RFPG Seminar: 14th June 2018

Permanence Orders: Elucidations and Amendments

Kenneth McK. Norrie

Law School

University of Strathclyde

University of Strathclyde Glasgow

Permanence Orders: Overview

- Introduced by Adoption and Children (Scotland) Act 2007, in force from 28th September 2009
- Replaced freeing orders under 1978 Act and parental responsibilities orders under 1995 Act
- Designed to be more flexible than either and to make *permanent* provision for upbringing of child for whom adoption is not, or not yet, suitable/available.
- Recognises that adoption is not the only way to achieve permanence.
- Legislation (ss. 80 – 104) structured quite awkwardly.

Conditions-Precedent: the *sine quibis non*

- Order can only be sought by local authority: s. 80(1)
- Child must be under 18 (s. 119), never having been married or in a civil partnership: s. 85(2)
- Child over 12 must consent, or be incapable of consenting: s. 84(1) and (2)
- If authority to adopt is sought, the parents must consent or have their consent dispensed with: s. 83(2) and (3). See *R v Stirling Council* [2016] CSIH 36 where "necessity" test set down for adoption orders by Lord Reed in *S v L* [2012] UKSC 30 held to apply to permanence orders too.

Threshold Test: the Justification for State Intervention

- There is no person who has the right to have the child living with them or to regulate the child's residence: s. 84(5)(c)(i)
  - Mere suspension of the right (e.g. by terms of a compulsory supervision order) is not sufficient: *East Lothian Council, Petrs* [2012] CSIH 3 at [9]. *Quaere:* removal of right of residence by s. 11 order – no right, or right suspended?
- **There is a person with that right but the child's residence with that person "is, or is likely to be, seriously detrimental to the welfare of the child": s. 84(5)(c)(ii)**
- Without one or other of these tests being satisfied, the court cannot go on to examine welfare considerations: *W v Aberdeenshire Council* [2012] CSIH 37, per Lord Bonomy at [13]
- *R v Stirling Council* sheriff criticised for dealing with welfare before the threshold test (but decision not overruled). Threshold is a statutory test in itself and not a mere aspect of welfare.

Considerations to be Taken into Account: the order CAN be made, the question now is SHOULD IT?

- The court must consider that making an order would be better for the child than not making the order: s. 84(3).
- The need to safeguard and promote the child's welfare throughout childhood is the court's paramount consideration: s. 84(4).
- The court must have regard to the child's views, after taking account of the child's age and maturity (with a presumption that a child 12 or above has the capacity to form views): s. 84(5)(a) and (b)(i) and (6).
- The court must have regard to the child's religious persuasion, racial origin and cultural and linguistic background, and the likely effect on the child of making the order: 84(5)(b)(ii) and (iii).

West Lothian Council v B (or Re EV) 2017 UKSC 15

- Parents with learning difficulties. Allegations against the father of inappropriate sexual behaviour with another adult with learning difficulties, three years before the child's birth; allegation that he had expressed sexual desire towards the mother's 8 year old daughter; allegations of threats made to social workers. Child was now almost 3 years old.
- Lord Ordinary made POA and prohibited contact, but made no findings of fact that these allegations were proven.
- Inner House held that Lord Ordinary entitled to find test satisfied even without making findings as to the truth of the allegations, though authority to adopt was dropped. The concerns of the local authority were all reasonably held.

West Lothian Council v B (cont.)

- The Supreme Court held that the threshold test in s. 84(5)(c)(ii) was a factual one so had to be satisfied by the court making findings of fact on the balance of probability.
- The threshold must be crossed BEFORE applying the welfare test in s. 84(4). Welfare cannot determine the facts, and the threshold test is a matter of fact. *S v Stirling Council* approved on this point, and widened to include POs as well as POAs.
- Court of Session's error was in treating the case as one of assessing the reasonableness of the local authority's concerns.
- Taking account of unproven allegations went against Supreme Court authority in *Re J (Children)* [2013] 1 AC 680

West Lothian Council v B (cont.)

- In *Re J* it was accepted that the past is a good predictor of the future.
- BUT: *only* when the past is established fact. "The child is likely to suffer in the future" is a conclusion that can be legitimately inferred from a finding that "the child has suffered in the past" but NOT from "the child is likely to have suffered in the past".
- Lord Hope in *Re J*: "the golden rule must surely be that a prediction of future harm has to be based on facts that have been proved on a balance of probabilities" (para 84).
- In Scottish permanence orders, this means there MUST be findings of fact to support the conclusion that there will be serious detriment to the child's welfare. The judge must also explain why such detriment is "serious" and why it is "likely".
- *The onus is always on the local authority to show parental deficiencies: it is not on the parents to prove parental capacities.*

CE v Glasgow City Council [2018] SAC (Civ) 3

- Parents (JehvWit) were strong advocates of corporal punishment of children and had previously been convicted of beating their three elder children – to an "appalling" extent. The youngest was removed on a CPO at age one. Now 11, she had never since been in the care of her parents. She expressed the view that she did not wish to return to her parents' care.
- Sheriff granted a PO on basis that residence with either parent was likely to be seriously detrimental to child's welfare since there was no evidence they had changed their views on corporal punishment.
- Parents appealed on ground that this required them to prove that the child could safely live with them, contrary to the Supreme Court's decision in *West Lothian Council.*
- SAC refused appeal: the lack of evidence of changed attitudes simply meant that the sheriff had to rely on the existing factual evidence of child beatings by the parents. This was not a shift in the onus of proof.
- ECHR was not relevant to the threshold test (*Re B* 2013 UKSC 33)

ECC v GD [2018] SAC (Civ) 5

- Child was victim of scheduled offence while in care of parents, but there was no evidence of who was responsible, though it had to have been one or other, or both, parents. Parents now separated.
- Sheriff held threshold test not satisfied and so refused to make a POA.
- SAC held that the test *was* satisfied in this case because there was no satisfactory explanation of how the injuries were caused and so "serious detriment" to the child's welfare was "likely" from continued residence with either parent.
- "Likelihood" meant a real possibility of future serious detriment. This conclusion is an assessment, NOT a matter of proof on the balance of probabilities.
- The children's hearing can act even without the identity of the perpetrator being known, so it would leave some children in limbo (or kept under temporary CSOs) if a permanence order could not be made in the same circumstances.

