LEGAL SERVICES AGENCY
PERMANENCE ORDERS
SEMINAR 18 JUNE 2012

Outcomes

This presentation is designed to further the PEAT outcome for the seminar by conveying relevant legal knowledge. It introduces delegates to the legislative structure relating to permanence orders, reviews the reported cases and identifies the legal issues that have arisen for resolution in litigation.

Introduction

[1] If there were a subheading for this presentation it might be "lost in translation". The policy objective behind the new permanence order in the Adoption and Children (Scotland) Act 2007 was to provide a Scottish measure for children for whom there is no reasonable prospect of living at home with their families and who are either going to spend the rest of their childhoods accommodated by the local authority, or are going to be placed for adoption. In contrast to the children's hearing this order is to have a long-term focus, throughout childhood. Orders should be flexible and tailored to the child, rather than having a "one-sizefits- all" approach. The Adoption and Children (Scotland) Act 2007 was to some extent a surprise. The draftsman had his own ideas on how to implement the policy and the legislative package is somewhat impenetrable. The courts have been required to get on with the task of applying the Act. Some helpful decisions are emerging.

[2] The provisions of the 2007 Act were brought into force on 28 September 2009 by the Adoption and Children (Scotland) Act 2007 (Commencement No 4, Transitional and Savings Provisions) Order 2009, SSI 267/2009 (amended by SSI 99/2012). There is a new Act of Sederunt (Sheriff Court Rules Amendment) (Adoption and Children (Scotland) Act 2007) 2009, Chapter 4 of which covers permanence orders. The rules are largely modeled on the adoption rules. More of both later.

Permanence orders

[3] A permanence order is an order made on the application of a local authority, that vests in the local authority the right to regulate a child's residence and the responsibility to provide guidance to the child (2007 Act, section 80(2)(a) and 81). The right to regulate residence is a parental right found in section 2(1)(a) of the Children (Scotland) Act 1995. The mandatory vesting of this right in the local authority reflects the notion that the child cannot return to live with the parent. The responsibility to provide guidance is in section 1(1)(b)(ii) of the Children (Scotland) Act 1995. It is not entirely clear why this is a mandatory part of a permanence order, save that rights in section 2 of the 1995 Act are there to fulfil responsibilities in section

1 so it may have been thought necessary to pick a responsibility to go with the right. This one has the benefit of lasting until the child attains the age of 18.

[4] In addition to the mandatory part of the permanence order, the court may add such ancillary provisions as it thinks fit (section 80(2)(b) and 82). This allows the court to redistribute the parental responsibilities and parental rights found in sections 1(1) and 2(1) of the Children (Scotland) Act 1995. The court must however ensure that every parental responsibility and parental right in respect of the child vests in a person (section 80(3)). The provisions of section 82 are very detailed and specific and this is where many of the difficulties are apparent. Finally the permanence order may grant authority for the child to be adopted (section 80(2)(c) and 83). If there is a permanence order with authority to adopt in force then the child may be adopted in later proceedings without any question of parental consent arising (section 31(7)).

Conditions for making a permanence order

[5] There are age constraints on making an order. A permanence order may only be made in relation to a "child", defined in section 119 as a person under 18. In practice it is doubtful whether an order could or should be made for a person over 16, as the only parental responsibility to exist after a person's 16th birthday is the responsibility of providing guidance. A person aged 12 or over must consent to the order (section 84(1)), unless incapable of consenting (section 84(2)). Section 85 allows a permanence order to be made in respect of an adopted child, but not a child who has been married or a civil partner.

[6] The conditions and considerations for making an order are found in section 84:

- The court may not make a permanence order unless it would be better for the child that the order be made than that it should not be made (section 84(3)).
- The welfare of the child throughout childhood is the paramount consideration when deciding whether an order should be made, and if so what provision the order should make (section 84(4)).
- A child of sufficient age and maturity must be given the opportunity to express a view, to which the court should have regard (section 84(5)(a), (b)(i)), a child of 12 or over being presumed of sufficient age and maturity to form a view (section 84(6)).
- There must be regard for the child's religious persuasion, racial origin and cultural and linguistic background (section 84(5)(b)(ii).
- There must be regard for the likely effect on the child of making the order (section 84(5)(b)(iii)).
- Before making a permanence order the court must be satisfied that:

> "(i) there is no person who has the right mentioned in subsection (1)(a) of section 2 of the 1995 Act to have the child living with that person or otherwise to regulate the child's residence, or
> (ii) where there is such a person, the child's residence with the person is, or is likely to be, seriously detrimental to the welfare of the child." (section 84(5)(c)).

