SHERIFF APPEAL COURT

[2019] SAC (CIV) 20
PHD-AD19-17

Sheriff Principal M Stephen QC
Sheriff Principal CD Turnbull
Appeal Sheriff WH Holligan

OPINION OF THE COURT

delivered by

APPEAL SHERIFF WILLIAM HOLLIGAN

in the appeal by

DK

Appellant
(and Respondent at first instance)

against

AB and CD

Respondents to the Appeal
(and Petitioners at first instance)

Appellant: Aitken, advocate; Livingstone Brown
Respondent: McAlpine, advocate; Grant Smith Law Practice

9 April 2019

Introduction

[1] This action involves the child L who is nearly three years old. At Peterhead Sheriff Court the respondents to this appeal lodged a petition seeking an order in terms of the Adoption and Children (Scotland) Act 2007 ("the 2007 Act") authorising them to adopt L ("an AO"). By interlocutor dated 19 December 2018 the sheriff granted the prayer of the petition and this appeal is against that interlocutor. In order to avoid confusion, in this

opinion we shall refer to the respondents to the appeal as the petitioners (who are husband and wife) and we shall refer to the appellant as the respondent.

[2] L's mother is AG. L's birth certificate recorded his parents as being AG and father as JM. The latter was not true. The respondent is L's natural father. The respondent raised an action seeking a declarator of paternity. Decree in his favour was granted on 12 May 2017 at Peterhead Sheriff Court. The respondent and AG are not and never have been married to each other. There is no agreement between them as to parental rights and responsibilities ("PRRs") in terms of the Children (Scotland) Act 1995 ("the 1995 Act"). He is not named upon the birth certificate. The declarator of paternity in his favour does not of itself confer PRRs; he does not have PRRs in relation to L. In or about October 2017 the respondent raised an action seeking PRRs but, in the meantime, proceedings seeking a permanence order with authority to adopt ("POA") were raised by the local authority. Before the respondent's action seeking PRRs was disposed of decree in relation to the POA was granted on 1 November 2017 (see also section 11A of the 1995 Act restricting the making of orders under section 11 when a POA is in force). Read short, (referring to the 1995 Act) the POA vested in the local authority the parental responsibility to provide guidance (section 1(1)(b)(ii)); the parental right to regulate the child's residence (section 2(1)(a)). The POA vested the following ancillary provisions in the petitioners (described as the "prospective adopters"): the parental responsibility to safeguard and promote the child's health, development and welfare (section1(1)(a)); the parental responsibility to provide direction in a manner appropriate to the child's stage of development (section 1(1)(b)(i)); the parental right to control, direct or guide the child's upbringing in a manner appropriate to the stage of development of the child (section 2(1)(b)); the parental responsibility and corresponding right to act as the child's legal representative in terms of sections 1(1)(d) and 2(1)(d). The

order went on to extinguish the PRRs of AG and JM with the exception of the parental responsibility and right of contact. The order provided that there be no direct contact between L and AG and JM. It did provide for indirect two-way letterbox contact once per year between L and AG and the respondent. It revoked the compulsory supervision order which related to L and also:

> "Dispensed with the consent of [AG], the mother of the child and [JM], the legal father of the child on the grounds that they are unable to satisfactorily discharge their parental responsibilities and parental rights and are likely to continue to be unable to do so, all in terms of Section 83(3) of the Act;
> Granted authority for the child to be adopted in terms of Section 80(2)(c) of the Act".

[3] It is not in dispute that the respondent was served with the appropriate documents in relation to the POA proceedings. He failed to enter appearance. The precise circumstances in which that came to pass are unclear. As a matter of fact the respondent has had limited involvement in L's life. L has never been in his care. The only contact he appears to have had was very limited, extending to no more than four or five visits of reasonably short duration when L was aged about six months (October 2016). L has lived with the petitioners since 24 August 2017.

