



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 47

F6/25

OPINION OF LORD BRAID

In the cause

PSC

Pursuer

FC

First Minuter

OC

Second Minuter

and

CEIT-ANNA MACLEOD KC

Third Minuter

against

NS

Defender

Pursuer: Party

First Minuter: Scott KC; Millard Law

Second Minuter: Ennis KC, Aitken; Lisa Rae & Co

Third Minuter: McGregor KC, Critchley; Balfour & Manson LLP

Defender: Party

22 May 2026

Introduction

[1] This is an unusual and highly anxious case, which first proceeded to proof last summer before Lady Tait, who issued her opinion on 30 September 2025 ([2025] CSOH 90) (the September decision), awarding the parties shared residence of their three children and refusing the pursuer's conclusion, in terms of section 11(2) of the Children (Scotland) Act 1995, for a specific issue order that he be allowed to relocate with the children to the United States of America (whence they had all come a relatively short time previously). Two of the children now wish to vary that decision, which did not accord with their expressed wish to return to America, and they have entered the process and lodged minutes of variation in an endeavour to achieve that aim. The principal questions which the court now requires to resolve are, first, in what circumstances may the court revisit the care arrangements for children following a decision after proof; and second, if the court is entitled to revisit those arrangements in this case, ought the September decision to be varied, and if so, how?

[2] The background facts are set out in full in the September decision, but I must mention some of them (along with other facts which are either non-contentious or have been agreed by joint minute) so as to set the scene for what follows. Until 2024, the pursuer and defender, who are married to each other, lived in America, latterly in Lake Tahoe, California with their sons F and O, respectively now aged 13 and 11, and their daughter, I, now aged 8. The pursuer is a dual UK and US citizen; the defender a German national who held a US Permanent Resident card (which she no longer has); and all three children are natural born US citizens, but have had dual UK citizenship since 2019. The defender has indefinite leave to remain in the UK, and she works in Scotland as a specialist medical consultant.

[3] In 2024, the family moved to a town in Scotland on a staged basis. The pursuer, F and O travelled there on 17 July 2024, the defender and I joining them on 9 September 2024. There was then a certain amount of shuttling back and forth across the Atlantic for various purposes including a holiday and a trip to collect the family dogs, but by 29 November 2024, when the defender returned with the dogs, the entire family was safely ensconced in their chosen destination in Scotland. On 3 December 2024, the pursuer travelled to England, where he was on 4 December 2024, and on that date the defender told him that she had decided to separate from him and had moved into a rented house.

[4] Perhaps unsurprisingly, the children were unhappy with that turn of events, to the extent that the boys (although not I) very quickly became estranged from the defender and chose to reside with the pursuer. The pursuer wished to return to America with all three children, also their wish, which the defender opposed, resulting in this action. For her part, the defender sought residence of the children, failing which a shared-residence order, and she opposed the relocation order. The action proceeded to proof.

[5] The issues in dispute at that proof were recorded in para [4] of the September decision as follows: (i) the parties' respective roles in caring for the children in America; (ii) the circumstances, purpose and duration of the parties' coming to Scotland; (iii) the pursuer's conduct towards the defender and the children, in particular towards O; (iv) the defender's immigration status and ability to return to live and work in America; and (v) the children's views and whether they were genuinely held. On the first four of these matters, Lady Tait found as follows. (i) Both parties had been actively involved in and committed to the children's lives. (ii) Contrary to what the pursuer had contended, the move to Scotland was to be permanent, rather than a trial, notwithstanding that the parties had retained their two homes, and furniture, in America and that the pursuer had characterised the move to

the children as flexible as a means to reassure them. (iii) The pursuer had been verbally abusive towards the defender, having belittled her, sworn at her and been aggressive on occasions, although he had not exercised financial control, as had been claimed. He also assaulted O in a motel bedroom in May 2024, having kicked him in the abdomen, and had hit both boys on other occasions and threatened to hit I. (iv) The defender will be able to return to America on a permanent basis only with difficulty, in a process that at best is likely to take more than a year: and possibly, it now transpires, even if her visa application is successful, not before March 2028. Her ability to return for shorter stays of up to 90 days is uncertain.