This last condition reflects the original basis for the policy of permanence orders. It was initially left out of the Bill, but inserted later by amendment. As will be seen its centrality in decision-making is now emerging in the reported cases. There are now two decisions from the Inner House on this section. Both involved cases that were appealed from the sheriff to the sheriff principal and then on to the Inner House.

[7] The first Inner House decision is *East Lothian Council, Petitioners* [2012] CSIH 3, 2012 Fam LR 7. This is predominantly a decision that turns on its own facts. Sheriff Gillam granted a permanence order without any express finding in relation to the condition in section 84(5)(c) (Scottish Courts website, 30 July 2010). The omission was explained by a Joint Minute where parties had agreed that there was no person who had the right mentioned in subsection (1)(a) of section 2 of the 1995 Act to have the child living with that person or otherwise to regulate the child's residence. This would have satisfied the test in section 84(5)(c)(i). The solicitors involved in the case appear to have been confused by the fact that the child was subject to a supervision requirement which prevented the parents exercising their right to residence. A supervision requirement suspends rights, it does not extinguish them. The parents still had the right to have the child living with them, albeit they could not exercise that right. The matter should have been considered under section 84(5)(c)(ii). The parents appealed and the error appears to have come to light in the course of the appeal. The sheriff principal remitted the case to the sheriff for consideration of the test in section 84(5)(c)(ii) (*East Lothian Council v S,* 2011 Fam LR 80). The sheriff decided the test was satisfied and sent the matter back to the sheriff principal, who refused the appeal (Scottish Courts website, 13 July 2011). The case was then appealed further to the Court of Session, who refused the appeal. The Extra Division were satisfied that the sheriff had given careful consideration to the case and it could plainly be inferred from his findings that it was and would be seriously detrimental to the child's welfare to reside with his birth parents. The sheriff principal had been entitled to proceed by way of remit to the sheriff. The importance of the question of residence is however clear.

[8] The second Inner House decision is *W v Aberdeenshire Council* [2012] CSIH 37. Here Sheriff Mann refused a permanence order without expressly addressing the issue in section 84(5)(c) (Scottish Courts website, 6 December 2010). He considered that the local authority should have completed a kinship care assessment of the mother's parents before proceeding with the application. The local authority appealed to the sheriff principal, who

allowed the appeal (*Aberdeenshire Council v TW, JW,* 2011 SLT (Sh Ct) 186). The sheriff principal held that the sheriff should have addressed the issue of residence and was "plainly wrong" because the child required permanence, continuity and stability and the sheriff's decision introduced harmful delay. The parents appealed to the Court of Session. They argued that the sheriff had rejected the application on the basis of the 'no order' principle in section 84(3), having regard to the child's welfare in terms of section 84(4), and so had no need to address the question of residence under section 84(5)(c). The issue of residence only arose as a constraint when subsections 84(3) and (4) were satisfied. The Extra Division rejected this submission. They held that there is no hierarchy among the subsections of s. 84 of the 2007 Act. The factors as to the child's residence arising under section 84(5)(c) will generally require to be addressed in the course of an application for a permanence order, bearing in mind the requirement of s. 84(4) to regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration. The consideration of residence should have occurred by the time the court comes to consider the application of the "no order principle" in section 84(3). The sheriff principal was therefore correct in his decision that had the sheriff addressed the question of whether the child's residence with the appellants was, or was likely to be seriously detrimental to her welfare he would inevitably have been satisfied that to live with them would be seriously detrimental. The sheriff had been 'plainly wrong' and should have granted a permanence order. The decision reinforces the centrality of the question of whether the child can reside with his or her parents without serious detriment to welfare.

Terms of a permanence order

[9] Permanence orders require the distribution of parental responsibilities and parental rights in terms of section 1(1) and 2(1) of the Children (Scotland) Act 1995. It is impossible to understand permanence order without a firm grip on the terms of these sections. Section 1(1) provides that a parent has in relation to his child the parental 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
> (d) to act as the child's legal representative.

Section 2(1) sets out parental rights. To enable a parent to fulfil parental responsibilities a parent 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
(d) to act as the child's legal representative.

