SHERIFF APPEAL COURT

[2019] SAC (CIV) 7
FAL-AD27-17

Sheriff Principal DL Murray
Appeal Sheriff W Holligan
Appeal Sheriff AG McCulloch

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in the Sheriff Appeal Court

in the appeal

BH

First Petitioner and First Respondent

and

EH

Second Petitioner and Second Respondent

against

CH

First Respondent and Second Appellant

and

SM

First Appellant and Second Respondent

First Appellant: McAlpine, Advocate; Hill & Robb
Second Appellant: Gilchrist, Advocate; Marshall Wilson Law Group
Respondents: Cobb, Advocate; Gair & Gibson

27 February 2019

[1] This is an appeal against the decision of the sheriff following proof to make an adoption order in respect of a child E, in favour of the respondents BH and EH. The appeal is brought by SM and CH, the natural parents of E, who are both 21 years of age ("the appellants"). E is 3 years of age, BH and EH, who are both 38 years of age, are the parents of CH, the birth mother of E, and the maternal grandparents of E ("the respondents").

[2] The sheriff heard four days of evidence. All the witnesses provided affidavits which represented the principal parts of their evidence in chief. The sheriff determined that he could dispense with the consent of the appellants to the adoption because they had "failed to discharge their parental responsibilities or exercise their parental rights" and he was "not persuaded that they are likely to be able to exercise their responsibilities and rights in the reasonably foreseeable future." He concluded that if he was wrong about that he would have dispensed with consent in terms of section 31(3)(d) of the Adoption and Children (Scotland) Act 2007 ("the 2007 Act") on the basis that the welfare of E made it necessary that the appellants' consent be dispensed with. Having so determined he examined welfare considerations as set out in section 14 of the 2007 Act. He concluded that "adoption is the required approach having regard to [E's] long term future and that residence would not suffice to secure that long term future." He also concluded in terms of section 28(2) of the Act that it was better for E that an order was made than not made. He made no order for contact.

[3] In summary, the material facts, found by the sheriff, which were not disputed in the appeal, are as follows. In April 2015 social work services became aware that CH was pregnant with her second child E. Her first child, J, was born in August 2014. SM is not the birth father of J, but by the time J was born he was in a relationship with CH. Following J's

birth she was cared for by the appellants. She was found to be at risk from domestic abuse, emotional abuse and neglect, parental drug misuse and parental mental health problems. In addition SM and CH failed to engage with the authorities. J was therefore made the subject of a compulsory supervision order, with a measure providing that she reside with her parental grandmother and that she have contact with the appellants.

[4] Following the birth of E, in October 2015, a child protection order was granted. She was removed from the care of the appellants and placed with a foster family. Thereafter interim compulsory supervision orders were put in place with a condition of residence with foster carers. Arrangements were made for contact between the appellants and E twice a week under supervision. By 20 November 2015 the first appellant had missed two contacts and his last contact with E was that day. The second appellant last had contact with E on 24 November 2015. Contact between the appellants and E was suspended following a child protection case conference on 4 December 2015. The appellants did not engage with social work services. In January 2016 the respondents indicated to social work services they wished to be considered as kinship carers. Following a 12 week assessment, during which they had contact with E, they were approved by social work services as kinship carers. E began to reside with the respondents on 7 April 2016 and has continued to reside with them since that date. There is no permanence order with authority to adopt the child. At a looked after review in August 2016, attended by the appellants, the respondents stated their intention to apply to adopt E. On 25 May 2017 the Children's Hearing provided advice to the sheriff in support of the plan for E to be adopted by the respondents. In or around May 2017 the appellants separated, however they are still to be found in each other's company from time to time. Their lifestyles remained chaotic and social work services were legitimately concerned on that account. E is happy and settled with the respondents.

[5] It is convenient at this point to set out the relevant statutory provisions. Section 31 of the 2007 Act regulates the requirement for parental consent to adoption. The default position is that where the parent is alive and their whereabouts known, absent parental consent, an adoption order cannot be made. Section 31(2)(b) confers upon the court the power to dispense with the consent of a parent on the grounds specified in section 31(3). In the instant case the appellants do not consent to the adoption. So far as material the relevant sub sections of section 31 are:

> **"31 Parental etc. consent**
> (1) An adoption order may not be made unless one of the five conditions is met.
> (2) The first condition is that, in the case of each parent or guardian of the child, the appropriate court is satisfied—
> (a) that the parent or guardian understands what the effect of making an adoption order would be and consents to the making of the order (whether or not the parent or guardian knows the identity of the persons applying for the order), or
> (b) that the parent's or guardian's consent to the making of the adoption order should be dispensed with on one of the grounds mentioned in subsection (3).
> (3) Those grounds are—
> (a) that the parent or guardian is dead,
> (b) that the parent or guardian cannot be found or is incapable of giving consent,
> (c) that subsection (4) or (5) applies,
> (d) that, where neither of those subsections applies, the welfare of the child otherwise requires the consent to be dispensed with.
> (4) This subsection applies if the parent or guardian—
> (a) has parental responsibilities or parental rights in relation to the child other than those mentioned in sections 1(1)(c) and 2(1)(c) of the 1995 Act,
> (b) is, in the opinion of the court, unable satisfactorily to—
> (i) discharge those responsibilities, or
> (ii) exercise those rights, and
> (c) is likely to continue to be unable to do so.
> (5) This subsection applies if—
> (a) the parent or guardian has, by virtue of the making of a relevant order, no parental responsibilities or parental rights in relation to the child, and
> (b) it is unlikely that such responsibilities will be imposed on, or such rights given to, the parent or guardian."

