FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 59
XA32/18

Lord President
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD MENZIES

in the cause

NORTH LANARKSHIRE COUNCIL

Petitioners and Appellants

against

KR

Respondent

Petitioners and Appellants: J Scott QC, Cartwright; Ledingham Chalmers LLP
Respondent: K Campbell QC, Gilchrist; Drummond Miller LLP (For Moss and Kelly, Solicitors, Glasgow)
Curator *Ad Litem*: Wild

28 June 2018

Introduction

[1] This case is about the welfare of a little girl, P, who has recently celebrated her fifth birthday. Her mother is the respondent KR, who was born in 1991. KR is Scottish and has lived in Scotland all her life. She was adopted as a child and was diagnosed with Asperger's Syndrome when she was 8 years old. This is an autistic spectrum disorder. P's father, J,

does not have parental responsibilities or rights in respect of P. He is an Indian citizen, and was removed from the United Kingdom to India in March 2014.

[2] P has not resided with KR since her birth, except for a period of about 4 months between 17 January and 23 May 2014. The petitioner's Social Work Department had concerns before P's birth about KR's ability to care for her, and following a pre-birth case conference on 15 May 2013 the unborn child was registered on the Child Protection Register. On 16 July 2013 when KR was expecting P she agreed that when the baby was born the baby was to be cared for by foster carers to allow a parenting capacity assessment to be carried out. Following P's birth KR consented to her staying with foster carers in terms of section 25 of the Children (Scotland) Act 1995 ("the 1995 Act"), and on 23 August P's name was placed on the Child Protection Register. P was rehabilitated home with KR on 17 January 2014, but as a result of events which occurred in the following months, a Child Protection Order was granted on 23 May 2014 which provided that P was to remain in the care of her grandparents (KR's adoptive parents). On 11 July 2014 grounds of referral were established at Airdrie Sheriff Court, and it was found established that P was likely to suffer unnecessarily or her health or development was likely to be seriously impaired due to lack of parental care.

[3] P's grandparents reached the conclusion that they were unable to continue to look after P, and she was placed with foster parents. On 23 July 2014 a decision was taken to appoint a safeguarder, and on 3 August 2014 the safeguarder reported her conclusion that rehabilitation was not an option and contact with KR should be reduced. A permanency planning meeting on 19 August 2014 agreed that adoption would be pursued. Various further steps and proceedings then occurred, and eventually on 1 August 2016 the petitioners applied to the sheriff for a permanence order under section 80 of the Adoption

and Children (Scotland) Act 2007 ("the 2007 Act") together with authority for P to be adopted and dispensation with the consent of KR.

[4] KR opposed this application, and the matter went to proof at Airdrie Sheriff Court. The sheriff heard the proof over 6 days, which included oral evidence of 14 witnesses, additional affidavit evidence and a joint minute. On 11 July 2017 the sheriff refused the application, observing that he was not satisfied that the point had been reached when nothing other than a permanence order would do, and he was therefore not satisfied that a permanence order was necessary.

[5] The petitioners appealed to the Sheriff Appeal Court, and on 15 December 2017 the Sheriff Appeal Court refused the appeal. Leave to appeal to this court was refused by the Sheriff Appeal Court on 25 January 2018, but granted by this court on 29 March 2018. We heard this appeal on 28 June 2018. On that date we allowed the appeal, made a permanence order in respect of P with authority to adopt, together with ancillary orders. We indicated that in due course we would give our reasons in writing for allowing the appeal. This we now do.

The factual background

[6] The sheriff made 83 detailed findings in fact, none of which (apart from the last) was put in issue or subject to any criticism before the Sheriff Appeal Court or this court. It is not necessary for us to rehearse these in detail, but it is appropriate to make reference to some of the sheriff's findings because they provide the factual context for the petitioners' concerns regarding the ability of KR to care for P.

[7] When KR was about 18 years old, she attended a course to prepare students with Asperger's Syndrome for onward education and to give them general life skills. At about

this time her adoptive mother expressed concerns to the petitioners' social work department as KR was sending naked pictures of herself by text to people she had met online. She was also sending inappropriate pictures to a person she had contacted through a newspaper advertisement. While she was attending this course, KR met J; she moved in with him 8 weeks after meeting him, and stopped attending the course. J was controlling and abusive of KR; he took her money to gamble with, and controlled who she met and what she wore. At an adult protection case conference in November 2010 it was determined that KR was an adult at risk.

[8] In about September 2012, when J was in immigration detention, KR went to London to visit him. She went without any money. She was taken by a person she met to a women's refuge, which contacted the petitioners' social work department. The refuge gave KR money to return to Scotland, but she did not return. She was reported missing. She later attended at a police station in London and arrangements were made for her to return to Glasgow. During her period in London she had been sleeping on the streets and at the homes of people she did not know.

[9] During 2012 KR gave the keys of the property of which she was tenant to another person while she visited London. When she returned that person would not let her back in. The petitioners' social work department had to have the locks changed. All KR's furniture was ruined and there was no flooring.

[10] In September 2012 J returned to Glasgow having claimed asylum. KR resumed her relationship with him, although she had expressed concern to the petitioners' social work department that she was frightened of him. In January 2013 KR revealed that she was pregnant. She was referred to the petitioners' social work department where she was described as a vulnerable woman; there were concerns in relation to her being pregnant and

her ability to care for a child both physically and emotionally. At an adult protection case conference on 10 April 2013 concerns were expressed that KR was unable to predict or identify risk. It was decided that she remained an adult at risk.

[11] At a pre-birth child protection case conference on 15 May 2013 KR stated that she was no longer in a relationship with J and had been housed in homeless accommodation. The unborn child was registered on the Child Protection Register so that further assessment could take place and additional support offered.

[12] In July 2013 the petitioners obtained a report from a consultant psychiatrist which stated, *inter alia*, that in terms of her capacity to care for her baby it seemed to the author that KR had good insight into her own difficulties as well as the challenges posed by looking after a baby. It might transpire that KR would struggle with aspects of this, although at present she was preparing and looking forward to it, and the author would have no specific concerns regarding this. On 16 July 2013 KR agreed that when the baby was born the baby was to be cared for by foster carers to allow a parenting capacity assessment to be carried out. Following P's birth KR consented to P staying with foster carers in terms of section 25 of the Children (Scotland) Act 1995, and on 23 August P's name was placed on the Child Protection Register. Thereafter a capacity assessment of KR commenced, involving her having a lengthy period of contact with P. She was given a high level of support from professionals and from KR's parents. Work was done with regard to KR in respect of her personal care, budgeting and home management to ensure that all the areas of family life were supported and protected. At this time it emerged that despite having told social workers that she had no contact with J, KR had seen him both prior to and following upon P's birth, and had sent photographs of P to J.

[13] During the course of this assessment period and soon after P's birth, KR formed a relationship with another male, LD, who was known to the petitioners' social work department. He had two children who had been adopted. The social work department had concerns about his home environment. On one occasion he and his former partner had tried to evade social work by moving to England when his former partner was expecting a child. In the past he had threatened to set fire to a contact centre and had been charged with assaulting an ambulance worker. The petitioners were concerned for the safety of P should LD be present during contact, and also for the safety of their staff. Contact was reduced and scheduled to take place outwith KR's home. At this time KR was less focussed on contact with P and prioritised her relationship with LD over that contact. Her relationship with LD ended with an incident of domestic abuse in September 2013.

