respondent 2014 - 2017

94. The respondent has attended the majority of the contact sessions which have been arranged in relation to AT since September 2014.

95. Initially, AT exhibited disturbed behaviour during contact. At a session prior to the beginning of October 2014 he hit Sandy Torrance, then a support worker, bruised her, nearly bit her, and called her a 'stupid mongol'. He had a tantrum and Miss Torrance had to call for assistance.

96. Other than in these early sessions in 2014, however, AT has been compliant and generally well behaved during contact. He has never demonstrated any of the challenging behaviour which he had previously exhibited whilst in the respondent's care, and which he has continued to exhibit to his foster carers.

97. AT and the respondent have generally showed verbal and physical affection towards each other during contact, often expressing love for each other and exchanging kisses and cuddles at the beginning and end of contact sessions.

98. The respondent has tried to be positive towards AT, bringing games and other activities for him to do. However on occasion she has tended to impose her chosen activities upon AT rather than respond to his needs and wishes.

99. The respondent has not been able to consistently demonstrate positive parenting strategies for AT during contact sessions, for example boundary setting, but given his compliant behaviour she has not been significantly challenged in this regard.

100. AT can be controlling and attention seeking with the respondent during contact. AT generally leads the contact. He will tell the respondent what he wants to do, for example what game or activity he wants. However her response has

generally been to appease him, rather than to challenge him or to demonstrate that she could manage him and/or say "no" to him.

101. The respondent has sometimes struggled to understand and respond appropriately to AT's development, which has led to minor health and safety concerns. For example when he was two years old she failed to recognise that AT required to be stopped from eating hot soup, not merely told to blow on it. At the other end of the scale, when he was four years, old the respondent would not allow him to eat a whole grape in case it choked him.

102. The reduction in the frequency of the respondent's contact with AT between September 2014 and May 2015 was not because of anything occurring during the sessions, but because it was noted at that time that his behaviour sometimes deteriorated badly after contact. In particular he sometimes demonstrated anger, aggression and disturbed behaviour in the days following contact. This included lashing out at his foster carer and urinating and smearing faeces over the toilet. As these behaviours appeared to be a reaction to the contact sessions, the petitioner reduced the frequency of contact so as to reduce the frequency of AT's disturbed behaviour.

103. During his placement with Mrs Tait from June 2016, however, AT did not show any significant adverse reaction to contact with the respondent. Mrs Tait would not tell AT that he was going for contact until he was in the car on route to the visit. That was because she was concerned that he might misbehave. However he did not do so. He would generally be happy, and looking forward to the contact, although sometimes acting in a slightly immature manner. Further, during his

placement with Mrs Tait AT did not exhibit any disturbed behaviour after contact, or at least, any disturbed behaviour which she attributed to the contact.

104. The quality of contact between the respondent and AT improved towards the end of 2016. In particular the respondent was encouraged by Mrs Mains to set boundaries in relation to AT's behaviour during contact sessions, for example, when he used a negative tone of voice towards her or did not do what she asked him to do, such as tidying up the toys at the end of the session. The respondent attempted to set such boundaries and employ appropriate strategies, for example, by turning tidying up into a game, but she was not always consistent in this.

105. The respondent has however been more willing to accept assistance from Mrs Mains in relation to caring for AT during contact, for example, in receiving advice that as AT is now at school he is now able to go to the toilet by himself and does not need her to go with him any more.

106. There was also some evidence of positive change, for example, in that the Christmas presents that the respondent bought for AT in 2016 were more age and stage appropriate than in 2015. Additionally, whereas previously the respondent would tend to rush AT though playing with his toys, in relation to the 2016 Christmas presents she showed more awareness of his age and stage and allowed him more time and freedom to explore and play with the presents at his own pace.

107. More generally, the respondent has shown some progress in being able to adapt games for AT, for example by adapting the rules, or not sticking to them, so that he can play the game. She has thus demonstrated some better understanding of the stage AT is at and some better ability to respond to this. Accordingly recent contacts have involved more shared activities, and have been calmer, suggesting

some greater willingness or capacity of the respondent to respond to AT's needs on the day.

108. At a contact session in October 2016, however, the respondent left the contact centre engrossed in her mobile phone rather than saying goodbye appropriately to AT. On the other hand, at the contact session in December 2016 AT was a bit upset at the end of the contact session and the respondent, at Mrs Tait's suggestion, approached AT in Mrs Tait's car, gave him another cuddle, and put his seat belt on for him.

109. Overall, and more particularly during 2016, contact with the respondent has been a positive experience for AT.

110. The respondent manages AT's behaviour within the present contact arrangements. He has never exhibited during any contact session the kind of disturbed behaviour witnessed by Mrs Tait. Pamela Mains, the contact supervisor since 2014, has never seen AT exhibit such behaviour.

111. The contact sessions have by nature been an artificial parenting environment, however. Given their infrequency and short duration, they have provided a very limited opportunity to properly assess whether the respondent's ability to cope with caring for AT has improved or not since 2014. Moreover there has been no attempt by the petitioner since 2015 to seek to increase or change the contact so as to test the respondent's current ability in this regard. This is because since 2015 the petitioner has been working toward obtaining a permanence order, and thereafter to end all contact between the respondent and AT.

The respondent's circumstances, 2014 to 2017

112. Since AT was accommodated in September 2014, and more particularly since around the end of 2015, there have been a number of changes in the respondent's circumstances bearing, or at least potentially bearing, on her ability to parent him.

113. In particular, the respondent has remained mentally well since January 2016. She has been substantially free from the symptoms of depression from which she had suffered on and off since 2010, particularly in 2014, and which had been recognised by the ADM in October 2015 to be a "key barrier" to her parenting. She is now no longer taking anti-depressant medication. She presently has no psychiatric problems which might affect her ability to look after children.

114. The respondent has continued to have a social life, and for that purpose has on occasion gone out to visit friends, to go to parties, and to seek to form relationships. However she has not been involved in any anti-social behaviour or illegal or high risk taking activities, such as might have been prejudicial to the health of any child in her care.

115. Whatever the position noted by her GP in November 2015, the respondent has not had an ongoing alcohol abuse problem since then, nor currently.

116. The respondent has decreased her contact with her parents. She did have face to face contact with her mother in November and December 2016. Both those meetings were in Dundee city centre, and related to the giving of birthday and Christmas presents. The respondent has also had regular telephone contact with her mother. Telephone contact with her father is irregular and less frequent. The respondent recognises that her parents are not suitable persons to have care or

contact with her children. The respondent's brothers provide her with more stable support.

117. The respondent has obtained employment. In particular she previously obtained part time employment in a local take away. She has also now undertaken voluntary work, as a befriender, caring for the elderly. She has now done this work for over a year. The service is operated by the petitioner. It involves the respondent going out to the homes of elderly people, buying shopping for them, and to ensure that they are safe and well. She does this work alongside other volunteers. She works from about 9am to 3pm, dependent on demand, averaging about 16 hours a week. The respondent was interviewed by the petitioner for this work and has been successfully PVG (protecting vulnerable groups) checked for this purpose. She is awaiting an interview in order to become a full befriender, which would involve her being given greater responsibility.

118. The respondent's other personal circumstances are more stable. Apart from briefly resuming her relationship with RJ in spring of 2015 she has only had one very brief sexual relationship since AT was accommodated. She decided that it was not serious and did not continue with it. She better understands that being in a relationship bears on her ability to properly care for her children. She is not presently in a relationship.

119. The respondent also has a stable address, at which she had lived for around 10 months at the time of the proof. She had previously moved address on a number of occasions, including in search of work.

120. The respondent is unlikely to have any further children. She does not want any more children, and uses contraception. She also recognises that a further

pregnancy would be potentially dangerous for her in that she has already had miscarriages, three caesarean sections and associated medical complications. If she were to fall pregnant again, therefore, she would likely seek to have an abortion.

121. The petitioner has carried out six unannounced out of hours visits to the respondent, at evenings or weekends, since the end of 2015. Of these, the respondent was at home on only two occasions. However at least one of the respondent's absences from home was due to her being engaged in her said employment in the take away, and she had notified the petitioner's staff of this employment.

122. The respondent has continued to not be wholly open and honest with the petitioner's social work department. In particular she did not advise them in advance of her decision to resume a relationship with RJ, notwithstanding the previous history of domestic abuse towards her by him in the children's presence. On the other hand, the respondent did not in fact have the children in her care at the time.

