

OUTER HOUSE, COURT OF SESSION

[2021] CSOH 71

F36/20

OPINION OF LORD ARTHURSON

In the cause

AH

Pursuer

against

SH

Defender

Pursuer: Innes, QC; BTO Solicitors LLP
Defender: Brabender, QC; SKO Family Law

16 July 2021

Introduction

[1] The parties were married at Edinburgh on 7 May 2011. In 2018 the defender raised an action of divorce against the pursuer. The parties separated for a period from the date of service of the summons in that action, which was 26 November 2018, and thereafter reconciled in early 2019. The instance in that divorce action fell. The pursuer has had three periods in residential rehabilitation facilities, the most recent from 31 December 2019 until 5 May 2020, during which period he received treatment as an in-patient at Castle Craig Hospital. On 20 March 2020 the defender removed herself and the children from the matrimonial home, X. Prior to their marriage, the parties entered into a pre-nuptial

agreement which was executed by them on 13 and 15 April 2011. There are three children of the marriage, namely D, born 9 July 2012, W, born 11 May 2014 and B, born 4 April 2016. The present action, and consequently this opinion, focuses exclusively on questions of residence, contact, relocation and schooling in respect of the children.

[2] The children commenced their education at school C. After attending there for a pre-school year and two further years, D moved to school B in autumn 2019. W continues to attend school C. B commenced attendance at school C in autumn 2020. Following the parties' separation in 2020 and prior to the raising of the present action, the pursuer had no direct contact with the children. From 12 August 2020 the pursuer had direct contact with the children on a non-residential basis together with contact by way of FaceTime, all on stipulated days and at arranged times. Contact was supervised by the pursuer's employee, the children's nanny HG. The pursuer was interdicted from driving the children. Residential contact was introduced around Christmas 2020 with a term time arrangement established thereafter on the basis of a 2 weekly cycle to include alternate residential weekends from a Friday until a Monday, together with a single period of non-residential contact on intervening Fridays and continuing mid-week FaceTime contact. During the school holidays in early 2021, namely the February and Easter holidays, agreement was commendably reached between the parties whereby the children would spend their time equally with each of them. The parties were further able to agree arrangements for half term and summer holiday arrangements, again all on the basis that the time be shared equally between them. These holiday arrangements have all been based upon the children spending three or four nights with each of the parties on an alternating basis.

[3] Both parties seek residence orders in respect of the children. The pursuer additionally seeks specific issue orders concerning the schools to be attended by the

children. The defender additionally seeks a specific issue order regulating that the children be permitted to move to reside with her in England. Submissions were also made on behalf of each party in respect of direct contact arrangements during term time, it being agreed that future holidays would be spent equally by the children with each of the parties. Finally, the pursuer offered certain undertakings to which further reference will be made in due course.

The evidence led at proof

[4] Evidence was adduced by senior counsel for the pursuer from the pursuer himself; from his sisters A and E; from HG, nanny to the children; and from CB, the parties' former housekeeper. Evidence was further led on behalf of the pursuer from Professor Jonathan Chick, consultant psychiatrist and the medical director of Castle Craig Hospital; from Teri Lyn Fairnie, lead family therapist at Castle Craig; from Professor Gary McPherson, consultant forensic clinical psychologist; and from Rachel Roper, a forensic psychologist.

[5] Evidence was adduced by senior counsel for the defender from the defender herself; from her friends FB and PM and her brother WR. Evidence was further led on behalf of the defender from Peter Davies, an employment and vocational rehabilitation consultant; Dr John Ferguson, consultant psychiatrist; from Anne McKechnie, a consultant forensic clinical psychologist; and from Dr Kirsty Dalrymple, a consultant clinical psychologist who had been appointed by the Court in August 2020, on the basis of a joint instruction of the parties, as child welfare reporter in respect of the children's views.

[6] For completeness it should be noted that the terms of affidavits from five other witnesses were the subject of agreement.

[7] The pursuer gave evidence in general terms about schooling matters. In general his position was that it was sensible to keep the children together but that D was not suited for

boarding school. No decisions had been made about the later schooling of the children, on the basis that clarity on the right school for them would emerge over time. The pursuer confirmed that he was committed to funding the children's schooling at school C and that he would fund their schooling in England, in the event of relocation, on the basis that the fees were of a similar level. With regard to speaking with the children about the defender, the pursuer stated that he only said positive things about her. It had become clear to him that the defender wished no contact with him whatsoever, and he in particular denied using, for example, Zoom calls to monitor the defender or the use of employees to spy on her.

[8] Regarding his own history of substance misuse, the pursuer accepted that there was a history of addiction in his family and that he himself had an addictive personality. He accepted that he had used cannabis on an increasing basis from 2010 and that he had attempted to hide that from the defender and from his family and friends. This addiction had impacted all parts of his life. He had in addition started using tranquilisers during 2018, namely Valium, and Xanax in 2019. He had sourced the Valium on the internet. Following a period of rehabilitation at Castle Craig Hospital in December 2018, the parties were reconciled in early 2019. The pursuer had promised the defender that he would change his behaviour in respect of his substance misuse. He remained abstinent until early December 2019. On 31 December 2019 he commenced his most recent rehabilitation period at Castle Craig Hospital. He accepted that earlier in his life he had suffered from addiction issues in respect of alcohol but denied a more recent alleged addiction to solvents. He accepted that his substance misuse meant that he had not been the husband or father that he could have been. The pursuer denied the use by him of any violence towards the defender. That said, he accepted that on an occasion in 2018 he had raised a stool in his hands above his head and, as he put matters, "pretended to throw it" at the defender and threw it into a fireplace.

He accepted that this incident occurred after he had taken cannabis and tranquilisers. The pursuer spoke of his children, and indeed the defender, with affection and tenderness. It appeared to be a cause of considerable sadness to him that his own conduct had led the defender to take the decision to separate from him and at no stage in the course of his evidence did he seek to level any blame at her for that decision and its consequences for him and their family.

[9] The pursuer's sisters A and E gave evidence which I considered to be of very limited value. Their evidence was in general terms partisan in its nature and I have elected to give it no weight at all in my assessment of the issues before the Court in this case.