[6] The children's views and their authenticity was the subject of much evidence.

Dr Katherine Edward, chartered clinical psychologist, was appointed by the court to prepare a report on the children's views, and whether their views were independently their own or were to any extent the result of influence. Her evidence is discussed in detail in the September decision, but in summary was as follows. F and O both would prefer to live with the pursuer as opposed to the defender, wherever they were living, but their strong preference was to live in America, which they missed, and to return to their previous schools, friends and the activities which they had pursued. Both were very angry with the defender. The child I had adapted better to life in Scotland than her brothers, and was relatively happy with splitting her time equally between her parents, but her preference, too, was to return to America. Dr Edward was of the view that all of those views were genuine and had not been manipulated by the parties. Her report was criticised by Dr Hessel Willemsen, clinical psychologist, on the basis that there were multiple factors which could have influenced the children's views and which had not been adequately analysed, including allegations of domestic violence, parental conflict and alienating behaviour.

Dr Edward had responded to those criticisms in her second report but, in substance, did not alter her opinion as to the genuineness of the children's views. In her oral evidence, she did acknowledge that if O had been assaulted by the pursuer [as, indeed, was found to have been the case], that would place a different hue on the child's presentation to her.

[7] Against that background, the September decision was that, notwithstanding the children's views, to which Lady Tait had regard, it was not in the children's best interests that they return to America with the pursuer without the protective involvement of the defender, but instead both parents should be involved in their care, allowing the defender to safeguard them. Lady Tait acknowledged that the boys were unlikely to participate in a shared care arrangement without therapeutic intervention (about which Dr Edward had given evidence). She refused the pursuer's conclusion for a specific issue order and made a residence order for the children to reside equally between the parties. No order for therapy was made, but Lady Tait expressed the hope (at para [226]) that the "parties' priority will be to arrange the support and therapy for the boys which has been considered necessary for some time".

[8] Neither the pursuer nor the boys reacted well to that decision. It seems that the pursuer made no attempt to explain it, or the reasoning which underpinned it, to the boys, nor to arrange support and therapy. Although the parties disagree as to the reasons, no therapeutic intervention has taken place and both parents (and the experts now involved in the action) all agree that, as things stand, there is no immediate or even short-term prospect of there being a shared care arrangement as ordered in the September decision, although the defender harbours hopes that if therapeutic work were done with the boys, shared care would be workable. Since the September decision was issued, O and F have continued to reside with the pursuer, other than between 2 October 2025 and 18 October 2025 when the

pursuer was in America, during which time they lived with the family of one of O's school friends. They have not resided with the defender. They have seen her from time to time at her home only for brief periods, meetings lasting for no more than about 15 minutes on each occasion, save on 29 November 2025 when F stayed for about 30 minutes. When O sees the defender, he is abusive towards her. I has resided with the pursuer and defender in alternate weeks, changing over on a Wednesday. All three children attend schools in the town in which they reside, F a secondary school and O and I the local primary. I is in primary 4. She is settled in school and has made friends. She is doing well academically. She has a close relationship with F and O, and enjoys spending time with them.

[9] Finally, the pursuer and defender continue to own the former family residence at Lake Tahoe, although whether it will eventually have to be sold in the context of their ongoing divorce proceedings, or to meet their respective liabilities, is presently unclear.

The Minutes to Vary

[10] Following the September decision, F, and subsequently O, sought their own legal advice, which resulted in their both sisting themselves as parties to the action, and presenting their minutes seeking to vary that decision¹. Although the precise orders they seek are not in identical terms, in substance they both ask the court to vary the decision by recalling the shared residence order, making a residence order providing that they live with the pursuer and granting a specific issue order allowing the pursuer to remove them from Scotland to America in order that they might reside there, in Lake Tahoe. F also seeks an order in respect of I, that she, too, be allowed to relocate to America. While the competency

¹ Strictly speaking, O's "minute" is in the form of answers to F's minute, but nothing turns on that detail.

of that might be open to question, the court appointed a curator *ad litem* to I, who has entered the process to represent her interests. Although the curator has not formally sought an order, her position is that it is in I's best interests to move to America with the boys, should they be allowed to go. The pursuer has not formally sought to vary the original order but supports his sons' minutes. The defender is opposed to any change which would result in any of the children moving to live in America.

