

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2018] SC GLA 47

F1465-17

JUDGMENT OF SHERIFF A Y ANWAR

in the cause

MR ROSS<sup>1</sup>

Pursuer

against

MRS ROSS

Defender

**Pursuer: Thompson;**

**Defender: Gordon;**

4 June 2018

**Introduction**

[1] This action concerns Emily who is now five years of age.

[2] The pursuer is Emily's father. He seeks a residence order which failing a contact order in relation to Emily. He also seeks a perpetual interdict preventing the defender, Emily's mother, from removing Emily from his care and control without his express prior written consent.

[3] The defender seeks a residence order which failing a contact order. She also seeks a specific issue order allowing her to relocate to California, USA with Emily.

[4] At a hearing after service on 1 December 2017, I assigned an expedited timetable and a diet of proof for January 2018. As there were ongoing criminal proceedings involving the

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<sup>1</sup> Pseudonyms have been used in this judgment.

defender, the proof required to be discharged and a further diet was assigned. The proof was heard over 5 days between 15 February 2018 and 15 March 2018. I pronounced a lengthy *ex tempore* decision on 22 March 2018.

## **Findings in Fact and Law**

### ***Findings in Fact***

[5] Having heard the evidence, I made the following findings in fact:

- (1) The pursuer and the defender are respectively Emily's father and mother. Emily is currently five years old.
- (2) The defender has a daughter from a previous relationship, Susan, currently aged 14. Susan does not have contact with her natural father. Susan is an American citizen.
- (3) The pursuer is a British citizen. The defender is an American citizen.
- (4) The parties met online. The defender travelled to Scotland from California to meet the pursuer in or around August 2010. She entered the UK on a tourist visa. Susan remained in California and was cared for by her maternal grandparents.
- (5) In or around September 2010, the parties travelled to California. They travelled back to Scotland in December 2010. The defender travelled to California in May 2011 for a short period and thereafter returned to Scotland.
- (6) The parties married in June 2012.
- (7) The defender wished to give birth in the USA and returned to California in August 2012. The pursuer joined her shortly thereafter, travelling on a tourist visa. Emily was born in December 2012 in California.

(8) While residing in California, the pursuer frequently used cannabis. The defender obtained a medical card for medicinal cannabis by representing to the medical authorities that it was for her own use. She provided the cannabis to the pursuer.

(9) In May 2013, during an altercation between the parties outside a public house in California, the pursuer pushed the defender. A third party contacted the police. The pursuer was arrested. As the pursuer had overstayed the period permitted by his tourist visa, he was transferred from police custody and was detained by the immigration authorities. He was not convicted of any offence. After a period of detention, he was released by the immigration authorities having been counselled to return to the UK.

(10) The parties returned to Scotland with Emily in around mid-2013. Susan travelled to Scotland for the first time, shortly thereafter. Both the defender and Susan were permitted entry to the UK on tourist visas. The defender advised the pursuer that she had a difficult relationship with her family in California and that she wished Susan to relocate to Scotland. The parties intended to reside permanently in Scotland with Emily and Susan.

(11) As neither of the parties was employed during this time, the parties were supported by and resided with the pursuer's parents for approximately three years.

(12) In or around 2015, the parties agreed that the pursuer should become Susan's adoptive father. The pursuer required to obtain disclosure of his criminal records from the USA (item 6/28 of process). The pursuer was unable to pursue an application for adoption *inter alia* as a result of the incident between the parties in May 2013.

(13) The parties resided with Emily and Susan in Scotland until March 2016. The pursuer continued to occasionally use cannabis. The parties' relationship deteriorated. It became volatile. They argued regularly. The defender frequently voiced her desire to return to California.

(14) On the morning of 18 March 2016, the parties argued. Emily wished to accompany the pursuer to work. The defender held on to Emily's arm to prevent her from leaving with the pursuer. The pursuer accused the defender of assaulting Emily by grabbing her.

(15) Following their argument and after the pursuer had left to go to work, on 18 March 2016, the defender travelled to London and sought to board a flight from Heathrow to California with Emily and Susan. She did so without the pursuer's prior knowledge or consent.

(16) On 18 March 2016, the pursuer raised proceedings in the Sheriff Court. The court granted an *interim* interdict preventing the defender from removing Emily from the UK. Police officers spoke to the defender at Heathrow Airport. She was advised of the terms of the *interim* interdict. She returned to Scotland with Emily and Susan. The defender was advised by the immigration authorities that both she and Susan had overstayed their six month tourist visas which had been granted in 2013 and that they required to regularise their immigration status.

(17) Upon their return to Scotland, the defender, Emily and Susan were provided with temporary accommodation by the social work department in a hotel and later in local authority housing. The pursuer purchased necessities and items of furniture for the defender.

(18) By interlocutor dated 11 April 2016, the sheriff ordained the defender to lodge Emily's passports with the sheriff clerk, continued the *interim* interdict granted on 18 March 2016, granted an *interim* residence order providing that Emily reside with the defender and found the pursuer entitled to interim residential contact each Friday from 6pm until Monday at nursery.

(19) The parties resumed residing together with Emily and Susan in or around September 2016.

(20) On 4 November 2016, both the defender and Susan were granted leave to remain in the UK until 3 May 2019. However, neither the defender nor Susan are entitled to access to public funds. Since 4 November 2016, the defender has been permitted to work in the UK. Since 4 November 2016, Susan has been eligible to attend school in the UK.

(21) By interlocutor dated 14 February 2017, on joint motion, the sheriff court proceedings were dismissed. By interlocutor dated 12 April 2017, the sheriff clerk was authorised to release Emily's passports to the defender's agent.

(22) On 6 April 2017, the defender issued an email to the US Embassy. She sought assistance from the Embassy to return to the USA. She stated *inter alia*:

"Since 2013, my husband has refused to allow myself, my daughter (his step-daughter, [Susan]) and our daughter, [Emily], to return to the USA. From 2013 until now, in an attempt to stop us visiting the USA, my husband has emotionally blackmailed me and has stolen my belongings, including my daughter [Emily's] birth certificate and the social security print out that I received when [Emily] was born."

The defender referred to the "breakdown of trust" between the parties. The defender described herself as being desperate for the support of her family.

(23) On 8 April 2017, the defender presented the pursuer with a document in the following terms: "I consent to my wife [Mrs Ross] travelling to the US with our two children". The defender told the pursuer that she required to travel to California to visit her father who was seriously ill. The pursuer signed the document, having added the words "at the end of June, no later". The defender was aware that the pursuer did not consent to Emily permanently relocating to the USA. The defender was aware that the pursuer

consented to Emily travelling to the USA provided that Emily returned to Scotland by June 2017.

(24) The pursuer became aware of the terms of the defender's email to the US Embassy.

On 7 May 2017, he sent an email to the defender in the following terms:

"Based on the information I have read and the divisive way you are acting towards me and [Emily], I cannot allow you to take her out of Scotland at this time. I still see what you did to [Susan's] father as a huge reason to think I'll never see [Emily] again if you take her to America. I would have to apply the Hague Convention Ruling. I am not happy with the living conditions she will be subjected to, your dad is renowned for being violent and abusive towards your mum and I've seen him treat [Susan] bad so I don't want [Emily] to be near him without my supervision. ...it's a one bedroom bedsit with what would be 6 people living in it.. until we have saved enough money to get our own place and I can travel with her, I don't want [Emily] taken out of Scotland."

