

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 29

POA84/16

JUDGMENT OF SHERIFF T WELSH QC

in the application of

CEC

Petitioner

against

EAH

First Respondent

DEH

Second Respondent

WD

Interested Party

Petitioner: M Loudon; City of Edinburgh Council
First Respondent: A Mellor; Edinburgh
Second Respondent: N Conroy; Collins and Co, Edinburgh.
Interested Party: S Trainer; BCKM Solicitors, Edinburgh

Edinburgh, 24 May 2018

The Sheriff having resumed consideration of the application by the Petitioners for a permanence order under section 80 of the Adoption and Children (Scotland) Act 2007 [the Act] with ancillary orders, in respect of the child AH; Finds the following facts admitted or proved:

1. AH was born on 4 March 2014 at Edinburgh. He is the biological son of EAH (mother – born 21 August 1987) and DEH (father – born 12 August 1987) who were married on 17 June 2013. AH is of mixed heritage. His mother is Scottish and his father is Algerian. Both parents practice the Muslim faith. Both parents have parental rights

and responsibilities. Neither parent consents to permanence or adoption of AH. AH is incapable of consent to adoption given his age.

2. WD is AH's paternal aunt. She is Algerian. She practices the Muslim faith and has lived in Scotland since October 1999.
3. AH has two half-siblings, both children of EAH; AS who was born on 19 January 2010 and KT who was born on 16 February 2005. Their father is GS.
4. Prior to AH's birth, EAH and DEH lived together in Edinburgh with AS and KT in their care. AS and KT had regular contact, including residential contact, with their father GS and paternal grandmother CB, with whom their father lived. In 2014 DEH was the principal carer for all three children.
5. On 25 September 2014 during a routine health visit to the family home AH's health visitor Lorna Williams noted a bruise on AH's right cheek. AH was not medically examined in relation to this bruise. DEH was never charged with an assault on AH in respect of this matter. This discrete issue was never referred to the Children's Reporter. The petitioner's social work department [SWD] received information from AS's school that bruising had been noted on AS's hand and fingers.
6. On 23 October 2014 an initial child protection case conference was held in respect of all 3 children. There were concerns regarding AS having said adults in her life were touching her vagina. There were concerns about bruising on all 3 children. The purpose of the meeting was to decide if the children's names should be placed on the Child Protection Register. Productions 1, 2 and 3 in the Fourth Inventory of Productions for the petitioner are true and accurate copies of Reports prepared by Audrey Tait, Social Worker; Lorna Williams, Health Visitor and Dr L Philip, respectively, for this conference. EAH was in full time employment working 7am to

10pm in a pattern of 5 days on 4 days off. DEH looked after the children for most of the time. There were 'strained relationships' noted between GS and CB and DEH and EAH over the child care arrangements for AS and KT. In her pre-case conference report Audrey Tait indicated she did not have a clear view as to whether the level of risk to the children warrants their being placed on the Child Protection Register. Both EAH and DEH said they would work with the children's allocated Social Worker and on the understanding that another conference would be held or a referral made to the Children's Reporter if further concerns came to the attention of SWD. The children were not registered on the Child Protection Register. The parents agreed to work voluntarily with SWD.

7. On 28 November 2014, a member of the public witnessed DEH grabbing KT by his top around the neck, holding his face close to his and threatening to punch him. The police attended at the family home to carry out a welfare check after receiving a complaint from a member of the public regarding this matter.
8. On 13 November 2014, AS was taken to her GP by DEH with bruising on her face, (two black eyes), and other parts of her body. DEH reported to the doctor that AS had sustained the injuries by falling down some stairs. The GP concluded that the explanation given was consistent with the injuries.
9. On 2 December 2014, EAH when bathing AS noticed bruising to AS. She did not take any action, including seeking medical assistance, at that time regarding the bruising.
10. On 3 December 2014, EAH and DEH attended the SWD, where the children's social worker was based, with AS, seeking advice and a meeting. AS had sustained significant bruising. Later that day, AS was taken to the Accident & Emergency Department of the Royal Hospital for Sick Children, Edinburgh where blood

samples were taken to exclude a medical cause for her extensive bruising. The blood samples were found to be normal. AS was subject to a video interview by police.

11. On 3 December 2014 AS and KT were placed with their father, GS and paternal grandmother CB with whom they have since lived. AH was placed with foster carers. At that time EAH and DEH agreed with these placements. CB was subsequently granted a residence order in respect of AS and KT, although GS retains parental responsibilities and rights. EAH has supervised contact with AS and KT, in a contact centre, on four occasions per year for two hours.
12. On 4 December 2014, a forensic medical examination was carried out on AS by Dr Juliet Christian Graham and Dr Lesley Ross. Production 5 in the Third Inventory of Productions for the petitioner is a true and accurate copy of their report and accurately reflects their findings and opinions. AS was found to have extensive bruising on her arms, legs and back. Her left knee was swollen. Her right arm was found to have fingertip bruising which, in the opinion of the doctors, was consistent with pressure having been applied by an adult. The injuries were consistent with blunt force trauma being inflicted on the child.
13. On 5 December 2014, KT was subject to a medical examination by Dr N McCormick and Dr Charlotte Kirk. Production 7 in the Fourth Inventory of Productions for the petitioner is a true and accurate copy of their report and accurately reflects their findings and opinions. KT was found to have multiple bruises over his thighs and a large tender bruise over his left wrist which in the opinion of the doctors was due to blunt force trauma. The number of bruises over his thighs was considered likely to have been sustained non-accidentally.

14. On 5 December 2014, a child protection order was granted in respect of AH, since which time he has been subject to statutory measures of care. He has not lived with his parents or any wider family member since 3 December 2014.
15. On 6 December 2014 AH was medically examined by Dr Lesley Ross. He was found to have no bruising on his body and there were no concerns about his motor skills or health.
16. On 10 December 2014 the case of AH was referred to a Children's Hearing on the ground that he was, or was likely to become, a member of the same household as a child in respect of whom a schedule 1 offence had been committed. The grounds were denied by the parents and the matter referred to the sheriff. On 20 March 2015 the grounds were held established and the matter remitted back to a Children's Hearing.
17. Since 9 December 2014 AH has been subject to a compulsory supervision order. There are conditions attached to the order that AH shall reside with foster carers. Supervised contact between AH and his parents has been allowed twice per week for one hour since December 2014. No concerns have been raised about this contact. DEH and EAH attend this contact religiously. It works well and AH enjoys it. AH has supervised contact with his half siblings once a month for one hour. EAH and DEH are appropriate and respectful towards AH's foster carers. EAH contacts them twice a day to inquire about his welfare.
18. On 6 October 2015 at a looked after and accommodated child review it was recommended that AH be referred to an adoption and permanence panel. At the review AH was described as settled with foster carers; age appropriate in all aspects of his development; in regular contact with both parents; there were no concerns

about his supervised contact with his parents and in contact with his half siblings AS and KT. There is no record of possible kinship care options being discussed at this review. Under a heading "Referral to permanency Panel" there is minuted the following:

"Audrey Tait noted that Children and Family staff are not comfortable with the prospect of A[H] returning to his parent's care. This was due to the fact that his older siblings were assaulted and it has not yet been possible to establish how this happened and who was responsible. It is therefore the assessment of the Children and Families staff that it would be unsafe for A[H] to return to the care of his parents....Audrey therefore felt that it was no longer possible to consider A[H] being rehabilitated to the care of his parents. Alistair Stevenson noted that the unexplained injuries mean that it is impossible for social work staff to feel confident that A[H] would be safe in the care of his parents. The assaults the children had been subject to took place while their mum and dad were responsible for their care and safety. He therefore noted that in these circumstances the Children and Families Department would have *no option but* to consider A[H]'s longer term care and that the forum for this would be through the Permanency Panel. The professionals at the meeting agreed that a referral to the Permanency Panel appropriate in these circumstances." [emphasis added].

19. On 22 January 2016, at Edinburgh Sheriff Court, after a trial on summary complaint, DEH was found guilty of two charges of assault to injury against AS and KT. After trial the sheriff instructed that a copy of the remarks he made on conviction be sent to the Director of Social Work and the Reporter to the Children's Hearing. Bail was revoked and DEH was remanded in custody.
20. On 5 February 2016, DEH, a first offender, was sentenced to 12 months imprisonment (the maximum sentence). A copy of the sheriff's sentencing remarks was sent to the Director of Social Work and the Reporter to the Children's Hearing. These were noted by subsequent children's hearings considering compulsory measures of care for AH.

21. DEH appealed his sentence to the Sheriff Appeal Court but it failed the double sift, without an oral appeal hearing, having been adjudged unarguable.
22. On 31 March 2016 and 7 April 2016 an adoption and permanence panel unanimously recommended that AH be registered as in need of permanent alternative care away from his parents and that the legal route should be for the petitioner to make an application for a permanence order with authority to adopt, which recommendation was ratified by the petitioner's independent decision maker on 13 April 2016. The minutes of that panel record that AH was then meeting all developmental milestones; he had eczema which required some attention; he continued to have supervised contact with both parents and his half-siblings. Placement with relatives was considered but rejected as not in AH's best interests. The panel were of the view "..... that the extended family were supportive of both parents' views of what had happened." It was said by SWD that no extended family member had come forward as a potential kinship carer. It was stated EAH "...had put forward the names of possible family members but turned down the opportunity to speak further about them." It was considered likely that a suitable adoptive placement would be found for AH. Details relating to AH were entered into "Linkmaker" which was formerly the Scottish Adoption Register. It covers the whole of the UK and a search can specify filters like ethnicity and religion. Three possible couples showed interest in AH. One couple did not complete the process. Another couple withdrew interest on 7 December 2017 because of the length of time the permanence process was taking and because of the level of contact AH has with his natural parents. The SWD are presently in contact with a couple based in England. As at the date of proof they had not been interviewed as prospective adopters.

23. On 9 May 2016 agents for WD wrote to the petitioner requesting to be considered as a kinship carer. This was acknowledged by the petitioner on 31 May 2016. Agents for WD wrote to the petitioner requesting that it “.....begin the necessary process in order to assess our client as a kinship carer.”

24. On 14 June 2016 at a Childrens Hearing the record of proceedings states:

“In addition, potential kinship carers were mentioned by the parents and it was acknowledged by social work that this needed to be explored further.”

25. On 27 July 2016, DEH was released from prison at which time he returned to live with EAH, with whom he still cohabits. DEH had supervised contact with AH when in prison. DEH has always maintained he is innocent of the crimes he was convicted of. EAH also maintains that DEH was not guilty of the crimes, although it is accepted by both parents that AS and KT did in fact make allegations of physical abuse against DEH. DEH maintains that AS and KT lied about the allegations against him.

26. On 19 August 2016 the SWD wrote to agents for WD intimating that SWD is unable to support the kinship care request for the following reasons:

- i. Concerns relating to WD’s physical and mental health and her ability to provide appropriate and adequate care to AH.
- ii. Concerns arising from the close family relationship between WD, EAH and DEH that WD would be unable to protect AH from EAH and DEH.
- iii. Concerns arising from the denial of guilt on the part of EAH and DEH.

- iv. The fact that kinship care had been considered at the permanency panel on 31 March 2016 and rejected.

27. On 14 September 2016 a Childrens Hearing unanimously decided to give advice to the sheriff in support of the present application in respect of AH. The advice stated "...that there was no evidence that either parent recognised the seriousness of the offence and both still maintained innocence." As a result, the advice given by the hearing was that successful rehabilitation would be unlikely. The advice stated "...it would not be appropriate for AH to reside in the same home as either parent, given that his well-being could not be guaranteed." With regard to possible kinship care the record of proceedings states "There was a minority decision to appoint a safeguarder as it was felt *insufficient information and reasoned recommendations* were available from Social Work as regards the issues raised at the previous hearing relating to Contact, Rehabilitation and Kinship care." The advice states that the hearing was ".....informed that the local authority had *investigated the possibility of kinship care* but were unable to source a safe option. On the initial Place of Safety placement, the LA had investigated the possibilities of family care but were unable to find anything suitable. Over the past few months the local authority have reviewed WD but found there were personal issues barring her from giving a safe and secure home and doubt over her ability to perform satisfactory gate-keeping for AH in his contact with his parents." [Emphasis added]

28. On 12 October 2016 the application for a permanence order with authority to adopt and local authority report dated 11 October 2016 compiled by Audrey Tait, Senior Practitioner, was lodged with the court. On 18 November 2016, AH's curator *ad*

litem reported and supported the application. The curator did not address the question of kinship care in his report. The local authority report of 11 October states:

“The Local Authority has fully explored the possibility of the suitability of kinship or relative carers for [AH]. In December 2014, Ann Garson, team leader, reviewed social work records and also Police records, in collaboration with Public Protection Unit. Those record checks informed cause for concern in respect of both paternal and maternal sides of [AH’s] family. In addition, the family is close knit and there are grounds for concern that [AH] could not be kept safe within the family group. That was a conclusion shared by Childrens Hearing members at the Advice Hearing on 14 September 2016. The local authority also explored the possibility of placing AH with his older siblings and their paternal family; the siblings’ paternal family felt unable to offer care to [AH].”

29. Dr Sue Reynolds, Consultant Psychologist, was jointly instructed by all parties. Her report is production 2 in the second inventory of productions for the petitioner. The Parties are agreed that this report shall be taken as her evidence in chief and admitted into evidence.

30. Dr Lorraine Johnstone, consultant clinical and forensic psychologist, was jointly instructed by the petitioner and the first and second respondents to complete a psychological risk assessment of DEH. In preparing her report, Dr Johnstone had access *inter alia* to the case notes of the SWD of the petitioner, recorded on an electronic system (SWIFT), which have also been made available to the respondents’ agents. Dr Johnstone’s report dated 29 January 2018 is lodged as a production. Parties agreed that this report shall be taken as Dr Johnstone’s evidence in chief and admitted into evidence.

31. All social work records, reports and minutes lodged as productions are, so far as copies, to be held as equivalent to principals and as having been written or pronounced by parties by whom they bear to have been written or pronounced on, on or about the dates they respectively bear. Minutes of Childrens Hearings and

Looked After Child Reviews lodged as productions are accurate. Reports lodged as productions accurately record the author's observations, opinions and views.

32. Production 2 of the second respondent's first inventory comprises true and accurate copies of the case notes of SWD recorded on the SWIFT electronic system.

33. Production 1 of the second respondent's first inventory comprises a true and accurate copy of the letter by the Home Office containing DEH's Residence Permit.

34. WD was seen by doctors for depression in 2013 and between September 2014 and November 2015. She was prescribed anti-depressant medication and was under the mental health team for further psychological therapy. She has no physical or mental health issues which would prevent her providing kinship care to AH.

35. Productions 9 and 10 in the second inventory of productions for WD are true and accurate reports prepared by teachers regarding WD's own 2 children.

36. The application for a permanence order has requested that the order include provision granting authority for AH to be adopted. Both EAH and DEH understand that the effect of making an adoption order in respect of AH would sever their legal bond with him.

37. DEH assaulted AS and KT in and around December 2014. EAH was complicit in DEH's abusive behaviour to AS and KT. DEH is in denial about his guilt.

38. Without very considerable professional intervention, DEH and EAH lack the necessary capacity to parent AH on a full-time basis. DEH has strong views deriving from his own Algerian cultural perspective about discipline and high expectations about things like good behaviour, performance, homework and handwriting irrespective of how measured and age appropriate this discipline is. He has authoritarian beliefs and problematic expectations about how to socialize children

and how to manage challenging behaviour. He lacks moral emotions such as empathy, remorse, regret and responsibility taking and when motivated to do so, will engage in deceptive and manipulative behaviour. Rehabilitation to the care of EAH and DEH would be seriously detrimental to the welfare of AH, considering their incapacity to parent without professional intervention. DEH's denial of his guilt is an insurmountable barrier to risk management in this case if AH is rehabilitated to his and EAH's care as parents. EAH lacks empathy towards her children and was complicit in DEH's abuse of AS and KT. The late suggestion of individual parenting assessments for each parent is a ruse and not genuine. It is an attempt by DEH and EAH to thwart the permanence application. The relationship between the natural parents of AH and Audrey Tait and Ann Garson has broken down.

39. DEH poses a significantly reduced risk of harm to AH than to his stepchildren AS and KT.

40. WD is a strong, intelligent devout Muslim woman who respects the law. Her own children live with her and are thriving at school. She has worked successfully as a gatekeeper with SWD to protect her own children from harm from her ex-husband. She allows unsupervised contact between her own children and DEH. There has been no difficulty with that. She has significant insight into the complications which might arise bringing AH up in circumstances where he is not living with his natural mother and father in their care. If kinship care were allowed she is intelligent enough to seek the guidance and support of SWD to help her to manage any potential problems regarding AH's life story. If properly managed which WD is capable of and committed to do there is no reason why AH will become distressed

or confused by being in WD's care. WD can keep her own views private about her brother's guilt and safeguard AH. There is no evidence which supports a reason to disbelieve WD in her commitment to safeguard and promote the welfare of AH throughout his childhood. She behaves appropriately with SWD staff and is known to AH as 'auntie'. She wants to kinship care for AH and if his parents cannot rear him safely she is prepared and able to do so herself. She is strong and will not be intimidated by DEH or EAH. If there is any attempt to undermine kinship care with her she will contact the police and SWD immediately. WD is capable of creating appropriate boundaries between AH and his parents. There are no health or mental health issues which would rule WD out as a potential carer. She has the support of her other adult siblings (DEH's brothers) who do not constitute a threat to AH's safety if in kinship care with WD. WD will not become isolated from her family if she has kinship care of AH. DEH and EAH will not attempt to undermine kinship care with WD. During present contact arrangements both EAH and DEH have shown appropriate respect and gratitude to AH's foster carers for the work they have done. WD's offer of kinship care is a realistic viable alternative to permanence which has not been adequately investigated and assessed because she has never been interviewed about it by the petitioner's independent kinship assessment team.

41. WD last had contact with AH in October 2016. No good reason has been established for terminating that contact after WD made a formal approach to SWD on 9 May 2016 to become a kinship carer. The decision to restrict WD's contact to AH was biased against her because of her support for her brother.

42. WD has a close relationship with EAH and DEH. She is supportive of them. She does not know if AS and KT were assaulted by DEH because she was not there at the

material time. She respects the verdict of the court. She believes that the natural parents can care for AH. However, she is prepared and willing to undertake that responsibility if the court finds it is unsafe to allow the natural parents to perform that function.

43. The minority voice at the Childrens Hearing on 14 September 2016 was correct to feel insufficient information and reasoned recommendations were available from SWD about the issues raised at the previous hearing relating to contact, rehabilitation and kinship care. It was inaccurate to state that SWD had investigated the possibility of kinship care on the part of WD. In fact, WD was excluded from independent assessment and a biased judgement was made that she was too close to DEH and EAH for kinship care to work safely. SWD disapproved of the fact that WD supported her brother. Because WD has never been interviewed or formally assessed as a possible kinship carer by the SWD's independent kinship assessment team, the petitioner's SWD carried out an inadequate kinship care assessment of WD as a potential kinship carer.

44. Having regard to AH's religious persuasion, racial origin and cultural and linguistic background, and the likely effect on him of the making of the order sought he has more to lose from being permanently removed from his family and placed for adoption than remaining in foster care with the realistic alternative option of being placed in kinship care with WD. At present he has contact with his natural parents and his cultural and religious background. If he was placed in the kinship care of WD that contact will broaden to include his Muslim family in Scotland and Algeria. The pool of prospective UK adopters is limited for someone of his religious persuasion, racial origin and cultural and linguistic background.

Finds in fact and law that:

1. On the facts established in relation to the conduct of DEH towards AS and KT in and around December 2014 and the complicity of EAH in that conduct, residence with either or both of them was likely to be seriously detrimental to the welfare of AH in terms of section 84(5)(c)(ii) of the Act.
2. On the facts established in relation to the continuing attitude of both EAH and DEH towards the guilt of DEH and the complicity of EAH in that guilt arising from the assaults on AS and KT in and around December 2014 residence with either or both of them is likely to be seriously detrimental to the welfare of AH in terms of section 84(5)(c)(ii) of the Act.
3. On the facts established in relation to the potential risk of harm posed by DEH to AH and the likely inability of EAH to protect AH from that harm, residence with either or both of them is likely to be seriously detrimental to the welfare of AH in terms of section 84(5)(c)(ii) of the Act.
4. In considering whether to make a permanence order in respect of AH and having regard to the need to safeguard and promote his welfare throughout his childhood as the paramount consideration in terms of section 84(4) of the Act, which welfare includes his interest to be brought up by his natural family and having regard to his religious persuasion, racial origin and cultural and linguistic background, and the likely effect on him of the making of the order, it is not, in terms of section 84(3) of the Act, better for him, on the facts established, that a permanence order be made than that it should not be made because a realistic and viable alternative to

permanence in the form of kinship care with WD is available and has not been excluded;

Accordingly, dismisses the application, with no expenses due to or by any party.

Note

[1] I heard this proof between 6 and 9 February 2018 continued to 19 to 23 February 2018 (9 days). I heard oral evidence from the following witnesses:

1. Audrey Tait, Social Worker.
2. Ann Garson, Social Worker Team Leader.
3. Emma Sage, Social Worker.
4. W Susan Reynolds, Consultant Psychologist.
5. Dr Lorraine Johnstone, Consultant Clinical Forensic Psychologist.
6. GD (head teacher)
7. EAH
8. DEH
9. WD
10. PB
11. AB
12. WD

I had the benefit of reading affidavits from witnesses 1, 2, 3, 6 and 11 above. In addition, I read affidavits from Lorna Williams, Health Visitor, Lesley Anne Ross, Consultant Paediatrician, Charlotte Barrett Kirk, Consultant Paediatrician, and NF.

The Issue

[2] AH is a 4-year-old boy of mixed Scottish/Algerian heritage. In 2014, when only 9 months old he was taken into local authority care, made subject to compulsory measures of care and has since been looked after by foster parents. His biological father DEH was prosecuted, convicted and imprisoned for assaults on his step children AS and KT who are AH's stepsister and stepbrother. AH's biological mother EAH, who is also biological mother of AS and KT, is believed by the SWD to be complicit in the mistreatment and abuse of AS and KT, who now live with their natural father GS and paternal grandmother CB. The Petitioners seek a permanence order in respect of AH with various ancillary orders including authority to place AH for adoption. His parents DEH and EAH who are vested with parental rights and responsibilities oppose the application. AH's paternal aunt, WD, has offered to be kinship carer for him and is prepared to rear him if his parents cannot. The petitioner has rejected WD's offer of kinship care. Thus, is permanence with authority to place him for adoption, necessary for AH?

