

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT KIRKCALDY

[2026] SC KDY 100

KKD-F378-20

JUDGMENT OF SHERIFF JOHN A MACRITCHIE SSC

in the cause

MB

Minuter

against

LP

Respondent

**Minuter: Party
Respondent: Inch**

Kirkcaldy, 16 July 2026

The sheriff, having resumed consideration of the Minute to Vary and Answers:

FINDS IN FACT

Directly relevant prior findings

(1) Following proof in the original proceedings, this court found on 6 December 2023, so far as relevant to the present application, that:

- (a) The minuter and respondent met in or around February 2020 and entered a short sexual relationship.
- (b) That relationship ended in late March 2020.
- (c) In April 2020, during the COVID-19 pandemic, the minuter attended at the respondent's home to deliver food. While alone with the respondent's daughter, CJ,

then aged 4 years, the minuter sexually abused the child by exposing his genitals to her, asking her to touch them, requesting to see her genitals, and touching them.

(d) The abuse constituted an opportunistic breach of trust.

(e) EP, conceived during the parties' short relationship, was born prematurely on 17 July 2020 and remained in hospital for approximately 2 months.

(f) During that period, the minuter was permitted to visit EP on several occasions.

(g) The minuter has had no contact with EP since her discharge from hospital on 19 September 2020.

(h) Following disclosure by CJ of her abuse by the minuter, a social work safety plan dated 11 December 2020 prohibited contact between the minuter and both CJ and EP.

(i) EP has no memory of the minuter and no relationship has ever developed between them.

(j) There was a real risk of abuse to EP arising from contact with the minuter.

(k) Neither direct nor indirect contact between EP and the minuter was in EP's best interests.

(l) All contact, including supervised contact was specifically considered and rejected.

(m) Although the minuter had been interviewed by the police, no criminal proceedings had been raised against him.

(2) On 28 October and 18 December 2024, the Sheriff Appeal Court upheld those findings, refused the minuter's appeal, and refused permission to appeal to the Court of Session, respectively.

Current circumstances

- (3) EP is now 5 years old.
- (4) There has still been no contact between EP and the minuter since infancy.
- (5) No new evidence has been presented demonstrating any change in the risks previously identified, which remain extant.
- (6) No new evidence establishes any benefit from contact between EP and the minuter capable of outweighing that risk.
- (7) No new evidence demonstrates that contact between EP and the minuter, whether supervised, unsupervised or indirect, would be in EP's best interests or promote her welfare, having regard to the findings that the minuter sexually abused her sibling and EP has never had any relationship with the minuter.
- (8) There is no welfare reason since the original decision to render a reconsideration of contact between the minuter and EP as appropriate.

FINDS IN FACT AND LAW

- (9) In terms of section 11(7)(1) (a) of the Children (Scotland) Act 1995 ("the 1995 Act"):
 - (a) It is not in EP's best interests that she has direct or indirect contact with the minuter. Her welfare is the paramount consideration, and such contact remains detrimental to that welfare.
 - (b) It would not be better for EP that a contact order be made than that none be made.

(10) In terms of sections 11(7A) and 11(7B)(a) of the 1995 Act, there remains a need to protect EP from abuse, and from the risk of abuse, including conduct giving rise, or likely to give rise, to fear, alarm, or distress.

(11) In terms of section 11(7D) of the 1995 Act, it is inappropriate to make a contact order requiring the respondent to co-operate in arrangements for contact between EP and the minuter, given the finding that the minuter had sexually abused the respondent's said elder child, CJ.

(12) In terms of section 11(7)(1)(b) of the 1995 Act, having regard to EP's age, maturity and circumstances, it is not practicable to obtain views from EP which would materially assist the court in determining the welfare issues arising in this application. EP is 5 years old, has no memory of the minuter, has never had a relationship with him and lacks the maturity necessary to evaluate the complex welfare considerations arising from the established findings of fact.

(13) *Esto* EP were afforded an opportunity to express a view by age-appropriate means, any such view would necessarily be formed without a sufficient understanding of the circumstances giving rise to these proceedings and could therefore carry little or no weight in the welfare assessment. In all the circumstances, dispensing with the obtaining of EP's views is consistent with her welfare and best interests.

THEREFORE

(14) In terms of Ordinary Cause Rule 33.44A(4), dispenses with intimation to EP and with the obtaining of her views by Form F9 or otherwise.

