SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2021] SCGLW 018

GLW-F918-19

JUDGMENT OF SHERIFF ANDREW M MACKIE

in the cause

A (Assisted Person)

Pursuer

against

A

Defender

Pursuer: Cooney
Defender: Kilcoyne

GLASGOW 29 October 2020

The Sheriff, having resumed consideration of the cause, finds the following facts to be admitted or proved:

(1) The parties are as designed in the instance. The parties are habitually resident in Scotland. The pursuer had been resident within the Sheriffdom of Glasgow and Strathkelvin for a period in excess of 40 days immediately preceding the raising of this action.

(2) The parties were married at Glasgow in 2014.

(3) The parties know of no proceedings continuing in Scotland or elsewhere which are in respect of parties' marriage or which are capable of affecting its validity or subsistence.

(4) The parties separated from one another on 19 December 2018. Since 19 December 2018 the parties have not lived together nor have they had marital relations. There is no prospect of a reconciliation. The pursuer seeks decree of divorce. The defender consents to decree of divorce being granted.

(5) There is one child of the parties' marriage under the age of 16 years namely BA, born in 2018 (hereafter referred to as "the said child").

(6) The said child resides with the pursuer at the address in the instance and is habitually resident within the jurisdiction of this court.

(7) Glasgow Sheriff Court has jurisdiction.

(8) No permanence order (as defined in section 80(2) of the Adoption & Children (Scotland) Act 2007) is in force in respect of the said child.

(9) Between the date of parties' marriage and the date of their final separation on 19 December 2018 the defender behaved in an abusive, aggressive and controlling manner towards the pursuer. The defender's behaviour towards the pursuer deteriorated during her pregnancy and throughout the period from the birth of the said child until parties separated for the final time on 19 December 2018.

(10) After the birth of the said child, the defender continued to be verbally abusive and aggressive towards the pursuer in the presence of the said child throughout the period when parties lived together in family with the said child. During the said period the defender shouted and swore at the pursuer at times and repeatedly behaved in a violent and aggressive manner towards the pursuer in the presence of the said child. During the said period the pursuer's sister heard the defender shouting at the pursuer in the presence of the said child on a number of occasions.

(11) The pursuer gave birth to the said child in hospital. On the date of discharge of the pursuer and the said child from hospital the defender was unable to collect them as he was visiting his brother in prison. The pursuer and the said child were collected from hospital and taken to the home of the pursuer's mother by the pursuer's sister and other members of her family. The defender attended later that day at the home of the pursuer's mother. During said visit the parties argued. The defender became very angry. The pursuer and the said child were distressed by the defender's conduct. The defender wished to take the said child to visit the defender's mother and refused to listen to concerns raised by the pursuer about the welfare of the said child.

(12) Following their discharge from hospital the pursuer and the said child stayed with the pursuer's mother at the home of the pursuer's mother for a week or two before the pursuer and the said child moved into the family home with the defender. Thereafter, the defender prohibited members of the pursuer's family from visiting the pursuer and the said child at the home which parties shared.

(13) Prior to 19 December 2018, during the period when the pursuer and the said child lived in family with the defender, the pursuer contacted her sister on a number of occasions asking her to deliver items which the pursuer needed for herself or the said child. The pursuer's sister required to leave these items outside the door of the parties' home due to the defender's prohibition on members of the pursuer's family visiting parties' home.

(14) On one occasion, in 2018, within the parties' home, the defender repeatedly shouted and swore at the pursuer and moved towards the pursuer in an aggressive manner and punched the wall next to the pursuer. The defender thereafter slammed

an internal door within parties' home causing the said child to cry. On another occasion around that time the defender became angry when the said child urinated on him and angrily shoved the said child into the arms of the pursuer.

(15) A day or two after the incident during which the defender punched the wall next to the pursuer, the defender insisted that the pursuer and the said child accompany him on a visit to the defender's brother who was serving a prison sentence. The pursuer voiced concerns about taking the said child to the prison to visit the defender's brother. The defender became very angry with the pursuer and threatened to take the said child to the prison without the pursuer. The pursuer accompanied the defender to the prison and the parties took the said child with them. The pursuer left the visit with the said child after only a short time and took the said child back outside. Following their return home the parties argued and the defender became aggressive. The defender threw the pursuer and the said child out of the family home. The pursuer and the said child returned to live with the pursuer's mother.

(16) In mid-2018 the pursuer reported concerns about the defender's abusive and aggressive behaviour to the health visitor. The pursuer received advice from the health visitor that she should report her concerns to the Police Service of Scotland. The pursuer made such a report following which the defender was interviewed by the police in respect of same. During said interview the defender denied that he had behaved as described by the pursuer.

(17) The parties reconciled some weeks later. They then lived together in family with the said child until 19 December 2018. The defender's aggressive and controlling behaviour towards the pursuer continued during said period.

(18) On 19 December 2018 the defender assaulted the pursuer within parties' home by punching her on the cheek. The defender also attempted to strangle the pursuer during said assault and threw the pursuer over the sofa in parties' home. The said child was present throughout said assault and was very distressed, crying uncontrollably. The pursuer sustained bruises as a result of the defender's said assault.

(19) The defender was prosecuted in respect of said assault. The defender pled not guilty and the case proceeded to trial. The pursuer gave evidence at said trial. The defender was convicted of said assault, after trial, in 2019. Sentence was deferred on the defender for a Criminal Justice Social Work Report to be obtained. Thereafter, the court made a community payback order in respect of the defender comprising a requirement that the defender complete 150 hours of unpaid work within a period of 9 months. The court also made the defender the subject of a non-harassment order. In terms of said non-harassment order the defender is prohibited from approaching, contacting or communicating with the pursuer, in any way, for a period of 2 years.

(20) The defender continues to deny having perpetrated said assault upon the pursuer.

(21) Prior to the imposition of said non-harassment order the defender had been subject to special conditions of bail in respect of said prosecution arising from his assault on the pursuer. Those special conditions of bail included a condition prohibiting the defender from approaching, contacting or communicating with the pursuer in any way.

(22) Following the imposition of said special bail conditions the defender arranged for one of his friends to attend at the pursuer's home to post a document through the pursuer's front door. The document comprised a form which the defender had obtained from Glasgow Central Mosque in connection with an Islamic divorce. The pursuer reported receipt of said document to the Police Service of Scotland. The defender was subsequently detained and interviewed by the said Police Service on the basis that the document which had been posted through the pursuer's door contained the defender's signature.

(23) After parties separated in 2018 the pursuer's motor vehicle was vandalised on a number of occasions. The damage to the pursuer's vehicle consisted of tyres being punctured and windows, including the windscreen, being smashed. On each of said occasions when the pursuer's motor vehicle was damaged, other cars in the immediate vicinity of the pursuer's home remained undamaged. The damage to the pursuer's motor vehicle occurred on or around each of the dates when the defender appeared in court in respect of the said criminal proceedings. On or around one of said dates when the defender had been due to appear in court in connection with said criminal proceedings the pursuer did not park her motor vehicle close to her home. On that occasion the motor vehicle belonging to the pursuer's mother was vandalised, the damage consisting of all four tyres being punctured. It is likely the defender was responsible for said damage to said motor vehicles.

