SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT KIRKCALDY

[2024] SC KDY 2

F265-17

JUDGMENT OF SHERIFF PAUL REID, KC

in the cause

AB

Pursuer and Minuter

against

CD

Defender and Respondent

Pursuer and Minuter: M Moran, Stevenson & Marshall LLP, Dunfermline
Defender and Respondent: R Gray, George More & Company LLP, Edinburgh

Kirkcaldy, 20 November 2023

FINDINGS-IN-FACT

The Child

1. "Andrew" was born in 2012 and is 11 years old. The pursuer is his mother. The defender is his father.

2. Andrew resides with the pursuer. He previously lived in Fife but now lives in another part of Scotland.

3. Following the end of his parent's relationship, Andrew lived with the pursuer and had regular contact with the defender. That contact included residential contact. From November 2017, Andrew's residence and contact with the defender was regulated by court order. Since February 2018, that order has provided that the defender have no contact with Andrew.

4. A residence order provides that Andrew shall live with the pursuer. An interdict is in place which prevents the defender removing Andrew from the pursuer's care.

5. Andrew has had no contact with the defender since 2018, other than no more than three brief and coincidental meetings with the defender.

6. Andrew knows that the defender is in prison. Andrew does not know why the defender is in prison.

7. Until September 2019, Andrew had regular contact with his paternal grandmother (the defender's mother). That contact was agreed with the pursuer.

8. Andrew attends primary school. There are no concerns about his presentation or progress at school.

9. Andrew is registered with a General Practitioner in the town where he now lives with the pursuer.

The pursuer

10. The pursuer was in a relationship with the defender from 2010 to 2017.

11. The pursuer has a full set of parental responsibilities and rights in respect of Andrew.

12. The pursuer has three other children: two girls and a boy. The defender is not the father of those children.

13. The prospect of the defender becoming involved in Andrew's life again following his release from prison causes the pursuer anxiety and distress.

The defender

14. The defender is currently serving a sentence of imprisonment.

15. The defender previously lived in the same Fife town as Andrew and the pursuer.

16. In June 2022, the defender wrote to Andrew's school to enquire about the possibility of engaging with the "Storytime dads" programme. "Storytime dads" is a programme by which a prisoner can write a story for their child which is then sent to them. The school confirmed that it could not share such with Andrew a story given the terms of the contact order.

17. Whilst in prison, the defender has participated in and completed a prison programme called "Moving Forward 2 Change". This programme involved 69 group sessions over a 6-month period.

18. The defender has a full set of parental responsibilities and rights. His parental responsibilities and rights are curtailed by virtue of a residence order and a contact order which are currently in place.

The defender's conviction

19. In February 2018, allegations of a sexual nature were made against the defender by the pursuer and her two daughters. The defender was charged and appeared on petition at Kirkcaldy Sheriff Court, where he was committed for further examination and admitted to bail. Following the making of the allegations, the defender's contact with Andrew was reduced to nil.

20. In 2019, the defender was convicted of the following offences following a trial in the High Court: (a) one charge of sexual assault; (b) two charges of sexual assault under section 3 of the Sexual Offences (Scotland) Act 2009; (c) one charge of lewd, indecent and libidinous practices and behaviour; (d) two charges of sexual assault on a young child under

section 20 of the Sexual Offences (Scotland) Act 2009; and (e) two charges of assault to injury.

21. In respect of those offences, the complainers were: (a) the pursuer in respect of an assault and a sexual assault; (b) the pursuer's eldest daughter in respect of a sexual assault and lewd, indecent and libidinous practices and behaviour; (c) the pursuer's youngest daughter in respect of an assault and a sexual assault; and (d) the pursuer's son in respect of an assault.

22. The defender received a custodial sentence comprising of a 4 year period of imprisonment and an extension period of 2 years.

23. The defender will be released from custody before the end of 2023.

24. An appeal against conviction was refused.

25. The defender continues to deny his guilt.

26. The defender committed the offences for which he has been convicted.

Andrew's contact with his paternal grandmother

27. Before Andrew moved away from Fife, the defender's mother had weekly contact with him. It was agreed that Andrew would not see the defender during this contact. There were no planned meetings between Andrew and the defender during this contact. There were no more than three brief and coincidental meetings between Andrew and the defender. Andrew had a good relationship with the defender's mother during this time.

28. After Andrew moved away from Fife, the defender's mother continued to have contact with Andrew. During the pandemic, this contact was by telephone. Once travel restrictions eased, the defender's mother travelled to visit Andrew. This involved an overnight stay. Andrew was less enthusiastic about contact with the defender's mother

during this time. Attempts to facilitate contact between Andrew and the defender's mother were not persisted in.

29. An attempt to secure a contact order from the court which permitted her contact with Andrew were not insisted upon by the defender's mother.

Concerns about autism

30. In 2018, the pursuer became concerned that Andrew may have autism. She discussed those concerns with Andrew's General Practitioner in June 2018 and July 2019.

31. Following the July 2019 consultation, Andrew was referred to community paediatrics for an assessment. That assessment did not take place. The pursuer was advised to discuss the matter with Andrew's school and obtain a written report from them.

32. A written report was obtained from Andrew's school in November 2019 and passed to Andrew's General Practitioner.

33. In October 2020, the defender sought information from Andrew's General Practitioner about the possibility of autism. This caused Andrew's General Practitioner to read the November 2019 report from Andrew's school for the first time. There was further correspondence between the defender and Andrew's General Practitioner about the issue.

34. In October 2021, the pursuer discussed her concerns about Andrew possibly having autism with a new General Practitioner (following her move from Fife). She was advised to speak to the school about obtaining an assessment by an educational psychologist.

35. In March 2022, the defender sought information from the local health board about the GP practice at which Andrew was now registered.

36. In April 2022, the defender wrote to Andrew's new GP practice seeking information about the possibility of Andrew having autism. There was further correspondence between the defender and the GP practice about the issue.

37. Andrew's school had no concerns that he may have autism. Out of deference to parental concern, a referral was made to the school doctor. No appointment was offered by the school doctor given Andrew's progress and development since joining that school.

FINDINGS-IN-FACT AND LAW

1. That it is in the best interests of Andrew that an order be made suspending the defender's parental responsibilities conferred by s.1(1)(a) and s.1(1)(d) of the Children (Scotland) Act 1995; and it is better for Andrew that the order be made than no order be made.

2. That it is in the best interests of Andrew that an order be made suspending the defender's parental rights conferred by s.2(1)(b) and s.2(1)(d) of the Children (Scotland) Act 1995; and it is better for Andrew that the order be made than no order be made.

3. That it is in the best interests of Andrew that an order be made permitting the pursuer to remove him from the United Kingdom without the consent of the defender; and it is better for Andrew that the order is made than no order is made.

THEREFORE, SUSPENDS THE PARENTAL RESPONSIBILITIES OF THE DEFENDER AND RESPONDENT CONFERRED BY S.1(1)(A) AND S.(1)(1)(D) OF THE CHILDREN (SCOTLAND) ACT 1995 IN RESPECT OF [ANDREW]; SUSPENDS THE PARENTAL RIGHTS OF THE DEFENDER AND RESPONDENT CONFERRED BY S.2(1)(B) AND S.2(1)(D) OF THE CHILDREN (SCOTLAND) ACT 1995 IN RESPECT OF [ANDREW];

PERMITS THE PURSUER AND MINUTER TO REMOVE THE CHILD [ANDREW] FROM THE UNITED KINGDOM WITHOUT THE CONSENT OF THE DEFENDER AND RESPONDENT; FINDS NO EXPENSES DUE TO OR BY EITHER PARTY IN RESPECT OF THE MINUTE PROCEEDINGS; AND *QUOAD ULTRA* REFUSES THE MINUTE.