(15) Repels the plea-in-law for the minuter.

(16) Sustains the plea-in-law for the respondent.

(17) Refuses the craves of the Minute to Vary for contact.

(18) Finds the minuter liable to the respondent in the expenses of the Minute and Answers procedure, as taxed; ordains the respondent to lodge an account thereof in process within four months; and, upon such account being lodged, remits the same to the Auditor of Court to tax and report.

NOTE

Introduction

[1] This is a Minute to Vary following a previous final determination refusing all contact between the minuter and EP.

[2] The minuter again seeks supervised contact.

Background

[3] The findings made following proof in December 2023 included a determination that the minuter sexually abused the 4-year-old female child CJ and presented a real risk of abuse to her sibling EP.

[4] Those findings were not disturbed on appeal.

Evidence

[5] On 29 May 2026, evidence was led from the minuter and respondent. Neither led evidence from any other source.

Evidence of minuter

[6] The minuter indicated that he was requesting the court to give him supervised contact with EP. He understood that the court had previously refused him any contact but indicated that this was in 2023 and from that time there has been a material change in the circumstances.

[7] Since then, there had not been any criminal investigations, he had not acquired any criminal record and there were no ongoing Police Scotland investigations.

[8] EP is older than she was at that time. He understood that the perceived risks would not have changed and that was why he was asking for supervised contact only.

[9] He had tried offering to go through mediation services to resolve the matter outside the court, but this had been refused by the respondent. However, he accepted that this was not a change in circumstances.

Evidence of respondent

[10] The respondent confirmed that the minuter has had no contact with EP since she was 2 months old. EP has no knowledge of the minuter. EP has no knowledge of the minuter's sexual abuse of her older sister CJ. To make an informed decision she would need to know about the sexual abuse of her older sister by the minuter. She is only 5 years old and too young to be told about this without causing her unnecessary distress. She is quite shy and would probably say no to contact with the minuter in any event if asked by the court. Even if EP wanted contact this would not be a "good idea" because of the minuter's sexual abuse of her daughter CJ. That is never going to change.

Submissions

Submissions for the minuter

[11] This case concerns the welfare of his daughter, EP. The minuter relied on his having no criminal convictions relative to his abuse of CJ, the passage of time, and a willingness to engage in supervised contact, as being a material change in circumstances since this court's previous decision. The minuter respectfully requested supervised contact in a safe and controlled environment.

[12] The minuter fully respected the previous decision of the court and did not seek to challenge it. However, he submitted that the present circumstances are materially different. He has clear confirmation from the Police Service of Scotland that he has "no history".

[13] There have been no further investigations or concerns. He has attempted to resolve matters through Relationship Scotland. He now seeks supervised contact as a cautious and child focused approach.

[14] The minuter understood that concerns may have existed previously, however supervised contact takes place in a safe controlled and professionally supervised environment. He respectfully submitted that it was in the best interests of EP's welfare to have the opportunity to know her father in a gradual and safe manner. A complete refusal of contact is the most restrictive outcome. Supervised contact is a proportionate and balanced alternative that protects EP while allowing a relationship to develop.

[15] The minuter stated that he approached the court calmly and respectfully. He was willing to comply with any conditions that the court considers appropriate. For these reasons he respectfully asked the court to grant him contact at a contact centre, at a level the court considered appropriate. He ended by indicating that this is not about the past but

about giving EP a safe opportunity to know her father. EP probably wanted to see him and to get to know him. He had no submissions to make regarding expenses.

[16] When asked why he had not made any attempt to obtain EP's views before the proof, he indicated that his previous solicitor had advised him that obtaining EP's views should be done through the court. Sheriff Officers had also advised him that he would need to go through the court to obtain these. However, the respondent accepted that he had not done anything in this respect and not complied with Ordinary Cause Rule 33.44(c)(2)(a) before the proof.

Submissions by respondent

[17] The respondent relied firstly on there being no material change in circumstances since this court's previous decision. The findings of risk made in 2023 remain valid.

[18] The welfare of EP required continued protection by her not having any contact with the minuter. Any form of contact, including supervised contact, remained contrary to EP's best interests. There were no criminal matters outstanding at the time of the previous judgment. All that has changed is the age of child. Given the nature of these findings, it is unthinkable that a court should make a contact order. The court was invited to refuse the minute. The respondent moved for expenses to be awarded in favour of the respondent.

