SHERIFF APPEAL COURT

[2016] SAC (Civ) 1
X024/16

Sheriff Principal C A L Scott QC
Sheriff Principal M Lewis
Sheriff A MacFadyen

OPINION OF THE COURT

delivered by the Vice President, SHERIFF PRINCIPAL C.A.L. SCOTT QC

in

the Petition of

DUNDEE CITY COUNCIL

Appellants

Appellants: Moran, Solicitor.
Respondent: Cartwright, Advocate.

26 April 2016

[1] On 9 February 2016, the sheriff granted a permanence order in respect of the child A. As part of that order, the sheriff also determined that there should be contact between A and his father (the respondent in this appeal) four times a year.

[2] The permanence order had been sought by Dundee City Council (hereinafter referred to as "DCC"). At the hearing before the sheriff, DCC did not seek to exclude post-order contact between father and child. However, they founded upon the evidence

given by a member of their social work department to the effect that it was in A's best interests that direct contact post-adoption be no more than twice per annum.

[3] DCC have appealed against the sheriff's decision to order that contact take place four times a year rather than two. The note of appeal purports to identify certain errors in law on the part of the sheriff. However, as the submission advanced by DCC's solicitor developed, it became plain to us that it could only be construed as a challenge to the exercise of the sheriff's discretion.

[4] For the purposes of the appeal, the solicitor for DCC sought to highlight the proposition that the post-adoption placement intended for A had been withdrawn "as a result of the sheriff's decision on contact". On the hypothesis that such a proposition was factually correct, we understood her to submit that, had the sheriff simply followed the social work approach to contact, the placement would have remained open and available.

[5] That apart, and having listened to DCC's solicitor at length, we can only conclude that the thrust of their appeal carried with it the contention that, in some manner, in electing to order that contact should take place four times per annum rather than two times per annum, the sheriff had been plainly wrong when it came to the exercise of her discretion. However, no cogent argument in support of such an obvious shrieval departure from the sound exercise of her discretion actually emerged in the course of the submissions for DCC.

[6] Counsel for the respondent, at the outset of her submission, pointed out that an appeal to this court was, in any event, unnecessary. In terms of section 92 of the Adoption & Children (Scotland) Act 2007 a local authority such as DCC could make application to the court to have the sheriff's ancillary order regarding contact varied. Accordingly, aside from the merits of the appeal, counsel for the respondent questioned the overall approach taken by DCC.

[7] In turning her focus to the substance of the appeal itself, counsel for the respondent argued that it could only amount to a challenge to the exercise of the sheriff's discretion. She submitted that the issue for the court at first instance was to determine the extent of contact and reference was made to paragraph 4 in the sheriff's note. Parties had agreed that post-order contact *was* in the child's best interests. Counsel submitted that whether there ought to be post-order contact and, if so, the extent of such contact were matters for the sheriff to determine subject to her assessment of the evidence presented to her.

[8] Counsel reminded the court that when it came to the sheriff's assessment of the evidence an appellate court would only be entitled to interfere with the sheriff's assessment and analysis of the factual material in question should it be in a position to conclude that her decision was "plainly wrong". Reference was made to the case of *McGraddie* v *McGraddie* 2014 SC (UKSC) 12.

[9] With regard to the evidence led before the sheriff, counsel noted that there had, indeed, been some evidence as to the consequences of A having been diagnosed as autistic in the spring of 2015. (See finding in fact 5). However, counsel for the respondent pointed out that no medical evidence or evidence from a specialist source had been presented for the benefit of the sheriff. Moreover, for the purposes of the appeal, no actual evidence had been presented as to why the prospective adoptive parents had decided to withdraw from the process. To that extent, this court was simply being asked to proceed upon DCC's assertion that the placement withdrawal flowed directly from the sheriff's decision on contact.