NOTE

Introduction

[1] In 2019, the defender and respondent ("the defender") was convicted of a number of serious charges, including various sexual offences in respect of children, following a trial in the High Court. His victims were his former partner, the pursuer and minuter ("the pursuer"), and her (but not the defender's) older children. A sentence which comprised of a custodial term of 4 years and an extension period of 2 years was imposed upon the defender. An appeal against conviction was unsuccessful but he continues to deny his guilt. It is expected that he will be released from custody at some point before the end of 2023. Until March 2017, the pursuer and the defender were in a relationship. Andrew (not his real name) is a child of that relationship. Andrew was not a complainer in the defender's criminal trial. He is currently 11 and has, in accordance with a residence order made by this Court, lived with the pursuer since the parties' separation. Until February 2018, the defender had contact, including regular residential contact, with Andrew. From November 2017, that contact was regulated by an interim contact order made by this Court. After the allegations which resulted in the defender's conviction came to light, contact was reduced to nil by this Court. The defender has had no contact with Andrew since 2018. In these

proceedings, the pursuer seeks an order removing the defender's parental responsibilities and rights in respect of Andrew.

Procedural Matters

[2] Evidence was heard on 24 February 2023 and 1 June 2023. The case also called on 22 June 2023 at which point the defender closed his case (the case having been adjourned for him to conclude a line of enquiry which may have seen further evidence led). Evidence was due to be heard on 5 May 2023. On that day, the defender was not present when the case called. Although he had been ordered out of custody and, I was told, left prison on his way to the Court, he was returned to prison without arriving at Court due to staffing issues with the prison transport service.

[3] Submissions were then heard on 24 August 2023. Again, due to resource issues with the prison transport service, the defender was not, despite having been ordered out of prison for the hearing, brought to the Court. On his behalf, a motion was made to adjourn the hearing for the defender's appearance. The pursuer was essentially neutral on that motion. I refused the motion. I recognised the importance of a party participating in a hearing (as explained by, for example, Lord Reed in *R (on the application of Osborn)* v *Parole Board* [2014] AC 1115 at para 68; see also: *Secretary of State for the Home Department* v *AF (No.3)* [2010] 2 AC 269 at para 63 (Lord Phillips)). Where important issues are being decided, the presence of a person at a hearing can play an important role in acceptance of the outcome and the overall fairness of the process. Had the defender's interest been the only one engaged, I may have granted the motion. His were not, however, the only interests engaged and it could not be said that he had been denied an opportunity to participate in proceedings (represented, as he was, by a very able solicitor). Time and again first instance

courts have been reminded of the importance of dealing with cases concerning children as expeditiously as possible. The child at the heart of these proceedings is entitled to have any ongoing uncertainty resolved. Separately, the pursuer has an interest in obtaining a decision on her Minute so as to bring her certainty. And there is an interest in that certainty being available before the defender's anticipated release later in the year. There is also the fact that no guarantees could be given that similar issues would not arise at any further hearing. Finally, evidence was first heard on this Minute on 24 February 2023. A further delay was not consistent with the speedy process that Minute proceedings are meant to be. So, whilst I accept, and regret, that the defender lost the opportunity to observe the discussion that was had, when placed in the balance with the other relevant interests, it was, in my view, in the interests of justice that the hearing proceeded notwithstanding the absence of the defender. I indicated that the defender could, if necessary, lodge a short supplementary written submission within a week or so if there were points that emerged from the discussion that he considered were not properly responded to as a consequence of his absence. No such submission was lodged.

The Evidence

Introduction

[4] Evidence was led from 7 witnesses, 5 of whom were called by the pursuer. A detailed joint minute was also lodged in Process. I will start by outlining the facts which were agreed by the parties before turning to the witness evidence was led. After that, I shall explain my assessment of the evidence. The conclusions I have drawn from the evidence are reflected in the findings-in-fact above.

Agreed Evidence

[5] A joint minute agreed the core facts in respect of the application and the formalities associated with the various productions. In respect of the core facts, the following narrative was agreed. The parties are Andrew's parents and both have parental responsibilities and rights in respect of him. They were previously in a relationship, which ended in March 2017. The pursuer and Andrew previously resided in Fife but have since moved to another part of Scotland (where the pursuer lives is deliberately vague as she does not wish it to be known to the defender and has been designed as care of her solicitors for the purposes of these proceedings; she moved in February 2021). The pursuer has three other children: aged 21, 19 and 13. The pursuer and these three children were complainers in criminal proceedings which resulted in the defender being convicted following trial in the High Court. As a result of that conviction, the defender was imprisoned. Prior to his incarceration, the defender resided in the Fife town the pursuer previously lived in.

[6] Following the parties' separation, Andrew lived with the pursuer and had contact with the defender. From 10 November 2017, the position was regulated by the Court. Andrew resided with the pursuer in terms of an interim residence order. An interim contact order meant he saw the defender every second weekend and for a few hours after school one day a week. The allegations which led to the defender's conviction were made in February 2018. The pursuer stopped facilitating contact once those allegations had been made and that same month the court, on the pursuer's motion, reduced the defender's interim contact to nil. Andrew has had no contact with the defender since 2018 (other than no more than three brief and coincidental meetings). A few days later, the defender appeared on petition, was committed for further examination and released on bail. In October 2018, the Court pronounced a decree the effect of which was that the interim

residence order was put on a permanent footing and the defender was interdicted from removing Andrew from the pursuer's care. Those proceedings were undefended.

[7] The defender's mother, Andrew's grandmother, also had contact with Andrew following the parties' separation. Between March 2017 and September 2019 this was by agreement with the pursuer. It was agreed that during such contact, Andrew would not have contact with the defender.

[8] In 2019, the defender stood trial in the High Court. He was convicted of the following offences: one charge of assault; two charges of sexual assault under s.3 of the Sexual Offences (Scotland) Act 2009; one charge of lewd, indecent and libidinous practices and behaviour; two charges of sexual assault under s.20 of the 2009 Act; two charges of assault to injury. The complainers in respect of the charges on which the defender was convicted were the pursuer (assault and sexual assault), the pursuer's eldest daughter (sexual assault and lewd, indecent and libidinous practices), the pursuer's youngest daughter (sexual assault and assault) and the pursuer's other child (assault). Following conviction, the defender was imprisoned for six years, that consisting of a custodial term of four years and an extension period of two years. An extract conviction is lodged in process, the terms of which are agreed.

[9] In 2018 the pursuer became concerned that Andrew may have autism. There concerns were discussed with a General Practitioner on 13 June 2018 and 24 July 2019. Following the latter appointment, a referral was made to Community paediatrics for an assessment. That referral was not progressed due to a lack of information. The pursuer was advised to discuss matters with Andrew's school and obtain a written report. That report was obtained in November 2019 and passed to Andrew's GP (who was not the GP who had made the referral). In October 2020, the defender sought information about Andrew and

that caused the GP who had made the referral to read the report from the school for the first time. The day he read the report, that GP wrote to both the pursuer and the defender. There was further correspondence between that GP and the defender in March 2021. In October 2021, the pursuer discussed her concerns about Andrew possibly having autism with her new GP (following her move). She was advised to speak to his school and seek an assessment from an educational psychologist. In March 2022, the defender sought information from the local health board about the practice at which Andrew was now registered and in April 2022, the defender wrote to that practice seeking information about Andrew, in particular enquiring about autism. The practice responded later that month. There was further correspondence between the defender and both the new GP and the new school during May and June 2022.

[10] Andrew's new school have no concerns as to his presentation or progress. Nor do they have concerns that he may have autism. In deference to parental concerns, a referral was made to the school doctor for further investigations into possible autism. However, given Andrew's progress and development since joining the school and the absence of major concerns on the part of the school, Andrew was not offered an appointment.

[11] The schools Andrew has attended and the General Practitioners he was registered with were agreed. The provenance of the documentary productions was also agreed (but it was not agreed that they could be admitted into evidence without being spoken to).

The Pursuer

[12] A detailed affidavit, which itself referred to and incorporated an earlier affidavit, for the pursuer was produced. Her evidence-in-chief was simply an adoption of that affidavit. A fair amount of those documents sets out the history of her relationship with the defender

and details of the behaviours which underpinned the criminal proceedings which led to the defender's conviction. Much of the substance of that was agreed in the Joint Minute and so it does not need repeated.