[4] The petition for an AO was raised on 12 January 2018. We will return to the procedure adopted in this matter in more detail. For present purposes it is sufficient to say that the respondent received certain documents in relation to the petition. He instructed solicitors to enter process. In her note dated 7 February 2019 ("the February 2019 note") the sheriff records the procedure taken before her. The petition was initially opposed by AG and the respondent. AG failed to attend a number of hearings and did not arrange legal representation. The matter proceeded upon the basis that AG was no longer insisting upon her opposition. The sheriff records that the respondent, having failed to enter process in opposition to the POA, lodged with the Sheriff Appeal Court a motion to allow him to

appeal although late. In April 2018 that motion was refused. The petition called for the first time as a preliminary diet on 7 March 2018. At a further diet held on 30 May, the petitioners were ordered to lodge a rule 16A statement and the respondent to lodge answers. On 30 May the sheriff allowed a proof and assigned 13 and 14 September as a diet, notes of disputed issues were ordered and a pre proof hearing assigned for 27 June 2018. The pre proof hearing was continued to 25 July 2018. There was sundry procedure in relation to a specification of documents which is irrelevant to the present proceedings. The sheriff records that on 24 August 2018 she:

> "…indicated to parties that having reconsidered all paperwork in this case I was concerned [the respondent] was advancing and the petitioners were preparing to respond to a case which could not be dealt with within the context of this adoption petition, being as it was an application following on from the granting of a [permanence order] with authority to adopt… I advised parties that on the state of pleadings to date it was my view [the respondent] was seeking to have the court reconsider the issue of adoption *per se*. I advised that I did not consider that that was competent".

[5] The sheriff went on to say that, in her opinion, the only way in which adoption could be looked at again was if the court was persuaded to revoke the POA. In order to do so the respondent would require to lodge an application seeking leave to pursue such an application. The sheriff then discharged the proof and assigned a further diet on 25 October.

[6] The sheriff issued a lengthy note dated 6 September 2018. In that note (at paragraph 8) the sheriff repeated her view that a "...very important circumstance to be taken into consideration by the court… was the fact that a PO with authority for adoption had already been granted. It now appeared that [the respondent] was seeking, in the context of these adoption proceedings, to persuade the court that, had he been a party to the POA proceedings, the threshold test would not have been met regarding his parenting; therefore on this basis, supported by a positive current parental assessment he would argue that the

adoption order should not be granted". In the opinion of the sheriff if the respondent was successful in persuading the court to refuse the petition for adoption, the POA would still remain in force and he would remain devoid of any parental rights. Accordingly, in the sheriff's opinion, he would require to have the court revoke the POA and to do so he would require leave of the court to make such an application. The sheriff went on to say (at paragraph 9) "It is now clear to the court that this is what [the respondent] should proceed to do". The sheriff anticipated that, were proceedings taken in relation to the permanence order (in terms of section 93 of the 2007 Act) the petition for adoption would be sisted pending the outcome. At paragraph 14 of her note the sheriff recorded that if the respondent elected not to raise proceedings under section 93 she would proceed to determine the adoption petition on the date the matter next called. The respondent then lodged an application seeking leave to apply for variation/revocation of the POA. On 31 October 2018 the sheriff heard the application for leave to apply to have the POA varied/revoked which she refused. It is not necessary for us to record her reasons for so doing. On 1 November 2018 the sheriff issued a note advising it was her intention to grant the petition to adopt but giving parties a final opportunity to address her. A date was assigned for 19 December 2018 and upon that date the order was granted.

[7] The procedural course which the petition took was not one urged upon the sheriff by either party. Indeed, it is fair to record that both parties disagreed with the analysis of the sheriff and urged her to proceed with a proof involving the respondent. In the February 2019 note the sheriff sets out her reasoning. In summary, she repeated her view that the question of adoption had been dealt with and could not be revisited in the context of the petition. The sheriff stated (at paragraph 7 – there is an error in the numbering) it was clear that it was "not the intention of parliament to consider whether the child be removed from

its' natural family and whether adoption in principle be the best course for the welfare of the child throughout its's childhood and life on more than one occasion (sic)". During the course of these proceedings it came to light that the respondent had against him outstanding criminal charges and that, if convicted, he might receive a custodial sentence. The sheriff records that it was submitted to her she was not entitled to take allegations into account when determining whether the threshold test had been met. Although the sheriff accepted that the threshold test cannot be established on the basis of unsubstantiated suspicions she was of the view that was not the situation in circumstances where criminal proceedings of a serious nature had been taken against the respondent and a date fixed for trial. The sheriff recorded the respondent wanted to provide alternative care for the child but had not suggested what evidence might be led to that effect. She was of the opinion that such evidence cannot be led. In her view the case management powers of a sheriff obliged her not to permit parties to lead evidence that will not assist in the resolution of the issue before the court.