(24) No criminal proceedings have been instigated against the defender in respect of said vandalism. The pursuer reported the damage to the said motor vehicles to the Police Service of Scotland on each occasion. There was insufficient evidence that the defender was responsible for said damage to allow the defender to be prosecuted

in respect of same. The pursuer believes the defender was responsible for said damage to said motor vehicles and that he was attempting to intimidate and threaten the pursuer by so doing.

(25) On a number of occasions between the date of parties' reconciliation in 2018 and their separation on 19 December 2018, the defender took the said child to his mother's home. On average, the defender took the said child to his mother's home once each week for a period of around one hour. On these occasions the pursuer visited her mother's home which is located near to the home of the defender's mother as the said child was being breast fed on demand and the pursuer would require to be reasonably close to the home of the defender's mother so that the said child could be brought to her if he became hungry or distressed. The pursuer was not in favour of this arrangement and would have preferred that the defender's mother visit parties' home. The defender refused the pursuer's request that his mother visit parties' home. The defender forced the pursuer to comply with the arrangement which he wished to take place.

(26) During the period of parties' relationship the defender bullied and intimidated the pursuer. The defender made the rules in the parties' household in respect of who was allowed to visit parties' home and required the pursuer to obey the rules which he made.

(27) The defender has anger management issues.

(28) The said child is happy, healthy, safe and settled in the pursuer's care.

FINDS IN FACT AND IN LAW**:**

(1) The marriage of the parties has irretrievably broken down.

(2) The defender consents to decree of divorce being granted.

(3) Both parties have parental responsibilities and parental rights in respect of the said child.

(4) It is in the best interests of the said child to live with the pursuer.

(5) It is better for the said child that a residence order be made in favour of the pursuer in respect of the said child than that no order be made.

(6) It is not in the best interests of the said child for the defender to have contact with the said child.

(7) It is not better for the said child that an order for contact be made in favour of the defender than that no order be made.

THEREFORE: (1) Sustains the first plea-in-law for the pursuer and Grants crave 1 for the pursuer whereby Finds it established that the marriage of the parties has broken down irretrievably and divorces the defender from the pursuer and Grants decree of divorce; (2) of consent of the defender, Repels the first plea-in-law for the defender and Sustains the second plea-in-law for the pursuer and Grants crave 2 for the pursuer whereby makes a residence order in favour of the pursuer in terms of section 11(2)(c) of the Children (Scotland) Act 1995 in respect of the child of the parties, whereby Directs that the said child shall live with the pursuer; (3) of consent of the parties, Repels the third plea-in-law for the pursuer and the second and third pleas-in-law for the defender; and (4) Sustains the fourth plea-in-law for the pursuer, Repels the fourth plea-in-law for the defender and Refuses crave 1 for the defender; and (5) Finds no expenses due to or by either party.

NOTE:

[1] Proof in this action took place on 24 and 25 August 2020. There had been a case management hearing on 22 June 2020 and a pre-proof hearing on 10 August 2020. I had presided over both of those hearings. Nonetheless, it was on the first day of the proof that the defender's agent made a motion that I consider recusing myself from these proceedings. No written motion had been lodged with the court nor had any written motion been intimated to the pursuer's agents.

[2] The basis for the defender's motion was that I had presided over a child welfare hearing on 15 October 2019 during which the defender had made a motion for an interim contact order which motion had been refused *in hoc statu*. It was the defender's position that, during said child welfare hearing, the defender had moved for a child welfare report to be instructed by the court and that said motion had also been refused. The interlocutor dated 15 October 2019 was silent in respect of any motion that the court instruct a child welfare report. However, for the purposes of the recusal motion, I accepted that the defender had made a motion for the instruction of a child welfare report at the hearing on 15 October 2019 but that said motion had been refused and I had directed that the case should proceed to proof.

[3] The defender's agent submitted that, in these circumstances, it would not be appropriate for me to preside over the diet of proof. When asked to explain the basis for such a submission, the defender's agent submitted that, as I had dealt with the case previously at said child welfare hearing and had determined that there should be no interim contact and that there should be no child welfare report prepared, I should not therefore preside over the diet of proof. I did not consider that these submissions addressed the issues which the court required to consider when dealing with a motion for recusal.

[4] The defender's agent accepted that the decision in respect of contact which had been made on 15 October 2019 had been a decision in respect of interim contact and that the court had made no findings in fact on that date, no evidence having been led. The defender's agent also accepted that a child welfare reporter could not make findings in fact in a child welfare report but would report parties' respective positions to the court. The defender's agent submitted, however, that a child welfare reporter could have investigated matters more promptly and could have come up with solutions, such as supervised contact between the defender and the said child. I did not consider that these submissions addressed the issues which the court required to consider when dealing with a motion for recusal.

[5] The defender's agent accepted that, by the time of said child welfare hearing, the defender had been convicted of assaulting the pursuer and had been made the subject of a non-harassment order which prohibited the defender from approaching and contacting the pursuer. It was accepted that these were facts upon which the court was entitled to rely at said child welfare hearing when coming to decisions in respect of interim contact and the instruction of a child welfare report. However, the defender's agent went on to submit that, although it was a fact that the defender had been convicted of a domestic assault upon the pursuer, the defender had made it clear that he did not accept that he had behaved in the manner libeled. In my view such a position rendered proof almost inevitable. I had indicated that on 15 October 2019 when making my decision in respect of interim contact. The defender's agent also acknowledged that the pursuer's averments in respect of the defender's behaviour towards her were broader than the specific averments in respect of the incident which gave rise to the criminal conviction of the defender. In view of this, I said, on 15 October 2019, that it appeared that proof would be required before the court could properly determine whether contact between the defender and the said child would be in

the best interests of the said child, treating the welfare of the said child as the court's paramount consideration.

[6] In making the motion for recusal the defender's agent was unable to refer to the relevant authorities and was unable to set out the basis upon which it would be appropriate for a sheriff to recuse herself/himself from proceedings. The defender's agent did not submit that there was actual bias or that there was apparent bias on the part of the court such that I should recuse myself. The defender's agent submitted only that a number of decisions had been made on an interim basis at a child welfare hearing and that this should, of itself, be sufficient to lead to recusal. I did not consider that such a submission addressed the issues which the court required to consider when dealing with a motion for recusal.

[7] Although never expressed in these terms, I took it that the defender's agent was suggesting either that there was actual bias on my part or that there was apparent bias in the sense that he considered the court appeared, objectively, to lack the essential quality of impartiality. As I understood it, the defender's agent was advancing the motion for recusal on the basis only that I had refused the aforementioned motions made on behalf of the defender at the said child welfare hearing. Although the defender's agent made no direct reference to actual or apparent bias, I took it that he was suggesting that such bias had been demonstrated by the said decisions having been made at said child welfare hearing. Accordingly, I gave consideration to the issues of actual bias and apparent bias in the context of the defender's said motion for recusal.

[8] It might be helpful if I set out the relevant provision of the European Convention on Human Rights and some relevant extracts from the authorities.

[9] Article 6(1) of the European Convention on Human Rights (ECHR) provides *inter alia* as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

[10] In *Porter* v *Magill* [2001] UKHL 67, at paragraph 88 of the judgment, Lord Hope referred to the judgment of the European Court in *Findlay* v *United Kingdom* [1997] 24 EHRR 221 wherein, at paragraph 73, the European Court said, of the concept of impartiality:

> "As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect".