Section 31(4) and 31(5) must be read alongside the definition of parental responsibilities and parental rights in section 1(1) and 2(1) of the Children (Scotland) Act 1995 ("the 1995 Act").

Section 1(1) provides:

> **"1.— Parental responsibilities**
> (1) Subject to section 3(1)(b) , and (d) and (3) of this Act, a parent has in relation to his child the responsibility—
> (a) to safeguard and promote the child's health, development and welfare;
> (b) to provide, in a manner appropriate to the stage of development of the child—
> (i) direction;
> (ii) guidance,
> to the child;
> (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
> (d) to act as the child's legal representative,
> but only in so far as compliance with this section is practicable and in the interests of the child."

Section 2(1) provides:

> "**2.— Parental rights.**
> (1) Subject to Section 3(1)(b), and (d) and (3) of this Act, a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right—
> (a) to have the child living with him or otherwise to regulate the child's residence;
> (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;
> (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and
> (d) to act as the child's legal representative."

These provisions must be read alongside the other provisions of the 2007 Act. Particular regard must be had to section 14, which is concerned with the considerations relevant to the exercise of powers under the Act. So far as material it provides:

> **"14 Considerations applying to the exercise of powers**
> (1) Subsections (2) to (4) apply where a court or adoption agency is coming to a decision relating to the adoption of a child.
> (2) The court or adoption agency must have regard to all the circumstances of the case.
> (3) The court or adoption agency is to regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration.

> (4) The court or adoption agency must, so far as is reasonably practicable, have regard in particular to—
>
> (a) the value of a stable family unit in the child's development,
>
> (b) the child's ascertainable views regarding the decision (taking account of the child's age and maturity),
>
> (c) the child's religious persuasion, racial origin and cultural and linguistic background, and
>
> (d) the likely effect on the child, throughout the child's life, of the making of an adoption order.

It is also necessary to have regard to section 28, which provides:

> **"28 Adoption orders**
>
> (1) An adoption order is an order made by the appropriate court on an application under section 29 or 30 vesting the parental responsibilities and parental rights in relation to a child in the adopters or adopter.
>
> (2) The court must not make an adoption order unless it considers that it would be better for the child that the order be made than not.
>
> (3) An adoption order may contain such terms and conditions as the court thinks fit."

Submissions for the appellants

[6] Mr McAlpine made submissions for the first appellant SM which were adopted by Ms Gilchrist for the second appellant CH. The appellants invited the court to recall the sheriff's interlocutor and substitute a residence order in favour of the respondents. No order for contact in favour of the appellants was sought. The appellants did not insist on their argument in terms of Article 8 of the Convention.

[7] The appellants criticised the sheriff for failing properly and adequately to set out the legal tests to be applied in relation to incapacity; not specifying the statutory provisions and applying the appropriate dicta from case law. The relevant provisions on consent are contained within section 31 of the Act. The court must consider these provisions together with the overarching provisions specified in section 28 of the Act. *S Petitioner* 2014 Fam LR 23 makes clear the sheriff is to act as a fact finder. The court is then required to use those findings-in-fact to evaluate whether the test set out in 31(4) of the 2007 Act has been satisfied

(which for reasons of brevity we shall refer to as "the incapacity test"). Paragraphs 27 and 28 of *S Petitioner* make clear that a finding of historical inability to satisfactorily discharge and exercise parental rights and responsibilities is insufficient. The facts found by the sheriff were not sufficient to establish parental inability. In the course of his judgment the sheriff referred to contact between the appellants and E (paragraphs [15] to [17]). The sheriff suggested mediation with a view to providing a framework for future contact. The statements by the sheriff that he hoped that contact will take place in future and that progress can be made whether contact is direct or indirect were inconsistent with the sheriff's finding that the appellants are likely to be unable to continue to satisfactorily discharge the appropriate parental rights and responsibilities. The sheriff's findings-in-fact were insufficient to support the conclusion that the parents were unable to discharge parental responsibilities or exercise parental rights other than those respectively set out in sections 1(1)(a) and 2(1)(a) of the 1995 Act. In Mr McAlpine's submission, section 31(4) is clear in that, when determining whether a parent can discharge his parental rights and responsibilities, the court excludes consideration of contact; that is what the subsection provides. The sheriff did take contact into consideration and he was in error in doing so.

[8] Further the sheriff had failed to record the incapacity test correctly, he used the phrase "have failed" as opposed to "are unable" in both his finding-in-fact-and-law [1] and in paragraph [10] of the note. This demonstrated that the sheriff did not apply the relevant legal test. He failed to assess the appellants' current and prospective parenting abilities. He failed to make any findings-in-fact regarding the appellants' current or prospective parental inabilities. His focus was on their past failures. It was essential for him to have made findings on the appellants' ability to exercise their rights and responsibilities in the future. As a consequence his evaluation that consent could be dispensed with in terms of section

31(4) was flawed. Absent such findings that consent could be dispensed with no adoption order could be made.