The Evidence

Petitioner's case

Audrey Tait (47) [the following is from her affidavit and oral testimony]

[3] Ms Tait is a Senior Practitioner in the Children and Families Department of The City of Edinburgh Council based at Captains Road, Edinburgh. Her qualifications are as follows: NNEB (Nursery Nurse) qualified 1989, HNC in Social Care qualified 1999, DSW (Social Work) qualified 2002, trained Joint Investigative Interviewing 2004 (approx.), Practice Educator. She began her career in Social Work Nurseries (now called Child & Family Centres); the children she provided a service for would all have been defined as "Children in

Need". She offered group care but also worked with parents and children separately and together. It was her job to assess child development and address the child and families' needs. She then moved to the voluntary sector for a period of approximately two years working as a project worker for Barnardos. The focus of this job was group work with Parents and Children aged from 0-12 years. She ran groups for parents, teaching parenting skills, and she also ran groups where the focus was on nurturing parent/child relationships and facilitated groups where the aim was to reduce social isolation, support and educate women about mental health. She then returned to local authority (Edinburgh), returning to work in Child and Family Centres. In 2002, she qualified as a Social Worker. She continued to do some residential work for the following 2/3 years but her focus was on Practice Team Social Work, her case load consisting of children who are either accommodated or where there are child protection concerns.

[4] The witness adopted the content of her affidavit as evidence. The witness became the allocated Social Worker to AH just prior to the initial child protection case conference on 23 October 2014. Prior to the case conference and before she became the social worker there had been SWD concerns raised on numerous occasions in respect of both of AH's elder half-siblings, AS and KT. AS had bruising to her face and hand. KT had been presenting as very distressed at school talking about wanting to end his life. AH had sustained a round shaped bruise to his face. The bruising to AS's hand was explained by her step-father DEH stating he had held his hand over hers to teach her to write. The bruising to AS and AH's face was stated to have been caused by DEH "sucking their cheeks". According to the witness, DEH explained this was an expression of affection and he had not intended to cause injury. The witness was not present at Captains Road Social Work Centre when AS was brought in by her mother, EAH and her stepfather, DEH on 3 December 2014. The witness did accompany

AS to a forensic medical examination on 4 December 2014 which was conducted by Lesley Ross, Paediatrician. Because of the injuries to AS, she was initially placed in a foster care placement with the agreement of her mother EAH.

[5] The witness said she was really shocked at the extent of the injuries. There was a significant amount of bruising to AS's upper and lower arm. There was significant bruising to her knee. There was bruising to her lower leg and her foot. The witness indicated she has been involved in child protection since 1989 and a social worker since 2002. In all of these years she has never seen a child who has been as badly injured. The witness indicated that Lesley Ross, the Consultant Paediatrician, had to take a breath and move away when she first saw the injuries.

[6] The witness indicated DEH has never admitted that he physically hurt AS to the extent of the injuries that she saw. She stated that DEH only ever acknowledged that he caused round bruising to AS and AH's cheeks by "sooking" their cheeks and also caused slight bruising to AS's hand where he said he was holding her fingers helping her to write. He has never admitted physically hurting KT. DEH continues to deny that there was any physical or emotional abuse of these children despite his conviction.

[7] The witness is of the view that DEH has the capacity to assault a child to the point of significant injury. There is therefore always going to be the risk that DEH could assault another child. The witness has no confidence that if AH was being parented by EAH and DEH that DEH would not resort to physical punishment of AH. DEH has the capacity to seriously assault young children. The witness was of the view that when AS and KT lived with their mother and step father, that physical chastisement and rules were given high importance. Her view was that the level of chastisement given to AS and KT was significant and not within normal bounds.

[8] The witness indicated that DEH would have to admit and accept his guilt for any help to be given to him to change his behaviour in the future. Because he is unable to do this there is no way for DEH to make a change in his behaviour. There is no way that social work or any other supports can work with DEH to look at how he can do things differently next time to reduce the risk. There is no way that any supports or work around safety planning could work as he does not accept that he had done any wrong. A further issue is that EAH has been clear that she is supportive of DEH's position. EAH has said AS and KT have lied about how they incurred their injuries. EAH has not believed her children and the witness believes EAH prioritises her relationship with DEH above her children's needs; therefore, she has no capacity to protect any of them.

[9] The witness has heard directly from AS and KT about how they were treated when they lived with their mother and stepfather. The view of the witness is that there can never be any confidence that any child could be safe in the care of DEH and EAH. The witness said that the risk would be too great to try to test the situation.

[10] The witness indicated KT has said that EAH was present on some occasions when AS and he were hurt by DEH. Both children have said that they told their mother, EAH, that they were sometimes unhappy in DEH's care, KT to the point where he repeatedly asked to go and live with his natural father. EAH continued to leave the children in the sole care of DEH. The witness stated this makes EAH complicit to the physical and emotional abuse of her children by their stepfather. She failed to protect AS and KT from the emotional and physical abuse of their stepfather. If AH were returned to the care of his parents, the witness indicated her concern would be that EAH would be unable to protect AH from any similar emotional or physical abuse.

[11] The witness was of the view that it would be seriously detrimental to the welfare of AH to be returned to the care of his birth parents. His parents are presenting as a couple. They do not wish to be assessed separately to parent AH. They wish to parent him together.

[12] The witness indicated contact now takes place for one hour twice per week and is supervised. The focus of contact is to ensure that AH is comfortable within the contact situation and enjoys contact. The parents' focus during contact is on seeing AH and enjoying him. They do not see AH when he is tired, hungry, or challenging. Within the confines of a one hour supervised session the parents can entertain AH and enjoy his company. The witness did not consider that the contact sessions are not true reflections of what day to day life with a young child would be. The contact sessions do not offer any situation which would be likely to make a parent stressed or challenged by the child. The witness said she would expect most people to be able to manage this type of contact session.

[13] With regard to post-permanence contact the witness said she not think that direct contact should continue if a permanence order or a permanence order with authority to adopt is granted. This is for several reasons. The first reason is that DEH does not accept that he has ever done anything wrong in relation to his stepchildren. EAH also does not accept that her husband has done anything wrong and has put her relationship with her husband before that of her older children. Both DEH and EAH have demonstrated that they have the capacity for emotional abuse of children. The witness would have no confidence that they would put AH's emotional needs before their own especially if there was no longer any local authority involvement in his care.

[14] The witness indicated that if an order for post-permanence direct contact were made and this continued once AH was adopted, any prospective adopters, would then have to deal with contact issues themselves. The witness said she would have real concerns about

this. DEH is a man who has been convicted of the violent assault of children. There has been a significant degree of animosity by DEH and EAH. The witness would be concerned that this animosity would transfer to any carer who was dealing with ongoing direct contact.

[15] The witness said that both she and her team leader Ann Garson were so concerned about EAH, they shared their concerns with EAH; they were concerned that she may have been in a relationship where there was domestic abuse. They gave her the opportunity to talk about her relationship, but she in fact challenged their concerns by making complaints about the fact they had asked her and showed their concern.

[16] The witness indicated that if there was ongoing direct contact she would also have concerns about what EAH might say to AH as he gets older. There is evidence that she has emotionally manipulated her older children, AS and KT. The witness said that on 1 April 2016 EAH told AS that she could not stay with her grandparents forever as they "would be dead soon". After this was said AS was distraught and it took her grandparents and the witness a lot of time to calm her down. The witness indicated this is emotional abuse.

[17] The witness indicated AS and KT have continued to experience emotional distress through contact with their mother. On 15 March 2016 AS reported to the witness that 'mummy' had shown her a photo of DEH during contact and told AS that she, AS, loved DEH. AS was clear that she did not love DEH, because he hurt her. AS explained that her mummy had repeated to her that she, AS, loved DEH. AS found this distressing. She stated to the witness that she did not even want to hear DEH's name because he is "scary, real scary". The witness indicated this is an example of EAH lacking empathy, ignoring her children's views and trying to manipulate AS's beliefs, all of which caused AS distress. There is no reason to believe that in the future EAH would not behave in a similar way towards AH in relation to his life story.

[18] The witness indicated that initially when she worked with the family they asked for and accepted practical help. Within the family home, KT's bed was broken and AH was sleeping in a travel cot. They were a low-income household and they seem prepared to accept practical support and stated they would work in partnership with social work. They presented as open to social work involvement. This was why the children's names were not on the child protection register. However, concerns continued to be received from the school and health visitor and members of the community. For example, KT continued to express his unhappiness at home, he stated to his teachers on a regular basis that he wanted to go and live with his natural father. On 28 November 2014 a parent from KT's school reported that he had observed DEH threaten KT by shouting at him and telling him he would be punched when he got home, KT was described as being terrified. The member of public stated DEH had been verbally abusive towards him. On 13 November 2014 AS was taken to the GP with two black eyes and other bruising to her body; DEH advised she had fallen down the stairs, the GP was satisfied that the injuries were consistent with a fall down the stairs.

[19] The witness said in relation to post-permanence contact, her view was that indirect contact would meet AH's needs. Children who are adopted are usually curious at some point in their lives about their birth family. Ongoing indirect contact offers them a safe connection to their birth family, the chance to learn more about their birth parents and to have a sense of who they are. When birth parents write letters, this demonstrates to the adopted child that they continue to care about them. In the long term when the child becomes an adult a history of having indirect contact does mean that if the adopted person then wants direct contact this is easier both on an emotional and practical level.

[20] The witness indicated that she is aware that AH's paternal aunt, WD, has indicated that she wishes to be a potential kinship carer for AH and to have ongoing contact with him.

The witness said she can remember that WD attended one of the contacts that the witness supervised on 15 January 2015 just after AH was accommodated. WD seemed enthusiastic and enjoyed seeing AH. WD was appropriate with him. She asked about the possibility of her looking after AH if he required to remain accommodated. The witness said she remembers that at the time that EAH did not show much enthusiasm for this. The witness said she told EAH and WD that either or both of them should telephone her office and she could meet to explain the kinship assessment process and if WD then wanted to go ahead and be assessed the witness would refer her to the kinship team. Neither EAH nor WD contacted the witness for this to be set up. At a later point the witness said EAH has stated that the conversation never happened.

[21] The witness said that WD presents as very close to both EAH and DEH. She has been a support to EAH and has attended prison visits with EAH when DEH was serving his sentence. She also accompanied EAH to court hearings in relation to AS and KT. They have a strong bond together. The witness said that when she first started working with the family DEH described his family as a close family. They would meet together on a regular basis and they would all be entwined in family life. DEH talked about the family celebrations together but also just seeing each other in the regular course of life.

[22] The witness stated that after the application for a permanence order with authority to adopt was raised, WD arranged for a solicitor to formally ask for her to be assessed as a kinship carer. By this point she said SWD had learned more about the relationship in the family. A response was sent with a list of concerns that the SWD had. These concerns came about as a result of an assessment of her by looking at case notes relating to WD and her family and also SWD observations to date. The letter stated why the SWD did not think a referral to the kinship team was appropriate. The things highlighted were a history of

depression, historically her own children being on the child protection register due to domestic abuse, and her close relationship with EAH and DEH. By this time, the SWD knew significantly more about WD's relationship with EAH and DEH. The witness indicated that her biggest concern about WD being a kinship carer for AH is her closeness to EAH and DEH. The witness does not believe that WD would supervise any contact between AH and EAH and DEH effectively. If she was a kinship carer there would be a requirement for WD to make significant changes to how the extended families live and socialise together as there would have to be clear boundaries between her and AH and his birth parents. These boundaries would need to be in place to ensure AH's safety. The witness is of the view that WD would have to become more isolated from her own extended family to keep AH safe and ensure there was no unsupervised contact with his birth parents.

[23] The witness was of the view that it would be seriously detrimental for AH to return to DEH and EAH's care as there would always be a significant risk that he would be seriously assaulted as AS was. In addition the witness indicated AS and KT since being accommodated with their natural father have described many incidents of physical and emotional abuse, KT has described being excluded from peer relationships and not being allowed out in the community to play. AS has described being put in a room and being told there were lots of spiders in there; AS is afraid of spiders. AS and KT told the witness they have both been called names by DEH. 'Dog' being a common name he called them. They said they had shoes thrown at them. KT has stated his mother, on occasions, was present and that she would sometimes tell DEH to stop but that DEH would not always listen. According to the witness, EAH, despite witnessing her children being hurt, and them telling her that they were unhappy in DEH's care continued to leave the children in DEH's sole care. KT has disclosed that DEH would not give them enough to eat. EAH continued to

leave her children in DEH's care while she worked long shifts. Above all said the witness both KT and AS subsequent to going to live with their father and their paternal grandparents have conveyed that they lived with a constant sense of unpredictability and fear. Living in fear the witness said affects every area of a child's development. The focus has to be on survival. No child can reach their full potential in these circumstances and the witness said she had no evidence to convince her or give her confidence that AH would have a different experience from his stepbrother and stepsister.

[24] The witness indicated that currently AH has supervised contact with his parents twice a week for an hour; DEH and EAH have good attendance at contact. SWD has ensured that contact has become part of AH's routine, it occurs at the same time each week and generally in the same place. Young children appreciate routines and familiarity, therefore the predictability of the timing and venue and the parents' good attendance has helped AH to feel safe and comfortable in contact. The witness said she initially supervised contact however the decision was made that she would not continue to do this. This was because the parents had become upset and angry in relation to SWD intervention and recommendations in respect of AH and had stated clearly, they did not want any contact with the witness. The witness stated AH is the department's first priority and for her to continue to supervise contact would have impacted on him negatively as it would have most likely created an atmosphere/tension in contact. AH usually enjoys the individual attention and playfulness that EAH and DEH can offer him during contact, he enjoys the sweets and McDonalds meals that they provide. Having spoken to AH about contact the witness has the impression that he views EAH and DEH as friends, he calls them mum and dad but as he gets older he is questioning this as he recognises that his foster carer fulfils the role of a parent. AH accepts seeing EAH and DEH as part of his routine. The witness stated AH is pleased to see

his foster carer at the end of contact and he doesn't look for it to last longer or ask for more contact with DEH and EAH.

[25] The witness indicated she did not think it would be in AH's best interests for contact to continue. She said as AH gets older he will have questions about his history. All children need a coherent story about their past, they need this to develop a sense of themselves to understand their identity and in turn build self-esteem. As DEH and EAH have never accepted that AH is accommodated because of the risk DEH poses they would inevitably give AH a different explanation for why he does not live with his parents than the life story given by SWD, carers and adopters. There is evidence, she said, that EAH has tried to manipulate the children's understanding of what had happened. The witness said she recalled AS telling her that mummy had told her that DEH had hurt her hand by accident; that he was only trying to help her to learn to write. AS told her that she objected to this and she said that EAH had insisted that AS did like DEH. This caused AS distress as she was clear she didn't like DEH and that he had hurt her. The witness said that EAH has also told AS that AS and KT were lying about how their injuries occurred.

[26] The witness said AH needs to be claimed fully by a family. Most prospective adopters do not wish there to be direct contact with the birth family, at least while the child grows up, so if it was agreed for AH to continue with direct contact with his parents then the witness said she was advised by Family Based Care that this will reduce the likelihood of finding adoptive parents. If AH were to have ongoing direct contact with his birth parents it may well be the case that the actual time he spent with his parents would continue to be amenable, however the fact that contact was happening forces a child to face the fact that they are not being cared for by their birth parents and therefore forces them to revisit their history. Indirect contact allows the connection to the birth parents to continue but the child

has more control over when they engage with them, they can choose when and where to read a letter. The witness said in her experience the impact is never confined to one day there is usually a build-up of emotion before direct contact and then post direct contact there is a period of strong emotion where the child processes the experience.

[27] The witness indicated adoption would be the best outcome for AH; it would mean that he would be claimed by a family who can meet his needs both practical and emotional and be able to support him through his childhood and throughout his life. If a permanence order with authority to adopt was not granted, the Children and Family department would not look to rehabilitate him home. The witness indicated the SWD would continue to seek compulsory supervision orders with conditions of residence with foster carers. This ultimately would not meet AH's needs, as a lot of foster carers often only care for certain age groups or retire. Children can end up having multiple losses as they have to change placements or grow up in families where there are constant changes as children join and leave the family group. This does not offer a child life long stability.

Ann Garson (51) [the following is from her affidavit and oral testimony]

[28] The witness indicated she was a social work team leader in a children and families team, employed by The City of Edinburgh Council based in Edinburgh. She has been a social worker for 29 years and has been in her current post since May 2004. She is responsible for 5 members of staff. This entails managing their caseloads, providing supervision, advice, guidance and support. The workers she supervises carry heavy and complex caseloads. She is also part of a management team sharing responsibility for the Duty/Access Team managing incoming unallocated work. She has CQSW (Certificate of Qualification in Social Work) from 1988 and has completed the certificate in child protection

and practice teaching. The witness has completed a post-graduate course resulting in a certificate of leadership and management at Stirling University. Prior to her current post, the witness was a social worker from 1988 to 1993. The witness is chair of one of the adoption and permanence panels in Edinburgh. She has been a chair for around 7 years, and prior to that sat as a Children's Hearing panel member.

[29] The witness said she is the team leader to Audrey Tait who is the social worker allocated to AH. She has been involved in the case since EAH's older children, AS and KT, came to the attention of the SWD in November 2014 when AS had presented at her GP with injuries. She had two black eyes and it was reported to the GP by her step-father DEH that she had fallen down the stairs. The witness said that on 3 December 2014 AS came to the social work office with her mother, EAH, and her step-father, DEH. The witness indicated EAH had called her at the social work office to say she had an issue of concern she needed to bring to her attention. She explained that AS had injuries to her body, the reason for which, she did not know. It was agreed she would bring AS to the social work office to agree what should happen next. Audrey Tait was not working that day. The witness initially met with them in one of the interview rooms and EAH agreed that AS should remove her top and trousers in order that the witness could see the injuries. The witness was horrified with what she saw. The witness indicated she has been a social worker for twenty-nine years and she had never seen anything like it before. She said it was truly awful. She then went to get a colleague to witness what she had seen. With EAH's permission, she took AS into another interview room in order that the colleague could see the injuries. Whilst in the room, both asked permission from AS to look at the extensive bruising on her body. The colleague was equally shocked at what she saw. The witness said she found it very hard not to react in front of AS due to the extent of her injuries.

[30] The witness said she then spoke to EAH and DEH individually to get separate accounts of what they believed had happened to AS. Following this meeting the witness said she was criticised by EAH for speaking to her and DEH separately. However, EAH did say that prior to the injuries being noticed, DEH had been the sole carer for AS, KT and AH. The witness said she did try to give EAH the opportunity to ask for help and asked if she was afraid or felt threatened within her marriage. As a result, EAH made a complaint against the witness.

[31] The witness said she was aware that EAH and DEH are presenting as a couple; they wish to be assessed together and wish AH to be returned to their joint care.

[32] The witness said that before the children were accommodated they were in the primary care of EAH and DEH. AS and KT were injured whilst in the care of their mother and DEH. EAH and DEH have stayed as a couple since that time and EAH remains fully supportive of DEH despite his conviction. There is a continued lack of acceptance of the reasons why AH was accommodated and a lack of acceptance as to why he would be at risk in their care. There is a continued denial DEH is responsible for the injuries to both children.

[33] The witness indicated that as a couple, EAH and DEH appeared to have strong views about discipline and high expectations about things like good behaviour, performance, homework and handwriting. How measured and age appropriate this discipline was has been a concern. The witness said she would say that it was unreasonable chastisement, and unreasonable in terms of their expectations. The children also had unexplained bruising. Several of these concerns led to the initial child protection case conference. AS had bruising to her hand and was unable to hold a pencil properly. KT, the witness said, finds learning a challenge and he was made to do two or more hours of homework each night. The witness said this is unreasonable and unrealistic. The discipline

that AS and KT received was not measured and not age appropriate for their age and stage. The witness said SWD were informed by the school and by the health visitor about issues relating to this such as concern that AH was watching too much baby TV to the extent that he disengaged from play to watch it. The Health Visitor referred AH to the vulnerable children's clinic for examination. She was also concerned that DEH and EAH were not focused on the needs of the children and not fully able to take on board parenting advice. The head teacher, GD reported that KT often did not want to go home after school and wished to return to live with his birth father. The Health Visitor spoke about KT looking fearful and upset in the family home.

[34] The witness said the child protection conference took place in October 2014 shortly before AS's significant injuries became evident. She said she was aware that AH's parents share a view that he would not be at risk in their care as he is DEH's birth son. However, the witness's view is that the risks to AH are the same. The witness was of the view that DEH is a man who was both capable and convicted of inflicting horrific injuries to two children. In her opinion, he is also capable of harming AH. Therefore, the risk to AH remains unacceptably high. There has been a sustained level of denial from DEH about the cause of AS's horrific injuries and the emotional abuse of both AS and KT. Despite his conviction, the witness said DEH is still in denial. DEH and EAH present a strong united front. EAH was unable to keep KT and AS safe and the witness does not believe she would be able to offer AH the protection he needs to keep him safe. The witness said she would stress that the risks to AH are the same as the risks that AS and KT were exposed to. These are continued unacceptable risks and prohibitive to consideration of a rehabilitation back to parental care. In addition, AH will get older. He will grow and develop. He will push boundaries. There will be different challenges at every age and stage. He will reach the age that AS and KT

were at. It is reasonable to assume his parents will have the same unrealistic expectations around behaviour, discipline, academic achievement and homework.

[35] AH's mother, EAH, has remained loyal to her husband. In the opinion of the witness, she was unable to protect her older children and was complicit in much of the abuse the children suffered. She allowed DEH to inappropriately discipline her children in front of her. She was part of that process and complicit within much of the abuse the children suffered. There was evidence of this from video recorded interviews (VRI). KT provided a statement in a VRI on 27 April 2015 that his mother had been present whilst he was hit by DEH and she was also responsible for hitting him too. At a further VRI on 28 July 2015 KT disclosed that he had been hit by DEH's brother and his mother had been present whilst this took place. At the last VRI that took place on 1 November 2016 KT disclosed that DEH burnt AS with a cigarette and told their mother about this after the incident. Neither AS nor KT noted their mother to have tried to prevent or protect them from harm. Indeed, the witness said EAH was part of and an active participant in the children's abusive experiences whilst in parental care.

[36] The witness said DEH has continued to deny his part and accept responsibility for the injuries he inflicted upon AS and the abuse of KT. DEH was charged with assaults to both AS and KT; found guilty in court and subsequently sentenced on 5 February 2016 to a period of one year in prison. The witness said she visited DEH in prison with Audrey Tait on 25 February 2016 when he maintained his innocence. He expressed his view that he had done nothing wrong. The witness said it was her view that it would be seriously detrimental to AH's welfare to return to the care of either his mother or father or both. Furthermore, the witness said she believed there would be a significant and unacceptable level of risk of

emotional and physical harm as well as a risk to AH's safety if he were returned to their care.