[11] In *Porter* v *Magill*, *supra*, Lord Hope went on to make clear that not only must the tribunal be free from actual bias but it must also not appear, in the objective sense, to lack the essential quality of impartiality.

[12] At paragraph 103 of the judgment in *Porter* v *Magill*, *supra*, Lord Hope said that, in assessing the issue of apparent bias, the question is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

[13] Lord Hope, delivering the judgment of the Supreme Court in *O'Neill* v *HM Advocate* [2013] UKSC 36, referred to the test for apparent bias as laid down in *Porter* v *Magill*, *supra* (para 47 of *O'Neill* refers) before going on to consider a number of cases in which it was the judge's decision not to recuse himself that was in issue (paras 49-52 of *O'Neill* refer). In his consideration of these cases a number of factors were identified by Lord Hope which would be taken into consideration by the fair-minded and informed observer when considering the issue of apparent bias. In particular, said observer would have regard to: (i) the context of

any remarks made by judges; and (ii) the fact that such remarks are made by professional judges, with relevant training and experience, after having taken the judicial oath.

[14] In the case of *Helow* v *Secretary of State for the Home Department* 2009 SC (HL) 1 (to which Lord Hope refers at para 52 of *O'Neill*) consideration of these factors led to the conclusion that there was not any real possibility of bias on the part of the judge. Following consideration of these factors, amongst others, the same conclusion was reached by the Court in *O'Neill* (paras 53-57 refer).

[15] Having considered the foregoing authorities I came to the conclusion that there was no basis for the defender to suggest that there was actual or apparent bias on my part on the basis that I had made a decision to refuse to make an interim contact order in favour of the defender on 15 October 2019; that I had refused to instruct the preparation of a child welfare report on 15 October 2019; and that I had directed that the parties be allowed a proof of their respective averments prior to further consideration being given to any contact order being made in favour of the defender, standing the serious nature of the allegations made by the pursuer against the defender.

[16] Accordingly, I refused the defender's motion. The diet of proof thereafter commenced.

[17] Parties were in agreement that the defender should lead at the diet of proof as the only issue which the parties required the court to determine was whether the making of a contact order in favour of the defender in terms of crave 1 for the defender (or in any other terms) would be in the best interests of the said child.

[18] Evidence was led for the defender from the defender himself, from the defender's mother, SA, and from the defender's friend, MT. Affidavits had been lodged as evidence in

chief of the foregoing witnesses. Said affidavits comprise Nos 16, 17 and 18 of process respectively.

[19] Evidence was led for the pursuer from the pursuer herself and from the pursuer's sister, TA. Affidavits had been lodged as evidence in chief of the foregoing witnesses. Said affidavits comprise Nos 15 and 14 of process respectively.

[20] I heard parties' submissions on 25 August 2020. A summary of parties' submissions is set out in the appendix hereto. I have, in general terms, preferred the submissions for the pursuer to those for the defender for the reasons set out below.

Assessment of Defender's Witnesses

First witness – the defender

[21] The defender adopted the terms of his affidavit dated 14 August 2020, No 16 of process. The defender was then asked a number of questions during examination in chief principally to provide the defender with an opportunity to comment on the affidavit evidence of the pursuer and her sister. Thereafter, the defender was cross-examined.

[22] The defender sought to characterise parties' relationship as beset by difficulties arising from the fact that the parties' respective extended families did not get on with one another. In paragraph 3 of his affidavit the defender explains that there was a fall-out between the defender and the pursuer's family prior to the birth of the said child. In addition, the defender blamed parties' separation on lies being told by the pursuer and her mother about the pursuer's father. The defender's evidence in this regard is set out in paragraphs 5 and 6 of his affidavit. The defender's evidence was that the pursuer had made up the allegations of domestic abuse which she had made against the defender. The defender denied that he had been abusive at any time towards the pursuer. I rejected the

defender's evidence in this regard and preferred that of the pursuer who said that parties' relationship had ended as a result of the abusive, aggressive and violent behaviour repeatedly perpetrated against her by the defender.

[23] I found the defender's evidence to be largely neither credible nor reliable. I found the defender to be evasive at times. He appeared to be intent on minimising his role in any dispute between the parties and on blaming the pursuer for the incident which led to his conviction for assaulting the pursuer. I formed the view that the defender was dissembling at various times during his evidence. For the most part, I rejected the defender's evidence, save where it was supported by the credible or reliable evidence of other witnesses.

[24] The defender denied that he had forced the pursuer to take the said child to visit the defender's brother in prison. The defender acknowledged that the pursuer had raised concerns about taking the said child to a prison visit and, in particular, had raised concerns about how she would breast feed the said child. The defender confirmed that the pursuer had left the visit "early" and that he had remained for perhaps an additional 5 or 10 minutes. The defender denied that he had become angry or aggressive before or after the visit. However, the defender acknowledged that, in the car ride home from the visit, the atmosphere was "awkward and quiet".

[25] Despite the defender's evidence that he had not forced the pursuer to accompany him on the said prison visit and to bring the said child to the prison, the defender's evidence made it clear that the pursuer had been reluctant to accompany him to the prison, had raised concerns about taking the said child to the prison and had cut short the visit against the defender's wishes. I consider the defender was seeking to minimise the extent of the dispute between the parties over said visit and to minimise his role in pressurising the pursuer to attend said visit and to bring the said child.

[26] I accepted the evidence of the pursuer that she did not wish to attend said visit, that she did not consider it appropriate to take the said child on said visit and that the defender became angry with her when she expressed reluctance to attend the visit. I also accepted the pursuer's evidence that the defender became aggressive with the pursuer following said visit and that he threw the pursuer and the said child out of the family home in consequence of the pursuer having cut the visit short.

[27] Although the defender accepted that he had been convicted, after trial, of assaulting the pursuer on 19 December 2018, the defender denied having committed such an assault. The defender denied that the said child had been crying during the incident which took place on 19 December 2018 "up until she (referring to the pursuer) walked out the door". The defender said that he had been found guilty only "because that's what it is on paper" and maintained that the truth was "it didn't happen". The defender accepted that photographs were presented by the Crown during his trial but denied that these photographs showed any injuries to the pursuer. The defender accepted that there had been an incident between the parties on 19 December 2018 during which the pursuer had shouted and sworn at him and had complained that he was always working and never at home. The defender said that, on that day, he had been intending to go out to get his hair cut, to take his mother to hospital and to visit his brother in prison. The defender said that the pursuer had stood in front of the door and that, before the defender had left the house, the pursuer had ripped his jacket. The defender said that he had also reported the incident to the police.

[28] The defender's evidence in respect of the incident on 19 December 2018 was that there had been an altercation in the family home in the presence of the said child during which the pursuer had been shouting and swearing at the defender and had ripped his jacket. The defender maintained that the said child had not been upset by this incident.

[29] The defender's account of the incident on 19 December 2018 appeared rehearsed and improbable. He recounted said incident almost entirely by describing the actions of the pursuer. The defender sought to persuade the court that he had passively endured the behaviour which he described on the part of the pursuer. I found his evidence in this regard incredible. Further, if the pursuer had indeed behaved as the defender described, the defender nonetheless chose, on his account, to leave the said child in the care of the pursuer in the family home, despite the abusive and aggressive behaviour which he alleged had been directed towards him by the pursuer.