[13] One topic on which there was a dispute between the parties was the circumstances in which the defender had contact with Andrew following the interim order reducing his contact to nil. As noted above, the defender's mother (Andrew's gran) continued to have direct contact with Andrew. On a few occasions during the summer of 2018, the defender saw Andrew when he was with his gran. In her affidavit, the pursuer speaks of two incidents (once at a bank and the other in Princes Street gardens). When the pursuer learned of these incidents, she sought to stop contact between Andrew and his gran. She explains in the affidavit that she lost trust in his gran (given the defender was not meant to see Andrew) and that she wanted a "*clean break*" following the criminal proceedings. Whilst Andrew's gran raised proceedings to secure contact with Andrew, these were not insisted upon. The pursuer explained that contact was causing Andrew distressed and he would be "*howling in the street*" when being taken to meet his gran.

[14] What Andrew knew about the defender's incarceration, and how he came to know about it, was also explored. In her affidavit, the pursuer explains that she did not tell Andrew about it but one of her other children did. This led Andrew to ask whether his dad was in prison. The Pursuer told him he was "*in jail for being bad*". So far as the pursuer is aware, Andrew still does not know why the defender is in prison. The pursuer denied, when challenged in cross-examination, that she had told Andrew that his dad was in prison, why he was in prison or that it was his gran's fault he was in prison. In re-examination, she was adamant that Andrew was too young to know the reasons for the defender's imprisonment.

[15] As to why she was seeking an order removing the defender's parental responsibilities and rights, the pursuer, in her affidavit, explained that she believed it was best for Andrew not to have contact with the defender in the future. She did not want Andrew to have contact with him. "I want us all to be able to move on", she explained. Given how long it is now since Andrew has seen his dad, "there is no relationship there." She was concerned that the defender would travel to where she now lives to look for Andrew. And reference was also made to the defender contacting Andrew's school and GP. In cross-examination, the pursuer accepted the defender would be subject to conditions upon release from prison and that these conditions would offer her some protection. She also understood that breach of those conditions would likely trigger the defender's recall to prison. In re-examination, the pursuer explained that whilst the defender having parental responsibilities and rights had not affected Andrew since contact was stopped, it had affected her. Knowing that the defender was still in the background was a "constant worry". When she learned of the defender's communications with Andrew's school and GP she was anxious, stressed and on edge. She agreed with the proposition that the children pick up on that stress. The pursuer has never been, and has no plans to go, abroad with Andrew but it would be a possibility in future. When asked whether Andrew ever talks about the defender, she answered no.

[16] Subject to the necessary allowances for the passage of time in respect of some of the more granular detail of specific events that happened years before, the pursuer was a credible and reliable witness. In particular, I accept her evidence that the defender's continued involvement in Andrew's life was a source of stress and anxiety for her. To the extent that her evidence wandered into inferences she had drawn as to the defender's motive for certain events, as explained below, I was not satisfied that her inferences were

always fair (even if they were understandable given the circumstances in which her relationship with the defender broke down).

The pursuer's mother

[17] A detailed affidavit, which like the pursuer's affidavit referred to and incorporated an earlier affidavit, was produced for the pursuer's mother. Again, evidence-in-chief was simply an adoption of that affidavit. Again, much of those affidavits concerned matters which were either agreed in the Joint Minute or sat behind the criminal proceedings against the defender.

[18] In her affidavit, the pursuer's mother confirmed that Andrew knew that the defender was in prison and had found out from one of his half-siblings. She also confirmed that Andrew was upset about contact with the defender's mother and that he never asks about, or mentions, his dad. In her affidavit, she said: "I don't think [Andrew] would know him if he saw him. I don't think there would be any relationship there. The way that his dad is, the bairn is better off without him." Nothing was said in the affidavit about what effect the defender having parental responsibilities and rights was having on the pursuer.

[19] Whilst various aspects of what was said in the affidavit were challenged in cross-examination, these were invariably in respect of issues which were not directly relevant to the issue raised by this Minute or issues of fact which were ultimately determined by the terms of the Joint Minute.

[20] To the extent that cross-examination was intended to cast doubt on the credibility and/or reliability of the pursuer's mother, it did not do so to a material extend. Clearly the pursuer's mother does not have much time for the defender (unsurprisingly given what he has been convicted of) and the reliability of her account of events which happened years

before needs to be approached with the caution demanded by the passage of time. In large measure, the pursuer's mother's account of supportive of the pursuer's account. On the whole, I accept the evidence she gave.

Other Evidence for the Pursuer

[21] Several witnesses were led for the pursuer who gave largely unchallenged evidence which came mainly in the form of affidavits. Dr Gordon is a General Practitioner at the practice at which Andrew was registered in 2020. Appended to his affidavit were two letters of 23 October 2020, both written by him. One was to the pursuer and the other was to the defender. In short, the letters explained to both parents that earlier correspondence from Andrew's school teacher had been overlooked and Dr Gordon was checking whether an educational psychologist assessment was still required. Dr Hewitt is also a General Practitioner, albeit at a difference practice from Dr Gordon. He is Andrew's current GP. Appended to his affidavit was a summary of Andrew's medical records and a letter from the Community Child Health team which confirmed that no appointment would be offered to Andrew to investigate possible autistic spectrum condition. That was because Andrew's progress at school suggested it was unnecessary. Dr Hewitt explained in oral evidence that the process by which an assessment for possible autism was considered was instigated by Andrew's head teacher. His head teacher was the next witness. Mrs Reid has been the head teacher at the school since 2015. Her affidavit spoke to correspondence in May and June 2022 in respect of Andrew. This correspondence largely related to further investigation for possible autism (although the school did not have any concerns about Andrew's presentation or progress). One letter (6 June 2022) was a response to the defender explaining that the school could not share a story he had written for Andrew given the

Court had reduced his contact with Andrew to nil. That perhaps misunderstood what the defender had said in his letter of 23 May 2022 to Mrs Reid (that letter was also annexed to her affidavit; Mrs Reid did not accept she misunderstood the defender's letter) and the defender responded pointing that out by letter dated 16 June 2022 (also annexed). In oral evidence, Mrs Reid was asked about the process of assessing for possible autism and what she made of the tone of the various correspondence from the defender. In relation to the process of assessing for possible autism, she explained that the referral would be to the community child health doctor and that an educational psychologist would not be involved in making the diagnosis. In relation to the tone of the correspondence, she considered it to be "quite firm". The evidence of these witnesses was not in substance challenged and I accept it as credible and reliable.

The defender

[22] Like the other witnesses, the defender adopted the terms of an affidavit which had been lodged. Again, like the other affidavits, it sets out the circumstances in which the relationship broke down and how his contact with Andrew came to end. I will turn to the contentious matters in a moment. But in adopting his affidavit, the defender also explained that he had undertaken and completed a prison programme called "Moving Forward 2 Change" ("MF2C"). MF2C is a group programme which took around six months and had 69 sessions. It required a lot of in-depth and personal work, including reflection and consideration. The course culminated in presenting a plan for the future and how to manage return to society. Given the defender continues to deny his guilt (and intends to present an application to the Scottish Criminal Case Review Commission once released), it was unusual that he was given a place on MF2C.

[23] In respect of the contact the defender had with Andrew after his contact was reduced to nil, the defender explained that these were each coincidental and unplanned meetings. Andrew was with the defender's mother and they happened to meet. He adhered to that position when challenged in cross-examination. He was also asked, in cross-examination, about having taken Andrew away from nursery one day. This, explained the defender, had happened but at a time when he had full and unrestricted parental responsibilities and rights. It was born out of a desire to see his son who, the defender maintained, had asked to see him.

[24] In respect of his contact with Andrew's GP, in his affidavit, the defender explained that this was done in an attempt to keep himself updated in relation to Andrew and to make sure the various referrals and investigations Andrew required were taking place. In cross-examination, he accepted that there was nothing in the GP records which suggested he had enquired with Andrew's GP before these proceedings were raised. He explained that he was concerned that the possibility of Andrew having autism had been raised but, so far as he was aware, had not yet been appropriately assessed. He was anxious for the matter to be progressed.

