SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2025] SC EDIN 62

EDI-F498-21

JUDGMENT OF SHERIFF ALISON STIRLING

in the cause

B(A)

Pursuer

against

B(J)

Defender

Pursuer: Ahmad, Advocate, Thompson Family Law Solicitors
Defender: Laing, Advocate, Gibson Kerr

Edinburgh, 25 August 2025

The sheriff, having resumed consideration of the cause:

Finds the following facts admitted or proved:

The parties and the decree

1. The pursuer is the mother and the defender is the father of the child Iain, who was born in late 2016. They married in early 2011. They separated in 2020. They both have parental rights and responsibilities in respect of Iain.

2. The pursuer was 41 years old at the date of proof. She has previously worked in a care home. The defender was 66 years old at the date of proof. He was an Executive Officer in the Civil Service. He is retired.

3. On 23 May 2022 the sheriff granted decree in terms of the parties' joint minute. The sheriff made a residence order in favour of the pursuer. He made a contact order in favour

of the defender providing that Iain would have residential contact with the defender from 1 pm every Sunday until the start of nursery or school on Wednesday (or 5 pm if there was no school). Regarding school holiday contact he made an order providing that Iain would have residential contact with the defender for 7 days during the February school half term holiday commencing at 1 pm on the first Sunday of that holiday; residential contact with the defender for the first week of the summer school holiday from the first Saturday to the second Saturday at 5 pm; residence with the pursuer from 5 pm on the second Saturday until 5 pm on the third Saturday of the summer school holiday period; and residential contact with the defender from 1 pm every Sunday until 5 pm every Wednesday for the remainder of the summer school holiday period. He made an order that Iain was to reside with the pursuer for one week during the October school holiday. He made an order that Iain was to have residential contact with the defender from 1 pm every Sunday until 5 pm every Wednesday. He made an order providing that Iain would spend 5 hours with the parent with whom he was not staying on his birthday. He made an order providing that Iain was to attend Primary School One. He made an order for no expenses.

4. Residence, contact and schooling operated in terms of that decree until 29 September 2024.

5. On about 15 November 2024 the pursuer lodged a minute to vary the decree. She sought to vary the defender's contact to nil. She also sought a specific issue order providing that Iain should attend Primary School Two. The pursuer averred that the material change of circumstances was the defender's unreasonable conduct and alcohol consumption. She referred in particular to the defender having been arrested on 29 September 2024.

6. The defender lodged answers, craving an order requiring Iain to be re-enrolled at Primary School One, the pursuer having removed Iain and enrolled him at Primary School

Two on 22 October 2024. He averred that in correspondence between agents he had refused to agree to Iain changing school, and that the pursuer had used the opportunity of his arrest to change the school. He averred the detail of the charges he had faced, and that on 18 October 2024 the charges had been diverted from prosecution. The defender adjusted into his pleadings a plea in law that there was no material change of circumstances.

The parties' contact with the criminal justice system

7. On 28 November 2017 the defender was convicted of behaving in a threatening or abusive manner likely to cause a reasonable person to suffer fear or alarm, contrary to the Criminal Justice and Licensing (Scotland) Act 2010 section 38(1). The complainer was the pursuer. Sentence was deferred for good behaviour and on 29 May 2018 he was admonished.

8. On 16 September 2020 the defender called the police to report that following an argument the pursuer had spat in his face and coughed at him. Police attended and the pursuer was conveyed to a police station. On 3 October 2020 the defender called the police to report an incident in which the pursuer had shouted at him, pulled at his arm causing minor scratches to his arm and slapped his face. Police attended and conveyed her to a police station. She was charged with an offence and placed on bail with conditions not to approach the defender or his property. She pled not guilty and a trial diet was fixed for February 2021. That diet was postponed to August 2021 and then until 12 January 2022. The pursuer was ultimately granted an absolute discharge, the facts of the offence having been established.

9. On 29 September 2024 Iain was in the defender's care. A member of the public who worked at Primary School One contacted the police because the defender appeared to be

intoxicated while caring for Iain. He was slurring his words and unable to operate his mobile telephone. He and Iain went into the defender's home. The police attended. Police assessed him as too intoxicated to care for Iain. The defender was arrested and charged. Police bail conditions restricted the defender's contact with Iain to supervised contact, facilitated and monitored by a third party. Iain was returned to the pursuer's care. Police raised an Inter Agency Referral Discussion at about 3 pm. The Child Protection Resource in Edinburgh were involved. The Inter Agency Referral Discussion was concluded on 25 October 2024 and the Child Protection Resource involvement ended on 29 October 2024.

10. The defender faced a charge of being drunk in charge of a child whilst in a public place, contrary to the Civic Government (Scotland) Act 1982 section 50(2). He also faced a charge of behaving in a threatening or abusive manner likely to cause a reasonable person to suffer fear or alarm by shouting, swearing and acting in an aggressive manner towards a paramedic, contrary to the Criminal Justice and Licensing (Scotland) Act 2010 section 38(1). Those charges were diverted from prosecution. The defender successfully completed the diversion from prosecution programme, as a result of which the procurator fiscal depute decided to take no further prosecutorial action. The prosecutor reserved the right to prosecute at a later date if offending of a similar nature came to light.

The defender and alcohol

11. The defender was not intoxicated at a handover at Marks and Spencers in July 2024.

12. As part of his diversion from prosecution, the defender worked on his mental health. He engaged with professionals including medical professionals. He has reflected on his misuse of alcohol. He accepted he was abusive and aggressive towards the paramedics. He accepted that the incident would have been traumatising for Iain.

13. Since 29 September 2024 the defender has not consumed alcohol while caring for Iain.

14. On 7 November 2024 the defender had a private FibroScan test performed. It showed that his kPa score (liver stiffness) was 3.8, within the normal range, indicating little or no scarring or inflammation. His CAP (Liver Fat) test result was 233, within the lowest range indicating a percentage of 0 – 10 % Liver Fat.

15. The defender was not "tipsy" when returning Iain from contact on 16 February 2025.

16. The defender was not intoxicated on a video call with Iain in March 2025.

Education

17. Iain started Area One Nursery in January 2020, when he was 3 years old.

18. Iain has had additional support at school since he was in nursery through Child Planning Meetings. He had input from the health visitor, the head teacher, the Early years' officer at the nursery, an educational psychologist and an additional support needs teacher. He was given additional support to develop his language and communication skills. The nursery assisted him to make friends.

19. During lockdown when schools were closed Iain was permitted to attend nursery because he was a vulnerable child. The defender requested that Iain had an additional year at nursery and an enhanced transition to Primary 1. The professionals assessed Iain and granted the request. Part of Iain's difficulties related to the significant domestic disharmony between his parents.

20. Iain has been at Primary School One since he was 3 years old. He has longstanding friends, some from nursery and more from Primary 1.

Withdrawal from Primary School One

21. On 22 October 2024 the pursuer removed Iain from Primary School One and placed him in Primary School Two in breach of the decree of 23 May 2022. She did so during the course of an academic year. There was no transition planning. She saw the defender's arrest on 29 September 2024 as an opportunity to suit her own convenience of having Iain at a school within walking distance of her house. On 3 July 2024 when the defender messaged the pursuer telling her he had bought Iain some clothes for Primary 3 and offered to buy him more, the pursuer told him not to bother because she was changing Iain's school in August. She knew from correspondence between agents that the defender did not consent. She had no regard as to whether the move was in Iain's best interests.

22. On 16 December 2024 the court ordered that Iain was to be re-enrolled at Primary School One on an interim basis.

23. It was in Iain's best interests to attend Primary School One at the very start of the spring term so that he could settle back in following a natural break in the academic year. The pursuer did not return him when term started on 6 January 2025. She returned him on 13 January 2025.

24. The move to Primary School Two and then back to Primary School One was disruptive for Iain. At Primary School Two he was very quiet and shy but was beginning to come out of his shell, and the school was beginning to see progress in terms of his learning and confidence by the time he left. He found the return to Primary School One challenging and he was very withdrawn. On several occasions he was quite upset in class but unable to communicate why. In the spring term of 2025 he was regularly late to school and often missed the teaching input in the morning. The pursuer had sole responsibility for getting him to school that term.

25. In June 2025 at the end of Primary 3 Iain was on track to reach the First Level of the Curriculum For Excellence by the end of Primary 4 in reading and in numeracy. He was not yet on track to reach that level in writing, in listening and talking, and in health and wellbeing. He was working with support in the three areas where he was not on track. At the end of Primary 2 he had been on track to reach those levels in listening and talking, and in health and wellbeing. The two changes of school will have contributed to his no longer being on track in those areas.

26. In withdrawing Iain from Primary School One where he had been settled for several years with no transition planning the pursuer did not act in Iain's best interests. She acted in her own interests.

27. The pursuer wants Iain to move to Primary School Two for her own convenience.

Parties' understanding of the importance of education

28. The pursuer does not know what Iain is learning. She is not able to help him with his homework, even though he is only 8 years old. She does not see the importance of helping him with his homework. She does not know what Scratch Junior and Sum Dog are, or that Sum Dog is about maths. The pursuer has no homework routine for Iain. The defender has asked her to pass him Iain's homework on Sundays but she has not done so. She has refused to allow the defender to have more contact on Sundays to allow him to complete Iain's homework with him. She does not engage with Iain's online learning journal. She is not interested in what he is learning. She assumes that the curriculum in both schools is the same because they are both council run. She does not understand the importance of supporting Iain's education.

29. The defender accesses Iain's online learning journal to keep up to date with what Iain is doing. He has asked the school to send him Iain's homework so that he can do it with Iain. Primary School One recommended the website Scratch Junior to teach children coding, which Iain and the defender have used. They also use the website Sum Dog, where Iain does mathematical problems against the clock.

30. The defender has attended all of Iain's parent evenings while he was a pupil at Primary School One.

31. The defender has taken Iain to Area One Library where Iain can meet friends from school. He has taken Iain to Lego Club on alternate Tuesdays, which some of his friends attend.

32. The defender is sensitive to Iain and picks up on his abilities. He celebrates Iain's achievements. Following his end of year report for Primary 2 which reported that he is good at running, jumping and throwing, the defender sought to foster his sporting ability. The defender is a good runner, and can help Iain with running. The defender wishes Iain to have the opportunity to try athletics, badminton and tennis, and to learn to play football. He wanted to take Iain to free archery lessons and to a running camp at Private School One during the summer of 2025, but the pursuer did not respond to his requests. Participating in sport will boost Iain's confidence and let him meet a wide variety of different people. PE had been Iain's favourite subject. Sport is important for his physical and mental health. Iain will have more opportunities for sports, hobbies and activities if he lives with the defender from Sunday until Wednesday.

33. The defender knows who Iain's teachers will be in Primary 4 at Primary School One. Iain met his new teachers for Primary 4 there before the end of the summer term. He will have a new male teacher for four days a week and the principal teacher on Tuesdays. The

principal teacher had been at the school for many years and had previously taught Iain if other teachers were absent. Term started on 14 August 2025.

34. On 27 June 2025 the defender was awarded a Certificate of Participation for completing a course for parents about Raising Children with Confidence. The course was run by the City of Edinburgh Council. He found out about the course through his involvement with other parents at Primary School One. It helped the defender to understand how Iain thinks.

The pursuer's failure to take Iain to school on time

35. The pursuer frequently takes Iain to school about half an hour late. She did so before 29 September 2024 and after. That is disruptive to Iain's education. He misses teaching time.

36. Iain does not like being late for school. When he arrives late he has to go into the school office and then be taken into his classroom by a member of staff after the class has started. He feels awkward and embarrassed. It upsets him.

37. At the parents' meeting in May 2025 Iain's class teacher told the defender that Iain is missing the start of his lessons and that is upsetting him.

38. When the defender was responsible for getting Iain to school, he took Iain to school on time. He understands that it is embarrassing for Iain to attend classes late, and that it has an adverse effect on his education.

39. There is a direct bus service between the pursuer's house and Primary School One. The pursuer could catch a bus at 0811 hours every morning from Ocean Terminal, a 5 minute walk from her home. The bus arrives at Primary School One at 0836 hours. School starts at 0855 hours. If the pursuer caught that bus Iain would be in time for school.