123. The respondent has resumed contact with BT. In early 2016 she sought and obtained an interim award of contact in respect of him in opposed proceedings against TT. Initially, in around March 2016, the court awarded her one hour of supervised contact per week at the premises of Relationship Scotland. This contact progressed satisfactorily and by November 2016 the respondent was found entitled to three hours contact with BT every Saturday morning. Two of these three hours are unsupervised and being exercised outwith the contact centre. She has taken him for food, shopping and recreation in Dundee city centre. This contact has mostly gone well. BT's behaviour has been challenging on a couple of occasions but the

respondent has managed this adequately. She recognises that BT's best interests are served by him residing with his father.

124. The respondent has recognised, correctly, that she had no bond or attachment with CT, and that it was not in his best interests for her to care for him. Accordingly she did not oppose the petitioner's application for permanence. To this extent the respondent has demonstrated that she is capable of recognising and acting in the best interests of one of her children, and putting his interests before her own wishes.

125. The respondent has also recognised, again correctly, that prior to September 2014 she was not, and is still not, able to cope with having more than one child in her care at a time. Given the present legal status of CT and BT the respondent would not have care of more than one child were AT to now return to reside with her. While she presently has contact with BT, she does not want the boys to meet. If AT was returned to her care the respondent would intend to make arrangements for him to be looked after by his maternal uncle while she had contact with BT. She would also intend to reduce this contact to once per fortnight.

126. If AT were returned to the respondent's care, she would intend to contact the petitioner if she was having difficulties parenting AT. She would however be reluctant to do so, for fear that he would again be accommodated.

127. Notwithstanding these said changes in the respondent's circumstances, the petitioner has not formally reassessed the respondent's ability to parent AT as at the date of proof. This is because the ADM had already decided in November 2015 that an application should be made for a permanence order with authority to adopt. Indeed this has been the petitioner's intention since the recommendation of the LAC in March 2015.

AT's present circumstances

128. AT's physical health is good. He has a good diet and enjoys swimming and football. There is no evidence of any learning difficulty, indeed he is a bright boy.

129. AT is however attention seeking and manipulative. He likes to be in control of situations. He reacts adversely to be told "no" by an adult, and to an extent which is abnormal for a 5 year old boy. He is demanding of full attention from adults and reacts adversely when this is not forthcoming. In particular he reacted adversely to sharing the respondent's attention with BT, prior to 2014, and with CT, prior to December 2015.

130. AT's behaviour towards his foster carers continues to be often very disturbed and challenging, as described above in relation to his placement with Mrs Tait. Given this behaviour, AT cannot safely be left alone unsupervised with other children.

131. The cause of AT's ongoing disturbed behaviour is unclear. Given that more than two years have passed since he was in the care of the respondent, it is not established that it is attributable to anything done or not done by the respondent by way of parenting him prior to September 2014. Nor is it apparent that there is any present correlation between AT's disturbed behaviour and his contact with the respondent. Given that his behaviour has continued to be disturbed notwithstanding the relatively strict parenting regime maintained by Mrs Tait between June 2016 and December 2016, it is not established that the presence of such a boundary setting regime ameliorates his behaviour, nor that the absence of it is likely to lead to a deterioration.

132. Given AT's ongoing disturbed behaviour, consideration has been given to formally assessing him, for example, by a child psychologist. This has not been done. The petitioner took a decision not to do so until the present proceedings were concluded.

133. Consideration has recently been given to carrying out life story work with AT to give him some understanding as to his history and current placement. However social work staff are concerned that this will unsettle AT and accordingly that it should not be carried out until the present proceedings are concluded.

134. AT needs a clear family structure and routine in his care in order to help him feel safe and secure. He will need significant support from his future carer to regulate his emotions and develop his coping skills. The precise nature of that support and how best it can be given remains to be fully assessed.

135. AT has not yet been placed for adoption. Family finding has been put on hold by the petitioner pending the conclusion of the present proceedings. The petitioner is reasonably confident that a suitable adoption placement will be sourced and that an adoption petition will be lodged within identified timescales. That is based on social work staff's experience of finding adoptive placements for children like AT with similar behaviours.

136. AT has a photograph of the respondent on his bedside cabinet, and it is important to him. He also has a jumper which the respondent bought him, and which he took to school for a homework activity where he had to bring in something to do with his family.

FINDS IN FACT AND LAW:

1. The respondent is a person who has the right mentioned in subsection (1)(a) of section 2 of the Children (Scotland) Act 1995 to have AT living with her or otherwise to regulate his residence.

2. AT's residence with the respondent is not likely to be seriously detrimental to his welfare.

THEREFORE:

Dismisses the petition; finds no expenses due to or by either party, and decerns.

NOTE:

[1] I heard proof in this matter on 17 January and 27 January 2017. Parties had helpfully prepared and lodged a lengthy joint minute. Mrs Carena, for the petitioner, led evidence from Donna Ross, Sandy Torrance, Lynne McBean, Elaine Tait, and Pamela Mains. They spoke to confirm and to supplement lengthy and detailed affidavits produced in lieu of examination in chief, and were subject to cross examination. Mr Mackinnon, for the respondent, led evidence from the respondent herself and from Dr Sarah Holmes, a consultant psychiatrist.

[2] A hearing on submissions was fixed for 21 March 2017 but was adjourned to allow parties' representatives to consider and take account of the decision of the Supreme Court in *West Lothian Council* v *B* 2017 SLT 319, in which judgment was handed down on 1 March 2017.

[3] Meantime, after argument, I allowed the respondent to adduce additional evidence, in the form of a joint minute, regarding a conversation which the

respondent had had with Sandy Torrance on 30 January 2017 (now the subject of finding in fact 136, above).

[4] The adjourned hearing on submissions was held on 30 March 2017, following which I reserved judgment.

Witnesses – Donna Ross

[5] Donna Ross is a social worker who has been employed by the petitioners since 2011. Her qualifications and experience are as set out in paragraphs 1 to 6 of her affidavit of 22 December 2016. Miss Ross was AT's allocated social worker between 1 September 2014 and 5 December 2016, when she was promoted to Team Manager. She spoke to the terms of her affidavit of 22 December 2016.

[6] Miss Ross was clearly an experienced social worker, and I have no doubt that she was seeking to act in the best interests of AT. I did however consider that there was force in Mr MacKinnon's submission that there was evidence of material changes in the respondent's circumstances since the end of 2015 relevant to her parenting ability, and that a further formal assessment of this could and should have been carried out. But, as Miss Ross accepted, once the ADM's decision to seek permanence with authority to adopt was made it was not open to her to change it. Miss Ross did seek to suggest that there had been some degree of informal assessment of the respondent's parenting skills since the ADM's decision, and suggested that she had not seen any change in this regard. Miss Ross also said that she could have asked the APP to reconsider the matter if changes had occurred. However it seemed to me that there was circularity here, because standing the

ADM's decision no further formal assessment was carried out, and thus the changes in the respondent's circumstances were not fully appreciated or evaluated.

Elaine Tait

[7] Elaine Tait has been an approved foster carer since March 2016. She had previously been a police officer for 12 years, and prior to that a prison officer for five years. AT was Mrs Tait's first placement, and he resided with her from 24 June 2016. Mrs Tait gave evidence at the hearing on 17 January 2017, and in particular spoke to her affidavit of 6 January 2017. By the time of the adjourned diet on 27 January 2017, however, the placement had broken down due to an allegation by AT that Mrs Tait had scratched him on the face, and AT had left her care. Mrs Tait was not recalled, but the circumstances of the breakdown were spoken to by Sandy Torrance. She advised that Mrs Tait denied the allegation. The police and social work investigation was ongoing at the time the proof was concluded.

[8] Without prejudice to the outcome of this investigation, Mrs Tait appeared to me to be an impressive witness who had done her best for AT in the face of the very considerable challenges which he presented for her. I accepted her evidence as generally credible and reliable. However there remains the critical question of why AT exhibited such disturbed behaviour while in Mrs Tait's care. Mrs Tait could not answer that question. She said that she had taken a strict, boundary setting approach to AT from day one. It is unclear to me whether a different, more nuanced, or simply less strict approach would have resulted in better or worse behaviour. Mrs Tait thought that AT's behaviour would have been worse with a less strict approach but, with respect to her, given his extreme behaviour I would not be

prepared to draw such a conclusion without hearing expert evidence. Such expert evidence might have been available from the proposed Rainbow House child psychology assessment, but the referral was only initiated in December 2016 and no report was available for the proof. That is of course not Mrs Tait's fault.

Lynne McBean

[9] Lynne McBean is an experienced Team Leader in the petitioner's social work department. She spoke to her affidavit of 20 December 2016. As Team Leader, part of her role is to analyse case information primarily derived from contact through front line social workers. The respondent's case had been referred to her team in around July 2014. Mrs McBean had therefore been line manager for Donna Ross following her assignment to the case in September 2014, and continued in this role until Miss Ross' promotion to Team Leader in December 2016. Mrs McBean continues to be line manager for Pamela Mains.