[10] HG, the nanny employed by the pursuer to look after the children, gave evidence of a very different nature and quality. Both parties, and a variety of other witnesses, spoke very highly of HG, and having heard her evidence, I am not surprised that they chose to do so. It was abundantly clear that HG was wholly and exclusively committed to the welfare of the children in every aspect of their lives insofar as she had any influence over or contact with them. She described her continuing involvement in a supervisory role following a prior interlocutor of the Court, which she undoubtedly took extremely seriously. HG described the daily routine of the children when they were living at X in the care of the pursuer. She described the children as adoring both parties. She stated that she had no concerns about the children when they were with the pursuer and that if she did at any stage have such concerns she would let these be known; indeed, she advised that she would speak to the judge who had given her this responsibility. She was acutely aware that both parties had placed great trust in her role with the children and she had at all times attempted not to take sides in the dispute. The defender had confided in her that she was very unhappy and had asked her to retain spare cash and car keys at her home. The witness

advised that she was surprised that the defender had said that she was so unhappy but added that this was not the first time that the defender had said something like this to her. Although handovers of the children for contact had been difficult, the witness advised that both parties had attempted to be positive at these times and that nothing untoward had been said in respect of the other parent by either party. The witness confirmed, finally, that she would be willing to continue to support contact between the children and the pursuer, if that was what the defender wanted her to do.

[11] CB was the former live in housekeeper employed by the parties. She had been dismissed by the defender in June 2018. The defender had made a recording of the pursuer and CB had disclosed that to the pursuer. CB recalled accompanying the family on a day out by car to Alnwick Castle on a date that she did not specify. Although the pursuer drove, as she put it, a bit faster than normal on the way home, she did not feel that the speed at which he was driving was excessive. There was no conversation at all between the parties on the journey. She described feeling very safe in the car with him that day, as she always did if he was driving. In cross-examination she denied communicating with the defender by text other than perhaps by one or two texts, but when a text message dated 25 March 2018 was put to her in terms of which she had stated that she had long wished to help the defender, the witness simply stated that she did not recall sending that message.

[12] Professor Jonathan Chick, consultant psychiatrist and medical director at Castle Craig Hospital, a consultant who had specialised in addiction and its treatment for over 40 years, gave evidence in general about the risk of relapse and in particular in respect of his involvement with the pursuer. In terms of steps to be taken to militate against relapse, the witness stated that it was very helpful if an individual agreed to a prolonged stay in a protected environment, as the pursuer had done in this case during his last rehabilitation

period. The ongoing provision of hair samples by him for testing on a 3 monthly basis was also a helpful protective measure. It was part and parcel of addiction behaviour for an individual to seek to protect their use of substances. On the important condition that the pursuer continued to abstain, as he had done to date following his departure from Castle Craig in May 2020, the witness did not perceive any risk to the children in respect of non-residential or residential care by the pursuer. On the statistics available to him, Professor Chick stated that at the end of one year some 80% of patients have maintained abstinence, and that if abstinence is maintained for a period of two years, the risk of relapse is very much less than that. He was clear that the length of a person's addiction behaviour had no impact on the ongoing risk of relapse; indeed, he observed, such a person would have accumulated greater understanding of such matters and would therefore be able better to practise living abstinently. The two year period in the pursuer's case would run from the end of December 2019, being the date when he last went into hospital for rehabilitation. That said, the witness was clear that the period of caution to be observed in respect of risk should be lifelong. The use of solvents, Professor Chick stated, was very uncommon indeed, and he appeared very much to discount this as an issue for the pursuer, as I understood his evidence.

[13] Teri Lyn Fairnie was the pursuer's focal therapist at Castle Craig from April 2020. She described attending at a family therapy session there on 16 March 2020. The defender had attended this session and in the course of it had advised the pursuer that she and the children were moving out of the matrimonial home. The witness described this conversation as being calm and very peaceful, albeit the defender had been anxious. The witness in cross-examination confirmed that the pursuer was doing much better now in her view than in comparison with his position at the time of his hospital discharge.

[14] Professor Gary McPherson, a very experienced consultant forensic clinical psychologist, had been jointly instructed by the parties to prepare a report in respect of matters of risk concerning the pursuer. The witness had interviewed the pursuer for a period of 5 hours in person on 17 February 2021 and had spoken to him again virtually on 19 February 2021 for 1 hour. Professor McPherson advised that the pursuer had told him that there had been times when he had behaved in an abusive and unreasonable manner. Certain adverse experiences in his childhood had impacted the behaviour of the pursuer as an adult. Professor McPherson had noted evidence to support a history of alcohol use disorder on the account given to him by the pursuer and had noted the pursuer's use of cannabis, online Valium and benzodiazepine. He made it clear that he was relying on Professor Chick's expertise in respect of addiction matters and on Dr Dalyrmple's report as a comprehensive assessment in respect of the children. Professor McPherson reported that the pursuer showed a positive and future-focussed interest in his children. He noted that the contact arrangements presently in place were supported by a nanny who had known two of the children since birth and one since the age of one. The pursuer was engaged in two online parenting classes. In terms of risk, the approach adopted by Professor McPherson was one of structured clinical judgement based on his consideration as a whole of evidence-based risk factors. The history of spousal abuse featuring in the case was a very prominent risk factor. On his own account, as reported to Professor McPherson, the pursuer had behaved in a fear inducing and intimidating way towards the defender. That alone was sufficient for the witness to determine that spousal abuse was present in this case. The risks presented by the pursuer would increase if he began once again to use substances problematically. Professor McPherson concluded that the pursuer appeared to be committed to long-term abstinence, albeit that in respect of relapse there would remain an

ongoing risk. The witness noted that during his contact with the pursuer, the pursuer had always been respectful of the defender with no expressed negativity in respect of her character or her care of the children. There were, in the witness's view, no obstacles to shared care. Following detailed cross-examination by senior counsel for the defender on the terms of his report and in particular matters of risk, the witness adopted a final position thereon to the effect that while the witness had no reservations about the pursuer's ability to parent, he was however aware of the history of substance misuse and a potential to relapse into the use of substances.