[9] In relation to the sheriff's conclusion as to section 31(3)(d), this is a high test and is one of necessity (*Fife Council* v *M* 2016 SC 169 paragraph [60] and *S* v *L* 2012 SLT 961 at paragraph [34].) This welfare test for dispensing with parental consent falls to be read along with the requirement imposed by section 14(3) to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration**.** The sheriff was criticised for a lack of analysis in his reasoning for the finding that consent could be dispensed with in terms of section 31(3)(d). While he sets out in paragraph [12] of the judgment his understanding of what is meant by "requires" he does not offer context as to why it is necessary to dispense with consent out of necessity for E's welfare.

[10] Turning to the broader welfare requirement, the sheriff failed to consider properly evidence of the options short of adoption; in particular he makes no findings-in-fact which demonstrate why adoption and nothing short of adoption is required. Neither does he undertake a detailed analysis of why nothing else will do. He discounted the evidence of Mr Waite, the independent social worker. At paragraph [4] of the judgment the sheriff stated he found Mr Waite to be "fair and balanced and derived a great deal of help from that evidence." However at paragraph [10] he decided that he was not persuaded by his evidence that a residence order would secure E's long term future.

[11] The sheriff failed to record that he considered the granting of a residence order would confer parental rights and responsibilities on the respondents. He had not explained his reasoning why a residence order in favour of the respondents would be insufficient and it was also noted that such an order could also remove the parental rights and responsibilities of the appellants. There was no analysis of why a review of a residence

order would be harmful to the future welfare of E, especially when such an application to vary the residence order could only be made on a change of circumstances. Nor did the sheriff appear to have recognised that the making of an adoption order is not of itself a bar to a future application for contact under section 11(3) 1995 Act (as amended by section 107 of the 2007 Act). The sheriff did not appear to consider that the making of a residence order would likely mean the end of the child's involvement in the Children's Hearing system. Rather at paragraph [12] he proceeded on the basis that there was a potential for continued involvement. He also failed to set out his consideration of the status of E in particular about her becoming the child of the respondents: namely that the respondents would no longer be her grandparents but her parents, and the second appellant would no longer be her mother but her sister. Such a change in the child's status would not be in her interests. The sheriff failed to take a global and holistic approach; he took a linear approach. For the foregoing reasons he therefore erred in law in his application of the welfare test.

Submissions for the Respondents

[12] The respondents' motion was for the court to refuse the appeal and to adhere to the sheriff's interlocutor. The sheriff was entitled to make the findings-in-fact based on his evaluation of the witnesses and he made sufficient findings-in-fact to allow him to conclude that the making of the adoption order was the correct and proportionate course. The sheriff gave proper consideration to the options available in determining whether or not to make the adoption order. The judgment sets out each stage that he followed in reaching his decision. Paragraphs [7] to [11] of the judgment deal with the first issue to be considered: the consent of the parents. Paragraphs [13] and [14] explain the next two stages and paragraph [15] refers to the main substantive considerations. The sheriff dealt in comprehensive fashion with the requirements of each stage in turn. This reflected the

approach commended in *S* v *L* 2012 SLT 961. The appellants have failed to explain or elaborate where the sheriff has gone wrong.

[13] The sheriff had correctly set out the law and applied the appropriate tests. He had referred in terms to the tests in the 2007 Act. As examples, in paragraph [13] he referred to Section 14 of the Act and in paragraph [15] to Section 28(3).

[14] Reference was made to paragraph [76] of the Opinion of Lady Wise in *AV and SV* v *AJF and IDF* 2017 Fam LR 110. The sheriff was required to undertake a fact-finding exercise and determine whether the relevant parent or guardian is unable satisfactorily to discharge the rights and responsibilities referred to and whether or not they are likely to continue to be so unable. The sheriff was entitled to make the findings-in-fact that he made based on the evidence before him. There was no proper basis to say that his conclusion was wrong. In relation to the construction of section 31(4)(a) contact was not irrelevant when considering whether the parents were able satisfactorily to discharge their parental rights and responsibilities. Evidence of past conduct can be relied upon in relation to conduct in the future. It was unnecessary to consider the *esto* position under Section 31(3)(d) as the sheriff was entitled to proceed on the basis of the incapacity ground. However, in dealing with this ground, the respondents' position was that the appellants failed to make clear what defects there were in what was a global and holistic approach adopted by the sheriff. The suggestion that the sheriff had adopted a linear approach was without merit and could not be upheld on an analysis of the sheriff's judgment when read as a whole. In relation to the "nothing else will do" test expressed by Lord Reed in *S* v *L* and summarised in *Fife Council* v *M* 2016 SC 169, the sheriff had explained why adoption is necessary. He used the word "requires" in paragraph [11] and twice in paragraph [12]. At page 14 and paragraph [13] at page 15 he uses the words "necessary" and "demand" in paragraphs [12] and [13] of his

judgment. In particular in paragraph [12] he states "I accept that consent can only be dispensed with if the welfare of the child requires it." He therefore clearly recognised it must be something more than being merely desirable or reasonable. This demonstrated that the sheriff applied the correct test.