[11] It is important to note that this is neither an appeal against, nor a review of, the September decision. The correctness of that decision at the time it was made, and the findings-in-fact which led to it, are not open to challenge. Rather, the minuters, that is F and O, must show, first, that there is a justification for the court reconsidering the arrangements for their care; and, if so, that their welfare would be best served by the court now granting the orders previously refused. It is a review only in the sense that if the court is satisfied that it is appropriate to reconsider the children's welfare, then, and only then, may the *arrangements* previously made be reviewed. In that event, the court must also decide whether, if it is in the best interests of F and O to return to America with the pursuer, it is also in I's best interests to do so or whether she should remain in Scotland with the defender (although in fairness, the defender did not contend that it is in the interests of any of the children for them to be separated from each other). Depending on the outcome of these issues, the court may also have to consider what contact there should be between I and whichever parent does not have primary residence (if shared residence of her, for whatever reason, is not to continue).

[12] It follows that any decision the court makes must be against the backdrop of the original findings-in-fact, two of particular note being that the parties' move to Scotland was not to be a trial; and that, irrespective of what the pursuer, F and O all apparently would

prefer to be the position, (or, as the pursuer continually put it, their “lived experience”) the pursuer did abuse the boys and the defender in the manner stated above.

The proof

Introduction

[13] F, O and the curator *ad litem* were all represented at the proof by senior (and in the case of O and the curator, junior) counsel. Both the pursuer and defender represented themselves. The pursuer had the advantage that his position aligned with that of F and O; the defender did not, but she conducted her case extremely ably. The bulk of the evidence-in-chief comprised (i) affidavits from F, O, the pursuer, and I’s curator; (ii) a witness statement from the defender, which she adopted on affirmation as her evidence; (iii) reports by Dr Lucie MacKinlay, Chartered Clinical Psychologist, who, in relation to F, adopted her reports dated 10 November 2025 and 30 March 2026, and an additional letter dated 15 January 2026; and, in relation to O, her report dated 24 January 2026; (iv) Dr Willemsen, who was again called by the defender, and who adopted his report dated 2 April 2026; and (v) Dr Anne E Woodhouse, Consultant Chartered Clinical Psychologist, who was called by the curator, and who adopted her report dated 30 March 2026. F supplemented his affidavit by giving parole evidence, but he was not cross-examined by any party. O chose not to give parole evidence. The other witnesses all supplemented their affidavits or reports with parole evidence, and were all cross-examined. The parties also entered into a joint minute of admissions, the material parts of which are reflected in the introductory, section of this opinion.

The evidence

F

[14] F's evidence largely chimed with Dr Edward's earlier account of his views. He very much wishes to return to his life in America. He still has friends there with whom he has kept in touch and whom he misses. While one may raise an eyebrow at his professed inability (as opposed to unwillingness) to pursue in Scotland some of his favourite pastimes, such as mountain biking, ski-ing and snowboarding, and his assertion that in Lake Tahoe, apparently unlike Scotland, there is "nature" consisting of a forest, rivers, mountains and great weather, his overall position is encapsulated at paragraph 27 of his affidavit, where he states:

"I 100% want to go back to America. I want to go back because it is better. It is my home. It is what i (*sic*) have grown up with and it is where everything I've ever loved is. I am American. I identify as American because that is where i (*sic*) was born and that is my home."

The one activity F has continued to pursue in Scotland which he also did in America is football (soccer) at which, by all accounts, he excels and which he says he hopes to pursue as a career, although even there he claims that the coaching in US is much better, the youth level is significantly better and that his prospects of getting into a college or professional team would be much enhanced were he able to return to America.