[8] The respondent appealed against the adoption order. In substance, the petitioners do not oppose the appeal. The orders sought by the respondent are to allow the appeal and to remit the case to a different sheriff with a direction of that the sheriff hold a pre proof hearing (or perhaps more appropriately a preliminary hearing). Given the lack of opposition to the respondent's appeal the respondent lodged a motion, not opposed, to allow the appeal and remit the matter to the sheriff. This court declined to do so. The appeal could not be allowed without some consideration being given by this court as to whether a direction should be given as to the correctness of the sheriff's analysis of the effect of a POA and a direction as to the conduct of further proceedings. It was accepted by both parties that this appeal raised several important issues, procedural and substantive, upon

which there is little or no authority. Giving direction to the sheriff requires careful consideration.

Issues

[9] Before turning to the issues it is necessary to set out certain parts of the relevant statutory provisions. Dealing first with the 2007 Act:

> **"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 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.
> …
> **28 Adoption orders**
> (1) An adoption order is an order made by the appropriate court on an application under section 29 or 30 vesting the parental responsibilities and parental rights in relation to a child in the adopters or adopter.
> (2) The court must not make an adoption order unless it considers that it would be better for the child that the order be made than not.
> (3) An adoption order may contain such terms and conditions as the court thinks fit.
> …
> **31 Parental etc. consent**
> (1) An adoption order may not be made unless one of the five conditions is met.
> …
> (7) The second condition is that a permanence order granting authority for the child to be adopted is in force.
> …
> **40 Status conferred by adoption**
> (1) An adopted person is to be treated in law as born as the child of the adopters or adopter.
> …

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.

81 Permanence orders: mandatory provision

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

(a) the responsibility mentioned in section 1(1)(b)(ii) of the 1995 Act… and

(b) the right mentioned in section 2(1)(a) of that Act…

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 the 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.

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 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.

…

92 Variation of ancillary provisions in order

(1) This section applies where a permanence order which includes ancillary provisions is in force.

(2) The appropriate court may, on an application by a person mentioned in subsection (3) vary such of the ancillary provisions as the court considers appropriate.

…

114 Rules of procedure

(1) Provision may be made by rules of court in respect of any matter to be prescribed by rules made by virtue of this Act and dealing generally with all matters and procedure.

(2) In the case of an application for an adoption order, the rules must require –

(a) any person mentioned in subsection (3) to be notified of the matters mentioned in subsection (4), and;

(b) the person mentioned in subsection (5) (if he can be found) to be notified of the matters mentioned in paragraphs (a) and (b) of subsection (4).

(3) Those persons are –

(a) every person who can be found and whose consent to the making of the order is required to be given or dispensed with under this Act or, if no such person can be found, any relative prescribed by rules who can be found…

(4) Those matters are –

(a) that the application has been made,

(b) the date on which, and place where, the application will be heard;

(c) the fact that the person is entitled to be heard on the application, and;

(d) the fact that, unless the person wishes, or the court requires, the person need not attend the hearing.

(5) The person is the father of the child to be adopted if he does not have, and has never had, parental responsibilities or parental rights in relation to the child.

[10] The adoption rules are to be found in the Act of Sederunt (Sheriff Court Rules Amendment)(Adoption and Children (Scotland) Act 2007) 2009 ("the 2009 Rules"). The relevant parts of those rules are as follows:

"**4 Power of sheriff to make orders etc.**

(1) The sheriff may make such order as he thinks fit for the expeditious progress of an application under the 2007 Act…

…

14 Intimation of application

(1) On the lodging of a petition under rule 8 –

(a) the sheriff clerk must fix a date for a preliminary hearing, which must take place (except on cause shown) not less than 6 and not more than 8 weeks after the date of lodging the petition;

(b) in the case of a petition under rule 8(1) the petitioner, or where a serial number has been assigned under rule 10, the sheriff clerk must send a service copy of the petition in Form 1A along with a notice of intimation in Form 5 to –

(i) every person who can be found and whose consent to the making of the order is required to be given or dispensed with under the 2007 Act;

…

(d) in the case of a petition under rule 8(1) the petitioner or, where a serial number has been assigned under rule 10, the sheriff clerk must send a service copy of the petition in Form 1A along with a notice of intimation in Form 6 to the father of the child if he does not have, and has never had, parental responsibilities or parental rights in relation to the child and if he can be found;

…

(f) the sheriff may order the petitioner or, where a serial number has been assigned under rule 10, the sheriff clerk to intimate the application to such other person and in such terms as he considers appropriate…

15 Orders for intimation

In any application for an adoption order… the sheriff may at any time order intimation to be made in such terms as he considers appropriate on any person who in his opinion ought to be given notice of the application.