[15] In relation to the sheriff's assessment of the evidence of Ms Wannan and Mr Waite he explains his evaluation of the various witnesses. He was entitled to prefer the evidence of Ms Wannan and discount the recommendation of Mr Waite. He explains his reasoning in paragraphs [7] to [10] of his judgment. The evaluation of evidence and witnesses was properly a matter for the sheriff at first instance and this court should accept his conclusions. The sheriff had properly addressed the issues and it was to be noted that paragraph [27] of *S Petitioner* recognised that the court has to form a view in answer to a number of questions. The sheriff adequately explains his reasoning for reaching these conclusions and there is no error in his conclusion that he is entitled to dispense with parental consent in terms of Section 31(4) of the Act. In paragraph [10] of the judgment it could be seen that the sheriff had regard to the future:

> "the question then is whether they are unlikely to be able to do so in the future. Given the [appellants'] history of sometimes limited and at other times complete lack of engagement I have considerable doubts as to whether or not they would be able to exercise their rights or discharge their responsibilities in the future. As I will indicate later on in this judgment, I hope that contact will take place in the future but I am not persuaded that they are likely to be able to exercise their responsibilities and rights in the reasonably foreseeable future."

That was reinforced by finding-in-fact-and-law [1] which on a plain reading made clear that the sheriff's conclusion was that the appellants were unable to discharge their parental rights and responsibilities both now and in the future. Although it was accepted that the sheriff's finding-in-fact-and-law [1] did not follow exactly the wording of section 31(4) it was nonetheless sufficient to satisfy this court that he was entitled to dispense with parental

consent. In relation to the tests in Section 14(3) and 14(4), it was clear from the terms of the sheriff's judgment at paragraph [12] that the sheriff had considered the correct test and assessed the evidence against the correct standards (reference was made to *R* v *Stirling Council* 2016 SLT 689).

[16] The point of any prospect of rehabilitation into the care of one or both of the appellants had passed. The case proceeded on the basis that there was no question but that the child was going to remain with the respondents. The sheriff had to consider the case against the two realistic alternatives which were at large: either the making of an adoption order as sought by the respondents, or the making of a residence order as sought by the appellants. He was clearly concerned about the potential problems of the continued involvement of E in the Children's Hearing system and the potential for variation of any residence order. These were valid concerns in the context of the child's placement with the appellants being undermined. He had a valid basis for making the adoption order, for the reasons he explained. It was a conclusion he was entitled to reach. The sheriff was aware that this is not a case of "foster adoption" but kinship adoption. Reference was made to "open adoption", an issue raised by the curator, Mr Gould. Mr Gould was not a lawyer and it is not a term of art. In this context counsel submitted that "open adoption" means some form of contact between E and the appellants with contact operated not of right but subject to the control of the respondents (Lady Wise referred to "closed adoption" at paragraphs [92] and [97] of *AV and SV* v *AJF and IDF*). Neither the social worker nor the curator supported a residence order. The sheriff was concerned that contact with the appellants would be disruptive to the placement and to the child (finding-in-fact 27). Remaining with the respondents would offer stability and be beneficial to E.

Additional submissions

[17] Although the reference to the exclusion of contact in section 31(4)(a) (which we will refer to as the "contact proviso") was referred to in argument before us no party was able to explain the purpose of the provision. Accordingly, following submissions, the court requested that parties should provide further written submissions on the contact proviso. Parties were also requested to address the procedural implications of making a residence order in an adoption petition.

[18] The appellants submitted that the "incapacity test" in section 31(4)(a) of the Adoption and Children (Scotland) Act 2007 has no nexus with the parental right and responsibility of contact. There is no ambiguity in section 31(4)(a) and there is no need for a further aid to statutory interpretation as the terms of the provision are plain. This accorded with the analysis of Professor Norrie in *The Law of Parent and Child in Scotland, 3rd Ed*, at para [21.52] that the issue of personal relations and direct contact with the child are expressly excluded from the incapacity test. Although there was no legitimate basis to look beyond the words of the provision, that analysis was supported when consideration was given to the legislative progress of the Act.

[19] For the respondents, on a proper construction of section 31(4)(a) it is open to the court to have regard to the failure of parents to maintain contact as part of the overall assessment of their ability satisfactorily to discharge their parental rights and responsibilities (see Lord Glennie in *M* v *R* 2013 SCLR 393 at paragraph [76] and *The Law of Parent and Child in Scotland, 3rd Ed* at paragraph 21.53).

[20] Parties noted that in adoption proceedings the Extra Division in *LO* v *N and C* 2017 Fam LR 44 accepted that Section 11(1) of the 1995 Act is framed in terms sufficiently broad to give the court power to make an order under Section 11 of the 1995 Act. Alternatively, such

an order could be made in separate proceedings invoked for that purpose (see also *X* v *Y* 2015 Fam LR 41 and *AV and SV* v *AJF and IDF*). Accordingly had the sheriff chosen to do so, the making of a residence order in favour of the respondents would have been a competent step.

[21] They also agreed that this court may therefore make a residence order of its own motion. Section 47(3) of the Courts Reform (Scotland) Act 2014 gives to the Sheriff Appeal Court:

> "all such powers as are, under the law of Scotland, inherently possessed by a court of law for the purposes of the discharge of its jurisdiction and competence and giving full effect to its decisions."

The 1995 Act section 11 provides:

> "(1). In the relevant circumstances in proceedings in the Court of Session or sheriff court, whether those proceedings are or are not independent of any other action (emphasis added), an order may be made under this subsection in relation to –
> a) parental responsibilities;
> b) parental rights;"

Section 11(3)(b) provides:

> "that although no application for an order under subsection (1) above has been made, the court (even if it declines to make any other order) considers it should make such an order."

