

**SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES & GALLOWAY  
AT DUMFRIES**

**[2018] SC DUM 54**

F332/17

JUDGMENT OF SHERIFF BRIAN A MOHAN

in the cause

X

Pursuer

against

Y

Defender

**Pursuer: Innes; Brodies LLP, Glasgow  
Defender: Colledge; Colledge & Shields, Dumfries**

Dumfries, 31 August 2018

**Introduction**

[1] The central issue in this case was the allegation that the pursuer (the husband) raped the defender (the wife) in a hotel three days before the parties separated in October 2017. All of the contested orders which the court was asked to make turned on whether this allegation was proved. Neither party made any financial claim in the divorce.

[2] The pursuer's application for divorce was based on unreasonable behaviour. He claimed that the rape allegation was untrue and that, by making the false allegation, the defender acted unreasonably. He also sought an order allowing him contact with his two daughters, who are now 8 and 5 years old. He has not seen or spoken to them since the defender left the matrimonial home with the children.

[3] The defender sought a residence order for the girls. She opposed contact because she said that she was subjected to a rape and this criminal act should prevent the pursuer from having any relationship with their daughters. Her secondary argument was that the girls did not want to see their father and no order for contact should be made because he was cruel, insensitive and abusive towards them when the family lived together.

### **Procedure**

[4] These proceedings were raised in December 2017. There were a number of interim orders sought by the parties, including interdict and contact. No order for interim contact was made because the grave allegation of rape was outstanding. The decisions concerning interim orders were reviewed by the Sheriff Appeal Court (*X v Y* [2018] SAC (Civ) 10).

Following their Lordships' decision at appeal, a number of case management hearings took place. I then heard evidence at a proof over four days in May 2018.

[5] The Sheriff, having resumed consideration of the cause,

### **FINDS IN FACT:**

#### *The parties' relationship*

1. The parties were married on 24 May 2009. There are two children of the marriage, *I* born 28 May 2010 and *V* born 30 May 2013. The children are now 8 and 5 years old respectively. The parties lived together continuously from the date of marriage until they separated on 31 October 2017.

2. Throughout the parties' relationship the pursuer was employed [in rural locations]. His occupation required him to reside in tied accommodation and to work unpredictable hours.

3. The pursuer's employment in Perthshire came to an end in 2016. He secured alternative employment [in] Dumfries and Galloway. The defender was supportive of the move and the parties and their children relocated there in July 2016. They moved into a tied house.

*The state of the parties' marriage before October 2017*

4. The defender had difficulty settling within the new environment in Dumfries and Galloway. The house was in a state of disrepair. The defender struggled to cope with the disruption and change of location. She was not in employment. Initially she found it difficult to make friends locally.

5. The defender suffered from depression. She received assistance and support from her health visitor in 2014. Following the move to Dumfries and Galloway the defender sought further assistance from her general practitioner. She continued to suffer from depression during the whole period that the parties resided in [Dumfries and Galloway]. She was prescribed medication to alleviate her symptoms.

6. The defender had a particular interest in animals. When the parties first met she worked in a veterinary practice. The defender owned two horses and brought them to [Dumfries and Galloway]. Soon after they moved the defender lost interest in her horses and gave up riding. While the parties lived together in [Dumfries and Galloway] the defender kept about 15 chickens in a pen beside their home. She also had a dog. The defender became friends with a neighbour, CE; they both had a love of animals.

7. The pursuer was aware that the defender was unhappy in the Dumfries and Galloway area. He was not aware that the defender intended to separate from him. By mid-2017 the pursuer learned that the defender had voiced her unhappiness in the marriage to

members of his family. He sought to provide reassurance to the defender. He arranged with his employer to be allowed more time off to assist with household tasks. He arranged for the defender to accompany him when he performed some of his duties, so that they could spend more time together.

8. By the summer of 2017 the defender had decided that the marriage was over. She was not receptive to the changes made by the pursuer. She made plans to leave the pursuer, and to take the children with her. In July 2017 the defender visited her mother in Surrey. After that time she began to take practical steps to separate from the pursuer. She made arrangements for her horses to be moved and looked after elsewhere. She removed personal belongings, including the children's passports, to the home of her friend and neighbour CE. She told members of the pursuer's family in September 2017 that she intended to leave the pursuer. She spoke to the head teacher of her older daughter's primary school about alternative arrangements for her daughter's education if she were to take the children out of school and nursery for an extended period. These arrangements all occurred before the wedding which the parties attended on 27 October 2017.

9. The parties stopped having sexual intercourse in July or August 2017. This was the defender's decision. The pursuer continued to seek affection from the defender, but she avoided intimacy with him in bed. The parties continued to share a bed together within their home after they stopped having sexual relations.

#### *The Kildrummy wedding*

10. The wedding of the pursuer's brother took place on Friday 27 October 2017. A large group of friends and family, including the parties and their children, stayed overnight at Kildrummy House Hotel in Alford, Aberdeenshire on Thursday 26 and Friday 27 October

2017, to attend the wedding at a nearby location. The parties and their daughters shared a family room in the hotel. The parties slept together in a double bed and the girls had single beds located in an alcove within the room.

11. Both parties enjoyed the wedding. They spent time with each other and with their children. They danced together. They danced with their children. They had a meal and drinks in the company of friends and family in the Kildrummy House Hotel on Thursday 26 October, the evening before the wedding. The large family group returned there after the wedding on Friday 27 October and socialised in the hotel's bar. The parties left this group after 1am on 28 October to retire to bed. The parties each carried one of their daughters to their room. At that point the parties were both under the influence of alcohol they had consumed throughout the day, but not incapable of consenting to sexual intercourse. Neither party consumed further alcohol in their room or ingested any other substance which may have affected their capacity to provide consent.

12. During the early hours of 28 October 2017 the parties engaged in consensual sexual intercourse in the double bed within their room in Kildrummy House Hotel. At that time the defender was not impaired through intake of excess alcohol or any other substance from being able to consent to sexual activity. When this act of sexual intercourse took place both children were asleep in their own beds.

#### *Events after the Kildrummy wedding*

13. During the late morning of Saturday 28 October 2017, the parties and the children checked out of the hotel. They all engaged in conversation in the hotel's public areas with friends and family who had stayed overnight. After they left the hotel, the parties and the children travelled home by car to Dumfries and Galloway. The journey took several hours.

On the way home they stopped to eat at a restaurant and did some shopping at a garage in Dumfries.

14. The parties shared a bed at the matrimonial home overnight on 28, 29 and 30 October 2017.

15. During the evening of Saturday 28 October the defender sent a text to the pursuer's mother asking how the pursuer's father was doing. On Sunday 29 October 2017 the defender sent an email to the head teacher of the children's school asking for a meeting the following day, which was the first day of school after the mid-term holiday. That same day the defender had an exchange of text messages with her friend and neighbour CE. She told Ms E that she had arrived home safely after the wedding. Ms E invited the defender to visit the following day for coffee and the defender agreed to do so. These email and text message exchanges were unremarkable in their tone and did not exhibit any anxiety from the defender. On Sunday 29 October the defender drove with the children, but without the pursuer, to a local kennel business which had looked after her dog while the family were at the wedding.

16. The defender drove her daughters to school on Monday 30 October at around 9am and then travelled to Ms E's house for her planned visit.

17. At some point during the night of Sunday 29 October or early morning of Monday 30 October 2017, 10 or 12 of the defender's 15 chickens were killed by a fox or other wild animal which had entered their pen. The pursuer discovered the dead chickens at approximately 9am on 30 October 2017 when he was working [ ]. At around 9.15am that day the pursuer telephoned the defender. He told her that he had found the dead chickens in the pen. The defender was distressed when she received this news.

18. At around 9.30am on Monday 30 October 2017 the defender arrived at the home of CE. On her arrival she was distressed and upset. During the conversation which then took place the defender reported that she had been raped.

*Police enquiries and criminal proceedings*

19. On 30 October 2017 at about 10am Ms S, head teacher of I's primary school, visited the defender at the home of CE. This visit was arranged in a telephone call which CE made shortly after the defender arrived at her home. During that morning the defender told Ms E and Ms S that she had been raped by the pursuer on 28 October 2017. The matter was reported to the local social work department and police. The defender returned home on 30 October and spent that evening with the pursuer and the parties' children. During that evening she exchanged friendly texts with the pursuer's mother. She shared a bed with the pursuer.

20. On 31 October 2017 the pursuer made a formal complaint of rape to the police. She underwent a forensic medical examination that day. Vaginal swabs taken during that examination confirmed the presence of semen from the pursuer within the defender's vagina.

21. After making the report to police the defender returned to the matrimonial home on 31 October 2017 accompanied by police officers. The pursuer was not in the home, but was at work. The defender collected clothing and belongings for herself and the children. The children were then collected from school by the defender. Neither she nor the children returned to the matrimonial home after that time. From 31 October 2017, following the intervention of the police, social work department and Women's Aid the defender and the children were housed in emergency accommodation in the Dumfries area for about one

month. Thereafter the defender moved to Surrey, close to her mother. She has lived there since November 2017. She has obtained privately rented accommodation and lives there with her two daughters.

22. During the evening of 31 October 2017 police officers visited the pursuer and told him that his wife had made a serious allegation against him. He was told not to attempt to contact his wife or the children. He has not spoken to the defender or the children since then.

23. Police officers and social workers interviewed the children in February 2018 regarding the allegation of rape in the Kildrummy House Hotel. The children were unable to provide any information of evidential value. No formal Joint Investigative Interview took place, and no further interview of the children was considered appropriate as part of the police investigation.

24. The pursuer was interviewed by the police in November 2017 in relation to the allegation of rape. He had legal advice prior to interview. He gave a 'No comment' interview. The pursuer was not arrested in relation to the allegation. By May 2018 no criminal proceedings relating to the allegation had commenced.

25. The defender has made a false allegation of rape against the pursuer.

*The parties' children*

26. When the parties lived together their children displayed different personalities and characteristics from each other. At the date when the parties separated *I* was seven years old, and was a pupil in P3 at a local primary school. She was tall for her age and was often clumsy at home. *I* was a sensitive child and faced some challenges in learning. In particular, she struggled with writing and spelling. She required regular reassurance and was very



close to the defender, her mother. By the time she was seven *I* still asked to be accompanied by an adult on visits to the toilet.

27. When the parties separated *V* was four years old, attended nursery and was scheduled to begin school in August 2018. In her interactions with the parties *V* displayed a more robust personality than her older sister. In October 2017 *V* was unable to read or write.

*The pursuer's relationship with the children*

28. The defender was the primary carer of the girls while the parties lived together. Both of the children had a close and loving relationship with the defender. The children also had a close and loving relationship with the pursuer. He was part of the same household as the children for all of their lives until the parties separated.