[14] P was rehabilitated home with KR on 17 January 2014 with an ongoing package of care including health, social work services and a nursery placement being made available. Interaction and the building of positive relationships between KR and her child were encouraged. Social work conducted home visits under child protection procedures and undertook video interactive guidance with KR. Play at home was arranged for KR and a nursery placement was arranged for P, initially for 4 mornings a week and thereafter for 5 mornings a week. Home support attended at night in a monitoring role and to check that P was safe and settled. Social workers gave advice to KR about keeping the house clean and tidy. In short, a high level of support was provided to KR which was not sustainable long term and was not a natural environment for P to grow up in long term.

[15] KR was having difficulty in recognising P's cues showing empathy and eye-contact, and being able to nurture P, as a result of KR's Asperger's Syndrome, so the social work department gave her video interactive guidance. During this period KR was provided with

one-to-one support by Cornerstone. KR required prompting to clean her house and attend to personal care. At times she neglected her personal appearance and appeared unkempt and was malodorous. She did not recognise P's cues such as when P needed her nappy changed. At times when she did recognise those cues, she failed to act on then, failing for example to feed P when she was hungry. KR exhibited an inability to recognise risk. She failed to attend to her own and P's health issues without prompting, and required prompting and assistance to attend to everyday tasks. She did not sterilise P's bottle unless prompted. When P had an extensive nappy rash, KR obtained cream from a chemist but did not seek the help of the health visitor or any of the other many agencies who were in attendance on her when it became obvious that this cream was having no effect. She failed to make an appointment with her doctor when she was suffering from scabies. When her central heating boiler broke down she did not have it repaired. Although not required to do so, the helper from Cornerstone prepared a report expressing the view that P should not be returned to KR due to serious risk of harm and neglect. She prepared this voluntarily out of concern for P. At times P was hungry on arriving at nursery and obviously had not been given breakfast. KR did not like being alone with P when P came out of nursery; after nursery KR regularly travelled with P into Glasgow to see her friends, leaving P in her buggy without stimulation. On one occasion in March 2014 after home support had visited her at 10pm to ensure that P was safely in bed asleep, KR took P at 11.30pm on a late night bus to Glasgow to visit a pregnant friend.

[16] On 17 February 2014 KR's house was found to be in such a poor condition that P was removed to KR's parents while the house was cleaned. Dirty dishes were left lying around, bin bags had not been emptied, washing was lying on the floor, pots and pans had been put away unwashed. The house was in a generally dirty, messy and smelly condition.

[17] On 19 March 2014 social workers discovered a man hiding in a cupboard in KR's house. KR had met this man shortly before on social media and he had attended at her house for sex. KR failed to see the risk involved in inviting someone she barely knew to her house.

[18] By April 2014 P had not been weaned off milk. Nursery staff were concerned about this, and a member of the staff attended a local supermarket with KR to purchase appropriate foods and prepared a visual timetable of P's feeding needs for KR to follow. KR did not follow up on this.

[19] On 20 May 2014 KR, without warning and without advising her social workers or the nursery, travelled with P to London where, having spent the night at a hostel with P, she presented herself to the social work office claiming to have fled domestic violence in Scotland. She stated that she was homeless and required support. The petitioners had reported KR missing to Police Scotland. On the following day social workers in London contacted the petitioners to explain that KR was with them and that she had advised them that she had no money for accommodation. KR's main reason for acting in this way was that she found the level of support and intervention being provided by the petitioners' social work department overwhelming and overly intrusive. Social workers from the petitioners' social work department travelled to London and met with KR, who entered into a section 25 voluntary agreement, and social workers returned with P to Scotland. KR did not feel able to return to Scotland along with the social workers in these circumstances and travelled back to Scotland later. A Child Protection Order was granted on 23 May 2014 providing that P was to remain in the care of her grandparents (KR's adoptive parents). Grounds of referral were established on 11 July 2014 at Airdrie Sheriff Court. In terms of section 67(2)(a) of the Children's Hearings (Scotland) Act 2011 it was found established that P was likely to suffer

unnecessarily or her health or development was likely to be seriously impaired due to lack of parental care.

[20] P's grandparents were unable to continue to look after her, and P was placed with foster parents. At a Children's Hearing on 23 July 2014 a decision was taken to appoint a safeguarder. The safeguarder reported on 3 August 2014 and concluded that as rehabilitation was not an option contact should be reduced. Contact was thereafter reduced to once a week for one hour. At a looked after and accommodated review held on 8 August 2014 it was agreed that KR could not sustain P's safety and wellbeing and that legal advice was to be sought with regard to securing P's future. A Compulsory Supervision Order was put in place at a Children's Hearing on 11 August 2014 with a condition of residence with foster carers and supervised contact to take place one hour per week. A permanency planning meeting on 19 August 2014 agreed that adoption would be pursued.

[21] In September 2014 KR consulted Dr Christine Puckering, a highly qualified chartered clinical psychologist with some 40 years' experience working as a psychologist with a particular interest in very early parent and child relationships. KR found Dr Puckering on her own initiative, having received advice from her solicitor.

[22] A review in December 2014 did not support the suggestion that P attend Mellow Parenting (Dr Puckering's organisation) with KR. However, KR attended a 14 week course of Mellow Parenting group sessions without P. She was extremely committed. There were positive changes in KR during Dr Puckering's involvement with her. Mellow Parenting operated a more intensive approach to assisting with parenting skills than the petitioner's social work department, and Dr Puckering's approach went beyond what was done by the petitioners' social work department. KR had a very poor relationship with some of the

social workers dealing with her, which had an adverse impact on the effectiveness of the interventions put in place by the social work department.

[23] Due to the conflicting views expressed regarding KR's parenting capacity by the social work department and Mellow Parenting, the Children's Hearing instructed an independent parenting assessment from Dr John Marshall, a clinical psychologist. Dr Marshall reported in June 2015. He found that KR is a sensitive and kind person but also found that there are significant risks to P in the event of her being returned to KR's care. At the contact he observed that there were issues of safety that led to him and a social worker involved having to intervene. Her tendency to take impulsive decisions was an issue. KR's vulnerability and suggestibility remained an unchanged risk factor when seen by Dr Marshall. At that time KR was not able to hold in mind and consistently apply parenting skills to keep P safe and there were significant risks to P in the event of her being returned to KR's care.

[24] KR has been subject to 6 adult protection referrals between 2010 and 2015. The last of these arose from a police referral in July 2015 when it was discovered that KR had been inviting men she met on a website to her house and had been having sex with them. The referral stated that KR had been having sex with men of Asian origin over a period of time, was vulnerable and was not happy that she had had this sexual activity. It was discovered that males had been using KR's address as an address of convenience in respect of possibly fraudulent insurance activity; she had been paid small amounts of money in respect of this and had consented to it as she was frightened of those involved. Social workers discovered that KR's house was in an extremely untidy and malodorous conditions. Cat faeces were present throughout the house. Several opened condom wrappers were lying on the floor. KR was rehoused to protect her from potential further exploitation. KR engaged well with

social workers dealing with her as an adult at risk, and as a result of her level of engagement on 14 July 2016 the decision was taken that she was no longer an adult at risk. Since May 2015 KR has continued to have contact with P, although this has been reduced and since 13 October 2015 has been taking place once a month for a minimum of one hour.

[25] At times during contact KR has continued to demonstrate a lack of awareness of danger. In March 2015 when baking with P she placed a hot baking tray where P could reach it. In December 2015 KR wanted to put P (who was then aged 2) on a carousel at a funfair by herself. In September 2016 she asked P if she wanted to help KR put cakes in a hot oven. In May 2016 KR failed to recognise the danger in allowing P to approach a large drop at a closed rollercoaster ride. In September and October 2016 KR suffered from an infestation of head lice. She required assistance to rid herself of this infestation. During that period she exercised contact to P. She was advised not to place her head too close to P. She did not follow that advice, and in consequence P caught head lice from KR.