16 Form of response

(1) Any person who has received intimation of an application by virtue of rule 14 or 15 and who intends to oppose that application shall lodge a form of response in Form 8 not later than 21 days after the date of intimation of the application or such other period as the sheriff may direct.

(2) A form of response under paragraph (1) –

(a) must contain a brief statement of the respondent's reasons for opposing the application but shall be without prejudice to any answers lodged under rule 18(1)(b)(ix).

…

16A Opposed applications

Within 14 days of a form of response being lodged, the petitioner shall lodge and intimate to all other parties a brief statement in numbered paragraphs setting out the facts upon which the petitioner intends to rely including averments in relation to –

(a) considerations under section 14 of the 2007 Act;

(b) terms and conditions under section 28(3) of the 2007 Act;

(c) consent under section 31 of the 2007 Act.

…

18 Preliminary hearing

(1) At the preliminary hearing the sheriff must –

(a) if no form of response has been lodged under rule 16, dispose of the case or make such other order as he considers appropriate;

(b) if a form of response has been lodged –

(i) ascertain the nature of the issues in dispute, including any questions of admissibility of evidence or any legal issues;

(ii) ascertain the names of all witnesses…

(iii) consider the scope for use of affidavits and other documents in place of oral evidence…

(vi) order the lodging of joint minutes of agreement, affidavits, expert reports…

(vii) fix a diet of proof not less than 12 and not more than 16 weeks after the date of the preliminary hearing or any continuation thereof unless, on cause shown, a longer period is appropriate;

(viii) fix a pre-proof hearing not less than 6 and not more than 8 weeks before the diet of proof;

(ix) order answers to the statement referred to in rule 16A to be lodged within 14 days of the date of the preliminary hearing or any continuation thereof or such other period as the sheriff considers appropriate…

19 Pre proof hearing

(1) The parties must provide the sheriff with sufficient information to enable him to conduct the hearing as provided for in this rule.

…

(2A) At the pre-proof hearing the sheriff must ascertain, so far as is reasonably practicable, whether the case is likely to proceed to proof on the date fixed for that

purpose, whether the appropriate number of days have been allowed and if further days may be required.
(3) At the pre-proof hearing the sheriff may –
(a) discharge the proof and fix a new date for such proof;
(b) adjourn the pre-proof hearing;
…
(d) make such other order as he thinks fit to secure the expeditious progress of the case including restricting the issues for proof and, on the motion of either party, on cause shown, or of the sheriff's own motion, excluding specified documents, reports and/or witnesses from proof".

[11] The February 2019 note raises sharply the issue as to the interaction between a POA and an AO. At the outset, it is appropriate to consider the relevant statutory provisions relating to an AO. Section 28(1) of the 2007 Act describes what an AO is and what it does – an order vesting the PRRs in relation to a child in the prospective adopters. Section 28(3) gives to the court the power to make an order subject to such terms and conditions as the court thinks fit. The exercise of the power is qualified to the extent described in section 31(1) (parental consent), section 28(2) ("the no order principle") and sections 14(2)-(4)). Consideration of section 31(1) comes first because if it is not satisfied the court cannot proceed further. Section 31 addresses the question of parental consent. Read short, it deals with circumstances when parental consent is forthcoming, and dispensation with such consent when it is not. In the present case it is section 31(7) which applies: a POA is in force. It follows that where section 31(7) is satisfied the condition as to consent is met.

[12] Authority to adopt is part of a PO (section 80(2)(c)). POs were introduced by the 2007 Act following the publication of the Adoption Policy Review Group ("the Review Group") to which we were referred ("Adoption: Better Choices for Our Children, Adoption Policy Review Group: Report of Phase II", Scottish Executive, Edinburgh 2005). Put briefly, the Review Group carried out a comprehensive review of the law of adoption in Scotland and made a series of recommendations. It is important to recall that the subject matter of the

Review Group was the needs of children who cannot be brought up by their families (paragraph 1.1). They carried out a review of the law as it related to children, including orders freeing a child for adoption contained within the Adoption (Scotland) Act 1978 ("the 1978 Act"). In order to resolve the issue before this court it is appropriate to consider the evolution of a POA.