29. On different occasions both parties lost their temper with the children or exercised disciplinary measures towards them. The pursuer was more strict with the girls than the defender. On occasions the pursuer would find that the defender was upset and distressed at the children's misbehaviour or failure to complete tasks requested of them. On such occasions the pursuer often shouted at the girls.

30. On one occasion around July 2017 the defender asked the children to tidy their playroom. They did not do so. The defender became exasperated and upset with them, because family were due to visit later that day. The pursuer was informed that the girls had not tidied their room. He told them to pack suitcases because they were going to live with another family. The children complied with this and were subdued and tearful. For a short period both parties allowed the children to believe this step was going to be taken. The pursuer then told the children that they could stay with him and the defender. He made them apologise to the defender for not doing what they were told. They did so. The children

were no longer upset. The pursuer's brother, his partner and their son arrived a short time later. The children played with their cousin and appeared unaffected by the incident with the suitcases. The parties told the pursuer's brother and his partner about the steps the pursuer had taken to ensure that the children tidied their room that day. The incident with the suitcases was an inappropriate method of chastisement used by the pursuer. In the circumstances in which it occurred it was not an act of abuse.

*Views of the children*

31. The pursuer last saw the children during the morning of 31 October 2017 before they left for school. At that time the children were dressed in Hallowe'en costumes to attend parties in their respective school and nursery. They showed off their costumes to the pursuer. They said goodbye to him in the normal way. The children were unaware at that time that they would not be returning home. The pursuer has not seen, spoken to, or otherwise communicated with the children since they left for school on the morning of 31 October 2017.

32. The children have stated their opposition to resuming a relationship with the pursuer. They have put those views in the form of pictures and words. They have told a number of persons outside of their family that they are afraid of being taken away by him. They have stated their opposition to contact with the pursuer or any members of his family. These persons included a Women's Aid worker in Dumfries whom they spoke to in November 2017, and the court child welfare reporter who interviewed them in March 2018.

33. The views stated by the children are not genuine, independent and uninfluenced. The children's opposition to contact with the pursuer has been influenced by the defender.

[6] **FINDS IN FACT AND LAW:**

1. The defender has behaved unreasonably towards the pursuer by making a false allegation that he raped her.

[7] **FINDS IN LAW:**

1. Both of the parties have parental rights and responsibilities towards the children *I* and *V*.
2. It is in the best interests of the children *I* and *V* to reside with the defender.
3. It is in the best interests of the children *I* and *V* to have contact with the pursuer.
4. It is better for the children that residence and contact orders are made by the court than that no orders are made.

[8] **THEREFORE:**

- 1) Divorces the pursuer from the defender,
- 2) Sustains the defender's Pleas-in-Law numbers 2 and 3, and in terms thereof makes a residence order providing that the children *I* and *V* shall live with the defender at [ ] Surrey,
- 3) Sustains in part the pursuer's Plea-in-Law number 6, and in terms thereof makes an order allowing the pursuer to exercise contact to the children *I* and *V* on the following occasions:
  - (1) on the first weekend of each month, said contact to take place no further than 40 miles from the children's now home address [ ], with contact to operate as follows:-

- (a) On the first four occasions contact will be non-residential for a period of six hours on a Saturday,
  - (b) Thereafter contact will operate overnight from Saturday at 10am until Sunday at 6pm,
  - (c) Collection and return of the children to and from their home address or such other location as may be agreed will not involve the parties coming into direct contact with each other; the children will be collected and returned by the pursuer's mother or father, or such other person as agreed between the parties,
  - (d) The first six such contact visits by the pursuer will be supervised by his mother or father, or such other person as is agreed between the parties,
- (2) In addition to the monthly contact visits detailed above, residential contact during the Christmas and New Year holiday period in 2018 from 12 noon on 27 December 2018 to 12 noon on 31 December 2018, said contact to be supervised by the pursuer's mother or father or such other person as agreed between the parties,
- (3) In 2019, in addition to the monthly residential contact, holiday contact to both children for four weeks, to operate for one week during each of the children's school Easter, summer, autumn mid-term and Christmas holidays,
- (4) From 2020 onwards, in addition to the monthly residential contact, holiday contact to both children for five weeks, to operate for one week during each of the children's school Easter, autumn mid-term and Christmas holidays, and for two weeks during the children's summer holidays,

- (5) Contact during the holiday residential periods detailed above will not be limited to operate within any specific distance from the children's home address, and, except as herein provided for in relation to December 2018, holiday contact will be unsupervised,
- (6) As an ancillary order to said contact provisions and to allow both parties to make arrangements regarding the exact dates of holiday contact, orders the defender to provide the pursuer with relevant information about the dates of the children's forthcoming school holidays for each year by 1 December of the preceding year, the first such information to be provided by 1 December 2018,
- 4) Repels the pursuer's Pleas-in-Law numbers 2, 3, 4, 5, 7, 8, 9 and 10,
- 5) Dismisses the pursuer's craves 2, 3, 4, 5, 6, 8, 9, 10 and 11,
- 6) Sustains the defender's Pleas-in-Law numbers 4, 5, 6, 7, 8, 10 and 11,
- 7) Repels the defender's Pleas-in-Law numbers 1 and 9,
- 8) Dismisses the defender's craves 2 and 3,
- 9) Appoints 24 September 2018 at 10am at Dumfries Sheriff Court as a hearing on expenses.

## NOTE

### **Evidence at the proof**

[9] Due to the nature of this case and the serious allegations involved, this judgment is divided into a number of sections, dealing with the rape allegation and then proposed orders for the children. Because the defender led at the proof, each disputed matter is addressed with the defender's evidence and submissions first.

[10] By agreement between the parties the defender led her evidence first, as she was offering to prove that rape had been committed. The defender gave evidence and called five witnesses. These were her friends RK, CE and SR; SS who was the head teacher of her daughter's primary school in Dumfries and Galloway; and her mother DR-G. A joint minute agreed the statement of a further witness, Detective Constable Martin Robertson. The pursuer gave evidence on his own behalf and called eight witnesses: his mother ER and his father WR; two aunts, AW and LH; his friends PR and WB; his brother AR; and AMcC, the partner of another of his brothers.

[11] The evidence of the parties themselves – both examination in chief and cross examination – was given in oral testimony. The evidence in chief of the other thirteen witnesses who came to court was in the form of affidavits, lodged in process; their attendance in court enabled them to be cross-examined. There were also two joint minutes of admissions, and a report from a court appointed Child Welfare Reporter (number 26 of process).

### **The state of the marriage**

[12] The parties to this action separated less than one year ago (31 October 2017). Both parties accepted that the marriage was at an end. However, the only ground of divorce under consideration in this action was that claimed by the pursuer, namely that the false allegation made by the pursuer amounted to unreasonable behaviour under Section 1(2) (b) of the Divorce (Scotland) Act 1976. Neither party has made any financial claim in the divorce action.

[13] It was clear from the evidence that the home environment in [ ] was not harmonious in 2017. The defender never settled there, following the enforced move the year before to

allow the pursuer to take up new employment. The home was in a state of some disrepair and the pursuer's employer delayed in carrying out the improvements which were initially promised. Relations between the parties deteriorated. The defender suffered from depression and was prescribed medication at a high daily dose (100mg) to assist her. The girls, meanwhile, were at times boisterous and challenging.

[14] Evidence from both parties indicated that there could be a difficult atmosphere in the home, generated by the deterioration in the parties' relationship. The pursuer did not face up to this, and appeared to hope that matters would resolve themselves with the passage of time. He hoped that the defender would grow more fond of life in [the area] as the girls settled in school. The defender sometimes accompanied the pursuer on his duties. While this was unpaid, the pursuer hoped that this would help the defender feel more at ease with life in Dumfries and Galloway. He hoped that the defender would obtain paid employment from his employer. To some extent, he buried his head in the sand and chose not to notice his wife's increasing unhappiness.

[15] The defender was depressed at the move to the new area, as it had involved leaving Perthshire where she was happy. She decided by the middle of 2017 that she was going to separate from the pursuer. She became critical of him. She spoke openly of her dissatisfaction to members of the pursuer's family, including his mother and father. She visited her own mother in Surrey with the children in July 2017 and after that put in place arrangements to separate altogether. She exchanged text messages with her mother about the future planned departure (6/2 of process). Her plan appeared to be to move close to her mother. She spoke to the head teacher of the children's school in September 2017 about her intention to leave. She sought informal advice from a friend who was a solicitor. She understood through that discussion that she would be unable to move the children away

without the consent of the pursuer. The parties stopped their sexual relationship, a decision made by the defender. She told the pursuer that this was because of her anti-depressant medication.

[16] By October 2017 the defender's plans were far advanced. She had moved personal belongings, including the children's passports, out of the family home to the house of a neighbour, CE. She had arranged for her horses to be relocated and looked after by someone else. She had sought advice about taking the children out of their school and nursery. The pursuer was not aware that she intended to separate, though he was aware that she planned to go for an extended visit to her mother after a family wedding at the end of October.

[17] These were the relevant background circumstances which applied in the months before the parties and their children went for a short break to the Kildrummy House Hotel in Aberdeenshire, to attend the wedding of the pursuer's brother on 27 October 2017.

## **THE RAPE ALLEGATION**

### **Rape allegation – defender's position**

[18] The defender's position – in her pleadings and in her evidence before the court – was that she did not engage in any consensual sexual activity with the pursuer within the Kildrummy House Hotel during their stay in October 2017. Her position was that the sexual intercourse which took place on 28 October was rape. The other sexual behaviour carried out by the pursuer at that time was a sexual assault. The parties did not have an active sex life at that time, and their last sexual intercourse had been some months before, in July 2017. She did not want to have sex with the pursuer any more. She was no longer physically attracted to him. The end of their sexual relationship was her decision and not that of the



pursuer. He accepted her decision: he often asked but was “never pushy”. Since July they had still shared a bed at home, but she made excuses to avoid any physical intimacy.

Nothing had changed by the time of the wedding.

[19] The wedding was on Friday 27 October in Alford, Aberdeenshire. Their daughters *I* and *V* were flower girls and they all stayed in a nearby hotel – the Kildrummy House Hotel – with other members of the pursuer’s family. The parties and their children shared a family room and stayed for two nights, Thursday 26 and Friday 27 October. The girls had single beds in an alcove and the parties shared a double bed: she had done a rough sketch of the room layout (6/17). Nothing untoward happened in the room on the first night, and the wedding was a successful and enjoyable day.