[37] With regard to contact if a permanence order were to be granted the witness did not consider this would be in the best interests of AH. She explained that initially, Audrey Tait, AH's social worker, supervised contact. However, a decision was taken that she would no longer supervise contact due to the level of animosity towards her by both parents. They made complaints about both Audrey Tait and the witness. There was no wish to provoke the situation further. As a result, a social work assistant was assigned to supervise the contact. She has supervised this on a consistent basis since. The contact sessions supervised by the social work assistant are recorded onto a (SWIFT) recording system. These are a factual narration of what has happened during the contact sessions. They show that the contact sessions meet AH's needs within the one-hour time limited supervised contact which takes place in familiar surroundings and it has a predictable routine. The current arrangements put in place ensure as far as possible that contact is a comfortable and enjoyable experience for AH.

[38] However, when considering longer term contact plans for AH the witness did not think that direct contact post-permanence, if granted, would meet his needs. The witness stated that for post-permanence direct contact to be successful there would need to be full emotional permission from both AH's parents for him to be settled and secure out with their care in a permanent placement with another family. The parents would have to give AH permission to be settled out with their care on a permanent adoptive basis. As his parents continue to oppose permanency planning, it is unlikely in the witness's opinion that this permission would be forthcoming.

[39] The witness was of the view that if there was to be contact post-permanence, there will be times during contact where AH will ask questions about his past. He is likely to ask why he was adopted or why he was removed from parental care. The witness stated AH would likely be unable to make sense of his journey into care or why he was adopted without a coherent and consistent account of his past. Both parents continue to share the view that DEH was not responsible for AS and KT's injuries and there is no acceptance of guilt despite his convictions and a subsequent period of custody in prison. The reasons AH became a looked after and accommodated child is part of his life story. His parents' account would differ dramatically from that provided by the local authority and his adoptive parents. The accounts will conflict and this would undoubtedly confuse AH. The witness said any adopted child needs a clear and honest account of their life story to make sense of their life journey and life story, however difficult that might be. If the birth parents continue to challenge and deny the fundamental reasons for AH's accommodation, they will never be able to provide him with the permission he needs to move on to another family. The witness said AH will not always be an infant. With increasing age, his questions will undoubtedly become more complex and his curiosity greater.

[40] The witness did not think that EAH or DEH would give AH permission to be adopted. She said they may state that they would, but due to their continued negativity towards those working to get the best outcome for AH, the witness felt that their underlying attitude would be one of non-acceptance. According to the witness, EAH has a history of emotionally manipulating her older children and demonstrating a lack of insight into their needs. Since AS and KT moved to live with their paternal family EAH has reportedly spoken negatively of and insensitively about their grandparents, noting they would die soon, much to AS's upset. EAH has also spoken of DEH in positive terms, encouraging AS

and KT to reflect about him in this way and ignored their wish not to do this. The witness was of the opinion that as AH gets older he will inevitably sense any form of negativity or lack of acceptance from his birth parents about an adoptive family.

[41] According to the witness, for post-permanence direct contact to work, the adoptive parents need to support ongoing direct contact. In addition, the witness stated there is also the risk of animosity. There has been significant animosity towards social workers supervising contact and social workers involved with AH's case. If the birth parents do not support the adoptive placement there is a significant risk that there will be animosity towards the prospective adopters. The witness thought that it would be very difficult to envisage a productive and meaningful relationship between the birth parents and adoptive parents, in this case.

[42] The witness also expressed concerns about the safety of ongoing direct contact. DEH has a conviction for a Schedule 1 offence against children. The witness considered there is a potential risk of violence when he is provoked or challenged.

[43] The witness was of the view that indirect contact would meet AH's needs as he grows. His social worker, Audrey Tait, has prepared life story work for AH whatever the future might hold for him. She is in the process of making a book with pictures and stories about his life story to date. There are pictures and stories about contact with his half siblings AS and KT. AH will also have a memory box in which there will be things that his parents have given him have been kept by his foster carers. These things are available for AH to move on to an adoptive placement. The life story book, memory box and other photos and information will be given to prospective adopters to allow them to help AH to understand his journey. The witness stated that in a permanent adoptive placement AH would be making lifelong attachments and relationships, these need to be protected and promoted.

Indirect contact would allow this protection whilst providing a continued link with his birth family. The witness did not think that it would be detrimental to AH should direct contact cease with his birth parents; his life and development would continue. The witness said she was aware that after contact ends AH gets on with his week and he does not talk about his parents. His primary attachment figure is his foster carer and her family. His needs are fully met in his foster placement and he is happy to leave at the end of contact. The witness said that AH's parents were not able to fully protect him when he lived at home and his half-sister and half-brother were victims of significant emotional abuse. His mother played a part in this and his father served a prison sentence as a result.

[44] With regard to kinship care by a family member the witness said she knew that AH's paternal aunt, WD, also seeks ongoing direct contact post-permanence with AH. The witness said she did not have a lot of contact with WD but met with her along with Audrey Tait at the SWD; as far as she could remember, EAH was also present. WD asked what she would need to do to have AH in her care, rather than him remain in foster care. By this, the witness understood WD wanted to be assessed as a kinship carer for her nephew. WD was advised she needed to submit her request in writing to our team manager. The witness said WD never did this. The witness also stated she was present at a Children's Hearing on 14 September 2016 at which time WD expressed her request for AH to live with her. The witness stated the panel felt this was not a safe option. The witness said WD was there as a support to AH's parents. The witness indicated that when she has met with WD she has shown no acceptance of her brother's convictions for assaulting children. According to the witness WD has been seen to be and still is a significant support to AH's parents, her brother and sister-in-law. According to the witness, DEH and EAH speak openly about the close relationship they have with WD and value the support she offers them, alongside other close

paternal family members. The witness said WD accompanied EAH many times to visit DEH in prison.

[45] The witness stated she does not feel that WD is a suitable kinship carer for AH for a number of reasons:

- i. WD has a close relationship with DEH and EAH as well as other close family members who also visit the family home on a regular basis.
- ii. At a Children's Hearing on 14 September 2016 WD expressed her desire to panel members to act as a kinship carer for AH. She expressed her full support of both DEH and EAH in their wish to have AH returned to parental care. She did not express any view about DEH's conviction or that AH needed to be protected as a result.
- iii. The witness feels strongly that AH would not be safe in her care as WD is an ongoing family support and an integral part of the family.
- iv. WD could not provide AH with safe independent care and therefore she is not a protective factor in AH's life.
- v. Assessment of WD's ability to care was undertaken further to consultation of SWD records about her and her family. There were significant historical child protection concerns putting in to question the safety of her children and her as their protector as well as physical and mental health concerns about WD herself.

[46] The witness believed that adoption will give AH the best chance in life. The value of a stable adoptive family unit in his life is invaluable. It would be seriously detrimental to his

health, development and safety to be in the care of either or both of his parents. Long term foster care would not provide him with the security and increased sense of belonging which an adoptive placement can provide. Adoption is likely to guarantee a happy safe and predictable future ahead where AH can feel totally and wholly claimed. Adoption is the best way in which to achieve this.

Emma Sage, (39) [the following is from her affidavit and oral testimony].

[47] The witness is a qualified social worker. She has the following qualifications MA Heriot-Watt University 2000, Masters in Social Work, Edinburgh University 2004, Post Graduate Certificate in Child Protection, Stirling University, 2011. The witness said she works in the permanence team of the Children and Families Department of The City of Edinburgh Council. The purpose of her role is to 'family find' for accommodated children who have been recommended for permanence. The role also involves preparation and assessment of prospective adopters and post-adoption support.

[48] The witness stated that following a permanence panel on 31st March 2016 in relation to AH, papers relating to him came to her team. The witness was allocated to the case and initially looked at approved City of Edinburgh Council adopters to see if there was an appropriate link and match for AH. She wanted to find adopters who met AH's cultural background. In addition AH's parents indicated that they wished him to be raised in the Muslim faith. The witness was unable to identify any City of Edinburgh Council adopters who would meet his ethnic or religious background.

[49] As a result of this the witness made a referral to "Linkmaker" which was formerly the Scottish Adoption Register. It covers the whole of the UK and a search can specify filters like ethnicity and religion. From this referral the witness made a few potential matches.

There was one potential match in England which did not go forward. As a result of this AH was featured at an adoption exchange day which took place on 10th March 2017 in Dundee. At the adoption exchange day, a profile for AH was available with photographs. Attending the adoption exchange day would be approved adopters who were not yet linked or matched with a child. There would be a variety of local authorities at the adoption exchange day with profiles of children. It is an opportunity for approved adopters to see profiles and speak directly to a child's social worker. Audrey Tait, AH's Social Worker, attended the exchange day with his profile.

[50] The witness indicated one potential couple showed interest that met AH's religious, cultural and ethnic needs. The witness said the couple did not go through the matching process for AH. This was due to their concerns about the length of the legal process, the potential for ongoing contact with the birth parents and the uncertainty that an opposed application has. The witness indicated that one of the things they were concerned about was the high level of contact that AH was having with his birth parents and the fact that AH was not in a position to move to their care due to the permanence order with authority to adopt application going through Court and the knowledge that this was being opposed.

[51] The witness said the couple were concerned if there was to be ongoing direct contact. They were aware of the background of AH's birth father and his conviction for a serious assault on a child. The witness stated she could not imagine any adopter who would want their adopted child having contact with a birth parent who had been convicted of such a horrific child assault or with a mother who did not act as a protective factor to a child. On 7 December 2017 the couple's social worker emailed SWD to advise that they no longer wished to proceed with a potential match with AH.

[52] The witness stated AH's profile on Linkmaker was then re-activated and a search for prospective adopters for AH continues should permanence with authority to adopt be granted. A potential link has been identified with prospective adopters who live in England. The male prospective adopter is Muslim. Information has been shared between the relevant workers and the witness said SWD are looking at arranging a visit for herself, Audrey Tait and Ann Garson to visit the prospective adopters and their worker to further discuss the link. It was said this link is in the early stages but appears very positive.

[53] The witness indicated that from her experience in family finding there is not a huge pool of adopters, particularly in Scotland, who meet AH's cultural, ethnic and religious needs. In addition, she said, from her experience of previous cases and from discussions with colleagues, it can be incredibly difficult to find a placement where there is ongoing direct contact with a birth family member. Both of these issues will limit the number of adoptive families who will be a potential match for AH in her opinion.

[54] The witness stated AH is a young child who is meeting his developmental milestones and there are no known medical concerns. He is described as affectionate, smiley and engaging and has made positive attachments with foster carers. These qualities increase the likelihood of finding an adoptive family for him. On the basis of this information, in addition to the fact that SWD has previously identified suitable prospective adopters for AH, in her view there is a high likelihood that SWD will be able to match AH to prospective adopters who will be able to meet his needs.

[55] With regard to ongoing contact if permanence is granted the witness indicated that in adoptive placements, for ongoing direct contact to work successfully in the child's interests, there would need to be an acceptance on behalf of the birth parents in relation to the plan for adoption. They would need to be able to give the child positive messages about

adoption and his new family. From what the witness has read about this case, AH's parents do not believe that he should be adopted. They do not accept the reasons why he was accommodated in the first place. The witness also indicated that in her opinion she would question how direct contact could be managed if AH were adopted. Given his birth father's conviction in relation to assaulting another child and given AH's mother standing by her husband in relation to this, any direct contact would have to be set up in such a way so as to keep AH safe. Additionally, the witness stated the other issue in relation to direct contact was that she is aware that there is animosity by the birth parents towards social workers in this case. The witness indicated she cannot see how SWD could place adopters in the position of supervising contact pending adoption as there may be similar animosity towards them and a risk to them.

[56] With regard to indirect contact post-adoption should that arise the witness stated that indirect (letterbox) contact and life story work can help promote adopted children's understanding of their family background and provide a link to their birth family. For AH, this could include indirect contact with his half-siblings. She said indirect contact, also known as an information exchange, is managed by a social worker from the permanence team. This is normally the worker who has been the tracker for the child. When an adoption petition has been granted, the child's social worker fills out a referral form for an information exchange to be set up. This form contains relevant information, such as the name and address of the birth relatives who are to be involved in the information exchange and also agrees the frequency of the information exchange (e.g. letter once a year to be sent in the month of May). Information exchanges can either be one way (from the adoptive parents to the birth parents) or two ways (adoptive parents write to birth parents and then birth parents send a reply).

[57] Finally the witness stated that in her opinion in this particular case, given that the birth father has been convicted of a violent assault on AH's half-siblings and the birth mother was unable to be a protective factor for her children, she would question whether there should be any indirect letter contact at all with AH.

Lorna Williams, (55) [the following is from her affidavit].

[58] Loma Helen Williams is a specialist community public health nurse (health visitor) in Edinburgh. She is a registered general nurse, a registered sick children's nurse and a supervising practice teacher. She trained as a health visitor in 1989.

[59] The witness became involved with the family in 2014. The family had recently moved to the area. The witness contacted the family to arrange a new family visit, which is standard procedure whenever a family move to an area. This meeting was arranged for 1 September 2014. The children's mother, EAH cancelled this first appointment. She did not give a reason for the cancellation. The witness's records indicate notification of an interagency referral discussion ("IRD") around that date with regard to AS, AH's half sibling. This is normal procedure when a referral has been made for a child in the same household.

[60] On 5 September 2014 the witness made her first home visit. AH was at home with EAH. He was in his bouncy chair during the visit. He looked comfortable, clean, was dressed and settled. AH had infantile eczema and EAH had been prescribed treatment for this. On 19 September 2014 the witness made a planned home visit to the family. On 25 September 2014 AH's parents did not take him for his immunisations. AH was six months old at this time. AH's growth percentile measurements were satisfactory and within normal parameters. He presented as happy and animated. The witness noted that AH had a small round bruise on his right cheek, with the area above looking pink in a trail. When raised

with EAH, initially she was not able to explain what had caused this. She then stated that AH was rolling all over the place and had bumped his face.

[61] Following the visit on 29 September 2014, the witness sought advice from the on-call GP and the on call paediatrician at the Royal Hospital for Sick Children. The witness was advised that AH should be taken to the Royal Hospital for Sick Children for assessment. The witness telephoned EAH to advise her of this. An interagency referral discussion was raised as a result of this referral by the hospital child protection team.

[62] On 23 October 2014, the witness attended an initial child protection case conference with regard to all three siblings, AH, KT and AS. The children were not placed on the child protection register at that time. The plan was for Audrey Tait, social worker, to work intensively with the family at home.

[63] On 24 November 2014 the witness visited with Audrey Tait, social worker. AH was eight and a half months old at this time. The witness noted that AH sat staring at the muted television throughout the visit. He did not respond to the presence of other people within the family home.

[64] On 24 November 2014, the witness contacted the parents by telephone and by letter to inform them that AH had been referred for a developmental assessment, due to concerns about lack of eye contact and focus. Audrey Tait, Social Worker, was informed of this referral.

[65] On 3 December 2014 the witness was notified that an interagency referral discussion was raised in respect of AS and KT. On the 10th of December 2014, the witness was notified that AH had been moved into foster care.

[66] On 22 December 2014 EAH handed a letter into the surgery stating that she did not wish the witness to be AH's health visitor any longer. The witness has had no further involvement with the family or with AH since.

Lesley Anne Ross, (55) [the following is from her affidavit].

[67] The witness is a consultant paediatrician in Edinburgh. She qualified in 1985 and has worked in the specialty of paediatrics since 1989. Her qualifications are MBChB (1985), MRCPCH (1993) and FRCPCH (2005).

[68] On 4 December 2014 the witness performed child protection medical examinations on AS (DoB 19.01.10) and AH (04.03.14). In summary, the witness's conclusions were that there was extensive bruising on AS's arms, legs and back caused by blunt force trauma. AS's left knee was swollen. The witness stated KT was also examined by Dr Charlotte Kirk, consultant paediatrician. He had bruising and swelling of the left wrist and bruising to his upper thighs. The bruising to his wrist was considered to have been caused by significant blunt force trauma.

[69] The witness states AH was medically examined on 6 December 2014. When she examined him, the witness did not notice any bruises on him. There was nothing of any concern. The witness had no concerns about his motor skills; he was able to sit independently, was starting to crawl and was babbling.

[70] The witness next saw AH on 15 May 2015 with his foster carers and his parents. The clinic review was to check on his development. At 14 months, his language was still only at a developmental age of 8-9 months. Other areas of his development scored at 10-11 months which is slightly delayed. Neither his carers nor his parents had any concerns about his

development. Although he showed signs of mild developmental delay, he was making good progress and the witness discharged AH from follow up.

W Susan Reynolds, (55) [the following is from her report dated 27 June 2017 and her oral testimony].

[71] The witness set out her qualifications in her report. She holds an honours degree in psychology from the University of Glasgow (MA Hons, 1973); the certificate in education from Jordanhill College of Education (Cert Ed, 1974); and the two-year postgraduate qualification in educational and child psychology from the University of Glasgow (DEP, 1975). She is qualified as a chartered psychologist and as a registered psychologist with the Health Professions Council. She has extensive experience over several decades in the practice of psychology, specialising in the field of child and adolescent psychology. She has occupied a position as a principal educational psychologist for over 10 years within the largest local authority in Scotland.

[72] The witness stated she was jointly instructed by all parties in this case. Her remit was to consider the following issues:

- i. The joint capacity of EAH and DEH to parent AH on a full-time basis.
- ii. Whether rehabilitation to the care of EAH and DEH would be seriously detrimental to the welfare of AH, considering their capacity to parent.
- iii. A risk assessment of DEH given his criminal conviction in relation to AS and KT.
- iv. Whether a kinship placement with WD would best meet AH's needs.
- v. If it is found to be seriously detrimental to the welfare of AH to live with his parents whether adoption would be in his best interests.

- vi. If adoption were to be in the best interests of AH what future contact direct or indirect, with EAH and DEH and/or WD would best meet AH's needs.

[73] The witness was fully instructed in relation to the factual background of the case. She spent time observing the supervised contact between EAH and DEH with AH. The witness interviewed and assessed EAH, DEH and WD. The witness interviewed Audrey Tait and AH's foster mother.

[74] The witness reached the following conclusions:

- i. In her opinion, EAH and DEH without very considerable professional intervention, lack the capacity to parent AH on a full-time basis.
- ii. In her opinion rehabilitation to the care of EAH and DEH would be seriously detrimental to the welfare of AH, considering their capacity to parent and without professional intervention.
- iii. Recommended that a full risk assessment of DEH be made by a forensic psychologist given his criminal conviction in relation to AS and KT.
- iv. In her opinion a kinship placement with WD would not meet AH's needs.
- v. In the event that the court found it to be seriously detrimental to the welfare of AH to live with his parents, adoption would be in the best interests of AH.
- vi. If the Court determined that AH should be adopted, in her opinion there should be no direct contact with his EAH, DEH or WD; indirect contact on an annual basis with EAH and DEH would be appropriate.

[75] In reaching her conclusions the witness considered a number of key issues. She considered the family history of both parents. She assessed the possibility of rehabilitation of AH to both parents as a single-family unit. Neither parent asked for or suggested a separate parental assessment as an individual. The witness concluded that:

“EAH and DEH are both in good physical and mental health. There is no history of substance abuse. Neither party abuses alcohol. There are no learning difficulties. They are in a stable relationship and have a very supportive family network. Both parents are working and have been doing so for several years at the same employment. There are no reports of difficulties with the police. They have no housing problems; they maintain their Local Authority House to a good standard. The couple present well; they are of neat and clean appearance and are articulate and courteous in conversation.”

[76] The witness considered whether the parents could meet AH’s needs. She had no concerns about basic care. The witness was concerned that the parents did not show consistent empathy towards AS, KT and AH. Also, she had concerns about the parents’ ability to set rules, limits and boundaries. Drawing on the information provided and from her own assessment she concluded in the following way:

“Overall, DEH set rules and limits at home that were unrealistic, too strict and not child centred. I am also concerned that DEH denied various things (like the length of the homework period, bruising on children’s faces due to forcible kissing) which had been clearly established and admitted to by other parties such as his wife and his sister. This pattern of denial presents a risk to monitoring of future behaviour should AH be returned to his care.”

[77] The witness considered the overall attachment and emotional warmth between the parents and AH. She concluded having seen AH at contact and with his foster parents:

“AH does not have a primary attachment to his [birth] parents but he is very comfortable with them and relates to them as a child might to a trusted familiar adult like an auntie or uncle. This is to be expected, given he has been with the foster carers since he was 11 months old. If AH was to be rehabilitated to his parents’ care I would not anticipate any particular difficulty.”

[78] The witness also considered whether the birth parents could meet AH's need for stimulation and development and concluded from her observations that they were well able so to do.

[79] Given the previous conviction of DEH the witness assessed him for risk of violence using historical clinical risk management tool HCR-20. DEH denied he was guilty of the assaults on AS and KT despite being convicted and serving a 12 month sentence for the crimes. The witness concluded:

“Unless DEH accepts responsibility for his actions, he may be resistant to remediation attempts which would involve a reappraisal of his attitudes. He would need to accept training in positive parenting and a re-education of his beliefs concerning child rearing.”

Because of this result and because EAH expressed a belief that DEH is innocent and that AS and KT were lying at the trial, the witness considered:

“This is an area which requires further assessment with regard to whether AH could be safely returned to the care of his parents.”

The witness recommended that a full risk assessment of DEH be made by a forensic psychologist.

[80] The witness considered the question of whether DEH posed a lower risk to his biological son than to his step-children and on the basis of the scientific studies in this area concluded that:

“.....it would be predicted that there would be a significantly lowered risk of physical violence from DEH to his biological son.”

[81] A number of factors contributed to the opinion of the witness that EAH and DEH lacked the capacity to parent AH on a full-time basis without very considerable professional intervention. These may be summarised in the following way:

- i. Both AS and KT reported being hit and punched by DEH. AS, in particular, was severely physically assaulted.
- ii. There was evidence of what the witness called emotional cruelty by both parents to AS and KT. These children were reported to have been scared of DEH. AS said she was force fed and sent to bed if she was sick. KT said he was threatened by DEH. KT became unhappy and talked of suicide at school. The witness concluded there appeared to have been a troubled relationship between EAH and KT which preceded her marriage to DEH. EAH appeared to lack emotional warmth and empathy towards her older children and colluded with DEH. The witness considered she prioritised her relationship with DEH over her relationship with her two older children.
- iii. With regard to rules and boundaries the witness concluded that DEH expected KT to study for two hours on top of any work set by school, although after SWD spoke to the couple, DEH moderated this to one hour. The witness concluded that DEH taught AS to write her name and bruised her hand in the process. EAH said she had to constantly 'get on' to DEH to get him to moderate his views with the children. While the witness appreciated that this approach to homework and education may have been culturally driven, it showed a lack of understanding and warmth towards children where obedience is attained through mutual respect as part of a loving relationship and not through coercion.
- iv. EAH did not talk with insight or empathy for her older children as to what they must have gone through with the court process or the pain that AS must have been in after the assault. According to the witness this means that EAH

was not a protective factor for her older children. The witness went further and stated that EAH positively colluded in the abuse of the older children AS and KT at the hands of DEH. The witness stated that EAH is wilfully blind. She has made a choice in favour of DEH over her older children notwithstanding his behaviour to them. The witness said EAH has a lack of maternal feeling. Whether she was deluding herself or turning a blind eye the witness could not say.