40. It would take the pursuer and the children about 26 or 27 minutes to walk from her house to the new Primary School Two. There is a tram, which might cut down the travel time, but Iain would have to walk to the tram from his house, and from the tram to Primary School Two.

41. It takes less than 10 minutes to walk from the defender's house to Primary School One.

42. The defender has offered to pay for taxis in the morning so that the pursuer can get Iain to school on time. Taxis would cost around £200 a week. The defender is able to afford that. He has offered to collect Iain from the pursuer's home and take him to school himself, either by taxi, by bus or by walking or running to the pursuer's house. These offers have been declined by the pursuer.

The two schools

43. The two schools are similar in terms of league tables, but Primary School One ranked higher than Primary School Two in 4 out of the last 5 years, and in two of these years it ranked significantly higher.

44. Primary School Two has at least two classes per year. Primary School One only has one class. It is a smaller school. Iain knows many of the staff and the pupils at Primary School One and they know him.

45. Iain's headteacher at Primary School One advised that a change of school is not beneficial for him, or for any child who lacks confidence and finds social interaction difficult as he does.

46. Iain has been at Area One Nursery or Primary School One since January 2020, other than for half of the autumn term in 2024.

47. It is in Iain's best interests to remain at Primary School One to complete his primary education.

Other welfare issues

48. At the pursuer's request her friend came to court with Iain and the pursuer's baby on the morning of the first day of the proof. That was the pursuer's arrangement for the care of both children at the start of the proof. Iain was in the canteen. He saw the defender and waved to him. The pursuer was not there initially. The children remained in the court building from about 9 am until about 12 noon. It was not in Iain's best interests to be at court at all. It was not in his best interests to have been brought to court in relation to litigation between his parents about him. Edinburgh sheriff court has busy criminal courts with many offenders milling about. There was a loud disturbance during the submissions when an accused person was screaming for a lengthy period of time outside the proof courtroom.

49. On the second day of the proof the pursuer's child care arrangements were for Iain and the baby to go to McDonalds for breakfast with a friend of the pursuer who had just come off a night shift.

Contact with Iain's wider family

50. The pursuer has no family in Scotland.

51. The defender and Iain met up with the defender's mother and the defender's nephew BR and his two children in Tranent every couple of weeks until December 2022 when the defender's mother died. After that the defender took Iain to Livingston by train to visit BR and his family on most Sundays when BR's work rota could accommodate that.

That amounted to roughly half the Sundays in a year, but the pattern was irregular. The defender and Iain tended to visit for about 5 hours. Sometimes Iain brought homework with him, and he did it with the defender. Iain played in the garden or with computer games. He got on well with BR's children L and K, and his step daughter C, who were all several years older than Iain. He liked dancing with C. Iain enjoyed himself and was happy. Iain usually spent Christmas and Easter with BR's family. The restrictions placed on contact since 29 September 2024 meant that there was no time for Iain to go to Livingston. BR visited Iain in Edinburgh at Easter.

Communication between the parties and whether they can cooperate with each other: section 11(7D)

52. The defender apologised to the pursuer for the incident on 29 September 2024.

53. The pursuer does not comply with court orders for contact. She cancels contact to suit herself. She does not answer FaceTime calls. She blocks the defender's number on her phone. She couples discussions about contact with discussions about money, making the defender feel he has to give her money in order for contact to take place. She changes the dates and times to suit her own convenience.

54. The defender tries to cooperate with the pursuer. On 3 July 2024 he emailed the pursuer to say that he had bought Iain some clothes aged 8 – 9 for Primary 3, and that he could buy more before school started if she wanted. The pursuer responded telling the defender not to buy the jumper because she was going to change Iain's school in August 2024.

55. On about 22 October 2024 the pursuer unilaterally moved Iain from Primary School One to Primary School Two. She did not tell the defender she had moved Iain until

several days after the event when the defender was about to have telephone contact with Iain. The defender had no opportunity to process the information before having to discuss it with Iain.

56. The defender had been the parent who dealt with Iain's health and dental needs. In September 2024 the pursuer changed Iain's GP from Area One Medical Practice to Area Two Surgery without the defender's knowledge or consent. The defender found out when he went to uplift Iain's repeat prescription and was told that Iain was no longer a patient. Area Two Surgery told him that he was not registered as Iain's father on his patient record. The pursuer registered her friend RMcK as Iain's emergency contact. The defender has now been recorded on Iain's medical record.

57. In April 2025 the defender repeatedly sent the pursuer WhatsApp messages asking her if she had taken Iain to the GP because he had blisters round his mouth. After 8 days she responded "Assholeee it's not a herpes it's impetigo he already been to the doctor" (*sic*). She did not respond to his further texts for updates.

58. The pursuer's daughter was born in December 2024. The pursuer did not tell the defender that she was pregnant and that she had given birth. On 25 December 2024 the defender's nephew saw the pursuer's posts on Facebook about having had a baby. At a court hearing in February 2025 the pursuer confirmed she had had a baby.

59. The defender asked Iain about the baby and who the father was. Iain said he was not allowed to tell the defender. Iain told him that the baby's father visited the house to see the baby, and that the pursuer visited him with the baby. The defender was unable to support Iain through this change in his life, because he had not been told about it.

60. The defender offered to meet the pursuer, Iain and the baby so that Iain would know that he could talk about the baby to the defender. They have since met.

61. The defender ordered two sets of Iain's school photographs, and put one set in Iain's school bag for the pursuer. The defender agreed to have contact with Iain on 10 July 2025 instead of on 13 July 2025 so that the pursuer could take him on a camping holiday. On 10 July 2025 the defender had contact for 7 hours. They went for a long walk. Iain was happy and enjoyed himself.

62. The defender is both able and willing to work with the pursuer.

Whether there has been abuse by one party of the other and whether that has affected Iain: section 11(7B)

63. The pursuer often tells the defender in front of Iain that he is Iain's grandfather, not his father, because of the defender's age.

64. She frequently refers to him as "assholeee" both in text and in email, and also over the phone. She says it in front of Iain.

65. She asks Iain if the defender is drunk.

66. The pursuer did not allow the defender to see Iain on Iain's birthday despite the terms of the order.

Iain and his views as expressed to the child welfare reporters

67. Iain was 8½ years old at the time of the reports. He is able to express his views.

68. Iain is a lovely little boy. He is a delightful and engaging child with a keen sense of humour. He is thoughtful and considerate. He is honest and polite. He can be shy, but he is quite outgoing with people he knows.

69. Iain likes maths, but he does not like division. He has a friend called F. He likes Lego. He likes watching Netflix.

70. Iain has a bedroom in both houses. He likes being at the home of both of the parties. He likes his cat, who lives in the defender's house.

71. Iain understands the contact regime. Sometimes they go to the park. Sometimes the defender cooks pizza for him. He enjoys contact with the defender. He thought he might like to stay overnight with the defender again.

72. Iain used to visit his cousin by train when contact was for a longer period of time. He liked seeing his cousin. The pursuer does not have family here.

73. Iain is half-Scottish and half-Asian.

74. He likes both schools.

Finds in Fact and Law:

There has been no material change in circumstances justifying variation of the decree of 23 May 2022.

Therefore:

1. sustains the defender's first plea in law; and repels the pursuer's first plea in law;

2. refuses the pursuer's first and second craves; and

3. finds no expenses due to or by either party.

NOTE

Introduction

[1] The pursuer is the mother and the defender is the father of Iain, who was born in late 2016.

[2] On 23 May 2022 the sheriff granted decree in terms of the parties' joint minute making *inter alia* a residence order in favour of the pursuer and orders for contact in favour of the defender, the most significant of which was residential contact every Sunday from 1 pm until the start of school on Wednesday, or 5 pm if Wednesday was not a school day. Residential holiday contact was also regulated, with the defender having 7 day periods of residential contact. A specific issue order was made requiring Iain to attend Primary School One.

[3] On 15 November 2024 the pursuer's minute to vary was warranted, and a procedural hearing was fixed for 13 December 2024. On 13 December 2024 a child welfare hearing was assigned for 16 December 2024. At that child welfare hearing the sheriff made orders for interim contact and ordered the child to be re-enrolled at Primary School One. The sheriff assigned 11 February 2025 as a child welfare hearing for discussions on contact only, and 11 March 2025 as a child welfare hearing on the school Iain should attend.

[4] On 11 February 2025 the sheriff refused the pursuer's motion for contact to take place in a contact centre and for a social work report *in hoc statu*. The sheriff varied the interim contact order and made an interim contact order finding the defender entitled to unsupervised contact with Iain on Sundays from 1 pm until 5.30 pm, with handovers at a specified location and finding him entitled to Facetime contact every Wednesday at 7pm for up to 30 minutes, or at times otherwise agreed. The sheriff noted that the parties' relationship was acrimonious and that an order for contact with specific days and times and minimising contact between them was necessary and should be strictly adhered to.

[5] On 11 March 2025 the sheriff fixed a three day proof commencing on 14 July 2025, and set a timetable for further procedure. On 28 March 2025 the court re-appointed Fiona

Corsar to prepare a child welfare report. On 1 July 2025, having heard submissions, I appointed Angela Craig as child welfare reporter to take Iain's views.

[6] Evidence was led on 14 and 16 July 2025. The pursuer gave evidence herself and led evidence from TD, RMcK and MS. The defender gave evidence himself and led evidence from BR. TD was a professional witness and she spoke to social work documents. All the other witnesses had sworn affidavits, which they adopted. Parties had also entered into a joint minute of admissions. Paragraph 13 of that joint minute only agreed that a copy letter was a true and accurate copy. The terms of that letter were not agreed, and it was not put to any witness.

[7] On 17 July 2025 I heard submissions on evidence, made an interim order for contact, and made *avizandum*.

Submissions

The pursuer's submissions

[8] Counsel for the pursuer adopted her written submissions and supplemented them orally.

[9] Counsel asked me to find the pursuer credible and reliable, and to accept her evidence that she sometimes did not remember specific details as a plausible reason for any inconsistencies. She asked me to find that the defender was not credible or reliable and that he had not been truthful about his alcohol consumption and had taken no steps to address this problem.

[10] Counsel focused on the pursuer's case that the defender had a problem with alcohol generally and that specific incidents had occurred. She referred to the incident on 29 September 2024 and the charges laid by the Crown. She submitted that this would have

been traumatising for the pursuer and for Iain. That incident was evidence of abuse in terms of section 11(7B). Counsel referred to the pursuer's evidence that the defender had also been under the influence of alcohol at handover in June 2024, that he was drunk at handover after contact in July 2024 in the presence of her friend MS, that the police had had to be called by the head teacher because of the defender's behaviour on an occasion, that the defender was too drunk to have contact on 26 January 2025, that he was drunk when returning Iain after contact on 16 February 2025, and that he was drunk on a video call in around March 2025. The liver and hair strand tests did not show whether the defender had consumed alcohol.

[11] The pursuer's evidence was that contact since 29 September 2024 had gone well because she was present during contact. She had continued to facilitate contact despite her concerns. If the defender were to have overnight contact, that would increase the risk of Iain being exposed to the defender consuming alcohol.

[12] The defender did not have contact with Iain on Iain's birthday, though he had telephone contact and he had had in person contact the day before Iain's birthday.

[13] Counsel submitted that Iain was shy and not able to express himself easily, and that he was more in need of safeguards. That could be seen from Fiona Corsar's report dated 25 June 2025 at pages 3 and 5. The pursuer's evidence was that she questioned Iain about whether the defender was drunk at contact, Iain did not understand what being drunk meant but he said that the defender lay in his bed watching television.

[14] Although Iain had indicated to the child welfare reporter that he might like to stay overnight again at the defender's house for one night, the pursuer was opposed to residential contact.

[15] Counsel submitted that if there were a return to the order of 23 May 2022, that would have an adverse effect on Iain's relationship with his 6 month old half-sister.

[16] Counsel submitted that the defender knew that the pursuer had wanted to move Iain to a school in her catchment area. She moved him to Primary School Two in October 2024 following the defender's arrest. The pursuer has been involved in Iain's education. The defender had been involved in Iain's education at Primary School One, and he could have the same input at Primary School Two.

[17] Iain's school report was positive. Iain had told the child welfare reporter in March 2025 that he liked both schools. Counsel submitted that he did not have a strong attachment to Primary School One, having regard to the report. She submitted that he would easily settle at Primary School Two again. The pursuer's evidence was that both schools offered the same education.