[13] It was the 1978 Act which introduced into Scots law freeing orders. The introduction arose following a series of recommendations made following a Report of the Departmental Committee on the Adoption of Children (Cmnd. 5107, 1972) more commonly known as the Houghton Report. The committee was a UK committee established, *inter alia*, to look at the law of adoption and to make proposals for reform. The freeing order was introduced to address two circumstances. Firstly, there were cases when the natural mother was willing to give up the child for adoption from an early stage. There was no mechanism for this to be done other than the normal, lengthy adoption process which led to continued anxiety and distress to both the natural mother and the intended adoptive parents (paragraphs 168-169). The second category related to children who had been in long term care whose parents would not consent. In the absence of an identified adoptive parent there was, again, no mechanism for early resolution. The adoption process was the only mechanism. A child might be placed only for that placement to be terminated (paragraphs 223-4). The solution to both these problems was the introduction of a procedure (called "relinquishment") whereby consent could be dealt with before an adoption order was made. It was recognised that, notwithstanding the making of such an order, there might yet be consideration given to the interests of unmarried fathers in later adoption proceedings (paragraph 196).

[14] The Review Group considered freeing orders and noted both their advantages and disadvantages (paragraphs 5.5 and 5.6). Amongst the advantages were the avoidance of

direct conflict in court between the adopters and birth parents and the provision of a mechanism for both parents to consent to adoption at an early age. One of the disadvantages of the freeing system was that it entailed a clean break with the birth family, a consequence which the Review Group felt was no longer appropriate. The Review Group recommended the retention of a "pre adoption order" (paragraph 5.7). It is of note the Review Group anticipated that a parent would retain the right to be heard in the subsequent adoption process "not in relation to consent to adoption, but in relation to contact and similar issues relating to the welfare of the child, unless the court authorising placement has ordered that the parent should not be heard in relation to any such matter." (paragraph 5.28). The Review Group also made a number of recommendations as to unmarried birth fathers without PRRs (paragraphs 5.54-5.57). Drawing on the experience of freeing orders the Review Group recommended that unmarried fathers without PRRs should be informed by local authorities and the courts following the applications for POs and AOs. Such fathers would then be entitled to be heard on welfare issues but they did not recommend that an AO should require the consent of an unmarried birth father without PRRs. The report of the Review Group was followed by a bill, *inter alia*, to reform the law of adoption in Scotland which became the 2007 Act.

[15] Returning to the legislation, there is a degree of similarity between the provisions relating to a POA and an AO. Section 83(1)(c) and (2)-(4) and section 31(2)-(4) relate to parental consent. Section 83(1)(c)(i) refers to parental understanding of the effect of the making of an adoption order (emphasis added), that is the parents are consenting to the making of an adoption order not an order with authority to adopt. The no order principle in section 83(1)(d) refers to it being better for the child that authority be granted than not, not that it is better to have an adoption order be granted than not; that remains to be considered

in terms of section 28(2). Section 80(1) provides that only the local authority may apply for a POA. Sections 29 and 30 make provision for applications for AOs by couples and one person. Section 80(2)(c) is silent as to whom authority is granted.

[16] In our opinion having regard to the foregoing, it is clear that the effect of a POA relates principally to parental consent. Sections 87 and 88 deal with the effect of a PO. No specific mention is made of a POA. Section 31(7) expressly provides that the making of a POA is one of the conditions which satisfy section 31(1). It is also clear that the making of a POA is not of itself an adoption order. As the history of this and the 1978 Act show it was never intended that it be so. Section 83(1)(b) provides that before the making of a POA the court must be satisfied that the child has been, or is likely to be placed for, adoption. However it is not possible to provide that adoption will automatically follow the granting of a POA, immediately or at some later anticipated date. At paragraph 6 of the February 2019 note (it is the second paragraph numbered 6) the sheriff said that a POA will not be granted unless prospective adopters have been identified. It is accepted that the sheriff was in error in so concluding (section 83(1)(b)).

[17] Once the issue of consent is addressed, in an AO the remaining statutory provisions to be addressed are contained in sections 14(2)-(4) and in section 28(2) which for ease of reference we will refer to as the "non-consent provisions". Their consent having been addressed, the natural parents may relinquish any interest in subsequent proceedings. However, as in the present case, a natural parent may wish to be involved. The issue is their entitlement to do so and the extent, if any, thereof. It is important to recall that the parent has either consented to the making of an "adoption order" or that their consent thereto has been dispensed with. It must follow that as a matter of statutory construction the factors left

for the court to consider are the non-consent provisions. The only relevant evidence can be evidence in relation thereto.