[15] The final witness called on behalf of the pursuer was Rachel Roper, a chartered forensic psychologist. The witness indicated that it was not in her remit to dispute the post-traumatic stress disorder diagnosis offered by others in respect of the defender. The witness had not met or interviewed the defender herself. In terms of treatment for that condition, she advised that part of any work done would involve helping the defender to feel safe wherever she was. The witness was in no doubt that the defender believed that a move south was the best course of action for her, in terms of making her feel safe, and indeed the witness could not dispute that that would be helpful. The witness, however, expressed the view that such a move was not necessary in respect of the defender's recovery. There were material limitations on the value in my view of the evidence of this witness. She accepted that she had no training in the formulation and diagnosis of complex post-traumatic stress disorder. In addition, the exercise undertaken by her in respect of the defender was very much a paper exercise only.

[16] Turning to the defender's proof, the defender herself gave evidence on her own account. On schooling, the defender indicated that both parties had planned that D would go to school B, but this was only necessary if he was going to go onto further schools in

England. She spoke to the pursuer's reservations about certain Scottish schools. The defender spoke of the behaviour of the pursuer during the marriage, for example storming out at meals and displaying what she described as paranoia and a short fuse. She said that at all times she required to be compliant in the marriage. The witness placed much of this type of behaviour on the part of the pursuer in the context of his misuse of substances. The pursuer lied fluently about his misuse of drugs, but the defender was aware of that misuse and spoke of him living for periods in part of X during which times he looked to the defender as if he was using heroin. If she tried to approach him at this time he would, as she put it, "come raging at" her. The defender described a return journey by car from a family trip to Alnwick Castle in 2017 during which she observed the speedometer to be displaying a speed of between 110 and 130mph. In her view the pursuer was accelerating in this way in order to terrify her. She described another occasion in which the pursuer was in a wild rage screaming at her the words "Time for some pain" and throwing a stool at a wall. She described being chased by him and running outside into a storm. The defender disagreed with what the pursuer had said about not assaulting her, recalling an occasion early on in their marriage when he had slapped her on the head. The defender spoke very highly of HG and her care of the children. Under reference to a psychological assessment report prepared in respect of D, the witness expressed gratitude to the author for the understanding that this report presented to the parties, expressing the hope that D could obtain the help which he clearly needed at school and at home in respect of the specific learning difficulties identified therein. The defender spoke to a trip by school C to X scheduled for mid-June 2021, indicating that she would not be attending as a parent on the basis that she did not want to go near the pursuer, and indeed that she could not do so.

[17] The defender spoke with great enthusiasm about the proposed relocation plan. In broad terms, her view was that a move to England would allow her to get better and be the mother that she could be. As she put matters, she could build herself back up and "glide on in life". She described a huge network of support available to her in that area, and contrasted that with the very limited support available in the area where she presently was living. The defender confirmed that she had been offered a placement on a teacher training course with the Buckingham Partnership for 2021/22 and advised that she was due to have an interview for the Northampton Teacher Training Partnership school based training programme shortly. The securing of a place by her with the Buckingham Partnership would permit her to train and the children to attend the Royal Latin Grammar School, and the securing of a place in the Northampton programme would allow her to teach at and the children to attend the Northampton School for Boys. She confirmed that funding for these training programmes was in place and that, as she would be teaching physics, extra funding could be available from the Institute of Physics. Relocation would accordingly provide her with employment and the children with one of two excellent schools to attend. In addition the defender would have the support of a large group of supportive friends in an area far enough away from where she presently lived to allow her to feel safe and to commence her recovery. The defender spoke to meeting with Dr Ferguson in March 2020 and to his diagnosis of her condition. She confirmed that she had been the subject of an earlier diagnosis of post-traumatic stress disorder by another doctor in London in 2011. The defender advised that she had made no enquiries about treatment to date.

[18] The general tenor of the defender's evidence on her future plans was that all would turn out well once there was some distance between the parties. After the move to England she advised that there would be no more disruption for the children. Cross-examined on the

detail of the proposed relocation, however, the defender had considerable difficulty with certain specifics. She accepted that under the schooling arrangements she proposed in England there would be a staggered end to the school day for a short period, but insisted that she could work around it, volunteering, for the first time in the case as I understood it, that she could do the teacher training part-time. She was unsure which year group B would enter, and indicated that she would have to check. When asked whether there was any additional charge for learning support, the defender advised that she could find out more about that. When asked about her proposals for a part-time training placement, the defender advised that she could do this at the Royal Latin School but would require to check this with the Northampton Partnership. When asked whether the teacher training programme in England guaranteed a probationary year, the witness answered that she did not know and that this was a good question. On travel times to the area in England that she wished to move to, she said that she would require to check the time for a journey by rail. In terms of the pursuer's contact with the children, she said that he had the option of a flat in London and had relatives in England. When asked whether the flat in London would provide suitable accommodation for the children, she confirmed that she had never been to the property. In terms of handover of the children by the pursuer following contact by him with them in England, the defender accepted that the pursuer would require to return the children to her on a Sunday rather than taking the children to the school on the Monday. My impression was that the witness was thinking about this important matter and indeed other matters of detail for the first time as she was in the course of giving her evidence. The defender spoke briefly to an alternative future career in interior design but it was plain that this was not something even she herself was seriously considering.

[19] I considered the defender to be a very impressive and genuine witness who was plainly devoted to her children and, notwithstanding the difficulties in her evidence which I have outlined above concerning the proposed relocation plan, was very much putting them at the heart of her own future plans and proposals in respect of accommodation and employment. The defender impressed me as a highly intelligent person of great warmth and enthusiasm who had come to the view that her relationship with the pursuer could no longer continue and that any ongoing contact with him on her part was out of the question. That said, it was very much her position that ongoing contact with the pursuer both in term time and during school holidays was undoubtedly in the children's best interests.