(25) On 9 June 2017, the defender removed Emily from nursery. The defender travelled to Stranraer with Emily and Susan, with the assistance of friends, and boarded a ferry to Belfast. She took a bus from Belfast to Dublin and boarded a flight to California, via Reykjavik with Emily and Susan. The defender did so to avoid being detained at a UK airport. The defender switched off her mobile phone to avoid being detected and located. The defender had been planning her departure for some time. The defender had stored her luggage at her friend's home. Susan was aware of the defender's plans. The pursuer had no knowledge of the defender's plans. The defender was aware that she was leaving the UK with Emily without the pursuer's knowledge or consent.

(26) Upon becoming aware that the defender had left their home in Scotland, the pursuer contacted the police. For a few days the pursuer was unaware of the defender's whereabouts.

(27) Between 9 June 2017 and the defender's return to Scotland on 23 November 2017, the pursuer was distressed and distraught. He sent a number of inappropriate and hurtful

messages to Susan, for which he later apologised. He sent a number of inappropriate messages to the defender and to friends of the defender. He threatened to commit suicide. He required to take time off work due to stress. He was diagnosed as suffering from anxiety and was prescribed Diazepam. He used illicit substances during this period.

(28) Emily was not enrolled in nursery while in California. The defender enrolled Susan in school in California.

(29) The pursuer entered into discussions with the defender's solicitor with a view to arranging Emily's return to Scotland. However, no agreement was ultimately reached. While in California, the defender facilitated indirect contact between Emily and the pursuer.

(30) Susan provided the pursuer with the defender's address in California. Susan asked the pursuer to petition the courts in California to secure Susan's return to the UK. The pursuer explored the possibility of doing so. On 23 October 2017, the pursuer lodged a petition in terms of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Hague Convention") with the Superior Court for the State of California seeking Emily's return to Scotland.

(31) On 17 November 2017, the Superior Court of the State of California disposed of the pursuer's petition under the Hague Convention. The Court *inter alia* made the following findings and orders:

"Petitioner [Mr Ross] and respondent [Mrs Ross] are the parents of [Emily] who was habitually residing in Scotland, United Kingdom prior to her removal to the United States. The petitioner was exercising his custodial rights prior to the removal of the minor child to the United States. The petitioner did not consent to the respondent's removal of the minor child to the United States. Removal by the respondent of the minor child from Scotland on or about June 9, 2017, was wrongful removal under the Hague Convention. The respondent proved no affirmative defence."

(32) The Superior Court of the State of California granted the petition. The pursuer was unable to obtain a visa to travel to California to attend the hearing on 17 November 2017 as a result of overstaying his tourist visa in 2013. His sister attended on his behalf. The Superior Court ordered that Emily return to Scotland with the pursuer's sister. The Superior Court ordered that the defender was not to travel to Scotland until two days after Emily had left the USA. The court counselled the defender to leave Susan in California to complete her school semester and further counselled that the defender should secure accommodation before arranging for Susan to travel to Scotland to join her.

(33) Emily returned to Scotland with the pursuer's sister on 21 November 2017. The defender removed Susan from school in California and returned to Scotland on 23 November 2017.

(34) Upon her return to Scotland, the defender was arrested in relation to the allegation of assault upon Emily on 18 March 2016. The defender was acquitted after a trial on 23 January 2018.

(35) Until in or around late 2017, Susan enjoyed a close and loving relationship with the pursuer. She referred to him as 'dad' and regarded him as her father. The pursuer regards Susan as his daughter and wishes to be involved in her life.

(36) Susan did not attend school in the UK between 2013 and 2017. She has been entitled to do so since 4 November 2016. She was enrolled in a secondary school in Scotland during the course of the proof.

(37) The defender has completed and submitted false state and federal tax returns in the USA while residing in Scotland. The defender has fraudulently represented that she is earning an income in the USA and that she is entitled to a tax refund. The defender has thereby obtained approximately \$4,000 each year, for a number of years, from the Internal

Revenue Services of the USA. If prosecuted and convicted by the US authorities, the defender may receive a demand for repayment, a fine and/or a custodial sentence.

(38) The defender has not sought employment in California. She does not currently have an offer of employment in California. In the event of her relocation to the USA, until she is able to secure employment, she will be reliant upon family and/or charitable support and upon public funds.

(39) The defender does not have stable or secure accommodation in California.

(40) The defender does not have stable or secure accommodation in Scotland. Since her return to Scotland in November 2017, the defender and Susan have resided with a friend, in hotel accommodation provided by the social work department, in hotel accommodation paid for by a charitable donation and in a bed and breakfast owned by an acquaintance. They are currently residing with a friend and share a bedroom in her property. That accommodation is available to the defender until the conclusion of these proceedings. The defender is reliant upon support from charitable organisations, friends and family. She has no access to public funds.

(41) The defender has been entitled to work in the UK since 4 November 2016. The defender has not sought employment in the UK. She arranged an interview at a job centre during the course of the proof.

(42) The defender has not sought an extension of her leave to remain in the UK. The defender has not requested a change to the conditions of leave by the removal of the prohibition on recourse to public funds. She arranged a meeting with a solicitor specialising in immigration law during the course of the proof.

(43) The pursuer is in full time employment and has secure and stable accommodation. Emily has resided with the pursuer since her return to Scotland on 21 November 2017. Since

her return to Scotland, Emily has enjoyed contact with the defender. At a child welfare hearing on 8 January 2018, the defender was granted interim contact each week from Sunday at 9.00 am until Tuesday at 1.00 pm. The parties have generally co-operated in relation to contact however, handovers have been difficult.

(44) Emily was due to commence primary one in August 2017. As a result of her removal to California, Emily has been unable to progress to primary one with her friends. She has been returned to nursery and will commence primary one in August 2018.

(45) The pursuer and the defender have each played a significant role in Emily's life. Emily enjoys a close and loving relationship with each of her parents. For the majority of Emily's life, she has resided with both parents.

(46) Emily has a close relationship and a strong bond with her half sibling, Susan.

(47) Emily does not have a close bond with her maternal grandparents. While in California, she did not reside with her maternal grandparents.

(48) Emily has a close relationship with her paternal grandparents with whom she has resided for approximately three years. They continue to be involved in her care and she continues to spend significant periods of time with them. Emily has a close relationship with her paternal aunt and her cousin. Relocating to California will have an adverse effect upon the relationships Emily enjoys with her paternal family. The defender has made no proposals for contact between Emily and her paternal family in the event of relocation.

(49) The defender has proposed that the pursuer and Emily can enjoy contact over Skype and by telephone in the event that she is permitted to relocate to California. The defender has made no proposals for direct contact however she has indicated that the pursuer may enjoy contact with Emily in California. The defender does not have the means to travel to Scotland from California with Emily to facilitate direct contact with the pursuer. The

pursuer does not have the means to travel to California regularly. Having overstayed his tourist visa in 2013 and having acquired a criminal record, the pursuer may not be permitted entry to the USA. The contact arrangements proposed by the defender will have an adverse effect upon the nature of the relationship Emily enjoys with the pursuer.