- v. DEH maintains he is innocent of the criminal assaults on AS and KT. The witness concluded that the difficulty with DEH being in denial is that he may not be open and receptive to remediation of his actions if he continues to deny that he ever did them in the first place. As a consequence of his denial the witness agreed with the conclusion of Dr Johnstone [see para [101] below] that such denial is an insurmountable barrier to risk management in this case.
- vi. The witness had concerns that DEH has built in cultural attitudes towards coercive discipline, a strict adherence to rules and enforcement of a work ethic which would remain a feature of his parenting style even with his own biological children. Further the witness considered that while EAH engaged very well with AH during the one contact which she observed she lacked empathy with her older children which casts doubt on her ability to be a sensitive and caring parent for AH.

The witness concluded that in her opinion EAH and DEH do not currently have the parenting capacity to parent AH safely; they would need intensive professional support in order to help them achieve the parenting capacity necessary for the safe parenting of any

child in their care. Assessment of willingness to engage and ability to change would be a crucial part of this support along with a forensic risk assessment. Further such professional support and education would take time which is a problem in this case given the age of AH who needs parents of his own out with the cared for and accommodated system. When asked why DEH does not admit he assaulted the children given he has been convicted and punished the witness indicated he may be innocent which would be a tragedy for him. Or he may be unwilling to own up and lose face among his own family for what he has done and any such admission now would not guarantee the return of his son. An admission may cause a rift with his own family and conflict with cultural norms within it. The witness said it was extremely complicated.

[82] Having regard to the conclusion the witness reached on parenting incapacity she addressed the issue of whether rehabilitation of AH to the care of EAH and DEH would be seriously detrimental to the welfare of AH. The witness concluded:

“In my opinion, without intensive professional advice and supervision, it would be seriously detrimental to AH to return him to the care of his parents. DEH does not appear to have an internal model of parenting which is compatible with a nurturing approach to child rearing. He appears to have been heavily influenced by a cultural norm which is harsh and inflexible. DEH does not acknowledge this. He is still in denial with regard to the physical abuse of EAH’s two older children.....I would expect that DEH would be far less likely to use harsh discipline with AH because he is his biological son but while his underlying views remain unchallenged and unchanged they pose an ongoing risk to AH.”

[83] The witness considered whether a kinship placement with WD would meet AH’s needs. She concluded such a placement would not meet his needs. WD impressed the witness as a very pleasant, warm hearted lady. There have been no difficulties with her own children whom she has brought up on her own since she separated from her husband in 2011. There have been no child protection issues since she split up from her husband. The witness stated that WD agreed that she had suffered from depression but she had continued

to look after her two children without there being any issues and she has now fully recovered. There had been specific reasons for her depression which are now in the past. The witness did not think it would be appropriate for AH to be placed with WD for three reasons:

- i. WD shares the same support network as DEH and EAH and that would make the situation unworkable.
- ii. Notwithstanding that WD said she would not allow contact between AH and his parents if that is what the court ordered the witness thought it would be virtually impossible to cut EAH and DEH out of the family network and if she was to try and ensure that EAH and DEH did not see their son, the resultant ill feeling could split this family apart.
- iii. Because WD does not accept DEH is guilty and because he is 'great with children' and loved by her two children it would be very difficult for WD to explain to AH why he is not in the care of his mother and father or be allowed to see them while still seeing aunts and uncles and cousins. The witness believed this would result in AH being confused and distressed as time went on.

[84] In the event that permanence was ordered in this case the witness expressed a view that the best interests of AH would be served by adoption. She said:

"It is better for children to have the security of a family of their own and adoption is the route by which children's lifelong interests can be protected. Under those circumstances, given AH's age, adoption would be in the child's best interests. There would be nothing to be gained by being in a long-term foster placement. AH is a bright sociable child who is already forming a close attachment to his current foster carers. He should manage the transition to an adoptive family without too much difficulty if it happens within a reasonably short period."

[85] With regard to post-permanence pre-adoption contact and post-adoption contact with EAH, DEH and WD the witness favoured indirect contact with only the birth parents post-adoption. She referred to the research of Professor John Triseliotis and indicated that the child placed for adoption needed to develop a new relationship with the adopting parents. Post placement contact only worked if the birth parents gave their approval of the new relationship. Having divided loyalties would be distressing for a child in the process of being adopted or actually adopted. In the present case she favoured indirect contact and life book story work should be done with AH so that he can understand his life journey in time and have a connection with his half siblings. She said:

“Regular contact with his parents would undermine the process of attachment to his future adoptive parents and infrequent contact would be confusing to the child. His parents are most unlikely to accept the adoption and give it their support in which case they are likely to undermine the placement which would be detrimental to AH. The child does not have an ongoing relationship with his aunt and therefore contact with her would not be meaningful for him. I would recommend indirect contact on an annual basis.”

If permanence is ordered the witness stated the present level of contact at twice per week to the natural parents should be reduced in her opinion to once per month pending adoption. The witness said AH was young enough to have a family and that she could not see how long term permanence within the cared for and accommodated system would be good for him.

[86] The witness was asked if her opinion would change should EAH leave DEH and want to be rehabilitated to AH as a single parent. The witness indicated that a fresh parenting assessment would be good practice in that event. She said if the proposal was a genuine one then there are many complicated issues raised by it. In the first place this was the first time such a suggestion had been made to her during the proof. She felt if she was a professional making the assessment on the basis the proposal was not just a stalling device

she considered she had 75% of the information she would need already. However, it would require concluding that EAH had discovered that DEH was not the person she thought he was and that she was wrong to call AS and KT liars to social workers in the past and in the court process. She indicated there would be considerable risk factors in rehabilitating AH to EAH as a single parent. EAH had a difficult upbringing herself which is a risk factor; she had problems parenting KT; she repeatedly told social workers the older children were lying; even if she divorced or separated from DEH she would still be connected to the close-knit family because her own sister P is married into it; albeit her contact with AH is good she has in the past not proved to be a warm, caring or sensitive parent. The witness was of the view the 25% of new material would have to be remarkable to change her opinion that rehabilitation of AH to EAH would not be seriously detrimental to his welfare.

[87] The witness was cross-examined on behalf of WD whom she described as a very nice lady who had done a good job of her own children but in the opinion of the witness she was 'too enmeshed' in the wider close family unit for AH to be safely rehabilitated to her. The witness repeated she had no concerns about WD as a person. Her mental health difficulty (depression) was in the past. The witness said her main concern was that if WD had AH she might have to cut ties to her wider family and that would be 'an extremely difficult situation'. The witness said she had given a lot of thought to this case. She said WD is in denial as well. She believes her brother was wrongly convicted as well. The witness was concerned about AH being placed in a confusing situation regarding his life story. The witness thought it would be difficult to cut WD off from P who is the sister of EAH. The witness questioned whether family relations could continue with AH in the middle. The situation was 'almost unworkable'. The witness said WD had good sense and was warm and nurturing. However, gatekeeping is complicated. The witness was concerned about who is

to be excluded. Key social contacts among the family are the same. The witness could not see how the family dynamic would work given the closeness of the family unit if AH was rehabilitated to WD. The witness was concerned that DEH has what she called a forceful personality. She thought there was a risk that the gatekeeping function would fail and AH would end up living with his birth parents exposed to risk. The witness considered there were too many unknowns with this arrangement. The witness considered WD was genuine and wanted to help but it was wrong to set her up to fail. The witness said a cost benefit analysis had to be made. If the placement of AH with WD failed then he would lose his foster placement which he is settled in and any prospective adoption placement. Time would move on and the clock is ticking for this child. Another factor to consider according to the witness was the risk that because WD believes her brother is innocent she may be tempted to tell AH that he is wrongly placed away from his parents out of sympathy for her brother and his wife. The witness was asked if parenting classes for the natural parents would make a difference. The witness was of the view that it was difficult to say but progress could not be made unless DEH explains how AS and KT got the injuries they sustained in December 2014. In that respect she agreed with the conclusion of Dr Johnstone referred to in para [101] below. With regard to post-permanence pre-adoption contact and post-adoption contact for WD to AH the witness considered that needed to be looked at carefully. She thought it unlikely that at this stage AH would have a clear recollection of WD. Post-adoptive contact if it were to occur would have to be planned carefully and WD should not be introduced out of context. It was suggested to the witness that WD had attended 21 contacts with AH between December 2014 when he became accommodated and October 2016 when contact was restricted by SWD to immediate family members. Unless annual family contact was granted to the birth parents when WD could be included as a family

member the witness favoured indirect post-adoption contact for WD. The witness said it was difficult to recommend annual direct contact in this case.

GD, (52) [the following is from his affidavit and oral testimony].

[88] GD is the head teacher at the primary school AS and KT attended in Edinburgh in 2014. He has been a qualified teacher for 25 years.

[89] He said KT often presented as a very unhappy child. He spoke to the pupil support assistants a bit about his concerns about homework. He felt he had too much homework and was worried about this. He also shared that he missed his dad. He shared that he would often communicate with his dad on the Xbox. He felt this was a secret way to speak to dad, and that he would delete the messages sent afterwards so that EAH and DEH wouldn't see them. The witness said KT shared that he was so unhappy that he wanted to kill himself, but that if only he could see his real dad, everything would be OK. He spoke of being very unhappy. The witness said KT's relationships with adults in the school was very good, but he appeared very unhappy, enough for the school to be quite concerned at that point.

[90] On 28 November 2014, the witness said he was contacted by a parent of another child at the school to notify him that they had witnessed DEH "throttling KT" in Tesco. The witness said he was told that DEH had held KT close to his face and said that he would punch him later on. KT had also said to other children in his class that he wanted to kill himself. He had told some of his classmates he was so unhappy that he wanted to die, although this was not heard by a member of staff.

[91] With regard to the suggestion that AS got bruised in the school playground in December 2014 the witness indicated that EAH had said that extensive bruising on AS's body had been caused by other children in the playground hitting her with a ball. KT was

reported as having initially said that he had seen this happen, but according to the witness KT would have been in a separate playground. The witness said AS's playground was also staffed by six pupil support assistants, as well as a number of Primary 7 pupils who help out as playground buddies. No one witnessed an assault or injury to AS by other pupils.

Dr Lorraine Johnstone (45) [the following is from her report dated 28 January 2018 and oral testimony].

[92] The witness is chartered with the British Psychological Society and registered by the Health Professions Council as a clinical and a forensic psychologist. She is an associate fellow of the British Psychological Society. Her formal qualifications include a doctorate degree in clinical psychology and a Bachelor of Arts (Hons) degree in Social Sciences (majoring in psychology). She has worked in forensic mental health (across high, medium, low secure and out-patient forensic mental health services for adults presenting with complex mental disorder(s) and risk of serious harm to others (interpersonal, sexual, spousal, stalking, and child abuse)) and Child and Family Mental Health Service (CAMHS).

[93] The witness explained that at the request of the solicitors representing DEH and EAH and Edinburgh City Council, she completed a psychological risk assessment of DEH for the purposes of informing decisions about the care plan relating to AH. The witness did not interview or assess WD.

[94] The witness was fully instructed in relation to the factual background of the case. The witness interviewed and assessed EAH and DEH. The witness telephone-interviewed DEH's half-brother AB. In addition, the witness had access to all reports, SWD records, statements and pleadings relating to the application for permanence as well as the CJSWR and sentencing remarks relating to the criminal prosecution of DEH.

[95] The witness stated there were some important limitations to the data available to her. The most significant related to the absence of health records (from Algeria and Scotland), the absence of education records, the absence of employment records and the absence of police records. None of these were available given DEH's status as an immigrant. The witness also attempted to arrange times to interview WD, however, despite repeated attempts to make mutually convenient times, this was not possible due to the narrow times offered by WD.

[96] The witness stated that in order to assist the Court in its deliberations, she was asked to complete a specialist clinical forensic psychology risk assessment and to comment upon the following:

- i. The likelihood of DEH re-offending;
- ii. The level of risk of posed by DEH to his biological son, AH;
- iii. Should AH reside in the same household as his parents whether: DEH would, or is likely to assault his biological son, AH;
- iv. Should AH reside in the same household as his parents whether EAH would tell professionals if AH made disclosures concerning DEH's ill-treatment of AH;
- v. Should AH reside in the same household as his parents whether DEH and EAH would engage with professionals to allow AH to be monitored for the protection of his welfare;
- vi. How safe would AH be if he were to reside with his mother and father where the social work department and other professionals had a statutory basis to monitor AH?
- vii. What, if any, protective factors would allow AH to safely reside with his parents.

[97] In assessing risk the witness used a structured professional judgment approach (SPJ). She said the SPJ approach has been endorsed in the international literatures (clinical and research), policy and legislation as the model of best practice. Assessing risk of harm to others is a highly specialised procedure and decision-making is assisted by guidelines that have been developed to reflect the state of the discipline with respect to scientific knowledge and professional practice.

[98] With regard to DEH's presentation at interview, the witness found him to be well-presented, polite and appropriate in his approach. He appeared to be fully aware of the nature and purpose of the assessment. He provided consent and information to enable collateral data to be gathered although he emphasized that his records would be limited given that he was an immigrant from Algeria. At no time did he display any acute mental illness or cognitive difficulties. His language skills were good and the witness did not consider an interpreter to be necessary. The witness found him to be orientated to time, place and person. She did not suspect any substance use or intoxication. The witness did however note some significant inconsistencies across the available information. DEH also impressed the witness as attempting to present himself in a socially desirable manner and denied even slightly negative aspects to his functioning. The witness also found some aspects of what he told her implausible. The witness therefore had serious reservations over the veracity of DEH's account of events and his self-report.

[99] In relation to her interviews with DEH the witness concluded that despite a criminal conviction for child physical abuse and multiple other allegations of child maltreatment, DEH continues to deny his guilt, blames other individuals for manipulating the children into making false claims and cites institutional racism as contributory factors for his

incarceration. The witness was further of the view that DEH has committed acts of child abuse, that he takes no responsibility for this, he shows extreme denial and minimization and shows a lack of regard and concern for the impact of his behaviour on others including his direct and indirect victims. Prior incidents of abuse or neglect are associated with recurring abuse. The witness stated that some studies have reported repeat abuse in 30% to 50% of cases and DEH's position with regard to this reveals highly problematic attitudes and exposes barriers to risk management relevant to the decisions regarding AH's future care.

[100] With regard to her assessment of risk the witness considered any pre-disposing factors and concluded that DEH originates from Algeria. It seems that he has a large sibling group but the identity of each child, their role in the family, the quality of parenting received, and the nature and status of the marital relationship is unclear. As such, the witness considered it was difficult to ascertain what his early experiences were, what internal working models were formed, what attachments he developed and the extent to which he was exposed to nurturing and appropriate care experiences. It was not clear to the witness what foundations DEH has for adopting and executing the parenting role. The witness considered DEH appears to hold authoritarian beliefs; he also has some problematic expectations about how to socialize children and how to manage challenging behaviour. He also described some distorted attitudes towards the reasons for children's behaviours and emotional distress. According to the witness DEH seems to lack moral emotions such as empathy, remorse, regret and responsibility taking and, when motivated to do so, will engage in deceptive and manipulative behaviour.

[101] The witness addressed the factors which precipitated the violence towards children which he was convicted of and concluded:

“In the absence of an account of what factors led to the assaults on AS and KT – and that their injuries occurred when they were known to social work – it has been impossible to ascertain the chain of events that led to the children being injured by DEH. As such, it is not clear what the precipitating factors were. This is an insurmountable barrier to risk management. His unwillingness to detail what led to his behaviour means it is unclear whether there was a contextual influence on his conduct or, for example, he behaved in this way for some other intrinsic reason.”

[102] The witness then considered what she called perpetuating factors which prolong this risk in DEH’s case and concluded:

“There are many factors in this case which perpetuate the risk. These include DEH’s problematic attitudes towards the offences committed, his lack of responsibility taking, his lack of empathy and remorse, his manipulative conduct, his unwillingness to engage with risk management, his lack of access to an objective and impartial social support and his exposure to stress (even those associated with typical day-to-day functioning such as finance) and his lack of adequate coping skills.”

[103] The witness then considered if there were any protective factors she could detect.

However, she concluded:

“Based on my analysis of this case, I could not detect any protective factors other than information that suggests that when motivated to do so, DEH can engage with his son in a playful, nurturing and safe way and that he clearly derives delight and has strong affection for AH.”

[104] The witness then indicated she had devised some risk scenarios not as predictions but to inform and assist risk management. In relation to the reduction of risk identified by Dr Reynolds based on biological connection as opposed to step-parenting Dr Johnstone prefixed her scenarios with this comment:

“Based on the information I have reviewed, I detail the most plausible and likely scenarios to apply in this case if DEH were to have AH returned to his care. Whilst he may have a closer bond to his biological son, he has repeatedly identified that his feelings for his stepchildren were very positive and loving. As such, DEH should be viewed as posing the same types of risk to children in his care.”

Under three headings she then stated:

“a. Physical Abuse. AH would be at risk of serious physical assault and injury on a repeated basis if in the care of his father. This would be most likely to manifest if

AH was challenging and thwarting his authority or if he was not adhering to DEH's expectations although I could not exclude an intrinsic motivation to harm on DEH's part. Related to this, I would also doubt whether DEH would seek medical care for his child in the fear of losing him from his care.

b. Emotional Abuse. DEH has been accused of speaking to his step-children in highly demeaning terms. As such, his conduct in terms of parenting and relating to his step-children is likely to replicate his conduct with his own son as they become more familiar with each other and DEH re-establishes his position of power.

c. Flight risk. DEH should also be viewed as posing a flight risk. I would be concerned that, if AH were to be returned to his care, rather than adhering to or risking further statutory involvement should concerns be ongoing, DEH would be tempted to return to Algeria with his child. This could therefore place AH in a very vulnerable situation – physically and psychologically."

[105] The witness then turned to risk management but stated she was unable to identify a viable risk management plan that would be sufficient to mitigate the risks of serious harm to AH should he be rehabilitated to his parents' care. The parents have not been able to fully comply with or benefit from past supervision and monitoring, they do not identify treatment targets and indeed, at a cognitive level appear to know the socially desirable answer, AH is too young to adhere to a victim-safety plan and there are no other particular case-specific issues that if remediated would reduce the risk.

[106] The witness indicated that she appreciated that her opinion was only one of a range of opinions and assessments that will be considered and she emphasized that there are important caveats and limitations to her analysis that should be borne in mind. However, in response to her specific instructions, she provided the following responses to the questions posed:

"I. *The likelihood of DEH re-offending?* I consider DEH at a high risk of perpetrating future acts of child maltreatment.

II. *The level of risk of posed by DEH to his biological son, AH?* I would consider DEH to pose a risk of serious physical harm to his son as well as a risk of emotional harm.

III. *Should AH reside in the same household as his parents whether: DEH would, or is likely to, assault his biological son, AH? I would consider this likely.*

IV. *Should AH reside in the same household as his parents whether EAH would tell professionals if AH made disclosures concerning DEH's ill treatment of AH? I would consider this highly unlikely given EAH's position regarding her husband's innocence, her ongoing support of her husband, her position that her older children are lying and her diverse barriers to risk management.*

V. *Should AH reside in the same household as his parents whether they would engage with professionals to allow AH to be monitored for the protection of his welfare? DEH and EAH do not trust social workers, consider them to be racist and discriminatory and are focused on aspects of their conduct which they perceive as incompetent or unfair. In order to have a successful risk management and protection plan, there would need to be honesty and transparency between the parents and agencies and I do not consider the evidence indicative of that being thus far achieved."*

VI. *How safe would AH be if he were to reside with his mother and father where the social work department and other professionals had a statutory basis to monitor AH? Given the nature and configuration of ongoing risk factors coupled with the fact that AS and KT were assaulted when concerns had previously been communicated and whilst there was a high level of input from agencies, including attention being directed to AH and his care also raising concerns, I am unable to identify any protective factors that would allow AH to safely reside with his parents.*

VII. *What, if any, protective factors would allow AH to safely reside with his parents? As stated above, as it stands at present, I am unable to identify any protective factors that would allow AH to safely reside with his parents."*

[107] Notwithstanding the fact that the witness did not have historical medical records relating to DEH, or what she considered to be accurate family background from Algeria, or Scottish prison records relating to DEH's incarceration, or his employment records, she did consider she had sufficient information to complete a risk analysis. The witness did not specifically consider risk of harm to AH from DEH in the context of kinship care.

[108] In relation to her conclusion stated at para [101] above the witness emphasised that without understanding the context of the violence used management of the risk was impossible. If DEH explained how and why the violence occurred triggers could be identified and anger management may be the answer. Or if he had an underlying depression

or personality trait that could be managed. However, in the absence of an explanation and in the presence of severe denial risk management is impossible.

[109] In cross-examination for EAH the witness confirmed she made her analysis on the basis EAH and DEH were a couple. She was never asked to do a separate risk analysis on the basis EAH was living apart from DEH. The first time this suggestion was made to the witness was in cross-examination.

[110] In cross-examination by Ms Conroy the witness identified and apologized for several typos and grammatical errors in her report which she said was due to insufficient time to adequately proof read the text. I attached no significance to these errors and they did not undermine my view of the witness or confidence in her expertise.

With that evidence, the various reports and productions, the Applicant closed her case.

The First Respondent's case

EAH, (30) [the following is from her affidavit and oral testimony].

[111] The witness stated that she met DEH through her sister P who is married to DEH's brother. The witness has two older children, AS and KT by a previous relationship with GS whom she left because of his domestic abuse of her in May 2012. The witness took her children with her and lived in temporary accommodation in Edinburgh. She met DEH in December 2012/January 2013. She married DEH in May 2013. AH was born in March 2014. DEH helped a lot with AS and KT. After birth, AH had some mild skin problems. The witness accepts that there was social work involvement with her family from 23 October 2014 when an initial child protection case conference was called. The witness does not dispute that AS was taken to the GP with bruising. The witness indicated that on 2 December 2014 she showered AS. AS had bruises on her body and said she fell. The witness

said, the night before, when at work DEH had telephoned her and said AS had fallen at school. In the bathroom AS told the witness she had fallen. The witness thought that it looked as if someone had hurt AS. The witness indicated that KT said AS had been hit by two boys, B and C, from her class who were kicking and punching her. KT said he had told a teacher about this but could not remember which one. The witness said she needed to get advice and contacted SWD next day. She took AS to SWD on 3 December 2014. AS and KT were placed with their father GS and his mother CB. AH was taken into foster care. The witness does not dispute AS was seriously injured. The witness said she did not think it was DEH. The witness said KT was making up stories at this time. The witness sees AS and KT twice per year. They are in the care of their father and grandmother. The witness said she sees AH every week for two hours and has seen him on that basis since he has been fostered. The contact goes well. There are no issues. The witness acknowledged DEH was tried, convicted and imprisoned for assaults on AS and KT. The witness gave evidence at the trial and said the children were lying, which she now regrets saying. The witness said she was not always in the house with the children. She was working and relied on others to look after the children.