[30] If the defender were to be believed, the pursuer had fabricated the allegations of abusive, aggressive and violent behaviour on his part. If the defender were to be believed, the reports by the pursuer to her health visitor and to the Police Service of Scotland were false. There was nothing in the pursuer's evidence which would lead me to such a conclusion. My assessment of the pursuer's evidence is set out below. I found the pursuer to be a generally straightforward, credible and reliable witness and, for the most part, preferred her evidence to that of the defender. By contrast, I consider the defender to have been vague at times in his evidence and to be intent on blaming his victim, insofar as the incident on 19 December 2018 is concerned. Throughout his evidence the defender appeared to be reluctant to take any responsibility for any deterioration in parties' relationship and appeared intent on minimising the effect of the incident on 19 December 2018 upon the said child. The defender was reluctant to accept that the said child might have been adversely affected by said incident in view of the very young age of the said child at that time. I consider this demonstrated a lack of insight into the needs and interests of the said child.

Second witness – MT

[31] MT adopted the terms of his affidavit dated 13 August 2020 (No 18 of process) and was asked a few questions during examination in chief before being cross-examined.

[32] MT is a friend and former work colleague of the defender. He has known the defender for 2 or 3 years. Prior to parties' separation MT and his wife socialized with the parties. MT and his wife have not seen the pursuer since prior to Eid 2019.

[33] MT gave his evidence in a calm, clear and straightforward manner. He did not appear to be obviously dissembling at any time. MT appeared to answer the questions posed by parties' agents in a forthright and straightforward manner. If MT could not recollect something he simply said so.

[34] MT's evidence was of little assistance to the court. He accepted that the last time he had seen the said child was likely to have been around Bonfire Night in November 2018 when the said child was around 5 months old. MT said that he and his wife considered themselves to be friends of both the pursuer and the defender but conceded that neither he nor his wife had spoken to the pursuer for a period of more than one year. Notwithstanding the lack of contact between the pursuer and MT and his wife, MT confirmed there had been no friction between the pursuer and MT and his wife.

[35] MT said that he and his wife would be able to assist the parties by facilitating contact between the defender and the said child. They could collect the said child from the pursuer, convey him to the defender and subsequently return the said child to the pursuer. I consider that the proposal made by MT to have been well intentioned but wholly unrealistic. Such a proposal appeared not to take into account the fact that MT and his wife are strangers to the said child. MT did not, at any stage during his evidence, demonstrate any insight into the difficulties which the said child might well experience in being conveyed by strangers to and

from contact with the defender who is also now a stranger to the said child, there having been no contact between them for a period approaching 2 years.

Third witness – SA, the defender's mother

[36] SA adopted the terms of her affidavit dated 14 August 2020 (No 17 of process) and was asked a number of questions by way of examination in chief. SA was not cross-examined on behalf of the pursuer. SA is the defender's mother.

[37] SA gave her evidence in a calm, clear and straightforward manner. SA was asked how contact arrangements between the defender and the said child would work if parties' respective families did not get on. SA said that she could be involved in facilitating contact between the defender and the said child and added that "no harsh words" had been exchanged between herself and the pursuer.

[38] I consider SA's proposal that she be involved in facilitating contact between the defender and the said child to be misguided and unrealistic. The terms of SA's affidavit make it clear that there had been a period prior to the birth of the said child during which SA and the pursuer had not been talking to each other. SA alleged in her affidavit that the pursuer had "left (SA) out of significant life-changing events previously". SA said that she was "banned" from going to see a house which the defender had purchased as the pursuer had not wanted SA to see it. It is clear from the terms of SA's affidavit that the relationship between SA and the pursuer was a poor one and that she has had no contact with the said child for nearly 2 years.

[39] SA appeared disingenuous during her oral evidence when she said that she could not see why being involved in facilitating contact between the defender and the said child would be a difficulty. SA demonstrated a lack of insight into the needs and interests of the

said child in making that suggestion given the poor relationship between SA and the pursuer and given the fact that SA is now a stranger to the said child. Further, when asked about alternative arrangements which could be made, SA referred to MT picking up the said child. SA demonstrated a lack of insight into the needs and interests of the said child in making that suggestion given that MT is a stranger to the said child. The only other proposal made by SA is that the parties agree that a mutually acceptable third party could facilitate contact. She was unable to identify anyone other than MT as a potential candidate.

[40] SA gave evidence that the contact which she witnessed between the defender and the said child prior to 19 December 2018 was of good quality and that further contact between the defender and the said child would, in her opinion, be beneficial for the said child.

Assessment of Pursuer's Witnesses

First witness – the pursuer

[41] The pursuer adopted the terms of her affidavit dated 13 August 2020 (No 15 of process) and was asked a few questions by way of examination in chief to clarify one or two issues and to comment on the development and welfare of the said child. The pursuer was then cross-examined before being briefly re-examined.

[42] I found the pursuer, generally, to be a credible and reliable witness. She gave her evidence in a calm, clear, forthright and straightforward manner. She appeared, generally, to have good recall. She did not appear to be obviously dissembling or obfuscating with one or two exceptions referred to below. Throughout almost all of her evidence the pursuer appeared to be a truthful witness doing her best to fully and honestly answer all questions posed. Where the pursuer's evidence differed from that of the defender and his witnesses, I generally preferred the evidence of the pursuer.

[43] The exceptions to which I refer above are those chapters of the pursuer's evidence in respect of the defender's involvement in the care of the said child prior to parties' final separation in December 2018. The pursuer struggled to say anything positive about the defender in respect of his role in the life of the said child prior to parties' final separation. It was apparent that the pursuer continues to feel considerable antipathy towards the defender, no doubt as a result of his abusive, aggressive and violent behaviour towards her as more fully set out below. During these chapters of her evidence the pursuer's demeanour was suggestive of someone being less than open and straightforward with the court. I consider this rendered the pursuer's evidence unreliable insofar as it related to the pursuer's account of the defender's involvement in the care of the said child prior to 19 December 2018.

[44] This contrasted with the pursuer's demeanour when giving evidence of a history of aggression on the part of the defender throughout parties' relationship. During these chapters of her evidence the pursuer gave her evidence in a calm, clear, forthright and straightforward manner and did not appear to be obviously dissembling.

[45] The pursuer said that the defender had been verbally aggressive towards her throughout the period from the date of parties' marriage until the birth of the said child. The pursuer said that she had been scared of the defender throughout their relationship but that she had noticed a change in the defender's behaviour towards her from the time of her pregnancy with the said child. The pursuer said that the defender's behaviour had deteriorated from that time and that, following the birth of the said child, the defender had become physically aggressive towards her as well as verbally aggressive. During a compelling chapter of her evidence the pursuer said that, prior to the birth of the said child, she had believed that she was "stuck" in the marriage as it had been her choice to marry the

defender. The pursuer went on to say, however, that her attitude had changed after the defender became physically abusive towards her in the presence of the said child.

[46] The pursuer described having shared her concerns about the defender's deteriorating behaviour with her health visitor in mid-2018. Thereafter, on the advice of her health visitor, the pursuer made a report to the police in respect of the defender's increasingly abusive behaviour towards her. It was clear from the pursuer's evidence that she had not taken the step of making a report to the police lightly. The defender was subsequently interviewed by the police but denied having behaved in the manner described by the pursuer.