[20] The family group came back to the hotel after the wedding and sat in the bar/lobby area until after 1am. At one point the pursuer took *I* up to the room to let her change from her wedding outfit into her pyjamas. Shortly after he came back down, the defender decided that it was time for them all to go up to bed. Both she and her husband had been drinking alcohol at the wedding, but she was not drunk because she knew her limits. She carried *V* up the stairs while her husband carried *I*. The girls were put to bed and the defender went into the bathroom; she changed into shorts and a vest top for bed. She noticed some torn pieces of paper in the U-bend of the toilet, but assumed it was a discarded receipt. The pursuer gave them each a glass of water. He made a comment about having sexual intercourse. He said “Are we seriously going to let this room go to waste?”. She told him she was tired and went to sleep.

[21] The defender gave a graphic and detailed account of the rape which she alleged was then committed against her by the pursuer. She woke up and was unable to move. She was aware of what was going on but was unable to speak. She was lying on the bed and the

pursuer was standing on the floor at the bottom of the bed, [details redacted]. She was physically unable to resist or speak, despite wanting to do so. She remained conscious throughout the attack, though some of it was “like flashes happening in my head”. She was aware of the pursuer going to and from the bathroom within the suite. He appeared to be wiping or cleaning her and then he put her shorts back on her. They both then fell asleep.

[22] The defender’s evidence therefore was that she was subjected to [details redacted]. She did not say that at the material time her ability to consent was impaired through the intake of alcohol. She implied that the pursuer had administered a drug which disabled her. Her evidence was circumspect in this regard, though her pleadings stated this explicitly. She surmised that the discarded paper in the toilet had something to do with this. Her husband had rinsed and tidied the water glasses the next morning which she found suspicious, as this was something he never did. There was semen in the crutch of her shorts. She put them into her toiletries bag.

[23] Under cross examination she denied the suggestion that what happened in the bed was consensual. She denied that she and the pursuer began a conversation when they went into bed, except for a brief chat about breakfast the next morning. She denied that they faced each other and began kissing, then cuddling, and that this developed into foreplay with them touching each other’s genitals. She was indignant about the suggestion that she had instigated any sexual foreplay or that she persisted [details redacted]. Her response to these suggestions was “Why would I be doing that with a man I’ve been so unhappy with?” She believed that the pursuer was probably in shock when he heard her account of the attack, because he would not have realised that she was conscious, though immobilised.

[24] The family all woke up late the next morning and had missed breakfast in the hotel. They gathered up their belongings and then checked out. She felt unwell, as the ground felt

“like walking on sponge”; she could feel heart palpitations. She was too shocked and afraid to mention what had happened to any of the friends and family in the hotel, so she “put a face on”. They drove home and she avoided conversation with her husband. He made some references to having had sex the night before, but she changed the subject. He was unapologetic about what he had done. As the day went on she felt pain in her backside, especially when going to the toilet. She remained in shock for the next two days and was only able to make sense of events on the morning of Monday 30 October when she went to the home of her friend CE for coffee. While there she broke down in tears. She felt safer and was able to confide in her friend.

[25] When she got to CE’s house on 30 October she was shaking. C noticed immediately that she was in a state. The defender said in evidence:

“[C] said ‘Has he hit the girls?’ [My answer was] ‘No.’ ‘Has he hit you?’ ‘No, worse.’ She said ‘He’s raped you?’ That’s the first I’d heard the words. I said ‘Yes’.”

Ms E helped her to take steps to report the rape. Ms E called the head teacher whom the defender had been hoping to meet that day. Although Ms E did not know the head it was agreed that Ms S would attend at her home, which she did that morning. The defender remained very distressed and upset and Ms E helped to explain the attack to the head teacher. The defender revealed to them both that she had been raped in the hotel but was unable to resist. They all discussed whether the defender could have been drunk, or if she had been given something else. That was when the defender realised the full enormity of the incident, because it was premeditated. Ms S sought advice from the local authority’s child protection officer because the children had been in the room. This activated a procedure that alerted social work and the police to the incident. It was agreed that the defender would

return home that evening with the girls and then report the incident formally to the police the following day (31 October).

[26] On 31 October the defender attended at the police station accompanied by CE. She underwent a forensic medical examination. Intimate swabs were taken. She understood from discussion with the examiner that there were red marks on her bottom. She had experienced pain there since the attack. She was informed much later (March 2018) that traces of semen had been identified from her vaginal swabs. On 31 October she realised that she could not go back home. She suggested that she would take the girls to her mother's in Surrey, but the police assisted her in obtaining immediate accommodation in a Women's Aid refuge in Dumfries.

[27] She had seen her daughters playing with each other on the floor of the refuge at one point and thought that they may have been simulating sex, because she heard them talking about 'mummies and daddies'. The girls had repeated that behaviour in front of her mother some months later. During one conversation *I*, her older daughter, spoke about the October wedding, not liking it very much, and how the pursuer had put ice or lemon in a glass of water for her (the defender).

[28] The defender agreed that, on the morning of 30 October, shortly after 9am, she had received a telephone call from the pursuer. She had dropped the girls at school and was on her way to CE's house for coffee. The pursuer told her that 10 or 12 of her 15 chickens had been killed the night before: a wild animal, probably a fox or a pine marten, had got into their pen. She agreed she was "very upset" at this news. She denied, however, that this was the reason for her distress when she reached CE's house around fifteen minutes later.

[29] The defender denied any suggestion that the allegation was fabricated to allow her to leave the pursuer without opposition. Her predicament was far from comfortable. She had

been the victim of a rape. She had been subjected to an invasive forensic examination which was humiliating. She had to recount the distressing attack to the police and in court. She had to move to emergency accommodation. While the services had been very supportive and the accommodation was clean and comfortable, it was a disruptive and emotionally distressing time. The girls had been removed from their home, their school or nursery environment, and their friends. She was estranged from her previous support network and endured criticism from the pursuer's friends and family. She had managed to secure a private tenancy near to her mother in Surrey after a month in Dumfries. She was recovering from the events, but she was not working and survived on benefits.

[30] CE was a neighbour of the parties. She lived in a nearby village. She got to know the defender in 2016 after the family moved into the estate. She had seen all of them around, but she became particularly friendly with the defender. They were both animal lovers and each had a dog which had died in the year after the defender had moved. They were mutually supportive over that. She became aware from her conversations that there were difficulties in the marriage. She knew by the summer of 2017 that the defender wanted to separate from the pursuer. She understood that the defender was initially going to go down to her mother's. Ms E allowed the defender to store various personal items in her home in preparation, such as personal papers and the ashes of her dead dog.

[31] Ms E knew of the family wedding in late October 2017. On Sunday 29 October she exchanged texts with the defender to invite her to come for coffee the following day. On Monday 30 October at about 9.30am the defender appeared at her door and was pale and very upset about something. She was unable to speak or hold her coffee cup. Ms E asked what had happened. The defender was unable to reply. Ms E then asked: "Has he hurt the children? Has he hurt you? Has he raped you?" After that the defender explained what had

happened in the hotel. The defender decided that she would be leaving the pursuer, and the head teacher had to be informed. Ms S, the head teacher, came to the house. Matters proceeded from there with school and social work input. Ms E accompanied the defender to the police station the following day to make the formal complaint.

[32] Ms E was aware that something had happened with the defender's chickens being attacked. She did not think that was the same morning the defender had come to her house very upset.

### **Rape allegation – pursuer's position**

[33] The pursuer accepted in his evidence that the move to [Dumfries and Galloway] in 2016 was difficult for the defender. The house they lived in was in a state of disrepair: a plastered wall collapsed soon after they moved in and this led to much disruptive work needing to be done. The defender did not find that other parents at the school gates were friendly; she encountered difficulty with other residents in the area regarding her horses. She suffered from depression and this became more acute. She sought help from her GP and her medication was increased. Their sex life stopped around the beginning of August 2017. The defender told him that it was a reaction to her medication. He accepted that, but said they still hugged and kissed, especially when his wife was upset.

[34] His brother's wedding in October 2017 was a happy occasion for all. The children were flower girls and were excited about that. The night before the wedding a large family group had a meal and drinks together in the Kildrummy House Hotel, where they were all staying. It was an enjoyable evening. The pursuer, the defender and the children were in a family room. The defender's plan (6/17) showed the children's beds much closer to the double bed than was actually the case. The alcove in which the girls' beds were located was

at a right angle beyond the foot of the double bed. One of his brothers – who had been in the room at one point dropping off someone’s wedding outfit – drew a plan which showed the layout better (5/12). When the girls were lying in bed they would have been unable to see the double bed. Nothing happened in the bedroom on the first night of their stay.

[35] He and the defender had been through a difficult few months, but the wedding day was the “best we had been for ages”. They were with each other the whole time. They danced together and with their daughters. After the wedding, the party who were all staying at the same hotel returned there by bus. They sat in the bar area of the hotel and there was more socialising. At one point his wife went to the toilet and he took *I* upstairs to change from her wedding outfit into her pyjamas, and then brought her back down. About half an hour later the girls were falling asleep so they carried their children upstairs and placed them in their beds.

[36] He and the defender got themselves ready for bed. He poured them each a glass of water. They lay in bed and talked for a time about the wedding. A bedside light was on. He did not recall asking for sex in the way the defender had described. They were facing each other as they lay in bed. They then began kissing. He said that it was not instigated by either, but “It just happened.”

[37] The pursuer’s evidence was that the parties then engaged in consensual cuddling and foreplay which progressed to intercourse. His wife was wearing shorts and a vest. She kept them on throughout. They had intercourse for about five minutes. This was not completed to the point of ejaculation [details redacted]. They both then went to sleep.

[38] The pursuer’s evidence was that he was woken by his wife the next morning and told that it was late, and that they had missed breakfast. The girls were awake and came into their bed “for a cuddle”. After that they had to get up. He had to pack the cases and return

his own wedding outfit (a kilt) to another room. He made a few trips down to the car to clear everything out of the room. They all went to the hotel lobby and met others. They chatted as everyone made their arrangements to leave. There was no difficulty and no bad atmosphere.

[39] Under cross examination the pursuer was vehement in his denial of any wrongdoing. His evidence was that consensual sexual intercourse took place in the hotel [details redacted]. He disputed the account that he had pulled his wife by the ankles to the bottom of the bed. The suitcases were spread out on the floor there, and it did not happen. He did not put a pair of shorts back on his wife afterwards, because she had not undressed. At no point during the sexual encounter was his wife asleep, or “doped out of her head” or unconscious. He was “100 per cent” sure that it was consensual activity they had engaged in. The sexual touching was being reciprocated, and at no point had she asked him to stop.