[10] I had some concerns about Mrs McBean's evidence. In the first place, given the nature of her role, it often amounted to her opinion as to the interpretation of factual matters relayed to her by other social workers. That is by its nature of limited assistance to the court in carrying out its primary fact finding role. In the second place, however, I felt there were problems in Mrs McBean's understanding and interpretation of the facts in any event.

[11] For example, in paragraph 9 of her affidavit Mrs McBean states that "it has been difficult to evidence [the respondent's] position over the last year". If that is so however, it seem likely that it is because, as noted above, her position had not been formally re-assessed over this period, the decision to seek permanence having

already been made. Thus when Mrs McBean states that "we have no confirmation regarding her mental health … being in a better place", it begs the question why she had not sought this. But in any event this statement also now flies in the face of the letter of 22 September 2016 from the respondent's GP, which Mrs McBean accepted in oral evidence that she had seen before signing her affidavit. It also flies in the face of the report of 6 January 2017 by Dr Sara Holmes, the respondent's consultant psychiatrist, albeit that Mrs McBean had not seen that report prior to giving evidence. In the light of all this Mrs McBean's conclusion regarding the respondent's present mental state cannot be accepted. There clearly is evidence, indeed unchallenged medical evidence, that the respondent's mental health has improved since the end of 2015.

[12] It was also concerning to me that Mrs McBean's oral evidence was that she was not aware that the respondent's mental health problems had ever been "significant". That is surprising, given that (i) on 5 October 2015 the ADM had described the respondent's poor mental health as a "key barrier to her parenting", and (ii) that on 15 December 2015 he had recognised, in approving the APP decision for permanence in the light of the GP's letter of 11 November 2015, that she had "had her medication increased to match [her mental health] symptoms/levels of concern". In my view therefore there clearly was evidence that the respondent's depression was both significant in nature and degree at the end of 2015, and that it was relevant to her ability to parent AT at that time. Mrs McBean was therefore either unaware of this or unwilling to acknowledge it.

[13] Mrs McBean also states at paragraph 9 of her affidavit that "my team still do visits to [the respondent] on a sporadic basis but she's never at home". I would

accept that as Team Leader Mrs McBain would not necessarily have the precise number of visits at the front of her mind, but this statement appears to be inaccurate and unfair to the respondent. It was inconsistent with Miss Ross' evidence that the respondent was at home on two out of (only) six visits which have taken place since the end of 2015. And it also fails to take account of the evidence that the respondent was notified that the respondent was likely to have been at work on at least one of the occasions when she was not at home, a matter of which Mrs McBean was apparently unaware. This was a matter relevant not only to explain the respondent's absence from her home out of hours, but might also suggest some greater willingness by the respondent to communicate relevant information to the social work department, and also perhaps some increased level of stability reasonably to be associated with gaining employment. At the very least, it was not correct to proceed on the basis that the respondent was "never at home", and therefore by implication that she was simply continuing to live the same unstable lifestyle as prior to September 2014.

[14] Further still, when Mrs McBean asserted at paragraph 10 of her affidavit that "[the respondent's] pattern of parenting has promoted AT's behaviours", it is unclear what expertise she has to give such an opinion given the extreme nature of his behaviour as spoken to by Mrs Tait. It is also unclear how Mrs McBean's opinion squares with the evidence that, two years after he was removed from the respondent's care, Mrs Tait's very different pattern of parenting had apparently done little or nothing to alleviate AT's behaviours. And additionally, Ms McBean's further comment that "at the moment AT's behaviours are contained in the placements" seemed to me to rather fly in the face of Mrs Tait's evidence.

[15] Fundamentally, Mrs McBean's position was that, as she puts it at paragraph 10 of her affidavit, "there is no evidence from [the respondent] that there would be any difference from the previous time when AT lived with her." In my view that assertion is not correct – there is at least *some* evidence to this effect. There have been relevant changes in the circumstances and presentation of both the respondent and AT over the last 18 months. Whether these changes, although relevant, are sufficiently material as to justify a conclusion that the respondent could now properly parent AT remains to be seen. But there are at least grounds to formally reassess the matter. In the absence of this I am unable to accept Mrs McBean's assertion, in effect, that as regards the respondent's ability to parent AT, there have been no positive changes since 2014.

Pamela Mains

[16] Pamela Mains is an experienced Family Support Worker employed by the petitioner. She spoke to her affidavit of 31 October 2016, and supplemented this with further oral evidence. Mrs Mains first had involvement with the respondent and AT in 2012 when working at the Douglas Family Support Centre. She resumed working with the family after AT was accommodated in September 2014. Since then she has in particular supervised contact between the respondent and AT – both Miss Ross and Ms McBean had accepted that they had not been significantly involved in this contact.

[17] Mrs Mains' affidavit reads rather negatively in relation to the extent to which the contact visits reflect on the respondent's ability to properly parent AT. Mrs Mains was however rather more positive in her oral evidence, and pointed to a

number of areas where she had seen some recent improvement in this regard. These included greater awareness of and ability to respond to the age and stage of his development and which I have sought to reflect in the findings in fact set out above.

[18] I was however concerned in relation to the general picture being presented in relation to contact. The petitioner's broad thesis is that the respondent would be unable to cope with the sort of behaviour from AT that Mrs Tait described in her evidence. In particular that is said to be because the respondent is no better at boundary setting for AT in relation to his bad behaviour than she was in 2014. However Mrs Mains' evidence was that AT has never exhibited any significantly challenging or disturbed behaviour during contact sessions since 2014. It follows that there has never been any real opportunity to assess how well the respondent would now cope with it.

[19] That begs the obvious question, why has contact not been increased or changed so as to test the respondent's current ability in this regard? Why has the contact remained at such a low level, only one and half hours a month, since around May 2015, notwithstanding the evidence of some positive change in the respondent's circumstances? I am driven to the conclusion that the real reason for this is that the petitioner has planned since 2015 to seek a permanence order with adoption and to stipulate no contact with the respondent thereafter. That plan having been made and decided upon, the petitioner has not considered it appropriate to try to develop contact further, let alone to use it to re-assess the respondent's parenting abilities.

[20] Like Mrs Tait, Mrs Mains thought that the respondent would struggle to cope with the sort of extreme behaviour which AT has exhibited in recent times. I can well understand their concerns. But as I commented in relation to Mrs Tait's

evidence, it is hard if not impossible to properly evaluate this without knowing more about *why* AT still behaves as he does, which parenting strategies would best address this behaviour, and the extent to which – if need be with suitable assistance – the respondent would now be able to make use of such strategies. In particular the context for such assessment is not what it was in 2014 and 2015, standing that the respondent no longer has care of either BT or CT, and that they will (as I understand it) be having no further contact with AT. In the absence of evidence about this, as Mrs Mains accepted, what might happen as regards his behaviour if AT were to move back to live with the respondent is essentially speculative.

Sandy Torrance

[21] Sandy Torrance has been a qualified social worker employed by the petitioner since November 2015. However she has many years' previous experience working in children's services in a number of different roles. Her experience is set out in full in her affidavit of 13 January 2017, to which she spoke in evidence. Miss Torrance had contact with the respondent and AT when employed as a child support worker in August 2014. She observed contact between the respondent and AT and BT around this time, and also observed contact between the respondent and AT in the weeks after he was accommodated in September 2014. Her next contact with the respondent and AT was when she was allocated as AT's social worker in November 2016.

[22] It was clear that the respondent was unhappy that Miss Torrance had been appointed as AT's social worker, and that she perceived her as having a vendetta against her, arising from previous involvement with her mother and brothers. Miss

Torrance denied this, and I was not satisfied that there was any real substance in the respondent's allegation. Nevertheless, that remains her perception, which is unfortunate, given that it may have affected her ability to fully engage with Miss Torrance, and be completely open and honest with her.

[23] Miss Torrance's involvement as social worker had been relatively limited by the time of the proof. She had only met the respondent twice at home, twice at contact, and at a children's hearing. However she maintained, for the reasons set out in the last three paragraphs of her affidavit, that the respondent had not given any serious thought to how she would manage AT if he was returned to her, nor how she would cope with both boys at the same time, given the renewal of contact with BT. She also did not accept that the psychiatric report by Sarah Holmes established that the respondent's mental health presentation had changed such as to justify reassessment of her ability to parent AT. Furthermore she did not accept that the respondent was being honest with the social work department, for example in relation to ongoing contact with her family and as regards any new relationships which she might be entering into. She also criticised the respondent for still seeming to prioritise AT over BT.