[15] Worryingly, F spoke to his mental health having declined in Scotland. As he put it, returning to his happy place would restore it. Living in Scotland provided him with no motivation, and he was very unhappy here. If made to stay here he could see no clear path of how to live his life. (F's suicidal ideation was spoken to in more detail by Dr MacKinlay, below.) It was also evident from F's affidavit that he still harbours negative feelings about the defender and that he believes she lied to him (and his siblings) by saying that the move

to Scotland was merely to be a trial, and that he now feels trapped in Scotland by the defender. He believes that in opposing his return to America the defender is selfishly thinking only of herself and that if she truly loved him as she says, she would allow him to return. He also feels aggrieved that the defender (as he sees it) thwarted his desire to see his sister, I, on his birthday. He does not want to do therapy although if allowed to return to America, he would be open to perhaps speaking to the defender on a one-to-one basis and to attempting to repair their relationship. He has not closed his mind to contact in America, but would not wish to return to Scotland to see the defender here. Ideally, he would like to return to America by May 2026, in time for summer camp and to enable him to return to his school before the end of term, which he thought would make it easier for him when starting the new term after the holidays.

[16] It was put to F that his academic performance in Scotland left much to be desired. As he acknowledged, his report card shows that he has some low grades, consistently does not pay attention in class and misbehaves. He had “quite a few” demerits and the lowest number of merits of any pupil in his class. That contrasted with his performance in America where on one occasion he received straight As, for which he was rewarded with a ski pass. In attempting to explain that, F was somewhat dismissive of the Scottish education system in contrast to that in America. He found the learning method uncomfortable, the kids were unfriendly and the teachers rushed the learning. He did not enjoy it and so did not put any effort in, as he was not happy. He had no desire to learn at the school. In America, the learning was structured differently and always engaged him.

[17] As regards I, F spoke of her in positive terms. She lightened up the house when around. He could not envisage the three siblings being separated. They all wanted to be together.

[18] I gained a very clear sense from his evidence that F has simply not allowed himself to enjoy life in Scotland, as evidenced, for example, by his assertion that Scotland does not have “nature” (I concede that he may have a point about the weather) and that he has been unable to pursue his former activities. I accept the defender’s evidence that all of the activities which he used to do, and more, have been offered to him but he has declined to take part. He also appears to have set his mind against learning in school, and to have a fixed view that the American system is “better”, which it may or may not be. Although there was other evidence that his talents lie on the sporting, rather than in the academic, field, it is incontrovertible that he is presently demotivated and is not achieving what academic potential he has. I accept that the manner in which the permanent move to Scotland was presented to the children was perhaps less than fully transparent, but F is wrong to blame the defender alone for that. Another matter on which he is undoubtedly wrong is that the defender has opposed his return to America for her own interests. I am entirely satisfied on her evidence that her opposition is firmly based on what she perceives to be in his best interests. Nonetheless, despite these criticisms, I do accept that F sees himself, as he put it in the passage repeated above, and as Dr MacKinlay affirmed, as an American boy and, that he does not want to be in Scotland, which is, to him, a foreign country and that his views, and attitude to life in Scotland, must be viewed in that context.

O

[19] O’s evidence, too, largely chimed with what Dr Edward previously reported. He, too, very much wishes to return to life in America and for F and I to go back with him. Like F, he extolled the virtues of life there (Dr MacKinlay wryly observed that the boys could gain employment with the Lake Tahoe tourist board): in his words, a massive cliff area next

to the family home in Lake Tahoe; a massive mountain; a really big river; and a national forest literally on their doorstep. He enjoyed being surrounded by nature. He enjoyed school there and had a lot of friends. He played football, went mountain biking and ski-ed in the winter. None of those things he did in Scotland, other than football. The school which he attends was much smaller than his American school (which he saw as a negative) and not as "nice", although he did have some friends. He did not like the Scottish weather and the buildings were all "clumped up" together. In short, according to O, everything in America is better than in Scotland and he just wishes to go home because life is better there. Like F, he repeated the mantra that the move to Scotland had only been a trial and that the children had been told that they could return after a year if they did not like it. Like F, he is wrong to blame the defender alone for that gloss having been put on the move. He was angered by the fact they had not been allowed to go back to America, and by his parents' separation which had come as a massive surprise to him, having been unaware of any difficulties between his parents in America [although the marriage was plainly in trouble before the parties came to Scotland]. He was able to discuss his feelings with a lady at school, who helped him to control his emotions. He now feels very angry with the defender for trapping him here, and does not want to spend any time with her. He does not like her, because of "what she has done" and he does not think that the relationship can ever be fully repaired, whether he is allowed to return to America at this time or not. If not allowed by the court, he would "try all the other ways to get back" and would wait until he was 16 and then immediately fly back on his own. The court's decision in September had had a really negative effect on him, and he had lost all hope.