[18] Primary School Two was nearer for the pursuer, and less time was spent travelling to that school. The pursuer was on maternity leave, but intended to return to work. She had obtained a nursery place for her baby. It was impractical for her to deliver the baby to nursery in Area Two and then take Iain to Primary School One.

[19] Counsel referred to Iain's lateness for school and to homework. She referred to potential difficulties of Iain attending High School One because he is not in the catchment area.

[20] The pursuer had arranged appropriate activities for Iain, including swimming and Lego.

[21] She referred to the Children (Scotland) Act 1995 sections 1, 2, 6(1C), 11(2)(d), (e), (7)(a), (b), (7A), (7B), (7C), (7D) and to *A* v *A* [2020] 10 WLUK 613 and *R* v *R* [2021] CSOH 69.

[22] [22] She invited me to find that the defender had harmed Iain, particularly in relation to the incident on 29 September 2024, and that this amounted to abuse in terms of section 11(7B). There was a risk that he might be exposed to similar harm, and so there

should be no residential contact. She submitted that contact should be on Sundays from 1 pm until 5.30 pm. She invited me to grant the specific issue order to allow Iain to attend Primary School Two.

[23] In her reply to the submissions of counsel for the defender, counsel submitted that there was a material change of circumstances having regard to the combination of events including the incident on 29 September 2024, the pursuer's new baby, the pursuer's wish to return to work, the need to secure Iain's education in the future, and Iain's friends. The pursuer had not focused on education: both schools were similar. Having regard to the impact that the incident on 29 September 2024 had had on the pursuer along with subsequent incidents, she had a genuine concern about residential contact. No change should be made to the interim contact order.

The defender's submissions

[24] Counsel adopted his written submissions and supplemented them orally.

[25] Counsel moved me to find that there had not been a material change of circumstances since decree was granted on 23 May 2022. Alternatively he moved me to make a contact order providing that Iain should have at least one overnight contact with the defender every week, seven consecutive days with the defender in the February holidays and seven consecutive days in the summer holidays, and to make a specific issue order that Iain should attend Primary School One for the remainder of his education at primary school.

[26] Counsel for the defender referred to the Children (Scotland) Act 1995 sections 6(1) and 11(7)(a) and (7A – 7E). He submitted that in relation to schooling and the no order principle, the onus was on the pursuer to satisfy the court that it was better to make the specific issue order than not to make that order.

[27] He referred to *J* v *J* 2004 Fam LR 20 at paragraph 13, lines 15 – 23, where the Second Division upheld a contact order, and acknowledged that while that might cause some temporary upset to the children the long-term benefit to them outweighed that. He referred to *Sanderson* v *McManus* 1997 SC (HL) 55 at page 58 B-E and to *D* v *L* 2021 SAC (Civ) 28 at paragraph 20 for the proposition that where there is a material change in circumstances it is permissible to proceed by minute to vary. Counsel referred to *B* v *Scottish Ministers* [2010] CSIH 31, 2010 SC 472 at 485 paragraph 42 for the standard of proof to be met in civil cases where there was an allegation of criminal conduct such as caring for a child while under the influence of alcohol.

[28] Counsel referred to the evolving nature of the pursuer's allegations against the defender as the proof progressed. During her evidence she alleged that the police had been involved on other occasions. If this was correct, there should have been other IRDs which could have been lodged, and TD as a child protection social worker would have been made aware of them. Nor was anything produced from the school to confirm the pursuer's allegation that the school had had to call the police because of the defender's conduct at the school.

[29] Counsel submitted that the defender was a credible and reliable witness. His affidavits were detailed, and supported by the documentary evidence lodged. By contrast the pursuer's affidavits were brief, and contained errors which had to be corrected including in relation to dates. The defender's oral evidence was clear. He made admissions against interest, accepting that Iain loved the pursuer and that she was an important person to him, and that he liked both schools. He was genuinely remorseful in relation to the events of 29 September 2024.

[30] Counsel submitted that BR was also credible and reliable. He did not advocate for the defender. He recognised that the events of 29 September 2024 were concerning. He was not subject to any meaningful cross-examination which undermined his credibility and reliability.

[31] Counsel submitted that the pursuer's evidence lacked credibility on several issues. She knew that she needed the defender's consent to change Iain's school because her agents had asked the defender's agents if the defender would consent. She had changed Iain's GP surreptitiously, without discussing it with the defender. She did not put the defender down as am emergency contact at Area Two Surgery: she put her friend down instead. These actions were to make sure the defender was not involved in Iain's life.

[32] Counsel also submitted that she was not reliable on several issues. He submitted that she lacked coherent reasoning on a number of issues. He submitted that she prevaricated and digressed, only answering the questions she wanted to answer. The pursuer had given evidence in cross examination that there was other specific evidence supporting her case but which had not been lodged. She said she did not know it had to be lodged, despite having lodged six inventories of productions since 2021.

[33] Counsel submitted that RMcK's evidence was of limited assistance. She might have benefitted from an interpreter. There were issues about her reliability. Some of her evidence was hearsay of the pursuer, her affidavit was sworn four months before the proof, her recollection was not good, she did not understand the contact arrangements, and she thought Iain should move to Primary School Two because it was more convenient.

[34] Counsel submitted that although TD was a credible and reliable witness, her evidence of limited assistance because she was not involved with the family for long.

[35] MS had sworn her affidavit "in support of her friend" She omitted important evidence such as her supervising contact between the defender and Iain and that contact going well. She accepted that Iain had a good relationship with the defender. She accepted that she could not give an informed view on his future education.

[36] The contents of the letter of 6 March 2025 from SB had not been agreed and it could not be relied on, although the pursuer sought to do so in her submissions at paragraph 57.

[37] The onus was on the pursuer to prove her averment that the defender was an alcoholic, but she had not led a skilled witness. The kPa (liver stiffness) test result of 3.8 was a good result and suggested that it was in the normal range, meaning little or no scarring or inflammation. The CAP (liver fat) test result of 233 was in the lowest category, with a live fat percentage of between 0 and 10%. While the test results are not definitive, they tended to suggest that the defender is not an alcoholic to the extent that he regularly or chronically uses alcohol such that it had caused damage to his liver as at November 2024.

[38] Counsel for the defender submitted that there had been no material change in circumstances since the decree of 23 May 2022 which would justify the minute to vary. The pursuer had expressed concerns about the defender's alcohol misuse to the child welfare reporter in 2022. The child welfare reporter was aware of the pursuer's concerns and had recommended a shared care arrangement which the pursuer had agreed to in May 2022, and decree was granted in those terms. The pursuer alluded to a concern in 2023, but there was no evidence supporting her claim and the pursuer did not seek to return to court then. The pursuer and MS gave evidence that the defender was drunk at a contact handover in July 2024, but there were difficulties with their evidence. The 29 September 2024 incident was serious and required police and social work involvement. However Iain had spent approximately 500 days with the defender between the granting of the decree and that

incident. The pursuer claimed that the defender was "tipsy" on 16 February 2025 when he returned Iain from contact, but there were difficulties with the pursuer's evidence about this. The pursuer also claimed that the defender was intoxicated on a video call with Iain in March 2025, but there were similar difficulties with her evidence about it and it was insufficient for a finding in fact to be made against the defender.

[39] The incident of 29 September 2024 had to be placed in context. In the period of 3 years and 2 months since decree was granted Iain had spent approximately 530 days with the defender. He had been incapable of caring for Iain on one day.

[40] Counsel for the defender considered the issue of Iain's education. He submitted that Iain had had all of his education at Primary School One, other than the short time he was at Primary School Two.

[41] There was no written confirmation that Iain would have a place at Primary School Two for Primary 4, and that created significant uncertainty. As an enrolled pupil at Primary School One, he had a guaranteed place there when term begins on 14 August 2025. Iain was making good progress at Primary School One. He had friends there and his confidence was growing. Iain liked both schools: in line with the no order principle there required to be relevant and sufficient reasons to change the status quo.

[42] A return to Primary School Two would be too much of a change for him. He had had two big changes in his primary education in the past academic year, in October 2024 and in January 2025, and neither was a planned transition. His head teacher at Primary School One was clear that a change of school was not beneficial for him, or for any child like Iain who lacked confidence and found social interaction difficult.

[43] Iain required to stay at Primary School One because there was a possibility the pursuer might move house which might necessitate a further change of school, given the birth of his sister into a two bedroomed flat. The children would each require a bedroom.

[44] The pursuer had previously sought an order to allow Iain to attend Primary School Three, not on educational grounds but because travel to that school was more convenient for her when she lived there. That was the reason she sought to transfer him to Primary School Two too. Travel is not a barrier to Iain remaining at Primary School One. It is a 30 minute journey by bus and on foot from the pursuer's flat to Primary School One. It is approximately a 25 minute walk from her flat to Primary School Two. Iain thought the bus journey was "okay". The defender had offered to pay for taxis to school and to accompany Iain. If Iain had overnight contact with the defender, his travel time to school would be about 10 minutes on foot. It would also address the problem of Iain's lateness at school, which made Iain feels embarrassed and awkward joining the class after it has already started. The pursuer's own evidence was that Iain had been late for school on the Thursdays and Fridays, which is when she had taken him to school.

[45] The order of 22 May 2022 in relation to Iain's education required to remain in place because the pursuer had demonstrated her willingness to change Iain's school contrary to the terms of the court order. Her moving Iain to Primary School Two was in bad faith and was premeditated. She told the defender on 3 July 2024 that she was going to do it. She knew from her solicitor that the defender did not consent. She moved his school in breach of the court order and contrary to section 6 of the Children (Scotland) Act 1995. She did not return Iain to Primary School One until the order of 16 December 2024 was made. An order was required in relation to Iain's schooling because the pursuer had unilaterally removed him previously.

[46] Counsel addressed the pursuer's conduct towards the defender and her ability to cooperate with him. The pursuer admitted she could not cooperate with the defender. The defender said he was able and willing to cooperate with the pursuer on matters relating to Iain. Reference was made to his attempt to cooperate with the pursuer about buying a uniform for Iain in July 2024, to his purchasing Iain's school photographs and ensuring that the pursuer had her own set, and by agreeing to change contact arrangements to allow Iain to go camping.

[47] The pursuer was unable to cooperate with the defender on matters affecting Iain. She had unilaterally removed Iain from Primary School One. She reacted with hostility to the defender's offer to buy Iain's school uniform. She moved Iain's GP practice without the defender's knowledge and did not record him as the emergency contact or next of kin for Iain. She did not cooperate with the defender over Iain's homework. She refused to accept the defender's offer of help in relation to transporting Iain to Primary School One. She failed to take Iain to contact on 26 January 2025 and 2 February 2025. She refused to answer the defender's texts about the blisters on Iain's mouth for 8 days, and when she responded she was abusive. She was not candid with the defender about the father of her second child, a man who might have been spending time with Iain, until the court asked her questions about him.

[48] The pursuer repeatedly referred to the defender as "assholeee". She regularly swore at him. She repeatedly told the defender in front of Iain that he was Iain's grandfather not his father.

[49] Counsel for the defender then considered contact. Throughout his life Iain had been used to having overnight contact with the defender. Between 2016 and September/October 2020 Iain had lived in the defender's home. Until August 2021 the defender was Iain's

primary carer and Iain spent four nights a week with him. Thereafter he spent three nights a week with the defender until 29 September 2024. Iain's views are positive in relation to contact with the defender. Iain had not raised any concerns about the defender's presentation or conduct, despite having met with a range of professionals. Contrary to the pursuer's submissions in paragraph 34, Iain was able and willing to talk to the professionals, and he had not expressed concerns to any of them about the defender's conduct, presentation or behaviour. Nor had Iain expressed concerns to the pursuer about the defender after contact had returned to an unsupervised basis on 11 February 2025 despite the pursuer asking him directly if the defender was drunk. This supported the conclusion that the events of 29 September 2024 were an isolated incident. The evidence was insufficient to find in fact that the defender has been intoxicated while caring for Iain since 29 September 2024.