[26] In March 2016 P was linked to prospective adopters Mr and Mrs A. On 6 June 2016 the Children's Hearing gave advice to the sheriff agreeing the application for a permanence order with authority to adopt, and P's condition of residence was changed to that of Mr and Mrs A. P moved to reside with Mr and Mrs A on 7 June 2016, and has remained there since. She is currently thriving and in a stable environment. She is well looked after by Mr and Mrs A who are able to provide for her and care for her.

[27] Since birth P has lived in 5 separate households. In the event of this application being granted P is likely to be adopted by Mr and Mrs A, who are against any form of direct contact by KR in that event.

[28] The sheriff noted that there had been positives to be taken from KR's contact with P. KR is highly committed to contact and prepares thoroughly for contact visits. She has

brought activities for P to contact and brought presents for P. At contact sessions while in general P is not very demonstrative on meeting KR, at times she is; on 10 January 2017 when P saw KR at contact she ran across the room and warmly greeted her with a cuddle. The sheriff found KR was taking care of her appearance and maintaining her house in a neat and tidy condition. She received help and support from the petitioners' social work department.

[29] The sheriff's final 2 findings-in-fact were in the following terms:

> "82. On the basis of past events, were P to be returned to KR's care at present her residence with KR is highly likely to be seriously detrimental to the welfare of P as matters stand.
>
> 83. There was however room for further intervention before a decision on permanence was taken and that remains the case. It has therefore not been established that the making of a permanence order with or without authority to adopt is necessary."

The sheriff's decision

[30] In considering whether the threshold test for a permanence order, provided for by section 84(5)(c)(ii) of the 2007 Act, was met, the sheriff placed considerable weight on KR's act of removing herself and P to London, which took the risk to P to a different level (see paragraphs 55/56 of his Note). He went on to observe that:

> "In her submissions counsel for KR submits that too much has been made of past events and that KR has changed. There are two difficulties with this. The first is that very often the best indicator of future events is what has happened in the past. That seems to me to very much the case here. The second is Dr Marshall's assessment of the respondent."

[31] The sheriff concluded his assessment of the threshold test at paragraph 66 of his Note as follows:

> "Pulling all of this together it appears to me that as matters stand at present it is probable that were P to be returned to KR's care a large number of interventions would be necessary to achieve a safe environment for P. Those interventions would

> have to be at the level which KR found overwhelming before she left for London in May 2015 (*sic*) with P. Dr Marshall concludes in his report that one of the biggest issues is KR's proclivity for impulsivity and risk taking, leading her to be vulnerable and exploited. I do not consider that conclusion to be in any way controversial. In those circumstances, in my view, in all probability KR would again find the interventions required unduly restrictive and overwhelming and would take action to evade or circumvent those interventions. That would place P's welfare in the form of her health and physical well-being at considerable risk. The threshold has therefore been crossed."

[32] The sheriff then went on to consider authority for adoption, and stated (at paragraph 71):

> "Those reasons which have led me to the conclusion that the threshold test in section 84 has been met also lead me to conclude that the threshold test set out in section 83(2)(c) has also been met. Again that is a factual test based on matters as they stand. As things stand, I am satisfied that KR is unable satisfactorily to discharge parental responsibilities and rights and is likely to continue to be unable to do so."

[33] However, the sheriff then went on to ask whether in this case it had been established that a permanence order was necessary. He stated that this followed from the requirement that he had to regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration, and that he may not make a permanence order unless he considered that it would be better for the child that the order be made than that it should not be made.

[34] The sheriff's consideration in this regard is set out in paragraph 74 of his Note. His assessment may be summarised as follows: Dr Puckering gave evidence that KR was capable of change. Ordinary human experience teaches us that people do change. People change as they get older. KR has a deep love for P and is very committed to contact. The sheriff was satisfied that Dr Puckering's assessment that KR was capable of change was well-founded. The relationship between KR and her social worker was not a good one, and this cannot have helped. KR now has a good relationship with the locality worker and the

support worker, which has had an effect. Moreover, Mellow Parenting and Dr Puckering would provide a more intensive course which goes beyond what the social workers have done, and would not merely replicate the work done by social work. The sheriff accepted Dr Puckering's conclusion that there was scope for further intervention before rehabilitation was finally ruled out. He was not satisfied that the point had been reached where nothing other than a permanence order will do. He was therefore not satisfied that a permanence order was necessary. He stated that he was deeply conscious of the fact that at that time P was just under 4 years old and had lived in 5 different family environments so far. She needed and deserved a stable family unit. He stated that he had therefore not reached this decision lightly. Mr and Mrs A seemed to him to be a reasonable match for P. However, P's relationship with her natural mother had to be maintained unless no other course was possible. It had not been shown that this stage had been reached, and in those circumstances the application should be refused. That is what the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration required.

The decision of the Sheriff Appeal Court

[35] The appellants argued before the SAC that the sheriff had failed to take into account relevant considerations, and that he failed to make a decision on P's welfare based on all the relevant circumstances. Senior counsel for the appellants identified 6 questions which she submitted that the sheriff had not addressed, which invalidated the sheriff's decision:

(1) Where would P live in the foreseeable future? She could not live with KR, and she could not now be adopted. The prospective adopters did not volunteer as foster carers, but rather expected to be able to commit to P and bring her up as their own. The SAC rejected

this ground (a) because it did nothing to address the finding that the link between KR and P could be preserved, (b) the practical arrangements for P in the event of refusal were not recorded by the sheriff as having been explored in evidence, and the appellants proposed no alternative finding-in-fact and did not challenge any relevant existing finding in fact, so the SAC had no basis to say that the sheriff had no such evidence before him or made any error, and (c) it elevates the logistical difficulty of P's arrangements ahead of the principle of retaining her family link with KR – it amounted to a submission that the sheriff had no rational alternative but to grant the permanence order because the petitioner had assumed that the order would be made and had made no contingency plan. There was no reason, and no evidence that the SAC could identify, for the sheriff to decide that P's living arrangements after the hearing need be any different to those immediately before the hearing.

(2) Who would discharge parental responsibilities and exercise parental rights? The SAC rejected this ground for similar reasons to the first. There was no evidence to decide that the existing arrangements could not continue to apply until either P was rehabilitated to the care of KR (should KR show sufficient improvement for that purpose) or a successful permanence order application made (should efforts to rehabilitate be shown to have been fairly tried and failed). P's arrangements will continue unchanged in the meantime.

(3) The effect on P of uncertainty over her status. The SAC rejected this ground. P was (at that time) 4 years old and had no direct understanding of these proceedings. The petitioners' current arrangements will continue until either of the events referred to above.

(4) Failure to consider the nature of the benefit P may derive from a relationship with her natural mother. The SAC rejected this ground. It inverted the presumption that the interests of the child would "self-evidently require her relationship with her natural parents

to be maintained unless no other course was possible in her interests (relying on Lord Neuberger's opinion in *in re B (A child)* [2013] 1 WLR 1911) and that the court should start from the least interventionist approach (*S* v *L* 2013 SC (UKSC) 20 per Lord Reed at para 123). The sheriff had carried out a detailed and carefully balanced assessment of that relationship, and was clear that the local authority could and ought to have done more by way of supported intervention in P's relationship with her mother and that the evidential lacuna in that regard lies with the appellant.