[18] At this point it is appropriate to refer to certain procedural aspects raised by this case. The petition for adoption was lodged in accordance with Form 1 of the 2009 Rules. Along with the petition, there is a report from the local authority (rule 8(3)(e)). In terms of rule 11, on the lodging of a petition under rule 8, the sheriff must appoint a curator ad litem and reporting officer. There is no obligation to appoint the reporting officer where a POA has been granted (rule 11(2)). The rules set out at length what the local authority report must contain and that includes a copy of the POA which, in the present case, contains the order for indirect contact between the child and both AG and the respondent (rule 8(3)(g)).

[19] Rules 14 and 15 set out the rules for intimation of the petition. Read short, on the lodging of a petition the sheriff clerk must assign a date for a preliminary hearing. Rule 14 prescribes intimation to particular classes of person. Rule 14(1)(b)(i) requires intimation to be made to every person who can be found and whose consent to the making of the order is required to be given or dispensed with. Consent having been already dispensed with it was not necessary under that sub rule that intimation be made to the mother of the child. Rule 14(1)(d) provides that, in the case of the respondent, intimation does require to be made to him in terms of Form 1A and Form 6. Neither Form 1A nor Form 6 includes a copy of the petition. Form 1A is brief and includes details of the petitioners and the child and that an AO is sought. Form 6 refers to a service copy of the petition. Form 6 informs the father of the application for an adoption order and that a preliminary hearing has been fixed for a specific date and time. The form does not say, in terms, what the father can or should do. In the present case where the petition was prepared by the petitioners we observe that the petition sought dispensation with the consent of AG and the respondent which, for reasons

we have given, was not necessary. We hasten to add that we have no criticism of the petitioners but it does highlight some of the difficulties for unrepresented persons preparing such documents. As was observed during the appeal, on the face of things, it does appear somewhat curious that a father who has no PRRs and never has had PRRs is entitled to intimation, whereas the natural mother is not. The foundation for rule 14(1)(d) is contained in section 114 of the 2007 Act which is quite specific in its terms. Section 114(5) requires that there be rules requiring that intimation be made to a father without PRRs. Section 114(2)(b) goes on to provide that such a father is entitled to intimation of the fact that the application has been made and the date on which, and place where, the application will be made (section 114(4)(a) and (b)). Unlike a person whose consent is required to be dispensed with, no express provision is made for him to be heard on the application (section 114(4)(c). So much is reflected in rule 14(3).

[20] However, it is important to note that rule 14(1)(f) and rule 15 each give to the sheriff the power to order intimation to such person as the sheriff thinks fit. Both rules prescribe that the sheriff may order such intimation "in such terms as he considers appropriate". The difference between the two rules is that the former arises at the stage of lodging the petition: the latter arises at a later time. For example, information may come to light following production of the report from the curator *ad litem* which suggests to the sheriff that intimation ought to be made to a particular person. In the respondent's submission the power to order intimation in terms provides a power to limit the engagement of the person to whom intimation is given. We will return to that issue.

[21] Once intimation of the petition has been effected, a preliminary hearing takes place. Rule 18(1)(b) prescribes what the sheriff must do if a form of response has been lodged. The list of requirements is extensive (rule 18(1)(b)(i)-(x)). For present purposes the most

significant is that the sheriff must assign a proof (rule 18(1)(b)(vii). Nowhere in that rule, or elsewhere, is there any express provision for disposal of a contested petition other than by way of a proof. There is no provision for the equivalent of summary decree. The rules do give to the sheriff very extensive case management powers to ensure expeditious progress of the case (rules 4(1) and 19(3)). It is unnecessary to set out all of the rules containing the case management powers. They include: ascertaining the issues in dispute (rule 18(1)(b)(i)); the lodging of joint minutes, affidavits and expert reports (rule 18(1)(b)(vi); the management of witnesses (rule 18(1)(b)(ii)). Other rules provide for more detailed statements of facts and answers (rule 16A and 18(1)(b)(ix)). Rule 19 provides for pre proof hearings. The sheriff clearly took the view that the respondent was not entitled to engagement in the process at all. Assuming that that is not correct, the question still arises as the extent to which the respondent is entitled to be engaged in the process and what relevant matters he can address. On that issue we were referred to the following authorities: *A* v *G* 2004 Fam LR 51 (a decision from 1994 but only reported in 2004); *East Lothian Council* v *LSK* 2012 Fam LR 7; *Anayo* v *Germany* (2012) 55 EHRR 5; *Re A and Others (Children)(Adoption: Scottish Permanence Orders)* [2017] EWHC 35 (Fam).