[24] I acknowledge Miss Torrance's concerns, but was not prepared to accept that they were as damaging to the respondent's position as seemed to be suggested. There is unchallenged medical evidence from both Dr Holmes and from the respondent's GP suggesting that the respondent's mental state has improved significantly since the end of 2015. Miss Torrance accepted that she could not disagree with this diagnosis, as she was not a doctor. But as already noted in relation to Mrs McBean's evidence, the respondent's perceived poor mental health was

regarded as significant in the decision to seek permanence. Therefore, for the reasons already discussed, unchallenged medical evidence to the effect that her mental health has since improved is on the face of it a matter justifying reassessment, and I was not prepared to accept Miss Torrance's evidence to the contrary.

[25] Further, I have difficulty understanding the criticism of the respondent for suggesting that if AT was returned to her care she would ensure that he went to a relative during contact with BT so as to ensure that they would not meet. It seems clear that it is not in these children's best interests to have contact with each other. That has been accepted by the petitioner and the children's hearing. By suggesting that she keep contact separate the respondent seems to me, responsibly, to be acknowledging and accepting this, and making a reasonable proposal to accommodate it should AT be returned to her care. Furthermore, there is nothing to the allegation of 'favouritism' in this context: if the starting point is that the boys must be kept apart in their own interests, then for the respondent to have contact with both of them will inevitably involve, if only for a couple of hours a fortnight, prioritising one over the other. I do not see the difficulty with that, nor that it somehow shows the respondent in a bad light.

[26] As for honesty between the respondent and the social work department, I acknowledge of course that this is important. There can be no sensible suggestion other than that were AT returned to the respondent's care she would need support from the petitioner in order to parent him, and that support can only properly be given, consistent with the child's best interests, if the petitioner is open and honest in her dealing with the social workers. There is evidence that she has not been, and I am not naïve about that. However it is unfortunate, to say the least, that the

particular social worker now allocated to AT's care, Miss Torrance, is one who the respondent regards as having a vendetta against her. That is hardly likely to foster the openness and honesty on the respondent's part which is being sought. No such allegation was made in relation to Miss Ross.

[27] Miss Torrance also confirmed that she based much of her view of the case on the history of it, and that she did not see herself as engaged in continuing to assess the respondent's suitability to parent AT. She accepted that this was because of the ADM decision to seek permanence in respect of him. I agree with Mr MacKinnon that this is concerning, in the circumstances. For example, some reliance was placed on the fact that the respondent's contact with AT, although on the face of it positive, was in a somewhat artificial setting, and therefore could not be relied upon as a useful predictor of what would happen if he was returned to her care. But as already discussed, no attempt had been made to develop the contact with AT to test this hypothesis. And, furthermore, no assessment had been carried out in relation to the contact which the respondent was now exercising with BT. That is so even though this contact was now not supervised within a contact centre, and that BT was no longer subject to social work supervision either. That seemed to me to be surprising, to put it mildly, particularly given that Miss Torrance was relying so heavily on the respondent's past failures to parent both boys. If matters have so changed since 2014 that the respondent is now deemed fit to have regular unsupervised contact with BT, then there is surely a case for at least reassessing her fitness to care for AT outwith the minimal present contact arrangements.

The respondent

[28] The respondent gave oral evidence and was examined and cross-examined at length. She was well presented, of average intelligence, reasonably articulate, patient and polite. She often used social work terminology in her evidence, which came across as slightly artificial. It was suggested that this meant that she was saying what the social worker wanted to hear and that her use of this terminology did not include full understanding of it. That may be so to some extent, but in my view it is also consistent with a life lived in and around social work intervention. I did not consider that it meant that she was being dishonest.

[29] The respondent spoke about her relationship and contact with BT, CT and AT. She said that she had always maintained that AT's father was KC, but this is inconsistent with evidence agreed by her in the joint minute. She gave an explanation for why another male, WP, had nonetheless had a DNA test to see whether he was the father. I did not find this particularly convincing, but in any event it is apparent that the respondent had had different sexual partners at or around the relevant time and it is unsurprising if there was some dubiety about who AT's father was. All that said, at least since WP's DNA test, if not before, the respondent has maintained that KC was AT's father. It is also clear that he has had never had any involvement with AT's life, and that his whereabouts are presently unknown to either party.

[30] As the respondent said, until 2014 there was no direct social work involvement with AT. She accepted that in that year she became, in effect, unable to cope with caring for BT and AT, and in particular that she was unable to put in place and enforce consistent boundaries in relation to their behaviour. She attributed

most of this to her being particularly depressed at that time. She described her symptoms. She went on to describe 'beating' her depression at around the end of 2015, and the treatment which she had around this time. I thought that the respondent's evidence in this regard was a little overstated, but accepted that there had been an improvement in her mental health since 2015.

[31] The respondent accepted that she was also prone to swearing when she was under stress, and that she had sworn at and used bad language around BT and AT when they were in her care. She said that she had been told by her GP that this might in part be due to Tourette's syndrome. That is not established by medical evidence, but to be fair to the respondent she did not seek to blame Tourette's syndrome for all her swearing, just to suggest that at times of stress it might play a part. In the absence of medical evidence to this effect I was not prepared to accept it. I thought it more likely that the respondent simply swore more at times of stress.

[32] The respondent denied, as is stated in her GP's letter of 11 November 2015, that she had ever said that she was drinking a bottle of vodka daily at this time. I didn't accept her evidence about this. This information in the GP letter could only have come from an entry in the GP notes, which in turn would likely have come from the respondent. The respondent's suggestion that this entry could not be true because "I don't drink", did not sit well with her earlier evidence that WP had had to take a DNA test in relation to paternity of AT because she had had sex with him "when I was drunk".

[33] On the other hand I do not see this as a particularly harmful point against the respondent. She was clearly depressed towards the end of 2015, as her GP's letter also makes clear, and alcohol and depression are regular bedfellows. But more

importantly, there is no other evidence in the case to suggest that the respondent has at any other time since 2015 had an alcohol abuse problem, let alone to a degree which impacts adversely on her ability to care for children. Allegations of alcohol abuse form no part of the petitioner's present case, as I understand it, and they presumably would do if there was any current evidence of it. Therefore even accepting that the respondent was abusing alcohol when depressed in 2015, her circumstances in this regard too appear to have improved since then, which again is generally supportive of her position in the case.

[34] The respondent accepted that she was now in regular telephone contact with her mother, indeed every couple of days. She was in telephone contact with her father once per week or once a fortnight. She accepted that she had had direct contact with her mother on two occasions in November and December 2016, but that prior to that she had had no direct contact with them since summer 2016. Her position was that she had put them out of her life, in particular because having beaten her depression she did not need their support any more. I did not wholly accept this and I did not fully believe the respondent's evidence on these matters. It seemed to me clear that she was still in regular contact with her parents, both by telephone as she accepted, and probably face to face more than she was prepared to admit. On the other hand I was prepared to accept that she had decreased her contact with her parents to some extent.

[35] The respondent was however able to identify her parents as negative influences on her life and, for example, to recognise that her mother continued to drink to excess. I felt that she was caught between telling the social work department what she thought that they wanted to hear, on the one hand, and

completely cutting her parents out of her life, which she did not want to do. The more important question to my mind, however, is the extent to which any contact with her parents might now impair her ability to provide adequate parenting for AT. There was evidence that on at least two occasions she had left AT in her mother's care in 2012, and of course that would still be concerning if repeated. However I did not understand it to be a major part of the petitioner's present case that AT would be at risk from direct contact with the respondent's parents if returned to her care. Rather the position seemed to be that the respondent's parents were woefully inadequate in their parenting of her, thereby depriving her of the basic experiences of growing up in a stable, functional family, and on which she could draw in seeking to parent her own children. While I may of course be wrong, I thought that there was in the respondent's evidence some recognition of this and that whatever motivation there was to maintain contact with her parents, it was not to seek their advice or support in relation to parenting AT. To that extent, at least, I did not consider that the respondent's continuing contact with her parents, and her lack of candour about this, was as damaging to her position as seemed to be suggested.

[36] The respondent was asked about her contact with AT, and she said that she thought that it was fine, but that he did not show any challenging behaviour. The respondent said that she would like him to show this sometimes, so that she could show that she was now able to put boundaries in place. She accepted that by September 2014 she was unable to look after AT properly. She said that she wanted another chance to prove that she could be the mother that he needed. She said that she had changed, in particular by beating her depression. She said that she had

asked Donna Ross for another rehabilitation assessment but that this had been refused.