[47] I accepted the pursuer's evidence of a course of abusive conduct on the part of the defender throughout the period prior to parties' final separation in December 2018. I accepted the pursuer's evidence that the defender's conduct had deteriorated during the pursuer's pregnancy with the said child and that, following the birth of the said child, the defender had become physically abusive towards the pursuer. I also accepted the pursuer's evidence that, in making reports to the police and in deciding to separate from the defender, she was considering not only her interests but also the interests of the said child.

[48] In response to all of the questions posed about said abuse, the pursuer answered in a straightforward manner. During cross-examination it was put to the pursuer that she had made up allegations of abuse against the defender. The pursuer denied that this was the case and I accepted her evidence in this regard.

[49] I accepted the pursuer's evidence that, during the period of parties' relationship, the defender had behaved in an abusive, aggressive, controlling and violent manner towards the pursuer and that the defender's behaviour had deteriorated in the months prior to parties' final separation. I accepted the pursuer's evidence that, prior to parties' final separation in December 2018, she had had genuine concerns that the defender's behaviour

was having an adverse impact on the welfare of the said child. The pursuer said that she did not want the said child to be around aggression and violence and that she had had concerns about the defender shouting and swearing in the presence of the said child.

[50] I accepted the pursuer's account of the assault perpetrated by the defender upon the pursuer on 19 December 2018, which assault was perpetrated in the presence of the said child. I accepted the pursuer's evidence that this had been a frightening and distressing incident from her perspective and also from the perspective of the said child.

[51] I also accepted the pursuer's evidence that, after parties' final separation in December 2018, she had made a number of further reports to the police. One of these reports related to the delivery of a document, signed by the defender, to the pursuer's home while the defender was subject to special conditions of bail prohibiting the defender from approaching, contacting or communicating with the pursuer in any way. The other reports made to the police by the pursuer related to damage caused to the motor vehicles belonging to the pursuer and her mother. I accepted the pursuer's evidence that her motor vehicle had been vandalised on a number of occasions after parties' final separation on 19 December 2018; that her mother's vehicle had been damaged on one occasion after parties' final separation; and that all of said damage had occurred on or around each of the dates when the defender appeared in court in respect of the criminal proceedings instituted against the defender in respect of his assault on the pursuer. The pursuer confirmed that no charges had been brought against the defender arising from said reports of vandalism.

[52] I accepted the pursuer's evidence that she believes the defender to have been responsible for said damage to said motor vehicles and that he was attempting to intimidate and threaten the pursuer by so doing. I consider that is a reasonable conclusion for the pursuer to have reached and that it is a reasonable inference to draw from the facts.

Second witness – TA, the pursuer's sister

[53] TA adopted the terms of her affidavit dated 13 August 2020, No 14 of process. This evidence comprised her evidence in chief. Thereafter, TA was cross-examined.

[54] I found TA to be a credible and reliable witness. She gave her evidence in a calm, clear, forthright and straightforward manner. She did not appear to be obviously dissembling at any stage. Throughout her evidence she appeared to be a truthful witness doing her best to fully and honestly answer all questions posed by parties' agents. TA's evidence was generally clear and consistent. Where the evidence of the defender and his witnesses differed from that of TA, I generally preferred the evidence of TA.

[55] In particular, I accepted TA's evidence that she had seen the defender behaving in an aggressive and controlling manner towards the pursuer on the day the pursuer and the said child were discharged from hospital following the said child's birth. I also accepted TA's evidence that, during telephone calls between herself and the pursuer, TA had heard the defender being verbally abusive towards the pursuer.

[56] I also accepted the evidence of TA that, when the parties had lived together in family with the said child in 2018, the pursuer had asked TA to shop for certain items for the pursuer on a number of occasions and that TA had required to leave the items which she had purchased at the pursuer's request outside parties' home as she was not allowed, by the defender, to enter parties' home.

[57] TA's evidence was consistent with that of the pursuer in respect of the defender's abusive and controlling behaviour towards the pursuer during parties' relationship and I assessed TA's evidence as credible and reliable.

Discussion

[58] Section 11(7)(a) of the Children (Scotland) Act 1995 (hereafter "said 1995 Act") provides that, in considering whether or not to make orders such as the order being sought by the pursuer in her second crave and the order being sought by the defender in his first crave in terms of section 11(1) of said 1995 Act, the welfare of the said child is the court's paramount consideration. It would be helpful to set out the relevant statutory provisions here. Section 11(1) of said 1995 Act provides as follows:

> "(1) In the relevant circumstances in proceedings in the Court of Session or sheriff court, whether those proceedings are or are not independent of any other action, an order may be made under this subsection in relation to –
>
> (a) parental responsibilities;
>
> (b) parental rights;
>
> (c) guardianship; or
>
> (d) subject to section 14(1) and (2) of this Act, the administration of a child's property."

[59] Section 11(2) of said 1995 Act (so far as relevant) provides as follows:

> "(2) The court may make such order under subsection (1) above as it thinks fit; and without prejudice to the generality of that subsection may in particular so make any of the following orders –
>
> (c) an order regulating the arrangements as to-
>
> (i) with whom; or
>
> (ii) if with different persons alternately or periodically, with whom during what periods,
>
> a child under the age of sixteen years is to live (any such order being known as a 'residence order');
>
> (d) an order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living (any such order being known as a 'contact order')".

[60] Section 11(3) of said 1995 Act (so far as relevant) provides:

> "(a) that application for an order under that subsection is made by a person who –
>
> (i) not having, and never having had, parental responsibilities or parental rights in relation to the child, claims an interest;
>
> (ii) has parental responsibilities or parental rights in relation to the child".

[61] Section 11(7) of said 1995 Act (so far as relevant) provides as follows:

"(7) Subject to subsection (8) below, in considering whether or not to make an order under subsection (1) above and what order to make , the court –

(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none be made at all; and

(b) taking account of the child's age and maturity, shall so far as practicable –

(i) give him an opportunity to indicate whether he wishes to express his views;

(ii) if he does so wish, give him an opportunity to express them; and

(iii) have regard to such views as he may express.

(7A) In carrying out the duties imposed by subsection (7) (a) above, the court shall have regard in particular to the matters mentioned in subsection (7B) below.

(7B) Those matters are –

(a) the need to protect the child from –

(i) any abuse; or

(ii) the risk of any abuse;

which affects, or might affect, the child;

(b) the effect such abuse, or the risk of such abuse, might have on the child;

(c) the ability of a person –

(i) who has carried out abuse which affects or might affect the child; or

(ii) who might carry out such abuse;

to care for, or otherwise meet the needs of, the child; and

(d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under subsection (1), would have) those responsibilities.

(7C) In subsection (7B) above –

'abuse' includes –

(a) violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress;

(b) abuse of a person other than the child; and

(c) domestic abuse;

'conduct' includes –

(a) speech; and

(b) presence in a specified place or area.

(7D) Where –

(a) the court is considering making an order under subsection (1) above; and

(b) in pursuance of the order two or more relevant persons would have to co-operate with one another as respects matters affecting the child,

the court shall consider whether it would be appropriate to make the order.

(7E) In subsection (7D) above, "relevant person", in relation to a child, means–

(a) a person having parental responsibilities or parental rights in respect of the child; or

(b) where a parent of the child does not have parental responsibilities or parental rights in respect of the child, a parent of the child."