[25] In respect of his contact with Andrew's school, in his affidavit, the defender explained that this stemmed from a project which ran in prison called 'Storytime Dads'. This involves prisoners writing stories for the children. The defender accepted that he contacted the school to ascertain if this was a possibility. He did not accept the characterisation of the correspondence in cross-examination as asking to send a story to the school for Andrew. He maintained that he was only trying to understand whether that was a possibility. The defender had also written to the school about the possibility of autism (see agreed evidence, above).

[26] In respect of his intentions upon release, in his affidavit, the defender denied any intention to remove Andrew from the pursuer's care. He noted that he would be subject to licence conditions which would not permit unsupervised contact with a person under the age of 18. He also noted the terms of the current residence order and the likely consequences for him (in terms of a return to custody) should he not respect the conditions of his release. He denied, in cross-examination, that he had made any plans about seeing Andrew once released.

[27] In respect of the order which the pursuer seeks, the defender did not accept that it was in Andrew's best interests or that it was necessary. He maintained that he had no interest in the pursuer and only wanted to know that Andrew is doing well. One day he would like to seek a Contact Order which reintroduced contact between him and Andrew. But he did not know when and did not know if it would be successful. He also acknowledged that re-establishing a relationship with Andrew would not be a quick process (if it were allowed to happen). In the meantime, he did not want to be "in the dark about [Andrew's] welfare". He had "no intention of causing difficulty". Whilst he does not accept his guilt, he did accept that he had caused the pursuer "upset".

[28] So far as the credibility and reliability of the defender's evidence is concerned, I had no material concerns. Whilst he continues to deny his guilt, as explained below, that he committed the offences for which he has been convicted his conclusively established by means of a statutory presumption. I deal with the more contentious issues arising from the defender's evidence below, where I explain why I have resolved those matters in a manner which is generally favourable to him.

The defender's mother

[29] The defender also called his mother to give evidence. She, too, adopted an affidavit. After some brief background details, it largely concerns her contact with Andrew and the circumstances in which the defender had contact with Andrew when it had been reduced to nil.

[30] In respect of her contact with Andrew, the pandemic intervened to prevent direct contact for a while. There was a lengthy telephone call which Andrew appeared to enjoy. Two subsequent video calls were different and Andrew appeared more guarded. She believed that the pursuer was with Andrew during these calls. Once travel, and inter-household meetings, were permitted again, she sought travel to see Andrew. That was a significant journey and it required an overnight stay. That ultimately broke down and attempts to secure contact through the Court were not insisted upon. Before contact had broken down, Andrew had asked about his dad whenever he had contact with her and had hoped to see him.

[31] Before all of this, and before the pursuer relocated, she had regular weekly contact with Andrew. She agreed that the defender would not see Andrew as part of that. But on two or three occasions the defender did see Andrew. Whether it was twice or three times was unclear. It was, she said in oral evidence, "certainly two, may have been three". None were pre-arranged and, indeed, she explained that she had been nervous to minimise the risk of inadvertent meetings as she knew the defender was not allowed to see Andrew. When they did meet, she found it very difficult. The defender and Andrew were both emotional and hugged each other. Each interaction was short and the meetings were entirely unexpected. It was put to her in cross-examination that her evidence that contact was not planned was untrue and that she had communicated with the defender about where

she would be with Andrew. She was emphatic in her denial of that suggestion. She generally spoke of a good relationship with Andrew and believed that Andrew was fond of her. She tried to deflect questions from Andrew about where his dad was.

[32] In respect of the removal of the defender's parental responsibilities and rights, she maintained that her son was a good dad. She was concerned that Andrew would lose touch with the parental side of the family. She was also concerned about whether Andrew's education and health would be looked at "with the same scrutiny" if the defender's parental responsibilities and rights were removed.

[33] In all material respects, I accept the defender's mother's evidence as credible and reliable. She struck me as a caring grandmother who tried as best she could to navigate what must have been a very difficult situation.

Assessment of the Evidence

[34] It is appropriate to start by saying more about the defender's evidence. I am asked to reject it as being neither credible nor reliable. To be fair to the pursuer, she does not shy away from what the submission on credibility means. As it was put in her written submission: "I respectfully suggest that the Defender was not truthful." I do not agree. To the extent that inconsistencies were pointed out in cross-examination, they were not significant. For example, whilst the defender suggest he had telephoned Andrew's GP practice before writing to them, the suggestion that is a lie because it is not mentioned in the GP records presumes that every telephone call to a GP practice is recorded in a patient's medical records. Nothing was led in evidence to support such a presumption (and it does not accord with practical experience). Other issues founded upon (e.g. that he appeared to have a sharper memory for the detail of some incidents than others) is a question of

reliability. So far as the general attack on the defender's reliability is concerned, again I am largely unpersuaded by it. Much is made by the pursuer in submission of the defender taking Andrew from nursery one day without the consent of the pursuer and his answer that he had full parental rights at the time. This answer, it is said, shows that the defender takes the view he can remove Andrew from the pursuer or those to whom she has entrusted his care "without consent or Court Order". That may be a fair comment on the answer. But it is hardly fair criticism. Because whilst those that hold parental responsibilities and rights ought to exercise them responsibly and consensually, they are entitled to exercise them without the consent of the other rights/responsibilities holder(s) or sanction from the court. Since the matter of residence and contact has been regulated by the Court, the defender has abided by those orders. That is inconsistent with the submission he is someone who is not accepting of not getting what he wants.

[35] Much was also made of the defender's attitude to his conviction. Before addressing that, it is convenient to explain the effect of that conviction for the purposes of these proceedings. The fact of conviction engages s.10 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968. Read short, if, in civil proceedings, a person is proved to have been convicted of an offence they are presumed to have committed that offence unless the opposite is proved. In other words, once the fact of conviction is proved, the onus switches to the person who has been convicted to rebut the statutory presumption contained in s.10 (see: *Towers* v *Flaws* 2020 SC 209 at para 27). A party seeking to invoke s.10 of the 1968 Act should prove the terms of the libel, as found established by the jury, and this is usually done by producing an extract conviction. To the extent that there is a coincidence between the libel and the averments made in the civil proceedings, the onus of proof is reversed (*ibid.*). In the present case, the pursuer has done her part: she has proved the terms

of the libel and it coincides with her averments. The defender has not sought to rebut the presumption. Whilst he maintained his innocence throughout, he did not seek to lead any evidence to that effect. Accordingly, he is "taken to have committed" those offences (s.10(2)(a)).

[36] Returning to what the pursuer had to say about the defender's attitude to his conviction. First, it is said he displayed a lack of candour when saying in his affidavit that he had been found guilty of sexually assaulting two children. That criticism is unsustainable when the affidavit is read alongside the pleadings, in which he admits the fact of his conviction and the fact he has not sought to displace the statutory presumption which attaches to the entirety of his conviction. Secondly, his continuing denial of guilt was founded upon: "this fact alone demonstrates that the Defender does not grasp the damage that he has caused to this family" (as it was put in the pursuer's written submission). In this context, reference was made by the pursuer to *Re D (Withdrawal of Parental Responsibility)* [2014] EWCA Civ 315 (first instance decision: [2013] EWHC 854 (Fam)). In that case, the father (F) of D had pled guilty to charges of sexual assault on the third day of his trial. Those charges concerned other children of his then partner (M) but not D. He had maintained his innocence until immediately before the children were to give evidence on day three of his trial. During sentencing, the judge described the offending as involving "particularly despicable exploitation by you of the situation in which you found yourself". F was imprisoned and upon release M filed an application seek an order terminating F's parental responsibilities in respect of D. That was opposed and in a directions hearing F stated that he was innocent and that his confession was false. He maintained that position throughout the proceedings. That prompted the first instance judge to comment (at para 51) that it was "highly unlikely that [F] appreciates the damage he has caused to every member

of the family, or the danger of further damage should he have any further involvement with the family." Like most cases, *Re D* turns on its facts. In that case, the facts included (unlike here) expert evidence of the effects on the children. The judge also applied his mind to, and reached a conclusion upon, F's guilt (para 47). That is unnecessary here given the statutory presumption which the defender has not sought to rebut (that point in and of itself distinguishes *Re D*: F tried to persuade the judge he was not, despite conviction, guilty). Finally, here the pursuer seeks a "clean break". Nothing was said as to how any questions from Andrew about his dad would be dealt with if and when they were asked. That contrasts with the specific provision made by the judge in *Re D* for F to write a letter that could be provided to D (see paras.63-64). That letter was characterised as a "mitigation" of the effect of removing parental responsibilities. Nothing similar was suggested by the pursuer here. Helpful though it is to see how other judges have approached a similar issue, *Re D* is of limited direct assistance. In particular, in the absence of any evidence on the effects on the pursuer's family the case does not support conclusions that the defender's behaviour has caused damage to every member of the pursuer's family or that the defender does not appreciate any effects of his behaviour.