[37] The respondent accepted that she had a number of sexual relationships, that she had been subject to domestic violence by RJ in particular, which was witnessed by BT and AT. She accepted that she had nevertheless resumed a relationship with him. She accepted that she herself had been violent towards BT's paternal grandmother, and that BT had been a witness to this, but she claimed that she acted in selfdefence. All this is concerning, of course. It suggests a lack of domestic stability, a failure to protect BT and AT from exposure to domestic violence, and no doubt gave good grounds for social work intervention in 2014. The question remains whether this would be likely to be repeated if AT were returned to the respondent's care.

[38] Overall, my impression of the respondent was that she remains somewhat immature, vulnerable and not fully honest with herself or the social work department. She continues to carry the scars of a very dysfunctional and disturbed upbringing which has left her ill-equipped to parent her own children. But she is not a bad person. She is trying to do the right things. The question is her ability to do so, not her wish to do so. There is no doubt that she failed in her attempts to properly parent BT and AT to 2014, but to be fair, she recognises and accepts this, and has shown some insight into the reasons why it occurred. She is realistic in seeing that she cannot cope with parenting more than one child. She is realistic in seeing that she needs help from the petitioner and other agencies in order to parent adequately. She expresses herself willing to seek such help. She had previously engaged with the petitioner's Incredible Years parenting programme, but her

children were removed from her care before this programme was completed. I accept that she is willing to utilise such supports again were AT to be returned to her. Overall it is not clear to me that if they were put in place she would not now be able to properly parent AT.

[39] Lest it be forgotten, I have no doubt that the respondent loves AT and wants to be a good parent to him.

Sarah Holmes

[40] Sarah Holmes is a visiting consultant psychiatrist at The Priory Hospital, Glasgow. She has been a consultant psychiatrist since 2006, and works in general adult psychiatry, taking referrals from GPs. She has a caseload of around 200 patients, and provides 30 to 40 reports for court per year. At the instruction of the respondent's solicitor Dr Holmes examined the respondent on 14 December 2016 and prepared a report dated 6 January 2017. She had had no previous knowledge of or involvement with the respondent. In preparing her report Dr Holmes had access to the respondent's GP medical notes, certain GP letters, and certain of the social work reports. Dr Holmes confirmed the terms of her own report, and was cross examined on it.

[41] Dr Holmes gave her evidence in a clear and cogent fashion. I had no difficulty accepting the central aspect of her evidence, which was that towards the end of 2015 the respondent was suffering from mild to moderate depression, that the symptoms of this condition had since resolved, and that she was presently not suffering from depression. Dr Holmes agreed that the history of the respondent's depression between 2010 and 2015, and its resolution since then, was consistent with

her having post-natal depression persisting after and through the birth of her three children. I was also prepared to accept Dr Holmes' further evidence that the nature and extent of the respondent's depressive condition prior to 2015 could well have adversely affected her ability to parent her children, but that there was now no psychiatric diagnosis which would affect her ability to do so. In particular I accepted that the respondent's depression may have affected her ability to regulate her emotions and so respond appropriately to her children's needs and emotions.

[42] Beyond that, I think that there is little that can be taken from Dr Holmes' evidence. In her report she noted the respondent claimed a number of changes and improvements had occurred in her social and personal circumstances since 2015, including that she had broken contact with her parents. Dr Holmes offered a tentative view that in the light of such changes, taken together with the improvement in the respondent's mental health, it might be appropriate for the petitioner to review their decision in relation to AT, taking into account his views, and to provide a current parenting report. With respect to Dr Holmes, it seemed to me that this went beyond her field of expertise. It is also dependent, in part, on acceptance of the respondent's account of her social circumstances as true and accurate, which is now a matter for the court to determine.

Submissions

[43] Mrs Carena moved me to grant the petition and make a permanence order with authority to adopt. She referred to section 84 of the Adoption and Children (Scotland) Act 2007. Under reference to *R* v *Stirling Council* 2016 SLT 689 and the decision of the Supreme Court in *B* v *West Lothian Council* she accepted that section

84(5)(c)(ii) represented a threshold test. Unless I was satisfied that AT's residence with the respondent was likely to be seriously detrimental to his welfare (the 'serious detriment' test), I would be bound to refuse the application. She submitted that on the evidence I should be so satisfied.

[44] In summary Mrs Carena submitted that the respondent's parenting had been defective prior to September 2014. It was not suggested that the respondent had ever failed to properly clean, feed, clothe or had otherwise physically neglected her children, nor that she had ever failed to maintain their home in a sufficiently clean and tidy condition. The respondent's parenting had been defective as regards understanding and responding appropriately to her children's emotional and developmental needs. This was notwithstanding that she had been offered various supports by the petitioner with a view to assisting her with parenting. There had been failures to discipline BT and AT, and to consistently set and enforce appropriate boundaries on their behaviour. There were numerous incidents of the respondent swearing at, or in front of, the children. There were instances of the children witnessing violence within the home, and the respondent had failed to protect them from this. As a result the children's behaviour was regularly verbally aggressive and physically violent towards each other, the respondent, and social work staff. Mrs Carena also sought to pray in aid the evidence regarding the contact sessions. She submitted that the respondent had continued to fail to set clear boundaries and demonstrate consistent parenting skills in this context.

[45] As regards the respondent herself, Mrs Carena noted that she claimed in large measure that her problems with parenting prior to September 2014 were due to her suffering from depression, and that in this and other aspects of her life she had

now changed for the better. But Mrs Carena disputed, in effect, that any changes which had occurred in the respondent's mental health, social circumstances or lifestyle were likely to have materially improved her ability to provide proper parenting for AT. She submitted that the social workers had not noticed any difference in the respondent's presentation as regards her mental health. She submitted that the respondent had been assessed following AT being accommodated, and that, in summary, there had been no significant or material improvements in her parenting ability. Mrs Carena asked me to accept the evidence of the petitioner's witnesses as consistent and reliable in this respect. She submitted that the evidence of the respondent herself was to the effect that she still did not believe that AT's behaviour was as bad as Mrs Tait and others had reported, and that she was being naive in believing that she could manage it appropriately. In the absence of positive changes in the respondent's parenting ability, Mrs Carena submitted that it was likely that AT would, if returned to her care, suffer serious detriment from a lack of consistent parenting and understanding of his needs, leading to a deterioration in his behaviour.

[46] Mrs Carena also sought to pray in aid the fact that numerous children's hearings since September 2014 had consistently decided that AT should be accommodated with foster carers and not returned to the respondent. I queried the relevance of this, and Mrs Carena accepted that the children's hearings had not had to address the serious detriment test in section 84(5) of the 2007 Act. She further accepted, as I understood it, the proposition which I put to her to the effect that even if all the decisions of the children's hearings were correct, that still did not establish that it would now be seriously detrimental to AT for him to reside with the

respondent. This would be so, even accepting that a refusal of the present application might well mean that AT remained within the children's hearing system rather than, in fact, being returned to the respondent's care. However the critical question is not whether it is preferable that AT is subject to permanence with authority to adopt on the one hand, or remains in the children's hearing system on the other, but simply whether the petitioner has established, on the evidence, that the serious detriment test has been met.

[47] On the assumption that the serious detriment test was met, Mrs Carena submitted that the further tests for the making of a permanence order in section 84 were also satisfied. In this connection Mrs Carena submitted that the making of a permanence order would give AT stability and security throughout childhood. It was in his best interests to make the order, and it would be better for AT that the order be made than not made. In this regard she accepted that the evidence suggested that AT needed professional help – which I took to mean from a child psychologist or other appropriate specialist – but that this had been delayed pending the conclusion of the present legal process.

[48] Turning to the question of adoption, Mrs Carena submitted that the tests in section 83 and 14 of the 2007 Act were met. She submitted that although AT had not been placed for adoption as yet, the evidence of the petitioner's witnesses established that he was likely to be placed for adoption within a reasonable time. In the event that a permanence order with adoption was granted, it was further submitted that it would not be appropriate that the respondent should continue to have direct contact with AT. She submitted that the test was whether ongoing contact would safeguard and promote AT's welfare. Mrs Carena referred to the case of *East Lothian Petitioners*

(re the child LSK) [2012] CSIH 3 at paragraph 49. She accepted that the onus of proof in this aspect remained on the local authority. She also accepted that some form of indirect contact, for example by letter once or twice a year, might be appropriate and that it was for the court to specify that under section 82(1)(e) of the 2007 Act.

[49] Mr MacKinnon, for the respondent, moved me to dismiss the petition. He began by submitting that the decision in *West Lothian Council* v *B* did not greatly affect the respondent's position other than to emphasise and strengthen the serious detriment test in section 84(5). Her position was, and remained, that this test had not been established by the petitioner in this case. He drew attention to paragraph 29 of the Supreme Court's decision where Lord Reed states that:

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

As I said to Mr Mackinnon, however, this passage really just emphasises the need for clarity in the written decision-making by the judge of first instance. It does not, of itself, say anything about the substance of the serious detriment test. It is however important to recognise that this test is prospective. It involves assessing likely future risks to the child based on findings of fact in relation to past events.