[40] He denied the suggestion that he had put a drug into his wife’s glass of water before they went into bed. He had no contact with drugs, and said that he would not know how or where to find them. He did not know that his wife was going to leave him and did not agree with the suggestion that he had attacked her because it was his “last chance”. He had never physically harmed her. He agreed that it was only when she gave evidence herself that the defender knew what he was claiming had happened in the hotel room. He had given no statement to the police and his court pleadings did not give the kind of detail that his wife was questioned about, or that he had spoken to in his evidence. He denied that this was a sign that he was not being truthful. He took legal advice, and acted on that.

[41] The journey home the next day was fine, and they diverted their route through Dundee so that they could visit a Pizza Hut at the defender’s request. They did some shopping at a garage on the way home. The next day (Sunday 29 October) he was up and



[working] early. Someone else had covered his duties for the days they had been away. He knew that the defender had driven to collect her dog from the kennels where it had been looked after while they were away. The mood at home was fine on both the Saturday and Sunday, and there was nothing unusual about the behaviour of the defender or the girls.

[42] On the Monday morning (30 October) he was due to help at [a nearby location], so this allowed him to leave home at the same time as the defender, when she drove the girls to school. He took his dogs on a walk and found pieces of chicken and feathers. On further inspection he discovered that about ten or twelve of the chickens kept by the defender had been attacked and killed. His wife was very fond of all of her animals, so he expected she would be upset when he told her of this. He did not want to call before she had dropped the girls at school, so he waited until 9.15 and telephoned. She was very upset and blamed herself for leaving the pen unlocked. That afternoon he arrived back home after 3 o'clock. The defender was inconsolable, her eyes puffy from crying. He had to comfort her and *I* who had learned that her own pet chicken was one of those killed. He said he would go out that night to try and find the fox or whatever had killed the chickens. *V* was not concerned, because that was her nature. He was not altogether surprised that the defender remained upset at that time. A pet dog had died a few months before and the defender had reacted as if it was the death of a close relative.

[43] On the Tuesday morning (31 October) the defender made some reference to the events of the Friday night by asking "What happened to you?" He thought this was a criticism that he had not ejaculated. Before the conversation developed much further *V* came into the room and they changed the subject. He later wondered if his wife was trying to record him on her mobile phone. He had a migraine that morning and was lying on the couch as the girls were getting ready for school and nursery. The girls had dressed up for

Hallowe'en parties. Both came in to show off their costumes. The defender then took them to school. That was the last time he had seen or spoken to any of them.

[44] That afternoon there had been no sign of the defender or the children returning home. He tried phoning his wife numerous times without any reply. During the evening he saw headlights outside the house. It was two police cars. Officers said his children were safe, but his wife had made an allegation and they had come to remove his guns. He was told nothing more. He telephoned his parents and the police station. He was going to go to the police station himself, but his aunt was a lawyer and insisted that he should not go to the police unless accompanied by a solicitor. He attended at the police station and his solicitor was told eventually that it was an allegation of rape. He was "absolutely dumbfounded". He was later interviewed and – taking legal advice – made no comment.

[45] The pursuer now believed that he was the subject of a malicious lie, itself planned by his wife to enable her to leave him and cut him off from his children while he remained under investigation. He believed that the allegation of rape allowed the defender to separate unchallenged and to limit his rights to resist her move to England.

[46] He did not dispute that the defender was distressed when she spoke to CE on the morning of Monday 30 October. His wife often became very upset and tearful. She suffered from depression and he was aware that it was an ongoing problem. He had to tell her about the dead chickens so that she or the children did not find them. He knew she would be upset. He thought that bad news explained her state of distress when she arrived at Ms E's house.

## **Rape and sexual assault – relevant law**

[47] This proof involved the determination of a criminal allegation. Rape was formerly a crime at common law. Rape and sexual assault are now defined in the Sexual Offences (Scotland) Act 2009. The allegation made by the defender was of a rape as defined by section 1. The incident alleged by the defender was capable also of amounting to an offence of sexual assault by penetration or sexual assault, as defined elsewhere in the legislation. It is appropriate that I set out those definitions, and the sections addressing consent.

The relevant sections of the Sexual Offences (Scotland) Act 2009 are as follows:

### **“1. Rape**

- (1) If a person (A), with A’s penis –
  - (a) without another person (“B”) consenting, and
  - (b) without any reasonable belief that B consents,
 Penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B then A commits an offence, to be known as the offence of rape.”

...

### **2. Sexual assault by penetration**

- (1) If a person (A), with any part of A’s body or anything else –
  - (a) without another person (B) consenting, and
  - (b) without any reasonable belief that B consents,
 penetrates sexually to any extent, either intending to do so or reckless as to whether there is penetration, the vagina or anus of B then A commits an offence, to be known as the offence of sexual assault by penetration.

...

### **3. Sexual assault**

- (1) If a person (A) –
  - (a) without another person (B) consenting, and
  - (b) without any reasonable belief that B consents,
 does any of the things mentioned in subsection (2), then A commits an offence, to be known as the offence of sexual assault.
- (2) Those things are, that A –
  - (a) penetrates sexually, by any means and to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B,
  - (b) intentionally or recklessly touches B sexually,
  - (c) engages in any other form of sexual activity in which A, intentionally or recklessly, has physical contact (whether bodily contact or contact by means of an implement and whether or not through clothing) with B, ...”

.....

**12 Meaning of “consent” and related expressions**

In Parts 1 and 3, “consent” means free agreement (and related expressions are to be construed accordingly).

**13 Circumstances in which conduct takes place without free agreement**

- (1) For the purposes of section 12, but without prejudice to the generality of that Section, free agreement to conduct is absent in the circumstances set out in subsection (2).
- (2) Those circumstances are –
  - (a) where the conduct occurs at a time when B is incapable because of the effect of alcohol or any other substance of consenting to it...”

*Civil Evidence*

[48] In civil proceedings corroboration is not necessary to establish any fact (Civil Evidence (Scotland) Act 1988, Section 1). Hearsay and affidavits are admissible as evidence (1988 Act, Section 2). The standard of proof in civil proceedings is the balance of probabilities: this applies to criminal allegations which are tested in civil proceedings (*Mullan v Anderson* 1993 SLT 835).

**Rape allegation – analysis of evidence**

[49] At the date of proof in this matter, seven months after the allegation was reported to the police, no criminal proceedings had commenced.

[50] The parties’ accounts in respect of the critical events in the hotel were at polar opposites. Both were adamant about their positions in evidence and insisted that the other was lying. The defender was forthright in her evidence and gave a graphic and detailed account of a humiliating attack on her. During the course of giving evidence the defender regularly broke down in tears. She did not depart from the detail of her account when the pursuer’s position was put to her for the first time in cross-examination, namely that

consensual foreplay led to sexual intercourse which did not reach ejaculation. The pursuer was less confident in his manner when he gave evidence, but no less adamant in stating that he had not and would not carry out such a degrading and humiliating attack on his wife.

[51] To accept the defender's version of events I would require to find that the pursuer, who still loved his wife and wanted to remain in a relationship with her, who still intimated his affection for her but respected her wish not to have sexual relations in their home, planned to force her to have sex with him. I would have to find that he did so by experimenting with an incapacitating drug of some sort (not alcohol) and chose the night of his brother's wedding, when they were not in their own bedroom in a remote house, but in a hotel with many other friends and family present, any of whom could have heard a disturbance; that he raped his wife with his children in the room, leaving no trace of force or injury; and that he ran the risk that the defender – who had already confided to other guests at the hotel that she wanted to leave him – would reveal this attack or display a medical reaction to such a substance the following morning when the family group was likely to meet before all departing home.

[52] To accept the pursuer's position I would require to find that, although the defender had decided to stop their sexual relationship and made plans to leave him, she nevertheless decided on the night of the wedding to resume that sexual relationship when their children were asleep in the same room; that she decided – either in advance as part of her plan to leave, or in the following few days – to allege that the sexual intercourse was not consensual, but that she had been raped by her husband; and that she chose to endure an intimate medical examination and police enquiries, and then gave false evidence on oath, all to ease her separation from the pursuer and to ensure that he would be unable to stop her relocating to the south of England with the children.

[53] Because of the contrast in the parties' accounts I have looked at the surrounding facts and circumstances to assist in my assessment of the evidence regarding this allegation.

Corroboration is not necessary for the proof of a fact in a civil case, but I have considered those parts of the evidence which may provide some support for either account, or assist in deciding on credibility.

*Eye witness evidence*

[54] This case first called before a sheriff on 19 December 2017 for consideration of pre-service interdicts. Both parties were represented. The sheriff hearing the motion noted that:

“[The defender’s solicitor] explained the circumstances surrounding the alleged rape and stated.....that “[I] saw her father rape her mother”. She submitted that the defender and the children had been traumatised by this event.”

(Sheriff’s Appeal Note to SAC dated 12 February 2018, number 20 of process, para [25])

No such eye witness evidence was offered at the proof, and there was no indication that there was any. The children were not spoken to by police and social work until February 2018, and the information then obtained was of no evidential value: this is confirmed in Productions 5/4 and 5/5, the terms of which were agreed by joint minute. In their later discussions with the Child Welfare Reporter the children did not mention the incident in the hotel room (Report at number 26 of process). They were asleep when sexual intercourse took place between the parties. At that early stage in proceedings in December 2017 the court was being asked to make immediate and significant decisions with regard to the exercise of parental rights. The presiding sheriff did so on the basis of *ex parte* statements. It is a concern that, at that stage, the defender made representations to the court about the existence of eye witness evidence which proved to be incorrect.

*DNA evidence*

[55] The only physical evidence led was a police forensic DNA report (6/18 of process), prepared after the defender underwent an examination on 31 October. The report was not in the standard form usually encountered in criminal cases: it was an email summary of findings. It was introduced after the proof had commenced: the joint minute agreeing its content was signed on day three of the proof, and no witness was called to speak to its terms. The swabs taken from the defender showed the presence of the pursuer's semen within the defender's vagina. The pursuer's counsel intimated that the terms of this report were agreed, but for a limited purpose. It was submitted that the report was not sufficiently specific to confirm whether the semen was only the result of ejaculation; it may have been from 'pre-ejaculate'. It was, therefore, accepted by the pursuer that this was evidence of intercourse, but not of full ejaculation. The defender's solicitor did not dispute that this was the agreed position. Accordingly, the DNA report was proof only of intercourse having taken place between the parties.

*Other physical evidence*

[56] The defender gave a graphic account of [details redacted]. She believed that red marks on her backside were visible when she underwent forensic examination on 31 October 2017. No evidence was led of physical injury or marking found on the complainer.

[57] The defender's nightwear, and in particular her shorts, were not available for analysis. The defender said that she had tucked these into her toiletries bag and hidden the bag under her bed on 28 October when she returned home after the wedding. Her evidence was that, on 31 October when she went to the house with police to collect belongings, the

shorts were no longer in the bag, so she was unable to produce them to the police for examination.