[112] The witness said that contact works well and AH refers to her and DEH as 'mummy and daddy'. The witness is not happy AH is in foster care. She has no issue with his carers but wants AH back. The witness texts the carers twice each day to see how AH is. The witness repeated she does not believe it was DEH who assaulted AS and KT. The witness said if she believed that, then DEH would not be in the house. She also stated, "As far as I am concerned if I ever thought that my husband actually had done this at that time I would not have been going off to Social Work and reporting matters". The witness said that if it made a difference she would consider being assessed for parenting AH on her own. She

would live on her own and she told SWD this. If she did then she would want supervised contact with AH awarded to DEH. The witness said she would do anything to get AH back. The witness denied she was implicated in the assaults on AS and KT. The witness denied she had said anything to AS and KT about their grandmother to upset them. She said the allegations are untrue. She said AS had asked to see a picture of DEH.

[113] The witness said that she would want to continue with post-permanence pre-adoption and post-adoption contact if permanence is granted. The witness said she attends all the SWD reviews for AH. She denied being hostile to SWD but said she opposed their plans for AH. She said she has not been offered parenting support by SWD. She said she would love to attend parenting classes. She self referred for parenting classes with SACRO but the class was too far away for her to attend with work commitments and contact visits to AH. The witness tried to attend an early year's class but after it became known that there was an application before the court for permanence with authority to adopt she was told the class was not suitable for her. The witness said if AH were in long term foster care she would work with SWD in his interests. If he were in the care of WD she would do the same.

[114] The witness denied her family were so close that WD could not be a carer for AH. She said she would not frustrate that placement if it is made, in the same way she has not frustrated the placement with AH's present foster carers. The witness said WD supports her a lot and accompanied her to contact when DEH was in prison. AH knows who WD is and is close to her. SWD restricted the amount of contact AH could have with his wider family in October 2016. Since then WD has not been to contact. There have been requests to extend contact to family members but these have not been allowed. The witness said the family is not so close as is being made out. The family is together on birthdays and at Eid-al-Fitr. An arrangement supervised by social work could work.

[115] It was put to the witness that in three years she has stood by DEH and there has never been any request for a separate parenting assessment. The witness said she suggested that to Audrey Tait in 2014. The witness accepted she asked for the health visitor Lorna Williams to be removed from the case. The witness did not dispute the injuries on AS and KT. It was put to the witness that the children have said it was DEH. The witness said she cannot accept it was her husband. She had never seen DEH being violent and the allegations were made after the children were accommodated at their grandmother's house. The witness said she could not say if DEH did or did not do it because she was not there to see it. The witness said that at the trial she did not mean to say her children were lying. The witness said DEH treated KT like a son but he rejected him. The witness denied she showed no empathy for her children. The witness repeated she did not mean to say the children were lying. The witness said she had worked with 'millions' of social workers throughout her life and been in foster care all her childhood herself.

PB, (35) [the following is from her affidavit and oral testimony].

[116] The witness is the older sister of EAH. She is married to DEH's older brother. She has 5 children. She works as a care assistant. She stated that after AH's birth there was no social work involvement with the family until AH was around 6 months old when a social worker noticed a bruise on AH's cheek. The SWD then became aware of bruises on AS and KT and all the children were removed from EAH and DEH's care. The witness does not believe EAH or DEH hurt any of the children. The witness is aware of what AS and KT said about how they were treated and bruised. She does not believe them. The witness has attended contact between AH and EAH and DEH. She said the contact went well and the parents of AH behave appropriately. The witness is aware of the problems EAH has with the SWD. The

witness supports AH being returned to the care of his parents. The witness does not believe that there would be any risk if AH was returned to EAH and DEH.

[117] The witness was asked about WD and confirmed she is a strong person and would not put her children or AH at risk. The witness said the family is close to an extent. The witness said there were concerns and social work involvement in WD's own family with her children. WD did what the SWD asked of her to protect her children and the witness thought she would do the same for AH if he was placed with her. She was asked about the dynamic of the wider family and said she was close to WD. She did not think EAH and DEH would put WD in a conflict situation if AH was placed with her.

[118] The witness confirmed she was separated from her husband. Her husband sees his children every day. The witness sees EAH once a week. She saw EAH more regularly when she had the children. The witness said she thought KT was trying to draw attention to himself. She said DEH is having his conviction reviewed. EAH has never wavered in her support for DEH.

The first respondent closed her case.

DEH, (30) [the following is from his oral testimony].

[119] The witness is unemployed. He is originally from Algeria. He is the father of AH and was stepfather to AS and KT. The witness confirmed he was imprisoned after being convicted of assaults on AS and KT. He said he is an innocent man. He said he was told AS and KT kept changing their stories. At the trial he did not give evidence. He indicated his first appeal was refused and his second appeal was unnecessary because he was put on a tag. He said he could not have an appeal and a tag at the same time. He said he did not lodge any other appeal and got out of prison after 6 months. He stated he had an application

outstanding with the SCCRC about his case. The witness said he cannot lie. He has not committed the crimes. He has served the sentence. He said he was innocent and has done nothing wrong. He said he would spend the rest of his life fighting the conviction. The witness said he caused injuries to AS's hands. He said back in Algeria adults played with children's hands and sucked them. This left a mark on her hands and he apologized for that. He said he accepts he cannot do that. The witness said he was genuine and telling the truth. The witness said he would work with social work supports if that means he is less of a risk but he said as long as he maintained his innocence he was getting nowhere. The witness said that since he has been in Scotland he has learned new things every day. He has no health problems and has no mental health problems. He got on well in prison. He said he had never been arrested in his life in Algeria or Scotland. He said he was remanded into custody after conviction. He then said 2 weeks after being released from prison in 2016 he was arrested in relation to harming AS with a cigarette. He was questioned but not charged. The witness explained his family history. His mother in Algeria was a nurse and midwife. She owns lockups which are rented out. The witness stated he and EAH took AS to the SWD because she had bruises. The witness said he had attended all the social work hearings to do with AH. The witness denied that he ever said to social workers that he caused a bruise to AH's cheek by sucking it. The witness said Audrey Tait came to see him in jail and he denied it to her there. The witness said Audrey Tait asked EAH to divorce him to get the children back. The witness said he would leave the family home so that EAH could get AH back and he would go on to fight to clear his name. The witness said he would be prepared to work with the social work department. The witness said that he and EAH offered to go on parenting courses but were told that as long as he says he is innocent he cannot go on any courses. He said from day one the social workers have been against him. The witness denied

he was a flight risk. His family is in Scotland and his life is here. He has brothers and cousins here. His brother has 5 children here. Sometimes he babysits for the children. If AH is adopted he would have to accept the court order. AH is in good hands and is well cared for with his foster carers. The foster carers do a good job and he is grateful for that. AH calls EAH 'mummy'. If AH is in long term fostering the witness would work with social work for AH. Ideally the witness would want to have AH with him. He would work with anyone including WD or foster carers for AH. He wants his son in an environment where his culture and religion can be practiced. The witness said he sees WD once a week or once a fortnight. If AH was in WD's care the witness said he would comply with any measure the court imposed. The witness wanted AH to have a good job, good education and good health.

[120] The witness was asked about WD as a kinship carer. He said no assessment had been carried out though this had been discussed in the family. The witness said the family is not so tight knit that this arrangement could not work. He said he would treat WD as a foster carer. He said the family sticks together but he would accept WD as a foster carer for AH. The witness said he was not a forceful character.

[121] In cross-examination the witness again denied he ever admitted sucking AH's cheek and causing a bruise on it. The witness said KT did not accept him as a step-father. He said KT was fine with him until he went to visit his father and came back. He said KT would reject him after visits to his father. KT was bullied at school. The witness said KT told lies. It was put to him KT had suicidal thoughts at school. The witness said this was nonsense. The medical records were put to the witness describing the injuries to AS and KT in December 2014. The witness accepted the children had these injuries. The witness said a big boy at school could have caused AS's injuries. The witness said KT changed his story all the time. The witness was asked to explain the injuries to AS when she was in his care. The witness

said he could give no explanation as to how she got the injuries as he was not there but he was 100% clear when she was in his care nothing happened to her. The witness was asked about the events of the days prior to the discovery of bruising on AS. On the Monday when he collected AS from school she said she fell and a teacher spoke to her. The witness saw red bruising on AS's hand and a scratch. There was bruising on her left arm. The witness told his wife EAH that AS fell in the playground. On Tuesday the bruises had come up after school. On Tuesday evening AS was being showered by EAH. She was brought downstairs and the witness was asked if 'he saw that?'. The witness said 'yes' but these were different bruises. The ones he saw were red. AS said she was battered. KT said he saw 2 boys kicking a ball against her. It all happened at school. The next day, the witness EAH and AS went to the SWD. The witness said the children changed their statements. The witness said he saw no bruises on KT. He doesn't know how KT got bruised. He got bruises all the time. The witness repeated that he 'did not do this to these kids'. The witness said he did not blame the children for what happened but people who put ideas into their heads. He blames the 'gran and the dad'. The witness denied he hit the children with pots and pans or harshly discipline them. He took the xBox off KT to discipline him. He admitted hitting KT lightly on the bottom and play fighting with him. He never smacked him. The children have changed their stories and made things up. The social workers came to the jail he said. They wanted him to sign papers for adoption. The witness believes he was unfairly treated by the SWD. He does not trust them. The witness said he asked for parenting courses while in prison. He was told they are not for short term prisoners. If AH goes to WD the witness said he would not argue with her. He would wait for contact and treat her the same as foster carers. The witness said he would accept the decision of the court but if he lost AH he would be heartbroken. AH is his blood.

AB, (57) [the following is from his affidavit and oral testimony].

[122] AB is the brother of DEH and husband of PB the sister of EAH. He is a self-employed barber. The witness indicated he was aware of the proposal that AH be cared by his sister WD. He said his family is quite close. He sees WD once per week. The witness said his sister WD would protect AH. In cross-examination by Ms Louden the witness said that the whole family does not believe DEH committed the assaults.

The second respondent closed his case.

WD, (40) [the following is from her affidavit and oral testimony].

[123] The witness said she was employed as a carer. On 12 February 2018 she started with a national charity as a support worker. Her role involves assisting disabled people with their basic care needs and ensuring they are able to get out in the community. The witness said she was born in Algeria but moved to Edinburgh in October 1999. She moved here when she married her ex-husband and has remained in Edinburgh ever since. She and her ex-husband share two children, MD (15) and RD (12). She separated from her husband in or around 2009/2010. Her children have contact with him on most weekends and during the school holidays when she is working. They have an amicable relationship but only really speak when it's to do with the children. Her children are doing great at school and the school has never had any concerns about them.

[124] The witness said her first language is Arabic, her second language is French and her third language is English. She is fluent in both Arabic and English but not entirely fluent in French, although she can manage general conversation. She is also currently studying Korean. The witness said she is a practicing Muslim and her children are too. Her wider

family is also all Muslim. Even though she is Muslim she does not push her children to practice on a strict level. For example, MD goes to mosque on Fridays but RD doesn't always go. She'll decide for herself when she's older how she wants to practice.

[125] The witness said that although she is from Algeria, a lot of her family also reside in Edinburgh. She has three brothers named DEH, NH and AB. DEH is married to EAH and has one child with her named AH. NH is married to JH and they have no children. AB is married to PB but separated and they have 5 children. PB is EAH's sister. The witness said she is very close to her family who live in Edinburgh and sees them all regularly, at least once a week.

[126] The witness said her mother, MD, lives in Algeria but visits Edinburgh every year. The witness goes to visit her around once a year or once every 2 years with her children during the school holidays usually for 4 weeks. The children love it, they get to see all the family and do lots of fun things in the hot weather. The witness travels to Algeria with her brothers and children to see her mum and the rest of her extended family. The witness said she also speaks to her extended family in Algeria on Skype most days. She is very close to them too.

[127] The witness said her nephew AH is currently in foster care. The reason for this is because her brother DEH has been convicted of offences for which he has spent time in prison. These offences relate to harming two of his wife's children from another marriage, AS and KT. The witness is aware that SWD has concerns that DEH is a risk to AH and that's why he isn't living with his parents at the moment. EAH and DEH are trying to get AH returned to their care. The witness is supportive of that, but if the court ultimately decides that they can't have AH then the witness asks that he be placed in her care. She wants to and is willing to take on that responsibility if the court decides that EAH and DEH can't.

However, the witness knows that SWD also have concerns about AH being placed in her care.

[128] From the information the witness has she does not think DEH committed the offences he's convicted of. She thinks this because she has seen how he is with children, including her own. In her opinion he is a peaceful man. Of course, she has seen him get angry in the past, but he is the type of man who walks away from the situation until he calms down. That's her experience of him. It's difficult for her to reconcile that with the offences that he has been convicted of. Whilst he was in jail the witness went to visit him regularly. The family is very close and she is close to DEH like she is with all her brothers. The witness does not think she should be criticised for visiting her own brother in custody nor for her view on his conviction. The witness stated that whatever she thinks about that is not really relevant to her ability to care for AH.

[129] The witness said it's fair to say as well as being close to her brother, she is also close to his wife EAH too. She said she has known EAH for years, since well before she was with DEH. She knew her well even before she had any children. Before she had AS, EAH moved to Fife so the witness didn't see her very often. However, she later moved back to Edinburgh so she saw her around once per week. At that time, the witness knew AS and KT very well. At the time EAH got into a relationship with DEH she would see them around twice per month, when they would have meals with the whole family. The witness thought DEH's relationship with AS and KT was really good from her experience with them. The last time she saw AS and KT was in or around November 2014 just before they were taken out of EAH's and DEH's care.

[130] The witness has been close to EAH and DEH throughout their relationship, however she feels particularly close to her nephew AH. When AH was born, she was there as she was

EAH's birthing partner. The whole family, moved into her house once he was born because EAH was really quite unwell. They stayed for around 10 days and in that time the witness helped to care for AS, KT and AH. AS and KT knew and got on well with her own children, just like they were cousins.

[131] AH was taken into care when he was around 9 months old. Prior to that, the witness said she saw him almost every day.

[132] In the first few weeks of AH being in foster care, the witness said she remembered attending a contact on 15 January 2015 with EAH and speaking to Audrey Tait who was the social worker allocated to AH. This was the first contact she had with AH since he had been taken into care. The witness said to her clearly that she would put herself forward to take AH for the moment. She didn't want him to be with strangers, like any family member would. There was no reason why she couldn't take him. Audrey Tait said the witness would have to go through a long procedure and because she had had previous social work involvement she might not be able to take him. Audrey Tait told the witness to arrange a meeting. The witness did not do that. She wasn't happy after the discussion she'd had at that contact and she didn't have the confidence to confront Audrey Tait about it. The witness was aware that EAH and DEH had experienced issues with SWD prior to that meeting whilst social workers were considering taking AH into foster care. The witness said that the fact Audrey Tait brought up her past made her scared that putting herself forward would jeopardize her own children and her own situation.

[133] From January 2015 until July 2016 the witness saw AH for an hour, twice per week. She went to almost every contact with EAH. They played with AH, gave him lunch and snacks, read him stories and sang nursery rhymes and songs to him. Contact always took place at the local library. When he was a little older, AH started to recognize the witness and

called her "auntie". The witness sometimes spoke to him in Arabic too so that he could begin to understand it. All of the family attended contact for his first birthday and it was lovely. For his second birthday, only the witness and EAH were allowed to attend but she was not sure why. In July 2016, DEH was released from custody and a Children's Hearing was held to allow him contact with AH. After this hearing, Audrey Tait sent an email to EAH on behalf of SWD. The email said that family members were no longer allowed to come to contact and that contact was just for EAH and DEH from now on. The witness said she hadn't been made a relevant person in Children's Hearing proceedings at that stage so she couldn't do anything about her contact with AH being terminated. By that stage the witness said she had already instructed a solicitor to write to SWD to ask that she be considered as a kinship carer for AH. The solicitor first wrote to the social work department in May 2016 about this. SWD responded in August 2016 with a list of concerns they had about the witness and said they were not going to assess her, formally.

[134] The witness said that in 2009 the social work department became involved in the lives of her children due to her ex-husband. The children had told her that their father had smacked her child, RD. At this point she said they were still together however she sought advice from Shakti Women's Aid and they telephoned the social work department on her behalf to report the concern. A social worker came to her home and spoke to her husband and asked him to leave the home for a few months. He did so. The witness said she raised the concern in the first place. At that time, she said she wasn't the woman she is today. She wasn't nearly as strong and she didn't know what to do in that situation. That's why she needed the help of Shakti, but she knew something was wrong and that she had to report it. That's why the witness thinks it unfair of Audrey Tait to have brought up the previous involvement of the social work department in the lives of her children, because in no way

was it her fault and she was the one who sought to involve SWD to protect her children. SWD involvement was absolutely nothing to do with the witness's ability to care for her own children. That is clear from the fact that there has been no social work involvement for a number of years, she said.

[135] The witness said that in 2009 when the social work department were involved with her children there was a measure put in place that her husband only be allowed contact with the children on a supervised basis. At no time did she break that measure. He was her husband, but she still safeguarded and kept her children safe. The witness thinks this shows that she is able to put the safety of the children in her care above her own thoughts and feelings. If the court said that EAH and DEH could only have supervised contact with AH then that is exactly what the witness would allow. The witness indicated the relationship would still be alright and she is confident that EAH and DEH wouldn't do anything to jeopardize AH's placement with her, if that was what was decided. The witness indicated that her involvement in this case isn't something that her family has just jumped into without thinking. There has been lots of discussion and consideration by all of them about what this would mean for them as a family. The witness said she has told EAH and DEH that if she was to have AH and they physically approached her to come and see him, she would call the police. The witness said they know she wouldn't jeopardize AH just for them.

[136] The witness said the social work department have said she struggled with her mental health, historically. The last time she was struggling with her mental health was in 2016 when she went to the GP to get medication for being unable to sleep. The medication was making her feel dizzy and unwell. Her mother came over from Algeria to help her look after her children because she recognised there was an issue she needed help with. She went to a counsellor and slowly started to open up to him and speak about herself. He advised

her to go out, do things, get involved in courses and things to help with her mental health. She said she finished the treatment in about 7 months and has felt much better since then. She went to one of the courses, which was about encouraging people to open up. She is a lot better at doing that now and uses the support around her to help whenever she has got a problem. Once her treatment finished, she started looking for a job and now she is very happy and settled. Right now, she is the happiest she has ever been.

[137] The witness indicated she knows that taking on AH would be a huge responsibility. He's 4. She knows he will be going to nursery now so she would hope that she could work around that when he goes to nursery and continue to work. If it becomes an issue, she knows there's a creche that she used when her son was little and they can collect him from nursery until she finishes work. The witness said she also knows a nanny who she could use on days when her work doesn't quite match up with nursery's finish time. There are many routes she could use; the practical arrangements would not be a problem.

[138] The witness said she lives in a three-bedroomed house and the plan would be for AH to share a room with her son. If necessary, there's space downstairs in her house for an extra room to be made so AH could have his own room when he gets a bit older. The witness said her own children MD and RD would absolutely love to see their cousin living with them. They want to have a little one around. With both MD and RD the witness said she tries to be equal as much as she can – it would be the same with AH. The way the children are and the way she grew up was to value your extended family and treat them as close as your own parents, brothers and sisters. They would be absolutely fine with AH joining the family. The witness said she can't predict what it will be like so it's hard for her to imagine any issues, but should there be problems she is confident she can deal with them in a way which will ensure all the children are happy and well cared for.

[139] The witness indicated her whole family await the outcome of these proceedings. She has a huge family. They are all so close. If they were allowed to be a part of his life, they would all be there for AH. The family has obviously discussed the worst outcome if he is not allowed to be a part of the family. The family has all said that everyone will continue to be there for AH, despite having no contact with him. She said it's heart-breaking to think he will grow up not knowing about his family, but should he approach us when he's an adult the family will be there for him just as they want to be now. He will always have his family, but they all want to be a part of his life now.

[140] The witness indicated that she asked for contact with AH many times but was told he was going for adoption and that the best option for him was not to see wider family members. The witness indicated that although her family is close they are not with each other every single day. They come together at Eid-al-Fitr, on birthdays and to find a solution if there is a family crisis. The witness reiterated she has given this case a lot of thought. If EAH and DEH arrive for contact without an appointment she will say no and telephone the police. She said her brother cannot force her to do anything. The witness said she had been through this before. Her ex-husband could not force her to do anything. Nor can her younger brother. It was put to her that she may be tempted to set the record straight about whether DEH committed assaults against AS and KT. The witness said her family is not a family to do such a thing. She said she would not be pressurised into doing such a thing. For AH she said she wanted a good education, for him to be healthy and to adhere to Islam and to be like her own children.

[141] In cross-examination the witness was asked what she would do if AH asked why he did not stay with his parents. The witness said she would tell him the truth that DEH had been convicted by the court of hurting AS and KT. She repeated she cannot say if he is guilty

or innocent because she was not there. The witness said she would take the advice of the SWD as to how best to deal with inquisitiveness on the part of AH. She said she will not lie to AH but that what she personally believes will remain with her and not be discussed with children. She was asked what she would do if there was a disagreement about the upbringing of AH between her and EAH and DEH. The witness said it was none of their business. The boy is with her and she will decide what is best. Again she said she will discuss this with the SWD. She indicated that if she was allowed to care for AH she would have a social worker allocated to her and she could discuss with that person how best to proceed. She said they may be mummy and daddy but she would be in charge. She also said discussions of this kind would not occur in front of the child. If there was a dispute about what school AH should go to she would consult social work. If there were any problems she would use the SWD as her reference and obey what the court decided. She said her own children have contact with DEH and that works.

NF, (45) [the following is from his affidavit].

[142] The witness said he is currently employed as a delivery driver. He is Algerian and moved to Edinburgh in 2007. He lives here with his wife. They have no children. He speaks Arabic as his first language and English as his second, although he is able to speak English fluently.

[143] The witness is the half-brother of WD, DEH and AB, all of whom live in Edinburgh. He also has two brothers who live in Algeria. WD is the closest person to the witness in his family and he sees her once or twice a week. He knows her children very well and he also see them regularly. He is probably next closest to AB and least close to DEH. This is because he and AB were around the same age growing up, whereas DEH is a bit younger than him.