[37] On behalf of the pursuer, it was sought (both in eliciting evidence and in submission) to make something of the tone and content of the defender's correspondence, especially with the new school. I am not satisfied that any criticism can be made of the defender in respect of that. On a view, the correspondence might be thought to be a little more forceful than would normally be expected from a parent corresponding with a school. But in my view, it was simply redolent a father who was trying to obtain information about his son was getting frustrated at how difficult it was to engage. In particular, on a fair reading, the correspondence about sharing a story with Andrew was an attempt to ascertain what might

be feasible rather than actually testing the boundaries of the existing contact order. Separately, as the pursuer's solicitor came to accept in submission, it was somewhat of a Catch-22 for the defender. Correspondence with a view to obtaining information about Andrew and it risks being said that he is seeking to reinsert himself into his life, to the distress of the pursuer; do nothing and risk it being said he has lost any interest in Andrew and so deserves no role in his life. In my view, it is important not to judge the defender's correspondence too harshly or to make no allowance for the inevitable frustrations which his situation will have given rise to. In my view, they were good faith attempts to show and take an interest in Andrew's development. There is no adverse inference to be drawn from any of the defender's correspondence with the GPs or the school.

[38] Moving on from the defender's evidence, inevitably, as a result of the emotional and emotive nature of the issue and the passage of time, there are differences in the accounts presented. Generally, those differences are immaterial. Whether the defender saw Andrew two or three times when Andrew was with the defender's mother does not matter. I accept the defender's (and the defender's mother's) evidence that these were inadvertent meetings. It was subject to robust challenge and throughout struck me as genuine and honest. I reject the submission that the defender's mother's answers support an inference she has discussed her affidavit with the defender. I also reject the invitation to reject her evidence as unreliable.

Conclusions on the Evidence

[39] Ultimately, the core facts in these proceedings are not contested: the defender committed various offences against both the pursuer and her children; the defender has not had any contact with Andrew since 2018; prior to that he had regular contact with Andrew;

the exercise of the defender's parental responsibilities and rights in respect of Andrew is very heavily regulated by the Court; and that the defender has a continuing role in Andrew's life causes the pursuer distress and anxiety. Otherwise, as is so often the way when the Court is asked to intervene in respect of a child, the evidence, and each party's response to the evidence, reflects the breakdown in the relationship, the lack of trust that now prevails and a tendency to impute an ulterior motive to the other party. That is particular so where the background is the serious criminal conduct of which the defender has been convicted. For the purposes of determining this Minute, little turns on the factual issues that the parties disagreed on.

The Legal Framework

Introduction

[40] It is helpful to start by considering the legal framework in which an application to remove a parent's parental responsibilities and rights falls to be considered. What follows is informed by the helpful submissions of both parties (and no discourtesy is intended by not recording those submissions separately and in detail).

Parental responsibilities and rights

[41] Parental responsibilities and rights are conferred by the 1995 Act in respect of each child. Invariably, the mother of a child has the full set of responsibilities and rights conferred upon her automatically (s.3(1)(a) of the 1995 Act). A child's father acquires a full set of responsibilities and rights if he is married to, or in a civil partnership with, the child's mother at any time after the child's conception or if he is registered as the child's father

(s.3(2)(b) of the 1995 Act). A father can also acquire those responsibilities and rights by way of agreement with the child's mother (s.4 of the 1995 Act).

[42] There are four parental responsibilities and four corresponding rights. The responsibilities are (s.1(1)): (1) to safeguard and promote the child's health, development and welfare; (2) to provide, in a manner appropriate to the stage of development of the child, direction and guidance to the child; (3) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and (4) to act as the child's legal representative. For the purposes of those responsibilities, a child is a person under the age of 16 (other than in respect of the responsibility to provide guidance, where a child is a person under the age of 18): s.1(2). The rights are (s.2(1)): (1) to have the child living with the parent or otherwise regulate the child's residence; (2) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing; (3) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and (4) to act as the child's legal representative. For the purposes of those rights, a child is a person under the age of 16: s.2(7).

[43] Subject to any court orders, a person who holds parental rights may exercise those rights without the consent of any other rights holder: s.2(2). In respect of major decisions involving parental responsibilities and rights, the views of any other rights holder should, so far as practicable, be had regard to: s.6(1). Those responsibilities and rights do not come in a single and indivisible package. Where asked to confer parental responsibilities and rights, the Court ought to consider the responsibilities and rights individually: *Principal Reporter* v *K* 2010 SC 328 at para 60. By parity of reasoning, where asked to deprive a parent of their parental responsibilities and rights, the Court ought again to consider each individually (a

view shared by Sheriff Miller in *M* v *M* [2020] SCGLW 12 at para 93; like *Re D*, *M* did not directly assist in resolving this case but Sheriff Miller's consideration of the issues he faced was instructive and informative, not least because it is one of the few published decisions considering an application of this kind). That said, each responsibility and corresponding right will invariably be considered together. For example, the responsibility to have contact goes hand-in-hand with the right to contact. Whilst I do not agree with Prof Norrie's characterisation of it being incompetent to remove the right but not the corresponding responsibility (see: Norrie, *The Law of Parent and Child in Scotland*, 3rd ed., para 8.06), and each needs considered separately, invariably one will follow the other.

Orders in relation to parental responsibilities and rights

[44] Under s.11(1) of the 1995 Act, the Court is given a broad power to regulate the use and operation of parental responsibilities and rights and this extends to removing such responsibilities and rights from a parent. The Court may make such order "as it thinks fit" (s.11(2)) and, in particular, it may make an order "depriving a person of some or all of his parental responsibilities or parental rights in relation to a child" (s.11(2)(a)). In permitting the court to remove the parental responsibilities and rights of a parent, the Scottish legislation goes further than the other jurisdictions of the United Kingdom.

[45] Section 11(7) explains what the Court must do before making any such order:

> "(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 order unless it considers that it would be better for the child that the order be made than that none should 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."

Whilst the repeated use of the word "may" throughout s.11 is often said to confer a discretion upon the Court (e.g. Norrie, *The Law of Parent and Child in Scotland*, 3rd ed., para 8.12), it is not a discretion in the normal sense of judicial decision-making. The nature of the power is, explained the Lord President (Rodger) in *Osborne* v *Matthan (No.2)* 1998 SC 682 at 688:

> "better described not as a matter of discretion but as a matter of judgment exercised on consideration of the relevant factors. The court must consider all the relevant circumstances and decide what the welfare of the child requires. Once the court has identified that, it has no discretion: the court must do what the welfare of the child requires."

Whilst the difference may seem one of terminology, recognising the decision as a judgment rather than simply the exercise of judicial discretion, highlights the need for a proper and robust process of reasoning to precede that judgment being reached.

[46] In exercising its power under s.11, the Court is directed to have regard to a number of matters, including the need to protect the child from any abuse (or the risk of abuse), the effect such abuse (or the risk of abuse) might have, the ability of the person who has abused (or may abuse) the child to care for the child and the effect of any abuse (or the risk of abuse) on the ability of any other person with responsibilities in respect of the child to discharge those responsibilities (s.11(7B)). Where any order would require two or more people to co-operate as respects matters affecting the child, that should also be considered (s.11(7D)).

Given the context in which this Minute is presented, it is worth dwelling on these provisions for a moment.

[47] The abuse provisions are contained in s.11(7B) and s.11(7C). They provide:

> "(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 the 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."