[58] There was no toxicology or drug report produced to support the defender's contention that she had been given an immobilising substance by the pursuer to prevent her resisting his attack. The police forensic report (6/18 of process) was silent on the matter.

#### *Reporting of incident*

[59] In rape and sexual assault trials, juries are now given a standard direction that there can be good reasons why a person against whom a sexual offence is committed may not tell others about it or report it, or delays doing so. Juries are also advised that such failure or delay does not necessarily indicate that an allegation is false. In deciding on the facts of this case I have to bear in mind that admonition: delay in reporting the rape does not of itself mean that an allegation is untrue. It is, however, relevant in this case to take account of the sequence of events after the incident, and the circumstances in which the report was made.

[60] The defender's position in evidence was that she did not report the rape later on the morning of Saturday 28 October because she did not feel safe. Most of the other guests were members of the pursuer's family, since it was his brother's wedding they were attending. She was unable to confide in any of the other guests or hotel staff. She then kept up a front to maintain the routine of family life. Her position was that, when she had the opportunity to speak more fully to a confidante, CE, she opened up to her and disclosed the rape on the morning of Monday 30 October.

[61] The evidence from a number of witnesses indicated that the defender engaged in normal conversation in the hotel lobby during the late morning of 28 October, and that she showed no sign of being upset or unwell. The parties had an uneventful long journey home



and stayed in or around their home during the evening of Saturday 28 October and all day on Sunday 29 October. They continued to share a bed. The pursuer was working for part of the Sunday. The defender drove to kennels without the pursuer to pick up her dog; the owner of the kennels (DH) stated in an affidavit lodged in process that the defender appeared “relaxed and happy” and that they had a conversation about the kennel owner taking his gun dog out on a shoot to be organised by the pursuer.

[62] The defender exchanged a number of unremarkable text and email messages over the period under consideration. On the Saturday evening she exchanged texts with the pursuer’s mother about how the pursuer’s father was feeling after the wedding (copied at 5/10 of process). She exchanged further texts with her mother-in-law during the evening of 30 October, after she had made the report of rape to Ms E and Ms S. She sent an email to the head teacher of her daughter’s school on Sunday 29 October seeking a meeting the following day, which was the first day back after the two week mid-term break: Ms S’s affidavit indicated that the email was routine in its tone. On the Sunday she exchanged texts with Ms E about the wedding, and made an arrangement to visit for a coffee the following day.

[63] This behaviour was not consistent with the defender’s account of being afraid of the pursuer and unable to communicate freely with anyone about the incident until Monday 30 October.

[64] The account given by both the defender and Ms E about their initial exchange on 30 October was highly unusual. Ms E was, by that time, heavily involved in assisting the defender to separate from the pursuer. When the defender turned up on the Monday morning very upset – after their having exchanged routine text messages the day before – it appeared extraordinary that Ms E’s questioning would have proceeded in the way they both said. With the defender saying very little, Ms E asked out of the blue if the pursuer had

raped her. The comments came out of nowhere, and I did not believe that those recollections were accurate, because it suggested that Ms E simply guessed at that explanation with no background to justify it. I was left with the conclusion that Ms E was anxious to offer any evidence that may have backed up the defender's account of the rape.

### *Distress*

[65] In criminal trials involving an allegation of rape or sexual assault distress on the part of the complainer can provide corroboration of a lack of consent. Evidence of distress can form part of the whole picture being considered. The defender was distressed when she attended at CE's house on the morning of 30 October. Her position was that her distress was due to the attack on her two days before. In considering the distress displayed by the defender I should note that there was no distress evident from the defender for two days, from Saturday morning until Monday morning, in any of the conversations, meetings or messages exchanged with persons other than the pursuer. Furthermore, it was a matter of agreement that, only minutes before the defender arrived at Ms E's home, the pursuer had told her that most of her chickens had been killed. She was very upset at that news. Given that context, I am unable to find that the distress exhibited on 30 October provides corroboration of the defender's account of rape.

### *Credibility of parties*

#### *(1) Pursuer*

[66] The pursuer, despite having raised this action, was not forthcoming in his pleadings. He denied that any rape had occurred. The whole basis of his divorce action is that the defender behaved unreasonably by making a false allegation of rape. He has been consistent

in that position throughout. However, his pleadings were not candid about his explanation of what – if anything – did happen in the hotel. It was not until the defender was cross-examined that there was any indication of the pursuer's position about consensual sexual activity. The defender argued that this demonstrated that the pursuer was changing his position, and that this claim of some limited consensual sexual activity only arose once the pursuer was aware of the outcome of the forensic report identifying his semen from the vaginal swab.

[67] The pursuer's position was that, because he was interviewed by the police in early November 2017 about the grave allegation of rape, and because the possibility of criminal proceedings remained live, he was reticent in giving detail in the pleadings which may have been used to aid a criminal case against him. This was an extremely delicate legal matter and, in the highly unusual circumstances of this case, his lack of candour in the pleadings should not be held against him. It was a decision made on legal advice. Ultimately, he wanted to see his children and had elected to give evidence. He was warned when he gave evidence that he did not require to answer any question which may incriminate him in a criminal offence, but he had chosen to speak openly about the sexual activity in the hotel. The divorce action was a means to an end, namely a way for him to seek orders in relation to his children. He had come to the realisation that the children should reside with their mother. He was anxious to have a relationship with his daughters and proceeded with the proof because of the continued and persistent opposition to contact. The only way to counter this was to address openly at proof the details of what had occurred in the hotel.

[68] I have concluded that the lack of detail from the pursuer in his pleadings about events in the hotel, when compared to the fuller detail given by him in evidence, was a

decision based on legal advice, and did not demonstrate a change in position. The account in the pleadings was limited, but it was not inconsistent with the account given in evidence.

(2) *Defender*

[69] The defender knew, from legal advice she had received, that she could face problems in relocating with the children without the pursuer having a say. Several pieces of evidence indicated that the defender had a pre-arranged plan to relocate to Surrey to be near her mother after the wedding at the end of October. The pursuer did not know anything about this, beyond the vague comments made by the defender about going to her mother's for an extended break "to get my head straight". He did not know that she planned to take the children out of school to go there.

[70] The following text messages were produced by the defender, and formed part of number 6/2 of process:

*"Tue 4 July [2017]*

*[Defender]: "I'd give my back teeth to be back in [ ] right now...."*

*[Her mother]: "Oh darling. I'd give mine to have you back here..."*

*[Defender]: "I'm a mess Mutti, I have a husband who's so so happy to have us back but I just don't want to be here. Problem is, I feel sorry for him, knowing what I know (if you know what I mean!) Just awful...."*

*[Her mother]: "I can't bear it for you, yes, it's awful. Please don't feel sorry for him (and I do know what you mean) unless he really tries to change. I feel so much more sorry for you, it's a ghastly predicament you're in. Just remember, if you really do need to get away, you can always come here...."*

[71] It appeared likely that the defender had formed a plan, despite her denials to the contrary. The text messages detailed above leave that strong impression, but there were other indicators. The defender, in unguarded moments, had revealed to members of the

pursuer's family not only that she was desperately unhappy in her marriage, but also that she was thinking of leaving. At a hen party in September 2017, a few weeks before the October wedding, she spoke to a woman named DC about leaving and said: "Don't worry, I've got it all planned." This statement was contained in Ms C's affidavit, produced in process. Although she was not called, its terms were put to the defender, who agreed she may have said that, but denied that she had formed any details of how to leave. AMcC, the partner of one of the pursuer's brothers, gave evidence at the proof of another conversation at the hen party where the defender spoke to her in similar terms.

[72] I found that the evidence of the pursuer's mother on this point was disingenuous. When asked if there was any plan formed for her daughter to leave and come to [Surrey] after separation she said "Absolutely not". She was vague and unconvincing in her explanation about the July texts and what they meant. Yet other evidence showed that she had been instrumental in arranging – over the summer months of 2017 – the removal of the defender's horses back down close to her. CE and SS who, in their different ways, had been consulted by the defender about her intended separation, both also said in evidence that they understood before the October wedding that the defender's intention was to go down to Surrey to stay with or near her mother. On the day she reported the rape to the police the defender indicated that she could go down to stay with her mother, until the women's refuge was offered.

[73] I am unable to ignore the weight of evidence regarding the defender's plan to separate from the pursuer with the children. Her having such intentions does not, of course, directly affect the credibility of either account of what took place in the hotel. However, the anxiety from both the defender and her mother in their evidence to downplay her intentions was a worrying element of the evidence, and affected my view of their credibility.

**Conclusion on rape allegation**

[74] I am not satisfied that the defender has discharged the burden of proving, on the balance of probabilities, that she was raped by the pursuer on 28 October 2017 in the Kildrummy House Hotel. The evidence from the surrounding facts and circumstances cast doubt on her account. Before the parties attending the wedding on 27 October 2017 the defender already intended to leave the pursuer. She took steps to put that plan into practice. She delayed reporting the allegation, and during this intervening period she continued to reside and share a bed with the pursuer. She communicated with several people over that period, but gave no indication that anything was wrong until the morning of 30 October. She was distressed on the morning of 30 October, but the death of her pet chickens was a matter that had caused her to be very upset only minutes before.

[75] There was no supporting evidence of injury or force, or of any substance being administered, all factors which the defender had claimed were present. The DNA evidence showing the presence of the pursuer's semen was indicative of sexual intercourse. This was neutral evidence, since it was a fact consistent with either version of the incident.

[76] I have concluded on the balance of probabilities that the parties had consensual sexual intercourse in the hotel on 28 October 2017. As a result of this conclusion I also find, on the balance of probabilities, that the defender has made a false allegation of rape against the pursuer.

## ORDERS REGARDING THE CHILDREN

### Residence

[77] It is in the best interests of the children *I* and *V* that they reside with the defender. A residence order stating that the children should live with the defender is not now opposed by the pursuer. He agreed in evidence – together with a significant number of his witnesses – that the children should reside with their mother. Residence and relocation were contested issues in this case during the earlier part of proceedings: an order is therefore appropriate, since both parties have parental rights and responsibilities in respect of the children. It is in the best interests of the children that a residence order is made. This removes any uncertainty in relation to that. The girls are well settled in their new home in [ ]. They are close to their maternal grandmother. They have been enrolled with a new school and have settled well there.

### Contact – defender’s position

[78] The matter of the pursuer’s proposed contact with the two girls *I* and *V* was opposed by the defender. The primary basis of her opposition was, unsurprisingly, the allegation of rape. Since I have not made a finding that the defender was raped by the pursuer this is not the basis for my decision in relation to the pursuer’s application for contact with the children.