(5) The sheriff failed to consider the report from the Children's Hearing. The SAC rejected this ground. The report from the Children's Hearing dated 6 June 2016 supported the application on the basis that there had been no evidence that KR had managed to make the changes needed to keep P, or herself, safe, and that a settled, normal family life looked unlikely to happen in the near future with KR. The hearing considered it important that P find a settled family and not be kept in the foster system any longer. The SAC considered that it was plain that this view was reached on the assumption that rehabilitation to KR's care cannot ever happen; the sheriff concluded that this assumption could not be supported on the existing evidence. That erroneous assumption by the Children's Hearing vitiated their conclusion, which could not (presently) be justified.

(6) The sheriff had failed to consider what further intervention is now practical. The SAC rejected this ground. They observed that it was based on the petitioners' submission that "KR is not in any event likely to co-operate with the petitioner". They observed that this appeared an almost wilful refusal to contemplate the clear import of the sheriff's judgment, which pointed to an obvious course of action, namely to support KR in a reference to the Mellow Parenting course (or similar resource), and to change their approach to KR from "hostile, quite judgmental, quite harsh, rigid and unforgiving" to one that will

meet KR's reasonable needs. The SAC observed that it remained to be seen whether such a resource will in fact be successful, but the sheriff had accepted that there were material prospects of success. His judgment in that respect was not challenged.

[36] The SAC rejected the submission that the sheriff had misapplied the test of necessity and had failed to take a holistic approach to P's welfare. They agreed that a holistic approach was required, but could detect no failure by the sheriff in this regard. In light of the sheriff's conclusions, none of the 6 features identified could be regarded as sufficiently material to vitiate the sheriff's exercise or conclusions. The SAC declined to quash the sheriff's decision and to make a permanence order. They observed that in any event, they were not asked to overturn the sheriff's finding that KR is capable of change (finding 57) or that there is room for further rehabilitation (finding 58) and they did not have any factual basis to do so. They would accordingly be unable to make such an order in any event.

Submissions

Submissions for the appellants

[37] Senior counsel for the appellants began by stating her understanding that several local authorities were hoping for guidance as to how to approach applications for permanence orders and authorities for adoption, particularly where it appeared that the threshold tests for each was satisfied. The Scottish Government's policy "PACE" (Permanence and Care Excellence) recommends that local authorities should identify and address drift and delay in permanence processes. Scottish Government policy recognises that permanent loving nurturing relationships are what matter most to children, and that this is best delivered by removing children from long-term supervision, where appropriate, and giving them the legal certainty that their relationships are permanent.

> "The programme supports local authorities and their partners – in health, children's hearings, the Scottish Children's Reporter Administration and the courts – to develop projects that will identify delays, blockages and difficulties to securing permanence for looked after children."

Senior counsel suggested that there was conflict between that agenda and the approach taken by the sheriff and the SAC in this case.

[38] There was an error of law in the sheriff's decision, which was endorsed by the SAC. The legislation regarding permanence orders requires the court, in deciding whether to grant a permanence order and separately to grant authority to adopt, to conduct a comprehensive or global evaluation of the child's welfare. That necessitates weighing the pros and cons of the available practical options for the care of the child. If the legislation is properly applied, that itself satisfies the requirement of article 8 of the European Convention on Human Rights. This was not the test applied by the sheriff. In any event, senior counsel's secondary position was that if the sheriff did apply the correct test, he was plainly wrong.

[39] It was not disputed in the present case that the child could not go home to her mother. The sheriff concluded that the threshold tests in relation to a permanence order and in relation to authority to adopt, as provided by section 84(5)(c)(ii) and section 83(2)(c) of the 2007 Act were each met. That conclusion was not the subject of challenge. The issue then was the welfare test provided by section 84(3) and (4) and section 83(d) of the 2007 Act. Section 14(2) required the court to have regard to all the circumstances of the case, and to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration. The sheriff decided that KR was not able to fulfil the parental responsibilities set out in section 1 of the Children (Scotland) Act 1995 and that she was not likely to be able to do so in the foreseeable future.

[40] Senior counsel submitted that once the threshold test had been established, the exercise for the court was to consider what would best serve the welfare of the child. This exercise inevitably involves considering the practical alternatives for the care of the child. By necessary implication, all aspects of these alternatives should be considered. In other words, the evaluation should be holistic. Having carried out that exercise, the court should not make a permanence order, or grant authority to adopt, unless this is the best option having regard to the whole of the child's welfare. Article 8 ECHR is satisfied if the 2007 Act is properly understood and applied. There is no additional or free standing test of necessity.

[41] In support of this proposition senior counsel relied on the following authorities: *TW* v *Aberdeenshire Council* 2013 SC 108 (particularly at paras [16], [18] and [26]) (although this authority pre-dated some important decisions of the UK Supreme Court); *Fife Council* v *M* 2016 SC 169 (particularly at paras [63] to [65] and [68]/[69]); *S* v *L* 2013 SC (UKSC) 20 (particularly per Lord Reed at paras [39]-[41] and [51]/[52], and Lord Carnwath at paras [74]/[75]). She also referred us to three decisions of the Court of Appeal in England, namely *in re B-S (children) (Adoption Order: Leave to Oppose*) [2014] 1 WLR 563 (particularly at paras [41], [44]/[45] and [63]), *in re W (A child) (Adoption: Grandparents' Competing Claim*) [2017] 1 WLR 889 (particularly at paras [68]-[75] and *in re R (A child) (Adoption: Judicial Approach)* [2015] 1 WLR 3273 (particularly at paras [41], [44], and [52]-[54]).

[42] In this case rehabilitation with KR had been tried and failed. Senior counsel drew attention to the circumstances narrated in findings-in-fact 61-63 relating to KR's actions in inviting men she met on a website to her house and having sex with them, and men using her address as an address of convenience in respect of possibly fraudulent insurance activities, together with the extremely untidy, malodourous and dirty condition of KR's house. These events all occurred after Dr Puckering's involvement with KR ended, and

amounted to a serious relapse by KR. It was wrong to suggest that the Children's Hearing simply accepted the position advanced by the appellants; KR asked to be allowed to take P to sessions with Dr Puckering, and the appellants opposed this. The Children's Hearing considered the request by KR and refused it, deciding that it was too risky for P.

[43] Having decided that the threshold tests had been met (see paras [65] and [71] of his Note), the sheriff turned to considerations of necessity at para [73]. However, he misled himself by the shorthand use of the necessity test. What is missing from para [74] is an analysis based on P's welfare. Nowhere did the sheriff conduct a global examination/evaluation of P's welfare now. This was a crucial omission.

[44] The sheriff erred in accepting Dr Puckering's conclusion that there was scope for further intervention before rehabilitation was finally ruled out, and in stating that nothing in the evidence suggests that is any different now. This ignores his finding-in-fact 74 that "P is currently thriving and in a stable environment and is well-looked after by Mr and Mrs A who are able to provide for her and care for her". The sheriff appears to have overlooked that he is not dealing with a one year old child recently separated from her mother, who might be able to attend a rehabilitation course with her. He was dealing with a child who was aged four (at the time of the proof), who had spent a year with potentially adoptive parents, who was settled and thriving, and who's life would be turned upside down if she required to be transferred to another household. Moreover, Mellow Parenting and Dr Puckering can no longer deal with a child of P's age, and there was no evidence of any alternative intervention being available. The sheriff did not carry out any analysis of what is open for P; there was no analysis of the practical options available .

[45] The options for P were:

- Option 1: P should remain subject to a compulsory supervision order pending a possible change in her mother's capacity to look after her.
- Option 2: P should be subject to a permanence order, which would exclude the possibility of a return home, but not necessarily exclude continuing contact.
- Option 3: P should be adopted by Mr and Mrs A, with whom she had been placed for adoption.