[20] Anne McKechnie, a consultant forensic and clinical psychologist, was the next witness led on behalf of the defender. She had interviewed the defender on three occasions for a total of some 6 hours. Ms McKechnie was aware of the defender's consultation with a doctor in London in 2011 and that the clinical opinion of that doctor had been that the defender had been displaying symptoms of post-traumatic stress disorder, based on the defender's account to that doctor of earlier isolated incidents of sexual assaults by two other men alongside certain symptoms. Ms McKechnie had found no indication of any residual post-traumatic stress disorder from these earlier incidents in the course of her own assessment of the defender. The witness spoke in general terms about intimate partner violence, which term could include any form of controlling or abusive behaviour where the aim is to gain and maintain control. She confirmed that there were features of intimate partner violence in the history reported by the defender to her. The witness emphasised that the appropriate discourse would be to talk not of the trauma of an event but of the trauma of the impact of that event and what the person who was the subject of it made of it. Accordingly, the perception of that person would be more important than the incident itself,

in terms of how the person perceived the behaviour inflicted upon them. Ms McKechnie adhered to her opinion that the defender presented with a diagnosis of complex post-traumatic stress disorder. This was a treatable condition, but a person would need to feel safe from any potential future threat in order for treatment to be effective. The environment of the person was accordingly relevant in considering matters of treatability. The appropriate treatment here was cognitive behavioural therapy. Certain adverse childhood experiences of the defender were put to the witness, including a move from boarding to state school, her mother's attempted suicide and temper and her father's affair. Notwithstanding these matters the witness had recorded the defender as describing her childhood as "idyllic". Against the background of the 2011 diagnosis, it was put to Ms McKechnie whether it was possible to say whether the defender had complex post-traumatic stress disorder in 2011. Ms McKechnie stated that if the defender had felt able to describe what was going on in her marriage, she was sure that there would have been a different diagnosis made and confirmed that in respect of untreated post-traumatic stress disorder a person can go on to have relationship difficulties together with the presentation of symptoms. The witness accepted that certain conditions would assist in the helpfulness of any treatment, namely the pursuer not approaching the defender or going to her home; handovers happening via school or being managed by a third party; and the defender living away from the immediate vicinity of X. The witness confirmed that this could be achieved not necessarily by moving to the south of England, but even by a move to the Edinburgh area.

[21] Dr Kirsty Dalrymple, consultant clinical psychologist, had prepared two reports for the Court, dated 11 December 2020 and 19 February 2021 respectively. The witness was very clear at the outset of her evidence that she had not undertaken an assessment of

parenting capacity or of parental psychopathology or mental health, albeit she had sought information from those working around the family. She further made clear that her report did not contain an assessment of the validity of the domestic abuse or substance abuse allegations arising in the case. In terms of the views of the children themselves, D had expressed the view that he would like to share his time equally between the parties. What he really wished for was that they could all live together and be a family again. D had advised that he did not want to move to England. He would miss his father if he was not able to see him every week and it would be a long journey. He named his family and friends as a range of people that he thought he would miss. W had expressed the view that he wished to split his time "half and half" between the parties and stated that moving to England was "a terrible idea". B had stated that he wished to have more time with the pursuer and offered no view on any move to England. Speaking in general terms about future care, Dr Dalrymple emphasised the essential nature of good communication between the parties. The children were well functioning, having managed several moves of accommodation and in her view had demonstrated a degree of resilience. Dr Dalrymple reiterated her view that a 7 night stay with one parent was too long for these children. The relocation proposal was not in her view driven by the needs of the children. It was clear that both parents had a loving attachment to the children. In respect of children in early to middle childhood it was important, in the opinion of Dr Dalrymple, for the central care givers to be involved in a meaningful way in the children's lives in matters of schooling and recreational activities, with the parents operating in a way that means they are, as the witness put it, available to the children. The witness referred to criteria put forward for consideration by Professor Zeanah in 2009, which she regarded as one of the better risk frameworks and which acknowledged that parents could change and that risk can be

managed and/or ameliorated. Supervision would be helpful in managing anxieties in this case, but was not necessary in the witness's view. The witness did not consider that the children were unsafe with the pursuer. Dr Dalrymple spoke of the importance of proceeding on a step-by-step basis with children and looking at each child individually during those steps. The answer to difficult relationships was not to move away from and rupture them, but instead to look to repair them. Dr Dalrymple stated that she did not often recommend relocation as a solution to relationship difficulties and stated that it was quite an extreme suggestion to say that this would meet the children's needs in the present case.

[22] Peter Davies, an employment and vocational rehabilitation consultant, gave evidence in general terms about the defender's plans in respect of retraining as a physics teacher, and far more briefly, an interior designer. In Scotland fees for teacher training were paid by the Scottish Government, whereas in England scholarships were available. In Scotland a one year probationary period was guaranteed but there was no similar guarantee in England.

[23] Dr John Ferguson, Consultant Psychiatrist, spoke to meeting with the defender at a consultation on 2 March 2020. He had no clear memory of the 2011 diagnosis being referred to at the consultation but he had been advised of it subsequently by an email dated 4 March 2020. He accepted that a prior diagnosis of post-traumatic stress disorder would be important to note, standing his own diagnosis of complex post-traumatic stress disorder. He was unaware of the background of the 2011 diagnosis in respect of sexual assaults upon her by other men. He had not covered the defender's childhood with her during the consultation. The witness conceded that it was possible that a suicide attempt by the defender's mother and sexual assaults upon the defender in later life could have given rise to a diagnosis of complex post-traumatic stress disorder. Dr Ferguson confirmed that the treatment option of trauma-related cognitive behavioural therapy was available on the NHS.

[24] Evidence was led on behalf of the defender from her good friend FB, who had offered her home in the south of England as a base for the defender and her children at the outset of their move in the event of relocation. FB advised that she and her husband were separating but that he had not yet moved out of their home. FB had last seen the children in person in December 2019 and had last met the defender in person in February 2020. She envisaged the defender and the children staying with her for a period of 3 to 6 months.

[25] The defender's brother, WR, advised that he had last seen the pursuer at Christmas 2019 and that he had been aware of difficulties in the marriage. He did not know of the defender having friends in the area that she was presently living in Scotland. The pursuer had denied his drug use to him in the past.

[26] The defender's friend PM, based in London, gave evidence concerning her visit to X in 2012. She spoke of her ongoing friendship with the defender and, under reference to a section of her affidavit in which she had said that it was clear that the children had become frightened of the pursuer, confirmed that this information had come from conversations with the defender and from contact that she had had with the children in early 2019. She accepted that she had not seen the children with the pursuer since 2012.

[27] Finally, regarding the agreed affidavit evidence, in the affidavit of the defender's childhood friend AM at paragraph 11 that witness described speaking to the defender in late December 2019 and stated that "She seems to be in a much better place than when I saw her in December. The old S is back".