[10] As already noted, all permanence orders must vest in the local authority the parental responsibility to provide guidance to the child in a manner appropriate to the stage of the child's development (Children (Scotland) Act 1995, section 1(1)(b)(ii), and the parental right to regulate the child's residence until the child attains the age of 16 (1995 Act, section 2(1)(a)). These are the "mandatory provisions" in section 81. The making of a permanence order extinguishes parental rights in respect of residence held, immediately before the order was made, by persons other than the local authority (section 87).

[11] It is worth looking at the ancillary provisions in section 82 in some detail as this is where most of the orders granted to date run into difficulties. There are six sorts of ancillary orders. The first are orders vesting parental responsibilities and parental rights in the local authority. Section 82(1)(a) provides for orders:

" (a) vesting in the local authority for the appropriate period—
(i) such of the parental responsibilities mentioned in section 1(1)(a), (b)(i) and (d) of the 1995 Act, and
(ii) such of the parental rights mentioned in section 2(1)(b) and (d) of that Act, in relation to the child as the court considers appropriate,"

The local authority already have responsibilities under sections 1(1)(b)(ii) and 2(1)(a) as the elements of the mandatory provisions. It is however significant that responsibilities and rights in relation to contact under section 1(1)(c) and 2(1)(c) cannot be vested in the local authority.

[12] The second sort of orders are those which vest responsibilities and rights is someone other than the local authority. These are found in section 82(1)(b) and are orders:

(b) vesting in a person other than the local authority for the appropriate period—
(i) such of the parental responsibilities mentioned in section 1(1) of that Act, and
(ii) such of the parental rights mentioned in section 2(1)(b) to (d) of that Act, in relation to the child as the court considers appropriate,

A person other than the authority may be given any responsibilities or rights, other than those relating to residence (1995 Act section 2(1)(a)). He or she may be given the responsibility of providing guidance alongside the local authority. There is a significant difference between section 82(1)(a) and section 82(1)(b) in that a person other than the authority may be given the responsibility and right of contact, which cannot be vested in the local authority. Where two or more persons have a parental right by virtue of section 82(1)(a) or (b) then each may exercise that right without the consent of the other or others, unless the order provides to the contrary (section 91).

[13] The court may then go on to remove parental responsibilities and rights from a parent, but only if the responsibilities and rights have vested in someone else. The court may make an order:

> (c) extinguishing any parental responsibilities which, immediately before the making of the order, vested in a parent or guardian of the child, and which—
>
> (i) by virtue of section 81(1)(a) or paragraph (a)(i), vest in the local authority, or
>
> (ii) by virtue of paragraph (b)(i), vest in a person other than the authority,
>
> (d) extinguishing any parental rights in relation to the child which, immediately before the making of the order, vested in a parent or guardian of the child, and which—
>
> (i) by virtue of paragraph (a)(ii), vest in the local authority, or
>
> (ii) by virtue of paragraph (b)(ii), vest in a person other than the authority,

This follows on from section 80(3) which provides that each parental responsibility and parental right must vest in a person. It means however that a parent cannot lose the responsibility and right of contact with the child, unless someone else has that responsibility and right.

[14] The court may then go on to make other orders:

> (e) specifying such arrangements for contact between the child and any other person as the court considers appropriate and to be in the best interests of the child, and
>
> (f) determining any question which has arisen in connection with—
>
> (i) any parental responsibilities or parental rights in relation to the child, or
>
> (ii) any other aspect of the welfare of the child.

Although (e) refers to “arrangements for contact between the child and any other person”, this may not refer to parental contact. “Other person” in the earlier parts of the section means a person other than the local authority or the parent. That may however be a technicality, as (f) allows determination of questions in connection with parental responsibilities and parental rights, which may clearly include parental contact. Subparagraph (f) seems to be modelled on the provision for a “specific issue order” in

section 11(2)(e) of the 1995 Act, but the power of the court is limited to determining questions which have arisen, as opposed to a "specific issue order" which may regulate "any specific question which has arisen, or may arise". The power in a permanence order appears to be limited in terms to responding to difficulties, rather than anticipating and providing for them.