These options were not identified by the sheriff and consequently he did not carry out the required evaluation of all the pros and cons. In effect, he selected option 1 without carrying out the analysis required by law.

[46] The holistic assessment of these options would have involved the following considerations:

Option 1: a compulsory supervision order. The benefit of this option was that it would have preserved for P ongoing contact with her mother and the best chance of a relationship with her mother in the future. There were several disbenefits:

- It would leave P's future residence uncertain. P's placement was for adoption. There was no finding that P could remain where she was if adoption did not proceed. The sheriff did not consider where P would live.
- There would be no-one to exercise parental responsibilities and rights. KR had been found to be unable to do so. The only order which would have allowed the local authority to do so was to be refused. P was and is about to attend school and decisions were required to be taken in the exercise of parental responsibility. The sheriff did not consider who would make parental decisions for P.
- There was no finding in respect of what steps might be taken to bring about change in KR so as to make it safe for P to live with her, particularly having regard to the

problems identified at para [66] of the Sheriff's Note. Dr Puckering did not offer current assistance; in her evidence she discussed the position in 2014/15 when P was under two years old.

- The Children's Hearing had advised against this option. KR had not changed within an appropriate timescale and they considered change unlikely in the near future, whereas P needed a settled family and not to be kept in the foster care system any longer. The sheriff did not consider the content of this advice with respect, in particular, to the effect of delay on P's welfare.

This option was in any event one that the Inner House had characterised in *TW* v *Aberdeenshire* as leaving the child's future in a state of uncertainty during the child's most formative years "by which time the child's life might be blighted irretrievably".

[47] Option 2: a permanence order without authority to adopt. This was neither considered by the sheriff nor advanced by the local authority. It ruled out living with KR in the future and also ruled out a full family relationship with Mr and Mrs A. Parental responsibilities and parental rights (other than contact) could have vested in the appellants, but P would have remained a "looked after child" and not a full member of any family. This option was given short shrift in *TW* v *Aberdeenshire Council*. The sheriff is not criticised by anybody for not advancing option 2, but he should have weighed it in his reasoning.

[48] Option 3: a permanence order with authority to adopt. This would bring the following benefits:

- P is "thriving and in a stable environment" with Mr and Mrs A (finding-in-fact 74).
- Mr and Mrs A are likely to adopt P (finding-in-fact 76). That is the basis on which she came to live with them. They will safeguard and promote her health,

development and welfare, along with all other parental responsibilities. They will exercise parental rights in respect of her.

- As in *TW* v *Aberdeenshire* she would have "the stability and security of a permanent home with committed and capable parents".
- This option gives the greatest opportunity for a settled, normal family life (as the Children's Hearing put it in their advice).

The disbenefit of this option was that P would cease to have supervised contact with her birth mother.

[49] In paragraph [77] of his Note the sheriff simply weighed P's need for a stable family unit and her "reasonable match" with Mr and Mrs A against her "relationship with her natural mother" which "has to be maintained unless no other course is possible". The sheriff did not evaluate either of these "needs", nor did he examine the welfare implications of the option he chose. He did not carry out the necessary analysis, and this is sufficient to vitiate his reasoning. If the sheriff had carried out the analysis and assessment of the various options available, as he was bound to do, it was inevitable that he would have concluded that option 3 was clearly the option which best met the need to safeguard and promote the welfare of the child throughout her life.

[50] Senior counsel submitted that the Sheriff Appeal Court failed to recognise the deficiencies in the sheriff's decision, and erred in law in its approach to the crucial issue of P's welfare. The SAC observed (at para [44] of its opinion) that:

> "while the case of *in re B-S (children)* described the requirement for global holistic evaluation as crucial, it was not in our view an invitation to find artificial appeal points through identifying minor or irrelevant omissions".

This suggests that the SAC considered that the sheriff's failure to carry out a full analysis of the options as described above was a minor or irrelevant omission. It was not – it was

sufficiently material as to vitiate his decision. Before the SAC senior counsel for the appellants presented six questions which the sheriff had not addressed. The SAC list these at paras [35] to [40]. These included where P would live in the foreseeable future; who would discharge parental responsibilities and exercise parental rights; the effect on P of uncertainty over her status; the failure to consider the nature of the benefit P may derive from a relationship with KR; the advice from the Children's Hearing; and what further intervention is now practical. In paragraph [45] of their opinion the SAC state that none of these six features can be regarded as sufficiently material to vitiate the sheriff's exercise or conclusions. This, together with the SAC's reasons for rejecting these features, amounted to an error of law.

[51] Moreover, the SAC fell into the same error as the sheriff in not having regard to the avoidance of delay in the determination of these issues. In giving its advice to the court in its report dated 6 June 2016, the Children's Hearing observed as follows:

- "In terms of timing, it is P's timing that the panel considered important. Coming up to three, she needs to find a settled family and not be kept in the foster system any longer.
- The Hearing felt that considerable supports had been tried without success and that rehabilitation was not a viable option within any timescale that would be beneficial to P."

[52] Although the SAC made reference to this advice (at para [39] of its opinion), it disposes of it by noting that the sheriff stated that he had not reached his decision lightly, and that this properly explained and justified his decision. It did not. It failed to take account of the guidance given by the Inner House in *TW* v *Aberdeenshire Council* (at para [18]), and the very clearly expressed guidance from Lord Reed in *S* v *L* (at paras [51]

and [52]). The result of the decisions taken by the sheriff and the SAC is further doubt and uncertainty, and further delay, without resolving any issues at present, in the hope that some unspecified form of rehabilitation with regard to KR may be successful at some stage in the future.

[53] For these reasons senior counsel urged us to allow this appeal. With regard to disposal, she submitted that there was enough material (including the recent report from the curator *ad litem* dated 1 June 2018) to enable this court to decide the issue itself. P had been the subject of proceedings since she was less than one year old; there was a need to resolve this matter without further delay, and further proceedings should be avoided if at all possible.

The curator ad litem

[54] Miss Wild appeared in order to assist the court on any matter which might arise from her report dated 1 June 2018. In the conclusion to that report she stated that there were several options available for P: she could be returned to KR; she could remain with the carers as an adopted child; or she could remain with the carers as a foster child. Her analysis of these options was as follows:

> "a) Return to KR
> KR clearly dotes on the child. She was well prepared for contact. She has only once been late for contact and is usually early. However, there was no sign of the outward affection from the child that I saw at the carers' home. The child often referred to "Mummy " and "Daddy", meaning the carers, during the contact session. Although she did not say anything when KR called herself "Mummy", as she is quite entitled to do, it was noticeable that the child did not call her anything. I was of the view that the child is quite happy to be with KR, but she does not identify herself as being KR's child.
>
> This is a child who remembers her foster carers with affection. She is very bonded to her current carers. A move away from her carers, who she identifies as her family, could be traumatic for her. I would be particularly concerned as the support with Dr Puckering is no longer available, given the child's age.

b) Remaining with the carers as an adopted child.
The child is a happy and confident child who is very outgoing. Much of that is owed to the stability and security provided by the family life she now has. The child refers to her carers as Mummy and Daddy. Her comment about pre-school meaning that you have a mum and a dad suggests that she wants to be part of a family. The game with the toy bunnies also demonstrates that the child identifies as being part of a family.

c) Remaining with the carers as a foster child.
The carers did not want to foster a child. They were clear that they had only ever wanted to adopt a child to be part of their family. It would be of concern if they were not able to adopt the child as it might alter the relationship they have with her. They have been exceptionally devoted to the child in the way that they have incorporated her into their family. Even if it did not alter the relationship, this child wants to be part of their family. She wants a Mummy and a Daddy."