Submissions for the pursuer

[28] Senior counsel for the pursuer moved the court to grant a residence order providing that the children would reside with the pursuer from September 2021 during the school term

for 7 nights in every 14 and for one half of the school holidays, the children to reside with the defender at all other times. Specific issue orders were also sought in respect of the schooling arrangements for the children, namely that D attends school B, W attends school C until the end of the academic year in 2021 and thereafter attends school B, and B attends school C. Senior counsel offered undertakings on behalf of the pursuer (a) that he will not assault or attempt to assault the defender, threaten her with physical violence, shout at her or be verbally abusive towards her and will not enter or remain in any property in which the defender is living without her consent; (b) until January 2025 that he attends for hair testing on a 3 monthly basis and to instruct that copies of reports in respect thereof are provided to the defender by the party who arranges the tests; and (c) unless otherwise agreed between the parties, where a handover would be between them and not at collection or drop off at school, a third party will undertake the handover.

[29] At the outset of her detailed and focused submissions, senior counsel drew the attention of the court to the provisions of section 11(7) of the Children (Scotland) Act 1995 and referred to certain authorities on relocation, citing *M* v *M* 2012 SLT 428, *S* v *S* 2012 Fam LR 32, *Donaldson* v *Donaldson* 2014 Fam LR 126, GL v JL 2017 Fam LR 54 and *MCB* v *NMF* 2018 SCLR 660.

[30] Senior counsel commended to the court the views of the children taken by an experienced child psychologist, noting that school had remained a constant for the children and submitting that the views recorded demonstrated that the children have a good relationship with the pursuer. Any move in schooling required to be viewed with caution, having regard to the evidence of Dr Dalrymple. In any event, if the defender moved to the Edinburgh area rather than the south of England and there was a change of school, this would not impact on the ability of the pursuer to have a shared care arrangement. It was

clear from the evidence of Professor McPherson that the pursuer had prioritised the needs of his children. He had to date taken an active and interested role in their education. Turning to the pursuer's health, the pursuer had accepted that he had had difficulties with addiction and as a result he had sought appropriate treatment and support, voluntarily undertaking hair testing throughout to demonstrate that he has remained free of substances. These documents were available to the Court and, together with Professor Chick's evidence, demonstrated that the pursuer had been abstinent since January 2020. Professor Chick's evidence in respect of the risk of relapse was also of note. The defender had made allegations in respect of the pursuer's behaviour. If the defender was correct in her account, and her evidence accepted even as a whole, the question arose as to what impact that evidence should have in respect of ongoing care arrangements. Since the separation of the parties in 2020 and the undertaking given on behalf of the pursuer in respect of non-abuse by him of the defender at the outset of proceedings, to which he had adhered, senior counsel submitted that a view could be taken that, while the defender has a perception of threat from the pursuer, that perception may not be rationally based, albeit that such a perception had a validity that the Court would require to consider.

[31] Having regard to Dr Dalrymple's evidence and indeed the whole evidence, it was clear that the pursuer had acknowledged the issues arising in the case; that he placed the needs of the children ahead of his own; that he had demonstrated the capacity for change and had so evidenced such change within a reasonable timescale; that he had worked constructively with involved professionals; and that he had made use of available resources such as parenting courses. In addition he had willingly accepted the support of HG and had engaged with Professor Chick and Ms Fairnie and with ongoing hair testing.

[32] Turning to the substantive orders sought, senior counsel proposed two alternative bi-weekly patterns whereby the children were with each party for 7 days out of 14 during term time. Requiring HG to stay overnight was no longer necessary, but if the Court was not minded to remove the requirement for HG's presence, her involvement ought to be time limited and tapered off. If Professor Chick's evidence about the risk of relapse after a period of two years was to be taken as a guide, the formal supervisory role of HG should, it was submitted, end in January 2022 with an initial removal of the requirement upon her to stay overnight. The driving interdict should be removed, it not being practical for the pursuer not to drive the children. Senior counsel adhered to the specific issue orders sought, advising that by agreement notice had been given to school C that W would be leaving at the end of the present academic session, whatever the outcome of the present proceedings.

[33] Senior counsel commenced her analysis of relocation by reference to the diagnoses of complex and post-traumatic stress disorder made respectively by Dr Ferguson and Ms McKechnie. It was understood that Dr Ferguson had been advised of the 2011 diagnosis after his consultation with the defender, but had not included it in his report. Dr Ferguson had not taken into account the sexual assaults upon, and certain adverse childhood experiences of, the defender. Both Ms McKechnie and Dr Ferguson, however, attributed their diagnoses to the pursuer's behaviour. The condition diagnosed in 2011 had been left untreated. The key issue accordingly became the defender's perception of events as threatening when in fact, it was submitted, they were not. In terms of the potentially available support network in the south of England, senior counsel submitted that the defender had overstated the support which she said that she would have there, submitting that looking for a home, starting the children at a new school and commencing teacher training would surely be a particularly significant undertaking for the defender. There was

no real clarity as to where the defender would settle with the children, nor was it known which school they would attend or indeed where the defender would be working. In any event, the pursuer had no accommodation available to him which would support the exercise by him of contact in the event of relocation being granted and he would likely lose contact with the children's school as he would not be locally available. Senior counsel submitted that the relocation of the children would require them to move home and school, with D in particular having vulnerabilities, in a manner contrary to their expressed views.

Submissions for the defender

[34] Senior counsel for the defender moved the court to grant a residence order in favour of the defender and to make a specific issue order permitting the children to reside in England with the defender. A contact order should be pronounced during school term time on a direct basis every second weekend from after school on a Friday until the commencement of school on a Monday morning. In addition an order should be pronounced for indirect contact by FaceTime each Wednesday evening, and for indirect contact alternating with direct contact every second Saturday morning and Sunday evening. Senior counsel further sought a direction from the court that until summer 2022 any direct contact be supervised or supported by HG or another person agreed between the parties.

[35] Senior counsel submitted that before making any order in terms of section 11 of the 1995 Act the Court would require to be satisfied that such an order was in the best interests of the child and to have regard in particular to the criteria set out in section 11(7B)(a) to (d) in respect of the protection of a child from any abuse or risk of abuse. The Court would require to adopt a presumption free approach and undertake a balancing exercise with the welfare of the children as the paramount consideration. Senior counsel referred to several of

the authorities on relocation cited by senior counsel for the pursuer, emphasising that much depends on the facts of each case but submitting that in the present case the Court required to consider the impact on the welfare of the children of the abuse and domestic abuse suffered by the defender.