[19] The respondent's agent submitted that it was not in EP's interests for the court to attempt to obtain her views for the reasons expressed by the respondent in her evidence. In the circumstances, it is not necessary and inappropriate to take the child's views as this would require the traumatising disclosure to the child of the sexual abuse by the minuter of her older sister. For the foregoing reasons the respondent moved the court to dispense with service of a Form F9 and the taking of the views of EP.

[20] Had the minuter sought to serve an approved F9 on EP in accordance with Ordinary Cause Rule 33.44C(2)(a), which he has not, it is likely that a motion would then have been made by the respondent to dispense with such.

Discussion

Requirement for a welfare reason since the original decision

[21] In *PSC v NS* [2026] CSOH 47; 2026 ST. 465, paragraph [76], Lord Braid concluded, (drawing together relevant authorities and academic text: *Sanderson v McManus* 1997 SC(HL) 55 at 58E; *S v S* 1965 SLT 131; *D v L* [2021] SAC (Civ) 28; 2022 SCLR, para [15]; *SA v DA and MF* (unreported, Edinburgh Sheriff Court, F42/08, 23 July 2015, paras [7] to [9]; *AB v JB* [2025] SC EDIN 62, paras [101] to [109]; Wilkinson & Norrie, *The Law Relating to Parent and Child in Scotland* (3rd edition, 2013), para 8.51):

“I take from the foregoing authorities that while, even in family actions, the principle of finality of litigation must apply to some extent - which is why, as in this case, it is not open to a party to re-open a finding-in-fact previously made- that does not preclude the court from re-examining the arrangements for the care of a child, **provided that there is a welfare reason to do so** (emphasis added). That will ordinarily require a material change of circumstances, but where the welfare of children is concerned it would be wrong to be too prescriptive as to when the court may or may not entertain a minute to vary, provided that something has changed since the original decision such as to render a reconsideration appropriate.”

[22] In *D v L* [2021] SAC (Civ) 28; 2022 SCLR, paragraph [15], Sheriff Principal Anwar stated:

“The purpose of the Minute to Vary procedure in a family action is clear. The procedure enables actions which have at their heart the welfare of a child, to be dealt with in one court process. It allows the sheriff to consider what previous decisions have been made by the court in relation to the child and the family, why such decisions have been made and **what, if anything, has changed in the child’s or the parties’ circumstances which might warrant further involvement of the court** [emphasis added]”.

[23] Accordingly, the issue for the court is whether since the original decision a welfare reason has arisen to render a reconsideration appropriate. Section 11(7)(1)(a) of the 1995 Act provides that the welfare of the child is the court's paramount consideration and that the court shall not make an order unless it considers it would be better for the child that the order be made than that none be made.

No prosecution

[24] Section 11(7A) and (7B) of the 1995 Act require the court to have regard in particular to the need to protect the child from abuse or the risk of abuse, which includes conduct such as unnecessarily disclosing and having to explain to her the sexual abuse of her sibling, with a likelihood of giving rise to fear, alarm or distress.

[25] The absence of criminal conviction was known at the previous proof. I accept that no criminal proceedings have been brought and that the minuter has no criminal conviction arising from these matters. However, those circumstances existed at the time of the original proof and were expressly known to the court. The findings made at proof were civil findings reached on the balance of probabilities. The absence of criminal proceedings neither undermines those findings nor amounts to evidence of rehabilitation or reduced risk.

[26] I accept that the passage of approximately two and a half years since the proof could constitute a change in circumstances in the literal sense. However, I am not satisfied that it is a material change for welfare purposes.

[27] The nature of the findings previously made is such that the mere passage of time, without evidence of rehabilitation, treatment, professional assessment or any objective change in the factors giving rise to risk, provides no evidential basis upon which the court could conclude that the identified risk has materially reduced.

Supervised contact only

[28] The minuter again seeks supervised contact only. There were no submissions that I should consider any other form of contact. There was, in any event no persuasive evidence to suggest that any other form of contact with the minuter was in EP's best interest. I have considered whether indirect contact by way of cards, letters, photographs, gifts or other forms of communication could be introduced. I am not satisfied that such arrangements would presently advance EP's welfare. EP has no memory of the minuter and no relationship with him.