[15] In *Aberdeenshire Council v TW, JW* 2011 SLT (Sh Ct) 186, the sheriff principal made some very detailed ancillary orders including the following:

> "(3) in relation to CW vests in the petitioners (i) the parental responsibilities mentioned in section 1(1)(a), (b)(i) and (ii) and (d) of the Children (Scotland) Act 1995 ("the 1995 Act") until the date on which she reaches the age of 18 in the case of the responsibility mentioned in section 1(1)(b)(ii) and until the date on which she reaches the age of 16 in the case of the responsibilities mentioned in section 1(1)(a), (b)(i) and (d), and (ii) the parental rights mentioned in section 2(1)(a), (b) and (d) of the 1995 Act until the date on which the child reaches the age of 16;
> (4) in relation to CW vests in the prospective adoptive parents whose names and current address are stated in the appendix hereto (i) the parental responsibilities mentioned in section 1(1)(a) and (c) of the 1995 Act until the date on which she reaches the age of 16, and (ii) until the date on which she reaches the age of 16 the parental rights mentioned in section 2(1)(b) and (c) of the 1995 Act, including the right (a) to consent to medical, dental and ophthalmic treatment, both routine and emergency, in respect of the child, (b) to apply for a passport for the child and to take her on holidays abroad and to apply for a European Health Card for the child, (c) to consent to the child joining social groups and to make nursery and school provision for the child as appropriate, and (d) to manage letter box contact between the child and her natural parents, namely the respondents TW and JW whose names are stated in the appendix hereto, and direct and letter box contact between the child and her siblings who have previously been adopted;
> (5) extinguishes the parental responsibilities in relation to CW which, immediately before the making of this order, vested in TW or JW in pursuance of section 1(1) of the 1995 Act;
> (6) extinguishes the parental rights in relation to CW which, immediately before the making of this order, vested in TW or JW in pursuance of section 2(1)(b), (c) and (d) of the 1995 Act;...
> (9) orders that direct contact between CW on the one hand and TW and JW on the other should cease on and from the date hereof;..."

[16] When the decision was appealed attention was focused on contact which the order vested in the prospective adopters, going on to extinguish the parents' responsibilities and

rights in relation to contact. There could be no doubt that the orders relating to contact were consistent with the terms of the legislation. By vesting the parental responsibility and right of contact in the prospective adopters, the sheriff principal set up a framework in the order that allowed him to extinguish the contact responsibilities and rights of the parents. But the child was living with the prospective adopters. Why did they need a responsibility and right which only applied where a child was not residing with the parent? The Inner House (*W v Aberdeenshire Council* [2012] CSIH 37) had no difficulty with this. They held that where a child is to live with prospective adopters, rights may be vested in them to place them in the same position, so far as possible, as natural parents. Arrangements for contact with the birth parents could be made under section 82(1)(e). The other terms of the permanence order were not challenged, but a similar pragmatic response would no doubt be given. In other words, despite the detail and technicality the Inner House has given a clear signal that the terms of section 82 are to be applied pragmatically and in the interests of children. The cue was taken up by Sheriff McCulloch who made some detailed ancillary provisions, extending to granting to the local authority and the prospective adopters the right to apply for a passport and consent to body-piercing (*Fife Council, Petitioners,* Scottish Courts website, 18 April 2012).

[17] The Extra Division also considered contact in *East Lothian Council, Petitioners* [2012] CSIH 3, 2012 Fam LR 7 but in that case attention was focused on what happened to contact were the child to be adopted. There was no vesting of the responsibility and right of contact in any other person. The birth parents were left with a responsibility and right of contact, albeit they were limited by the terms of the permanence order to 'letterbox contact'. This would be extinguished on the making of an adoption order (2007 Act, sections 35 and 102), but the court rules makes no express provision for the parents to receive intimation of an application for adoption. The Inner House held that the sheriff considering an adoption application should consider whether the parents should receive intimation under the discretionary part of the rules (rr 14(1)(f) or 15) having regard to the whole circumstances, including the parents' rights in terms of the European Convention on Human Rights. Again this is a response from the Inner House designed to make the 2007 Act work, in the interests of children.

[18] The emerging decisions on permanence orders continue to show confusion over the ancillary provisions in section 82. For example in an otherwise careful judgment in *Orkney Islands Council v H* (Scottish Courts website, 17 October 2011), Sheriff Johnston vests in the local authority the parental right (but not the parental responsibility) of contact, and extinguishes the parents' responsibility (but not their right) of contact, and them makes an order for face to face contact once a year and letterbox contact twice a year. Her interlocutor, at least as published on the Scottish Courts website, leaves the parents with the

responsibility of legal representation. This looks like a misprint as the sheriff's note is admirably clear.