[50] Mr MacKinnon also referred to paragraph 53 of *West Lothian Council* v *B*, where Lord Reed criticised the Lord Ordinary for failing to analyse the "benefits and detriments of the available options". He submitted that this was "eerily similar" to the present case. For my part I would accept that what this passage emphasises is that in addressing the serious detriment test it is necessary to compare the merits of the child residing with its parent or parents as against residence in the available

alternative settings, for example with foster carers. It is for the petitioner to lead evidence sufficient to demonstrate that residence of the child with the respondent would be likely to cause serious detriment to its welfare by comparison to the available alternatives.

[51] Mr MacKinnon submitted that he did not shrink from recognising on the respondent's behalf that there were significant problems with her parenting of AT two years ago when he was taken into care. But, he submitted, the petitioner had in effect closed its mind to assessment of the current situation, and the significant changes which had occurred since, both as regards the respondent's presentation, and AT's difficulties. He accepted that past events could be a legitimate guide to future risk, but submitted that the passage of time was so great since AT had been in the respondent's care, that matters had moved on and I was being asked to take a leap in the dark by holding that the respondent was still unable to parent AT without serious detriment to his welfare. The law had been sufficiently clear since *R* v *Stirling Council*. The case should have been reassessed by the petitioner in the light of that decision, and should not have come this far.

[52] So, submitted Mr Mackinnon, it was not good enough for the petitioner to come to court and say, in effect, that 'things were really bad a couple of years ago and since then she's had some contact with her mother, and sometimes AT talks down to her in a contact session, and that's enough to show that a permanence order should be granted'. That was not enough to pass such a rigorous test. Mr Mackinnon submitted that the evidence of the respondent herself, but also that Dr Holmes and Pamela Mains, all suggested that there had been positive changes in the respondent's parenting ability.

[53] Furthermore, Mr Mackinnon referred to paragraph 57 of *West Lothian Council* v *B*, where Lord Reed stated that:

> "So far as the father is concerned, it was not for him to show that he possessed the necessary parenting skills. The onus lay on the local authority to demonstrate that he did not, and that any resulting risk to the welfare of the child could not be addressed by the provision of support. The local authority was not in a position to adduce evidence on the point, having failed to carry out a parenting assessment. There was no finding as to the level of assistance which the parents might require."

Mr MacKinnon submitted that this provided another eerie echo for the present case. More than two years had passed since AT had been accommodated, circumstances had changed justifying a reassessment, but the petitioner had failed to carry it out. Notwithstanding the evidence of Lynne McBean to the contrary, the evidence of the front line social workers Donna Ross and Sandy Torrance made clear that the respondent had not been formally reassessed since 2015. This was in effect because the ADM had already decided from that time that the petitioner should seek permanence with authority to adopt. In other words, the petitioner's mind had been closed to the material changes which had occurred since then. It was not good enough to then seek to criticise her for failing to prove that she had improved her parenting skills since 2014.

[54] Mr Mackinnon submitted that the huge weight of evidence giving rise to criticism of the respondent's parenting was of some vintage. More recently, the evidence of Pamela Mains was more positive. The submission that there would be serious detriment to AT if he was returned to the respondent was, ultimately, based on conjecture rather than hard evidence. The hard evidence was that contact between AT and the respondent had gone well more recently. On the subject of

contact, however, it was noteworthy that the petitioner had not carried out any assessment of the respondent's recent contact with BT. Mr Mackinnon accepted that no two children were alike, but he submitted that, in effect, the progress or otherwise of this contact justified assessment for the purposes of the present case. The evidence from 2014 suggested that the respondent was at least as unable to parent BT as AT, but in 2016 she had been successful, in opposed proceedings, in obtaining an award of *interim* contact. This had now successfully progressed to unsupervised contact. Not only that, but it appeared that BT was not subject to social work supervision notwithstanding the grant of such contact. If the respondent was presently fit to exercise such contact with BT, how could it reliably be said, at least without further assessment, that there was a likelihood of serious detriment to AT if returned to her care?

[55] Mr MacKinnon also relied on other positive changes in the respondent's presentation since 2014. In the first place he submitted that the only up-to-date medical evidence came from Dr Holmes, and that this established that the respondent's mental health was substantially improved since 2014. Given that poor mental health may well have impaired the respondent's ability to parent AT at that time, Dr Holmes' evidence was of considerable significance in showing that the court should not rely on evidence of the respondent's defective parenting in 2014 as establishing that she was now unable to have AT reside with her without serious detriment to his welfare. Mr Mackinnon also relied on the evidence that the respondent had obtained employment and indeed had for a year been carrying out voluntary work. This had been in a situation where she was dealing with vulnerable people, providing an element of care to them, and indeed doing this on behalf of the

petitioner. Mr MacKinnon submitted, in effect, that the ignorance of the petitioner's witnesses of this matter emphasised the failure of their assessment of the respondent's present circumstances and the extent to which she had made positive and relevant changes in her life since the rehabilitation assessment was completed in early 2015. He submitted that this element alone made it fanciful to suggest that the respondent's current circumstances had been properly assessed.

[56] Mr Mackinnon conceded, however, that if I was against the respondent on the threshold test, then all the other statutory tests for the making of a permanence order, with authority to adopt, were made out. He also accepted that if such an order were made, that no order for direct contact between AT and the respondent should be made. She would in this event still seek indirect contact, by way of exchange of letters and cards, twice a year, accepting that this would be subject to vetting by the social work department so as to ensure that it would not cause distress to the child.

Discussion

[57] The tests for the making of permanence order are set out in section 84 of the Adoption and Children (Scotland) Act 2007. This provides, so far as material to the present case, that:

> **"84 Conditions and considerations applicable to making of order**
>
> **…**(3) The court may not make a permanence order in respect of a child unless it considers that it would be better for the child that the order be made than that it should not be made.

(4) In considering whether to make a permanence order and, if so, what provision the order should make, the court is to regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration.

(5) Before making a permanence order, the court must—

(a) after taking account of the child's age and maturity, so far as is reasonably practicable—
(i) give the child the opportunity to indicate whether the child wishes to express any views, and
(ii) if the child does so wish, give the child the opportunity to express them,
(b) have regard to—
(i) any such views the child may express,
(ii) the child's religious persuasion, racial origin and cultural and linguistic background, and
(iii) the likely effect on the child of the making of the order, and
(c) be satisfied that—
(i) there is no person who has the right mentioned in subsection (1)(a) of section 2 of the 1995 Act to have the child living with the person or otherwise to regulate the child's residence, or
(ii) where there is such a person, the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child…"

It is a matter of agreement in this case (a) that given AT's age and maturity it is not appropriate to seek to ascertain his views; (b) that there are no religious, racial, cultural or linguistic factors which need to be taken into account; and (c) that the respondent is the only person who has the right referred to in section 2(1)(a) of the Children (Scotland) Act 1995 to have AT reside with her.

[58] Until recently the understanding of section 84 was that the serious detriment test in section 84(5)(c)(ii) had to be addressed subject to the "paramount consideration" of the welfare of the child in section 84(4): see *TW* v *Aberdeenshire Council* 2013 SC 108, paragraph 13. That approach was recognised as erroneous in *R* v *Stirling Council*, now authoritatively confirmed in *West Lothian Council* v *B*. There is

no dispute that applications for permanence orders must now be considered under the direction and guidance of the Supreme Court in this latter case.

[59] Fundamentally, the position is that section 84(5)(c) of the Adoption and Children (Scotland) Act 2007 imposes a threshold test which has to be addressed, and satisfied, the onus lying on the local authority, before considering any other issue arising under this section. Accordingly, assuming that there is a person with the parental right of residence, the court must refuse to grant a permanence order unless it is satisfied that the child's residence with that person is likely to be seriously detrimental to his welfare. That is so even if to reside with that person would not be the best way to safeguard and promote the child's welfare through childhood or, put more generally, that it would be in the child's best interests to make a permanence order.

[60] As the Supreme Court further explains, the serious detriment test is a matter for the court to determine as primary decision-maker, on the basis of its own findings on the evidence. It is not enough for the court simply to review the reasonableness or otherwise of the local authority's judgement on this matter. And just as significantly, the Supreme Court's analysis of the threshold test emphasises the true height of the bar which the local authority has to surmount if it is to succeed in obtaining a permanence order. The Court was at pains to stress that depriving the parents of a child of their parental authority is a most serious matter and should only be done if strict criteria are satisfied. It approved earlier *dicta* to the effect that it is emphatically not enough to show that a child would benefit from being brought up elsewhere. The wisdom or foolishness of the parent is irrelevant, providing that the child's moral and physical health are not endangered. Society must be willing to

tolerate very diverse standards of parenting including the eccentric, the barely adequate and the inconsistent. It is not for the state to spare all children the consequences of defective parenting, and resulting experience of disadvantage or harm falling short of that which is seriously detrimental to the child's welfare.