[22] *A v G* is a very short report. The case concerned an AO. The sheriff ordered intimation of the date of the hearing to the unmarried father of the child. The sheriff went on to decide that the father was not a person whose consent to the adoption required to be given or dispensed with. The father appealed to the Inner House against that decision. The appeal was refused but the Lord Justice Clerk (Ross) went on to say that the father remained someone who was entitled to be heard and "at any future hearing he will be entitled to make representations or lead evidence relevant to the welfare of the child…". What he could not do is put forward an objection to the petition in his capacity as father or guardian. The

editor to the report notes that reference was made to this case by the Lord Justice Clerk (Gill) in *West Lothian Council* v *M* 2002 SC 411 where the Lord Justice Clerk said (at paragraph [77]) that "It is true that it is competent for birth parents who have suffered a freeing order to appear in adoption proceedings relating to the child… but they may do so only where the sheriff orders service on them of notice of the hearing (*A* v *G*)". *East Lothian Council* v *LSK* concerned a POA granted by the sheriff. The sheriff held that the consent of the natural parent should be dispensed with but made provision for indirect contact. The case is of relevance, not on its merits, but because of a number of the observations made by Lady Smith (giving the opinion of the court). At paragraph [28] Lady Smith looked ahead to an application for an AO, following the grant of the POA. Lady Smith noted that the 2009 Rules (14(1)(f) or 15) provide that intimation to the natural parents may be ordered if the sheriff considers that they should be heard. Acknowledging the discretionary nature of intimation Lady Smith went on to say that it is incumbent on the court to consider whether or not, having regard to the whole circumstances including the parents' Convention rights, there requires to be such intimation. She also observed that if the PO contains a provision for contact between the child and a member of his natural family she would expect the court to intimate the adoption application to any such family member bearing in mind the article 8 rights involved. She also noted that, even if an AO has been granted, a parent may yet apply to the court for an order for contact under section 11 of the 1995 Act (as amended by section 107 of the 2007 Act). However, (at paragraph [32]) Lady Smith went on to say that the right to make representations does not include a right to lead evidence. Articles 6 and 8 do not necessarily mandate a right to lead evidence. "Fairness, and respect for family life, will not necessarily depend on the ability to lead oral evidence" (Paragraph [32]). *Anayo* v *Germany* is a decision of the European Court of Human Rights. That case involved a claim

by an unmarried father for contact with his child. The national courts held that the Civil Code granted rights only to the legal father as opposed to the biological father. The mother of the child was married to the legal father. The biological father complained that the refusal by the domestic authorities to grant him contact to his children violated his rights under article 8. At paragraph 62 the court held that the decision of the domestic courts to refuse the father contact with his children interfered with his right to respect "at least, for his private life". It was accordingly the blanket refusal to allow him contact that fell foul of the Convention. However, it is important to note that, at paragraph 65, the court went on to hold that where article 8 is engaged on the merits the ultimate decision is determined by the best interests of the child. The court said "Consideration of what lies in the best interest of the child concerned is of paramount importance in every case of this kind; depending on their nature and seriousness, the child's best interests may override those of the parents". The case of *in Re A* involved the interaction between a POA granted in Scotland and an application for adoption in England. The judgement was that of the president of the family court (Sir James Munby). The president held that the English court should recognise a POA (paragraph 40) and that the POA removed the need for the English court to obtain the consent of a natural parent. At paragraph 44 the president held that the making of a permanence order which includes authority for the child to be adopted "…is the *final* occasion for the consideration by the court of questions of parental consent or objection to adoption". At paragraph 45, the effect of the relevant English legislation is to put the English court hearing an application for an adoption order under the Adoption and Children Act 2002 in the same position as a Scottish court would be if it was hearing an application for an adoption order for the same child under the 2007 Act. The president went on to analyse the effect of the retention by a Scottish court of the right of contact in relation

to "parental responsibility" as it is defined in the relevant English legislation. His conclusion was that retention of the right of contact only meant that the natural parents no longer had parental responsibility for the purposes of the English legislation. However, in accordance with English rules of procedure, although none of the natural parents was entitled or required to be joined nonetheless as a matter of discretion, the natural parents should have the opportunity to be heard though only in respect of future contact and that right arises before an adoption order is made (at paragraph 64). The president specifically approved the dicta of Lady Smith in *East Lothian Council*. He went on to say (at paragraph 65) that the purpose of joinder by the parents is not to enable them to defend the proceedings or to oppose the making of an adoption order but simply to be heard on the issue of future contact. From these authorities it is clear that any subsequent involvement of a parent in an AO is limited both substantively and procedurally. In none of the cases is there any exposition of the substance to be given to such rights as are conferred or are there any examples of the application of what it entails.