[36] Senior counsel observed that the children had grown up in a household with two issues which were acknowledged as having a significant detrimental effect on the welfare of a child, namely substance misuse and domestic abuse or intimate partner violence. The children required both parents to be enabled to be in the best position to offer them safe, secure and nurturing care and that would include the re-establishment of trust between the parties to enable them to communicate in the best interests of the children. Senior counsel advanced the following eight propositions in the course of her detailed and constructive submissions, namely: (i) the defender has been subjected to domestic abuse/intimate partner violence by the pursuer and suffers from chronic post-traumatic stress disorder; (ii) D, W and B are children affected by the abuse by the pursuer of the defender; (iii) the pursuer's long-standing addiction and substance misuse continue to pose a risk to the children; (iv) it is in the best interests of each child that a residence order be made regulating that D, W and B live with the defender; (v) it is better for each of D, W and B that a residence order be made than that no order be made at all; (vi) it is in the best interests of D, W and B to maintain a relationship with the pursuer; (vii) it is better for each of D, W and B that an order be made regulating the arrangements for maintaining personal relations and direct contact between each of them and the pursuer; and (viii) the benefits for D, W and B in moving to reside with the defender in England outweigh any potential detriment to them.

[37] Developing and applying these propositions, senior counsel submitted that, standing the two significant factors of a history of abuse and of substance misuse, shared care was not

indicated by the particular circumstances in this case. The children had undoubtedly been affected by the breakdown of the marriage. Given the risk of relapse, caution required to be exercised in particular in the first two years of sobriety. The presence of HG at contact was a protective factor. It was clear from the evidence that HG was at the heart of contact between the pursuer and the children at all stages.

[38] On relocation, it was clear that moving to reside in England with the defender would safeguard and promote the children's welfare in the particular circumstances of this case. The defender had identified an achievable path to remunerative employment. While living in her present area the defender was dependent on the pursuer. She was presently living in temporary accommodation and although she would in the event of relocation be residing in temporary accommodation with FB in the first instance, she would in due course obtain more permanent accommodation. In the event of relocation, the children would all attend the same school. It was clear from the evidence of the defender that she would ensure that the best education provision available was secured for the children. This contrasted with the pursuer's vague and non-committal plans for their education. There would be no significant reduction in contact between the children and the pursuer in the event of a move to England. It was accepted that effort would be required on the part of the pursuer, but this would be manageable and would not involve the rupture of their relationship. In the particular circumstances of this case, there were compelling reasons for the relocation of the defender and the children to England.

[39] In the event of relocation not being granted, it was submitted that the making of the specific issue orders in respect of schooling sought by the pursuer would prevent the defender moving to the Edinburgh area, the facilitation of the attendance of the children at school B and school C being unmanageable for a single parent working and studying in

Edinburgh. In the event of both parties remaining in Scotland, the children should have direct contact with the pursuer during term time every alternative weekend from after school on Friday until the commencement of school on Monday and non-residential contact in the alternate week from after school on Friday until 6.30pm, together with indirect contact by video platform on Wednesday evenings. Contact during holidays would be what had been agreed on an equal sharing basis. In any event, direct contact should be supervised or supported at all times by HG or such other person as agreed between the parties.

Discussion and decision

[40] Parties are to be commended for the ongoing agreements which they have reached at different stages of these proceedings in respect of holiday contact arrangements. The present agreement is that future school holidays will be split equally between the parties, with the children spending half of the total time available with the pursuer and the other half with the defender, albeit in small blocks of time. The issues for resolution by the Court are accordingly in these circumstances limited to arrangements for residence and contact during term time; schooling arrangements; and an application by the defender to relocate in the south of England with the children.

[41] As at the date of issue of this opinion, D is aged 9, W is aged 7 and B is aged 5. Their views have been taken and reported to the Court, on instruction, by Dr Dalrymple, and I propose to take their views, as recorded above, into account in the generality in resolving the remaining contested issues between the parties.

[42] I accept the respective diagnoses of the defender by Ms McKechnie and Dr Ferguson of complex post-traumatic stress disorder. That said, while both of these witnesses attributed their diagnosis to the pursuer's behaviour during the marriage, the weight of

evidence before the Court to that effect was not convincing. In so stating, I confirm that I am not taking into account the evidence of Ms Roper in this matter. Ms McKechnie appeared to accept the defender's account of her childhood as "idyllic", notwithstanding the adverse childhood experiences involving the defender's parents and separate sexual assaults perpetrated upon her by two men prior to her meeting the pursuer. In November 2011 a clinician in London had made a diagnosis of post-traumatic stress disorder based on her account of the earlier incidents of sexual assault. Ms McKechnie advised that when complex post-traumatic stress disorder is left untreated a person can go on to have relationship difficulties. Dr Ferguson, although he was advised after his consultation with the defender of the 2011 diagnosis, had not included it in his subsequent report. He appeared to know nothing of the antecedent history of sexual assaults and very properly agreed that it would have been important to note the 2011 diagnosis as a matter of importance. In the light of these difficulties I am not able to find that the current respective diagnoses by these witnesses of complex post-traumatic stress disorder, which I accept, can be said to be, as was the position of these witnesses, attributable to the conduct of the pursuer during the marriage of the parties.