[20] I accept that O's very strong wish is to return to America. As with F, he has not allowed himself to embrace life in Scotland. He, too, views himself as an American boy who wishes to be in America.

Dr Lucie MacKinlay

[21] Although Dr MacKinlay was at pains throughout her evidence to stress that all she had been instructed to prepare were reports on the boys' views, not a comprehensive family assessment, in fact her reports were more than a mere recounting of their views; rather, as senior counsel for F submitted, she assessed those views from a psychological perspective. However, she accepted that there were limitations to her reports in that the boys' accounts had not been triangulated with external evidence and that she had not explored the wider dynamics and influences present within the wider family system, as she would have done had her remit been wider.

[22] Much of what F told Dr MacKinlay echoed his evidence to the court and, by extension, what he previously told Dr Edward. In short, F sees himself as an American boy with an American way of doing things, particularly in respect of sport, who very much wishes to return to America. He is unequivocal in his desire to return to Lake Tahoe. He is very connected to his American identity and his goal is to be an American child and man. He is very angry with the defender for not letting him lead the life he thinks he should have. The reasons for his preferences were "multifaceted and well-articulated" and supported by his responses to the Beck Youth Inventory. He demonstrates a high level of insight and self-reflection regarding his wishes and the reasoning behind them. He accepts that things are not necessarily better in America, but they are different. He considers that coming to Scotland was supposed to be a temporary adventure. He feels robbed of something and is

grieving the loss. It is important to him to do things the American way. As regards his relationship with the defender, F was clear that it had been significantly affected by the current living situation. He was willing to see his mother, but only if allowed to return to America: forcing him to stay in Scotland would ruin any chance of repairing the relationship. He would not comply with a shared-care arrangement. Should the pursuer go back to America without him, he would rather go into foster care than reside with the defender. He saw that as preferable to living with the mother who had (in F's mind) disregarded his thoughts and feelings and caused him extreme psychological pain. Any mandated shared-care arrangement would be inherently damaging and would likely result in disorganised attachment, chronic emotional dysregulation and a further decline in his mental health.

[23] As regards the genuineness of F's self-reported views, Dr MacKinlay's opinion was that his maturity, consistency and the absence of indicators of manipulation supported the reliability of his views as a genuine reflection of his current psychological state. His account was nuanced, specific and rooted in his lived experience. His views had remained stable and consistent since the parental separation and did not appear to have been affected by violence and aggression towards him or any other family member. His account of family discipline and conflict suggested that his views were shaped primarily by his sense of safety and comfort in his father's care, rather than by fear or trauma resulting from violence or aggression. The defender's technique of stopping fights between F and O – which he said involved pinching on the back of his neck "in a sore way" and pinning of his and his brother's arms down with her knees – was more physically uncomfortable and, at times, distressing. However, that was not the reason why he did not wish to live with the defender, which was solely connected with her stance over his wish to return to America.

His anger was rooted in a sense of injustice and betrayal, rather than in fear or trauma, and was closely linked to his belief that his mother was not listening to or understanding his needs. Dr MacKinlay found no evidence of coaching or manipulation. She rejected Dr Willemsen's suggestion that F's (and O's) rejection of the defender may be the result of negative influence by the pursuer. There was no clear evidence from F's self-report or behaviour that he has been subject to systematic alienating behaviours from his father. Any pattern of parental alienation would have affected I as well, which it did not. F acknowledged the positive aspects of his mother's past role, and his negative feelings towards her stemmed solely from her refusal to allow him to relocate.