[29] The introduction of even indirect contact would be likely to raise questions regarding the minuter's role in her life and would create pressure for further explanation and future progression of contact. I am not satisfied that any welfare benefit presently outweighs the risks identified.

[30] Supervised contact was expressly considered and rejected in the original proceedings. It was recognised that supervised contact is ordinarily but a stepping stone to unsupervised contact and that in the circumstances this could not be contemplated due to the ensuing risk of serious harm to EP. Nothing now advanced justifies a different conclusion.

Age of the child

[31] Whilst EP is now older than at the date of the original proof, I am not satisfied that this increase in age is material to the welfare assessment.

[32] It provides no basis upon which I could conclude that the risks previously identified have reduced or that contact would now promote EP's welfare. There is no evidence to

support a conclusion that the increase in EP's age is a change since the original decision such as to render a reconsideration of contact as appropriate. EP's intellectual capacity to fully understand such abuse and the need to protect her from sexual abuse remains limited.

Child's views

[33] Section 11(7)(1)(b) of the 1995 Act requires the court, **so far as practicable** (emphasis added), to give a child an opportunity to express a view. It is this aspect of the case which has required some consideration by me *ex proprio motu* as neither party had sought to explore EP's views by the time of the proof.

[34] Having considered the evidence, it is noted that EP remains in ignorance of the abuse of her sibling by the minuter.

[35] There would be no reason for her to be told of this abuse at this early stage in her life, where contact with the minuter is not taking place. Any request to take EP's informed and thus meaningful views would however require exposing her to very distressing and therefore harmful facts at a very young age. I have concluded that it is therefore positive that neither party had sought to place EP's welfare at such risk by seeking such views. While I was initially concerned that the child had not been given an opportunity to express a view, in the exceptional circumstances of this case, and after careful consideration, I have concluded that parties were right not to have done so.

[36] Section 11(10) of the 1995 Act provides a presumption that at the age of 12 a child shall be presumed to be of sufficient age and maturity to form a view. That presumption does not apply here and is some time away.

[37] Macphail, *Sheriff Court Practice* (4th edn W Green 2022), para 22.27, confirms that: "the practicability of the proposed steps is the only proper and relevant test". In *Shields v*

Shields 2002 SC 246, para [11], it was held that “...so far as affording a child the opportunity to make known [her] views, the only proper and relevant test is one of practicability. ...”.

[38] However, in *M v C*, 2021 SC 324, it was stated:

“[8] ... **It seems inherently unlikely that Parliament intended that steps had to be taken to explore any views of the child no matter how harmful that would be for him or her.** [emphasis added] On the contrary, and in line with Art 3(1) of UNCRC, the court’s overarching duty is to safeguard the welfare of children and promote their best interests

...

[10] The word ‘practicable’ is not a straightforward term. It can be seen as having a narrow or a more extended meaning depending on the circumstances of its use. If a court is ordered to treat the best interests of a child as paramount, and also to do something concerning the child if it is practicable, it does little if any violence to that wording to decide not to do that something if it violates the first instruction. As a result of the adverse consequences, which include a breach of the court’s primary duty, it would not be within the realms of a possible or workable course of action. ... It is not a feasible thing for the court to do because it conflicts with the duty to treat the child’s best interests as its paramount consideration.

[11] We have no hesitation in reading the test in sec 11(7)(b) as importing a consideration of any harmful consequences for the child in question and whether they render all and any steps to explore the child’s views not practicable. ... **If something can be done, but only at the cost of serious harm to the child at the heart of the proceedings, it can be said that it is not a practicable course of action** [emphasis added].”

UNCRC considerations

[39] Section 6(1), (2)(1)(b)(i), (5)(a)(ii) and Article 12 of schedule 1 to the United Nations Convention on the Rights of The Child (Incorporation) (Scotland) Act 2024 (“Article 12 UNCRC”) also require that children be heard **where capable** [emphasis added] of forming his or her own views, the views of the child being given due weight in accordance with the age and maturity of the child.

Application to the facts

[40] I have considered whether EP's views could be obtained by means appropriate to her age and maturity, including by Form F9, through a child welfare reporter or by other recognised methods of eliciting a child's views. I am satisfied that they can be obtained in a purely procedural sense.