[79] The defender’s secondary opposition to contact was that the pursuer was cruel and abusive towards the girls and that, as a result, no contact order should be made. The children’s clear view was that they did not wish to see or have any relationship with the pursuer, and this view should be respected. The defender described the pursuer’s relationship with the older child *I* as “strained”. The child was tall and clumsy, but also

sensitive. These factors appeared to make the pursuer impatient with her, particularly when she needed careful management with some of her behavioural traits, like needing to be accompanied to the bathroom, being a slow eater, or having difficulty with her reading and writing. The pursuer was “too harsh” in dealing with *I*.

[80] The defender gave specific examples of this. One evening *I* was taking a long time to finish her dinner. To force her to speed up the pursuer led the rest of the family out of the kitchen and turned the light off, frightening the child. When she wanted to be accompanied to the toilet (the adult waiting outside to reassure her) he would do the same, turning off the light when she was taking too long. The defender said that she did not protest about this behaviour at the time, feeling pressurised to put on a show of parental unity.

[81] But sometimes her husband’s behaviour was more overtly cruel. The pursuer did not usually help *I* with her homework, but on one occasion the defender asked him for assistance. *I* was doing spelling but had great difficulty with it. The child was nervous and sought the pursuer’s approval. She made mistakes in her spelling and he lost his temper. He slapped her on the head. *I* started crying and the defender got up and left the room. Another incident only a few months before the separation took place one Sunday afternoon. The pursuer was watching television with the girls while drinking a can of beer. *I* accidentally knocked over the pursuer’s drink. He lost his temper because there were no more beers left. He called *I* a “fucking arsehole” and hit her with a pillow. The defender herself was upset at this and texted her mother in exasperation (the message was included at 6/2). He often engaged in “rough play” with the girls and hit them with cushions, but went too far. This was the worst example.

[82] The final example of cruelty which the defender wanted to speak about involved the children’s suitcases. The girls had a playroom which they often left untidy, with books and



toys lying around. The defender regularly asked them to clear up the room, but it was always a struggle. One afternoon she told the girls that they had to tidy the room or there would be trouble. She went out to tend to her animals. When she came back the girls were sitting in the hallway wearing jackets and sitting on suitcases. The pursuer told her that he had made clear to the girls that, because they refused to do what they were told, they were getting a new mum and dad. *I* in particular was very upset, crying and begging the defender not to send them away. The defender calmed the girls down, reassured them, and helped them to unpack their cases. This was an hour or two before one of the pursuer's brothers was due to visit. Once the relatives came, the girls were no longer upset and played happily with their young cousin. The defender herself remained horrified that the pursuer would go to such lengths. She was sorry that she had allowed it to happen.

[83] The defender's evidence was that the pursuer had a better relationship with their younger daughter *V*. *V* was a more robust, outdoors-loving child, and the pursuer clearly liked that. He often favoured *V* over her sister, and this was a concern.

[84] Overall, the pursuer was not a 'hands-on' father. His hours of work were very unusual. He could be out as early as 4am, back for something to eat, but then not home again until 10pm. It was the defender who did all the parenting of the girls. When his work hours were not as demanding, the pursuer still left the defender to do the majority of parenting tasks. His behaviour changed slightly towards the end of their relationship and he helped out more, but he was "clutching at straws" because he knew he had to change his ways. He had been in denial about the state of their marriage. The defender did not agree that he regularly took the girls out [ ] to accompany him on his duties; this was only an occasional experience.

[85] The defender agreed that the girls had a good relationship with their paternal grandparents, especially their grandfather WR, whom they “adored”. They had a good relationship too with the pursuer’s three brothers and their partners, though visits from them were infrequent because the pursuer’s family were based in and around Lanarkshire.

[86] After she had reported the rape and she and the girls were put in a refuge, *I* was crying on the first night there. The defender comforted her daughter, but *I* said “You misunderstand. These are tears of joy.” The defender had realised very quickly after leaving that the girls had been living under a cloud at [ ], because of the oppressive atmosphere created by the pursuer’s behaviour. The defender berated herself in her evidence for not having noticed this.

[87] The defender’s evidence was that after the separation, although her husband had “betrayed me in the worst possible way” she wanted to work out a way to allow the girls to maintain their relationship with him. But in the months since separation she had watched her daughters blossoming; it was “like a weight has been lifted off their shoulders.” She said that the girls both still had nightmares about him. At [ ] they used to cry on a daily basis. There was a huge difference in them now. She did not want their progress to be reversed. She thought that a contact order would not be in the children’s best interests.

[88] The defender called a number of witnesses to support her views about contact. SR was a friend of the defender. She met the parties in 2012 when they lived in the Inverness area. From what she saw, the defender tried to make the best of things, but was not supported by her husband. She still kept in touch with the defender, and had visited her in Dumfries and Galloway. She thought that the pursuer was often critical of *I* and her fear of the dark, calling her a “silly little girl”. RK was another friend of the defender, who got to know the parties when they moved to [ ], Perthshire in 2015. She and the defender had

children who started school together. She did not think the pursuer supported the defender, but left her to do all the childcare duties. She thought that the pursuer left the defender to take care of all of their animals (dogs, chickens, horses) each day before she had to get the children ready for school. As far as she knew from the defender, the pursuer stayed in bed, leaving her to do these jobs. She was unaware of the pursuer's hours of work. Both witnesses said that the defender had been thinking of leaving the pursuer for a long time.

[89] DR-G, the defender's mother and the children's maternal grandmother, gave evidence in support of her daughter. She was close to her daughter. Although she lived in [ ] in Surrey she was a regular visitor to the parties' different homes. From the early days she thought that the pursuer dominated her daughter and left her to look after the children. He was controlling, sometimes prevented her visiting, and was "incredibly lazy" around the house. With *I* he had a "simmering anger" and was impatient. He was too rough when playing with the children, and often would make them cry. He belittled *I*, the oldest, but had a different attitude to *V*. The defender and the girls were very aware of him treating *V* as his favourite. Since the separation, *I* needed constant reassurance that the pursuer was not going to come and take them away. They had gradually changed and were now much happier. Contact would be a backward step. She was concerned that the girls, when playing together, may have been "re-enacting the sex act". This added to her worry about the pursuer having contact.

### **Contact – pursuer's position**

[90] The pursuer maintained that he had a good relationship with each of his daughters before the sudden separation. He said they both had different personalities: *I* was outgoing and enjoyed the company of friends, and watching television, while *V* liked the outdoors

and was more 'hands-on'. He enjoyed spending time with both of them, and often took them out walking the dogs or going round [on his outdoor] duties when they lived in family.

[91] He believed that he was close to his children, and they gave public displays of affection towards him. *I* was very close to her mother. The defender did the majority of the day to day care of the children, usually while he was still at work, because his hours were unpredictable. His job could start at 4am. He usually managed to come home twice during the day, once for a coffee with the defender mid-morning, and in the early evening when he had a meal and then went back out [to complete various tasks]. In the summer months especially, the job was intensive. These demands meant that homework, bedtime and meal routines with the girls were usually carried out by their mother.

[92] The children had a good relationship with his wider family, especially his parents. When the defender had to have two weekends on her own in September 2017 – once to go to a hen party for his brother's fiancée and once to visit her father who had undergone an operation – his own father came down from [Lanarkshire] to help look after the girls. He denied that this showed he could not cope with the girls on his own. He had still to go out and about at odd times doing his various duties [ ], so he needed another adult present, even though he spent more time with the girls over those weekends.

[93] He denied the specific allegations of cruelty made by the defender and addressed in the child welfare report. He agreed that *I* was afraid of the dark, but denied leaving her in the dark to speed up her "painfully slow" eating or to stop her taking too long in the bathroom. His position was that he and the defender would use the threat of turning off the light to speed her up, and would count to three, the threat being that the light would go out if she was not out in time.

[94] He agreed that the threat of a 'new mummy and daddy' had been used one day when one of his brothers was due to visit. The defender was exasperated and upset that the girls had not tidied their playroom. The pursuer's position was that he intervened and told the girls to go upstairs and pack their cases because they would not do what they were told: he would be getting their mother to telephone for a new mum and dad. The girls packed their cases and were crying. He sat them down to say that they could not keep doing this to their mum. He made them apologise. His position was that everything was resolved with a hug and a kiss. His brother and partner came to visit and the girls played happily with their cousin. The matter had not caused any anxiety or disagreement after that, and the defender herself had not objected or been upset at it. With hindsight he could see that it was inappropriate, but in the stress of the moment he had taken that step to help his wife. Her frequent requests to the girls were being ignored and this was making her more aggravated.

[95] He denied becoming annoyed at *I* regarding her spelling. He had dyslexia, so not only was he "hopeless" at spelling, but he understood the frustration of such difficulties. He recalled a meeting at school where the class teacher had discussed a possible referral for *I* to obtain extra support. He was adamant that he had not shouted at or slapped *I* for having difficulty in completing her homework.

[96] The final allegation about spilling beer and his reaction was denied by the pursuer. *I* was clumsy, and regularly knocked things over. It was a "frustrating" trait, but he had no recollection of the incident claimed where he was alleged to have sworn at *I* for knocking over a beer while they were watching a film. He did not swear at the children. The text sent by the pursuer to her mother supposedly making an instant complaint about it did not make sense (6/2 of process). The text was sent during the afternoon one day in July, his busiest time of the year. He did not have time to sit and watch TV in the afternoon, far less drink

alcohol during the day. He worked with guns, often had to go out shooting in the evenings (every day of the week) and it was simply not the case that he had reacted like that to an incident with *I* knocking something over.

[97] The pursuer said that, very shortly after his wife left, he had been told by the police not to contact her. A lawyer's letter received a short time later warned him not to try and make any contact. He raised the court proceedings in December 2017 once it was clear that discussions between solicitors were not resulting in agreement about him seeing the children. He had sought residence when he raised the proceedings. He had wanted the children home and back to the school and nursery they had attended [ ]. He had not been able to see them. He received no information. His wife was making malicious allegations. She had a background of depression.

[98] He had thought long and hard about this in the months since. He still loved the defender, but after the allegation she had made they could no longer be together. His job was demanding and he realised that he would be unable to cope with the girls full time on his own. The defender had been the children's main carer all of their lives. They were very close to her. He realised that the children were settling down in Surrey. The court report explained that. That was why, before the proof, he conceded the question of residence. He did not want to disrupt their new arrangements, but wanted a relationship with his daughters. It was in their best interests for that to happen. He did not propose bringing the children all the way back up to Scotland if he was allowed weekend contact. He had a friend who could allow him use of a holiday cottage in an estate near London. School holidays would be a different proposition, and he wanted more flexibility around that.