The provisions are broadly framed (see: *R* v *R* [2010] Fam LR 123 at paras.25-27 (Sheriff Holligan), whose observations I agree with). Standing the offences which the defender has been convicted of, these provisions are plainly engaged. The obligation imposed upon the Court is to have "regard in particular" to the matters set out in s.11(7B); engaging the provision gives rise to no presumption as to outcome (*R* v *R*, above, para 27). In essence, it requires the Court to ask itself four questions: (a) does the child need protection from abuse? (b) what effect would such abuse have on the child? (c) can the abuser care for the child? (d) what effect does the abuse have on the ability of anyone else with responsibilities in respect of the child to fulfil those responsibilities?

[48] Finally, I note that deprivation of parental responsibilities and rights does not follow automatically as a result of criminal conviction, even if such a conviction relates to harmful conduct towards the parent's own child. Allowing for the automatic removal of parentally responsibilities and rights in such circumstances has been the subject of consultation by the Scottish Government but has not resulted in legislation to that effect (*Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy: a consultation*, May 2018, at paras.7.117 to 7.120).

Convention rights

[49] A decision to remove parental rights and responsibilities is an interference, indeed perhaps the most profound interference, with the rights of both the parent(s) and the child under Art.8 of the European Convention on Human Rights ("the Convention"). The 1995 Act is consistent with the requirements of the Convention: *White* v *White* 2001 SC 689. But that does not relieve the Court from considering whether any particular order it is asked to

make is compatible with the Convention rights of those affected by the decision. Indeed, the Court must consider that issue for it is unlawful for the Court, it being a public authority for the purposes of the Human Rights Act 1998 (s.6(3)), to act in a manner which is incompatible with a Convention right.

[50] To be a lawful interference with the Art.8 rights, it must be in accordance with law, be in pursuit of a legitimate aim and be "necessary in a democratic society". A reasoned decision of the Court, applying the framework of the 1995 Act, meets the requirement to be in accordance with law. Securing the best interests of a child is a legitimate aim. So, invariably, the question will boil down to whether the order the Court is asked to make is "necessary in a democratic society". And that requires that the Court adopt a structured approach to proportionality.

[51] In *Bank Mellat* v *HM Treasury* [2014] AC 700, Lord Reed, at para 74, explained the proper, and structured, approach to be taken to a Convention-based proportionality assessment. It has four stages: (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (2) whether the measure is rationally connected to the objective; (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (4) whether, balancing the severity of the measure's effect on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. Although dissenting as to outcome, Lord Reed's explanation of the approach to assessing proportionality was endorsed by the majority (e.g. Lord Sumption at para 20) and is now widely accepted and applied.

[52] In the current context, securing the best interests of a child is a sufficiently important objective to justify the limitation of a parent's Art.8 rights in respect of their child and

regulating a parent's rights and responsibilities in respect of their child will ordinarily be rationally connected to securing the best interests of the child. So, steps 1 and 2 will invariably be satisfied. Stage 3 (least restrictive means) is not a test of imagination. That other options may exist is not the touchstone. Rather, it is whether there are other options which can secure the objective as effectively. Thus, a relatively blunt measure may be acceptable if it provides a general, simple and readily applied solution which would, in practical terms, be more effective. Put another way, stage 3 requires the decision-maker (in this instance, the Court) to be satisfied that there are no less restrictive but equally effective measures. Stage 4 essentially calls for an assessment of whether a fair balance has been struck between the competing interests. For my part, in the current context, if no less restrictive but equally effective measures have been identified, then a fair burden will invariably have been struck. In other words, I would expect that Stage 3 and Stage 4 would invariably march hand-in-hand.

Conclusions on the legal framework

[53] Drawing that together, it suggests that when presented with an application by one parent seeking to deprive another parent of their parental responsibilities and rights in respect of a child with whom the other parent enjoys the protection of Art.8 of the Convention, the Court should approach the issue in the following manner:

a. Like any application for an order under s.11 of the 1995 Act, the interests of the child concerned are the paramount consideration for the Court.

b. Each responsibility (and corresponding right) should be considered separately but some considerations will be common to all of them.

c. Because an order depriving a parent of their responsibilities and rights is a (or perhaps the) most profound interference with their rights under Art.8 of the Convention, and because the Court is a public authority for the purposes of the Human Rights Act 1998, the Court must be satisfied that the order sought is proportionate. Ordinarily, that will resolve to a question as to whether there is no less restrictive but equally effective means of securing the best interests of the child.

d. Where the abuse provisions in s.11(7B) are engaged, particular regard must be had to the consequences of any abuse. In practical terms, it may be helpful to ask: (i) does the child need protection from abuse? (ii) what effect would such abuse have on the child? (iii) can the abuser care for the child? (iv) what effect does the abuse have on the ability of anyone else with responsibilities in respect of the child to fulfil those responsibilities?

e. Regard must also be had to the need for ongoing co-operation between those that hold parental responsibilities and rights (having regard, amongst other things, to the terms of s.6 of the 1995 Act). This factor is likely to be particularly important where the abuse provisions are also engaged.

[54] Having considered the legal framework within which the pursuer's application falls to be considered, I now turn to consider whether the Minute should be granted.

Decision and reasons

Introduction

[55] It can normally be assumed that a child will benefit from a continued relationship with a natural parent (*White*, above, para 14). But there is no presumption that there be

contact; it is not, in this case, for the pursuer to displace that starting assumption. This question falls to be answered by reference to the best interests of the child, Andrew. Here the Court is being asked to remove responsibilities and rights that Parliament has determined should, as a matter of default, be conferred upon a person in the defender's position. The exercise of those responsibilities and rights is already very heavily regulated as a consequence of orders of this Court. Is it in Andrew's best interests to go further and for those responsibilities and rights to not only be heavily regulated but removed entirely? Before turning to that question, I first need to explain why Andrew's views were not obtained.

Andrew's views

[56] Notwithstanding the terms of s.11(7) of the 1995 Act, the views of Andrew were not sought and available to the Court. Whether to seek his views had been considered prior to proof (by another Sheriff) and was considered again during proof. For the pursuer, it was submitted that his views should not be sought. That was because he did not know why the defender was in prison or the nature of the offences for which he had been convicted. There was no way to obtain his views on whether to remove the defender's parental responsibilities and rights without disclosing that to him. For the defender, it was not argued that Andrew's views should be sought. I was referred to no authority when asked to take a view on obtaining his views when it was raised during the proof.

[57] Given Andrew's age, it could normally be expected that he would be of sufficient maturity to express a view on an order that was being sought in respect of him. Possible harmful consequences for the child caused by seeking his views is a relevant consideration.

But proceeding without the views of the child is an exceptional step. That was made clear by the Inner House in *M* v *C* 2021 SC 324 at para 12:

> "…it will rarely be correct to conclude that seeking the views of a child will cause unavoidable and material harm to the child. Vague concerns that inappropriate information might be communicated are not a good reason for not seeking a child's views. Such matters can be guarded against. If children are of sufficient age and maturity to form and express a view, their voices must be heard unless there are weighty adverse welfare considerations of sufficient gravity to supersede the default position. Careful thought as to how a child's position is to be ascertained will often resolve concerns. The court would require to be in a position to justify the proposition that the welfare issues are such as to render the exercise impracticable."

[58] A little reluctantly, I was prepared to proceed without the views of Andrew. First, this Minute does not seek the re-introduction of any contact between Andrew and the defender. That is an issue on which Andrew's views would have to have been obtained. Secondly, the continuation of parental responsibilities and rights only has an indirect impact on Andrew given the existing residence and contact orders. Thus, views would be sought on, for a child of Andrew's age, a more abstract issue (as opposed to one which would directly impact him on a day-to-day basis). Thirdly, the practicality of obtaining views on the continuation of parental responsibilities and rights (as opposed to whether or not to see his dad or go to stay with his dad) would need explained. That would almost inevitably invite the question from Andrew 'why was dad in prison?'. For four years the defender has been in prison and Andrew has been shielded from the reason why. Such evidence as was available suggested Andrew was doing well following the relocation and what must have been a disruptive time in February 2018. Taking that all together, and bearing in mind that the requirement in s.11(7) to seek Andrew's views must be seen in the context that his best interests are the paramount concern, I was satisfied that proceeding without his views was acceptable.