[50] Counsel submitted that the defender was more involved in Iain's education than the pursuer and that more time together would help Iain's education. Reference was made to the second child welfare report about the pursuer generally not being in contact with Primary School One and to the pursuer's own evidence about Iain's homework, which suggested that she did not know much about it and did not have a homework routine. She said that she asked RMcK to help with homework, but when RMcK was asked about it she appeared surprised and knew nothing about being asked to help the pursuer with Iain's homework. It was clear that the pursuer had lied about that.

[51] The defender had attended all but one of Iain's parents' nights, had been in touch with the school about his learning outcomes, was involved with Iain's online learning journals, communicated with the teachers about homework and knew the names of Iain's teachers. The pursuer has not cooperated with the defender over Iain's homework. The

current arrangements made it difficult for the defender to do homework together. If he spent Sunday, Monday and Tuesday evenings with the defender, there would be more scope to work on homework and this would have a positive impact on Iain's education. This was important because Iain was still not at the level of attainment for his age and stage.

[52] If the care arrangements revert to the order of 23 May 2022 Iain would be late for school less frequently and that would have a positive impact on his education.

[53] Counsel submitted that the defender was attuned to Iain's emotional wellbeing and had a good insight into his needs. He had completed a course on raising children with confidence, and one about understanding their feelings and supporting their emotional health. He recognised inter alia the positive impact Lego Club had on his confidence and that greater involvement in sport might have a positive impact on his self-esteem and confidence. He also recognised that constant changes to Iain's education were difficult for him, that being late for school was not good for Iain and that the events of 29 September 2024 would have had a bad impact on him.

[54] Counsel submitted that spending more time with the defender would help Iain's confidence and social skills. The pursuer did not appear to have given Iain the opportunities to participate in extracurricular activities. Iain had some aptitude in sports. The defender wanted to give Iain the opportunities to try different hobbies and sports including athletics, football, badminton, tennis, archery and rugby. Both Iain and the defender were good runners. The defender had learnt chess, swimming and coding so that he could participate in these hobbies with Iain, but this was not possible within the current limitations of contact. The pursuer had ignored the defender's text proposals about participating in sports.

[55] Counsel submitted that if the care arrangements reverted to the order of 23 May 2022 Iain would have the opportunity to spend more time with members of his wider family. The pursuer does not have any family in Scotland. The defender has a small family. Iain likes visiting them.

[56] If the arrangements reverted to the order of 23 May 2022 parties would come into contact with each other once a week, which would reduce the risk of Iain being exposed to any hostility.

[57] Counsel invited me to make various findings in fact and sustain the defender's first plea in law. He submitted that there was no material change of circumstances justifying a variation. Alternatively if the court were to find a material change of circumstances, the order of 23 May 2022 should be made of new.

[58] Counsel for the defender then turned to the pursuer's submissions. In paragraph 8 the pursuer's inability to remember specific details was significant. It had a direct impact on the reliability of her evidence. In paragraph 33 counsel seemed to be asking the court to find the pursuer's concerns were genuine, but that added nothing to the case. Findings in fact could not be made based on a suspicion: *West Lothian Council* v *B (also known as In the matter of EV (A Child)) 2017 UKSC 15, 2017 SC (UKSC) 67*. In paragraph 37 of the pursuer's submissions there was an assumption that the incident on 29 September 2024 had affected the child. There also seemed to be a criticism of the child welfare reporter and that a more in depth report should have been prepared, but that submission should be rejected. The report was instructed at short notice and was limited to taking the child's views. Paragraph 39 referred to the impact on the sibling relationship, but there was no basis in the evidence for conclusions about this. In paragraph 40 the pursuer's frustration did not excuse her conduct in the abusive text messages, but it shone a light on the pursuer's attitude. As a single

mother with two children she would be frustrated, but she should not take it out on the defender. Giving notice to the defender that she was going to move Iain's school was not an excuse for doing it. In paragraph 45 counsel for the pursuer said that her motivation in changing Iain's school was the arrest of the defender for being drunk in charge of a child: her motivation was not that Iain has Additional Support Needs for which Primary School Two provided better help. The report referred to in paragraph 46 of the pursuer's submissions was from February 2021 and pre-dated the decree.

The pursuer's witnesses

TD

[59] TD is a social worker with the Child Protection Resource in Edinburgh. She adopted her letters dated 4 November 2024 and 7 March 2025 as her evidence.

[60] I found her to be a credible and reliable witness and I have made findings in fact from her evidence.

The pursuer

[61] The pursuer was nearly 42 years old at the date of proof. She worked as a care assistant, but was on maternity leave. She had two children: Iain, who was born in late 2016, and the baby girl who was born in December 2024.

[62] The pursuer adopted her affidavit number 5/5 of process dated 7 March 2025 and her affidavit number 5/13/1 of process dated 2 July 2025.

[63] I did not find the pursuer to be a credible or reliable witness. She was in the witness box for far longer than she needed to be. She was cross-examined at length, because she did not give straight answers to questions. The actual content of her evidence was very limited.

There was no substance to it. Her evidence was confusing. She kept repeating that the defender was drunk. She described only a few incidents of this, and her evidence was in general terms.

[64] The pursuer said that when she needed help with Iain's homework, she asked RMcK, who was her friend and neighbour and the mother of Iain's friend. RMcK looked surprised when she was asked that, and denied helping the pursuer with Iain's homework. The two accounts cannot be true, and there can be no misunderstanding on the pursuer's part. She has simply lied about that, to try and reassure the court that she could assist Iain with his homework.

[65] The pursuer said that sometimes when Iain stayed with the defender for three nights, Iain had returned to her looking dirty and skinny. She appeared to have been referring to more than one incident, and to it having taken place sometime after the regime of 3 nights contact was put into place on 23 May 2022. I do not believe her. A child would not look skinny after three days. This is just another lie in an attempt to get the order she wants. The pursuer also said that Iain had been returned home with his shoes on the wrong feet during that period. That is incredible: a child aged 5 - 8 years old does not put his shoes on the wrong feet. Again it is a lie, told for the purposes of enhancing the pursuer's case.

[66] I do not accept that the defender was "tipsy" when he dropped Iain off after contact on 16 February 2025. This allegation first appeared in the pursuer's affidavit dated 2 July 2025: her affidavit of 7 March 2025, where she refers to the child welfare hearing of 11 February 2025 which allowed the defender to have unsupervised contact with Iain, makes no reference to an incident which allegedly took place only 2-3 weeks before. Nor do I accept that in February or March 2025 the defender was drunk during a FaceTime call and so she switched off her phone. The defender denied both allegations and I accept his

denials. I do not accept any of the other allegations she made, such as her claim that Primary School One had to call the police about the defender's conduct at the school.

[67] There was evidence that the pursuer should have accepted but which she did not. The pursuer refused to accept that Iain enjoyed contact with the defender. She said he only enjoyed various contacts because Iain liked playing with the Lego, going to McDonalds or seeing the film the defender had taken him to. She said that the contact she had attended had only gone well because she was there. She is not impartial. Her hostility to the defender is clear.

[68] She did not accept that Iain had told the child welfare reporter Fiona Corsar that he enjoyed being at the defender's house until it was put to her, and even then she said that she was not sure if he did enjoy contact. She was reluctant to accept that Iain had told Angela Craig he enjoyed contact, and continued to say she was not sure that he did enjoy contact. She gave an explanation that Iain did not know what being drunk was, or whether he was in danger. She said that she asks Iain if the defender is drunk at contact, and that she had asked Iain about the incident on 29 September 2024. If that is true, it was inappropriate for her to have discussed such matters with him.

[69] Some of what the pursuer had said in evidence reflected badly on her. She claimed that since the order was made in 2022, contact had not been good and the police had been involved a few times. She had agreed that Iain could stay overnight with the defender because that would allow her to work shifts from 7.30 am – 8 pm as a care assistant. Either she is untruthful about the defender, or she is prepared to leave Iain with someone she thinks is unfit to care for him.

[70] Some of her evidence focused on convenience to herself rather than what was in Iain's best interests.

RMcK

[71] RMcK's English was very poor. Her affidavit was sworn in English. I cannot rely on it, because her English is so poor. It should have been sworn in her native language and been translated into English. She should have given her evidence with the assistance of a translator. Most of the affidavit is explicitly hearsay of the pursuer. The affidavit states that it was sworn "in support of my friend".

[72] In her evidence in court she denied that the pursuer had ever asked her to help with Iain's homework. She supported Iain moving to Primary School Two largely on convenience grounds. When asked if she could help the complainer with child care she said "Yes sometimes I can help. If she really needs it". Her son is the same age as Iain and they were friends. They might not be in the same class at Primary School Two because there was more than one class in each year.

[73] While I have concerns about RMcK's evidence based on her poor grasp of English, I accepted her evidence that the pursuer had never asked her to help with Iain's homework. This undermines the pursuer's credibility. I also formed the impression that RMcK was somewhat reluctant to assist the pursuer. The evidence about there being at least two Primary 4 classes is also important. She, like the pursuer, approached the school move in terms of convenience rather than looking at Iain's best interests.

MS

[74] Overall I thought MS was a good witness, despite the terms of her affidavit, which stated explicitly that it was sworn "in support of my friend", and much of which was hearsay of the pursuer. Her English was good. Her evidence was fair.

[75] MS accepted that she had supervised contact between Iain and the defender on 9 November 2024 (at the cinema and thereafter at a restaurant) and on 27 November 2024 (at a restaurant), and that Iain had been happy to see the defender, enjoyed his time with the defender, and there were no concerns about alcohol misuse. She accepted that she had not mentioned positive contact in her affidavit, and that it only included material supportive of the pursuer. She accepted that the defender and Iain had a good relationship, and that there was a close bond between them. She had no grudge against the defender, and simply wanted to help if she could. She accepted that the defender had been nice to her and that he did scowl and lowered his eyebrows.

[76] MS accepted that she did not know much about Iain's education and that she could not give an informed opinion about his education. Her support for Iain moving to Primary School Two was based on convenience.

[77] She gave an account of a handover of Iain in July 2024. I preferred her evidence under cross examination to her evidence in chief on this issue. On that date she had first met the defender and Iain when the pursuer was not present. The pursuer had told MS that the defender would not be happy about MS collecting Iain on her own. The defender was not happy. She, the defender and Iain all went to Marks and Spencers and met the pursuer there. There was some discussion between the parties and Iain was handed over. MS was not standing beside them and she was not paying much attention. She was not sure if the defender was drunk or abusive to the pursuer on that day. She heard a word like "twat". She did not remember the date. She had thought the defender was drunk because his face was reddish, and he was unhappy, making faces and scowling, though she accepted that the defender tended to scowl and lower his eyebrows.

[78] The defender denied such an incident, and I preferred his evidence.

The defender's witnesses

BR

[79] BR is the defender's nephew and Iain's cousin. He has two children, L who is 21 years old and K who is 17 years old. They live with their mother, but he sees them both at least once every week. BR lives in Livingston with his partner T and her 14 year old daughter C. They have been together for 7 years, and lived together for 4 years. He was 43 years old at the date of the proof.

[80] He adopted his affidavit sworn on 27 June 2025, and was cross-examined.

[81] He gave his evidence in a straightforward manner both in examination in chief and in cross-examination. He had not really seen the defender drinking or under the influence of alcohol, with or without Iain, even at Christmas or on special occasions. He was surprised that the defender had been arrested on 29 September 2024. He said it was not like the defender to be like that. He agreed that it was alarming for him to have been in such a state. Iain was always happy in the defender's care.

[82] I found him to be credible and reliable witness. I have made findings in fact based on his evidence.

The defender

[83] The defender adopted his affidavits dated 7 March 2025 and 30 June 2025.

[84] I found the defender to be credible and reliable. His evidence was clear and made sense. He came across initially as quite nervous, quick to answer the questions. He seemed to me to have quite an abrupt, brusque manner and a gruff voice, in common with many

Scottish men of a certain generation, but which may have been misunderstood by the pursuer's witnesses when they met him.

[85] The defender provided a considerable volume of documentation vouching his position, with his affidavits cross-referencing those productions.

[86] He made concessions including about his inability to drink alcohol.

[87] He did not exaggerate his position.