In terms of section 111 of the Courts Reform (Scotland) Act 2014 the Sheriff Appeal Court can both vary the decision appealed against or remit the matter back to the sheriff (sub-section 1(a)). There is no restriction in the 1995 Act or the 2014 Act preventing the exercise of either power by the Sheriff Appeal Court (section 111(2)). Therefore, in upholding the appeal if so advised, the Sheriff Appeal Court could decide that a residence order should be made in favour of the respondents, together with removal of such parental rights and responsibilities as the Sheriff Appeal Court considered appropriate. Alternatively the matter could be remitted back to the sheriff court with a direction that it be heard by a different

sheriff who could grant a residence order if he was satisfied that was the appropriate course having regard to the welfare of the child.

[22] Parties were also agreed that if such a residence order were made either by this court or by a sheriff, the appropriate procedure for seeking variation of its terms would be a Minute in the current adoption proceedings (OCR 33.44). It was not accepted that OCR 33.60 limits the operation of this rule, standing the exclusion of adoption from the definition of family action in OCR 1. Alternatively, if that approach was wrong, both parties submitted that the absence of an express rule does not mean the court does not have the power to deal with any applications for post-decree section 11 orders within the adoption process (see *Tonner* v *Reiach and Hall* 2008 SC 1 at paragraph 99): the procedure being a Minute to Vary and Answers. Such an approach would largely mirror the approach had OCR 33.60 applied. It was also noted that the situation would only arise if no adoption order was made. For present purposes given this is a kinship case, issues of confidentiality were less problematic.

[23] The appellants also proposed that an alternative way of dealing with matters would be for any subsequent application for section 11 orders post-decree to be by way of a fresh process in which the initiating document would be an initial writ. Any such writ could set out the terms of the existing order and the basis for seeking to vary it (by seeking of new a contact order). Such a situation and process was said to be akin to the regulation and variation of the care arrangements for a child where an English court had made a contact order and the child was now resident in Scotland.

[24] The procedural implications were largely focussed on the form of the initiating documents, either a minute in the present proceedings or an initial writ. Under either approach the substantive content was likely to be similar to, if not the same as, the minute or

initial writ setting out the terms of the existing section 11 order, referring to the adoption proceedings and containing averments dealing with the relevant legal tests for making section 11 orders in circumstances where a residence order has already been made.

Decision

[25] The appellants did not argue for rehabilitation at this stage, nor ask that a contact order in their favour be made. Their challenge focussed on the failings of the sheriff to demonstrate that he had: properly applied the statutory framework; made findings-in-fact sufficient to justify dispensing with parental consent having regard to that framework; and in the ultimate consideration of whether the making of an adoption order was in the best interests of the child throughout her life, undertaken the comprehensive evaluation he was required to undertake of all the various options and the merits and demerits of each. These points give rise to three key questions for this court to answer:

1. Has the sheriff made findings-in-fact sufficient to justify dispensing with consent?
2. Has he demonstrated he has applied the statutory tests to dispense with consent?
3. Has he shown he has adequately considered the options short of adoption, and explained his analysis of those options?

[26] The process to be undertaken in such cases is helpfully explained by Lady Wise in *AV and SV* v *AJF and IDF* at paragraphs [76] to [80]. This begins with the making of findings-in-fact upon which to base the evaluation of whether the consent of, in this case, the natural parents could be dispensed with.

[27] The court must be satisfied that the nature and extent of the parental inability is such as is necessary to dispense with parental consent. The statutory scheme provides for two

grounds on which consent may be dispensed with. Firstly, in terms of Section 31(4) the incapacity test: namely that the parents are unable to satisfactorily discharge parental responsibilities or exercise parental rights and are likely to continue to be unable to do so.

[28] The appellants submitted that the sheriff's findings-in-fact are insufficient to reach the conclusion that the appellants are unable to discharge and exercise their parental rights and responsibilities. It is well established that past failures are not sufficient to establish inability to exercise parental rights and responsibilities in the future. To fulfil the requirements of the statute the sheriff is required not only to make findings relevant to the past failures but also to link those failures to a prospective inability. While it was accepted that the sheriff made findings in relation to past matters, it was submitted that he had failed to make findings, or use language, which demonstrated to the requisite level that he had reached a conclusion that the appellants would be unable to exercise their parental rights and responsibilities in the future. In undertaking that assessment the appellants submitted that the exercise of (or failure to exercise) contact by them should be left out of account. This gives rise to a need to determine the correct interpretation of section 31(4). The appellants focussed on the contact proviso. It was their submission that read properly, when looking at the exercise of parental responsibilities and rights, the court must exclude the exercise of the right of contact, and focus on the exercise of the remaining parental responsibilities and rights. This interpretation was reached by considering the word "those" in subsection (b)(i). As subsection (4)(a) seemed to remove contact from the rights and responsibilities under consideration, it was the remaining responsibilities and rights that the court had to consider in dealing with the discharge or exercise by the appellants. During the debate neither party was able to advance an explanation as to why Parliament decided to insert the contact proviso. Both parties interpret the provision differently. Read literally, it suggests that