[19] An appeal to the new sheriff principal of Grampian Highlands and Islands, Sheriff Principal Pyle, would be interesting. As a sheriff he decided *The City of Edinburgh Council, re L* (Scottish Courts website, Dundee, 25 July 2011) and made a permanence order with authority to adopt. His interlocutor includes:

> "...
> 5. That the First Respondent should have (1) the right on two occasions each year to be provided by the Petitioners with written information about the welfare and development of the child and (2) the right on two occasions each year to send a letter to the child.
> 6. That the parental responsibilities and rights of the First and Second Respondents, except as provided for in 5. supra, should be extinguished;
> 7. That there should be vested in the Petitioners the parental responsibilities and rights;..."

Starting from the vesting in the local authority (which is where the sheriff should have started), the order vesting all parental responsibilities and parental rights in the local authority was not competent. The parental responsibility and right of contact could not be included as it was not a mandatory part of the order under section 81, nor competent as an ancillary order under section 82(1)(a). That meant the parents' responsibilities and rights relating to contact could not be extinguished under section 82(1)(c) and (d). There could have been an order regulating the responsibility and right of contact under section 82(1)(f) or possibly (e), but that does not appear to be what the sheriff has done.

Authority to adopt

[20] A permanence order may grant authority for a child to be adopted (section 80(2)(c)). The 2007 Act allows the court to deal with parental consent to adoption in the context of the permanence order. Section 83(1) sets out the conditions which require to be me met for a permanence order to include authority for the child to be adopted. These are:

> "(a) that the local authority has requested that the order include provision granting authority for the child to be adopted,
> (b) that the court is satisfied that the child has been, or is likely to be, placed for adoption,
> (c) that, in the case of each parent or guardian of the child, the court is satisfied—
> (i) that the parent or guardian understands what the effect of making an adoption order would be and consents to the making of such an order in relation to the child, or
> (ii) that the parent's or guardian's consent to the making of such an order should be dispensed with on one of the grounds mentioned in subsection (2),

(d) that the court considers that it would be better for the child if it were to grant authority for the child to be adopted than if it were not to grant such authority."

[21] There has been controversy in relation to whether the "childhood" test for a permanence order in section 84(4) applies to consideration of granting authority to adopt. Section 14 appears in the adoption section of the 2007 Act and provides:

"(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."

[22] Despite the lack of express reference in section 83 to section 14, a decision relating to authority to adopt is a decision relating to adoption of a child. In *City of Edinburgh Council, Petitioner (No 2)* 2010 FamLR 92 Sheriff Mackie was faced with a devolution minute based on the proposition that the "welfare throughout childhood" test for permanence orders was not compliant with article 8 of ECHR. She decided that section 14 applied to a decision whether or not to grant authority to adopt and in consequence that the welfare of the child throughout life (not just childhood) is the paramount consideration when considering authority to adopt. Both Sheriff Gillam and Sheriff Mann, in their respective decisions, applied the lifetime test to the question of authority to adopt. Sheriff Pyle did not.

[23] That brings us to the grounds for dispensation with parental consent. These are is exactly the same as for adoption. That is:

"(2)(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 (3) or (4) applies,

(d) that, where neither of those subsections applies, the welfare of the child otherwise requires the consent to be dispensed with."

The two sets of criteria in subsections (3) and (4) are:

"(3) 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.

(4) This subsection applies if—

(a) the parent or guardian has, by virtue of the making of a permanence order which does not include provision granting authority for the child to be adopted, 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."

These grounds are identical to the grounds for dispensation with consent to an adoption order in section 31.

[24] In *W v Aberdeenshire Council* [2012] CSIH 37 the parents had a poor history of caring for babies but sheriff concluded that the local authority had failed to demonstrate that they would not be able to discharge parental responsibilities in relation to an older child. The sheriff principal held that the sheriff had misconstrued s. 83(3)(c) of the 2007 Act. The Inner House agreed with the sheriff principal. It is not necessary to show that natural parents are likely to be unable to discharge their responsibilities and exercise their rights throughout the whole of an infant's childhood. What is required is a determination at the time the application is considered, as to whether the inability of the parents to discharge their responsibilities and exercise their rights satisfactorily is likely to continue in the foreseeable future. The sheriff principal had been right to allow an appeal against the sheriff's decision and to grant authority to adopt.