(50) Emily is happy and settled in Scotland. She enjoys stability and security in Scotland. She has formed friendships at nursery, is performing well at nursery and benefits from the stability, the routine and the extended family relationships that the pursuer is able to provide to her.

*Findings in fact and law*

[6] Having regard to Emily's welfare as the paramount consideration, I made the following findings in fact and law:

- (1) That it is not in Emily's best interests for a specific issue order to be granted allowing the defender to remove Emily from Scotland to reside with her in California, USA.
- (2) That it is in Emily's best interests that a residence order in terms of section 11(2)(c), be granted in favour of the pursuer.
- (3) That it is in Emily's best interests that a contact order in terms of section 11(2)(d) be granted in favour of the defender and that such contact take place each week on a Friday after nursery or school until Monday at nursery or school.
- (4) That it is in Emily's best interests that her UK and American passports are retained by the pursuer.
- (5) That it is better for Emily that these orders are made than no orders made at all.
- (6) That the defender having attempted to remove Emily from the jurisdiction of the court in 2016 and having successfully removed Emily from the jurisdiction of the court in

2017, on both occasions without the pursuer's consent, it is necessary to grant interdict in terms of the pursuer's third crave.

[7] Accordingly, I granted the pursuer's first and third craves, repelled the defender's first and third craves and granted the defender's second crave.

## **Evidence**

### *Evidence for the defender*

[8] The defender led at the proof. I heard evidence from the defender and from Susan. The defender had also lodged affidavits from NV and AW.

### *Susan*

[9] Susan spoke to her relationship with the pursuer, the extent of the pursuer's role in family life and to the pursuer's use of illicit drugs. She spoke to her relationship with her maternal family. She spoke of the extent of her home schooling; to the circumstances in which she had travelled with the defender to Heathrow Airport in March 2016; and to the circumstances in which she travelled to California with the defender and Emily in June 2017. She spoke of the defender's current circumstances and their living arrangements. She spoke of a change in Emily's demeanour during contact with her since their return to Scotland.

[10] It was clear that until June 2017, Susan had a loving relationship and a close bond with the pursuer, regarding him as her father. In 2015, he sought to adopt her.

Notwithstanding the breakdown of the relationship between the parties, she acknowledged that she missed the pursuer when she travelled with her mother to California in 2017 and she sent him texts of an affectionate nature. She accepted that she argued with the pursuer on the day of departure to California, because she "wanted to feel better about leaving".

While the pursuer acted inappropriately by arguing with her and sending hurtful messages (albeit it was his position that these were sent to the defender and not to Susan), it was clear, in my judgment, that Susan regretted the breakdown of their relationship, notwithstanding her evidence that she “hated [the pursuer] by the end”.

[11] I accepted the pursuer’s evidence, which was not challenged, namely that whilst in California, Susan asked him to lodge a petition in the Californian courts to secure her return to Scotland. Indeed, the defender accepted that the pursuer had wished to do so.

[12] Susan’s evidence reflected her conflicted loyalties and was influenced by the acrimony between the parties. She is a young 14 year old girl who by virtue of her circumstances has assumed the responsibility of providing emotional support to the defender. She was present during most of the proof<sup>2</sup> and has clearly been affected by her exposure to a range of legal processes (namely the prior section 11 proceedings, the proceedings under the Hague Convention, and the criminal proceedings against the defender). I regret that I concluded that Susan’s evidence was closely aligned to the defender’s and was designed, at times, to assist the defender. It required to be treated with caution. Where her evidence contradicted that of the pursuer’s, on material matters, I have set out below why I preferred the pursuer’s evidence.

[13] Significantly, during examination in chief, the defender described Susan as having “conflicting feelings” in relation to whether she wished to remain in the UK or to reside in California. I did not gain an impression from Susan’s evidence that she had a clear desire to return to California.

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<sup>2</sup> I excluded Susan from the courtroom during one chapter of the pursuer’s evidence. The pursuer described in detail his use of illicit substances and the effects upon him of these. I did not consider it appropriate for a child of 14 to be present and to be exposed to this evidence.

*The defender*

[14] The defender spoke *inter alia* to her relationship with the pursuer and to their living arrangements up to June 2017; to the circumstances in which Susan joined the defender in Scotland in 2013 and to her schooling arrangements; to the pursuer's arrest in California in May 2013; to her decision to travel to California with Susan and Emily in March 2016 and in June 2017; to the circumstances in which the pursuer signed the note dated 8 April 2017; to her communications with the USA Embassy in April 2017; to the communications between the parties before and after her departure in June 2017; to her parents' circumstances and to the support they were able to offer her; to her return to Scotland in November 2017 and to her subsequent arrest; to the difficulties with contact with Emily since her return and to a change in Emily's demeanour.

[15] The defender also spoke to her current circumstances and living arrangements.

[16] Regrettably, the defender was an unreliable historian. Her evidence was coloured by her desire to relocate. During cross examination (and indeed at times during examination in chief), her position on material issues changed markedly and frequently. The concessions which she required to make undermined her credibility. She exaggerated her account of the difficulties she had experienced in her relationship with the pursuer and minimised the difficulties she had experienced with members of her family. Where her evidence contradicted that of the pursuer or the pursuer's witnesses, I have preferred their evidence.

[17] I accept that the defender has a close and loving bond with Emily. I also accept that the defender finds herself in a difficult position both financially and emotionally. In part, her past conduct reflected her reaction to her unfortunate circumstances. The nature of her evidence however was such that I was unable to attach much weight to it. On the disputed issues of fact which I considered to be relevant to the orders sought by the parties, I have set

out the contradictory evidence and why I preferred the evidence of the pursuer. There are however a number of additional reasons why I considered the defender's evidence to be unreliable and lacking in credibility:

- (a) The parties agreed that following the incident in California in May 2013, the pursuer was arrested and detained. The parties agreed that the pursuer obtained details of his criminal records in 2015 when the parties had intended that the pursuer adopt Susan. Item 6/28 of process comprised a letter dated 20 August 2015 from the 'Records and Identification Bureau' in USA. The letter noted the pursuer's incarceration dates of "May 4, 2013 through June 9, 2013", being some 35 days. The pursuer was steadfast in his position that he had been detained in police cells for a period of five days as a result of his immigration status, was then transferred to a federal building to speak to an officer from US Immigration and Customs Enforcement and was released on the understanding that he would return to Scotland. The pursuer maintained that the record was incorrect. During cross-examination, when asked about the pursuer's period of detention, the defender commenced by stating "the record says one month". She then stated that the pursuer was detained for a "few weeks". When asked under cross-examination whether it was correct that the pursuer had been detained for five days, she reluctantly responded "I don't recall. . .it was somewhere between 30 days...I thought it was a few weeks". I am satisfied on a balance of probabilities that the pursuer was in fact detained for a period of five days and that the defender sought opportunistically to take advantage of a clerical error to create an impression that the pursuer's conduct in May 2013 merited a lengthy period of detention, when she was aware, by her own admission, that the period stated was incorrect;