[43] In any event, I have no doubt at all that the defender has suffered from domestic abuse in its broadest sense on the part of the pursuer. I accept the defender's account of the incident with the stool. This was on any view highly intimidating and threatening behaviour by the pursuer towards the defender which must have been quite terrifying for her. I do not accept the other specific allegations of domestic abuse made against the pursuer in this case, however. With regard to the car return journey from Alnwick Castle, I accept the evidence of CB as a neutral party in the car at the time who did not feel that the speed was excessive or that the driving was unsafe, albeit that the pursuer was perhaps

driving faster than normal. The incident spoken to by the defender of a strike to the head early on in the marriage was volunteered by her in response to a question in cross-examination, but it was not, according to my own notes, a matter put, as it ought to have been in fairness had the matter been known to those advising the defender, to the pursuer when he himself gave evidence at the outset of the proof. My firm impression up until that short passage of evidence was that all parties were in agreement that there had been no actual direct physical violence between the parties in the course of their marriage. Nevertheless, it is the defender's very real perception of threat which is of ongoing significance and I fully accept that the defender appears to have an authentically held core belief, based on the perception of threat, that the pursuer is a danger to her. She could not contemplate, for example, even attending as part of a large group of parents the mid-term school C visit to X. That is a relatively minor example, perhaps, of a general picture which I took from the overall evidence in the case concerning the risk which the defender perceives to emanate from the pursuer. The defender accordingly requires, I accept, to be in a stable environment where she feels safe in order to embark upon suitable treatment for her condition. That treatment is readily available, both privately and on the NHS, as I understand it, and although the defender has as yet taken no specific steps regarding the starting of treatment, I fully understand that she will wish to do so once the outstanding disputes in the present case have been resolved. On the evidence before the Court, I am however not satisfied that a proper basis has been made out that the defender's condition and prospective treatment requires relocation to the south of England. Indeed, Ms McKechnie herself recognised that a move to Edinburgh would be amply sufficient to provide the required safe environment for the defender to embark upon this treatment and to get well again.

[44] Looking at the detail of the relocation planned, I must say that having heard the evidence thereon I found the proposal to be unimpressive in many of its practical aspects. On one view the plan could be summarised as, at least in the beginning, an exercise by the defender in sofa surfing in the family home of the very impressive FB, albeit FB is herself presently going through a separation. FB was unable to say how long the pursuer and the children would require to reside with her but anticipated that this would be perhaps for a period of 3 to 6 months. In terms of the available support of friends in the south of England, I considered that in the generality the defender did overstate the position, but I am of the view that she did so on the basis of an understandable enthusiasm for a future in a safe environment away from the pursuer and with well-meaning and long-standing friends from her past life. The reality of the arrangements proposed, was, however, extremely vague. In cross-examination the defender moved from a position of full-time teacher training at one of the schools in England referred to in her evidence with a staggered collection at the end of the school day to a part-time position. She could not answer a question about which year group B would enter. She did not know whether a probationary year was guaranteed and did not even hazard a guess at the rail travel time involved in order for contact to be facilitated in the event of relocation being granted. The accommodation at which she suggested the pursuer, and presumably the children, could live, was a flat in London which she had never visited. Finally, it appeared to occur to the defender for the first time in the course of her evidence that the pursuer would in fact require to return the children to her on a Sunday rather than taking them to school on a Monday during weekend contacts exercised by him in England.

[45] I formed an impression that the defender had simply not grasped the reality of the impact upon the children of the relocation plan which she proposed, albeit with the very

best of intentions on her part. The plan would involve her initially living in someone else's home for a short period while looking for a permanent home, all while enrolling the children at an as yet unspecific school and commencing her own teacher training at the same time, either on a full-time or part-time basis, again presently unknown. This would be a huge undertaking for any parent, even one as competent and optimistic as the defender was in the presentation of her planned move. In terms of the wishes of the children, D and W were crystal clear in their expression of negative views about any such proposed move and B could simply not comprehend it due to his young age. Accordingly, insofar as any wishes were stated by the children, the defender's proposed move would fly in the face of those expressed wishes and would on any view in addition present significant obstacles to the pursuer exercising meaningful contact with them, including school involvement, while they were in England. There would be real challenges in turn for regular contact to be exercised by the pursuer in Scotland. The evidence of the employment consultant about jobs and training for physics teachers in England and Scotland was in my view wholly neutral. The defender would be able to apply to commence teacher training in Edinburgh if she wished. There is of course at the end of that a guaranteed probationary year and the defender would further probably have the benefit of undertaking the training without payment of fees.

[46] In all of these circumstances I have no difficulty in rejecting the application for relocation. I do so on the specific facts which I have found established in this case, taking into account the views of the children and placing at the front and centre of my determination their welfare having regard to their whole circumstances.

[47] It is of note that parties have agreed holiday contact going forward on an equal split basis. The principle therefore that the children can reside and be cared for by the pursuer

for at least some period, albeit with the support or supervision to date of HG, would appear in these circumstances not to be a contentious one.

[48] I have already addressed the issue of, broadly put, domestic abuse and indicated my findings thereon. The issue of importance remains the perception of matters by the defender. This is a material consideration in the light of the matters raised in this case, and I have had particular regard to the provisions of section 11(7B)(a) to (d) in my consideration of the merits of the competing applications before the Court. Accepting that there has been abuse in the past in this case, the question arises as to what weight the Court should attribute to that in the determination of issues of contact and residence. My firm impression was that the background issues of domestic abuse arose very much in the context of the admitted significant and long-standing issues of substance misuse on the part of the pursuer. That said, the undertakings offered by the pursuer and his conduct since the separation are relevant factors on this point. On the linked issue of substance misuse, if there was to be a relapse in any form on the part of the pursuer, having heard the whole evidence in this case I am of the view that this may well, notwithstanding the said undertakings, give rise to a risk in the future of abuse by the pursuer. Accordingly I have found considerable solace in the impressive evidence of Professor Chick and Professor McPherson. As the proof developed, parties appeared to be accepting without challenge Professor Chick's evidence about the significant diminution in risk of relapse following a successful two year period of abstinence. Professor Chick was clear that he did not perceive, with all of his experience in the generality and in the specific case of the pursuer, any risk to the children in respect of residential or non-residential care by him of them.
Professor McPherson, while accepting a history of substance misuse and a potential to relapse, was in turn clear that he had no reservations in respect of the pursuer's ability to

parent the children. Professor McPherson, of course, himself had made the link between aggressive behaviours and substance misuse, observing that there would be an increased risk in aggressive behaviour on the part of the pursuer if he began to use substances again problematically, which is the point I have raised above. Professor McPherson concluded however, that the pursuer appeared to him to be committed to long-term abstinence and was very child-focused. In Professor McPherson's view, there was no obstacle to shared care in this case.