[88] He described Iain as "just a quiet wee boy … a lovely wee boy" who liked playing games, discovering new things, going to parks including the Botanic Gardens. He loves Lego and attends the Lego club every second Tuesday in Area One Library. He has a pedigree cat called B, who is 12 years old. In his evidence he spoke warmly of Iain and it is clear that he loves Iain. His affidavits are similar. They show his sensitivity to Iain. The defender has a child centred approach. He has Iain's welfare at heart.

[89] The defender came across as very natural, explaining that he had completed a course for parents about Raising Children with Confidence: he said he thought it would be helpful because it was a long time since he was a child.

[90] The defender thought Iain loved him. Iain loved the pursuer too. Iain's relationship with the pursuer was important. Children needed both parents. He did not criticise the pursuer.

[91] He was well informed about Iain's education.

[92] The defender had offered to pay for a taxi for Iain to Primary School One. The cost would be about £200 a week, which he could afford. The pursuer had refused his offer without giving a reason.

[93] In cross-examination he made concessions, which enhanced his credibility.

[94] The defender admitted drinking alcohol once or twice a month with friends. He accepted he had been charged with having drunk alcohol while in charge of a child. He accepted that the incident on 29 September 2024 was serious. He accepted that the incident would have had a big impact on Iain. He did not seek to minimise his behaviour. He had apologised to the pursuer about it. He had not discussed the matter with Iain.

[95] I have made findings in fact based on his evidence.

Legal Framework

Legislation

[96] The Children (Scotland) Act 1995 section 1(1) defines "parental responsibilities" as the responsibilities "(a) to safeguard and promote the child's health, development and welfare; (b) to provide, in a manner appropriate to the stage of development of the child - (i) direction; (ii) guidance, to the child; (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and (d) to act as the child's legal representative, but only in so far as compliance with this Section is practicable and in the interests of the child."

[97] "Parental rights" are defined in section 2(1) of the Act as the rights, in order to enable the parent to fulfil his parental responsibilities in relation to his child, "(a) to have the child living with him or otherwise to regulate the child's residence; (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing; (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and (d) to act as the child's legal representative."

[98] A child is a person under the age of 16 years for all parental responsibilities and parental rights except the parental responsibility to provide guidance to the child, which lasts until a person is 18 years old.

[99] Section 6(1) of the Act provides:

> "(1) A person shall, in reaching any major decision which involves –
>
> (a) his fulfilling a parental responsibility … or
>
> (b) his exercising a parental right …
>
> have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child's age and maturity, and to those of any other person who has parental responsibilities or parental rights in relation to the child (and wishes to express those views); and without prejudice to the generality of this Subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view."

[100] Section 11 of the Act provides:

> "(1) … in proceedings in the … sheriff court, … an order may be made under this subsection in relation to –
>
> (a) parental responsibilities;
> (b) parental rights" …
>
> (2) The court may make such order under subsection (1) above as it thinks fit; and without prejudice to the generality of that subsection may in particular so make any of the following orders – …
>
> (c) an order regulating the arrangements as to –
> (i) with whom; or
> (ii) if with different persons alternately or periodically, with whom during what periods,
>
> a child under the age of sixteen years is to live …
>
> (d) an order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living …
>
> (e) an order regulating any specific question which has arisen, or may arise, in connection with [parental responsibilities or parental rights] …

(7) … in considering whether or not to make an order … and what order to make, the court -

(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and

(b) taking account of the child's age and maturity, shall so far as practicable -

(i) give him an opportunity to indicate whether he wishes to express his views;
(ii) if he does so wish, give him an opportunity to express them; and
(iii) have regard to such views as he may express.

(7A) In carrying out the duties imposed by subsection (7)(a) above, the court shall have regard in particular to the matters mentioned in subsection (7B) below.

(7B) Those matters are -

(a) the need to protect the child from -

(i) any abuse; or
(ii) the risk of any abuse,

which affects, or might affect, the child;

(b) the effect such abuse, or the risk of such abuse, might have on the child;

(c) the ability of a person -

(i) who has carried out abuse which affects or might affect the child; or
(ii) who might carry out such abuse,

to care for, or otherwise meet the needs of, the child; and

(d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has … those responsibilities.

(7C) In subsection (7B) above -

"abuse" includes –

(a) violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress;

(b) abuse of a person other than the child; and

(c) domestic abuse;

"conduct" includes -

(a) speech; and

(b) presence in a specified place or area.

(7D) Where -

(a) the court is considering making an order under subsection (1) above; and

(b) in pursuance of the order two or more relevant persons would have to co-operate with one another as respects matters affecting the child,

the court shall consider whether it would be appropriate to make the order.

(7E) In subsection (7D) above, "relevant person", in relation to a child, means -

(a) a person having parental responsibilities or parental rights in respect of the child".

Minutes to vary

[101] It is competent to make a fresh application to a judge at first instance for a decision about parental rights and parental responsibilities in private law matters on the ground of a change in circumstances, because a child's welfare remains open to further consideration by the court throughout his childhood: *Sanderson* v *McManus* 1997 SC (HL) 55 at page 58 B-E. At page 63C-E the test is described variously as being a "change in circumstances" and "a material change in circumstances".

[102] There may be no practical difference in these tests: a change in circumstances would still need to justify a variation, such that it would require to be material.

[103] In *D* v *L* 2021 SAC (Civ) 28, 2021 FamLR 123, at paragraph 15 the sheriff appeal court (sheriff principal Anwar, appeal sheriffs Holligan and Cubie) 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. The Minute to Vary process is an expeditious means by which to seek orders upon such a change of circumstances."

In that case it was conceded that there had been a material change of circumstances arising out of the mother's relocation to a foreign country.

[104] In *SA* v *DA and K's curatrix*, unreported, Edinburgh sheriff court case F42/08, 23 July 2015, sheriff Holligan, a court order of 2008 allowed the pursuer father contact with the child. On 10 November 2011 following a proof sheriff Holligan granted the defender's minute to vary and the pursuer's contact was reduced to nil. The pursuer appealed unsuccessfully to the Inner House.

[105] In about 2015 the pursuer presented a minute to vary in which he sought non-residential contact. The defender and the curatrix lodged answers opposing contact and tabled pleas to the relevancy of the application, submitting that there had been no relevant material change of circumstance in relation to the child or the pursuer. If there were a relevant material change of circumstance, they challenged whether any such change of circumstance was properly capable of having a bearing on the court's determination on the best interests of the child. They submitted that in the proof on the first minute to vary the court had found that the pursuer had behaved inappropriately toward the child. There had been no evidence in the proof that the absence of contact caused any difficulty for the child. The court had held it was not in the best interests of the child to have contact with the

pursuer. On appeal an Extra Division had noted that even contact in a contact centre would not necessarily protect the child from harm and might indeed result in emotional harm.

[106] The pursuer averred that there had been a material change of circumstance because he had married and had another child by that relationship, the child was older and more able to verbalise any concerns, and that a risk assessment had been carried out by a forensic psychologist.

[107] The matter was determined at debate.

[108] In a reserved judgment sheriff Holligan refused the pursuer's minute. Given that there are few decisions which look at the test for minutes to vary, it is appropriate to refer to sheriff Holligan's analysis in full, which is as follows:

> "[7] Minutes to vary orders for residence and contact are common. There is often no issue that, put broadly, the existing order no longer addresses the welfare of the child. There are, however, some cases in which there is a real issue as to whether the status quo should be disturbed. This is one such case. Identifying the correct test to be applied in approaching the matter is thus no academic enterprise but an essential element in determining how the matter should be dealt with.
>
> [8] As a general principle, in an ordinary non-family action, subject to appeal, a final decree is the end of the matter. Attempts to re-litigate it would be met with a plea of *res judicata* which, in turn, may be met with a plea of *res noviter*. *Res noviter* involves the consideration of new material or circumstances different from that relating to the original proof. Cases involving the welfare of children have long been regarded as an exception to this principle. On the one hand it is in the interests of parties (including the child) that there should be a straightforward procedure to revisit arrangements without appeals or fresh proceedings. On the other hand there has to be some mechanism to prevent matters being litigated unnecessarily, particularly where a decision has already been made. In cases where there has been a section 11 order the legal basis for allowing one party to reopen what would otherwise be a final interlocutor is section 11(13) of the 1995 Act. That said, it seems to me that it is rather a slender foundation and confers the right to seek a variation more by implication than by clear direction. Rule 33.44 is purely procedural. It is also clear that, unlike a number of provisions relating to aliment and periodical allowance to which [the solicitor for the pursuer] referred, there is no express statutory provision setting out the basis upon which a minute to vary may be determined.

[9] The issue is not new. It arose in cases concerning custody and access under earlier legislation. Reference was made to the case of *S* v *S* [1965 SLT 131]. This appears to be the only authority, in which, however shortly, the question of material change of circumstances was considered. That case concerned a motion for access which constituted a variation of the existing order. The averments seeking a variation of the order were challenged upon the basis that there were no specific and detailed averments about a change of circumstances and such averments were necessary to plead a relevant case. Reference was made to *Thomson and Middleton,* Manual of Court of Session Procedure at page 193 in support of the proposition. As the Lord Ordinary (Lord Kissen) observed, none of the authorities referred to supported it; they all concerned aliment. Lord Kissen commented, at page 132, that he was not satisfied a change of circumstances, in the narrow sense, is a necessary prerequisite to the competency of a minute. However, given that the minute did contain averments relating to a change of circumstances there was sufficient material to warrant inquiry. The procedure set out in *S* v *S* was based upon section 9 of the Conjugal Rights (Scotland) Act 1861 which gave to the Court of Session the power to continue to make orders in relation to children after decree had been granted. It was held (*Sanderson* v *Sanderson* 1921 SC 686) that in order to make use of this statutory power, the interlocutor had to contain an express reservation of the power to do so. The practice of reserving liberty to apply in the interlocutor had been in existence for some time. The case of *Symington* v *Symington* 1875 2 R (HL) 41, at 49, contains the wording "reserving to both parties respectively liberty in the event of any difficulty, dispute or *change of circumstances* (my emphasis) to apply to the Court for such variation…". (Section 9 of the 1861 Act was repealed and re-enacted in section 20 of the Court of Session Act 1988 which in turn was repealed by the 1995 Act). I appreciate that I was not referred to these old decisions. They are not essential to my decision but they are helpful to put the matter into context. It may be that the material change test emerged from an earlier statutory regime and the procedure created to give effect to it. In the cases to which [counsel for the defender] referred it respectfully appears to me that the *dicta* as to material change of circumstances, some of which are clearly of high authority, have assumed the position. The basis for, and substance of, the test, if it be a test, was not examined or argued. In the present case, and from a purely statutory point of view, it would be easy to say that the only tests in relation to whether a section 11 order ought to be varied are the tests set out in section 11(7) of the 1995 Act, the most significant of which is the welfare test. Any conclusion as to what is conducive to the welfare of the child is a matter of judgement based upon the assessment of factors specific to the particular case. What the material change of circumstances test does is to provide a mechanism which allows access to an existing process with all the advantages which that entails but also acts as a gateway to prevent the reassessment of matters already decided. It seems to me that the need to aver a material change of circumstances has arisen more as a matter of practice than as a rule of law.

[10] My conclusion is that, in cases involving section 11 orders such as the present (and I am not dealing with actions of divorce or the like), there is no common law power to vary a final decree. Section 11(13), however slender, gives the statutory power to vary the decree and chapter 33.44 sets out the procedure to be followed. In

considering whether to vary an existing order the court is bound to apply the statutory tests in section 11(7). Put another way, on its own, a material change of circumstances is not sufficient to warrant a variation of the order. However, implicit within consideration of section 11(7)(a) is that something has changed since the order was originally granted, if only because, absent such a change, ex hypothesi, there is no factual basis to alter the existing order and thus the minute amounts to a reconsideration of the same facts. One of the unusual features of this matter is that the respondents seek dismissal of the minute without a factual inquiry. Unusual or not, correctly in my view, [the solicitor for the pursuer] did not seek to argue that it is not competent for the respondents to do so. In my opinion, it is important, and in the interests of the child, that the court retains the power to regulate such matters and not simply surrender the pursuit of each minute to a proof. Accordingly, my conclusion is that I should approach consideration of the minuter's averments from the perspective of the welfare of the child beginning with consideration as to whether there has been a material change of circumstances since the November 2011 interlocutor.