[10] Perhaps, more acutely, it was submitted that the sheriff should not be criticised for failing to take into account material which was not placed in evidence before her at the hearing. Counsel stressed that there had been no evidence before the sheriff to the effect that the individuals interested in adopting A would decline to progress with the adoption

were contact between father and child to be set at a frequency greater than twice per annum. Counsel submitted that the appeal ought to be refused.

[11] In our opinion, in reflecting upon the merits or otherwise of this appeal, it is worth noting the approach actually taken by the sheriff. In the decision section of her note at paragraph 9, the sheriff begins by noting the competing positions adopted at the hearing. DCC favoured no more than twice yearly whereas, on behalf of the respondent, it was submitted that contact should be more frequent continuing at the level of frequency then prevailing, viz. once per month.

[12] The sheriff goes on to note the social worker's position to the effect that whilst twice yearly contact was in A's best interests, contact three times per annum could be detrimental to A. The sheriff found that view difficult to accept and presented her analysis of the flaws in such an approach towards the end of paragraph 9 in her note.

[13] At paragraph 10 in her note, the sheriff, *inter alia*, stated that:

> "Although I accept that the previous reduction in contact from fortnightly to monthly did not appear to have had an effect on A, twice a year contact would, in my view, make it a relatively unusual event for any child. Contact four times a year is more frequent. It could be arranged within school holidays and become part of an annual routine and structure which is something which A more than other children has particular need for. Such a level of contact could provide regular contact without it becoming so regular as to interfere with A's permanent placement elsewhere."

[14] At paragraph 11 the sheriff stated:

> "Moreover, post adoption contact with dad four times a year would, in my view, provide A with every chance to develop a sense of belonging to his adoptive family whilst allowing him to maintain some continuity of contact with his birth father albeit at a much reduced level. Dad has been shown to be supportive of A's current foster care placement. In my view it is likely, particularly given that dad is not opposing this application, that he will take the same approach with an adoptive placement. I recognise that dad has been given support by social work in the past but there is no reason why that support cannot continue if contact is, as it currently is, supervised. It seems

> to me from the evidence that A has obtained benefits from contact with dad: his dad is and has been part of his world for years and he enjoys contact with him. In my view it is likely that he will continue to enjoy such contact. In my view, these positive benefits far outweigh the risk that contact four times a year will disrupt his adoptive placement. In my view to reduce contact to twice a year only will reduce those positive benefits significantly."

[15] In our view, in the foregoing extracts from her decision and, indeed, looking to the sheriff's decision as a whole, she has displayed a careful and balanced approach to the issue in question, viz. the extent of post-adoption contact between father and child. It appears to us that no basis exists for this court to interfere with the exercise of the sheriff's discretion.

[16] The reasons for the withdrawal of the adoptive placement for A are not properly known to this court. Even if they were, they could never form a sound basis upon which to challenge the exercise of the sheriff's discretion in this matter. The withdrawal of the placement, for whatever reason, occurred after the court's decision had been taken. Therefore, stating the obvious, it is not a feature which can now *ex post facto* be utilised to criticise that decision.

[17] More generally, when the court pauses to analyse the scope of the issue brought before it on appeal, it struggles to avoid the conclusion that the appeal verges upon being unstateable. In reality, what it seemed to boil down to was DCC's displeasure at the sheriff's decision not to give effect to the tenor of the evidence from their social work department. We observe that it is the court's duty in cases of this nature to place the evidence led before it under close and, if need be, critical analysis before arriving at *its* decision as to what lies in the best interests of any child. It does not and cannot follow that a court of first instance has indulged in an improper exercise of its discretion merely because it happens to disagree with the evidence of a particular witness.

[18] Accordingly, in these circumstances we have refused the appeal as being entirely without merit. Counsel for the respondent argued that, were the appeal to fail, the expenses of the appeal should be awarded against DCC. She also sought to have the appeal certified as suitable for the employment of junior counsel. Having considered these matters, we are of the view that both these motions fall to be granted.