[25] There is controversy about the effect of the welfare ground in section 83(2)(d). Does the provision mean that even when a parent is capable of discharging responsibilities and exercising rights, or would be in the future, his or her consent can be dispensed with? Is this compliant with article 8 of ECHR? Is the test impermissibly vague? Not according to the First Division in *S v L* [2011] CSIH 38, 2011 Fam LR 106. This decision has been appealed to the Supreme Court. The appeal was heard on 21 and 22 May 2012 and we should have the outcome of that appeal within the next few weeks.

Deemed permanence orders

[26] As if permanence orders were not sufficiently complex, we now have "deemed permanence orders with authority to adopt" created outwith the express terms of the legislation as a resul of creative interpretation of the Adoption and Children (Scotland) Act 2007 (Commencement No 4, Transitional and Savings Provisions) Order 2009, SSI 267/2009. These regulations allowed applications for orders declaring a child free for adoption to continue after the commencement date of the 2007 Act. One year after implementation all children subject to freeing orders fell to be treated as if they were subject to permanence orders with authority to adopt. The regulations were silent on freeings granted after the year had expired. The Second Division held that this was inadvertence arising from inadequate draftsmanship and read the order as if it provided for children whose freeing orders were granted after 28 September 2010 to be subject to permanence orders with authority to adopt (*O v Aberdeen City Council* [2011] CSIH 43, 2011 FamLR 114). There is an outstanding challenge to this decision. The birth parents have appealed to the Supreme Court, but it is not yet clear whether their appeal will proceed. In the meantime the Scottish Ministers have attempted to remedy the problem by passing the Adoption and Children (Scotland) Act 2007 (Commencement No 4, Transitional and Savings Provisions) Amendment Order 2012, SSI 99/2012. This provides that children subject to freeing orders granted after 28 September 2010 are to be treated as if they were subject to a permanence order. It is not clear what retrospective effect these regulations could have.

[27] There is in any event another problem in relation to both the 2009 and the 2012 regulations. Regulation 17 of the 2009 Regulations applies in all such cases and provides that:

> "(2) The permanence order will be deemed to consist of—
>
> (a) the mandatory provision specified in section 81(1) of the Act;
>
> (b) the following ancillary provisions specified in section 82(1) of the Act vesting in the local authority:—
>
> (i) the parental responsibilities mentioned in section 1(1) of the 1995 Act;
>
> (ii) the parental rights mentioned in section 2(1) of the 1995 Act; and
>
> (c) provision granting authority for the child to be adopted."

Section 82(1) does not allow all parental responsibilities and parental rights to vest in the local authority. It excludes the responsibilities and rights in respect of contact. Aside from the confusion created by this regulation, it appears to be a modification of the legislation relating to permanence orders, to make deemed permanence orders equivalent to freeing orders, and as such the regulations should have been approved by resolution of the Scottish Parliament (2007 Act, section 117). Neither the 2009 regulations, nor the 2012 regulations have been approved by resolution. Both sets of regulations may be *ultra vires.* For the unfortunate birth parents there are serious questions arising under article 8 of ECHR. On the other hand, it could be argued that, if the regulations are competent, by failing to provide for

ancillary provisions extinguishing the birth parents' parental responsibilities and parental rights all (save for residence, probably extinguished by the operation of section 87) are revived. For prospective adopters who have taken on one of these children in anticipation of being able to adopt, there are serious questions of what can be done to protect the child and secure his or her status.

Procedure

[28] A permanence order can only be made by "the appropriate court" (see section 80). Where the child is in Scotland when the application is made, the appropriate court is the Court of Session, or the sheriff court of the sheriffdom within which the child is. If the child is not in Scotland then an application may be made in the Court of Session for a permanence order with authority to adopt (section 118). If children from the same family are placed in different sheriffdoms then there will either require to be applications in different sheriff courts or the applications may be made together in the Court of Session. There is a helpful decision to the effect that an application brought in the wrong sheriff court may be remitted to the Court of Session (*Midlothian Council, Petitioners* 2012 Fam LR 25). The legislation does not however permit applications in respect of children in one area to be remitted to a sheriff court for another area in order to proceed together with applications relating to siblings in the other area.