[62] The parties were married to one another when the said child was born. In addition, the defender is named as the father of the said child on the said child's birth certificate. Accordingly, both parties have parental responsibilities and parental rights in respect of the said child. Accordingly, the pursuer's application for a residence order in respect of the said child (under section 11(2) (c) of said 1995 Act) and the defender's application for a contact order in respect of the said child (under section 11(2) (d) of said 1995 Act) are applications by persons who have parental responsibilities and parental rights in relation to the said child, in terms of section 11(3) (a) (ii) of said 1995 Act.

The pursuer's crave for a residence order

[63] I accepted the submissions for the pursuer that the court should make a residence order in favour of the pursuer in respect of the said child. There was no opposition to the granting of such an order by the defender. The defender's evidence had been that he accepted it would be better for the said child to be resident with the pursuer.

[64] The said child lives with the pursuer and is happy, safe, settled and stable in her care. Standing the defender's violent and abusive behaviour towards the pursuer previously (some of which was perpetrated in the presence of the said child) and standing the likelihood that the repeated instances of the pursuer's motor vehicle being damaged after the parties' final separation are attributable to the defender, it would be better for the said child to have the security and protection of a residence order in favour of the pursuer. It would be better for the said child for such an order to be made. The making of such an order would ensure that the matter of residence for the said child would be regulated as between the parties and would enable the pursuer to ensure the said child would be returned to her care in the event of any contact taking place between the defender and the said child.

The defender's crave for a contact order

[65] In general terms, it is accepted in the Scottish Courts that it is conducive to the welfare of children if their absent parents maintain personal relations and direct contact with them on a regular basis. This is consistent with Articles 9.1–9.3 of the United Nations Convention on the Rights of the Child which provide:

> "1 States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> 2 In any proceedings pursuant to paragraph 1 of the present Article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

> 3 States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests".

[66] It is also consistent with Article 8 of the European Convention on Human Rights and Fundamental Freedoms which states as follows:

> "1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[67] It is clear, however, that these general principles are not to be applied without qualification or discrimination. Although there is a general assumption as to the value of an absent parent's contact with his or her child, such contact shall not operate if it is contrary to the individual child's best interests. There may be particular circumstances where the exercise of contact by a parent with his or her child would not operate in the interests of the child. If contact would not operate in the interests of the child then, regarding the welfare of the child concerned as its paramount consideration, the court ought not to make any Contact Order.

[68] Insofar as Article 8 of the European Convention is concerned, the competing interests of the various members of the family require to be balanced. Both parents have the right to respect for their private and family lives. The said child also has the same right. The Article 8 right does not exist to allow parents to create or perpetuate situations which jeopardize the welfare of children. The principal purpose of Article 8, where children are involved, must be the safety and welfare of the children concerned.

[69] This is reflected in the terms of section 11(7)(a) of said 1995 Act which makes clear that the welfare of the said child is the paramount consideration for the court. No Order is to be made unless it would be better for the said child that the Order be made than that none should be made at all.

[70] For a number of reasons I have concluded that making any contact order in favour of the defender would jeopardize the welfare of the said child and would not be in his best interests, treating his welfare as the court's paramount consideration.

[71] The parties' relationship was characterised by domestic abuse perpetrated upon the pursuer by the defender. Said abuse included verbal and physical abuse, as well as controlling behaviour on the part of the defender. The said child has also been present when the pursuer has been verbally and physically abused by the defender. The welfare of the said child has been jeopardized by the defender's said conduct towards the pursuer.

[72] During parties' relationship the defender exerted a degree of control over the pursuer. The court heard credible and reliable evidence of a number of instances when the defender subjected the pursuer to his will. This controlling behaviour on the part of the defender extended to controlling access to the home which parties shared by prohibiting members of the pursuer's family from visiting the pursuer at home.

[73] The pursuer endured emotional, verbal and physical abuse at the hands of the defender throughout the period of parties' relationship. However, the defender's behaviour towards the pursuer deteriorated during the pursuer's pregnancy and following the birth of the said child. The instances of physical aggression on the part of the defender occurred after the birth of the said child. It is significant that these instances occurred within a relatively short period of time between the birth of the said child and the parties' final separation on 19 December 2018. The parties had lived together in family with the said child

for a relatively short time during said period, the defender having thrown the pursuer and the said child out of the family home on one occasion during said period which led to parties' initial separation.

[74] It was clear from the pursuer's account of the defender's behaviour following the birth of the said child that there was an escalation in the abuse which the defender perpetrated against the pursuer during said period. I accepted the pursuer's evidence that, as a result, she was, and remains, terrified of the defender.

[75] In behaving in an aggressive, abusive and violent manner towards the pursuer in the presence of the said child, the defender has recklessly disregarded the emotional welfare of both the pursuer and the said child. The defender lacked insight into the potentially harmful consequences of his behaviour upon the said child. The defender denied that the said child had been distressed as a consequence of any behaviour on his part on 19 December 2018. The defender accepted a proposition put to him by his agent that the said child had not appeared to understand what was going on in the family home on 19 December 2018. I rejected both the defender's account of the events which took place on 19 December 2018 and his account of the impact of those events on the said child at the time. For the reasons set out above, I accepted the pursuer's account of those events and of the acute distress suffered by the said child as a consequence of the defender's violent and abusive conduct towards the pursuer.

[76] It is of significant concern that the defender accepts no responsibility for his abusive, controlling and violent behaviour towards the pursuer. The defender continues to deny that he has ever been violent towards the pursuer. His position is that the pursuer has lied under oath during these proceedings and during the criminal proceedings which led to the defender's conviction for assaulting the pursuer on 19 December 2018. It is also of

significant concern that, at times during his evidence, the defender sought to portray himself as a victim of abuse from the pursuer. I rejected his evidence in respect of all of the foregoing.

[77] Further, I have concluded that the defender is entirely lacking in insight into the effects of his violent and abusive behaviour upon the pursuer and the said child, both physically and emotionally. There was no possibility of contrition on the part of the defender in view of his denials. He would not accept that the pursuer had suffered physically and emotionally as a consequence of his said behaviour. He did not take any personal responsibility for his said behaviour. He appears to have taken no steps to address any issues which may have given rise to his said behaviour. If the defender has taken any such steps, he led no evidence in respect of same, nor did he lead any evidence as to the steps he would require to take to address any issues which may have given rise to his violent, abusive and controlling behaviour.

[78] Following his conviction in respect of the assault on the pursuer on 19 December 2018, the defender was made the subject of a community payback order in 2019. In terms of said community payback order the defender was required to carry out 150 hours of unpaid work within a period of 9 months. No programme requirement was made as part of said community payback order requiring the defender to undertake any domestic abuse or domestic violence programme such as the Caledonian Men's Programme nor was the defender made the subject of any supervision requirement as part of said community payback order.

[79] The defender led no evidence that he had received any professional advice, guidance, counselling or support in respect of his abusive, controlling and violent behaviour and the damaging effects of same on the pursuer and the said child. I inferred that there had

been no such interventions, particularly in light of the defender's continuing denials and in light of the sentence imposed in respect of his assault on the pursuer.

[80] It was apparent from his evidence that the defender has failed to recognise that it is likely that both the said child and the pursuer have been adversely affected by his said abusive, controlling and violent behaviour. This lack of insight and understanding leads me to conclude that if any contact order were to be granted in favour of the defender there is a significant risk that the said child would be exposed to further instances of abuse of the pursuer by the defender. The defender showed no insight into the appropriateness of the pursuer's exercise of her parental responsibility to protect the said child from such a risk of harm by denying the defender contact with the said child.