[61] In relation to the Court's role as primary decision maker, I note that in the present case I heard much evidence about the decision making processes within the petitioner's social work department. Social workers such as Donna Ross and Sandy Torrance are at the front line, as it were, and ingather and record primary evidence from individuals involved. Team leaders such as Lynne McBean supervise the front line social workers and analyse and assess the evidence which they ingather. In cases such as the present, they will then have a major role in presenting the evidence to the APP, who will then consider and if so minded make a recommendation as to whether the petitioner should apply to the court for a permanence order. If such a recommendation is made, then the ADM will consider it. If, and only if, the ADM approves the recommendation will a decision be made to apply for such an order. Where there is a supervision order – as there will generally be – the view of the children's hearing will be sought.

[62] It is not for me to criticise the petitioner's decision-making processes and structures *per se*, as they are largely a matter of internal administration. But it is appropriate for me to emphasise that there is no intrinsic magic in them. That a significant number of experienced and concerned professionals have reached a collective decision that a permanence order is appropriate does not make it so. In the first place, as is now clear, that is because the court is not engaged in a process of reviewing the adherence or otherwise of the petitioner to its decision making

process, nor whether its ultimate decision to apply for permanence was or was not reasonable. More critically still, if such a decision was based, perhaps at all levels of the process, on a misunderstanding as regards the legal tests for the grant of a permanence order, then it may be of little or no value at all. Not only that, it may mean in practical terms that the local authority does not have, or in any event is not able to adduce before the court, evidence sufficient to discharge the onus of proving that the serious detriment test is satisfied.

[63] In the present case I am concerned that the petitioner's decision makers have not fully recognised and then applied themselves throughout the process to the rigours of the threshold test in section 84(5) as this provision is now authoritatively explained in *West Lothian Council* v *B*. I acknowledge at once that the petitioner can hardly be criticised for this to the extent that the Supreme Court's decision postdates the hearing of evidence in this case, let alone the decision making process leading to the ADM's decisions in 2015. But the difficulty remains that in making this application the petitioner has not recognised that the first and fundamental question for it, both as regards evidence gathering and the decision making processes, is whether for AT to return to reside with the respondent would likely be seriously detrimental to his welfare. Just as the Court must now first direct itself to this threshold question in considering whether to grant a permanence order, so in future should the petitioner in deciding whether to apply for one.

[64] The essence of the case for the petitioner starts from the proposition that the respondent was unable to properly parent AT prior to September 2014. It is submitted, in summary, that this was caused by deficient parenting skills on her part, which in turn caused or at least failed to properly manage serious behavioural

problems on his part. It is then suggested, in effect, that nothing material has changed since September 2014 which alters the picture in either respect. Therefore it is submitted that it is likely that if returned to her care AT will suffer the same or similar detriment to that which he suffered prior to that time, and that this detriment would be serious.

[65] In my view the petitioner has failed to make out this case. I consider that it has failed to adduce sufficient evidence to establish it on a balance of probabilities. It may be that it would be in AT's best interests to be subject to permanence or adopted. It may be that there are still deficiencies in the respondent's parenting abilities, and that she is not being realistic about this. It may be that were AT to return to reside with the respondent that he would suffer some detriment along the lines submitted on the petitioner's behalf. But on the whole evidence, I am not presently satisfied that it is likely that serious detriment to AT's welfare will result. I consider that there are significant gaps in the petitioner's evidence, perhaps reflecting its failure to properly recognise the primacy of and therefore to adequately address the serious detriment test in its decision making leading to the raising of the petition. These gaps relate to both the current circumstances of both AT and the respondent, and reflect the significant passage of time since he was in her care, and changes in both their circumstances in the intervening period.

[66] As regards the respondent, I do not accept that the petitioner has established on the facts that there have been no changes in her circumstances, relevant and material to her parenting abilities, since September 2014. In the first place the evidence suggests that her mental health has significantly improved since the end of 2015. Depression was, on the evidence, a factor which prior to then, and in 2014 in

particular, was adversely affecting the respondent's ability to look after her children and to respond appropriately to their emotional needs. In my view it cannot sensibly be said by the petitioner that this is not a relevant and material change in circumstances given that its own ADM recommended permanence on the basis that the respondent's previously poor mental health was a "key barrier" to her parenting AT. Linked to this recommendation was the evidence that the respondent was abusing alcohol in 2015, but there has been no evidence to suggest that this has been a continuing problem, nor that it is presently a problem for her.

[67] In the second place, the respondent no longer has residence of BT, has consented to the petitioner's permanence application in relation to CT, and will very likely have no further children for medical reasons. Accordingly if AT is returned to reside with her she will have residence of him and him alone. That is relevant and material given that to some extent the difficulties which the respondent experienced in parenting prior to September 2014 were caused by her trying to care for more than one child. This was exacerbated by her tending to prioritise and favour AT over BT. She was unable to properly parent them both at the same time, and now recognises this. In my view it does not follow, therefore, that if the respondent were now to resume care of AT, and AT alone, that the respondent's parenting of him would necessarily be as defective as it was when she was trying to care for both AT and BT at the same time.

[68] In the third place, the respondent has now been awarded *interim* contact with BT, in contested proceedings. The evidence is that this contact has progressed well over a number of months, from supervised contact within a contact centre to unsupervised contact in the community. Not only that, but it appears that it has

occurred without the petitioner seeing the need to further refer BT to the children's reporter, there presently being no measures of supervision in place in respect of him. I agree with Mr Mackinnon that this suggests a relevant and material change as regards the respondent's ability to care safely and appropriately for one of her children, at least for short periods. If that is so, then it at least raises a question whether her ability to properly parent AT has improved since September 2014, or at least, tends to undermine the petitioner's position that nothing has changed to cause the court to now doubt the opposite.

[69] Fourthly, the respondent has obtained employment, first in a part time capacity in a take-away and, more significantly, as a volunteer in a care project for the elderly. She gave evidence that she had been doing this for more than a year, for an average of 16 hours a week, and that she had been subject to interview and PVG checking by the petitioner. She said that she was presently hopeful that she had done this work well enough to merit progress to a position of greater trust. I accepted her evidence in this regard, in particular because it was not contradicted by the petitioner's witnesses. Indeed they did not even seem to be fully aware that the petitioner was doing this work. But in any event this evidence suggests a greater maturity and ability on the part of the respondent to accept and respond positively to caring responsibilities. It tends to undermine that chapter of the petitioner's evidence which sought to suggest that the respondent was continuing to live the same rather chaotic or at least unstable lifestyle which she had led prior to September 2014. And yet this again was a factor relied on by the petitioner's ADM in deciding that a permanence order should be sought.

[70] Fifthly, I accept that – at least to some extent – the respondent has decreased contact with her own parents. They were clearly inadequate as parents to her, and were therefore both very poor role models for her in parenting AT. Indeed it would appear inappropriate for them to have contact with him at all, let alone for them to have him in their care as had happened on occasion in 2012. Although I felt that the respondent was perhaps over stating the extent to which she had broken off contact with her parents, she was clear and articulate in recognising and acknowledging their failings. I did not therefore see her continuing to exercise some contact with them, in particular as regards telephone contact with her mother, as suggesting that nothing had changed in this regard since 2014. On the contrary, I thought that there had been at least some progress in this regard.

[71] Sixthly, it is clear that the respondent had a series of relationships, prior to September 2014, none of which had been sustained, and at least one of which had led to domestic violence against her which was witnessed by her children. Since then, however, she appears to have stabilised her lifestyle in this regard, at least to some extent. True, she resumed her relationship with RJ in early 2015, but she soon recognised that this was a mistake, and broke it off again. Since then she has had only one brief sexual relationship. Her reaction to that was telling. She discussed it with Mr Mackinnon, when speaking to him on other matters relating to the present case. She then decided not to pursue the relationship as the other party, as I understood it, did not live in Dundee. On both counts that suggested to me some degree of discrimination and a desire to prioritise her desire to have AT returned to her care over her own interests. Again that suggests some small degree of maturity as against the position prior to September 2014.