[99] He accepted that if contact operated, he and the defender would not be able to meet face to face. His family all got on well with the girls and could help at handovers. The

defender's brother was another possibility, because he had always enjoyed a good relationship with him.

[100] The pursuer called a number of witnesses to support his comments about the state of his relationship with his daughters. His mother, ER, lived in [ ]. The pursuer was one of her four sons. She and her husband were regular visitors to the parties and the children when they lived at [different locations]. The parties always seemed like a mutually supportive, happy couple. There were particular challenges from the lifestyle [ ]: remoteness of locations and the threat of redundancy were factors. She began to learn of the defender's anxiety and depression, and in 2017 learned of the defender voicing her unhappiness in the marriage. She tried to offer some support and believed that she had formed a good bond with her daughter-in-law. The wedding on 27 October was a happy occasion and she exchanged texts with the defender in the days after it.

[101] She and her family, including the pursuer, were all shocked about the allegation made, and distressed that there had been no contact with the children since. The girls were very happy at the wedding. The defender was chatty and relaxed at the wedding and the following morning in the hotel reception. She could not believe that the girls would not want to see her or her husband. They had always got on so well, and there was nothing to suggest otherwise. The sudden separation had been a desperate time. She had thought that it was "much more sensible" for the girls to reside with their mother the defender, as the girls would be "lost without their mum". She supported her son's application for contact. He was a proud, hands-on dad.

[102] WR is the pursuer's father. He was a regular visitor to the [matrimonial home], and his son and family visited him in Hamilton. He believed that his son had a "great relationship" with the girls. They frequently came out with the pursuer [ ] at weekends.

Outdoor activities were part of the life [ ] and the girls enjoyed being out on quadbikes or helping with small jobs [ ]. He had been down for two weekends in September 2017 when the defender needed time away, and he helped his son look after the girls. They went fishing. He was also at the wedding in October.

[103] AR was one of the pursuer's brothers. He and his partner saw the parties regularly. They had a young son who got on well with the girls. He and his partner had visited one day when the incident with the suitcases took place. His partner was pregnant at the time, so it was in the late summer of 2017. He understood that the girls had been naughty and not tidied their room, leading to them being told they were going to a "new mummy and daddy". Both of the parties were joking about it, because they had led the girls to believe that his car had come to take them away. The girls came downstairs and behaved normally. They played with his son (their cousin) during the visit. *I* and *V* had a close relationship with the pursuer. He had seen that himself. *V* was a "daddy's girl", while *I* was probably closer to her mother. At family events both of the children spent time with the pursuer.

### **Views of the children**

[104] The girls made disparaging remarks about the pursuer when they were in a Women's Aid refuge in November 2017. This was immediately after the parties had separated. LH, a worker from Women's Aid, gave evidence. She noted that *I* told her on several occasions "I hate dad". The negative comments about the defender were made to her as early as 3 November 2017, when Ms H noted *I* saying:

"I'm glad mum and dad are splitting up. It was not nice at home. I am excited that we are going to, hopefully, move to England to be nearer family."  
(Production 6/10, affidavit of LH, para 5.)



[105] The defender denied exerting any influence on the children when it came to their views regarding contact. She said “They don’t need to hear me speak badly of their dad.” At an early stage, sitting in her mother’s kitchen in [Surrey], *I* had said that she wanted to talk to “the court people”, and produced her first drawing expressing her wish to have no contact with him (6/1 of process, which bears to have been made on 1 December 2017). The later notes prepared by the girls (6/5 – 6/8) were in the girls’ own words and had not been influenced. The defender said in evidence that she was “shocked” by the strength of feeling her daughters had in opposing any contact with the pursuer, but their views were genuine.

[106] A child welfare reporter spoke to the girls and produced a report dated 20 March 2018 (number 26 of process). The oldest child *I* (then seven), told the reporter that she had changed her middle name to remove any connection with her father. She was relaxed and spoke openly to the reporter. She made clear that she did not want to live with her father, the pursuer, but wanted to remain in England with her mother. She described the separation as “the best day of my life”. She described the pursuer as “horrible and mean”, and recounted a number of examples of this. These included both the incident with the suitcases and the spilled beer. Other episodes were one time when she fell out of bed and her dad laughed at her, and an occasion when he set off a mobile phone in a dark room to scare her.

The child welfare reporter observed:

“I found it difficult to consider that her father might just have been playing with her and trying to have fun. She would return to the view that her father was mean to her and mean to her mother.” (Child Welfare Report, p.4)

[107] The reporter also noted that he was unable to discuss the matter of contact in any positive terms because *I* “appeared to have a fear of being removed from her mother’s care....No approaches received any positive response”, and the child became upset.

[108] The reporter also spoke to *V*, then aged four. She was similarly against any relationship with the pursuer. She was pleased to be living where she was because this meant that “Dad can’t come as it’s too far away.” He observed that in discussions with *V* “the terminology was similar to that of her sister.” The reporter concluded with the following comments:

“*I* had a consistent and negative view of her father. Despite efforts it was very difficult to have *I* consider her father in a positive light. How that has arisen is not part of my remit or for this report but was evident throughout the discussions I had with *I*.”

[109] The pursuer did not believe that the views expressed about him by the girls were genuine. *I* was “definitely” not scared of him. He accepted that the worker from Women’s Aid and the court reporter Mr Bolling had noted accurately what the girls had said, but he did not believe the negative comments were the true feelings of the girls. He thought *I* had been coached by the defender or her mother. The girls had a very good relationship with him and his family. It was “horrible” to read and hear their negative comments saying that they hated him. He said for the girls “to suddenly be terrified of me – it’s nonsense.”

[110] He did not think that the written notes by the girls were genuine either. *I*’s note from February (6/8 of process) referred to him taking the girls back. By that time he had accepted that they were living in Surrey and enrolled in a new school, so it was clear to him that the defender had not tried to reassure *I* about that. *V* was not even at school, so he did not see how she could have written such notes (6/5 – 6/7) without copying.

### **Orders relating to children – relevant law**

[111] A number of the provisions of Section 11 of the Children (Scotland) Act 1995 (as amended) are relevant in this case. They are as follows:

- “(7) ...[I]n 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 should be made at all;
  - (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;
    - (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;
  - (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 domestic abuse...
- (7D) Where –
- (a) The court is considering making an order under subsection (1) above;
  - (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.
- ....
- (10) Without prejudice to the generality of paragraph (b) of subsection (7) above, a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view for the purposes ... of that paragraph...”.

[112] For many years the courts in Scotland, when considering applications made under the 1995 Act, have recognised the need to maintain relationships – where appropriate –

between a child and his or her non-resident parent. Norrie, in *The Law Relating to Parent and Child in Scotland* (W Green, 3<sup>rd</sup> Edn, 2013), notes at para 9.23:

“The general principle, or point of reference, that in the normal case it will be in the interests of a child to maintain direct relations and personal contact with their absent parent, is one that judges are entitled to take into account without the need for it to be established by evidence from experts or otherwise.”

The author cites Lord McCluskey in *Davidson v Smith* 1998 Fam L.R. 21 at [5]–[10], and Lord President Rodger in *White v White* 2001 SC 689 at [14], as authorities.

[113] In the case before me I was directed to a more recent articulation of the approach and starting point, noted in *J v M* [2016] CSIH 52, where Lord Malcolm observed at para [11]:

“(1) In terms of sec 11(7)(a) of the 1995 Act, the judge must treat the welfare of the child as the paramount consideration. The issue is: What is best for the child? Whether the sheriff had addressed the statutory test was an important issue in *NJDB v JEG* UKSC 21; 2012 SLT 840; 2012 SCLR 428 (see Lord Reed, paras 11-13, Lord Hope of Craighead, para 39). The court must have regard to a number of specified matters, including the need to protect the child from any abuse (defined as including any conduct likely to cause distress), and the need for co-operation between the parents (1995 Act, sec 11 (7A)-(7E)).

(2) Before refusing an application for parental contact, a careful balancing exercise must be carried out with a view to identifying whether there are weighty factors which make such a serious step necessary and justified in the paramount interests of the child (sometimes referred to as ‘exceptional circumstances’). Reference can be made to *M v K* [2015] CSIH 54; 2015 SLT 469 (para 25). This approach is reflective of the general background of it almost always being conducive to the welfare of a child that parental contact is maintained. In *NJDB v JEG* (para 14) Lord Reed explained that there must be ‘a reasonable basis’ for a decision to refuse such an application.”

### **Contact – analysis of the evidence**

[114] The incident with the suitcases is worthy of comment. The pursuer went too far with this and upset the girls, though he took this step because the defender herself had been upset that the girls did not do what they were told. The threat that the children were going to live elsewhere was withdrawn soon after it was made, the reasoning was explained to the children, both of whom were assured of the continuing love and affection of both of their

parents, and the children very quickly recovered and played as normal with their cousin.

The pursuer's brother gave evidence that he visited later that day and saw nothing untoward in the reaction of the girls. Both of the parties expressed regret that it had been done at all. I concluded that this episode was inappropriate chastisement but, in the circumstances in which it occurred, it was not "abuse" as defined in Section 11(7B) and (7C) of the Children (Scotland) Act 1995, noted above.

[115] As far as the other allegations were concerned, I have not made specific findings in fact about the other incidents complained of by the defender in relation to the pursuer's treatment of the girls, and spoken about in her evidence. There can be a danger in judging too finely behaviour which occurs in the day to day of a hectic household when information has emerged months later in affidavits or court evidence. Parents may often say or do things to their children in the stress of the moment which do not amount to abuse or neglect, but which they regret with the benefit of hindsight. There is a risk that recollections given in evidence about such incidents can be self-serving, and may be affected by the anxiety of a party keen to apportion blame and avoid any criticism of their own actions under the glare of the courtroom.

[116] I was satisfied from the evidence here that there were many stresses in the parties' household at [ ]. The relatively remote location, the recent enforced move to a new environment, the accommodation's state of disrepair, the pursuer's unpredictable and often anti-social working hours, the defender's deteriorating mental health and sense of isolation, the strains in the marriage and lack of communication between the parties about it. These were all factors which came into the equation when the parties were dealing with domestic challenges. Not least of these were the day to day difficulties involved in bringing up two young, active children. It appeared to me from the evidence that, on occasions, both parties

became impatient when dealing with the girls, lost their temper, and shouted at them. I concluded that – in context – none of the behaviour which happened amounted to “abuse” as defined in the 1995 Act. The pursuer was more authoritarian with the children than the defender and therefore probably raised his voice or shouted at them more than the defender did. As a result of his manner in dealing with them at stressful times the girls sometimes became upset. I have concluded that such distress and upset was short term and was not significant.