- (b) The defender stated during examination-in-chief that when she arrived in California in June 2017, she rented a room from a friend because she was aware that the pursuer would not wish her to reside with her parents and she wanted to respect the pursuer's wishes. Her evidence lacked credibility. She had entirely disregarded the pursuer's wishes by removing Emily. In my judgment, the pursuer's evidence was to be preferred, namely that the defender was unable to live with her parents owing to their limited accommodation and owing to the difficulties in her relationships with members of her family;
- (c) She admitted that she sourced cannabis for the defender by obtaining a medical card and representing to the US Authorities that the cannabis was for her own use. When asked during cross examination if she considered what she had done to be legal, she replied "I don't know". Her evidence lacked candour. It was clear that the defender too had used illicit substances, albeit that she maintained she no longer did so. On the one hand, the defender chose to criticise the pursuer's drug use yet on the other hand she freely admitted to fraudulently facilitating it. She appeared to accept that she had not objected to the pursuer's use of cannabis in California as "it's legal in the USA". Again, I regarded this chapter of her evidence as opportunistic;
- (d) Under cross-examination, a state and federal tax return for the year ending 31 December 2015 was put to the defender (item 5/6 of process). The defender accepted that since 2013, she has completed state and federal tax returns and has represented to Internal Revenue Service that she is self-employed, has earned income in the USA and is entitled to a tax refund. She admitted that she had done so with the assistance of a friend to whom she paid a fee. She admitted that she had fraudulently obtained approximately \$4,000 per year by doing so. When asked

whether she was aware that federal convictions may result in imprisonment, she replied "I don't know". She maintained that she had not been warned that completing fraudulent tax returns was a criminal offence. However, she was asked during re-examination whether she was aware of the penalties for such an offence. She responded "I thought it was a fine, not prison." The defender's position was untenable. It was clear that the defender had willingly participated in a fraudulent scheme. Her evidence that she was not aware of the consequences of doing so was blatantly implausible;

- (e) The defender's evidence in relation to the accommodation available to her in California was confusing, contradictory and lacking in credibility. The defender explained during examination-in-chief that her parents were in financial difficulties. She explained that they resided in accommodation provided by another member of her extended family and that her father was not able to work. Yet, she maintained that they could afford to support her by paying rent of \$1,300 per month on a private property in California which is currently unoccupied by the her; that they have done so since at least November 2017 and would continue to do so. Without any independent vouching for such payments, the defender's evidence required to be treated with caution. While the child welfare report (item 10 of process at page 7) was not put to the defender during her evidence, I note that it would appear that the defender advised the reporter that the accommodation in California was paid for in part by an organisation called "Gain", and in part by her family, and that the rent was over \$1,400 per month. It would also appear that she first advised the reporter that she had the use of this accommodation throughout the period she was in California from June 2017, but later advised that she had required to stay at hotels

with Emily and Susan until she was able to secure accommodation. She is also noted to have advised the reporter that her parents could not afford such a financial commitment much longer. During his evidence, the pursuer explained that the defender had represented, before the Superior Court of California, that she resided in Government housing. He maintained that the court had advised her to hand in her notice. I accepted the pursuer's position in relation to the defender's evidence before the Superior Court of California;

(f) The defender was evasive in her responses to the nature of her relationship with her brother. She minimised the circumstances which gave rise to his arrest for an assault upon her while she was in California, yet she felt sufficiently threatened to ask the police for a temporary restraining order.

[18] For all of these reasons I have been unable to place much, if any weight upon the defender's evidence.

### *Affidavits*

[19] AW is a friend of the defender's solicitor. In her affidavit, AW confirms that she has made a room in her home available to the defender and Susan until the end of the diet of proof. They have resided with her since around early 2018.

[20] She spoke to a close relationship between Susan, Emily and the defender. AW also spoke to an incident during contact when Emily's behaviour became challenging. She spoke to the defender's concern for her children's welfare. I regarded AW's evidence as uncontroversial.

[21] NV is the defender's friend and has known her since around September 2016. She spoke to what Susan and the defender had told her regarding their relationships with the

pursuer from which NW concluded that the defender has been in an “abusive relationship”. She spoke to being told by Susan that the defender and pursuer had been fighting and screaming; to being contacted in May 2017 by Susan because the pursuer was “going crazy”; to the circumstances in which the defender again resided with pursuer in 2016; to the defender’s desire to return to the USA; to the assistance that she provided to the defender, including by driving her to Stranraer in June 2017; to the defender’s desire that the pursuer reside in the USA with her; and to Emily’s anger towards the defender during contact. She spoke to the close relationship between Susan, Emily and the defender.

[22] NV’s account of the defender’s circumstances and of her relationship with the pursuer are almost entirely based upon the defender’s conversations with her. Having regard to my assessment of the defender’s evidence, NV’s evidence requires to be treated with caution insofar as it relates to matters communicated to her by the defender. NV noted in her affidavit that Susan was not at school and that the defender was “*having to home school her*”. She also states that she “*was very concerned about Susan and felt that her needs were just not being met...she was not at school*”. It is apparent that NV is not aware that Susan has been eligible to attend school in the UK since November 2016. The remaining matters addressed in NV’s affidavit I regarded as uncontroversial.

### **Evidence for the pursuer**

#### *The pursuer*

[23] The pursuer spoke to the current care arrangements with Emily; to Emily’s progress at nursery; and to Emily’s relationships with her paternal family. He spoke to the deterioration in his relationship with the defender; to the incident in May 2013; to the circumstances in which the defender travelled to Heathrow Airport in March 2016; to the

circumstances which gave rise to the parties living together once more; to the defender's request that he sign the note dated 6 April 2017; to the defender's desire to return to California; to the circumstances in which the defender left with Susan and Emily in July 2017 and to the effect upon him of her doing so. He spoke to his past drug use and his use of prescribed medication for anxiety. He spoke to his relationship with Susan. He also spoke to the basis of his opposition to the orders sought by the defender.

[24] I found the pursuer's evidence to be generally reliable and credible. His evidence was consistent with that of his parents. Where his evidence conflicted with that of the defender, I have preferred his evidence. There were however chapters of his evidence which were in my judgment either understated or exaggerated to suit his position, such as his evidence in relation to his past use of illicit substances and his report to the police regarding the defender's conduct on 18 March 2016.

[25] The pursuer presented as a father who had been deeply affected by the removal and attempted removal of his daughter and the breach of trust which that entailed. He appeared genuine in his concern for both Emily and Susan. He remained willing to co-parent Emily and to agree to the defender enjoying extensive contact with Emily. He understood the importance of the defender's relationship with Emily.

### *Affidavits*

[26] The pursuer's mother, HR, spoke to her close relationship with Emily and the pursuer; to being told by the pursuer that he was unhappy about the manner in which Susan and the defender were treated by the defender's family in California; to the close bond between the defender and Susan; to the pursuer's care of Emily and to his involvement in Emily's upbringing; to the parties arguing frequently; to what she described as the

defender's "controlling" conduct; to being unable to continue to support the parties financially by 2016; to the pursuer assisting the defender financially upon her return from Heathrow airport in March 2016; to her understanding (based on what she was told by the pursuer) of the circumstances leading to the defender's departure for California in 2017; to the pursuer's anxiety and distress while the defender was in California with Emily and Susan; to the effect upon the pursuer and upon her relationship with Emily, in the event that she is permitted to relocate to California; and to the defender being generally happy and settled in Scotland while she resided with the pursuer's parents.

[27] The pursuer's father, JR, spoke largely to the same issues as his wife. He spoke to being told by the defender how much she enjoyed living in Scotland and how much she preferred it to life in California, during the time she resided with the pursuer's parents.