[81] On the basis of the evidence led before me which I have accepted as credible and reliable, I have concluded that the defender repeatedly behaved in an abusive, aggressive, controlling and violent manner towards the pursuer in the course of parties' relationship. I have also concluded that the defender repeatedly behaved in the said manner towards the pursuer in the presence of the said child when the parties lived in family with the said child prior to parties' final separation on 19 December 2018. The defender refuses to acknowledge that he has behaved in such a manner towards the pursuer.

[82] I have also concluded, from the manner in which the defender often referred to the pursuer during his evidence, that the defender remains hostile towards the pursuer and does not respect the pursuer.

[83] Accordingly, in the particular circumstances of this case, given the history of abusive, aggressive, controlling and violent behaviour perpetrated by the defender against the pursuer, I have concluded that making any contact order in favour of the defender is likely to cause fear, worry and distress to the pursuer. I have concluded that making any contact

order in favour of the defender would be likely to adversely affect the pursuer's mental health and that, in turn, this could have a negative impact on the welfare of the said child, given the pursuer is his primary carer.

[84] I have given consideration as to whether it would be appropriate to make the order sought by the defender on the basis that, in pursuance of same, the parties would require to cooperate with one another as respects matters affecting the said child. I have concluded that there is a power imbalance in parties' relationship in view of the defender's previous controlling behaviour and his previous ability to subject the pursuer to his will. Consequently, in light of the defender's previous conduct, it would not be appropriate to make any contact order in his favour. I have concluded from the pursuer's evidence that, in the past, the defender has been able to bend the pursuer to his will and that, in the event of parties requiring to cooperate as respects matters affecting the said child, he will do so again. I have concluded that the defender is unlikely to cooperate with the pursuer as respects matters affecting the said child and that it is likely that the defender would revert to his previous practice of dictating the rules to the pursuer rather than cooperating with the pursuer as respects matters affecting the said child.

[85] I consider the concerns expressed by the pursuer in the course of her evidence relative to the making of a contact order in favour of the defender to be genuine and well-founded for a number of reasons. These include: (i) the history of parties' relationship; (ii) the defender's continuing denials in respect of his abusive, aggressive, controlling and violent behaviour towards the pursuer, sometimes in the presence of the said child; (iii) the defender's failure to accept any responsibility for his said behaviour; (iv) the defender's lack of insight into the damaging effects of his past behaviour upon the pursuer and the said child; (v) the defender's continuing hostility towards the pursuer and her family; (vi) the

likelihood that the defender would dominate any discussions with the pursuer as respects matters affecting the said child and that he would impose his will upon the pursuer in respect of those matters rather than cooperate with the pursuer in the interests of the said child; and (vii) the defender's failure to recognise the need for intervention to assist him in changing his said behaviour.

[86] Accordingly, I have concluded that it is likely that the said child would be at risk of abuse (as defined in section 11(7C) of said 1995 Act) if contact were to be granted in favour of the defender. The said child has previously witnessed the defender being abusive towards the pursuer. It is likely that the said child would witness further abuse of the pursuer by the defender in the event of contact being re-established whether this be at a contact centre or elsewhere as the parties would either require to come into contact with each other or to be in fairly close proximity to one another to enable such contact to operate.

[87] In terms of section 11(7)(a) of said 1995 Act, the welfare of the said child is the court's paramount consideration. It would not be conducive to the welfare of the said child to allow the defender to have direct contact with him for the reasons outlined above. Granting any order for contact between the defender and the said child would place the said child at significant risk of being adversely affected by abuse perpetrated by the defender against the pursuer. In the event of the pursuer being caused fear and distress by the defender, then it is likely that the said child will also be adversely affected by such fear and distress.

The views of the said child

[88] The said child is 2 years old. The said child has had no contact with the defender since 19 December 2018 when the said child was around 7 months old. The said child is too young to express a view in respect of the section 11 orders sought by the parties.

Decision in respect of the defender's crave for contact

[89] There is no legal onus. The decision in *White* v *White* 2001 SC 689 refers. There is no presumption that contact between a child and his or her parent is in the best interests of the child. The courts will generally consider that it is conducive to the welfare of children if their absent parents maintain personal relations and direct contact with them on a regular basis. However, in each case, the question which must be asked is what is in the best interests of this child?

[90] In this case it is not in the best interests of the said child for a contact order to be granted in favour of the defender for the reasons set out above. In so deciding, I have taken into account that it would, generally, be in the best interests of the said child to have contact with both of his parents to give him a fuller understanding of his own identity. Unfortunately, for the reasons set out above, it would not be in the best interests of the said child for any contact to be allowed with the defender, in the particular circumstances of this case.

[91] In arriving at that decision not to grant a contact order in favour of the defender, I have also taken into account that it is generally in the interests of children to know both of their parents; that it will not generally be in their interests to be deprived of a relationship with one of their parents; that it will not generally be in their interests to lose the opportunity to know that parent at first hand as this may result in the loss of information and knowledge that will go towards the formation of the children's identities; that it is generally not in the interests of children to increase the likelihood of their being unable to get in touch with and/or form a relationship with that parent later in life; and that it is

generally not in their interests to lose the opportunity to know grandparents and other relatives of that parent.

[92] Nonetheless, in the particular circumstance of this case, I have concluded that it is not in the best interests of the said child for any contact order to be granted in favour of the defender for the reasons set out above. I have determined, regarding the welfare of the said child as the paramount consideration, that it would not be in his best interests for any contact order to be made in favour of the defender and that it would not be better for the said child that the order sought by the defender in crave one be granted than that none be made at all.

Expenses

[93] Parties were agreed that there should be a finding of no expenses due to or by either party, whatever the outcome, and I have so found.

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

GLW-F918-19

APPENDIX TO JUDGMENT OF SHERIFF ANDREW M MACKIE

in the cause

A (Assisted Person)

PURSUER

against

A

DEFENDER

Pursuer's submissions

[1] The pursuer's agent invited the court to grant decree of divorce, of consent of the defender. The relevant consent form, signed by the defender, was now lodged in process. There had been evidence from the parties and from other witnesses that the parties had been separated for a period in excess of one year. The court should find that the ground of divorce had been established; that the parties' marriage had broken down irretrievably; and that decree of divorce should be granted. The care arrangements in respect of parties' child had been the subject of the proof and the court could be satisfied as to those arrangements on the basis of the evidence which had been led.

[2] The pursuer's evidence had been in short compass. Her position was very clear. The pursuer did not consider that contact between the defender and the said child would be in

the best interests of the said child. The pursuer's evidence, in particular, contained instances of domestic violence against her at the hands of the defender. There was no dispute that the defender had been convicted at Glasgow Sheriff Court of a domestic assault upon the pursuer.

[3] The court had also heard evidence in respect of the impact on the said child of the defender's domestic violence against the pursuer. The court had heard evidence of instances where the said child had been directly involved or directly impacted by the defender's violent conduct.

[4] The court had heard some evidence from the pursuer's sister about the defender being verbally abusive towards the pursuer, as well as some evidence about the controlling behaviour exhibited by the defender towards the pursuer.