[29] The Sheriff Court Adoption Rules 2009 found in an Act of Sederunt SSI 2009/284 set out the procedure for permanence orders in Chapter 4. The rules are modelled on the adoption process. The local authority is required to lodge a petition in Form 11 (rule 31(1)) and a report (rule 31(2)(b)). A curator *ad litem* should be appointed. A reporting officer is required if authority to adopt is sought, or the child is over 12 and required to consent to the order (rule 32). There is a timetable in the rules designed to takes matters on at a brisk pace. The curator and reporting officer have 4 weeks to report in writing, unless the sheriff fixes a different period (rule 44). There must be a preliminary hearing within 6 to 8 weeks of the petition being lodged (rule 33). The petition and notice of the preliminary hearing require to be served on anyone with parental responsibilities and parental rights and anyone else who claims an interest. Fathers who do not have parental responsibilities and rights must receive intimation.

[30] Anyone proposing to oppose the application is required to lodge notice in Form 15. The sheriff may allow a late response, but this is a matter for his or her discretion, which must be exercised reasonably. In *Aberdeen City Council v X and Y* (Scottish Courts website, 27 October 2011) the sheriff principal reversed a decision of the sheriff to allow late opposition by parents. In the absence of opposition the application may be granted at the preliminary hearing. If there is opposition then a proof should be fixed not less than 12 nor more than 16

weeks after the date of the preliminary hearing. The period can be longer on cause shown, but the intention is that these proceedings will be rapidly determined. There should be a pre-proof hearing not less than 2 nor more than 6 weeks before the proof. At the pre-proof hearing (which may be continued) the sheriff may order the lodging of joint minutes, affidavits and expert reports and make "such other order as he considers appropriate to secure expeditious progress of the case" (rule 36). Or he may despair and discharge the proof and fix a new date. At the conclusion of the proof the sheriff may pronounce a decision, and in the *Aberdeenshire* case Sheriff Mann did so (albeit with hindsight he may have wished he had taken more time to think about the case). The sheriff should state briefly the grounds for the decision, including reasons on any questions of law and of admissibility of evidence and may append to the interlocutor a note setting out these matters and findings in fact and law. Any of the parties may insist on such a note. Alternatively judgment may be reserved, but in that event should be given to the sheriff clerk within 4 weeks, unless the period is extended by the sheriff principal (rule 38). Expenses have to be dealt with within 21 days of the interlocutor disposing of the merits. This means that there will be a prompt final interlocutor and any appeal will have to be made promptly.

[31] The rules provide for the sheriff to order answers in an opposed application for a permanence order. This should be done at the preliminary hearing (rule 35(1)(b)(iv)). The answers must be "in numbered paragraphs corresponding to the numbered paragraphs of the report mentioned in rule 31(2)(b)." This is the local authority report which must be lodged in process with the application. There is a similar provision in the rules relating to adoption. Answering a report, rather than the application, is a departure for procedure in Scotland. It means that a report by a social worker is treated as if it is the principal writ. The application itself is put on one side. This can mean that the legal issues are overlooked. The report does not require to set out what ancillary orders are sought under section 82, nor the justification for those orders. Parties head straight for their dispute over the factual issues, rather than considering the principles of what they are seeking to achieve. The cases are evocative of the problem. There has also been confusion in appeals to the Inner House where it is not clear what should form part of the appeal print.

Revocation

[32] Much more might be said about permanence orders, but they are doubtless going to be with us for a long time and much more is likely to be said over the years. The last word should perhaps rest with the possibility of revocation, of the order that is, not the legislation. Section 98 provides that

> (1) The appropriate court may, on an application by a person mentioned in subsection (2), revoke a permanence order if satisfied that it is appropriate to do so in all the circumstances of the case, including, in particular—

(a) a material change in the circumstances directly relating to any of the order's provisions,

(b) any wish by the parent or guardian of the child in respect of whom the order was made to have reinstated any parental responsibilities or parental rights vested in another person by virtue of the order.

(2) Those persons are—

(a) the local authority on whose application the order was made,

(b) any other person affected by the order who has obtained the leave of the court to apply for revocation of the order.

(3) Subsections (4), (5)(a) and (b) and (6) of section 84 apply to the revocation of a permanence order under this section as they apply to the making of such an order.