[28] Both of the pursuer's parents spoke to their own observations of the parties and the children while they resided with them between 2013 and 2016. Neither of the affidavits was challenged and the defender did not seek to have either witness cross-examined. The pursuer's parents' affidavits are consistent with the pursuer's evidence. I had no reason to doubt the pursuer's parents' reliability or credibility. I note, however, that the pursuer's parents' account of the incident in May 2013 in California was not consistent with the pursuer's evidence. It would appear that neither of the pursuer's parents are aware that the pursuer accepts that he pushed the defender on that occasion.

### **Submissions**

[29] Both parties helpfully provided written submissions. There was no dispute as to the applicable law. Both parties addressed the court in relation to issues of reliability and

credibility and in relation to the matters which they each considered were relevant to an assessment of what orders were in Emily's best interests.

## **Discussion**

### *The disputed issues of fact*

[30] There were a number of areas of factual dispute. Those which I considered relevant to my decision were (a) whether the pursuer is suffering from a mental health illness, or an alcohol or drug addiction; (b) the defender's allegations of controlling and abusive behaviour by the pursuer; (c) the extent of the pursuer's involvement in Emily's upbringing; (d) whether the parties intended to reside permanently in Scotland; (e) whether the pursuer consented to Emily relocating to California in June 2017; and (f) the circumstances in which Emily returned to Scotland in November 2017.

### *Is the pursuer suffering from a mental health illness or an alcohol or drug addiction?*

[31] It was the defender's position that the pursuer has described himself as suffering from bi-polar disorder. The pursuer accepted that he had made such comments in the past however he maintained he had done so flippantly and without the benefit of any medical diagnosis.

[32] The pursuer accepted that he had suffered from anxiety in the past and that since June 2017 he has been prescribed sleeping tablets and medication for his anxiety. He accepted that he had threatened to commit suicide and had sent inappropriate messages to the defender and to Susan when Emily had been removed in June 2017. He described himself as both devastated and desperate at the time.

[33] The pursuer had obtained a medical report from his general practitioner (item 5/7 of process) dated 19 February 2018. The report confirms that the pursuer had been prescribed medication for anxiety which he uses occasionally. The general practitioner notes *“it is my opinion that this is certainly not excessive use and it is also the opinion of the other doctors who have seen him during his troubles”*. The pursuer explained that during discussions in relation to the conditions for her voluntary return to Scotland in 2017, the defender had insisted that the pursuer undergo a psychiatric evaluation. The pursuer explained that he was, and remains willing to do so. He had sought such an evaluation from his doctor, however his doctor had considered any further examination unnecessary as, in his view, the pursuer’s anxiety had been caused by the situation in which he found himself in June 2017. Indeed, the doctor has noted in the report dated 19 February 2018, that the pursuer had been attending at the surgery less regularly since Emily’s return.

[34] In my judgment, it is clear that the pursuer has been prone to outbursts of anger in the past, whether during arguments with the defender or in terms of the hostile communications issued by him to the defender and third parties. However, there was little evidence before the court that the pursuer was suffering from any mental health illness beyond the anxiety which he experienced when Emily was removed from Scotland. There was no evidence from which it could be concluded that the pursuer was unable to exercise his parental rights or discharge his parental responsibilities or that his ability to do so was impaired.

[35] During cross-examination, it was repeatedly put to the pursuer that he consumes alcohol to excess regularly. There was little evidence from the defender or from Susan that the pursuer did so when they resided with him. The pursuer denied the allegation. His

position was supported by his parents. I am satisfied that the allegations put to the pursuer were without foundation.

[36] During cross-examination, it was put to the pursuer that he had frequently used illicit substances while he resided in California. The pursuer accepted that he had.

[37] During her evidence, Susan spoke to attending at the pursuer's friend's home, with the pursuer, to purchase drugs. The discrepancies in her evidence regarding the frequency with which she had done so were telling. During examination-in-chief, she first stated that she had attended at the pursuer's friend's home "more than once"; when asked further questions, she replied that she had done so "once or twice a week", and she finally stated that she had attended "often". The defender spoke of Susan attending at the pursuer's friend's home "a few times". During cross-examination, the defender accepted that the pursuer's friend had been known to the parties for a long time and that she had permitted him to care for Susan (albeit that she stated that he had not in fact done so). When she was asked whether it was unfair to describe the pursuer's friend as the pursuer's "drug dealer", she chose not to respond to that question.

[38] While he readily conceded that he had used illicit substances in the past, the pursuer sought to downplay the frequency with which he did so. The defender chose to exaggerate it. However, I accept the pursuer's evidence that with the exception of the period during which Emily had been removed from the UK, he has abstained from using illicit substances since he obtained full time employment in 2016. His evidence was supported by the results of the drug test report (item 6/37 of process) covering the period from 8 November 2017 to 6 February 2018.

*Was the pursuer controlling and abusing the defender?*

[39] With the exception of the incident in May 2013 in California, I am not satisfied on a balance of probabilities that the pursuer has engaged in controlling and abusive behaviour towards the defender.

[40] There is no doubt that over time, the parties' relationship became an unhappy, and at times, a volatile one. However, in my judgment, both parties played their part in the breakdown of the relationship.

[41] I had difficulty reconciling the defender's evidence on this issue. With the exception of the incident in California in May 2013, the defender did not refer to any specific incident of verbal or physical abuse or controlling or abusive behaviour beyond referring to disagreements between the parties which caused hostilities. She described herself as "hurt because of the breakdown in communication" between herself and the pursuer.

[42] Indeed, the defender spoke of her hope that if she had successfully travelled to California in 2016 with Emily, the pursuer might have been persuaded to join her. She also spoke of her hope that the pursuer might join her in California in 2017 and referred to her mother's offer to pay for the costs of the pursuer's flights. The defender spoke of sending the pursuer details of websites which might assist the pursuer to understand the process and the costs involved in applying for a visa to travel to the USA. While she indicated that she had done so in order to allow the pursuer to remain involved in Emily's life, the defender's evidence did not sit well with her position that she had resolved to return to California, at least in part, because of the pursuer's behaviour towards her.

*The extent of the pursuer's involvement in Emily's upbringing*

[43] I am not satisfied that the pursuer's role in Emily's upbringing was either minimal or marginal.

[44] It was Susan's position that Emily's removal in 2017 was not difficult for the pursuer because "me and mum were more involved in Emily's life". She stated that the pursuer would not engage in activities with Emily outdoors. Under cross-examination, Susan was asked whether it was her position that the pursuer ignored Emily when she was a young baby. I noted that she responded very quietly "yes". She was asked again whether the pursuer was involved in Emily's care. She then responded "yes" but qualified the statement by stating that "he was involved but 70% he was not". She described him as spending most of his time using his iPad and smoking cannabis.

[45] The defender described the pursuer as "an introvert" and stated that he did not enjoy taking Emily outdoors. However, she also referred to the parties as "taking shifts" in caring for Emily as a young baby. She accepted that the pursuer changed and fed Emily.

[46] Both Susan and the defender spoke to Emily missing the defender while she was in California and to Emily speaking to the defender on Skype almost every day.

[47] The pursuer described a close and loving bond with Emily. He spoke to his engagement with Emily's nursery and to organising drama and swimming lessons for Emily. He described, in detail, the nature of the age appropriate activities he now undertook with Emily both indoors and outdoors.