[5] The evidence of the domestic assaults came directly from the pursuer, which was understandable given the nature of the allegations. The court requires to consider the need to protect the said child from abuse or from the risk of abuse by the defender. The court also requires to consider the ability of the pursuer to care for the said child if the court finds that there has been domestic abuse against the pursuer at the instance of the defender.

[6] The court had heard evidence from the pursuer and her witness that the defender had been very limited in his interactions with the said child following the said child's birth. The parties had only lived together as a family for a short period of time. The pursuer had been exclusively breast feeding the said child during that period. The said child could not therefore be too far from the pursuer at that time. The court should accept the pursuer's evidence that she had been the primary carer of the said child prior to parties' final separation. The court had heard evidence of the pursuer's concerns about the defender's ability to look after even the basic needs of the said child.

[7] The court should make a residence order in favour of the pursuer in respect of the said child. There was no opposition to the granting of such an order by the defender. It would be better for the said child for such an order to be made. The said child lives with the pursuer and is happy, settled and stable in her care. Standing the defender's violent and abusive behaviour towards the pursuer previously and standing the repeated instances of the pursuer's motor vehicle being damaged after the parties' final separation, it would be better for the said child to have the security and protection of a residence order in favour of the pursuer. This would regulate the matter of residence for the said child and would enable the pursuer to ensure the said child would be returned to her care in the event of any contact taking place between the defender and the said child.

The defender's submissions

[8] The defender had confirmed that parties had been separated for a period in excess of one year. He had provided his consent to a decree of divorce being granted on that basis. The defender had no issue with a residence order being granted in favour of the pursuer. The defender's evidence had been that he accepted it would be better for the said child to be resident with the pursuer. The pursuer's crave for a residence order was, therefore, unopposed.

[9] In respect of the defender's contact crave, the court had heard contradictory evidence in respect of the defender's interaction with the said child when the parties were together with the said child and when the said child was in his sole care during visits to the home of the defender's mother. The court had heard evidence in respect of these matters from TA and from the defender's mother, SA. There were also conflicts in the evidence as to what had happened during the parties' marriage.

[10] Some facts did not appear to be in issue. After a relatively brief separation the pursuer returned to the live in the matrimonial home with the defender in mid-2018. Thereafter, the defender had the said child on a regular basis and took the said child to his mother's home on a regular basis. No harm came to the said child on these occasions. The pursuer's evidence had been that the defender did not change the said child's nappy during such occasions but gave no evidence about any potential danger to the said child while the said child was in the sole care of the defender.

[11] The paramount consideration for the court is the welfare of the said child. A contact order should only be made if the court considers it better for the said child to make such an order than to make no order at all. The defender had explained at length, both in his affidavit and during his oral evidence, what benefit there would be to the said child in having contact with the defender. It was very clear from the defender's evidence that he is very fond of the said child, that he loves the said child and that he is keen to re-establish his relationship with the said child under any conditions which the court might deem appropriate. There was little suggestion that the defender is seeking contact for reasons other than the best reason, namely to have contact with his son.

[12] There had been a suggestion that the defender had not sought contact following parties' separation in December 2018. In fact, the evidence demonstrated that the defender had sought contact with the said child in February 2019. This was a short time after parties' separation on 19 December 2018. The defender's position had been consistent since the breakdown in relations between parties on 19 December 2018. His purpose was very clear, namely to have a relationship with his son and for his son to benefit from a relationship with his natural father.

[13] The defender accepted that he had been convicted of assaulting the pursuer. The defender did not accept that he had behaved as described by the pursuer and denied that he had assaulted the pursuer. There had been one other allegation of domestic abuse made against the defender by the pursuer. This allegation had been made to the police by the pursuer during mid-2018. The defender had been interviewed by the police in respect of that allegation and then released. The defender had been candid with the court in respect of the allegation which had been put to him by the police during said interview. The court should also take into account that the allegation made against the defender by the pursuer in mid-2018 had been made against the background of the parties and the pursuer's family becoming aware of allegations of criminal activity made against the pursuer's father at that time.

[14] It was accepted that, if the court found that there had been domestic abuse perpetrated against the pursuer by the defender, the provisions of sections 11(7A)–(7E) of the Children (Scotland) Act 1995 would apply. In terms of sections 11(7A) and 11(7B) of said 1995 Act the court required to have regard to the need to protect the said child from any abuse or from the risk of any abuse which affects, or might affect, the said child. In having regard to these matters the court should take into account that the defender had been made subject to the usual special conditions of bail in December 2018 and that, following his conviction in 2019, he was made the subject of a non-harassment order in terms of which he is not allowed to approach, contact or communicate with the pursuer. The defender had not breached the special conditions of bail nor had he breached the non-harassment order.

[15] The court had heard evidence from the defender's mother and from the parties' friend, TA, about what they could do to facilitate contact between the defender and the said child. The pursuer did not have a difficulty with the defender's mother but had indicated it

may be the other way around. In either event the defender's mother was prepared to facilitate contact. Avenues therefore appear to exist which would allow contact between the defender and the said child to take place without the pursuer coming into contact with the defender. This would protect the said child from any abuse or the risk of any abuse which affects or might affect the said child.

[16] When the court considers the matters set out in section 11(7B) of the said 1995 Act, the court requires to consider parties' competing versions of the events of 19 December 2018 which the court has heard. There was no dispute between the parties that the said child had been present within a ball pool within the same room in which those events took place. The said child was around 7 months old at that time. A child of that age is very likely to have no recollection or memory of the incident.

[17] In terms of section 11(7B)(c) of said 1995 Act, when considering the ability of the defender to care for, or otherwise meet the needs of, the said child, the court should find that the defender had shown a great deal of insight into why he is seeking contact with the said child and what he would do with the said child if contact were to be allowed. The court had also heard evidence from the defender's mother about the defender's interaction with the said child when the pursuer was not present. The court had heard evidence, which was positive in nature, in respect of the defender's abilities to care for, or otherwise meet the needs of, the said child. The court should have regard to TA's affidavit although it was accepted by the defender that TA has not had any contact with the said child for a very long time.

[18] When the court is considering the terms of section 11(7D) of said 1995 Act and, in particular, the issue of co-operation between the parties, the court should take into account that the defender does not oppose the making of a residence order in favour of the pursuer

but is simply seeking contact with the said child. If the court were to award contact to the defender there are avenues by which such contact could take place. Other people could step in to collect the said child from the pursuer and return the said child to the pursuer. Co-operation could be achieved in that way.

[19] The defender seeks to persuade the court that making a contact order in favour of the defender would be better for the said child than no such order being made at all. The benefits to the said child flow from having contact with his natural father, the defender, who has consistently sought contact with the said child post-separation. If anything untoward happens during any contact period allowed by the court, it would be open to the pursuer to take "further action".

[20] If the defender's analysis is correct, there had been no evidence from the pursuer that the said child would be in danger or would be adversely affected by contact with the defender. There do not appear to have been any issues when the defender was caring for the said child on his own prior to parties' final separation when the defender took the said child on visits to the home of the defender's mother.

[21] It was accepted on behalf of the defender that, following his conviction for assaulting the pursuer, the defender had not been made the subject of any community payback order with supervision or programme requirements. Following his conviction the defender had been made the subject of a community payback order with only an unpaid work requirement. In addition, the defender had been made the subject of a non-harassment order for a period of 2 years.

Expenses

[22] Parties were agreed that, irrespective of the decision in respect of contact, there should be a finding of no expenses due to or by either party.