The witness said he grew up with his grandparents and so didn't live with DEH when he was young. He usually sees DEH around once every few weeks.

[144] The witness said he knows that WD has seen AH a lot since he was in foster care, she attended a lot of the contact sessions with EAH and DEH. He said he knows that she has put herself forward to care for AH if the court says that EAH and DEH can't do that. The witness supports her in doing this. The witness thinks WD would be brilliant at caring for AH, just as she has been for her own kids. They are both doing very well as they have grown up. The witness said he also think that WD would definitely be able to keep AH safe and away from harm. For example, if the court were to say to her that she couldn't allow AH to have unsupervised contact with his parents, WD would absolutely stick by that. WD is responsible. She would never do anything that could compromise AH, herself or her own children. The witness said he knows that DEH is a brother, but in his family they can easily lay down boundaries and be honest with each other. He said he knows that he can't see into the future, but he honestly believes that WD's character would mean she would not in any way contradict what the court said had to happen.

[145] The witness said his family enjoy being a close family and that is why WD is involved with things to do with AH in the first place. He said he thinks it would be better for AH to be a part of the family. However, if the court says that this is to be done a certain way and with certain restrictions then the family are prepared to deal with that.

The Interested Party closed her case with that evidence.

The Submissions

[146] Parties lodged written submissions which I do not rehearse in detail. In terms of her submission for the applicant Ms Louden stated her motion was for the court:

- “(a) To make a permanence order in respect of AH with ancillary provisions 2(a) and (b), 3, 4, 5, and 6;
 (b) To dispense with both Respondents’ consent on the ground set out in Section 83(2) and (3) of the Adoption and Children (Scotland) Act 2007, (“the 2007 Act”), failing which in terms of Section 83(2) (d);
 (c) To make provision granting authority to adopt;
 (d) To terminate AH’s compulsory supervision order and
 (e) To find no expenses due to or by either party.”

[147] Mr Mellor for the first respondent opposed the application on the basis that the threshold test for grant of a permanence order had not been met. Nor was it established even if permanence was justified that adoption was necessary in this case. If it was established as necessary Mr Mellor argued that there should be direct contact pre and post-adoption along the same lines as it is currently exercised.

[148] Ms Conroy for the second respondent stated that her motion was:

- (1) To dismiss the petitioner’s application for a permanence order in respect of the child AH, the statutory test for making a permanence order having not been met.
- (2) To find the Petitioners liable for the expenses of this action.

Esto in the event the permanence order is granted, for an ancillary provision specifying that there be direct contact between the second respondent DEH and the child AH once per month, and indirect contact twice per year, or such other frequency as the court deems appropriate, all in terms of section 82(1) (e) of the 2007 Act. Refusing the application to include authority to adopt.

Esto in the event the permanence order is granted with the authority to adopt, for an ancillary provision specifying that there be direct contact between the second respondent DEH and the child AH once per month, and indirect contact twice per year, or such other frequency as the court deems appropriate, all in terms of section 82(1)(e) of the 2007 Act.

[149] Ms Trainer for the interested party stated her motion was for the court to:

- (a) Refuse the petitioner's application for a permanence order in respect of AH;
- (b) *Esto*, should the permanence order be granted, to grant an ancillary provision ordering direct contact between the child and the interested party WD on a monthly basis or at such other times and with such conditions as the court deems appropriate;
- (c) To find no expenses due to or by either party.

In her written submission Ms Trainer stated the interested party makes no submission in relation to whether the test of serious detriment under section 84(5)(c)(ii) is met in this case.

The interested party relies solely on the further considerations required by sections 84(3), 84(4) and 84(5)(a) and (b) of the Act. Thus even if I were satisfied the threshold test had been met Ms Trainer's position was that a permanence order should not be made and even if it were made with or without authority to adopt then direct contact between WD and AH should be included.

The relevant statutory law

[151] The following sections of the Adoption and Children (Scotland) Act 2007 apply and set out the relevant statutory framework and considerations which apply:

80. Permanence orders

- (1) The appropriate court may, on the application of a local authority, make a permanence order in respect of a child.
- (2) A permanence order is an order consisting of -
 - (a) the mandatory provision,
 - (b) such of the ancillary provisions as the court thinks fit, and
 - (c) if the conditions in section 83 are met, provision granting authority for the child to be adopted.
- (3) In making a permanence order in respect of a child, the appropriate court must secure that each parental responsibility and parental right in respect of the child vests in a person.

118 Meaning of 'appropriate court'

- (1) In this Act, 'appropriate court', as respects any application made by virtue of this Act, is to be construed as follows.

(2) If the application relates to a child who is in Scotland when the application is made, the appropriate court is -

- (a) the Court of Session, or
- (b) the sheriff court of the sheriffdom within which the child is.

119 Interpretation

(1)(b) In this Act, unless the context otherwise requires -.....

'parental responsibilities' and 'parental rights' have the meanings respectively given by sections 1(3) and 2(4) of the 1995 Act (analogous expressions being construed accordingly)

The meanings of the mandatory and ancillary provisions are set out in Sections 81 and 82 of the 2007 Act.

81. Permanence orders: mandatory provision

(1) The mandatory provision is a provision vesting in the local authority for the appropriate period -

- (a) the responsibility mentioned in section 1(1)(b)(ii) of the 1995 Act (provisions of guidance appropriate to child's stage of development) in relation to the child, and
- (b) the right mentioned in section 2(1)(a) of that Act (regulation of child's residence) in relation to the child.

(2) In subsection (1) 'the appropriate period' means -

- (a) in the case of the responsibility referred to in subsection (1)(a), the period beginning with the making of the permanence order and ending with the day on which the child reaches the age of 18.
- (b) in the case of the right referred to in subsection (1)(b), the period beginning with the making of the permanence order and ending with the day on which the child reaches the age of 16.

82. Permanence orders: ancillary provisions

(1) The ancillary provisions are provisions -

- (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,
- (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,
- (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,
 - (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.
 - (2) In subsection (1), 'the appropriate period' means -
 - (a) in the case of the responsibility mentioned in section 1(1)(b)(ii) of the 1995 Act, the period beginning with the making of the permanence order and ending with the day on which the child reaches the age of 18.
 - (b) in any other case, the period beginning with the making of the permanence order and ending with the day on which the child reaches the age of 16.
- Section 83 sets out the conditions which must be satisfied before authority may be granted for the child to be adopted.

83. Order granting authority for adoption: conditions

- (1) The conditions referred to in section 80(2)(c) are -
 - (a) that the local authority has, in the application for the permanence order, 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.
- (2) 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 (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.
- (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.
- (5) In subsections (1)(c) and (2) 'parent' in relation to the child in respect of whom the permanence order is to be made, means -
 - (a) a parent who has any parental responsibilities or parental rights in relation to the child, or
 - (b) a parent who, by virtue of a permanence order which does not include provision granting authority for the child to be adopted, has no such responsibilities or rights.

.....

84. Conditions and considerations applicable to making of order

- (1) Except where subsection (2) applies, a permanence order may not be made in respect of a child who is aged 12 or over unless the child consents.
- (2) This subsection applies where the court is satisfied that the child is incapable of consenting to the order.
- (3) The court may not make a permanence order in respect of a child unless it considers that it would be better for the child that the order be made than that it should not be made.
- (4) In considering whether to make a permanence order and, if so, what provision the order should make, the court is to regard the need to safeguard and promote the welfare of the child throughout childhood as the paramount consideration.
- (5) Before making a permanence order, the court must -
 - (a) after taking account of the child's age and maturity, so far as is reasonably practicable -
 - (i) give the child the opportunity to indicate whether the child wishes to express any views, and
 - (ii) if the child does so wish, give the child the opportunity to express them,

- (b) have regard to -
 - (i) any such views the child may express,
 - (ii) the child's religious persuasion, racial origin and cultural and linguistic background, and
 - (iii) the likely effect on the child of the making of the order, and
- (c) 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 the 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.
- (6) A child who is aged 12 or over is presumed to be of sufficient age and maturity to form a view for the purposes of subsection (5)(a).

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.
- (5) Where an adoption agency is placing a child for adoption it must have regard, so far as is reasonably practicable, to the views of the parents, guardians and other relatives of the child.
- (6) In carrying out the duties imposed on it by subsections (2) to (4) an adoption agency must, before making any arrangements for the adoption of a child, consider whether adoption is likely best to meet the needs of the child or whether there is some better practical alternative for the child.
- (7) If an adoption agency concludes that there is an alternative such as is mentioned in subsection (6), it must not make arrangements for the adoption of the child.
- (8) Without prejudice to the generality of subsection (4)(b), a child who is aged 12 or over is presumed to be of sufficient age and maturity to form a view for the purposes of that subsection.

89. Revocation of supervision requirement

(1) Subsection (2) applies where -

- (a) the child in respect of whom a permanence order is to be made is subject to a supervision requirement, and
 - (b) the appropriate court is satisfied that, were it to make a permanence order in respect of the child, compulsory measures of supervision in respect of the child would no longer be necessary.
- (2) The court must make an order providing that, on the making of the permanence order, the supervision requirement ceases to have effect".

Discussion

[150] This case is complicated both legally and factually. It has been in the court in its management phase for more than 15 months, before proof. I was not the managing sheriff but docketed to hear it. AH is just 4 years old. He has been accommodated since he was 9 months old. The parents have attended contact sessions, religiously, every week since he went into foster care. The child is of mixed Scottish Algerian heritage. His parents and wider family members are Muslim. Both parents oppose permanence and adoption. They have expressed a wish that AH be raised in the Muslim faith. The local authority seeks permanence for AH with authority to place him for adoption with indirect contact to his parents in future, should AH be successfully placed for adoption. Pending a decision in this case, AH has been listed for adoption and the local authority are in the process of interviewing prospective adopters (*cf North Lanarkshire Council v KR* [2017] SAC (Civ) 38 paras [49-50]).

Issues of credibility and reliability

[151] In relation to the evidence given by witnesses I found the assessment of credibility and reliability to be complex and difficult. I have deliberated long and hard about which

parts of the evidence to accept and believe in this case. I shall deal with the issues as they arise.

The joint presentation of DEH and EAH as a couple or individual parents.

[152] DEH and EAH are married. They presented to SWD as a married couple who want to be rehabilitated with their son as a married couple. They were assessed by Dr Reynolds, the independent jointly instructed expert, as a couple. For the first time during the evidence it was suggested to the petitioner's witnesses that they wish to be assessed separately as parents. I do not believe that is a genuine suggestion. I consider it to be a ruse or device introduced at this late stage to delay the possible grant of a permanence order with authority to adopt. EAH was wholly unconvincing in the evidence she gave about this matter. DEH was equally incredible in this respect.

The threshold test section 84(5)(c) of the Act

[153] Before I can grant a permanence order with authority to adopt in a case of non-consensual adoption I first require to be satisfied that, as a matter of fact, on a balance of probabilities, on the evidence I accept, that the threshold test for the grant of such an order has been met. Even if the threshold test is satisfied permanence is not automatic and separate welfare tests are engaged and must be satisfied before a permanence order can be granted, *West Lothian Council v MB* [2017] UKSC 15. Para [8] to para [14] *per* Lord Reed. The threshold test in section 84(5)(c) of the Act provides that I have to 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 the 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.”

Both parents have the parental right referred to in 84(5)(c) (i), to have AH living with them although he is presently subject to compulsory measures of care under supervision of the local authority and resides in foster care. Thus, the critical preliminary issue for me to decide is whether the facts established by the evidence satisfy me that AH's residence with either or both parents is, or is likely to be, seriously detrimental to his welfare.

Actual harm by DEH to AH

[154] In the evidence before me an issue arose about whether DEH had physically harmed AH in 2014. From the evidence led about the family circumstances at the time of AH's removal from the care of his parents into foster care, in December 2014, a question emerged about a bruise to his right cheek. The mark was seen by Lorna Williams on 25 September 2014 during a routine health visit when there was a suggestion by EAH that the mark was caused by AH rolling on the floor. Audrey Tait said the bruise was discussed at or before an initial child protection case conference on 23 October 2014 convened in respect of all three children. There was a dispute in the evidence about whether DEH had ever admitted at or before the case conference that he caused that bruise by suckling AH's face which was said to be related to cultural practice and a sign of affection in Algeria. Dr Johnstone was clear in her report that during one of her two interviews with him in 2017, DEH had admitted he made this bruise by suckling AH. In her report of 29 January 2018, she says:

"19. At my first contact with him [DEH], he said that he had sucked the children's skin (and this accounted for the marks on their body) but claimed that this was culturally typical in Algeria (and I noted that his brother told me that this was true and he too had been in trouble with social work for behaving the same way to his children). At my second interview, he [DEH] contradicted his earlier statements to me. He said that it had been recorded in social work records that he had said he had "sooked AH's cheek" but that this was a false record."

DEH, in his evidence before me, denied making the bruise or saying that he had done so. I did not believe him for a number of reasons. I preferred the evidence of Audrey Tait and Dr Johnstone on this issue. It seemed to me to be improbable that such a remark would be made up. Further, I am satisfied that DEH is in denial about any aspect of this case which he thinks may prejudice his hope to be rehabilitated with AH. I am satisfied that DEH did cause the bruising. However, I do not consider the presence of bruising on AH's right cheek on 25 September 2014 to be material in the context of this case. I have concluded in relation to the question of actual harm caused to AH by either of his parents that there is no evidence that they have ever, either individually or together, caused AH actual serious physical harm. AH was not medically examined in relation to this bruise. DEH was never charged with an assault on AH in respect of this matter. This discrete issue was never referred to the Children's Reporter. The evidence I accept in relation to this bruise establishes an explained non-accidental injury to AH. There is no evidence DEH ever manifested malice or evil intent towards AH. The explanation for the bruise is likely to be related to an Algerian cultural practice of play or affection towards children.

[155] The evidence which I accept from Audrey Tait, Ann Garson, EAH and DEH is that the parents in this case have attended religiously for contact with AH since he has been accommodated and that they are genuine, caring, affectionate and appropriate with him during contact. I took into account the evidence of Ann Garson that there have been serious tensions between the SWD and the parents in this case. Further, I concluded that the relationship between both parents and Ann Garson and Audrey Tait is toxic. However, there is no evidence which I consider to be material or significant that either parent has ever physically harmed AH.

[156] The applicant's case for a permanence order with authority to place AH for adoption depends on the risk of future harm to AH evidenced by DEH's past conduct towards AS and KT coupled with EAH's complicity in that conduct. The presence of the bruise on AH's right cheek alone, in September 2014, is insufficient to satisfy me that residence with either of his parents was then, or is likely in future, to be seriously detrimental to his welfare whether considered alone or in conjunction with the evidence relating to actual physical and/or psychological harm to AS and KT.

Unexplained actual harm to AS and KT satisfying the threshold test alone and giving rise to future risk of harm to AH.

[157] The evidence demonstrated that as a result of AS presenting at SWD on 3 December 2014 with extensive and significant bruising to her body, AH on 5 December 2014 was made the subject of an urgent Child Protection Order. A referral was then made by the Children's Reporter on the ground he is or is likely to become a member of the same household as a child in respect of whom a schedule 1 offence has been committed (section 67(2)(d) of the Children's Hearings (Scotland) Act 2011). The parents did not accept that ground but it was held established by the sheriff on 20 March 2015. AH has been subject of compulsory supervision since 16 December 2014. KT was also found to be bruised after medical examination on 5 December 2014. DEH was charged with assaults on both children on 15 January 2015, convicted of these assaults on 22 January 2016 and sentenced to 12 months imprisonment on 5 February 2016. Without an oral hearing his appeal against sentence was judged unarguable at the sift stage.

The threshold test – DEH

[158] With regard to DEH the threshold test is satisfied in relation to AH because the presentation of AS and KT at SWD on 3 December 2014 with extensive and serious unexplained non-accidental injuries in circumstances where he was the primary carer for the children clearly establishes that it was seriously detrimental to AH's welfare that he continue to reside with DEH. The explanations offered for the injuries, that AS fell and/or was assaulted by other children at school, were implausible given the forensic opinion expressed about their nature, distribution and possible cause of the injuries. The fact that DEH was subsequently convicted reinforces that situation. The fact that before me in evidence DEH maintained his innocence notwithstanding the fact of his conviction further demonstrated that AH is likely to be at some risk from DEH if he is rehabilitated with him given the psychological risk assessment of him and his present mind set. I am satisfied the evidence demonstrates DEH has strong views deriving from his own Algerian cultural perspective about discipline and high expectations about issues like good behaviour, performance, homework and handwriting irrespective of how measured and age appropriate for children this discipline is. He has authoritarian beliefs and problematic expectations about how to socialize children and how to manage challenging behaviour. He lacks moral emotions such as empathy, remorse, regret and responsibility taking and when motivated to do so, will engage in deceptive and manipulative behaviour. I rejected DEH's protestations of innocence. I did not find them convincing. I thought he is terrified to lose his son to adoption and that is why he lied before me. In my opinion, although he denies guilt he believes the sentence of imprisonment was sufficient punishment but to take AH away and have him adopted as well, is, in his mind, too much. However this application has nothing to do with punishment. Ms Loudon relied on the extract conviction lodged and the

presumption contained in section 10 of the Law Reform (Miscellaneous Provisions)

(Scotland) Act 1968. This states at section 10(2):

“(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or of a service offence

(a) he shall be taken to have committed that offence unless the contrary is proved.”

The evidence of DEH did not persuade me that the presumption was displaced. I accepted the evidence of Audrey Tait and Ann Garson in relation to the presentation of AS and KT at SWD on 3 December 2014. I accepted the medical evidence from Dr Kirk and Dr Ross in relation to the injuries on both children. I have no hesitation in concluding that the actual presentation of both children in the condition they were in satisfied the threshold test which is, in fact, doubly satisfied in respect of both limbs of the test [*i.e.* in relation to both actual and potential serious detriment to AH, section 84(5)(c)(ii) of the Act] given the evidence before me from DEH, who is in denial of his guilt, taken in conjunction with the expert opinion evidence led about the level of risk he poses to AH. I accepted the evidence of Dr Johnstone and Dr Reynolds that DEH given his present mind set of denial and strict attitudes towards parenting constitutes a risk of harm to AH if rehabilitation is sanctioned. I accepted the opinion of Dr Reynolds that rehabilitation to the care of DEH will likely be seriously detrimental to the welfare of AH, considering his incapacity to parent without very considerable professional intervention. I consider the inability of DEH to discharge his parental responsibilities and exercise his rights satisfactorily is likely to continue in the foreseeable future. Therefore, the threshold test is satisfied in both its aspects because future residence of AH with DEH is likely to be seriously detrimental to his welfare and actual residence with DEH, in the circumstances AS and KT presented on 3 December 2014, was seriously detrimental to AH's then welfare.

EAH

[159] With regard to EAH the threshold test is satisfied in relation to AH because the presentation of AS and KT at SWD on 3 December 2014 with extensive and serious unexplained non-accidental injuries in circumstances where she was one of the primary carers for the children clearly established that it was then seriously detrimental to AH's welfare that he continue to reside with EAH. The explanations offered for the injuries, that AS fell and/or was assaulted by other children at school, were implausible given the forensic opinion expressed about their nature distribution and possible cause of the injuries. The fact that DEH was subsequently convicted and EAH gave evidence that her own children lied about what happened to them reinforces that situation. I was satisfied that EAH was unable to protect AS and KT from DEH and was complicit in his abuse of them. Further and significantly, I considered it compelling that on 3 December 2014 EAH did not take AS to obtain medical help for her injuries but instead took the child to the SWD. That indicated to me that EAH knew the abuse was, fundamentally and in truth, a social work problem which must mean, in my opinion, that she was conscious there was an issue with DEH's treatment of the children. EAH, before me, said she had been in care all her childhood. She had dealt with many social workers. She came across as institutionalised. She complained about the health visitor Lorna Williams and the social workers Audrey Tait and Ann Garson. In my opinion she has learned to use complaint as a weapon against the SWD. I noted that Dr Kirk in her affidavit indicated that EAH's behaviour on 4 December 2014 at the Sick Children's Hospital "...was difficult to manage as she was behaving in a very defensive and aggressive way, writing down people's names when they spoke to her." This did not surprise me. EAH struck me as naïve. I thought she was hopelessly conflicted in her love of DEH and her love for her children. Before me she indicated she did not know if her husband was guilty, yet the

joint minute agreed between the parties, states, "DEH has always maintained he is innocent of the crimes he was convicted of. EAH also maintains that DEH was not guilty of the crimes, although it is accepted by both parents that AS and KT did in fact make allegations of physical abuse against DEH." [see finding in fact 25, above]. I accepted the opinion of Dr Reynolds that EAH had no insight or emotional empathy with her older children. My own assessment of her as a witness is that she is the product of institutionalisation. She struck me as having no insight into her predicament and was noticeably lacking in any emotion or empathy while giving evidence about her children. I considered that the threshold test is doubly satisfied in her case also, in respect of both limbs of the test [*i.e.* in relation to both actual and potential serious detriment to AH, section 84(5)(c)(ii) of the Act], having regard to the opinion of Dr Reynolds that rehabilitation to the care of EAH will likely be seriously detrimental to the welfare of AH, considering her incapacity to parent without very considerable professional intervention. I consider the inability of EAH to discharge her parental responsibilities and exercise her rights satisfactorily is likely to continue in the foreseeable future. Equally, therefore, the threshold test is satisfied in both its aspects because future residence of AH with EAH is likely to be seriously detrimental to his welfare and actual residence with EAH, in the circumstances AS and KT presented on 3 December 2014, was seriously detrimental to AH's then welfare.

[160] Both Mr Mellor and Ms Conroy submitted that the application should be dismissed because the threshold test had not been met. Ms Trainer made no submission in respect of the threshold test but submitted a permanence order should not be granted because kinship care by WD was a viable option and had not been adequately considered and excluded. Mr Mellor and Ms Conroy adopted that submission. On the evidence led I am satisfied, for the reasons I have given, that the threshold test is met.

The Permanence Order

[161] Even if the threshold test is met, permanence with or without ancillary orders including authority to adopt is not automatic. I will deal with the legal issues separately and in sequence although the factual substance of the issues relating to permanence and authority to adopt overlap. I considered that AH was obviously too young to express any views.