[48] Upon her return from Heathrow Airport in March 2016, the pursuer enjoyed residential contact with Emily during the weekend. Those arrangements reflected the pursuer's availability owing to his employment. Thereafter, the parties again resided together. The defender described the parties as "co-parenting" Emily at this time. Since his

return from California in November 2017, Emily has resided with the pursuer and has enjoyed residential contact from Sunday morning to Tuesday morning each week with the defender. It is clear that the pursuer was, and continues to be, significantly involved in Emily's upbringing and since November 2017, has been Emily's primary carer.

*Did the parties intend to permanently reside in Scotland?*

[49] I am satisfied that the parties had intended to reside permanently in Scotland after they were married. I accepted the pursuer's evidence in this regard. The defender's position that she did not intend to reside permanently in Scotland was not borne out by her own evidence under examination-in-chief.

[50] At the commencement of her evidence-in-chief, the defender spoke of her efforts to obtain a visa and passport for Susan. She spoke to the court proceedings which required to be raised in California to enable her to do so (as she could not obtain Susan's father's consent). The defender stated: "I wanted to **relocate** to the UK so I filed for full custody". Susan had remained in California between 2010 and 2013. During that period, Susan had attended school and was residing with her maternal grandparents. It was clear that the defender chose to take Susan out of school and arranged for her to travel to Scotland as the defender intended to permanently reside in Scotland with Susan, Emily and the pursuer.

[51] Moreover, the defender accepted that when she returned to California in 2012, she did so in order to give birth to Emily. She explained that she wished her to have dual nationality and that she wished to take advantage of the medical insurance available to her in California during childbirth. There was no suggestion that she did not intend to return to Scotland. The defender sought to rely upon her use of a tourist visa to regain entry to the

UK as evidence of her intention to return for recreational purposes only. I do not accept her evidence in this regard.

[52] I accepted the pursuer's evidence that both he and his parents had provided statements supporting the defender's applications for entry to the UK to allow her to reside in Scotland permanently. I accept his evidence that he had been told by the defender that she could no longer reside in California owing to her difficulties with members of her family. I accept the pursuer's parents' evidence that the defender expressed, to them, her preference to reside in Scotland.

*Did the pursuer consent to Emily relocating to the USA in June 2017?*

[53] I am satisfied that the pursuer did not consent to Emily relocating to the USA in June 2017. While the parties frequently discussed the possibility of relocating to California, they had not agreed to do so.

[54] I regret, that once more, the defender's position on this issue was untenable and her evidence was both contradictory and lacked credibility.

[55] During examination-in-chief, the defender was referred to item 6/16 of process being a note in the following terms:

"April 8, 2017  
I consent to my wife, [Mrs Ross] travelling to the US with our two children at the end of June no later."

[56] The defender described this note as the pursuer's "consent". She explained that she asked the pursuer to sign this note because he "would not give her a straight answer". She explained that when she broached the subject, the pursuer provided varying objections to Emily residing in California, including that Scotland was better for him and that the defender had no stable accommodation in California. Indeed, in her letter to the US

Embassy (item 6/5 of process) the defender notes “since 2013, my husband has refused to allow myself, my daughter (his step-daughter, Susan) and our daughter (Emily), to return to the USA”.

[57] The defender accepted that she had seen the pursuer’s email of 7 May 2017 (item 6/6 of process) in terms of which he withdrew his consent<sup>3</sup>. It was her position that she did not discuss this email with the pursuer. She maintained that after sending this email, the pursuer confirmed to her that he was happy for her to return to the USA. It was her position that she left in the manner that she did on 7 June 2017 because she was concerned that he would change his mind.

[58] However, later during her examination in chief, when asked whether she left Scotland knowing that the pursuer did not wish her to leave, she replied “yes”. Under cross-examination, she conceded that she did not have the pursuer’s consent to remove Emily from the UK. It was put to her that as the pursuer had refused to relocate to California, by leaving as she had, the defender had sought to “sort it out for herself”. She accepted that was the position. Yet later, when it was put to her that she had “disappeared with Emily” she again asserted that she had the pursuer’s consent.

[59] Susan, on the other hand, was very clear in her evidence. She stated that she was aware that the pursuer did not consent to Emily travelling to California and explained “that’s why we left as we did...[the pursuer] was not okay with it”. She described herself as feeling guilty about leaving as they had. She stated that she “wished they had obtained [the pursuer’s] permission”.

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<sup>3</sup> According to the Child Welfare Report dated 5 January 2018 (item 10 of process), the defender is alleged to have told the reporter that she had not seen the email from the pursuer dated 7 May 2017 before she travelled to California (see paragraphs 2.11, 2.12 and 2.15 of the report). That was a contradictory position to the position adopted under oath. However, the content of the report was not put to the defender and thus I have not attached any weight to it.

[60] The defender did not accept that she had planned her departure, insisting that it had been a spontaneous reaction to an argument between the pursuer and Susan and following a hurtful message sent by the pursuer to Susan. It was her position that she had arranged her travel, had her parents transfer money to her for the cost of flights, book flights for herself and the children, and that she had arranged for two friends to drive her to Stranraer, all on the morning of 7 June 2017. Notwithstanding her own solicitor's attempts to invite her to accept that it might appear implausible that such arrangements were made in such short compass, she insisted there was no pre-planning involved.

[61] Again, Susan was very clear in her evidence during cross-examination. She accepted that the departure had been planned and that the defender had hidden their luggage at a friend's house before the day of departure. She explained that the journey had been planned to reduce the risk of the defender being traced and prevented from leaving the UK.

[62] I found the defender to be selective in her presentation of the truth to the court. I preferred the pursuer's evidence and that of Susan, namely, that the pursuer had not consented to Emily's removal and that he was unaware of the defender's plans to travel to California with Emily on 7 June 2017. Had the defender believed that she had the pursuer's consent, the complicated and clandestine nature of her travel arrangements would not have been necessary.

[63] I preferred the pursuer's evidence that he had been presented with a handwritten note by the defender on 6 April 2017, whom he described as "hysterical" at the time; that the defender had represented to him that her father was seriously ill with kidney failure (which he stated transpired to be untrue); that he had inserted the words "at the end of June no later" to the note because he wished Emily to be back in Scotland for pre-planned activities; that he had consented to Emily travelling to California with the defender to allow her to

spend time with her family, and not with a view to permanently residing there; and that he had withdrawn that consent by email dated 7 May 2017 having become aware of the terms of the defender's communications with the US Embassy.

*The circumstances of Emily's return to Scotland*

[64] Various questions were put to the pursuer relating to his discussions with the defender and her agent regarding the terms of her voluntary return to Scotland. He accepted that he had discussed the possibility of the defender returning and residing in the pursuer's property. He accepted that he agreed that he would support the defender, on the condition that she, in turn, would undertake never to remove Emily from the UK again. However, it was his position that those discussions came to an end when the defender's solicitor explained that the defender intended to make an application to the Scottish courts upon her return to Scotland, to seek a specific issue order allowing Emily to relocate to California. It was his position that he could not trust the defender to return to Scotland. I accepted his evidence in this regard.

[65] While a number of notes of telephone conversations drafted by the defender's solicitor were put to the pursuer in order to test his credibility, the pursuer refuted the terms of these notes. The solicitor who drafted the notes did not give evidence.