section 31(4)(a) only applies to those with parental rights and responsibilities other than contact which seems incorrect. As the meaning is somewhat obscure it is open to us to consider the legislative history which gave rise to the contact proviso. From the materials helpfully provided to us, the contact proviso was inserted at a late stage in the enactment of the Bill. From the debates (8 November 2006 and 7 December 2006, Column 30248/30249) it would appear Parliament considered that, without its insertion, before an order for adoption could be granted, consent would have to be obtained from a person who had only the right of contact (such as a grandparent) and that such a provision would be an unreasonable fetter upon the availability of adoption. In our opinion, such a construction is consistent with the other parts of the statute. In the present case, the parents (the appellants) have all rights. It would seem a very odd construction to leave out of account consideration of a parent's exercise of their rights and responsibilities whether they kept in contact with the child (see also section 83(3)(a) and *JA, TA, JC* v *Mr and Mrs AC* 2018 Fam LR 75 at paragraph [73]). It is the manner in which they have exercised all of those rights and discharged all of those responsibilities that is important; it is entirely appropriate for the court to consider past contact history to inform the likelihood of future behaviour as required by section 31(4)(c). Accordingly, we reject the construction advanced by the appellants. In our view a similar construction applies to section 83(3)(a).

[29] The sheriff correctly sets out findings-in-fact and identifies that the first issue for him was to decide whether or not the statutory grounds for dispensing with consent of the respondents was made out. He notes that the opportunity was available for the respondents to demonstrate that they were able to exercise their parental rights and discharge their parental responsibilities while maintaining contact with their daughter but that they failed to do so. He further notes that this was against a background of the first respondent's first

child having been removed from her care early in 2015. While there was some improved engagement between the appellants and the social work department, they continued to miss almost half of the proposed contact arrangements. He also made findings that there were regular domestic incidents and, although the appellants separated in 2017, from time to time they are still in each other's company. The sheriff noted the appellants' position that inadequate assessment was carried out in relation to their capacity to exercise their parental rights and responsibilities. The sheriff found, however, that while the opportunity to demonstrate this was limited, that was on account of their failure to engage with social work services.

[30] In paragraph [7] of his judgment, the sheriff records that making a determination that the parents are unable to satisfactorily discharge parental rights and responsibilities or exercise those rights and are likely to continue to be able to do so, is a matter of some difficulty given the limited involvement that the parents in this case have had with their child. They had a very limited amount of contact shortly after the birth but without any justification failed to keep that up. Very shortly afterwards the contact was terminated, the last contact having taken place in November 2015. The circumstances of the appellants were at that time and frequently thereafter chaotic. Indeed, the appellants appeared, in the words of Clare Wannan, which he quoted, to "go off the radar" until about August of 2016. He identified that there was an opportunity at the outset for the appellants to demonstrate that they were able to exercise their parental rights and discharge their parental responsibilities by maintaining contact but they failed to do so. The sheriff identified that the appellants had failed from August 2016 onwards to establish a pattern of behaviour which gave confidence to those charged with the care of E that contact would be in E's best interests. The sheriff was criticised for the expression of finding-in-fact and law [1]:

> "the [appellants] have failed to discharge their parental responsibilities or exercise their parental rights in relation to [E] and are likely to continue to be unable to do so, and accordingly their consent to an adoption order should be dispensed with."

The Inner House stated in *TW* v *Aberdeenshire Council* 2013 SC 108 at paragraph [16], in the context of a permanence order but with equal application in direct adoption such as this:

> "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."

[31] This history of sometimes limited, and other times, complete lack of engagement gave the sheriff considerable doubts as to whether or not the appellants would be able to exercise their rights or discharge their responsibilities in future. This court accepts the finding of the sheriff that parental consent could be dispensed with in terms of section 31(4). We are certainly not of the view that that finding can be said to be wrong, given the particular factual matrix.

[32] We reject the submission by the appellants that the sheriff's expression that he hopes that contact will take place between the child and the appellants in the future is incompatible with the finding that the parents were unable satisfactorily to discharge their parental rights and responsibilities.

[33] We do not accept that the sheriff's failure to replicate the statutory language in finding-in-fact [1] and paragraph [10] of the judgment render his conclusion invalid. Clearly it would have been preferable that he used "are unable" as opposed to "have failed" but we do not find this vitiates his conclusion that consent be dispensed with. It is tolerably clear that his findings warranted the conclusion that the statutory test was satisfied to entitle him to dispense with parental consent. It is however appropriate that we adjust the terms of the interlocutor to reflect the precise terms of the statute.

[34] Lest his conclusion that consent could be dispensed with in terms of section 31(4) was erroneous the sheriff, properly, also considered the alternative basis on which consent could be dispensed with in terms of section 31(3)(d). That question does not arise given this court accepts that the sheriff was entitled to dispense with consent in terms of section 31(4). For completeness however, like the sheriff we express our view on the application of section 31(3)(d).

[35] It is clear that section 31(3)(d) imposes a high test. It must be read alongside section 14(3) (*S* v *L* paragraph [30]) requiring the court to have regard to the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration. In doing so it must have regard to the value of a stable family unit in the child's development. The sheriff found his initial assessment of the parents being unable to exercise their parental rights and responsibilities, either now or in the future, a compelling feature which supported dispensing with their consent. That feature is also relevant to the welfare of E where she had had no contact with her parents since November 2015. It is reinforced by the fact that E is happy, secure and developing well in the placement with her grandparents. In addition the appellants had significant periods of non-engagement with the social work department. The sheriff makes reference to sections 14(3) and 14(4) of the 2007 Act. We agree with the sheriff that if he was in error in dispensing with consent in terms of section 31(4) he was entitled to dispense with their consent in terms of section 31(3)(d). Accordingly we answer the first two questions posed above in the affirmative.