[55] Before this court the curator *ad litem* stated that it was her clear opinion that this particular little girl, in these particular circumstances, needed to be adopted and needed a family of her own. She stated that P's relationship with her prospective adopters was markedly different to that with KR. She recognised the steps which KR had taken to improve her life, but she observed that P has lived in her present home for about two years; she was about to embark on her school career and she wanted a mummy and a daddy. It was striking that P volunteered at interview with Miss Wild that at pre-school everyone else has a mum and a dad. Miss Wild did not consider that this remark had been rehearsed.

Submissions for the respondent

[56] Senior counsel for the respondent moved the court to adhere to the interlocutors of the Sheriff Appeal Court dated 15 December 2017 and 25 January 2018 (regarding expenses) and to refuse the appeal. In the event that the court was minded to allow the appeal, the court should not make a permanence order on the basis of the findings made by the sheriff, which were based on evidence more than a year old. Instead, the petition should be refused, leaving the appellants to commence fresh proceedings in a time and manner that may be more appropriate. He adopted the detailed submissions made in his Note of Argument.

[57] For the appeal to succeed the appellants must satisfy this court both that the sheriff erred in relation to his determination of the necessity test in section 84(3) and that the evidence supported positive findings in the appellants' favour on each and all of the criteria for the making of a permanence order. As this was a second appeal, the appellants must further satisfy the court that the SAC erred in its treatment of this issue. He reminded us that the primary fact finder must be satisfied to a high standard before making a permanence order, and submitted that the sheriff was entitled to make the decision which he did. There is no proper basis for interfering with the findings-in-fact of the sheriff or with the decision appealed in the absence of identifiable error – *Henderson* v *Foxworth Investments Limited* 2014 SC (UKSC) 203 at 221 per Lord Reed at para [67]. This has been given particular emphasis in the context of appeals in permanence cases – *City of Edinburgh Council* v *RO and RD* [2017] Fam LR 27 at para [5]. Senior counsel submitted (1) that there was no error of law in this case, and (2) that it was plain that the threshold for an appellate court interfering with the decision of a court of first instance is high (perhaps equivalent to the test of unreasonableness in the public law context), and there was no such error in this case.

[58] Although the sheriff was satisfied that the threshold test was met in the present case, he was not satisfied that it was necessary to make a permanence order. He was entitled to reach this conclusion; it was consistent with authority, with the structure of the statute, and he addressed all the relevant circumstances.

[59] It was accepted that section 14 requires the court to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration, but this is located within a larger structure, and the court must have regard to all the circumstances of the case. It must be borne in mind that there is a threshold that must be passed, and then the welfare of the child must be considered, and whether it would be better

for the order to be made than not made. There is a risk that each of these aspects of the task may become blurred; this was what the Supreme Court was warning about in its observations in *in re B (A child) (Care Proceedings: Threshold Criteria*) [2013] 1 WLR 1911, particularly at paras [76], [77], and [105]. Mr Campbell accepted that the sheriff did not assess the options for the future welfare of P as clearly as Mrs Scott had done, and he accepted that paragraph [74] of the sheriff's Note did not address P's welfare, but paragraph [77] did address this, and one should not overlook paragraph [75].

[60] Senior counsel submitted that the SAC correctly identified and applied the relevant legal principles. It accepted that a holistic evaluation of the child's circumstances was required, but decided that the sheriff had not failed in this regard (para [44] of its opinion). The SAC considered the question of what further intervention was practical at para [40]. Although he accepted that the sheriff had not made any finding-in-fact that there were material prospects of success in any further intervention, this could be inferred from his Note. Senior counsel accepted that Dr Puckering and Mellow Parenting were only able to provide support and intervention for children up to the age of five, and that this was no longer an option, but it would have been an option at the time of the sheriff's decision. He accepted that there was no evidence that there was any similar resource to the Mellow Parenting course. However, he submitted that the SAC's conclusions were sound and adequately reasoned. This court should refuse the appeal and adhere to the interlocutors of the SAC. Even if the court were minded to allow the appeal, it should not make a permanence order but refuse the petition, which would allow the appellants to raise fresh proceedings.

Decision

[61] It should be noted that the circumstances of this case are quite different from those considered by this court in the recent appeal in the *City of Edinburgh Council* v *GD* [2018] CSIH 52. In that case the issue was the soundness of the sheriff's decision that the threshold test in section 84(5)(c)(ii) had not been met. In the present case, the sheriff found that that threshold test, and the further threshold test set out in section 83(2)(c) of the 2007 Act, had been met. No issue is taken in this case with his decisions in these respects.

[62] The issue in the present case is whether the sheriff erred in his approach to the considerations in section 84(4) and (3) of the 2007 Act. The threshold test having been met, the court requires to consider what order (if any) should be made to safeguard and promote the welfare of the child throughout childhood (and indeed throughout her life – see section 14), and whether it would be better for the child that the order be made than that it should not be made.

[63] This is an exercise which involves a holistic, global evaluation. However, there is a risk in this difficult area of the law of paying lip service to phrases or shorthand terms without considering their purpose, what they truly mean, or what they require for application in practice. "Holistic evaluation" and "nothing else will do" are two such phrases which have found themselves used repeatedly in the recent case law in this area. We do not suggest that they are wrong, nor do we disagree with their use, but their context must be kept in mind. Mere repetition of the phrases does not ensure that the appropriate exercise is being carried out.

[64] Once the sheriff has decided that the threshold tests in sections 84(5) and (83)(2) have been met, it is clearly the case that a child will not be returned in the near future to live with the person who has parental rights with regard to the child. That being so, the court

requires to consider what are the various options available for the care of the child. Having identified the various options, the court then requires to carry out an assessment of the proportionality of each of these options. This will involve an assessment of the practicality of each option, and the possible benefits and disbenefits to the child's welfare of each option. This is an exercise which is looking to the future, but which is informed to an important extent by findings in fact relating to past and present facts and circumstances, because future assessments cannot be based merely on hope or speculation, but must be grounded in sufficient findings-in-fact of what has happened or is now happening.

[65] "Holism" is "the tendency in nature to produce wholes from the ordered grouping of units" (Shorter Oxford English Dictionary). The evaluation which is required is not merely an exercise in ticking boxes, but an assessment of the whole merits and demerits of the various options, taking into account all the circumstances – but with the paramount consideration of safeguarding and promoting the welfare of the child throughout the child's life.

[66] The phrase "nothing else will do" first arose in this context in *in re B (A child)*, where Baroness Hale of Richmond observed at paragraph [198]:

> "Nevertheless, it is quite clear that the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by *overriding requirements* pertaining to the child's welfare, in short, where nothing else will do." (see also to the same effect at paragraph [215]).

Lord Neuberger of Abbotsbury PSC put it this way in the same case at paragraph [76]:

> "It appears to me that, given that the judge concluded that the section 31(2) threshold was crossed, he should only have made a care order if he had been satisfied that it was necessary to do so in order to protect the interests of the child. By 'necessary', I mean, to use Baroness Hale JSC's phrase in para [198], 'where nothing else will do'."