The respective positions

[59] For the pursuer, emphasis was placed upon the abuse which had been perpetrated by the defender, resulting in his conviction, the lack of any possibility of co-operation between the parties in respect of Andrew's upbringing, the lack of any contact between the defender and Andrew for a number of years now and the fact that retaining parental responsibilities and rights would play no practical purpose given the orders currently in place regulating residence and contact. The effect of the defender's abusive behaviour could not, it was submitted, be stressed enough. It was recognised that removing the defender's parental responsibilities and rights was a very significant step. It would, however, remove the anxiety, stress and worry that the pursuer has about the defender attempting to exercise his rights. And that, it was argued, would benefit Andrew.

[60] For the defender, essentially it was submitted that the high threshold for depriving a parent of the responsibilities and rights conferred upon them by Parliament had not been reached. In particular, it was accepted that the defender had been convicted of serious offences but it was pointed out that none of the offences involved Andrew and, in any event, deprivation of parental responsibilities and rights did not inevitably flow from conviction for even more serious offences. It was submitted that the correspondence with the school and the GP had been motivated by Andrew's best interests. In the absence of Andrew's views, closing the door absolutely on the possibility of re-establishing the defender's relationship with Andrew was a step too far. If further regulation was necessary, there were measures short of deprivation that would be sufficient. Ultimately, the defender sought to preserve the existence of his parental responsibilities and rights and if that meant further regulation, that was acceptable.

Andrew's welfare

[61] Andrew's welfare is the paramount consideration. The starting point, therefore, is ascertaining what his welfare requires. Only then can the need for the order sought be considered. I had limited evidence about Andrew (although it was a matter of admission that he required stability and security). Much of the focus was on why the pursuer wanted the order and why the defender wanted to preserve his parental responsibilities and rights. Despite hearing from his head teacher, no evidence was elicited from her about how Andrew was getting on at school and her affidavit is conspicuously silent on that. That is redolent of Andrew's welfare having been lost sight of as the paramount consideration. There is a letter in Process from Andrew's teacher from primary 3, which pre-dates relocating to his current school. But I did not hear from the author of the letter and the parties' agreement in the Joint Minute did not extend to admitting this into evidence. That being so, I proceed on the basis that, like any child, Andrew's welfare requires, as well as stability and security, a safe, supportive and caring environment in which to grow and develop and in which to enjoy his childhood.

Removal of rights

[62] It is not, in my judgment, better for Andrew that the defender's parental responsibilities and rights be removed. There are a number of reasons for reaching that view. I will address each responsibility/right in turn when considering the pursuer's fall-back position. The substance of my reasoning for refusing to remove the defender's responsibilities and rights applies, however, generally.

[63] It is important to recall how monumental a decision the Court is being asked to make. Refusing contact between a parent and child is a "serious step" which requires

"exceptional circumstances" (*J* v *M* 2016 SC 835); severing entirely the legal relationship between parent and child is of a step which is of a different order seriousness. It demands the most compelling of reasons. Whilst sympathetic to the pursuer and understanding of the reasons why she has sought the order, I am not satisfied that the reasons are sufficiently compelling to justify such an exceptional step.

[64] First, although the defender has been convicted of several serious offences, some of which involved children, there is no evidence that he presented (or presents) any direct threat Andrew. There is no evidence that Andrew was not properly looked after when he was in the defender's care. Indeed, the evidence of any effect upon Andrew is limited. It was that the stress and anxiety caused for the pursuer by knowing the defender retained his parental responsibilities and rights had an indirect bearing on Andrew. I readily accept, particularly having been subject to the behaviour which led to the defender's conviction, that being unable to have a "clean break" from the defender will be a source of stress and anxiety. And I do not seek to underplay the effect that must be having on the pursuer. Many people who have separated but who have had children together will desire a "clean break" from their former partner. Children rarely make that possible. So, the desire for a "clean break" can carry little weight in support of an application seeking the removal of parental responsibilities and rights. Another part of the context is the evidence which was not led. For example, no evidence was led that the stress and anxiety had caused the pursuer to seek medical advice or manifest itself in a diagnosable psychological or psychiatric condition. Evidence of that nature would be a different issue. Finally, there was no evidence before me of a wider effect upon the pursuer's family. And, unlike in *Re B*, there was no evidence of an adverse effect on Andrew. On the contrary, the evidence

suggested that he was unaware that the defender had made enquiries of his school and GP and otherwise he seemed to be doing well at school and more generally.

[65] Secondly, there is no presumption that conviction for the offences that the defender has been convicted of carries with it the removal of parental responsibilities and rights in respect of any of the complainers. No offence carries such a consequence. That such provision does not exist (despite having been considered by the Government) is a caution against the Court creating a *de facto* presumption by applying too much weight to the fact of conviction. Whether an offence should ever have that consequence is for Parliament, not the Court, to decide. In submitting that the nature of the defender's convictions give rise to serious concern about whether his character is suitable to have any influence on the upbringing of a child, the pursuer came perilously close to suggesting that conviction in and of itself required removal of parental responsibilities and rights. As well as the lack of legislative provision to such effect, it is tantamount to denying any possibility of a rehabilitative effect of a custodial sentence. Whilst conviction for serious offences, especially involving children, is a relevant factor which can carry weight, it does not carry the sort of overwhelming weight suggested by the pursuer.

[66] Thirdly, having particular regard to the abuse provisions in s.11(7B) does not require the order be granted. Abuse, as defined in s.11(7C), is a very broad concept. It includes "any other conduct giving rise, or likely to give rise, to … distress". I respectfully agree with Sheriff McGowan's comments in *R*, above, at para 25 on the approach to the definition of abuse. I also agree that there is no requirement that abuse be directed at the child (see: *R*, above, at para 26). Obviously, the conduct which underpinned the criminal convictions is abuse. Separately, on the pursuer's evidence, which I have accepted, the defender's actions in communicating with the school and Andrew's GP (which would be "any other conduct")

amounted to abuse because they have given rise to distress on her part. That all happened in the past but it remains relevant. I am also satisfied that on the pursuer's evidence, which I have accepted, there is a risk of future abuse (as that term is defined for the purposes of s.11(7B)) when the defender is released. That is because any future engagement with the defender (which would again be "any other conduct") would be likely to cause the pursuer distress and so again it meets the statutory definition of abuse.

[67] Turning to the matters s.11(7A) requires me to have "regard in particular to". First, the need to protect the child (Andrew) from any abuse or risk of abuse which affects, or might affect, him (s.11(7B)(a)). There is no evidence of any risk to Andrew. He knew nothing about the defender's communications with the school and his GP and given the terms of the current orders in respect of residence and contact he will not have any direct contact with the defender. And there is no evidence that the conduct which resulted in the defender's conviction affected him. To the extent that the effect upon the pursuer may have an indirect effect upon him, that is addressed by s.11(7B)(d), which I will come to in a moment. Secondly, the effects of such abuse, or the risk of such abuse, might have on the child (s.11(7B)(b)). There is no evidence of any direct effects upon Andrew. I will come to indirect effects. Thirdly, the ability of the abuser to care for, or otherwise meet the needs of, the child (s.11(7B)(c)). This factor has no content given the terms of the current orders in respect of residence and contact. Such evidence as there was indicated no concerns about the defender's ability to meet Andrew's needs when he did have care of him. Finally, the effect any abuse, or risk of abuse, may have on the pursuer as someone who has responsibilities in respect of the welfare of Andrew (s.11(7B)(d)). I accept that the abuse (both that which resulted in criminal conviction and the other conduct which I have held falls within the scope of s.11(7C)) has had, and would continue to have, an effect on the

pursuer's abilities to carry out her responsibilities in relation to the welfare of Andrew. However, as already noted, there is little evidence about the extent of those effects. So, whilst I have regard to the effect upon the pursuer, it is not sufficient to justify the exceptional step she asks the Court to take.

[68] It is convenient at this point to deal with the co-operation provisions (s.11(7D)). There is no evidence before me which suggests there is any possibility of co-operation between the parties in respect of matters affecting Andrew. Unfortunately, such a position is not unusual. Such lack of co-operation can be a potent factor when the Court is asked to regulate the exercise of parental responsibilities and right. Lack of co-operation adds, however, little to an application to remove parental responsibilities and rights. That is because a lack of co-operation is likely to be an invariably feature of such a case.