[49] Dr Dalrymple gave evidence that was in my view pragmatic and highly impressive. She emphasised that the children were well functioning and resilient but that caution should be applied in particular to moving them from their present schooling arrangements standing the number of changes they had already been through in recent times. In particular I have noted above a passage in the evidence of Dr Dalrymple about the involvement of the central care-givers of children during their early to middle childhood. Parents require to operate in a way which means that they are available to the children meaningfully in their recreational activities and schooling. This would of course involve proximity to the children and frequency of involvement in their lives in these key areas at that age. Dr Dalrymple further emphasised that the literature made clear that parents can change and that risk can be managed, the pursuer in this case having acknowledged the issues, demonstrated the placing of the needs of the children ahead of his own, demonstrated a capacity for change within a reasonable timescale and worked constructively with those involved in assisting the family. In her view there was no evidence that the children were in any way unsafe with the pursuer and she noted their real fondness for X.

[50] I have concluded in the whole circumstances, having regard again to the paramount issue for the Court, namely the best interests of the individual children in this case, that

shared care is achievable during term time, as it is of course the subject of agreement during school holidays. It is always difficult to fix arrangements in the evolving and busy lives of children, and doubly so perhaps when the lives of their parents are also changing in terms of work, health and accommodation, and there is a sense that one is stopping the clock at a particular, and perhaps random, moment in time. The decision which I am making, in July 2021, may well in its detail and substance be a different one from that which might be made if one was dealing with this case in say 6 to 9 months time or indeed had it been dealt with it 6 to 9 months ago. Nevertheless, on the whole evidence presently available I am satisfied that I can reflect the shared care which I consider to be in the best interests of the children by making the following orders to regularise the position, my view being that it would be better for the individual children in this case that these orders be made rather than that no orders be made. These term time orders will commence in September 2021 and apply during the school term only, the school holidays being the subject of agreement between the parties.

[51] I accordingly make an order that the children shall reside with the pursuer commencing in September 2021 during the school term for 6 nights in every 14. I further make an order providing that the children shall reside with the defender during the school term for 8 nights in every 14. The pattern will run on a bi-weekly basis, these weeks commencing on a Monday as follows:

(a) Week 1: Monday: pursuer; Tuesday: defender; Wednesday: defender; Thursday: defender; Friday: defender, Saturday: defender; Sunday: defender;

(b) Week 2: Monday: pursuer; Tuesday: pursuer; Wednesday: defender; Thursday: defender; Friday: pursuer, Saturday: pursuer; Sunday: pursuer.

The arrangement which is proposed allows the children to spend alternate weekends with each of the parties and for handovers to take place at school. It will permit each party to participate meaningfully in the recreational and schooling lives of the children and takes into account, insofar as it can, Dr Dalrymple's evidence about relatively limited periods of separation from each parent. I have elected to balance the time in favour of the defender on the basis that on any view she has to date been the children's principal care provider. I have chosen to make residence orders to provide what in my view is a necessary robustness to arrangements concerning the children standing what I have heard concerning the many changes that have occurred in their young lives over a short period of time. It is very much my hope that an essential and considerable stability can be achieved for them by way of these definitive final orders of the Court.

[52] The remaining issue between the parties relates to the specific issue orders sought by the pursuer in respect of schooling. I decline to make any such orders, having regard to the weight of evidence before the Court concerning the requirement that the defender be able to move away from the area that she presently resides and in which she and the children are presently, through their schooling arrangements, embedded. This will allow the defender to commence the treatment she requires for her condition and, if she wishes, to commence teacher training in Edinburgh or wherever else she chooses to reside. The specific issue orders sought on behalf of the pursuer were understandable in terms of the stability which school C and school B offer to the children, and in particular to D, in their present circumstances during which they have endured much change. Indeed, Dr Dalrymple's evidence on this matter pointed, in my view, very much towards keeping the children at their present schools; that said, however, Dr Dalrymple also emphasised their resilience and high level of functioning in difficult circumstances, and I am confident that if necessary, and

of course this will require to be the subject of agreement between the parties, a single further move of schools might not only be achievable by them but be in their best interests and that of the family as a whole. In any event I am not satisfied that I should make the orders sought in respect of schooling on behalf of the pursuer as I do not wish to tie the defender to her present location and community for the reasons which I have stated.

[53] In this case my view is that both parties have much to offer to their children, albeit that both parties, in very different ways, are to some extent damaged individuals. The clear impression I took from hearing their evidence, and indeed the whole evidence in the case, was that with good will and the support of family, friends and professionals assisting them, the considerable stability to which reference has already been made can be achieved in a relatively short space of time for the benefit of the whole family and in particular of course for the children. I should add that I formed an extremely favourable impression of the children themselves through the whole evidence presented and in particular from the evidence of Dr Dalrymple and of the parties themselves.

[54] Turning to various miscellaneous matters which require to be addressed, the undertakings offered at the outset of the submissions of senior counsel for the pursuer will be recorded in the minute of proceedings accompanying the interlocutor which itself accompanies this opinion. I propose that the interdict in respect of the pursuer's driving be recalled. Further, I noted the willingness of HG to continue to be involved in the support of contact. At this stage I wish to record the thanks of the Court to HG for her vital and impressive commitment to the children and to the parties during what must have been a very difficult period in the course of her employment with the family. Standing, however, that I am making residence orders, there can be no formal role for HG in the support of contact. It is, however, very much my hope that she will continue to be involved in an active

and supportive role at least until the end of the year 2021 and further in regard to handovers and in other circumstances, ensuring that the parties do not meet in person. An alternative person will require to be identified and agreed by the parties to support this arrangement and I am content to leave that matter to parties' common sense and that of their advisors. I would also raise in passing the subject of future communication between the parties. It was clear that the use of a child focused and practical diary, as exchanged between the parties, will facilitate useful and non-confrontational communication between them. This is already a matter which parties were seized of and which they will I am sure wish to utilise during their future inevitable child related communications over the coming months and years.

Disposal

[55] For the reasons outlined above, I accordingly make residence orders in favour of each of the parties in the terms which I have already outlined. I refuse the specific issue orders respectively sought by parties, in respect of schooling by the pursuer and of relocation by the defender. The *interim* interdict previously granted in respect of the pursuer driving the children is recalled and I make no order in respect of the supervision or support of contact. The undertakings referred to above will be recorded in the Minute of Proceedings. In making these orders the accompanying interlocutor will reflect that I have sustained for the pursuer his first plea-in-law, in part, and third plea-in-law, and for the defender, that I have sustained, again in part, her first plea-in-law and have repelled the second plea-in-law for the defender. Finally, I reserve all questions of expenses.