[36] A determination having been made that consent may be dispensed with the court moves on to the second stage. The court must then consider what order (if any) should be made to safeguard and promote the welfare of the child throughout her life and whether it would be better for the child that the order is made than it should not be made. In doing so

regard must be had to the specific matters set out in section 14(4) of the 2007 Act. In reaching a view it is incumbent on the sheriff at first instance to assess the practicality of the various options which may be available of the care for the child and the possible merits and disadvantages of each of the options. Only if there is no realistic, reasonable alternative can the adoption order be granted. This analysis looks to the future, but is informed by what has occurred in the past. Having regard to the possibility raised before this court that a residence order in favour of the respondents with an order removing the parental rights and responsibilities of the appellants was an option which this court could consider or might warrant the matter being sent back to be considered anew, the court sought submissions from the parties on the benefit of obtaining a further curator's report. We concluded that such a report might avoid delay which would be inimical to E's welfare and provide up to date information which might be of assistance.

[37] The Inner House *North Lanarkshire Council* v *KR* 2018 Fam LR 92 at paragraph [64] set out the task which the court requires to consider at the second stage:

> "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 dis-benefits 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 in 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."

The court must identify the available options for the care of a child and carefully assess the merits and demerits of all of these.

[38] We repeat what was said by this court in *City of Edinburgh Council* v *RO*, RD 2017 Fam LR 27:

> "[6] In cases such as this the sheriff requires to produce the written judgment within a very tight timescale. There may be numerous findings in fact. Often such facts are contained in a joint minute of the parties, but the sheriff still requires to consider with care each proposed finding to ensure that it is accurate, correctly expressed and supported by evidence. He or she then has to set out the evidence of the witnesses in some detail, comment upon it and reach a reasoned conclusion. That task is made more difficult when care has to be taken not to make an unintentional error in expression which can in certain circumstances lead to the impression, which might be erroneous, that the sheriff has failed to apply the Act in the required manner. A judgment produced in such circumstances should not be subjected to the detailed scrutiny of a conveyancing document. That point was made in the dicta of Lord Hoffmann in an English case on financial provision on divorce (Piglowska v Piglowski , at p. 1372) in which he repeated what he had said in an earlier case:
> "…specific findings in fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made on him by of the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

We also note what was said by Lord Wilson in *In Re B* [2013] 1 WLR 1911 at p. 1929:

> "Lord Hoffmann's remarks apply all the more strongly to an appeal against a decision about the future of a child."

[39] That said, to answer the third question posed above this court must examine whether the sheriff has demonstrably analysed the arguments for and against making the adoption order, and explained adequately his reasons for preferring that option to the potential alternatives. This analysis should be based on the findings-in-fact.

[40] Like the sheriff and the parties we accept that the option of making no order at all had no merit and was not a realistic possibility. The appellants did not direct any substantial criticism on the sheriff for his curt reference to the "do nothing" option. They were right in their approach.

[41] In terms of the future arrangements for E, two options were presented to the sheriff: either make an adoption order or make a residence order. As noted above, even where as in the instant case the sheriff was faced with a binary choice there should be a demonstrable

analysis by the sheriff of both options, with findings in relation to the pros and cons of each of the options and the sheriff's explanation as to why, read short, nothing else than adoption will do (see the *dicta* of Lord Menzies in *North Lanarkshire Council v KR* at paragraphs [66] to [69]). It became apparent that the appellants' final position to this court was that a real alternative to making an adoption order was the granting of a residence order in favour of the respondents coupled, if the court felt it appropriate, with the removal of the appellants' parental rights and responsibilities. The appellants accepted that contact between them and E was not an option at this stage.

[42] In the instant case whether the adoption order sought by the respondents or the residence order advocated by the appellants is made, E will remain in a stable family environment with the respondents. On neither scenario is an order for contact sought, although the sheriff recognised that contact might be possible at some point in the future.

[43] As noted the court sought additional written submissions from parties on the procedure for the making of a residence order in adoption proceedings. That such an order is competent had been recognised by the Extra Division in *LO* v *N and C*. Section 11(1) of the Children (Scotland) Act 1995 is framed in terms sufficiently broad to give the court power in adoption proceedings to make such an order. We accept it was an option which was available to the sheriff and would be available to this court in the appeal. There are however no rules to regulate any application to vary such an order and there are procedural issues. It was never intended that adoption proceedings should continue. Special rules relate to custody of the process. A particular issue arises should variation of a section 11 order be sought. Ordinarily it would be by way of Minute in the process; in this case the adoption process. In our view, if a section 11 order is made in an adoption process any subsequent application to vary should not be made in that process but in a separate action

raised by way of an initial writ. Given the absence of any rules we consider it would be of assistance if the Scottish Civil Justice Council were to consult with a view to rules of court being issued to regulate such a process.

[44] The sheriff recognised that the possibility of a residence order was an alternative to adoption, but stated at paragraph [12] of the judgment:

> "such an order would not in this case be in [E's] long term interests. A residence order would hold out the prospect of [E's] continued involvement in the children hearing system and also the potential for applications to the court for variation of the order either in relation to residence or contact that in my view would potentially undermine the stability of [E's] placement".