[11] Applying the foregoing to the present case I start by considering the November 2011 interlocutor and what led to that conclusion. In short, it involved inappropriate behaviour towards K by the [pursuer]. As a matter of fact I found this to be established. There are averments key to the [pursuer's] case namely his remarriage; K's age; and the psychological report. In my judgement, I do not see that any of these constitute a material change of circumstances either individually or cumulatively. In relation to K there is a change of circumstances by reason only of the passage of time. That could be said in relation to any child. The [pursuer's] remarriage is not material to K. The psychological report, of itself, is not a material change of circumstances. Then there is the question of welfare. Again, the fact of remarriage does not seem to me to be relevant. I cannot say that, in the light of the November 2011 interlocutor, I take comfort from the averment that K's age means that she is more able to verbalise concerns. Harm was established. K is now 10. She remains young. The court's duty is to protect her from harm and the risk of harm. The change in her age would not lead to a variation. Then there is the psychological report referred to in the minute of amendment. It contains the key averment that "the [pursuer] does not present with any suggestion of significant mental health issues and there is no actual proven evidence which presents any risk of any nature to his daughter or anyone else". That averment seems to me to fly in the face of the November 2011 interlocutor. Reading the report as a whole, much of it is critical of the courts' conclusions leading to the November 2011 interlocutor and in particular the conclusions of the curatrix. Firstly, there never was a major issue as to the [pursuer's] mental health. Secondly, as [counsel for the defender] correctly pointed out, in essence, the report seeks to challenge the primary findings in fact of the November 2011 interlocutor and the decision of Inner House. I have to say that, with all due respect to the author of the report, there seems to be a misunderstanding as to the reasoning of the court. As I have said, [counsel for the defender] submitted that this whole matter is causing the [defender] anxiety which may well affect the child. It should be remembered that before she pursued her own minute, the [defender] had been quite prepared to allow contact. It was only stopped when the

> [pursuer's] conduct became known to her. At the proof it seemed to me that she was genuine in her surprise and distress. Reopening this matter on the grounds set out above will constitute a change to the status quo which has been in place for some time and will cause distress to her which may affect K. At the date of the proof K's current care and welfare was not an issue nor at that time was the absence of contact. There is also the court's duty in terms of section 11(7)(B).
>
> [12] Putting all of these matters together I am not satisfied that there is a material change of circumstances and that the averments relied upon are, in the context of this case, relevant for inquiry. I shall therefore grant the motion for the [defender] and curatrix and dismiss the minute. There will be finding of no expenses due to or by either party."

[109] I accept sheriff Holligan's reasoning.

Miscellaneous authorities

[110] In *B* v *Scottish Ministers* [2010] CSIH 31, 2010 SC 472 at 485 an Extra Division considered the standard of proof to be met in civil cases where there was an allegation of criminal conduct. Lord Eassie, delivering the opinion of the court, held at paragraph 42:

> "Where an allegation of criminal conduct is made in civil proceedings, the standard of proof is the balance of probabilities; but the nature of the allegation may be such as to call for evidence of quality and weight and for that evidence to be carefully examined and scrutinised in the course of the forensic process."

[111] In *West Lothian Council* v *B (also known as In the matter of EV (A Child)) 2017 UKSC 15, 2017 SC (UKSC) 67* the Supreme Court in considering the test in the Adoption and Children (Scotland) Act 2007 section 84(5)(c) of whether the child's residence with the parent is, or is likely to be, seriously detrimental to the welfare of the child, held that decisions as to a future likelihood of harm cannot be based merely on allegations or suspicions and must be based on findings of fact, which required to be established on the balance of probabilities (paragraphs 22 – 26).

[112] In *J* v *J* 2004 Fam LR 20 at paragraph 13, lines 15 – 23, the Second Division upheld a contact order, the sheriff having acknowledged that while that might cause some temporary upset to the children the long-term benefit to them outweighed that.

[113] In *A* v *A* [2020] 10 WLUK 613 the sheriff refused to make a contact order in favour of the father. The father had been convicted of assaulting the mother and sentenced. It is a decision on its own facts. It is not binding on me.

[114] In *R* v *R* [2021] CSOH 69 the Lord Ordinary made an order for residential contact, but did not make an order for holiday contact without further safeguards being put in place having regard to the pursuer's longstanding cardiac condition which had necessitated emergency treatment on at least two earlier occasions. This case is also a decision on its facts. It is not binding on me.

REASONING AND DECISION

Has there been a change of circumstances justifying variation of the decree?

The issues at the time of final decree

[115] On 23 May 2022 on the first day of a three day proof the sheriff granted decree in terms of the parties' joint minute. In terms of that decree the sheriff made a residence order in favour of the pursuer. He made a contact order in favour of the defender providing that Iain would have residential contact with the defender from 1 pm every Sunday until the start of nursery or school on Wednesday (or 5 pm if there was no school). Regarding school holiday contact he made an order providing that Iain would have residential contact with the defender for 7 days during the February school half term holiday commencing at 1 pm on the first Sunday of that holiday; residential contact with the defender for the first week of the summer school holiday from the first Saturday to the second Saturday at 5 pm;

residence with the pursuer from 5 pm on the second Saturday until 5 pm on the third Saturday of the summer school holiday period; and residential contact with the defender from 1 pm every Sunday until 5 pm every Wednesday for the remainder of the summer school holiday period. He made an order that Iain was to reside with the pursuer for one week during the October school holiday. He made an order that Iain was to have residential contact with the defender from 1 pm every Sunday until 5 pm every Wednesday. He made an order providing that Iain would spend 5 hours with the parent with whom he was not staying on his birthday, 9 December. He made an order providing that Iain was to attend Primary School One. He dismissed the parties remaining craves, namely the pursuer's crave for a specific issue order providing that Iain should attend Primary School Three and the defender's crave for a residence order, and made an order for no expenses.

The pleadings as at 23 May 2022

[116] The pleadings were finalised in the record, the final amendment having been allowed on 13 May 2022.

[117] Both parties accepted that their relationship was volatile. They each averred that the other party was abusive towards them. The pursuer averred that the defender was physically and mentally abusive towards her and drank alcohol to excess. The defender averred that the pursuer was physically and verbally abusive towards him in front of Iain. He denied drinking to excess.

[118] They separated for a few weeks in 2017 following an incident in which the defender had been verbally abusive and was charged. He pled guilty to a contravention of the Criminal Justice and Licensing (Scotland) Act 2010 section 38 committed in November 2017.

Sentence was deferred for 6 months for good behaviour, following which he was admonished.

[119] In April 2018 the pursuer attended her GP and alleged that the child had suffered facial injuries while in the residential care of the defender. The defender's position was that the child had a red mark on his face because he slipped on some CDs. The GP made a referral to social work.

[120] In May 2018 members of the public called police because the defender was heavily intoxicated and Iain was hanging out of his push chair. Iain was placed on the Child Protection Register until 2019. The pursuer was advised not to let the defender have unsupervised contact with the defender but she did so.

[121] In about June 2019 the parties reconciled. Latterly the defender had sole care of Iain from 6.30 am until 8.30 pm four days a week when the pursuer was working. The relationship ended in September 2020.

[122] The pursuer averred that the defender continued to misuse alcohol and be verbally abusive towards her.

[123] The defender averred that the pursuer moved out of the matrimonial home leaving Iain with the defender. He averred that she had arrived at the home in August 2020 intoxicated, and kicked his door causing a disturbance. The matter was reported to the police. He averred that in about September 2020 she returned to the property, told the defender she had Covid, spat and coughed in his face and shouted at him. The police attended and removed the pursuer to a police station.

[124] The pursuer moved into rented accommodation in Area Three. Around September 2020 arrangements were made for the pursuer to care for Iain from Thursday after nursery until Sunday at 1 pm, and to be cared for by the defender at all other times.

[125] On 3 October 2020 there was an incident in which the pursuer was charged with assaulting the defender at his home. Special bail conditions were imposed. A trial was set for 25 February 2021, but postponed to August 2021. On 12 January 2022 the court granted her an absolute discharge.

[126] The pursuer averred that on 1 May 2022 police contacted her to advise her to collect Iain because a member of the public had contacted them to say that the defender was under the influence of alcohol while caring for Iain. Police contacted the social work department. The defender averred that he had slipped twice on a paving stone.

Information available to the court at 23 May 2022

[127] The two inventories of productions lodged by the pursuer during the original action were not resubmitted with the minute to vary. Those lodged by the defender were resubmitted. These would all have been available to the court at the child welfare hearings and some of them would have been available to the child welfare reporter. The first inventory for the pursuer presumably contained the birth and marriage certificates.

[128] By 23 May 2022 the court knew that the defender's only criminal conviction in the period to 20 April 2021 was on 28 November 2017 and was a contravention of the Criminal Justice and Licensing (Scotland) Act 2010 with a domestic aggravator, for which he was admonished on 29 May 2018. I assume that he had pled guilty on 28 November 2017 and sentence was deferred for good behaviour for six months.

[129] Between 2 August 2020 and 3 October 2020 there were three incidents when the defender had called police about the pursuer's behaviour and they had attended, once in relation to a verbal argument and twice in relation to assaults.

[130] Both parties sought an additional year of nursery for Iain: Child and Young Person Planning Document dated 2 February 2021 and Delayed Entry to Primary School – Proposed Plan and Additional Information.

[131] There had been police involvement with the family. Social Work had been actively involved previously, and the health visitor was making a further referral. Housing support were involved with the pursuer. The family support worker had been involved with both parents, but worked mostly with the pursuer. The pursuer had support from Shakti. The additional support needs team and the speech and language team were involved to support the nursery and family with Iain's language development and his emotional resilience. Staff recognised when Iain was upset or unsettled from his physical behaviour, because he was not available to communicate his feelings at that stage.

[132] Iain had had very unsettled experiences during fundamental years in his development, including police and social work involvement. His parents' separation in October 2020 had caused his speech and language to regress to being almost non-verbal, and he was very emotional. He lacked resilience. He needed constant adult support, which was not available in Primary 1. At the age of 4 years and 2 months, he was working developmentally at age 3. He had attachment issues, and felt unsettled and insecure. He had regressed in toileting.

[133] There were real concerns that Iain did not have a more settled home life. One of the desired wellbeing outcomes was for Iain to feel safe and supported in both family homes.

[134] The proposed plan included an enhanced transition to Primary 1, so that Iain would feel confident to enter the new environment, have good self-esteem when entering Primary 1 and be able to manage the higher level of learning and be confident to share his thoughts with staff.

The affidavits lodged on behalf of the parties

[135] The pursuer had lodged affidavits from herself and from MS dated 20 April 2022. At that time the pursuer was working as a carer in a care home. She referred to the defender's alcohol misuse, to the police being involved, to separations and reconciliations, to Iain having been put on the Child Protection Register following an incident in May 2018 when the defender was drunk in charge of Iain, and to delayed entry to Area One Primary 1. At the time of the affidavit she rarely needed help from others with Iain.

[136] The affidavit from MS is largely hearsay of the pursuer. Paragraph 10 contains a brief narration of her observations of the interaction between the pursuer and Iain.

[137] The defender lodged affidavits from himself dated 20 April 2022, from BR dated 4 April 2022, from CH dated 4 April 2022 and from NM dated 8 April 2022.

[138] CH was Iain's nursery teacher and key worker from January 2020 until July 2021. Before the parties separated it was usually the defender who did pick ups and drop offs. Iain made progress in his social skills, particularly in relation to communication. The defender took advice. Iain's response to the parties was similar. When the parties' relationship broke down it was difficult for the parties to focus on Iain at times. The defender shared a lot of information about Iain with the school, and asked staff how Iain had been when he came to collect him. He always attended meetings and was engaged. He attended any courses they suggested and put what he learnt into practice. He took medical advice when Iain had health issues. During lockdown Iain attended the Hub along with a few other children and made good progress. He was affectionate, happy, settled and communicated well. He withdrew when faced with conflict, whether at home or at nursery. The school often noticed a change in Iain before they were made aware of a police report.

Conflict between the parties during direct handovers of Iain which had previously happened on Mondays seemed to cause a change in his behaviour, with him seeking additional support and comfort from nursery staff.

[139] NM took over from CH in August 2021. At the date of her affidavit Iain was doing well. Iain had increased his attendance at nursery to 5 days a week. He had one special friend at nursery. He was to have an enhanced transition to Primary 1 because he needed a little extra additional support.