[162] Having satisfied myself that the threshold test was passed and that I have jurisdiction to make a permanence order in this case and what provision the order should make I bear in mind the requirement of subsection section 84(4) to regard the need to safeguard and promote the welfare of AH throughout his childhood as the paramount consideration. I am also conscious of the requirement to consider the application of the 'no order principle' in subsection section 84(3) again keeping subsection section 84(4) in mind. Separately and in particular, I have to consider the question of the proportionality of making the order and the domestic and ECHR jurisprudence that informs that question. For AH the consequence of such a permanence order, if made, will be that the parental rights and responsibilities of DEH and EAH towards him will be severed and vest in the local authority and further steps taken to advance his eventual adoption. Obviously, there can be no more profound or significant act towards a child than severing the legal bond he has with his parents and permanently removing him from them and his family. For that reason, the jurisprudence in this area of the law involving permanence with authority to adopt and adoption itself has made it clear to decision makers that this radical step is not to be taken lightly. I am deeply conscious of the importance of this case for AH, his parents, SWD and the wider family involved. I do not rehearse the many statements of the law which inform

my decision, in fullness, however the following taken from *Fife Council v M* [2015] CSIH 74; 2016 S.C. 169 is sufficient to convey the import and significance of what is required:

“[62] Subsequently, the Court of Appeal in *Re B-S (Children) (Adoption Order: Leave to Oppose)*, under reference to *Re B*, set out in trenchant terms what was required of a court making an order involving adoption. In the judgment of the court handed down by Sir James Munby P[resident] (para 22) the message from *Re B* was drawn together: ‘The language used in *Re B* is striking. Different words and phrases are used but the message is clear. Orders contemplating non-consensual adoption — care orders with a plan for adoption, placement orders and adoption orders — are “a very extreme thing, a last resort”, only to be made where “nothing else will do”, where “no other course [is] possible in [the child’s] interests”, they are “the most extreme option”, a “last resort — when all else fails”, to be made “only in exceptional circumstances and where motivated by overriding requirements pertaining to the child’s welfare, in short, where nothing else will do”’.

[63] The court in *Re B-S* went on to identify two essential requirements in a case in which a court was being asked to approve a care plan for adoption or make a non-consensual placement order or adoption order. First, there was 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. Secondly, there must be an adequately reasoned judgment. At para 43 the court drew attention to what had been said by McFarlane LJ in *Re G (A Child)* (para 50): the judicial task was to undertake a ‘global, holistic evaluation of each of the options available for the child’s future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child’s welfare.’”

[163] In *S v City of Edinburgh Council* 2013 FamLR 2 the approach to applications for a permanence order with authority to adopt was considered by the Inner House. It was there held that a first instance decision-maker is entitled to rely on the same body of evidence for the purposes of both section 84(5) and section 83(3)(b) and (c). A finding would first have to be made that a child’s residence with the parent in question was or was likely to be seriously detrimental to the welfare of the child in terms of section 84(5)(c)(ii) of the 2007 Act. That approach applies in this case.

Kinship care with WD

[164] However, in the present case it is suggested that something else, less drastic than permanence with authority to adopt, will do. The interested party supported by both parents suggests there is a realistic alternative to permanence with or without authority to adopt, namely kinship care with WD. Ms Trainer suggested that this option had not been adequately assessed or considered by the applicant before the present application for permanence with authority to adopt was made. Ms Loudon for the applicants moved me to grant permanence with authority to adopt. She did not support permanence alone being in AH's best interests given his age and the prospects of finding an adoptive placement for him. In relation to kinship care she relied on *TW v Aberdeenshire Council* 2013 S.C. 108 para [24] and argued that WD had been adequately assessed (which she said was a continuous process) and excluded as a viable kinship carer for good reasons and that WD's offer to SWD and her offer in evidence before me was no more than a statement 'hope' that she could perform the role. I took Ms Loudon to mean that kinship care with WD was not a realistic option in this case and that permanence was the only viable option for AH. Accordingly, I proceeded upon the basis that I had to scrutinise the established facts to satisfy myself that kinship care is not a realistic option in this case before I could be satisfied that permanence was the only viable option for AH. I was very conscious it was not my task to review the SWD decision to reject WD as a potential kinship carer. My task was to scrutinise the established facts and make my own independent judgment as to whether permanence with authority to adopt must be granted, which can only be granted if there is no other realistic alternative and, therefore, permanence with authority to adopt is necessary. Given the radical effect of a permanence order with authority to adopt I was satisfied the evidence and the facts established from it had to be subjected to an intense level

of scrutiny before kinship care could be excluded and permanence with authority to adopt granted.

[165] In so doing this, I remind myself at this stage that I am not charged with the responsibility to make a kinship care assessment of WD for AH. That is a local authority function. My task, the threshold test having been satisfied, is to decide whether it has been established on the evidence before me, that nothing short of a permanence order with authority to adopt, the effect of which will irrevocably and permanently remove AH from his parents (subject to possible contact with family members), is the only realistic and viable option in his case, to safeguard and promote his welfare throughout his childhood. If I conclude, subject to sections 84(3), 84(4) and 84(5)(b) of the Act and the proportionality of the order sought, that permanently removing AH from his parents is necessary and the only realistically viable way established to safeguard and promote his welfare throughout his childhood, then my duty is to grant the order. If it is not so established because there is some other, less draconian and realistically viable option which protects AH from serious harm and will safeguard and promote his welfare throughout his childhood, then my duty is to refuse the order. The onus of proof is on the petitioner to prove permanence with authority to adopt is necessary and that nothing else will do.

[166] As a matter of fact, I found that on 6 October 2015 at a looked after and accommodated child review it was the view and recommendation of SWD that AH be referred to an adoption and permanence panel on the basis there was no other option thought viable at that time. There is no record that kinship care was discussed at that review although WD, EAH and Audrey Tait suggest there had been a verbal offer of kinship care by WD, in early 2015. By 6 October 2015, AH had not been in care a year and his father had not been tried on the allegations of assault against AS and KT. I further found that on 31 March

2016 and 7 April 2016, while DEH was in custody serving his sentence, an adoption and permanence panel unanimously recommended that AH be registered as in need of permanent alternative care away from his parents and that the legal route should be for the Petitioner to make an application for a permanence order with authority to adopt, which recommendation was ratified by the Petitioner's independent decision maker on 13 April 2016. At that panel, placement with relatives was considered but rejected as not in AH's best interests. The panel were of the view "..... that the extended family were supportive of both parents views of what had happened." It was said by SWD that no extended family member had come forward as a potential kinship carer. It was stated EAH "...had put forward the names of possible family members but turned down the opportunity to speak further about them." I was satisfied on the evidence that WD had made a verbal offer of kinship care in 2015 as she said in her affidavit that she did but that offer was not formalised until 9 May 2016 when agents for WD wrote to the Petitioner requesting that she be considered as a kinship carer. 24. On 14 June 2016 at a Children's Hearing possible kinship care was discussed. The record of proceedings states: "In addition, potential kinship carers were mentioned by the parents and it was acknowledged by social work that this needed to be explored further." This was clearly after the formal offer was intimated. On 19 August 2016, in a letter signed jointly by Audrey Tait and Ann Garson, SWD rejected the offer because of concerns relating to WD's physical and mental health and her ability to provide appropriate and adequate care to AH. There were also concerns expressed in the letter arising from the close family relationship between WD, EAH and DEH that WD would be unable to protect AH from EAH and DEH. Further, there were concerns arising from the denial of guilt on the part of EAH and DEH notwithstanding the conviction and sentence of DEH and the fact that kinship care had been considered at the permanency panel on 31 March 2016 and

rejected. Both Audrey Tait and Ann Garson explained to me that the Petitioners have an independent kinship care process. The process is intrusive and time consuming, they said. It can take several weeks before a decision is made in any given case. On 14 September 2016 a Children's Hearing unanimously decided to give advice to the sheriff in support of the present application in respect of AH. With regard to possible kinship care the record of proceedings states "There was a minority decision to appoint a safeguarder, as it was felt *insufficient information and reasoned recommendations* were available from Social Work as regards the issues raised at the previous hearing relating to Contact, Rehabilitation and Kinship care." [Emphasis added]. The advice states that the hearing was ".....informed that, the local authority *had investigated the possibility of kinship care* but were unable to source a safe option. On the initial Place of Safety placement, the LA had investigated the possibilities of family care but were unable to find anything suitable. Over the past few months the local authority *have reviewed WD* but found there were personal issues barring her from giving a safe and secure home and doubt over her ability to perform satisfactory gate-keeping for AH in his contact with his parents." [Emphasis added]. It is not clear whether the letter of 19 August 2016 rejecting the formal offer was before the Panel. However, I agree with the minority voice expressed in the record of proceedings. It would appear that a paper review of records was conducted because WD has never been interviewed by the Petitioners to assess her suitability to act as a kinship carer. The panel member who was dissatisfied was right to express his or her minority dissent.

[167] Although this is not a review of the local authority's decision to reject WD's offer, I have found it very difficult to understand from the evidence why WD was not assessed using the independent assessment process operated by the Petitioners. I appreciate that the social workers' position is that WD was continually assessed as SWD got to know the family

better and kinship care was not considered viable by Audrey Tait and Ann Garson for the reasons stated in the letter of 19 August 2016. However, in my opinion, their decision was not an independent assessment. Instead, what happened was that a judgement was made, by Audrey Tait and Ann Garson, with regard to WD's suitability to perform the role of kinship carer, which is different from an assessment. The relationship between the parents and Audrey Tait and Ann Garson was toxic. The parents had complained about Audrey Tait and Ann Garson. I have concluded that WD was not assessed but in fact she was deliberately excluded from the assessment process for the reasons stated in the letter. I reject the suggestion that assessment was continuous and an independent assessment using the local authority's independent assessment process was unnecessary. Given the breakdown in the relationship between the social workers and the parents I consider an independent assessment was necessary if it was felt WD was too close to the parents and kinship care would not work for that reason. I consider it more likely that WD was excluded from assessment because of her proximity to EAH and DEH and her support of DEH. Had a SWD assessment been made, genuinely and independently, there would have been independent material to consider in relation to the Petitioner's then assessment of her unsuitability, as a kinship carer, if that was the position. However, that was not done. Nevertheless, I still have to make my own independent judgment on the basis of the evidence led before me, in relation to WD's suitability, if I am to hold kinship care is not a realistic option in this case. From the cases already referred to, it is obvious that I am not conducting a review of the applicant's decision to reject WD as a kinship carer. Instead, it is my duty to make my own assessment of this suggested option which must include an assessment of WD against the background of the rejection of her offer, based on the evidence I have heard. This I must do as part of a global and holistic evaluation of what is necessary to protect AH from harm and

promote and safeguard his welfare, before I can conclude that kinship care with WD is not a realistic option and no other option will do except permanence with authority to adopt and grant this application. As was stated by Lord Reed in *West Lothian Council v MB* 2017 S.C.

(U.K.S.C.) 67:

“Finally, in relation to the application of the legislation, it is important that the court's reasoning should demonstrate that it has applied the legislation correctly. This requires more than the formulaic repetition of the statutory language. It should be apparent that the court has analysed the arguments for and against making a permanence order (including the various provisions which might realistically be under consideration) and, where appropriate, an order granting authority for adoption. Its reasons for preferring one option to the potential alternatives should be explained. In order to carry out this task, the court requires evidence which addresses all the options which are realistically available and analyses the arguments for and against each option.”

[168] I pass from my assessment of what the SWD did and did not do to consider my own assessment of WD as a witness and the viability of her offer of kinship care. I begin my assessment by making it clear I accepted the evidence of WD. I found her to be an impressive witness. She is very intelligent and clearly commands great respect within her family, a number of members of which I heard from directly in oral testimony. I thought she was an obvious authority figure. Her presentation was calm, controlled and in every respect appropriate throughout the proceedings before me. I noted the social workers stated she had always been appropriate in her dealings with them. This is reflected in the SWIFT notes. I agreed with Dr Reynolds that WD is genuine and has made a good job of bringing up her own children. I will deal with Dr Reynolds' reservations about kinship care with WD shortly. The petitioners rejected her application to be considered without interviewing her and allowing her access to the independent assessment process. I considered this to be biased against her. I have struggled to understand why such bias has been shown in this case. A great deal has been made in this case about the shocking condition AS presented in,

at SWD on 3 December 2014. The sheriff's sentencing remarks were sent to the Director of Social Work and the Reporter to the Children's Hearing. Those remarks, made at the sentencing of DEH, in relation to his conduct towards his stepchildren AS and KT, were placed before Children's Hearings dealing with the best interests of AH. The remarks include the following:

"Had I been sentencing you on indictment I have no doubt that the sentence would have been measured in years and a supervised release order would certainly have been appropriate. As it is you are extremely fortunate that you have been prosecuted on summary complaint and that my sentencing powers are therefore restricted to 12 months imprisonment."

As a first offender, DEH was sentenced to the maximum sentence and his appeal held to be unarguable without an oral hearing. I seriously question the extent to which the attitude of SWD to WD has been coloured by this background.

[169] One reason that was given for rejection of the kinship care offer, related to WD's mental health. I accept the evidence given and tested before me, of WD and Dr Reynolds that any depression which she had is now well in the past. However, it would have been open to an independent SWD assessor to seek medical clarification of that from WD's medical records if an adequate investigation had been made of her suitability. In any event, that not having been done, I am satisfied from the evidence led that there is no obstacle to kinship care arising from any present physical or mental health issues this witness had in the past. This would have been obvious had she been interviewed.

[170] Another reason stated for rejecting this option was that WD had social work involvement in her own family regarding her own children and abuse of them by her ex-husband. Again, I accept the tested evidence before me from WD and Dr Reynolds that social work involvement was in the past. I accept the submission of Ms Trainer in this regard that WD worked with the SWD and protected her own children from abuse from their father

and that in performing that role she has demonstrated that she can be trusted to perform a gate-keeping function. In fact, she has a good track record of so doing. The extent of her maturity and willingness to engage with SWD would have been obvious had she been interviewed.

[171] I turn then to her support of her brother in his assertion that he is innocent of the charges he was convicted of. I considered WD to show deep insight with regard to that, before me. She understood this conflict but was able to articulate it was not an obstacle to her performing a kinship care role. She was conflicted between love and loyalty for her brother and the fact he was convicted of conduct which she considered alien to the brother she knows. However, she said she was not present when the assaults were perpetrated. She stated that she would always put the interests of AH first and work with SWD in his best interests. I believed her evidence in that regard. One of Dr Reynolds' concerns about kinship care in this case was that because of what she called DEH's forceful personality, he and EAH may force contact with AH and WD would either not be strong enough to resist this or allow it because she believes DEH is innocent. In that way, the protection necessary for kinship care to work would break down and AH would be exposed to risk. Dr Reynolds said gatekeeping was difficult and there were 'too many unknowns' in this case to be confident it is a safe option. WD said she would accept the decision of the court and abide by it. I gave the matter considerable thought and having heard WD in evidence concluded that WD is trustworthy, genuine and honest. I did not believe she would undermine kinship care, if entrusted to her, or that she was in any way intimidated by her younger brother and his wife. She stated she would positively engage with SWD and she knew a kinship carer has an allocated social worker whom, she said, she would work with, in the best interests of AH. She struck me as confident and assertive when she stated that she would make all the

necessary decisions with regard to what is in the best interests of AH. I did not consider WD's private and personal reservations about her brother's conviction were a barrier to effective kinship care.

[172] Another reservation voiced by Dr Reynolds and social workers about the viability of this option related to AH's 'life-story' and what would happen as he got older and became curious about why he was not staying permanently with his mother and father but staying with WD. WD showed insight in this regard also. She said she would tell AH the truth about why he is not with his parents and discuss strategies for managing this issue with SWD and accept their advice. She also stated that what she personally believed about her brother's conviction was irrelevant. What mattered she said was the best interests of AH. It was suggested by social workers that AH would be confused, if he was in the kinship care of WD. I am not persuaded that he will be confused in fact, because he will be told the truth. I consider that the grant of a permanence order with authority to adopt will have a profound effect on AH and looked at holistically I consider he has more to gain from remaining within his wider family, in the care of WD, provided that is safe for him to be there and it will promote and safeguard his welfare throughout childhood, even if his family circumstances do not conform to the classic model of a nuclear family. Today, there are many different family models involving grandparents, single parents, same sex parents, separated and divorced parents, that living with and being brought up by an aunt is neither confusing or unusual. I am not persuaded that this reason relating to possible confusion in AH's life-story, carries sufficient weight for me to conclude that kinship care will not work and only permanence will do, or, that it is better for AH, given his religious persuasion, racial origin and cultural and linguistic background, to be removed from his own family completely and placed for adoption, rather than remain safely with his aunt within his wider family.

[173] Another aspect of Dr Reynolds' reservations, shared with the SWD, in this case related to what Dr Reynolds described as the 'enmeshed' nature of the family dynamic. SWD considered WD was too close to DEH and EAH for kinship care to work. Dr Reynolds considered that WD, DEH and EAH share the same support network and for that reason the family dynamic meant kinship care could not work. I rejected the opinion evidence of Dr Reynolds on this issue. I did not consider I needed an expert to assist me adjudicate on this matter of fact. It struck me that the issues surrounding WD as a potential kinship carer were, firstly, did she want to do the job and take the responsibility; secondly is she able physically and mentally to do the job and thirdly can she be trusted to protect and nurture AH throughout his childhood? There is no doubt WD wants to take on the responsibility. Dr Reynolds, with whom I agree, was satisfied no physical or mental impediment exists in her case. Therefore the only remaining issue is can she be trusted. In my opinion, absent some unusual psychological pathology, which is not present in this case, I concluded it was not necessary that a child psychologist assist me to make a judgment about whether WD could be trusted to perform this kinship care role safely and protect AH. I thought the evidence about 'family dynamic' and 'the enmeshed nature of this family', relied on by the Petitioners, was no more than spurious psycho-babble. I considered that I am perfectly capable of making a judgment about whether WD is to be trusted; *Kennedy v Cordia (Services)* 2016 S.C. (U.K.S.C.) 59. This is an issue of fact uncomplicated by any unusual psychological pathology on the part of the potential kinship carer. I do not need the opinion evidence of a child psychologist to help me judge whether WD is to be trusted. I was, however, acutely conscious that a flawed kinship care arrangement which exposed AH to risk of serious harm will be potentially disastrous. Ann Garson expressed a concern that the SWD could not experiment with AH. Kinship care with WD could not be safely tested. My difficulty with

this aspect of the SWD's implacable opposition to kinship care is that it is equally biased against WD without, in my judgment, any genuine independent assessment of her ability and resolve to protect AH having been made by SWD. I appreciate Ann Garson said that assessment is a continuous process and that the SWD department formed its impression of and assessment of WD being too close to DEH and EAH for kinship care to work, the more SWD got to know the family. I also take into account that it may be said WD was only excluded from further assessment after initial assessment for the reasons set out in the letter of 19 August 2016. However, the reasons given in the letter for rejection related in part to mental health and previous social work involvement with her own children, which were in my judgement, as the evidence before me has disclosed, completely bogus.

[171] I concluded that if you make the pre-judgement that WD *is not to be believed or trusted* then, if she had kinship care of AH, there is a risk that she will not take her responsibility to protect AH seriously and further she may undermine a kinship care placement by allowing DEH and EAH unsupervised contact with AH. However, having had the benefit of seeing and listening to WD, who was rigorously tested under cross-examination, I have reached the clear conclusion that *she is to be believed and trusted* because she is a strong, devout Muslim woman who respects the law; she has worked as a gatekeeper successfully in conjunction with SWD before, to protect her own children from harm who are thriving; she has significant insight into the complications which could arise, bringing AH up, in circumstances where he is not living with his natural mother and father but she is intelligent enough to seek the guidance and support of SWD to help her to manage these potential problems. I do not on the evidence led before me consider there is any reason to disbelieve WD in her commitment and ability to protect AH from harm and safeguard and promote his welfare. Nor do I consider that she will become isolated from her own siblings and wider

family, if AH were in her care. I am not persuaded that the family including DEH and EAH would undermine kinship care or expose AH to the risk of harm if he were in the kinship care of WD who is highly respected within this family.

[172] In looking at the viability of this option I also took into account significant cultural aspects which manifested in two ways in this case, in my opinion. Firstly, it was suggested WD, DEH and EAH were 'enmeshed' as a family and this would be an obstacle to kinship care operating satisfactorily. The family dynamic was 'too close' for kinship care to work, it was said by Dr Reynolds and the social workers. However, this wider family has a significant Algerian immigrant component within it. It does not surprise me that the adult Algerian immigrant brothers and sisters in this family are closely bonded, living as they do in Scotland, in what for them is a foreign culture. Accordingly, I did not attach as much adverse weight to this aspect of the case as was attached by SWD. It seemed to me at core that what was necessary was an assessment of WD as a potential kinship carer for AH. My judgement of WD was that she is to be trusted and can act effectively as a gatekeeper to safeguard AH. She has a proven track record for doing just that with her own children. She is known to AH. Other than bias against this family, based upon DEH's conviction, there was no convincing evidence before me that WD or any of DEH's siblings were a potentially malign factor in protecting AH's safety and promoting his best interests or that any of the adult siblings would not support and respect WD as a gatekeeper. Further, I did not consider PB, who is friendly with WD and the sister of EAH, to be a malign factor either or someone who would undermine kinship care if allowed.

[173] Secondly, I was conscious that finding an adoptive match for AH was difficult. I was told AH was the only Muslim child the Petitioner's SWD had experience of placing for adoption. Given the restricted pool of potential adopters, placing him has not been easy.

Accordingly, I took into account that at present he has potential access (though limited for the moment to his parents) to a family which represents his religious persuasion, racial origin and cultural and linguistic background. That includes not just his immediate and wider family in Scotland but potential access through WD, to his Algerian grandmother and foreign family, through regular visits abroad and Skype with them. Before me, WD displayed genuine warmth and love for AH. Looking closely at the cultural component within this case I was not satisfied, having regard to the need to safeguard and promote the welfare of AH throughout his childhood as the paramount consideration that it had been demonstrated by the petitioners that it was better to remove him from his own family completely and place him for adoption, than that he remain safely with his aunt within his wider Scottish Algerian family. I considered whether it would be better for AH that the order be made than that it should not be made keeping in mind the need to safeguard and promote his welfare throughout his childhood as the paramount consideration. I thought AH had more to lose, having regard to his particular religious persuasion, racial origin and cultural and linguistic background, by granting the order sought because WD and his wider family can actually provide him with these connections in large measure at present, than he had to gain on the evidence led before me, in relation to placing him for adoption, where the picture was at best uncertain.

[174] I also considered whether the natural parents would undermine any kinship care arrangement with WD. I took into account the fact that both parents engage positively with present fostering arrangements. They attend religiously for contact. There have been no material problems identified (other than tension when Ann Garson attended for contact sessions) in relation to their attitude to the foster carers or their behaviour during fostering sessions. I believed both parents when they told me they would extend the same respect to

WD if she were to be kinship carer for AH as they do to the present foster carers. The evidence from the SWIFT records, which I accepted, demonstrates that EAH and DEH engage positively during contact and AH enjoys his interaction with them. I accepted the evidence of DEH that he is grateful to AH's foster mum for the high quality of care and treatment she and her partner provide to AH, as an accommodated child. I accepted the evidence of both EAH and DEH that they will not undermine a kinship care arrangement with WD.