[72] Finally, although there have been positive changes bearing or potentially bearing on the respondent's parenting ability since 2014, it is important not to lose sight of those previously positive aspects which the petitioner accepts have *not* changed. The starting point here, lest it be forgotten, is that it forms no part of the petitioner's position that to return AT to reside with the respondent would in any way place him at risk of physical harm, ill-treatment or neglect. While in the care of the respondent AT and BT were satisfactorily fed and clothed, they were not the victims of any physical violence or neglect, and their home living conditions were suitable, safe and clean. There is also, as far as I can understand it, no dispute that the respondent loves AT and genuinely wants to provide a caring and appropriate environment for him to grow up in. Finally, it should also be noted that she has no record of adult offending behaviour, let alone offending behaviour which might suggest impairment of parenting ability. All these matters remain positive factors, pointing towards the respondent being able to have AT reside with her without serious detriment to his welfare.

[73] In the months immediately following AT being accommodated the respondent was subject to a rehabilitation assessment by social work staff, with a view to considering whether she could properly parent AT if he was returned to her care. That assessment was completed very early in 2015, by which time the respondent had not evidenced any of the positive changes described above. Since then, and notwithstanding these changes, the respondent has not been subject to further formal parenting assessment. It was not done because in the course of 2015 the APP and then the ADM decided to seek permanence for AT and CT, as is apparent from the evidence of Donna Ross and Sandy Torrance. Since then there

has been no further formal parenting assessment of the respondent. I accept Mr Mackinnon's submission in this regard.

[74] I also accept Mr Mackinnon's submission, based on paragraph 57 of *West Lothian Council* v *B*, that it is not incumbent on the respondent to show in this proof that she now has the necessary parenting skills to have AT reside with her without serious detriment to his welfare. It is for the petitioner to establish that she does not. In my view, paragraph 57 of the Supreme Court's decision, relied on by Mr Mackinnon, does not mean that there has to be a parenting assessment in every case before a permanence order can be granted. However it clearly recognises the consequence of the placing of the onus of proof on the local authority. If there has been a substantial period of time between the last time that the parent had care of a child, and the date of the permanence order hearing, the absence of formal parenting assessment may well mean that the local authority will be unable to adduce sufficient evidence to satisfy the court that the faults or defects in the respondent's parenting which led to her ceasing to care for her child are still present, and present in such a manner and to such a degree that that child's welfare is likely to be subject to serious detriment if he is returned to her care. That difficulty is likely to be exacerbated yet further if there is evidence available which suggests that there have been relevant and material changes in the presentation of either or both of parent and child.

[75] In my view that is very much the position in the present case. There are clear grounds for reassessment of the respondent's ability to parent AT given the passage of time since the conclusion of the rehabilitation assessment in early 2015 and the relevant and material changes in her circumstances since then. The petitioner has

not done this, and in the absence of such an assessment the available evidence does not satisfy me that the respondent does not presently have the necessary skills to parent AT without serious detriment to his welfare.

[76] Just as there is an evidential gap in the petitioner's case as regards the respondent's current ability to parent AT, so in my view there is also an evidential gap in its case as regards the parenting difficulties with which he currently presents. It is clear that prior to September 2014 AT presented as challenging, with aggressive and abusive behaviour. But it is also clear that during his placement with Mrs Tait in 2016 he was continuing to present with such behaviour. Indeed what she described was if anything even more extreme. The petitioner argues, in essence, that AT's behaviour prior to September 2014 was at least in part due to a failure by the respondent to consistently put in place and maintain boundaries in relation to him. Furthermore it is said that she is still unable to do this, with the result that if returned to reside with her AT's behaviour would deteriorate still further. That of course raises the question as to whether there is evidence sufficient to establish that the respondent is still not able to set appropriate and consistent boundaries for AT. But more fundamentally, even assuming that she cannot, there remains the question of *why* AT is currently behaving as he does, and thus the further question of what the most appropriate parenting approach for him should be. The evidence led by the petitioner has in my view failed to answer either question. It has therefore failed to satisfy me that the perceived deficiency in the respondent's parenting ability would, even if still present, likely lead to serious detriment to his welfare if returned to her care as compared with the available alternatives.

[77] As I said to Mrs Carena in argument, even if I were to find that the respondent had failed to set appropriate boundaries on AT's behaviour prior to September 2014, the evidence suggested that very clear boundaries had been set and enforced by foster carers since then – and in particular by Mrs Tait – but that this had not ameliorated or modified his disturbed behaviour. Two and a half years have now passed since AT was in the respondent's care – nearly half his lifetime. I therefore do not see on what basis I could be satisfied that AT's behaviour would now be likely to deteriorate further if he was returned to the care of the respondent. In other words I am not satisfied that there is evidence establishing a causal link between the suggested absence of clear boundary setting and enforcement by the respondent on one hand, and aggressive or disturbed behaviour by AT on the other. As that has not been established, I am not satisfied that it is likely that returning the child to the respondent would be seriously detrimental to his welfare, even assuming the absence of such boundary setting as had happened in the past. If all that could be said was that his behaviour would be the same, but no worse, than that described by Mrs Tait, then it is not established that his return to reside with the respondent would be seriously detrimental to his welfare. The petitioner bears the onus of proof in this regard, but, if anything, it seems to me that the evidence points the other way.

[78] In particular, there is the evidence of the contact sessions to consider. It is true that the respondent has not consistently shown during these sessions that she can set and enforce behavioural boundaries and associated parenting skills. However to my mind this evidence does not really address, let alone meet, the problem faced by the petitioner in this aspect of the case. Other than in the period very shortly after AT was taken into care in September 2014, he has not

demonstrated any significantly challenging behaviour during more than two years of contact sessions. The contact environment is of course artificial, and the sessions last for no more than one and a half hours per month. But even if it be true that the respondent has not demonstrated appropriate boundary setting for AT during contact sessions, there is no recent evidence that this has led to any deterioration in his behaviour, either during the sessions or afterwards. There is therefore no evidence that the respondent's current approach to parenting AT is presently causing the particular serious detriment which the petitioner fears would result if he was returned to her care. The petitioner therefore cannot say, in my view, that because the respondent has failed to set consistent behavioural boundaries during contact it is likely that her failure to set them if AT was returned to reside with her would lead to his behaviour deteriorating as compared with that described by Mrs Tait.

[79] This highlights a further difficulty for the petitioner, namely that it has chosen not to develop the contact sessions so as to test out the respondent's ability to manage AT at times when his behaviour is challenging. The contact was reduced to an almost nominal amount on the basis that AT was thought to be reacting adversely to it in the days following the sessions. However although it seems clear from Mrs Tait's evidence that this thesis is no longer valid, no attempt has been made to increase the contact again. It seems to me that this is likely to be because the petitioner had already decided to seek a permanence order with authority to adopt, and with no ongoing contact, and therefore saw no point in developing it meantime. Be this as it may, however, the position now is that the petitioner does not have

evidence from contact over the last two years which might perhaps have supported the aspect of its case presently under discussion.

[80] As noted above, Mrs Carena submitted that no specialist psychological assessment of AT had been carried out pending the conclusion of the present proceedings. I found that a rather concerning submission. It seemed abundantly clear from Mrs Tait's evidence in particular that AT is suffering significant behavioural problems. Mrs Tait had taken steps to seek to have him referred to a child psychologist. Mrs Carena seemed to accept that it was not strictly necessary to await the outcome of the present proceedings in order to make such a referral. More to the point, if AT does require specialist assistance of this sort, it would appear to be simply wrong to delay assessing this dependent on the outcome of legal proceedings. Indeed, the outcome of such an assessment might itself inform the determination of the proceedings. It might provide valuable evidence relevant to the question of whether the tests for permanence are met, for example by providing clues as to the underlying causes of AT's behaviour, and strategies for better management of it.

[81] In any event, in the absence of specialist assessment of AT by a child psychologist or other suitably qualified professional, and in the light of the limited evidence from the contact sessions, I am not satisfied that the petitioner has established that it is likely that AT's behaviour will deteriorate if he returns to reside with the respondent. Looked at from AT's perspective too, therefore, I consider that the petitioner has not made out its case that to now return AT to reside with the respondent would be likely to cause serious detriment to his welfare as compared with the available alternatives.

Conclusion

[82] In the light of all this it is of course quite possible that for AT to reside with the respondent may cause him some detriment in relation to his emotional and behavioural development. It is quite possible that the respondent may be unable to provide optimum parenting in this regard. It is quite possible that AT would not get the degree of family stability and security which might be provided were he to be adopted. But none of this entitles the court to make the order which the petitioner seeks. On the whole evidence led I have not been satisfied that for AT to reside with the respondent would be likely to be seriously detrimental to his welfare, as this test is explained in *West Lothian Council* v *B*. In these circumstances the petition must be dismissed.

[83] In my view it would be inappropriate to award expenses in the circumstances of this case and accordingly no expenses will be due to or by either party.

Sheriff SG Collins QC

27 June 2017