[140] BR's first affidavit was dated 4 April 2022. He and his children saw the defender and Iain every couple of Sundays at the defender's mother's house in Tranent. He had heard the pursuer screaming at the defender in about September 2020 when she had returned to live with him. He had seen pictures of injuries the pursuer had inflicted on the defender's face in July 2020. The pursuer had also broken the defender's finger. Iain's communication skills had improved. Iain enjoyed being with the defender.

[141] The defender's first affidavit was dated 20 April 2022. The defender referred to the pursuer's violent and aggressive behaviour towards him including in front of Iain, to her drinking until 3 am or 4 am at weekends, to incidents in August 2020 and on 16 September 2020 and on 3 October 2020 when the police had removed her from his property, to her saying the defender was Iain's grandfather not his father, to his having been referred to the Navigator Service at the Royal Infirmary following an assault by the pursuer on him and which helped him to open up and start talking about the violence, to the pursuer taking Iain abroad on several occasions without the defender's consent and to an incident on 14 May 2018 when the defender had been under the influence of alcohol while Iain was in his buggy where he was charged resulting in social work involvement, and to the pursuer threatening to stop the defender seeing Iain if he did not do what she wanted.

The child welfare report by Fiona Corsar dated 24 August 2021

[142] The reporter visited the parties. She spoke to Iain's health visitor HM, the defender's mother IB and Iain's former nursery teacher CH by phone.

[143] Most of the issues narrated in the report have been narrated elsewhere in this judgment.

[144] Because the pursuer had bail conditions preventing her from approaching the defender or his property following the incident on 3 October 2020, Iain's health visitor assistedties to reach an arrangement where Iain stayed overnight with the defender on Sunday, Monday, Tuesday and Wednesday, with the pursuer collecting him from nursery on Thursday at 3pm, having him overnight on Thursday, Friday and Saturday and returning him to the defender on Sunday afternoon in a public place.

[145] Iain's behaviour at nursery was an indication that things were not going well at home. In September 2020 there was a marked change in Iain: his language regressed, he was less interested in engaging with staff, he did not want to eat as much, he had toileting accidents, and he put his head down which indicated that he was upset but he did not say why. Neither party told staff that anything was wrong, despite staff asking. On 5 October 2020 CH submitted a child concern form because of Iain's presentation that morning. HM, Iain's health visitor, advised CH that Iain had witnessed an unpleasant scene at home that weekend and that the pursuer had been arrested. When the routine of living part of the week with one parent and part with the other became established, Iain became less upset. He began to make progress. Iain was permitted to attend nursery during lockdown from mid-January 2021 as a vulnerable child because of the changes seen in him in the previous months. He made significant progress.

[146] The reporter recommended that the existing arrangement should be altered so that Iain stayed with the pursuer from Wednesday until Sunday, with a view to his having his permanent residence with her in future. She recommended that the school issue should not be determined at that time. She recommended a review after 6 weeks at which time Iain might be allowed to stay with her on the Sunday night too. That would mean there was no contact between the parties at handovers.

Minute to Vary and Answers

[147] In the minute to vary the pursuer sought to vary the defender's contact to nil. She also sought a specific issue order providing that Iain should attend Primary School Two. The pursuer averred that since decree was granted the defender had abused alcohol and was abusive of the pursuer at handover, and that she required to contact police in about June 2024. She averred that she had obtained permanent accommodation, that Primary School Two was closer to her home and that it was in Iain's best interests to attend that school. She averred that on 29 September 2024 the defender had been arrested for being under the influence of alcohol while caring for Iain, and that there were bail conditions in place. The material change of circumstances was his unreasonable conduct and alcohol consumption.

[148] The pursuer adjusted her pleadings inter alia to substitute May 2024 (rather than June 2024) as the date she contacted the police (statement of facts 3).

[149] In his answers the defender craved an order requiring Iain to be re-enrolled at Primary School One, the pursuer having removed Iain and enrolled him at Primary School Two on 22 October 2024. The defender averred that in correspondence between agents he had refused to agree to Iain changing school, and that the pursuer had used the opportunity of his arrest to change the school. He sought return of Iain to Primary School One pending

any determination of the issues by the court. He had been charged with a contravention of section 50(2) of the Civic Government (Scotland) Act 1982 and a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. On 18 October 2024 the charges were diverted from prosecution, and the bail conditions fell. The pursuer had restricted his contact since 29 September 2024.

[150] The defender adjusted into his pleadings a plea in law that there was no material change of circumstances. He made averments about the pursuer's abuse of him at handovers.

[151] Counsel for the pursuer did not focus on the material change of circumstances test at all in her submissions. During her right of reply I asked her what the material change of circumstances she relied on was. She said that in general terms there was a material change in circumstances as a result of the events including 29 September 2024, the new baby, the pursuer's desire to return to work, the need to sort out Iain's education permanently with regard to secondary school, and the fact that he had friends locally.

The defender and alcohol

[152] I accept that it is a matter of concern that defender was charged for a second time while he was under the influence of alcohol while looking after Iain. The pursuer relied heavily on this at proof as a reason for varying the decree and reducing contact.

[153] Of the four incidents the pursuer spoke to in evidence I have found in fact that only the incident on 29 September 2024 took place. It is very similar to the incident which resulted in a conviction in November 2017, though the incident in 2024 was diverted from prosecution and did not result in a conviction.

[154] The pursuer has failed to prove that the defender was intoxicated at a handover at Marks and Spencers in July 2024, that he was "tipsy" when returning Iain from contact on 16 February 2025, and that he was intoxicated on a video call with Iain in March 2025. She was the only witness to the latter two alleged incidents, and I did not believe her. While I have generally found MS to be a credible witness, she was unsure about the first incident. I believed the defender that none of those three incidents happened. I have made findings in fact about this.

[155] The pursuer has failed to prove the case she pled in her minute to vary.

The pursuer's new baby

[156] The minute to vary was warranted on 15 November 2024. It made no reference to the pursuer's pregnancy. No reference was made by or on behalf of the pursuer to this at the hearings on 13 or 16 December 2024. The averments first appear in the pursuer's minute of amendment lodged on 23 June 2025. They are brief and refer essentially to it being more convenient for the pursuer for Iain to attend Primary School Two so that the pursuer can work. The pursuer did not seek to rely on her pregnancy and the birth of the new baby as a change of circumstances. Assuming a normal gestation period (there being no suggestion that the baby was premature and required specialist hospital care), the pursuer would have known she was pregnant by early June 2024. This may give some context to her assertions in text messages in early July 2024 that she was moving Iain's school and the defender should not buy him jerseys in Primary School One colours.

[157] Reference was made to the baby in the pursuer's affidavits dated 7 March 2025 and 2 July 2025, the focus being on the inconvenience of taking Iain to Primary School One. No reference was made to the baby in the child welfare report prepared by Fiona Corsar.

[158] The birth of a baby might be a change of circumstances, but the pursuer herself did not rely on it when she submitted the minute to vary. Rather, she hid her pregnancy from the defender and from the court until after the baby was born. She did not want the defender to know about the baby at all.

[159] The pregnancy shows the pursuer in a bad light. The pursuer had told Iain not to tell the defender about it, and Iain had kept that secret. The defender only found out when his nephew told him that he had seen posts on Facebook saying the pursuer had had a baby. To his credit the defender realised that it was in Iain's best interests to be able to talk about the baby to the defender, and he encouraged Iain to do so. He asked to meet the baby with the pursuer and Iain, so that he could reassure Iain that he knew about the baby and that Iain was allowed to talk about her. They did all meet.

[160] I do not have enough reliable information about the baby. I am not prepared to find in fact that the pursuer's relationship with the baby's father did end when the baby's father found out she was pregnant, and that he is going to return to America. The baby's father has apparently visited the baby at the pursuer's home and the pursuer has apparently taken the baby to the baby's father's home in Edinburgh. I do not have any information about the extent to which he may be supporting the pursuer financially. It is possible they are living together. The information about the baby's father came in response to my own questions of the pursuer at the end of her cross-examination.

[161] The pursuer has been very secretive about the baby, and she has involved Iain in keeping secrets about the baby. I have concerns about her behaviour. It is important that the defender resumes the role he played in Iain's life up until 29 September 2024 so that he can look after Iain's welfare.

[162] While the birth of the baby may be a change of circumstances, it is not one which justifies a variation to limit the defender's contact. It is not a material change of circumstances. Iain needs contact with his own father. Iain and the baby are half siblings and there is a large age gap between them. Iain's relationship with the baby will be sufficiently preserved by the continuation of the order of 23 May 2022.

The pursuer's wish to return to work

[163] The pursuer previously worked in a care home. That is part of the reason why the defender had Iain from Sundays to Thursdays initially, prior to decree. She worked shifts of more than 12 hours.

[164] I heard no reliable evidence about whether the pursuer would return to work. Her affidavit of 7 March 2025 described her as being on maternity leave, but employed on a part-time basis as a care assistant. Her affidavit of 2 July 2025 described her as unemployed.

[165] I heard no reliable evidence about her child care proposals for her return to work. There are long waiting lists for nursery places. On the second day of the pursuer's evidence, which was two days after the first day, she said that she had received an email on the intervening day offering her a nursery place. That email was not produced to the court.

[166] I cannot find in fact that she will return to work. Nursery places are very expensive, even if available. The pursuer has no appropriate back up childcare, as can be seen from her bringing the children to court with a friend on the first day of the proof and leaving them with a friend who had just come off night shift on the second day. It will be difficult for her to work if either child is ill.

Is the temporary move to Primary School Two a material change of circumstances?

[167] No. Iain was only at Primary School Two for half a term. He struggled to settle there, and he struggled to settle back in to Primary School One. He has now settled back into Primary School One.

[168] Taking Iain to school late is not something that has arisen out of the pursuer's move to Area Two. She took him to Area One Nursery late when she lived in Area Three. She was excused the requirement to attend nursery on Fridays because of her difficulty attending nursery on time.

[169] Her present request for Iain to attend Primary School Two is explicitly to suit her own convenience. Her counsel questioned witnesses about the schools specifically from the angle of convenience. That has little to do with the welfare test.

Secondary School Education

[170] There is no need to sort out Iain's secondary school education now. Much may change in the next few years. It is not a material change of circumstances.

Iain's friends in Area Two

[171] This is not a material change of circumstances. He has longer standing friends at Primary School One.

[172] I conclude that there has been no material change of circumstances arising out of any of the matters raised on behalf of the pursuer or obviously arising on the evidence which, either in themselves or when taken together, justify a variation from the perspective of Iain's welfare: *D* v *L* paragraph 15, *SA* v *DA and K's curatrix* paragraph 10.

If there has been a material change of circumstances/change of circumstances what order should be made?

[173] The defender's alcohol consumption while in charge of Iain is a concern. He was candid in his evidence and genuinely remorseful. The consequences in terms of the significant reduction in his contact with Iain were severe for both of them. The defender has completed the diversion from prosecution programme, and his liver tests were clear. There may be a risk of a further incident. However Iain is getting older and is more able to look after himself, or at least speak to someone if he needs help.

[174] I am also concerned about the pursuer's care of Iain, having regard to the evidence at trial. I am concerned about her credibility and whether she puts Iain first.

[175] Both parties have their flaws. Iain needs both parties to play significant roles in his life. In particular he needs the defender back in his life again.

[176] My concerns about the pursuer are such that the defender requires to play a full role in Iain's life.

The tests to be applied when making an order: section 11 of the Children (Scotland) Act 1995

[177] The welfare of Iain is my paramount consideration. I must not make any order unless I consider that it would be better for Iain to make an order than to make no order. I must have regard to his views. I must have regard to the need to protect Iain from any abuse which might affect him, the effect that abuse might have on him, the ability of the abusive parent to care for Iain, and the effect the abuse might have on his other parent. I have to consider whether it would be appropriate to make an order if the parties would have to cooperate with each other regarding Iain.

[178] These rules also apply if I am to make a specific issue order regulating Iain's schooling: section 11(2)(e), read with section 11(1) and 11(7).