[175] EAH and DEH indicated that AH calls them 'mummy' and 'daddy' during contact. They clearly believe this is significant. I was told by the social workers that AH is bonded to his foster carers, as his primary carers. When Ann Garson gave evidence about this, in cross-examination by Ms Conroy, I was distinctly unimpressed by the manner in which she dismissed the suggestion that AH thinks of EAH and DEH as 'mummy' and 'daddy'. My note and clear recollection is that she said referring to the words AH uses to describe EAH and DEH: "These are just words *to him*" and threw her head up and flicked her hand out as if to dismiss the suggestion, out of hand. Whether or not the child has the cognitive capacity to understand who his parents are, I did not appreciate the tone of voice Ann Garson used to refer to AH. That exchange has troubled me in my deliberation in this case and my general consideration of the question of bias.

[176] In considering the feasibility of kinship care with WD and whether that had been adequately considered and must necessarily be excluded as a realistic option I took account of the fact that WD had accompanied EAH to contact sessions on approximately 21 occasions between December 2014 and October 2016 when her contact with AH was stopped by SWD who restricted contact to both parents and excluded wider family members at that time. Ann Garson said in evidence this was because the contact should be child focused on

AH and not on wider family members. I was satisfied that AH is not a stranger to WD and the SWIFT records confirm that she behaved appropriately during contact. Ms Trainer submitted that in deciding that extended family members were no longer permitted to attend contact on a regular basis, as they always had done, the local authority were attempting to pre-empt the decision of the court in these proceedings. I concluded there was no good reason demonstrated in the evidence why WD who, by October 2016, had made a formal application to be considered as a kinship carer, should have been excluded from contact sessions. The obvious inference is that she was deliberately distanced from AH which is indicative of bias against her. The SWD antipathy towards her, in my view, was because she supported her brother, who denied his guilt.

[177] Another concern expressed by Dr Reynolds in relation to the viability of kinship care related to whether it was right, as she put it, 'to set WD up to fail' and what would be the consequences of that, if it occurred? She said 'the clock was ticking for AH'. Given his age, if kinship care was tried and failed he might lose an adoption placement which in his case would be important because of the restricted pool of potential adopters. He might be stranded in the child care system for the rest of his childhood. She was of the view he needed to be claimed by a family who will treat him as their own so that he will not feel different from other children as he goes into pre-school and primary school. As laudable as these sentiments are, they cut no ice with me, in my adjudication upon AH's right to a family life. AH already has a family, including WD, which wants to claim him and who love him and want him to grow up with them in his own wider family. That family share his religious persuasion, racial origin and cultural and linguistic background. He has a lot to lose by being removed from them. I am not persuaded it has been sufficiently demonstrated, on the evidence led, that it is necessary for AH to be found and claimed by strangers,

however well-intentioned, suitable and genuine they are, as prospective adopters, who are looking for a child of their own, when he already has a consanguine family member who is, in my opinion, demonstrably able and willing to perform that role who has been inadequately independently assessed by SWD and whose offer of kinship care has not been excluded as a viable alternative option to permanence with authority to adopt.

The issue of risk of harm to AH from DEH in a kinship care arrangement with WD.

[178] For the sake of completeness, I also considered the level of risk of harm to AH that DEH might constitute in any possible kinship care arrangement with WD. I accepted the threshold test was satisfied in respect of both parents for the reasons stated in paras [158] and [159]. However, in deciding whether kinship care with WD was adequately assessed and excluded and permanence proved to be necessary, I separately considered whether the evidence of the psychologists demonstrated that either or both parents posed a risk of physical or psychological harm to AH, in the context of possible kinship care. This issue was not directly addressed by Ms Loudon, I assume because she discounted kinship care as unrealistic, for reasons I do not accept. Dr Reynolds considered the question of risk to AH from DEH in her report in the context of rehabilitation with the parents. However, I considered what she said about the level of risk remained relevant in the context of kinship care with WD, if DEH was allowed contact with AH in the future. I noted and accepted what Dr Reynolds said in relation to DEH:

“Issue of lower risk to biological children than to stepchildren

The leading researchers in this field, Daly and Wilson, 2001 cite that in Canada, the police database indicate that children under the age of 5 who were residing with their biological fathers were beaten to death by their biological fathers at a rate of 2.6 deaths per million child[ren]. In contrast the corresponding rates of lethal abuse by stepfathers was over 120 times greater at 321.6 deaths per million child[ren] (Daly &

Wilson 2001). In the United Kingdom, Iain Duncan Smith, head of the Centre for Social Justice think-tank, talked of 'the increasing phenomenon of non-biological guesting or substitute fathers.' He added: 'Children living with their natural mother and a guest father are eight times more likely to be on the at-risk register.'

Conversely it would be predicted that there would be *a significantly lowered risk* of physical violence from [DEH] to his biological son." [Emphasis added]

Dr Johnstone in her report indicates that she was asked to comment upon the level of risk posed by DEH to his biological son AH. Separately, she was asked to comment on the risk to AH should he reside in the same household as his parents and the question put was whether: DEH would, or is likely to, assault his biological son, AH. Dr Johnstone said:

"Whilst he [DEH] may have a closer bond to his biological son, he has repeatedly identified that his feelings for his stepchildren were very positive and loving. As such, DEH should be viewed as posing the same types of risk to children in his care."

Dr Johnstone only considered the question of risk to AH in the context of rehabilitation, not in the context of contact as part of a kinship care arrangement. However, even if Dr Johnstone's opinion about level of risk applied to contact in the context of kinship care, I prefer the opinion of Dr Reynolds on the question of level of risk posed by DEH to his biological son, to the structured professional judgment approach of Dr Johnstone which makes no reference to empirical research and which seems to me to be a bare *ipse dixit* assertion without reasoning which carries no weight, *Kennedy v Cordia (Services) 2016 S.C.* (U.K.S.C.) 59:

"[48] An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or 'bare *ipse dixit*' carries little weight, as the Lord President (Cooper) famously stated in *Davie v Magistrates of Edinburgh* (p 40). If anything, the suggestion that an unsubstantiated *ipse dixit* carries little weight is understated; in our view such evidence is worthless. Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* (p 371):

'[A]n expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an

expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'

As Lord Prosser pithily stated in *Dingley v Chief Constable, Strathclyde Police* (p 604): 'As with judicial or other opinions, what carries weight is the reasoning, not the conclusion.'

Given the radical difference in the opinions expressed both experts cannot be right in this matter. I considered Dr Johnstone's opinion in relation to the risk DEH poses to his biological son to be of no assistance. It lacked any convincing analytical content and amounted to no more than an oracular pronouncement. The failure of Dr Johnstone to state adequate reasons for her opinion in this regard reduced her standing as an expert before the court. A structured professional judgment approach to the assessment of risk is no excuse for a failure to give sufficient and persuasive reasons in support of an important conclusion. Dr Reynolds was jointly instructed by parties. Ms Louden did not dispute, before me, the relevance or validity of the empirical research material Dr Reynolds based her opinion on. I did not accept the opinion evidence of Dr Johnstone that DEH poses the same risk of harm to AH as to his stepchildren. I concluded that in any context there would be a significantly lowered risk of physical violence from DEH to his biological son.

[179] A significantly lowered risk of harm is nonetheless a risk of harm and I agree with SWD that AH cannot be experimented with. However, a significantly reduced risk can be managed or even excluded if thought appropriate; precautions can be taken and strategies can be devised to manage a significantly reduced risk of harm. Importantly in all the time AH has been in accommodated care and had contact with his parents there has been no suggestion they have shown him malice or ill-will.

[180] I must stress however, it is not for me to assess and evaluate these matters if permanence is refused. I can only say what will not happen to AH, if I conclude permanence has not been demonstrated to be necessary. I cannot say what will happen to him in that event. Responsibility and jurisdiction for that rests entirely with SWD and the Childrens Hearing. The Childrens Hearing can order an independent parenting assessment of WD, if thought appropriate. Equally the Childrens Hearing can make its own independent judgment in relation to the level of risk DEH may pose to AH, if kinship care with WD is explored and sanctioned. Also, with regard to EAH the Childrens Hearing can make its own risk assessment if she is to be allowed contact with AH in the context of any kinship care arrangement.

[181] Ms Loudon further submitted that if this order was not granted AH could be in long term foster care which would not be in his best interests. She said the only alternative to a permanence order being made is that AH will remain subject to compulsory supervision and in the care of foster carers on a fostering basis, which would at some stage, as yet undetermined in the future, involve a move from his current short-term foster carers. She submitted that compulsory supervision orders provide legal, but not long-term security as they necessitate Children's Hearings, they must be reviewed every year, in fact may be reviewed much more frequently and substantive decisions of Childrens Hearings can be appealed. None of this process would be in AH's best interests, she said. Ms Trainer, on the other hand, submitted that an alternative to a permanence order being made is that AH could remain subject to a compulsory supervision order while a full and proper independent kinship care assessment is undertaken in respect of WD. Should such an assessment be positive in its terms, AH could be placed in the care of WD on a long-term basis. This would necessitate a move from his current short-term foster carers to WD. Should

such a move take place, it is not the case that he would require to remain on a compulsory supervision order throughout his childhood, which would continue to be reviewed and potentially appealed. Ms Trainer said that there is a legal route open to WD, following AH being successfully placed with her, which would ensure his long-term security. WD could seek orders from the court under section 11 of the Children (Scotland) Act 1995 conferring upon her parental rights and responsibilities in respect of AH and making a residence order securing the long-term placement of him, in her care. It is therefore not true, Ms Trainer said, to say that the only long-term route for AH following the refusal of the order applied for is that his care would be regulated by compulsory supervision.

Conclusion on permanence

[182] I concluded that there is an unusual and complex factual matrix in this case where actual harm to AH has not occurred because he is subject to compulsory measures of care under supervision in foster care. The father, DEH, is unwilling or incapable of admitting his guilt of assault on his stepchildren, AS and KT. The mother, EAH, is hopelessly conflicted between her love and loyalty for her husband and her love and responsibility to protect her children. The interested party, WD, to a lesser extent but with intelligent insight is torn between her love and loyalty for her brother and her love of her nephew whom she wants to be part of his biological family. With regard to disposal the casual, half-interested and uninformed observer might conclude the simple and easy solution is for the court to reach into this miasma, cut the Gordian knot, extract the innocent child and have him placed for adoption. That particular instant social engineering test has not yet reached the judicial toolbox and is not one I care to apply. Today's quick and easy solution may turn out to be tomorrow's deeply regrettable mistake. In a holistic assessment, which includes recognising

and giving practical effect to AH's right to a family life, I have to focus on the need to safeguard and promote AH's welfare throughout his childhood as the paramount consideration. As Lady Hale stated in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 W.L.R. 1911:

"198 Nevertheless, it is quite clear that the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do. In many cases, and particularly where the feared harm has not yet materialised and may never do so, it will be necessary to explore

and attempt alternative solutions. As was said in *In re C and B* [2001] 1 FLR 611 , para 34, "Intervention in the family may be appropriate, but the aim should be to reunite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child."

In the same case it is worth referring to what was said by Lord Wilson in relation to proportionality:

"33 In a number of its judgments the European Court of Human Rights ("the ECtHR") has spelt out the stark effects of the proportionality requirement in its application to a determination that a child should be adopted. Only a year ago, in *YC v United Kingdom* (2012) 55 EHRR 967 , it said, at para 134:

"The court reiterates that in cases concerning the placing of a child for adoption, which entails the permanent severance of family ties, the best interests of the child are paramount. In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and secondly, it is in the child's best interests to ensure his development in a safe and secure environment. It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. However, where the maintenance of family ties would harm the child's health and development, a parent is not entitled under article 8 to insist that such ties be maintained."

Although in that paragraph it did not in terms refer to proportionality, the court had prefaced it with a reference to the need to examine whether the reasons adduced to

justify the measures were relevant and sufficient, in other words whether they were proportionate to them.”

I deliberately based my conclusion in this case on an intense level of scrutiny of the witnesses led and the facts established. Central to my decision is the failure, in my opinion, of the petitioner’s SWD to conduct an adequate independent kinship care assessment of WD. Notwithstanding that failure, I have concluded that irrespective of how WD might have come over in an independent SWD assessment, had that been adequately carried out; or whatever impression she might have made or whatever evaluation of her might have been made in that event, a decision had already been taken about her. WD, as the sister of DEH was not to be trusted, based on the reasons set out in the letter of 19 August 2016 and that judgement was not made after an independent assessment of her qualities or ability to protect AH from harm and promote his welfare. While I can understand that the SWD rightly will not take chances with the safety of any child, in making my decision I have to balance the conflicting considerations in this case in a holistic way in making a judgment. I must recognise the right of AH to a family life and consider whether the permanent severance of AH’s connection with his family is a necessary and proportionate measure in the circumstances of this case. The petitioner has failed to persuade me that permanently severing AH’s connection with his family is necessary and that he must be put up for adoption. I have kept at the forefront of my deliberations the need to safeguard and promote the welfare of AH throughout his childhood as the paramount consideration in terms of section 84(4) of the Act. I have had particular regard to AH’s religious persuasion, racial origin and cultural and linguistic background, and the likely effect on him of the making of a permanence order in terms of section 84(5) of the Act, with particular regard to what he will lose if this order is granted. In terms of section 84(3) of the Act, unless I am satisfied that

it would be better for AH that the order be made than that it should not be made, I am not empowered to make a permanence order, in fact, I am specifically prohibited from so doing. Section 84(3) of the Act I consider to be an important statutory protection in favour of preserving AH's right to a family life. The legal effect of the provision disempowers the court from severing the connection between AH and his family, in a case where the threshold test is passed but a realistic and viable less draconian and more proportionate option is available, which has not been excluded. In short permanence with authority to adopt must be better for AH, than the realistically available other options. In this case, in my judgement, AH does not need to be made subject to a permanence order because it has not been demonstrated on the evidence that kinship care within his wider family, with WD, is not a viable realistic alternative. Kinship care is a realistic and viable alternative in this case. This is a case where it is necessary in the words of Lady Hale 'to attempt and explore alternative solutions'. WD's offer of kinship care is not just an expression of hope. Her own children are thriving. She enthusiastically wants to and is capable of performing the role, which she has successfully performed in relation to her own children. There is no physical or mental impediment to that and her 'family dynamic', in my judgment, is not an obstacle to safe kinship care for AH. There are significant religious, racial, cultural and linguistic factors which lead me to the conclusion that the petitioners have failed to satisfy me that it would be better for AH that the permanence order be made than that it should not be made.

[183] Thereafter, whatever compulsory measures of care and supervision are necessary to protect AH and whether he is placed in kinship care with WD is a matter for SWD and the Childrens Hearing system to judge. Whether contact with DEH and EAH is sanctioned, what the level of risk involved is and what protective factors are necessary, if any, are also matters for the SWD and the Childrens Hearing to assess. I hope the Childrens Hearing

takes a very active role in considering the suitability of WD as a kinship carer and keeps in mind the views expressed at para [182] above quoted by Lord Wilson "...that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family."

The ancillary orders sought

[184] Had I reached the conclusion that permanence was necessary I would, in that event, have required to go on to consider the ancillary orders sought by the petitioner. These orders are profoundly important because they extinguish each of the parents' natural legal rights and responsibilities to control and determine AH's future and invest these in the petitioner, save for the limited right to have contact with AH, if appropriate (section 82 of the Act). Specifically, the applicant seeks authority for AH to be adopted (section 83 of the Act) and an order that the compulsory measures of supervision in place in relation to AH shall cease to have effect in which case AH will no longer be subject to the jurisdiction of the Children's Hearing (section 89(1)(b) of the Act). These ancillary orders make the permanence order workable and if granted will further AH's journey towards adoption. However, neither parent consents to AH being placed for adoption, which they are entitled so to do. Accordingly, the petitioner asks the court to dispense with the consent of both parents on the basis that they are each incapable of discharge or exercise of parental rights and responsibilities and are likely to continue to do so (section 83(3) of the Act). Alternatively, should either or both parents not be so held incapable, their consent according to the petitioners should be dispensed with on the basis that AH's welfare requires the parents' consent to be dispensed with.

[185] Had I held that permanence was necessary and that nothing else in AH's case would do, I would have given effect to the ancillary vesting orders which are necessary to make the

permanence order work. I would have given effect to the consequential order removing AH from the jurisdiction of the Children's Hearing and freeing him from compulsory measures of care which would have no longer been necessary. In relation to parental consent and post-permanence/adoption contact I would have proceeded as set out below. I deal with each parent's consent separately. I shall deal with contact in relation to the parents and WD together.

Parental consent DEH

[186] The law in this matter is discussed in *Fife Council v M* [2015] CSIH 74; 2016 S.C. 169 which refers to the analysis of Lord Reed in *S v L* 2013 SC (UKSC) 20. In the first instance in deciding whether to dispense with parental consent to authority to adopt I require to make an evaluative judgment in relation to whether DEH can satisfactorily discharge his parental rights and responsibilities. That is an objective test.

[187] In relation to DEH the evidence before me disclosed he was convicted of assault of his two stepchildren. He is unwilling or unable to admit his guilt. The expert opinion is that he poses an unacceptable risk of harm to AH, in those circumstances, if AH is rehabilitated with him. DEH denies his guilt and that denial is an insurmountable barrier to manage his risk. DEH has not attended for parenting classes and even if he did they would be pointless given his state of denial. There is a complete impasse. Had I found permanence was necessary I would have gone on to accept the evidence of Dr Reynolds, Ann Garson and Emma Sage that AH needs to move on and that the clock is ticking for him. I would have held that it is better for him to be placed for adoption having regard to his long-term interests rather than remain within the care system. I would have held that in refusing to admit his guilt DEH is putting his own interest before those of his child. I would have

accepted the evidence of Dr Reynolds that even though he has been convicted and sentenced DEH cannot admit his guilt through fear of losing face within his family and community and even if he did there would be no guarantee he would secure the return of his son that way. I would have held that in behaving in this way DEH had demonstrated he is incapable of exercising or discharging his parental rights and responsibilities and as such I would have dispensed with his consent to authority to adopt.

[188] In the event I was plainly wrong in reaching that conclusion I would have reached the same conclusion for the same reasons, had I required to, in terms of the welfare test contained in section 83(2)(d) of the Act. I would have concluded that the impasse cannot stand in the way of AH's welfare. I would have taken the approach suggested in *Fife Council v M* applying *S v L* which frames the issue within the familiar necessity paradigm:

“As the decision whether to dispense with parental consent is a decision relating to the adoption of a child, the word ‘welfare’ has to be read in the context of the provisions of section 14 of the 2007 Act. Accordingly, in reaching its decision whether to dispense with parental consent on the welfare test, the court must regard the need to safeguard and promote the welfare of the child throughout the child's life as the paramount consideration (section 14(3)). The court must also have regard to the specific matters listed in section 14(4) so far as is reasonably practicable. These are: (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. Lord Reed went on to note (*S v L*, para 32) that the court may dispense with the appellant's consent only if it is satisfied that the welfare of the child ‘requires’ it. This imposed a high test. The word ‘requires’ should be given its ordinary English meaning: ‘to say that something is required means that it is not merely desirable or reasonable, but that it is necessary.’ The making of an adoption order against the wishes of a parent is a very serious intervention by the state in family relationships. The court will not lightly authorise such intervention. ‘It did not require the Convention to teach us that.’ (Para 33.) Lord Reed quotes from *Re S-B (Children) (Care Proceedings: Standard of Proof)* (paras 6, 7):

‘In this country we take the removal of children from their families extremely seriously.[It] is not enough that the social workers, the experts or the court think that a child would be better off living with another family. That would be social engineering of a kind which is not permitted in a democratic society.’

Severing family ties between parents and their children will not readily be construed as setting anything less than a test of necessity. Lord Reed continued (para 34): 'There must, in other words, be an overriding requirement that the adoption proceed for the sake of the child's welfare, which remains the paramount consideration. The court must be satisfied that the interference with the rights of the parents is proportionate: in other words that nothing less than adoption will suffice. If the child's welfare can be equally well secured by a less dramatic intervention, then it cannot be said that the child's welfare "requires" that consent to adoption should be dispensed with.'

Parental consent EAH

[189] In relation to EAH the evidence disclosed that she was complicit in the abusive conduct of DEH towards AH. She tolerated the abuse, by him, of her older children. The expert opinion is that without intensive professional advice and supervision rehabilitation to EAH would be seriously detrimental to AH. She has shown little enthusiasm for attending parenting classes. She has a manifest lack of empathy for her children and steadfastly supports DEH in his denial. Had I found permanence was necessary I would have gone on to accept the evidence of Dr Reynolds, Ann Garson and Emma Sage that AH needs to move on and that the clock is ticking for him. I would have held that it is better for him to be placed for adoption having regard to his long-term interests rather than remain within the care system. I would have held that in her complicity in DEH's guilt, EAH is putting her own interest before those of her child. Before me she said she wants to be considered as an individual for a parenting assessment. As I indicated before I did not believe this ruse. In making an evaluative judgment about her ability to discharge and exercise her parental rights and responsibilities I would have concluded she is incapable of so doing in relation to AH and her behaviour demonstrates that. Accordingly, in her case I would have dispensed with her consent to authority to adopt.

[190] In the event I was plainly wrong in reaching that conclusion I would have reached the same conclusion for the same reasons, had I required to, in terms of the welfare test contained in section 83(2)(d) of the Act and taken the approach suggested in *Fife Council v M* applying *S v L* to reach that result.

Contact with DEH, EAH and WD

[191] Had I concluded that permanence was necessary I would have gone on to hold that authority to adopt was also necessary for the reasons stated above. In that event I would have accepted the evidence of Dr Reynolds, Ann Garson and Emma Sage about the need for AH to move on with his life story. I would have concluded that given the natural parents' attitudes to date it is very unlikely they will relinquish their parental bond with AH and in that event direct contact with him in an adoptive placement would not work. I would also have been concerned about the impact that allowing direct contact would have on AH's chances of adoption. I accepted the evidence of Dr Reynolds and Emma Sage that adopting parents do not welcome such direct contact. I would also have accepted Dr Reynolds' evidence that post-permanence and pre-adoption contact should be scaled down in the first instance to once per month, to prepare AH for the next move in his life. I would have accepted Dr Reynolds' evidence that in AH's case indirect contact once or twice a year was necessary to safeguard and promote AH's welfare throughout his childhood. She said a story book would be created which would provide a connection between AH and his past. I can see no good reason to exclude WD from that indirect contact, as AH would on this scenario inevitably find out about his past when he gets older. WD is an important part of AH's wider family and for that reason I would have ordered she be included in the indirect contact.

Expenses

[192] In a case like this between a public authority and assisted persons I do not consider an award of expenses to be appropriate.