[33] An application for leave to make an application for revocation is made by letter addressed to the sheriff clerk stating the grounds on which leave is sought. The minute initiating the application, were leave to be granted, should accompany the letter. The application does not require to be intimated to anyone else in the first instance. Intimation of a legal aid application may be dispensed with or postponed at this stage, provided the Scottish Legal Aid Board agree. The sheriff can simply refuse the application, but if he or she is minded to grant it, then it should be intimated (as then should notice of the legal aid application). If there is opposition a hearing may be fixed. The general idea is for the issue of leave to be discussed and decided as a preliminary step.

[34] We have a reported case, that of Sheriff Veal in *R (mother of C) v Angus Council* (Scottish Courts website, Forfar, 10 November 2010). The mother in that case had failed to oppose the permanence order and sought its revocation. The sheriff appointed a hearing, with evidence, on "whether the criteria for permitting the minute to go to a full hearing on possible revocation had been met". The sheriff appears to have decided the matter by considering the criteria mentioned in section 98(1)(a) and (b). There was no change in circumstances and if the mother's wish to have her parental responsibilities and rights restored were fulfilled, the children's supervision requirement would have to be "reinstated". The sheriff did not consider this would "safeguard and promote the welfare of the child throughout childhood" and refused leave. The case raises the following issues:

- Whether or not a person secures leave is designed as a precursor to a hearing of the case on revocation. What happened here was a proof on the grounds for revocation.
- The grounds for revocation were narrowly construed. Revocation may be granted "if it is appropriate … in all the circumstances of the case…" The two conditions mentioned are not exhaustive of possible bases for revocation.
- A supervision requirement cannot simply be "reinstated" if a permanence order is revoked. If it appears to the court dealing with the revocation application that there

are grounds for referral, the case may be referred to the Principal Reporter under section 54(2)(ca) of the Children (Scotland) Act 1995 and the Reporter may arrange a children's hearing. Under the 1995 Act the ground for referral specified by the court is treated as established, but when section 62 of the Children's Hearings (Scotland) Act 2011 comes into force the ground would require to be proved, if not accepted or not understood by the child. There is no guarantee that a ground for referral would continue to be present (see *H v Harkness* 1998 SC 287).

Conclusions

[35] The new provisions for permanence orders are complex and are proving difficult to apply in practice. Cross-referencing to the Children (Scotland) Act 1995 seems to have obscured, rather than elucidated the statutory intention. New grounds for dispensation with agreement to adoption are causing consternation. The transitional provisions relating to old freeing orders being "deemed permanence orders" are a disaster. Early indications are that the revocation procedures may also be causing confusion and provide no way back to a supervision requirement. The children who are subject to these measures are by definition the most vulnerable in our society. The difficulty in interpreting and applying this legislation is not likely to assist.

Janys M Scott QC
18 June 2012

Background Reading:

- *Adoption and Children (Scotland) Act 2007, section 14 and Part 2 (Permanence Orders).*
- *Sheriff Court Adoption Rules 2009 (Act of Sederunt SSI 2009/284).*
- *Children (Scotland) Act 1995, sections 1 and 2.*

Further reading:

- *Adoption and Children (Scotland) Act 2007 (Commencement No 4, Transitional and Savings Provisions) Order 2009, SSI 267/2009.*
- *Adoption and Children (Scotland) Act 2007 (Commencement No 4, Transitional and Savings Provisions) Amendment Order 2009, SSI 99/2012.*
- *East Lothian Council, Petitioners,* [2012] CSIH 3, 2012 Fam LR 7
- *W v Aberdeenshire Council,* [2012] CSIH 37
- *Fife Council, Petitioners,* Scottish Courts website, 18 April 2012
- *Orkney Islands Council v H,* Scottish Courts website, 17 October 2011
- *The City of Edinburgh Council, re L,* Scottish Courts website, Dundee, 25 July 2011
- *City of Edinburgh Council, Petitioner (No 2)* 2010 FamLR 92.
- *S v L* [2011] CSIH 38, 2011 Fam LR 106.
- *v Aberdeen City Council* [2011] CSIH 43, 2011 FamLR 114
- *Midlothian Council, Petitioners* 2012 Fam LR 25
- *Aberdeen City Council v X and Y,* Scottish Courts website, 27 October 2011
- *R (mother of C) v Angus Council,* Scottish Courts website, Forfar, 10 November 2010