[69] Fourthly, the order sought is not a proportionate interference with the defender's Convention rights. In this instance, Andrew's best interests can be secured by less intrusive but equally effective means. The defender's rights in respect of residence and contact are already curtailed to the point they exist in name only. Those decisions were taken without the views of Andrew being available (I make no criticism of that: Andrew was much younger when the decisions were made). Whether it remains, or will remain, in Andrew's best interests that he has no contact with the defender is not a question I am asked to consider. But it is not something I can shut the door on. And it is not something I would shut the door on without the views of Andrew. In that regard, I have reached broadly the same conclusion for broadly the same reasons as Sheriff Miller in *M* (above, at para 106). In that case, Sheriff Miller suspended the various rights and responsibilities. That is important when considering the proportionality of an order removing rights and responsibilities. Where the child's future views in respect of a relationship with the parent are not known,

and where suspending parental responsibilities and rights is an available option, it seems to me that it could only be in the most exceptional and compelling of cases that it could be said there was no less restrictive but equally effective measure than removal of the responsibilities and rights. The circumstances of this case are no more compelling than those in *M* (in which removal was not sanctioned). Indeed, the circumstances of this case, serious though they are and sympathetic though I am to the pursuer, fall, in my view, well short of what would be necessary to permit the removal of parental responsibilities and rights.

[70] If, in terms of a proportionality assessment, the question is whether there is a less restrictive but equally effective means to secure the best interests of Andrew, then the answer is 'yes'. If that is so, given the order sought would be an interference with the defender's Convention rights, it would be unlawful for the Court to grant the order.

[71] Lastly, to make the order would, in the event of a loss of capacity by, or the untimely death of, the pursuer, leave Andrew legally orphaned (i.e. nobody would have parental responsibilities and rights in respect of him). That is a situation better avoided if it can be. There are no sufficiently compelling reasons to take that (albeit small and hopefully theoretical) risk.

[72] Packaging all of that in the language of the 1995 Act, having regard to Andrew's welfare as my paramount concern, I am not satisfied that it is better for him that the order sought be made than no order be made. Put another way, ensuring a safe, supportive and caring environment in which Andrew can grow and develop and in which to enjoy his childhood is not compromised by the defender retaining parental responsibilities and rights in respect of him. Making no order does not compromise Andrew's welfare. Accordingly, it cannot be said that making the order sought is better than making no order at all. In the

language of the Convention, the order sought is pursuant to a sufficiently important objective (securing the welfare of Andrew) and is rationally connected to it. But it is not the least intrusive means by which that objective can be secured and, separately, I am not satisfied that in all the circumstances granting the order would have struck a fair balance. If that is correct, it is not open to the Court to make the order.

Suspension of rights

[73] As a fall-back position, the pursuer invited me to consider each responsibility/right separately and, if not persuaded to remove them, to consider whether they should be suspended.

[74] Whether to suspend a responsibility/right is a very different question from whether to remove it. A residence order which provides that a child shall live exclusively with one parent is in substance a suspension of the other parent's right to residence. Suspending a responsibility/right is a regulation, and not a severing, of the parent/child relationship. Particularly when considering the least restrictive aspect of proportionality, it is more readily acceptable than removal.

[75] Starting with the right to have Andrew live with him or otherwise regulate his residence, suspension of this right is not necessary because of the terms of the existing residence order. In other words, it is not better that an order be made than no order because suspending this right would have no impact upon Andrew's welfare. I therefore refuse to suspend the right conferred by s.2(1)(a).

[76] Next is the right to control, direct or guide, in an appropriate manner, Andrew's upbringing. It is not appropriate that this right endures whilst the defender has no contact whatsoever with Andrew. Having regard to the effect of the abuse perpetrated upon the

pursuer and her other children, also points towards it being inappropriate to leave the defender with this right. Any attempt to exercise it (e.g. to control any aspect of Andrew's upbringing) necessarily seeks to impose some degree of control on how the pursuer lives her life. I shall therefore suspend the right conferred by s.2(1)(b).

[77] It is unnecessary to suspend the right to maintain personal relations with Andrew given the terms of the existing contact order. I therefore refuse to suspend the right conferred by s.2(1)(c).

[78] The final right is to act as Andrew's legal representative. Given the absence of any contact whatsoever with Andrew, and the limited information the defender has about his life, it is hard to envisage when it would be necessary or appropriate for the defender to act as Andrew's legal representative. Left unregulated, the defender can exercise this right without consultation with, or the consent of, the pursuer. That sort of uncertainty is not conducive to ensuring a safe, supportive and caring environment for Andrew. And that is my paramount consideration. Suspending the right simply means the defender cannot act as Andrew's legal representative without first obtain permission (in the form of lifting the suspension) from the Court. Putting that step in place, in my judgment, is in Andrew's best interests. Again, having regard to the effect of the abuse perpetrated upon the pursuer and her other children also supports putting that step in place. I shall therefore suspend the right conferred by s.2(1)(d).

[79] Turning to parental responsibilities, it follows from having suspended the right conferred by s.2(1)(d) that the responsibility imposed by s.1(1)(d) should also be suspended. The defender's responsibility, in terms of s.1(1)(c) to maintain personal relations and direct contact with Andrew on a regular basis given they are not living together is qualified to the extent necessary to give effect to the contact order which is in place. It provides that the

defender shall have no contact with Andrew. That is a *de facto* suspension of this responsibility. It is, accordingly, unnecessary for this responsibility to be suspended. Similarly, the responsibility imposed by s.1(1)(b), to provide direction and guidance, is *de facto* suspended in consequence of the contact order and so, again, it is unnecessary to suspend this responsibility.

[80] Finally, s.1(1)(a) imposes a responsibility to safeguard and promote Andrew's health, development and welfare. I have accepted that the defender's communications with Andrew's GP and school were motivated by a concern to secure Andrew's health, development and welfare. Having concluded that the defender's parental rights, to the extent they are not already curtailed by orders of the Court, should be suspended, then it is not appropriate to leave him subject to a parental responsibility. As s.2(1) makes clear, parental rights are conferred to enable a parent to fulfil their responsibilities. Having suspended his rights, it follows, in my view, that his responsibilities should be suspended. Accordingly, I shall also suspend the responsibility conferred by s.1(1)(a).

[81] I shall make a further order which flows as a consequence of the others. While the orders which will now be in place remain, it is inappropriate that the pursuer be prohibited from removing Andrew from the United Kingdom without the defender's consent. Given the defender will have no direct role in Andrew's life, there is no good reason for him to retain a role in holiday arrangements. I shall make an order that the pursuer is entitled to remove Andrew from the United Kingdom without the defender's consent.

[82] That leaves the defender with his parental responsibilities and rights but unable to exercise them without first seeking authority from the Court (either in the form of a variation of existing orders or lifting of the suspensions I am imposing). That should give the pursuer the certainty and security she seeks, it should secure the welfare of Andrew but,

importantly, does not close the door entirely on the possibility of the defender and Andrew re-establishing a relationship. Whether such a relationship is possible cannot be known at now. It is also something which will, in time, be very much dependent upon Andrew's views.

Conclusions

[83] For all of those reasons, I shall pronounce an interlocutor which varies the Decree granted on 9 October 2018 by (a) suspending the parental responsibilities conferred upon the defender by s.1(1)(a) and s.1(1)(d); (b) suspending the parental rights conferred upon the defender by s.2(1)(b) and s.2(1)(d); (c) permitting the pursuer to remove Andrew from the United Kingdom without the consent of the defender; and (d) *quoad ultra* refuse the Minute.

[84] Both parties were legally aided and so expenses have a degree of artificiality about them. For the defender, it was submitted that because this was a case involving a child unless I had significant criticism of the conduct of the case by either party, then there should be a finding of no expenses due to or by each party. For the pursuer, expenses were moved for in the event of success but the force of the defender's argument for a finding of no expenses was recognised. I agree with the approach of the defender and shall make a finding of no expenses due to or by either party.