North Lanarkshire Council v KR [2017] SAC (Civ) 38

- Mother had Asperger's Syndrome and led a chaotic life, struggling to cope with child's needs. After some attempts at rehabilitation, grounds of referral were established and child removed to foster carers. Mother and social work were unwilling to work with each other, but she exercised contact. Local Authority wished to add authority to adopt to permanence plan.
- Sheriff refused POA on the ground that the parent-child relationship should not be severed. There are two tests:
  - The threshold test in s. 84(5): this test the sheriff found satisfied, but its satisfaction does not make an order inevitable.
  - The test that it would be better for the child that the order be made than it not be made in s. 84(3): this test the sheriff found NOT satisfied and so he had to refuse the order sought. In essence, this is the "necessity" test, assessed by applying the welfare test in s. 84(4).
- Because of the need to preserve family life, and because there was room for "further intervention" (especially if better relationship with social work could be established), it could not be said that it would be better to make the order than not.

North Lanarkshire Council v KR (cont.)

- The Sheriff Appeal Court refused the appeal:
  - The child's expectations of adoption had been raised, but that was insufficient to meet the necessity test.
  - The difficulties of arranging contact should not be put ahead of the need to maintain family life.
  - A poor relationship between the mother and the social worker did not mean help and support should not be attempted.
- The sheriff's disagreement with the hearing, which had considered rehabilitation impossible, was rational and based on hearing detailed evidence to which the hearing had not had access.
- More work with the (admittedly difficult) mother might satisfy the child's welfare. The mother was capable of change.
- ***Of course, further intervention may fail but since there was a prospect that it might succeed it could not – yet – be concluded that "nothing else will do" other than severing the parent-child relationship.*** SW criticised for assuming that once they had decided on permanence, the court would fall in with their plans: they had, for example, encouraged the child to call her foster carers "mummy" and "daddy".

City of Edinburgh Council v EAH & Ors [2018] SC Edin 29 (24th May 2018)

- Child of mixed racial origins – mother (who had been in care all her own childhood and was antagonistic to social workers) Scottish, father Algerian. Paternal aunt Muslim.
- Father imprisoned for assaulting his children; mother disbelieved children, but "hopelessly conflicted" between love for her husband and for her children. Child removed at nine months (now 4).
- Hearing determined rehabilitation unlikely. By majority rejected kinship care with paternal aunt.
- Pool of adopters of child's racial origin, linguistic and cultural background very limited and POA would likely remove him from this influence.
- Sheriff Welsh held that s. 84(5)(c)(ii) was satisfied, BUT s. 84(3) had not been: option of kinship care with paternal aunt (same racial and cultural origin) had not been robustly excluded by LA. "The onus of proof is on the petitioner to prove permanence with authority to adopt is necessary and that nothing else will do" (para 165): it had not been shown that only POA would do.
- Sheriff rejected LA's argument that family were too "enmeshed" for kinship care to work – they would have preferred some distance to be kept by the aunt from the parents. Sheriff understood that alien cultures living in Scotland would tend to stick together.

Potential Reforms (1): The Role of the Children's Hearing

- Advice Hearings
  - Required whenever LA intends to make a permanence application, or its variation or revocation in respect of child currently subject to CSO: 2011 Act, s. 131.
  - Report must be drawn up under s. 141 to tell the court what the hearing thinks the court should do.
  - But what do these reports achieve? To advise the sheriff, to give a voice to parents, to maintain children's hearing's role?
- Sections 95 and 96
  - Hearing prohibited from making or varying (other than by interim variation) any existing CSO once application for PO has been made (s. 96); if it wishes to make or vary CSO it must draw up a report under s. 95 telling the court what the hearing thinks the hearing should do; if the court refers the matter back to the hearing, the s. 96 prohibition is removed.
  - Can the reconvened hearing do only what the s. 95 Report recommended, or if is free to make its own welfare decision?
  - Does the process work? Or do the rules distort practice (for example delaying applications when variation still possible?)
- Is there any role at all for the children's hearing, to justify the inevitably delay?

Potential Reforms (2): Relationship to Adoption

- Statutory timescales for POAs stricter than for POs
- Increase in early intervention has led to more need for permanence planning.
- What benefits do POAs have when adoption order possible?
  - Adoption orders are private law orders; POs and POAs are public law: is it right to confuse that division?
  - POAs provide a buffer between birth and prospective adoptive families: the LA
    - The LA does the work of instructing solicitors, drawing up grounds for dispensation etc – and bears these costs
  - BUT: does a POA pre-empt the adoption decision? (Difficult to refuse a later adoption application)
  - Prospective adopters are excluded from POA process; birth parents excluded from AO process.
  - Is the voice of the child lost in a contentious POA where adult interests are more at stake?