[66] The pursuer also maintained that the goodwill he had been willing to extend to the defender upon her return to Scotland was affected by the defender's opposition to the pursuer's application under the Hague Convention.

[67] Under cross-examination, it was put to the pursuer that the defender accepted that she had unlawfully removed Emily from the UK and that she had not in fact opposed the application to the Superior Court. The defender's solicitor made it clear in his questions that

the defender had been advised not to oppose the application. I accept the pursuer's evidence that she did in fact oppose the application, and that she maintained before the US courts that she had the pursuer's consent to travel with Emily. The Superior Court has noted that "*the petitioner did not consent to the respondent's removal of the minor child...the respondent proved no affirmative defence*".

### **The applicable law**

[68] Both parties hold full parental rights and responsibilities in respect of Emily. Both parties seek residence orders in terms of section 11(2)(c) of the Children (Scotland) Act 1995 ("the Act") which failing contact orders in terms of section 11(2)(d) of the Act. The defender also seeks a specific issue order in terms of section 11(2)(e) of the Act.

[69] In terms of section 11(7) of the 1995 Act, in considering whether or not to make any orders under section 11, 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; and
- (b) taking account of the child's age and maturity, shall so far as practicable—
  - (i) give him an opportunity to indicate whether he wishes to express his views;
  - (ii) if he does so wish, give him an opportunity to express them; and
  - (iii) have regard to such views as he may express."

[70] Emily is five years old and is not of sufficient age or maturity to express a view on the orders sought.

[71] It is now well settled that the welfare of the children concerned is paramount in relation to the determination of an application under section 11(2)(e) of the 1995 Act and falls to be judged without any reliance on any presumptive rule tending to favour the wishes or interests of either parent. The weight to be given to such wishes or interests must,

as with any other factor, be such weight as the court deems appropriate in the particular circumstances of an individual case: *M v M* 2012 SLT 248; *Donaldson v Donaldson* 2014 Fam LR 126. A party seeking such an order must undertake the dual evidential burden of showing (i) that relocation would actually be in the best interests of the child, and (ii) that, again, from the child's perspective, it would be better for a specific issue order to be made by the court than for no order to be made at all (*M v M supra* at paragraph 57). Whilst it is clear that there is no legal onus of proof upon a party seeking an order under section 11(2)(e) (*White v White* 2001 SC 689), a party seeking to alter the *status quo* has some liability to furnish the court with material potentially capable of justifying the making of the order (*S v S* 2012 Fam LR 32 at page 34, paragraph 10).

[72] Exactly what material will be potentially capable of justifying the making of an order will be entirely dependent on the facts of each case. As noted by Lady Wise recently in *MCB v NMF* [2018] CSOH 28, "relocation cases are fact sensitive and scrutiny of the particular circumstances of the dispute and the child is what matters" (at paragraph 6). Nevertheless, the party seeking to alter the status quo must furnish the court with evidence which allows the court to meaningfully assess whether relocation is in the child's best interest.

[73] Unless there are circumstances which might explain why such material is not available, in the ordinary course, a parent seeking to relocate with a child must, at the very least, be in a position to place material before the court in relation to;

- (a) the proposed accommodation for the child, its suitability and affordability;
- (b) the proposed schooling arrangements for the child;
- (c) the financial means of the parent seeking to relocate and how he or she will provide for the child;
- (d) the proposals for contact between the child and the other parent;

(e) the reasons for the proposed relocation.

Without such information, it is difficult to see how the court can properly discharge its function under section 11 of the Act.

### **The orders sought**

#### *The Specific Issue Order – Relocation*

[74] The defender failed to discharge the dual evidential burden of showing (i) that relocation would actually be in Emily's best interests and (ii) that, again, from Emily's perspective, it would be better for a specific issue order to be made by the court than for no order to be made at all. There was scant evidence before the court in relation to any of the matters referred to at paragraph 73 above.

[75] In particular, standing my assessment of the defender's evidence relating to the accommodation available to her in California, the court cannot be satisfied that the defender can provide Emily with a stable, suitable or affordable place to live in the short, medium or long term. The court cannot be satisfied that adequate arrangements exist for Emily's education – there was, remarkably, no evidence at all of the proposed schooling arrangements. Indeed, during her evidence, the defender stated that the provision of state education in the UK was superior to that of California. There was scant information in relation to the defender's financial resources. The defender has not sought employment in California. She did not appear to have made any enquiries as to the nature of the employment which may be available to her, or the rate of pay<sup>4</sup>. There was no evidence in relation to the availability or extent of the defender's entitlement to public benefits, beyond

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<sup>4</sup> I note that she responded yes to a leading question that the minimum hourly rate of pay in California was \$12 an hour.

an indication that she may benefit from public funds and has benefited from medical insurance for the purposes of Emily's birth in 2012. There was thus no evidence as to how the defender proposed to provide for Emily. There was no evidence of any bond or relationship between Emily and her maternal family. Indeed, the defender accepted that no bond currently existed, expressing her desire that such a bond be developed. There were no proposals for contact arrangements between the pursuer and Emily beyond the use of Skype or Facetime.

[76] Even if I am wrong and the defender has discharged the evidential burden incumbent upon her, having regard to Emily's welfare as the paramount consideration, I would have refused the defender's crave.

[77] I am satisfied that the defender is motivated by a desire to be closer to her family and friends in California, rather than a desire to undermine Emily's relationship with the pursuer. In light of her difficult circumstances in Scotland, it is not surprising that she seeks to escape from the troubled relationships she has with the pursuer and his family and that she seeks solace in familiar surroundings. However, I regret that the defender has assumed that what is reasonable for her, must be in Emily's best interests. It was submitted on behalf of the defender that in California, Emily would benefit from the love and care of her mother "unbeset from the adversities she faces" in Scotland. I am not satisfied, having regard to the defender's lack of resources, lack of employment and lack of stable accommodation in California, that the adversities she faces in Scotland are materially different to those she is likely to face in California.

[78] Moreover, the defender has the means to improve her situation in Scotland. She was granted leave to remain in the UK on 4 November 2016. She could have applied for leave to remain earlier – she chose instead to remain in the UK without regularising her immigration

status for three years after her tourist visa had expired. The defender has been entitled to obtain employment in the UK since 4 November 2016. She has not done so. It would appear that she had arranged an interview at a job centre only during the course of the proof. Susan has not attended school since 2013<sup>5</sup>. Susan has been entitled to attend school in the UK since 4 November 2016. Susan was enrolled in school during the course of this proof. The defender can apply to the Home Office for further leave to remain beyond November 2019. According to a report by an Accredited Immigration Law Specialist, lodged by her agents (in response to my enquiries), the prospects of the defender and Susan being granted an extension to their leave to remain in the UK are “good”. The defender and Susan are also able to request a change to their conditions of leave by removing the prohibition on the recourse to public funds. It would appear that the defender had arranged to speak with a solicitor specialising in immigration to regularise her immigration status, and potentially obtain access to public funds, only during the course of this proof. The defender was unable to provide any reasonable explanation or justification for her decision not to address any of these issues prior to the proof.