[117] The girls have expressed negative views towards the pursuer, and oppose any contact with him. *I*, the older child, made this clear in discussions very shortly after separation, in her notes (one prepared before the court action commenced) and in her discussions with the child welfare reporter. *V* expressed these views in notes made in February 2018 and in her discussions with the child welfare reporter the following month.

[118] The children have a close relationship with, and are loyal to, the defender. She has been their main carer for all of their young lives. However, the defender could see nothing positive in the pursuer’s relationship with the girls when they lived together, and appeared to blame him entirely for the difficult and strained atmosphere which was a regular feature of the family home. A more objective analysis is that both parties contributed to the unhappiness in the marriage. The pursuer appeared to lack some emotional intelligence, and struggled to face up to his wife’s difficulties, hoping that they would resolve themselves in time. But it was the defender who appeared to have an overwhelmingly negative view of the move to [Dumfries and Galloway] and of her marriage, and who voiced her unhappiness both inside and outside the home for months before her departure. Against that background it appears that her negative views have transmitted to the children.

[119] I have concluded that both *I* and *V* were worried that any expression of fondness or affection for the pursuer, any member of his family or even any part of their lives in Dumfries and Galloway would not be welcome. The defender had turned her back on everything about her life in Scotland. The children appeared to follow that lead in their responses to the child welfare reporter. My conclusion was that the negative views expressed by the children were not a genuine reflection of their relationship with the pursuer or their interaction with him. *I*'s views appeared to be motivated by loyalty to her mother: at one point she told the child welfare reporter that the defender was "my world". *V* appeared to take the lead from her older sister.

[120] I therefore concluded that the views expressed by these young children were influenced by the defender and, in all likelihood, her mother, their maternal grandmother. In her evidence, the defender's mother was extremely critical of the pursuer, notwithstanding her limited contact with him. She had nothing good to say about him at all. She described him as having a "simmering anger" around his daughter *I*. This description did not match the observations of numerous other witnesses, and I did not accept that it was a fair view of the pursuer's relationship with his eldest daughter.

[121] There were a number of indicators that the children's negative views were not independently formed from their experiences with the pursuer. Firstly, the views represented a significant change in their outlook towards the pursuer after separation. This had nothing to do with the rape allegation, since the girls did not mention this to the child welfare reporter, and were not aware of it. There was no evidence that the children had been unhappy when they lived in [ ]. There was no prior police, social work or school concern noted about conditions or behaviour within the home. *I* attended a primary school with a small roll. The head teacher knew all of the pupils and met with both parties to discuss *I*'s

educational needs, but made no mention of concerns expressed by *I* about her relationships at home. Even CE, the close confidante of the defender, who supported her friend and helped with the intended separation, appeared to think that the girls were happy and healthy, and did not observe anything untoward in the pursuer's interaction with his children.

[122] Secondly, the notes prepared by the children indicate that, far from being protected from the dispute between their parents, they were being encouraged to take a side in the conflict. The polarised nature of these proceedings, with the allegation of rape dominating everything, has meant that calm discussion about contact was not possible for many months. Neither the pursuer nor his parents have spoken to the defender or the children since 31 October 2017. The defender's concentration has been on preparing for the proof of the allegation and, on a day to day basis, establishing a new home and school life for herself and the girls in Surrey.

[123] *I* had prepared a note for court before any proceedings were raised (number 6/1 of process, prepared on 1 December 2017). Both of the girls' notes at 6/5 – 6/8 (prepared in February) referred to concerns about the pursuer 'getting them back' or 'taking them back'. It was correct for the defender to point out that residence was not formally conceded by the pursuer until May 2018, shortly before the proof commenced. However, many months before that the pursuer had accepted that the relocation had taken place and the children were enrolled in a new school. Although the defender insisted in evidence that she had tried to foster an ongoing relationship between the children and their father after separation, there was nothing to indicate that. Instead, the children's notes suggest that they had become embroiled in an 'all or nothing' dispute.



[124] The concept of contact did not feature until the child welfare reporter tried to introduce this into his conversation five months after separation, and he found that it was not possible to develop this discussion. Rather than this reflecting the children's true attitude towards the pursuer, I concluded that this showed that the children had received no encouragement from the defender to view their father or any kind of continuing relationship with him in a positive light. This all appears to have been part of the defender's 'clean break' strategy.

[125] Finally in relation to the children's views, I should observe a further misgiving about the notes prepared by them. The defender denied that *V*, then aged 4, had been helped to prepare her notes (6/5 – 6/7). She was not yet at school, though attended nursery, but she was "advanced". Under cross examination the defender changed her position slightly, and indicated that *I* had helped her younger sister to write her notes. However, the notes written by *V* spell the word "back" properly whereas the older child spelled it as "bac". I have reached the conclusion that *V*'s words were not freely written by her but that she had assistance writing those notes. Such assistance did not come from her older sister, who had difficulty spelling, but probably from her mother or maternal grandmother.

[126] It is apparent that the children have been more concerned at demonstrating loyalty and support for their new lives – which involve spending a lot of time with the defender and her mother – than making any positive comment about the pursuer, his wider family, or their former home. The child welfare reporter indicated that the children's views are genuine. I accept that conclusion, but my assessment is that those views were unduly influenced by the negative views which the defender had towards her husband. The children's professed dislike of the pursuer stands in direct contrast to the evidence of how they behaved with him before separation.

[127] Regarding the pursuer's relationship with the girls and his parenting abilities, I did not find the evidence of the defender's witnesses reliable. None of the defender's witnesses said anything positive about the pursuer in relation to his parenting skills or relationship with the girls. It may be, of course, that these witnesses were appalled at the allegation which was central to this dispute, namely that of rape, and that this coloured any recollection they had of the pursuer.

[128] The pursuer's witnesses, by contrast, appeared to have a more even-handed outlook. A number were very fond of the defender and expressed regret that their own relationships with her had terminated so suddenly. Many had been aware of the defender's depression and had offered support to her before the separation. None sought to use the defender's mental health difficulties as a reason for criticism. The pursuer's mother ER and his aunt AW both stated that they believed the girls should reside with their mother, the defender. The witnesses for the pursuer offered a more rounded picture of the parties' relationship with each other and the children, based on their own interactions and observations. As a result I found their evidence more credible and persuasive when assessing whether the criticisms about the pursuer's parenting were accurate.

[129] The evidence from a significant number of witnesses who observed the parties when they lived together was that the defender often complained about the pursuer and his attitude as a partner and parent. But when those same witnesses saw the pursuer interacting with the children they seemed to have a normal, loving, father-daughter relationship. The family wedding in Aberdeenshire was only a few days before the parties separated. Numerous witnesses saw the girls with their parents there, and saw them dancing with the pursuer and cuddling into him when they were tired.

[130] As far as the girls were concerned, the days following the wedding involved normal family life. There was no suggestion from any source that the pursuer behaved badly towards the children during the days immediately before separation. Chickens were killed by an animal which entered their pen, and *I* was particularly upset that her own pet was one of them. The pursuer hugged and comforted her then and promised to try and catch the predator. Both girls showed off their Hallowe'en costumes to the pursuer before they left for school on 31 October. This sequence of events was spoken to by both parties. I was very surprised at the evidence that *I* only a day later told her mother that she was crying "tears of joy" at getting away. While I have no reason not to accept that *I* told the Women's Aid worker in those first few weeks that she "hated" her dad, I do not accept that as the child's genuine view, independently formed.

### **Contact – conclusion**

[131] I have concluded that there is no reasonable basis for refusing a contact order. The evidence demonstrated that, while there were stresses at home, the pursuer had a healthy relationship with his daughters. He looked after them, albeit to a lesser degree than the defender. The defender trusted him to look after the girls over two weekends in September 2017, the month before separation. The pursuer provided for the children financially. He played a part in their health and development. They lived in the same household, at various locations, for all of their lives until 31 October 2017. The girls often went out with him [ ] and helped him with jobs. Even the defender – in texts to her mother in July 2017 – accepted his commitment to the family.

[132] The sudden departure and the break in their relationship was a decision made by the defender. She steadfastly opposed any contact, whether direct or indirect. The pursuer was

told by the police not to contact the defender or the girls after the rape allegation was made. The pursuer has indicated a desire to be part of the children's lives consistently since separation. It was the warning from police (not to make any contact) and the defender's resistance which prevented his relationship with them continuing. I have concluded that it is in the best interests of the children that they maintain a personal relationship with the pursuer, as the non-resident parent, and that he should exercise contact with them.

[133] Given the acrimonious background to these proceedings, there is clearly a difficulty in the parties having any direct contact with each other. I was satisfied that the defender's views were so strongly held that she would be distressed at any direct involvement in handovers of the children. I was satisfied, however, that the children had a strong relationship with the pursuer and with their paternal grandparents, especially their paternal grandfather. Consequently, I have reached the conclusion that contact should be supervised by one of the pursuer's parents, at least in its initial months.

[134] As far as the duration of contact is concerned, I have decided that this should operate once per month, and begin for a period of six hours for the first four visits. Thereafter it should operate once per month on a residential basis from Saturday to Sunday. The first six weekend visits are to be supervised by either of the pursuer's parents or another person to be agreed. I have decided on these measures so that the pursuer can be re-introduced gradually to the children. There was a sudden separation and there has been no contact for several months. Whatever the reasons for that, it is in the children's best interests for them to have the reassurance of knowing that the first few visits will be non-residential for a limited period and that either or both of their [Lanarkshire] grandparents will be there. The pursuer said that he has a friend who could find suitable accommodation for him to use during weekend residential contact visits. To allow for that and limit travel for the relatively short

weekend contact, I have restricted the distance the pursuer can take the children to 40 miles from their home in [Surrey].

[135] So far as holiday contact is concerned I have decided that this should take place on four occasions per year, to coincide with the children's school holidays. To introduce this sensitively and gradually I have decided that a period of four days should operate from 27 to 31 December 2018. That first holiday period should involve supervision, again to provide reassurance for the children. Thereafter holiday residential contact in 2019 (to operate in addition to the monthly weekend contact) will be for four weeks in total, being one week during each of the Easter, summer, autumn mid-term and Christmas/New Year holidays. After 2019, the summer holiday contact will be extended to a two week period, providing the pursuer with a total of five weeks. Because of the likely variations in school holidays between different areas I have ordered that the defender provides the pursuer with a note of school holiday periods by 1 December of the preceding year, beginning on 1 December 2018. This should allow for agreement about the precise dates and times of holiday contact from 2019 onwards.

### **Expenses**

[136] Expenses tend not to be granted in favour of either party in family actions without financial craves, but I have appointed a hearing on expenses in the event that this aspect needs to be considered further.