[67] However, as McFarlane LJ observed *in re W (A child)* [2017] 1 WLR 889 at paragraphs [68]/[69]:

> "The phrase is meaningless, and potentially dangerous, if it is applied as some free-standing, short cut test divorced from, or even in place of, an overall evaluation of the child's welfare. Used properly, as Baroness Hale JSC explained, the phrase 'nothing else will do' is no more, nor no less, than a useful distillation of the proportionality and necessity test as embodied in the Convention and reflected in the need to afford paramount consideration to the welfare of the child throughout her lifetime… The phrase 'nothing else will do' is not some sort of hyperlink providing a direct route to the outcome of a case so as to bypass the need to undertake a full, comprehensive welfare evaluation of all of the relevant pros and cons…
>
> [69] Once the comprehensive, full welfare analysis has been undertaken of the pros and cons, it is then, and only then, that the overall proportionality of any plan for adoption falls to be evaluated and the phrase 'nothing else will do' can properly be deployed. If the ultimate outcome of the case is to favour placement for adoption or the making of an adoption order it is that outcome that falls to be evaluated against the yardstick of necessity, proportionality and 'nothing else will do'."

[68] It should be borne in mind that these observations were made in the context of the different statutory scheme pertaining in England, but the concept of necessity was considered, in the context of the Scottish statutory scheme for adoption and whether it was compatible with article 8 ECHR, by Lord Reed in *S* v *L* at paras [39]-[41].

[69] We do not seek to suggest any disagreement with any of the *dicta* quoted above. We agree that the test for severing the relationship between parent and child is very strict – and properly so. But it is not an insurmountable test; where a court has identified all the available options for the care of a child, and carefully assessed the merits and demerits of all of these, and concluded that a permanence order with authority to adopt is the option which best safeguards and promotes the welfare of the child throughout the child's life, then that is the order which the court must make. That will meet the requirement of proportionality, and will be compatible with the Convention rights.

[70] There are many factors and circumstances which a court will require to consider and assess in reaching a decision as to what order, if any, best promotes the welfare of the child throughout the child's life. We do not consider that it would be helpful to attempt to list all

these factors, many of which will vary from case to case. However, one factor which, it seems to us, will be present in very many cases is the need to reach a decision which avoids unnecessary delay. Cases involving the possible severance of the relationship between parent and child will often involve difficult decisions, but they are decisions which the court must make. A decision which results in further protracted procedure being necessary will seldom promote the welfare of the child throughout the child's life.

[71] The court has repeatedly emphasised that unnecessary delay in reaching a final decision should be avoided. As the Extra Division observed in *TW* v *Aberdeenshire Council* at paragraph [16]:

> "Were it to be a requirement of authorising adoption that the natural parents must be shown to be likely to be unable to satisfactorily discharge their responsibilities and exercise their rights throughout the whole of an infant's childhood, then few children would be freed for adoption. More importantly, the determination of the question which faced the sheriff in this case would inevitably be postponed, with the result that the child's future would remain in a state of uncertainty during the child's most formative years. … What is required of the sheriff is a determination, at the time the application is considered, whether the inability of the parents to discharge their parental responsibilities and exercise their rights satisfactorily is likely to continue in the foreseeable future."

And again at paragraph [18]:

> "Whether the route favoured by the sheriff of refusing the application in its entirety, or the alternative solution of making a permanence order but refusing authority to adopt, were to be followed, in our opinion the inevitable result would be the creation of a state of doubt or uncertainty in the life of the child. She would either remain subject to supervision and regular review at Children's Hearings, or she would remain in the care of the local authority in terms of a permanence order with no realistic prospect of returning to the care of her natural parents in the foreseeable future."

[72] Lord Reed expressed similar sentiments more forcefully in *S* v *L* at paras [51] and [52] as follows:

> "[51] These adoption proceedings began in November 2009, when the child was two years old. He is now five years old, and the proceedings have not yet reached

> their conclusion. That is a very unfortunate state of affairs. He has been living with the respondents throughout that period. His mother, the appellant, has had no contact with him, and has been unable to fulfil the role of his mother. Equally, unless and until the proceedings are concluded in their favour, the respondents have to hold back from treating him fully as their son: he is not their child, and they do not know whether he ever will be. He has only one childhood, and it is rapidly passing. The appellant and the respondents have only one opportunity to fulfil the role of parents towards the child during his childhood. The delay can only be causing anguish to all the individuals involved.
>
> [52] The damaging consequences of delay in the determination of adoption proceedings have long been well known. The longer the proceedings unfold, the stronger the attachments which the child is likely to form with the prospective adopters, and they with the child. The child may identify wholly with the new family. It may be profoundly damaging to the child if the court does not endorse that new identity. The protracted uncertainty may itself be damaging and distressing. In the interests of the welfare of the child, and out of common humanity towards all the individuals involved, it is imperative that unnecessary delay should be avoided. The duty to avoid undue delay in the determination of disputes of this nature, in order to comply with the obligations imposed by Art 8, has also been made clear many times by the European Court. As is obvious, undue delay in the determination of adoption proceedings may have irreversible effects upon the child, and may in any event bring about the *de facto* determination of the issue.

[73] Most recently, this court made observations on the need to avoid unnecessary delay in *The City of Edinburgh Council* v *GD*, in which the Lord President observed, at para [37]:

> "Time is of the essence in this type of application. It will normally be important for a final decision to be made in the existing process rather than delayed until some uncertain date in what will thus become an uncertain future for the child. This is especially so where, as in this case, there are suitable adoptive parents who are ready to give this child a stable and caring upbringing."

Lord Menzies, in agreeing that time is of the essence in this type of application, observed, at para [48]:

> "This is an aspect of the duty to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration. It does not mean, of course, that the court should rush to a hasty or ill-considered judgment – the issues in cases such as this are clearly important and sometimes difficult. However, the court should have proper regard to the desirability of reaching a final decision with suitable expedition… Wherever possible, a determination should be made which avoids postponement of the final decision, and possibly the raising of fresh proceedings. Postponement of a decision, or the need

> for further lengthy procedure, will seldom be consistent with promoting the welfare of the child."

[74] It is not apparent from the sheriff's Note that he has carried out the rigorous exercise of identifying the various options for P's care in the future, assessing the benefits and disbenefits of each option, and deciding which will best safeguard and promote the welfare of P throughout her life. The sheriff does not appear to have considered the question of what options were available; certainly he does not list them, nor does he assess one against the other in order to reach a conclusion as to which will best promote P's welfare in the future. Indeed, although he refers to the requirement that he is to regard the need to safeguard and promote the welfare of the child throughout childhood (at para [72]) and sets out (at paras [16] and [24]) the terms of sections 14 and 84(5) – but not 84(3) or (4) – he does not expressly consider P's future welfare.

[75] Paragraphs [46] to [71] of the sheriff's note are concerned with whether the threshold tests were met. Having decided that they were, the sheriff moves on (at para [73]) to look at the question of whether a permanence order has been shown to be necessary. As senior counsel for the respondent properly conceded, para [74] is not concerned with an assessment of P's future welfare. It is looking back to the period during which Dr Puckering was involved with KR (a period which began in October or November 2014 and ended some 14 weeks later, perhaps in spring or early summer 2015) and is critical of the approach of the social work department at that time.

[76] Mr Campbell submitted that the sheriff did, at least implicitly, consider P's future welfare at paras [75]-[77]. We are not persuaded that this is so. In para [75] the sheriff accepts Dr Puckering's conclusion that there was scope for further intervention before rehabilitation was finally ruled out, and states that nothing in the evidence suggests that is

any different now. This is couched in very general, and brief, terms, and focuses only on the possibility of rehabilitation, without any attempt at identifying and assessing other options. Moreover, there are real difficulties with the view expressed by the sheriff in para [75]. It ignores the fact that Dr Puckering's conclusion related to a period ending more than two years before the sheriff's decision, at a time when P was aged between one and two years old. It ignores the fact that Dr Puckering's conclusion was reached in ignorance of the events of the summer of 2015, when KR was made the subject of an adult support and protection referral because of police concerns that she was being sexually and criminally exploited by men, and it ignores the conclusions of the consultant forensic and clinical psychologist, Dr John Marshall , whose report post-dated Dr Puckering's involvement. That report indicates "a theme emerges from Dr Puckering, Dr Hackley and KR in that she has learned from her past mistakes, was being exploited and controlled by other males and has moved on from the past. This is patently not the case from the evidence above".