[79] Significantly, the defender, and her agent, sought to minimise the potential effect of the consequences of the defender’s fraudulent conduct upon Emily and Susan. During cross-examination, it was put to the defender that it was at least possible that if she returned to California, she could be detained under suspicion of tax fraud. She replied “I don’t know”. She was asked whether, having now accepted that she had fraudulently obtained tax refunds, it was “still a good idea to return to the USA”. After a lengthy pause, she replied “I don’t know how it will impact matters”. She was asked whether, if she may be

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<sup>5</sup> While Susan had been home schooled between 2013 and 2016, according to Susan, her home schooling consisted of “tutoring for a couple of hours a week in the basics: maths, English and science”.

imprisoned, she was “willing to take that chance with Emily”. Again, after a long pause, she replied “No, I don’t want to take that chance”. Astonishingly, the defender’s position changed during re-examination. When asked to clarify her evidence, she stated “I said that it’s not a good idea [to return to the USA]. It’s probably not. When I was told I could be arrested and I could serve jail time that’s why I said no, but I don’t believe that it is a concern because I don’t believe that it will happen so I am not concerned.” She exhibited a reckless disregard for Emily and Susan’s welfare. She was prepared to accept the risk, however small she perceived it to be, that she faced imprisonment and/or a fine and/or a demand for repayment of sums of money which she could ill afford to pay, without any regard as to the effect any such penalty may have upon Emily and Susan.

[80] Moreover, I regret that notwithstanding the defender’s application to this court, I could not be satisfied that the defender in fact had a firm intention to relocate to California with Emily and Susan. During her examination-in-chief, a series of questions were put to the defender in relation to her discussions with the pursuer of her voluntary return to Scotland in 2017. She was asked, if she had decided to return, “was the whole thing not pointless?” She replied “No, the kids got to see their family”. She was asked, “did you want to relocate to California?” She replied “I don’t know – I wanted to see my family but I didn’t know if it was realistic. I would have liked to have stayed permanently but I didn’t know if it was realistic. I was hopeful that the pursuer would change his mind”. She then stated that she now wished to relocate and would prefer to reside in California. It was difficult to discern quite what had changed in the defender’s circumstances and on what basis she now considered relocation to be realistic.

[81] The defender made no proposals for direct contact between the pursuer and Emily. She appeared to accept that Emily had a strong attachment to the pursuer. The defender

accepted that, in the event of Emily relocating to California, the quality of her relationship with the pursuer would be adversely affected. The defender does not have the means to facilitate direct contact by travelling to Scotland with Emily. The pursuer does not have the means to travel to California regularly for direct contact. The pursuer has experienced difficulties in obtaining a visa for entry to the USA. It is clear that relocation to California would have a materially adverse effect upon Emily's relationship with the pursuer. This is a matter to which I attach significant weight.

[82] In the UK, Emily is at nursery, she has secure and stable accommodation with her father, who is in employment and is able to provide for her. She has friends at nursery, is settled and thriving. She has bonds with her grandparents, her aunt and her cousins. She has contact with her mother and her half-sister Susan.

[83] Were she to relocate to California, Emily would have indirect contact with the pursuer but is unlikely to have regular or frequent direct contact. It is not known where she would reside, where she would attend school or how the defender would provide for her. She *may* benefit from a relationship with her maternal family. She *may* be affected by the consequences of any criminal proceedings against the defender. She would continue to enjoy the benefit of her relationships with the defender and Susan.

[84] In all of the circumstances, it is not in Emily's best interests that she relocate to California.

### **Residence and Contact**

[85] The defender sought an order for residence. She appeared to accept, however, that it was not in Emily's best interests that such an order be granted.

[86] During cross-examination, it was put to the defender that “it could never be in Emily’s best interests that you are his primary carer when you do not have the means to support her”. She replied “Yes, that is the situation now”. It was put to her that it was not in Emily’s best interest to change her residence from the pursuer to the defender. She replied “not at this moment”.

[87] Notwithstanding the defender’s concession, she stated during re-examination that she “wanted more time” with Emily. She stated that the previous arrangements whereby Emily resided with her and had contact with the defender at the weekend, worked better. She did not explain her position beyond stating that she provided Emily with better “social connections”. She stated that she wished to take Emily to Spanish lessons. The pursuer accepted during his evidence that he would be happy to arrange for Emily to learn Spanish and he provided a detailed description of the social activities he undertook with Emily.

[88] In my judgment, it could not, on any reasonable view, be concluded that it was in Emily’s best interest for a residence order to be granted in favour of the defender. The defender has exhibited a disregard for Emily’s welfare and her relationship with the pursuer, by attempting to wrongfully remove her from the UK in 2016 and by successfully doing so in 2017. She has failed to prioritise her education. She accepted during the period of six months she was in California, she did not enrol Emily in kindergarten. Emily has been unable to commence primary one with her friends and peers as a result of the defender’s decision to remove Emily in 2017. The defender relies upon charitable support. She does not have stable accommodation in Scotland. She is currently residing with an acquaintance; the court was advised that this accommodation is available to the defender only until the conclusion of these proceedings.

[89] It is in Emily's best interests that a residence order be granted in favour of the pursuer. Emily has resided with the pursuer since November 2017 and has resided with both of her parents for the majority of her life. Emily is happy and settled in the pursuer's care. The pursuer is fully engaged in all aspects of Emily's care and education. Having regard to the tumultuous period in Emily's life between 2016 and 2017, and the challenging behaviours she has exhibited during contact with the defender, she requires stability and security. The pursuer is able to provide that stability and security.

[90] The pursuer's agent submitted that no order for contact should be made in favour of the defender having regard to the lack of stability of her living arrangements. While that submission had some force, in my judgment, it is in Emily's best interests that she maintains close contact with the defender and Susan. The pursuer accepted that there was a strong bond between the defender and Emily. That was also clear from the defender's evidence and from the affidavits of AW and NV.

[91] In light of the acrimony between the parties, court orders to regulate contact are necessary. The pursuer had been reluctant to arrange contact after the defender's return to Scotland in November 2017 and it would appear that the parties have experienced some difficulties during handovers.

[92] Notwithstanding the precarious nature of the defender's accommodation, in my judgment, Emily should attend for contact with her mother for the first three weekends of each month from Friday after school or nursery to Monday at school or nursery. This arrangement allows the defender and Susan to enjoy uninterrupted time with Emily, for as long as accommodation is available to them, relieves the defender of the financial burden and the responsibility of taking Emily to school each day and reduces the opportunities for

Emily to be exposed to the hostilities between the parties during handovers. The parties are, of course, free to agree further arrangements for contact if they so wish.

[93] Should there be a material change of circumstances, such as an improvement or indeed a deterioration in the defender's circumstances (including by the withdrawal of her accommodation) parties can of course present a minute to vary. However, I urge parties and agents to take careful note that these are the third set of proceedings involving Emily. I sincerely hope that these will be the last.

### **Interdict and Possession of Passports**

[94] Having regard to the defender's past conduct, the court can have no confidence that the defender will not again attempt to wrongfully remove Emily from the UK. A perpetual interdict preventing her from doing so is necessary in the circumstances. It is also in Emily's best interest that her UK and America passports are retained by the pursuer.

### **Expenses**

[95] The pursuer moved for the expenses of the cause. As the defender is in receipt of legal aid and in view of her difficult financial circumstances, I found the defender liable to the pursuer for the expenses of the cause, however those expenses were modified to nil.