[23] In relation to procedure, the 2007 Act and the 2009 Rules prescribe that certain categories of persons are entitled to intimation of a petition for an AO. The most significant class is those whose consent is required or whose consent must be dispensed with. In the present case, by reason of section 31(7) there is no one in that category. The other relevant category is that of an unmarried father. The respondent was entitled to notification both under section 114 of the Act and the 2009 Rules. He was thus entitled to lodge a Form 8. Neither the 2007 Act nor the 2009 Rules expressly confer a right to be heard but the authorities referred to permit representations on relevant matters to be made. Otherwise the right to receive intimation of the proceedings would be worthless. Given that the natural mother was exercising contact, albeit indirect, it is correct to say, consistent with the

authorities, that she should have received intimation (even if that intimation was discretionary) as indeed she did. It was suggested to us (see paragraph [21] above) that rule 15 ("intimation to be made in such terms as he considers appropriate") gives to the sheriff the power to set out the basis upon which participation might take place. The issue did not arise in this case. We accept it might be possible so to do but only in very clear cases. It appears to us that the more likely occasion for management of the involvement comes after the Form 8 has been lodged. It follows that, consistent with rule 18(b)(vii), the sheriff was obliged to assign a proof. However, as Lady Smith made clear it does not follow that the respondent had a right to lead oral evidence.

[24] So far as the substance of any right held by the respondent is concerned there is a distinction between issues relating to consent to adoption and issues relating to the non-consent provisions. It is a distinction which may be easier to state than to apply. Each case turns on its own facts. As we have said, it is relevant to have in mind that consent (granted or dispensed with) is to the making of an AO as that is defined in section 28(1). The focus of the non-consent provisions is that of the child not the parents. The consent of the parents in this case has been dealt with. The respondent's consent was never required. The 2007 Act, the 2007 Rules and the cases referred to give to him limited rights. We do not consider that the respondent is entitled to seek to open up issues which, in substance, relate to the making of the POA in so far as it relates to consent. Put another way, he cannot be in a better position to oppose the making of an AO than one of the natural parents whose consent has been dispensed with. Any material which the respondent wishes to put before the court ought to relate to the interests of the child and a sheriff is entitled to scrutinise any such material robustly. Matters may well have moved on since the POA was granted. It should not be forgotten that, consistent with the Convention, a child has a right to a family life (see

also section 14(4)(a)). Having read and considered the respondent's answers to the rule 16A statement, the respondent seeks rehabilitation of the child into his care or, in the alternative, direct contact (pages 12-16 of the appeal print). Without intending to fetter the hands of the sheriff it seems to us that such a position can be stated in an affidavit which the sheriff could consider along with all other material at a diet of proof. As to the merits of the respondent's position, given that the matter is to be referred to the sheriff it is not appropriate for us to express a concluded view thereon. In making a POA the court is not limited to consideration of consent only.

[25] On a separate issue, in the course of proceedings, the sheriff sisted the adoption action in order to allow the respondent to lodge an application for leave to vary the POA. It was pointed out by counsel for the respondent that, in terms of section 92(2) the court could only vary the ancillary provisions as these are defined in section 92(7). The definition does not include authority to adopt. Accordingly, even if leave had been granted it would not have been open to the court to make an order deleting authority to adopt.

[26] There remains the question of the criminal charges outstanding against the respondent. The sheriff appeared to consider that it was open to her to have regard to these allegations. The respondent acknowledged that his pending trial and potential consequences were relevant factors to be taken into account. However, and in this we consider the respondent was correct, it is not open to the sheriff to proceed upon the basis that the allegations are established.

[27] Consequently, in our opinion parties are correct on the fundamental issue that the sheriff went too far and too fast in granting the AO when she did. The POA did not have the broader effect which she considered it did. Albeit on very limited grounds, the respondent was entitled to have his position considered and that it follows therefore that we

shall allow the appeal and recall the sheriff's interlocutor of 19 December 2018 and remit to the sheriff to proceed as accords. There will be no order for expenses in relation to the appeal. As a post script, given the issues raised in this opinion, it seems to us that the 2009 Rules might benefit from further consideration by the Scottish Civil Justice Council.