Dr Marshall went on to say that KR

> "becomes highly over focused (due to Asperger's rigidity) in … males to the exclusion of what is going on around her (eg her adoptive parents and P). Combined with a proclivity for impulsiveness when there is male interest adds to risks for P and in KR not being psychologically present for her to meet her needs. This scenario whilst currently not being played out is highly likely; she still, for example, 'meets' males on Facebook and enters into relationships with possible exploitative males. She is not able to hold in mind and consistently apply parenting skills to keep P safe in my opinion. Sadly, the evidence points towards a permanency recommendation in this case."

This last point was ultimately correct – after several deferred decisions, the Children's Hearing on 6 June 2016 supported the application for a permanence order and advised the court that as P was

> "coming up to three, she needs to find a settled family and not be kept in the foster system any longer, and that the Hearing felt that considerable supports had been

> tried without success and that rehabilitation was not a viable option within any timescale that would be beneficial to P."

[77] Where is the evidence to suggest that there was scope for further intervention at the time of the sheriff's decision before rehabilitation was finally ruled out? We can find none. There is an echo in these circumstances of the observations of the Extra Division in *TW* v *Aberdeenshire Council* at para [26]:

> "In the present case the appellants have a proven track record of inadequate parenting. … There is no evidence of their ever having been able to cope adequately as parents. The sheriff was unable to make any finding as to when, if ever, they might be able to undertake the care of C… A vague hope of the possibility of maintaining some unspecified kind of relationship between a child and her natural parents from whom she has had to be taken into care shortly after birth is not an appropriate basis on which to disrupt the emotionally stable conditions in which a child is and has been residing with foster parents with a view to adoption. "

[78] We consider that the sheriff has fallen into error of law by not identifying the various options available for P's future care, and proceeding to carry out an assessment of the possible benefits and disbenefits of these options against the background of his findings-in-fact on the evidence he heard. It may be that he was distracted from this task by applying his mind to the shorthand "necessity test", but that test is (as explained in the authorities to which we have referred above) inextricably bound in with welfare considerations. Only after the comprehensive, full welfare analysis has been undertaken of the pros and cons can the phrase "nothing else will do" properly by deployed – *in re W (a child)* at para [69].

[79] It follows that the Sheriff Appeal Court also fell into error of law in refusing this appeal. The SAC stated at para [45] that "it is clear from the sheriff's lengthy, painstaking and careful judgment, read as a whole, that he has conducted the holistic, global evaluation which is required, against the correct legal tests." For the reasons we have given, we disagree. Much of the sheriff's judgment was concerned with considering whether the

threshold tests had been met. There is no indication that he carried out the comprehensive, full welfare analysis that was required.

[80] We also consider that the SAC fell into error in describing the six features identified by senior counsel for the appellants as not being sufficiently material to vitiate the sheriff's exercise or conclusions. Each of the questions raised posed a fundamental practical issue about P's care and welfare in the future. Taken individually and as a whole they were in our opinion highly material, and if made out, would have vitiated the sheriff's conclusions. Moreover, the SAC erred in our opinion in its disposal of each of these questions. This may perhaps be due to a misreading by the SAC of one of the sheriff's finding-in-fact. The SAC observes at para [47] that they were not asked to overturn the sheriff's finding "that there is room for further rehabilitation (finding 58)". That is not what the sheriff found in finding-in-fact 58. He found that "there was room for further intervention by the social work department before a decision on permanence was taken and there was room for further intervention before rehabilitation was ruled out." The finding relates to the period before the appellants made the decision on permanence (which was in August/September 2014) – the past tense is important. It was not a finding that, as at the date of the sheriff's decision, there is room for further rehabilitation. Although it was a finding which was critical of the appellants, it was not necessary for them to have it overturned in order for them to succeed on appeal.

[81] Furthermore, we consider that the SAC erred in law in its treatment of the sixth ground argued before it, in para [40], in which the SAC suggest that the sheriff's judgment

> "points to an obvious course of action, namely to support KR in a reference to the Mellow Parenting course (or similar resource) … It remains to be seen whether such a resource will in fact be successful, but the sheriff has accepted that there are material prospects of success."

[82] There was no evidence before the sheriff that there was a similar resource to the Mellow Parenting course. The evidence was to the effect that the Mellow Parenting course was directed principally towards parents of very young infants (aged one to three). It is not available to children aged five or over. Not only was there no evidence about a similar resource, but the sheriff expressed no views as to whether there were material prospects of success.

[84] For all these reasons we have reached the view that both the sheriff and the Sheriff Appeal Court fell into error of law and that this appeal must be allowed. We have recalled the interlocutors of the Sheriff Appeal Court dated 15 December 2017 and 25 January 2018, and the interlocutor of the sheriff dated 11 July 2017.

[85] This raises the question of further steps. In some cases it may be necessary for further or more up-to-date evidence to be obtained before any decision is made as to whether a permanence order should be granted, with or without authority to adopt. We do not suggest that such a course of action will never be appropriate, although it will inevitably carry with it the very unfortunate consequences of further delay which have been discussed above. If at all possible, unnecessary delay should be avoided. In the present case we have had the advantage of a recent report dated 1 June 2018 from the curator *ad litem*, which provides us with up-to-date information regarding KR and the present arrangements for P. That report carries out an assessment of the benefits and disbenefits of the various options for P's care and welfare in the future, and concludes that her welfare is best served by an adoption order being granted in favour of the carers. We are of course not bound to follow this advice. However, taking this, together with the oral presentation by the curator *ad litem* to the court, the submissions of senior counsel for both parties, and all the other materials

before us, we consider that we are able to reach a conclusion ourselves as to what disposal will best safeguard and promote the welfare of P throughout her life.

[86] We agree that the options for P were correctly identified by senior counsel for the appellants as set out at paragraph [45] above. We also agree with the assessment of the benefits and disbenefits of these options which was undertaken by senior counsel for the appellants in her submissions to us, and which are summarised at paras [46] to [48] above. We see no advantage to setting these out again here. We observe that this is the sort of comprehensive, full welfare analysis of the pros and cons and an assessment of overall proportionality that we would expect a judge at first instance to carry out. Having considered all of the possible benefits and disbenefits of the various options, and all the circumstances of the case, we are satisfied that a permanence order should be pronounced with authority for the child to be adopted. At this stage (and only at this stage) is it appropriate to use the phrase "nothing else will do". We are satisfied that it applies here.

[87] In conclusion, we echo the views expressed by the various experts who have provided reports and given evidence in this case, and the views of the sheriff and the Sheriff Appeal Court – we do not doubt that KR has a genuine and close affection for P. The test for severing the relationship between a natural mother and her child is a high one, and we have not reached our conclusion lightly. Inevitably there is sympathy for KR in the situation in which she finds herself. However, we are driven to the conclusion we have reached by the requirement to regard the need to safeguard and to promote the welfare of the child throughout the child's life as the paramount consideration. In our view that consideration points strongly in favour of granting authority for P to be adopted, and to provide her now with the stability which she needs.