[41] The question, however, is not merely whether views can be obtained, but whether obtaining them would be practicable and capable of meaningfully assisting the court in determining the welfare issue before it. EP is only 5 years old. She has no memory of the minuter, has never enjoyed a relationship with him and has no knowledge of the circumstances giving rise to these proceedings. Any view expressed by her would therefore be based upon a very limited understanding of the matters requiring determination.

[42] In these circumstances I am not satisfied that any view expressed by EP would materially assist the court in resolving the welfare issues before it.

[43] Conversely, any attempt to provide EP with sufficient information to enable her to express a more informed view would risk exposing her to information which is developmentally inappropriate and contrary to her welfare.

Ultimate welfare analysis

[44] I have not treated the previous judgment as determinative of the present application. Rather, I have considered EP's welfare as at the date of this proof. In doing so I have taken the previous findings as established facts, while separately considering whether any subsequent development justifies a different welfare outcome. Having carried out that exercise, I am satisfied that it does not.

[45] The findings of risk remain extant, and nothing has changed since the original decision such that there is a welfare reason to render a reconsideration appropriate. Having considered the evidence led at this proof and assessed EP's welfare as at the date of determination, I am satisfied that the statutory tests in section 11(7)(1)(a) are not met. It is not in EP's best interests that contact take place and it would not be better for EP that a contact order be made than that none be made. The findings of risk remain extant, and no subsequent development establishes a welfare basis for departing from the earlier determination.

[46] The considerations in sections 11(7A), 11(7B) and 11(7D) further support the conclusion that contact would be inconsistent with EP's welfare and that protection from abuse and the risk of abuse remains paramount.

Conclusion

[47] Any award of contact would require a basis for revisiting the original decision. No such basis has been established.

[48] The only issue is whether I require to obtain EP's views even where there is no basis for revisiting the original decision as even a refusal to grant a section 11 order is, nevertheless, an order made "in relation to" parental rights and responsibilities" (*D v L supra*) on which the child's view could be sought.

[49] I have concluded that this is one of the exceptional cases in which obtaining the child's views is not practicable for the purposes of section 11(7)(1)(b) of the 1995 Act and that EP currently would not have the capacity to express a meaningful view for the purposes of Article 12 UNCRC. That conclusion arises not from any unwillingness to hear from EP, but

because of her age, lack of maturity, absence of relationship with the minuter and the limited utility of any views which she could presently express.

[50] I have concluded that involving EP meaningfully would be likely to cause severe emotional distress to her and would require her exposure to matters beyond a 5-year-old child's expected level of understanding. Having expressly considered *ex proprio motu* whether it would be appropriate to ascertain EP's views, I have concluded that doing so would not be meaningful and would not serve EP's best interests unless she was fully informed as to the prevailing circumstances, which it is not practicable to do, as this would be likely to cause significant fear alarm and distress and thereby be seriously harmful to her.

[51] I have considered whether a complete refusal of contact constitutes a proportionate interference with the minuter's and EP's Article 8 rights. I am satisfied that it does. The legitimate aim pursued is the protection of EP's welfare and the protection of EP from abuse and the risk of abuse. I have also considered whether lesser measures, including indirect contact, exchange of correspondence, photographs, supervised contact and a staged reintroduction of the minuter into EP's life, would adequately protect EP.

[52] Having regard to the findings previously made concerning the minuter's sexual abuse of CJ, the absence of any established relationship between EP and the minuter, the continuing risk findings and the absence of any identifiable welfare benefit to EP, I conclude that no lesser measure would presently safeguard EP's welfare to the same extent. The refusal of contact is therefore necessary and proportionate.

[53] This approach is therefore consistent with Article 8 ECHR, Article 12 UNCRC, and the 1995 Act as aforesaid, which do not impose an absolute obligation to hear from a child where welfare considerations justify a reasoned departure from the default position as here.

[54] The present determination is based upon the evidence presently before the court, EP's current age and circumstances, and the welfare assessment which falls to be carried out at this time.

[55] Without seeking to encourage a course of action that may result in the minuter being declared a vexatious litigant if he continues to litigate in respect of this matter, nothing in this decision should be understood as preventing a future application should materially different circumstances arise. For example, the said statutory presumption as to EP's views would apply when she reaches 12 years of age. It may then be possible, after careful consideration, to conclude that EP is of an age when she can express a meaningful and informed view on contact, but that is an issue for another time.

Decision

[56] The Minute to Vary is refused.

Expenses

[57] Expenses should ordinarily follow success, and I have awarded them accordingly.