He contrasts that with the benefit of adoption which would provide a guarantee of residence with the petitioners' family which is a stable and happy environment. The sheriff was also not persuaded that the assurance from the respondents that they would not seek to disrupt the placement could be relied upon in all the circumstances. He then turned to consider the welfare considerations within section 14 of the 2007 Act.

[45] We did not find there to be substance in the appellants' argument in relation to Mr Waite's evidence. What was said about that in the judgment at paragraph [13] is as follows:

> "I found Mr Waite's evidence to be helpful in setting out a residence order as an alternative. However, I was not persuaded by his argument that that would secure [E']s long-term future. Ultimately, in evidence, Mr Waite was of the view that residence was the "slightly better" option. Mr Waite recognised the risk of disruption to [E] in the event of a residence order being granted but indicated that the risk of disruption had reduced significantly due to changes in each of the parents' lifestyles, their acknowledgement of past mistakes and their acceptance of the petitioners' parental role with [E]. He was not suggesting that all risk had disappeared, only that there had been a significant change which suggested future stability, more sensible decision-making and increasing capacity to prioritise [E]'s needs in contact. I was not persuaded, given Mr Waite's limited contact with the respondents, that the risk of disruption was significantly reduced. I found the evidence of Clare Wannan, who had been involved with the family since 2015, to be more compelling. Her evidence was that adoption would give the family and in particular [E] a clear way forward outwith the children's hearing system and the court system. I was persuaded that adoption would provide a valuable and stable family unit for [E] both now and in the future with legal parents of that family as

> she progresses into adulthood. I have therefore concluded that having regard to the provisions of section 14, an adoption is the correct way forward."

That passage demonstrates that the sheriff has weighed up the evidence of the witnesses and has explained why he has not ultimately accepted the positon advocated by Mr Waite. This court has no basis on which to demur from that conclusion.

[46] The Inner House in *Fife Council* v *M* endorsed the approach of the Court of Appeal in *In re B-S*. At paragraph [63] they made clear that there is a requirement for proper evidence which must address all the options which were realistically possible and must contain an analysis of the arguments for and against each option. This was more recently expressed by the Inner House in the passage in *North Lanarkshire Council* v *KR* set out above at paragraph [37] above. We have considered the sheriff's judgement carefully and have concluded that the sheriff has reached a conclusion which he was entitled to reach on his evaluation of the evidence.

[47] The sheriff identified at paragraph [13] that he required to examine the welfare considerations within section 14 of the 2007 Act. He noted the provision referred to the welfare of the child "throughout her life as the paramount consideration". He identified that this distinguished adoption orders from orders that can be made under section 11 of the Children (Scotland) Act 1995 for adoption has consequences throughout the life of the child and imposes rights and obligations which might otherwise cease on the child gaining maturity. It was in this context that he determined that adoption was required having regard to E's long-term future and that residence would not be sufficient to secure that long-term future.

[48] We set out in paragraph [45] above the sheriff's explanation of why he did not accept the position as advocated by Mr Waite. The sheriff found on the evidence that there was a

risk of disruption to E in the event of a residence order being granted. He concluded that there were considerable risks of disruption in only granting a residence order and that an adoption order was to be preferred given the long-term stability and security which it would provide. In particular he identified the benefit of making an award of adoption over residence was that adoption would provide a guarantee of a stable and happy environment for E who has had no contact with her parents since 2015 and is happy and secure where she is in a stable family unit with the respondents with whom she has been living since 7 April 2016.

[49] The sheriff also had regard to the provisions of Section 28(2) of the 2007 Act, that the court must not make an adoption order unless it considers that it would be better for the child that the order be made than not. He was satisfied it would be. The sheriff had concerns that there might be an early application for contact if he were only to grant a residence order which would be disruptive to the child's placement. He further noted that Mr Waite had indicated that before contact were to be allowed the appellants would need to demonstrate they could be responsible in the exercise of their rights and responsibilities.

[50] The sheriff also recognised that adoption would give the family, and in particular E, a clear way forward outwith the Children's Hearings system and the court system. He concluded that adoption where there is a valuable and stable family unit for E, both now and in the future, with the appellants becoming her legal parents as she progresses into adulthood, was the right option for E's long term welfare. We find no error in his conclusion and are satisfied that, in concluding that it was proportionate to make an order for adoption, he has given the necessary consideration to the alternative of a residence order. We therefore also answer the third question in the affirmative.

[51] The conclusion of the sheriff is also supported by the report of the curator dated 16 January 2019. That report confirms the benefits to E of adoption, rather than residence with the respondents and also confirms that E is currently well looked after, and thriving. It also addresses the option of a residence order being granted along with the removal of the appellants' parental rights and responsibilities. This was a position not advocated by the appellants but which it was suggested would be an option for the court to consider and which persuaded us that for completeness a further curator's report should be obtained. The curator's report did not support this alternative option. That fortifies our conclusion that a residence order combined with an order removing parental rights and responsibilities was not an option which could negate the reasoning of the sheriff that an adoption order was required. Many of the concerns which he had would also apply if such an order were made.

[52] We therefore find no error in the sheriff's decision to make the adoption order. We shall therefore refuse the appeal and adhere to the interlocutor of the sheriff save that for finding-in-fact-and-law 1 the following shall be substituted:

> "the respondents [appellants] are unable satisfactorily to discharge their parental responsibilities or exercise their parental rights in relation to [E] and are likely to continue to be unable to do so, accordingly their consent to an adoption order should be dispensed with."

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