[179] The approach of counsel for the pursuer was somewhat surprising. She cross-examined the defender on the basis of "where the resident parent is, the school is" (her words) and sought his agreement on that. She suggested to the defender that he should have gone to court to get an order for Iain to stay at Primary School One because the pursuer had repeatedly told the defender that she wanted Iain to go to Primary School Two. She seemed to suggest that the defender should have sought an interdict and lodged a minute for contempt.

[180] This is incorrect. The tests are welfare, the no order principle, the views of the child, and abuse and cooperation.

[181] The defender did not need a court order for Iain to stay at Primary School One: there already was an order in place providing that he was to attend Primary School One.

The charges against the parties for which they appeared in the criminal courts

[182] On 28 November 2017 the defender was convicted of behaving in a threatening or abusive manner likely to cause a reasonable person to suffer fear or alarm, contrary to the Criminal Justice and Licensing (Scotland) Act 2010 section 38(1). The way in which he is said to have behaved in a threatening or abusive manner is not specified, but there was a domestic aggravator indicating that the offence was directed against the pursuer. Sentence was deferred for good behaviour and on 29 May 2018 he was admonished. The inference I draw from the sentence is that he pled guilty when he first appeared in court and that the charge was a minor domestic charge.

[183] On 12 January 2022 the court granted the pursuer an absolute discharge. It is not clear what charge or charges she faced, but I assume she faced a charge of assault arising out of the incident on 3 October 2020 because the injury sustained by the defender could corroborate his account. Alternatively she may have been charged with a section 38 offence. She may also have faced a charge arising out of the incident on 16 September 2020. She pled not guilty and a trial diet was fixed. The trial appears to have been adjourned until August 2021 and then to 12 January 2022. It is not clear whether she offered to plead guilty at that trial, or whether evidence was led at trial. If she had been charged with more than one offence, she may have offered to plead guilty to one charge and not the other and that may have been accepted. An absolute discharge is only granted where the court is satisfied that the accused committed the offence: section 246(3) of the Criminal Procedure (Scotland) Act 1995. It is clear therefore that the pursuer did commit the offence she was charged with (whatever that was), but the sheriff refrained from convicting her on the grounds that it was inexpedient to inflict punishment.

[184] Following an incident on 29 September 2024 the defender was served with a summary criminal complaint from the procurator fiscal charging him with being drunk in charge of a child whilst in a public place, contrary to the Civic Government (Scotland) Act 1982 section 50(2), and with behaving in a threatening or abusive manner likely to cause a reasonable person to suffer fear or alarm by shouting, swearing and acting in an aggressive manner towards a paramedic, contrary to the Criminal Justice and Licensing (Scotland) Act 2010 section 38(1).

[185] Section 50(2) of the 1982 Act is in the following terms: "Any person who is drunk in a public place while in charge of a child under the age of 10 shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding Level 2 on the standard scale." The

heading for section 50 is "Drunkenness", and appears in Part IV of the Act which deals with "annoying, offensive, obstructive or dangerous behaviour". Other offences in that section include soliciting and importuning by prostitutes, urinating in the street, dog fouling, and playing instruments. These are minor, nuisance offences, some of which may be tried in the Justice of the Peace court. (The indecent images offences in that Part of the Act are offences of a completely different character.)

[186] Those charges were diverted from prosecution.

[187] The police had arrested the defender on suspicion of having committed a contravention of the Children and Young Persons (Scotland) Act 1937, section 12(1) which makes it an offence *inter alia* to neglect a child under the age of 16 in a manner likely to cause him unnecessary suffering or injury to health. That is a more serious charge. The procurator fiscal must have been satisfied that it could not be proved.

[188] In the section 38 charge, the actions by the defender which were said to amount to the contravention were "shouting, swearing and acting in an aggressive manner towards a paramedic".

[189] All of the charges faced by the parties are minor, and understandably resulted in admonition, absolute discharge and diversion from prosecution.

[190] It is a matter of concern that they have both been charged with criminal offences. It is matter of concern that the pursuer is continuing to make allegations against the defender. It is not in Iain's best interests for either parent to be involved with the police and criminal justice system.

Education

[191] I have made findings in fact about Iain's early years at Primary School One, about his progress then, about the effect the move to Primary School Two and back to Primary School One have had on him, about his friends there and about some differences between the schools. I have also made findings in fact about the parties' understanding of the importance of education, and about the pursuer's failure to take Iain to school on time. Iain needs a stable education placement where the staff know him. He needs to stay at Primary School One.

[192] Secondary school is several years away, but I am of the view that Iain will be offered a place at High School One. I accept the defender's evidence that he will move into the Primary School One catchment area within the next few years, and so Iain will be entitled to attend High School One. Even if he does not, Primary School One is a feeder school for High School One and he will have priority because of that. I would not expect High School One to be oversubscribed: I am dealing with another case about a child attending Primary School Four (another feeder school for High School One) whose parent wishes to send the child to a private school after primary 5. This is not unusual, and many of the private schools in Edinburgh take pupils from state primary schools at the start of Primary 6 or Senior 1 with the result that there are places available at schools like High School One.

[193] Iain needs the defender to be involved in his school life at least to the extent set out in the decree of 23 May 2022.

[194] The defender is able to help Iain with his education, wants to be involved and does help Iain. He is involved with other parents and took up their suggestion of the course Raising Children with Confidence. The pursuer cannot help Iain with his homework. She admitted that sometimes she did not understand Iain's homework. She is not interested in

what he does at school. She assumes both schools give the same education because they are council run.

[195] Education is fundamental to Iain's future. The defender understands that: the pursuer does not.

[196] The defender takes Iain to school on time. He understands that if Iain is late, he misses out on learning and he is embarrassed at having to come into the class late. The pursuer is persistently 30 minutes late. She admitted that lateness had a bad impact on Iain's education, it embarrassed him and that he had problems with his confidence. If she caught the earlier bus or if she accepted the defender's proposals to pay for a taxi or to collect Iain himself, Iain would not be late.

[197] In addition to Iain's formal education the defender wishes to offer Iain the chance to participate in a variety of sports and other activities. Before the incident on 29 September 2024 he took Iain to Lego Club in Area One Library every second Tuesday. Other than having swimming lessons, the pursuer did not appear to do much with Iain.

[198] There is no welfare based reason for removing Iain from Primary School One where he is settled and making progress. The pursuer's convenience is not a good enough reason. Iain needs stability.

[199] If I had been deciding the issue of new, I would have made the same decision regarding Primary School One. An order would be necessary to reinforce to the pursuer that she must not change Iain's school unilaterally.

Residence and contact

[200] Again, I recognise the potential risk to Iain if the defender drinks alcohol to excess while Iain is in his care. However Iain is getting older, and is less vulnerable.

[201] I have a number of concerns about the pursuer too. I have concerns about her dishonesty. I have concerns that she did not tell the defender about her pregnancy, and that she told Iain not to tell him about it. I have concerns about whether she is still in a relationship with the baby's father, about whom I know nothing. I have concerns about her continuing lack of candour about this.

[202] I suspect she will find it very hard to return to work. I suspect that she will have difficulties with child care. Even if she is able to obtain and afford a nursery placement, she will require back-up child care when either child is unwell. In July 2024 she sent MS to collect Iain after contact rather than attending herself. This caused a dispute between the parties. I formed the impression that while RMcK agreed to assist the pursuer with childcare she was not enthusiastic about doing so.

[203] I have no confidence that the pursuer has proper back-up care for her children. On the first day of the proof both children attended court from about 9 am until 12 noon with a friend of the pursuer. They bumped into the defender. It is not appropriate for children to be brought to court when their parents are litigating against each other. It is not appropriate for children to be brought into a court building where there are so many offenders milling about. There was a loud disturbance in the court building during the submissions when an accused person was screaming for a lengthy period of time outside the proof courtroom. On the second day of the proof Iain and the baby had gone to McDonalds for breakfast with a friend of the pursuer. The friend had just come off a night shift and wanted to go there. When they got tired, the pursuer thought they might go back to her flat.

[204] I also have concerns that the child welfare reporter Angela Craig, who was supposed to meet the pursuer and Iain at Chambers Street Museum, was asked by the pursuer to go to

her home to collect Iain to suit the baby's nap time. This suggests that the pursuer is unable or unwilling to attend important appointments, including about Iain's welfare, timeously.

[205] I have concerns about the pursuer's lack of cooperation with the defender and her abuse of him in general. It is a particular concern that the pursuer tells the defender in front of Iain that the defender is his grandfather not his father. This is disrespectful of the defender, and it may cause Iain some confusion. She referred throughout her evidence to "my son", without acknowledging that Iain was also the son of the defender.

[206] I have concerns about whether the pursuer can properly look out for Iain now that she has a baby to look after, and two estranged fathers looking for contact.

[207] It is not in Iain's best interests to have so much time with the pursuer and so little time with the defender. Iain needs proper time with the defender during which his needs will be prioritised. It will still allow him to have time with the baby.

[208] Having regard to the evidence I heard, had I been deciding the matter of new, I would have made a similar decision to the decree of 23 May 2022 regarding residence and contact. It is a routine he is familiar with. An order is necessary to reinforce to the pursuer that she must make sure Iain spends time with the defender. The order will minimise handovers between the parties to Sundays only, with the other handover being direct from the school. This will help reduce the risk of abuse in front of Iain. It will minimise the extent to which the parties require to cooperate with each other and the risk of conflict between them.

[209] I might have characterised that order a shared residence order to impress upon the pursuer that she is not the sole decision maker and in the hope of encouraging her to cooperate. I might have made an order in terms of which Iain lived with the defender until Thursday after school too. That is the arrangement suggested by Iain's health visitor and

put into place when the parties separated. The aim of that order appears to have been to assist the pursuer to work while the defender took responsibility for getting Iain to school timeously. Such a change might suit the pursuer because there may be a limit to what she can do with Iain on Wednesday after school, and it would mean she only had to take Iain to school one day a week. Alternatively I might have allowed the defender more time with Iain on a Sunday, perhaps with an earlier handover, so that the defender could spend more time with Iain at the weekend, though he is retired and has free time during the working week.

[210] I heard no evidence or submissions about such options. Having found there has been no material change of circumstances the order of 23 May 2022 will remain in place. It would be open to parties voluntarily to make such changes themselves.

Iain's views

[211] Iain met the child welfare reporter Fiona Corsar on 5 June 2025 and the child welfare reporter Angela Craig on 6 July 2025. His stated views are fairly neutral. He likes both schools and he likes both parents. I have made some findings in fact from these reports. However the pursuer told him over a number of months that he was not allowed to tell the defender about the baby. I have some concerns that the pursuer may have told him what to say to the child welfare reporters.

[212] I have taken his views into account. I have not made an order which conflicts with his stated views.

Observation: Inappropriate service on Iain of the draft Form F9

[213] The minute to vary procedure is regulated by Ordinary Cause Rule 33.65, which provides that an application after final decree for variation of a section 11 order shall be made by minute in the process of the action to which the application relates. Rules 33.44A to 33.44D apply to the seeking of the child's views in relation to a minute to vary. It is clear from those rules that a Form F9 cannot be sent until after the period for lodging a notice of opposition or answers has expired. The Form F9 has to be revised if the defender has any craves: OCR 33.44D.

[214] On 15 November 2024 the minute to vary was warranted. The sheriff allowed intimation to Iain of the draft F9, subject to any proposed revisals by the defender.

[215] Iain's views were lodged on 28 November 2024. They should not have been, as any period for lodging answers had not expired (14 days from intimation). At the stage of taking Iain's views the pursuer did not know whether the defender might respond with answers containing a crave which would require intimation to Iain. The answers sought to dispense with intimation on Iain by form F9 on the basis that his views should be taken by a child welfare reporter. The answers contained a crave requiring Iain to be re-enrolled at Primary School One, on which Iain's views were required. Furthermore it was the pursuer's friend and neighbour, RMcK, who took Iain's views. I have already referred to her poor English.

Conclusion

[216] The defender's submissions are well founded. I am not persuaded by the pursuer's submissions.

[217] There has been no material change of circumstances to justify variation of the decree of 23 May 2022. Even if there had been a material change of circumstances, I would have made the same order, possibly with some small changes.

[218] Parties agreed that there should be a finding of no expenses due to or by either party.

[219] Finally I wish to record my thanks to Mrs Ahmad, Advocate, and Mr Laing, Advocate, for their assistance during the proof.