[24] Dr MacKinlay went further. The September decision had had a profoundly negative psychological impact on F, exacerbating his existing feelings of sadness, anger, and hopelessness. That impact was severe and ongoing, with significant implications for his emotional and behavioural functioning. If the court decision was not "overturned", he would become doubly angry with the defender and the relationship would never be restored. F was clear that forcing him to remain in Scotland, would have a permanently detrimental effect on his emotional and psychological welfare. He would not "see a point in continuing with anything." This reflected a profound sense of hopelessness and despair and suggested a risk of significant depression and even suicidal ideation, all linked to his being forced to remain in Scotland permanently. He was not feeling suicidal at present, but presented with significant symptoms of depression, including persistent sadness, hopelessness, loss of pleasure (anhedonia), and a profound lack of motivation, particularly regarding his education. Removal of his hope of returning to America would pose a substantial risk of a severe depressive crisis or self-harm, and he would need considerable mental health support in that eventuality. A boy, such as F, who is impulsive and

overwhelmed is a significant risk to himself if he is suicidal. Because he could become overwhelmed and aggressive, it was also possible that F could hurt the defender or someone at school. F's psychological difficulties were best understood as a complex interplay between his profound sense of loss and identity disruption following forced relocation, ongoing family conflict, and a perceived lack of agency in decisions affecting his life. His depressive symptoms and suicidal ideation were directly linked to these stressors and were perpetuated by continued residence in an environment he found unsatisfactory and alienating. Therapy alone would not address these issues. Any therapeutic intervention would be to help him cope with the reality that his needs and preferences are not being prioritised, rather than try to change his mind about his preferred living arrangements, or to persuade him to adopt a particular view of Scotland or of his mother. Finally, F's siblings were very important to him. He found it very difficult to envisage life in America without I, which would be intolerable for him.

[25] Turning to O, Dr MacKinlay said that he, too, was capable of forming a coherent view and communicating it effectively. He is absolute in his wish to reside with the pursuer and his siblings in their former home in Lake Tahoe. He sees his current life in Scotland as a form of imprisonment. O is fundamentally an American boy who views his time in Scotland as a temporary and unwelcome interruption to his real life. He feels trapped and betrayed, primarily by the defender, and believes that his future is compromised by staying in Scotland. He has categorically rejected shared care or residence with the defender and considers that his quality of life and mental health are entirely dependent on his returning to America. He now sees the defender as the source of all his misery and pain. Dr MacKinlay considers that O's desire to return to America is a deeply-rooted requirement for his emotional and psychological stability.

[26] As regards the genuineness of O's views, he provided a reasoned, consistent account of his needs, focussing on his own interests in an age-appropriate way and in age-appropriate language. In response to a question put to Dr MacKinlay that O has an idealised fantasy of life in Lake Tahoe, she said that O knew from speaking to friends that life was continuing in Lake Tahoe and that he would be going to a different school. He was aware their home still existed there, and he wanted to move back into his bedroom and carry on. He was sad that his life as it was will not exist in the same way, but insofar as his mum was no longer included, life was already different. O had great attributes: he was capable, articulate, friendly and nice. He was embarrassed by the way he acts towards his mother. He did not give the sense of being frightened of either parent for any physical intervention. Prior to the rupture, O could have returned to the United States with his mother but he now viewed her as his jailer, in whom he had lost faith. His alignment with the pursuer was his ticket to get what he wanted. So far as Dr MacKinlay could tell without having interviewed the pursuer, O did not appear to be parroting the latter. As with F, Dr MacKinlay effectively ruled out the possibility of parental alienation.

[27] In Dr MacKinlay's opinion, the September decision had caused significant psychological injury to O, plunging him into a state of chronic distress, characterised by helplessness and a sense of profound entrapment. It had triggered a significant decline in his self-esteem. He was in a chronic state of resentment and despair and was highly depressed. He had disclosed suicidal ideation during his assessment, as he viewed the cessation of his life as a way out of a situation he found "intolerable and permanent". This appeared to be directly and exclusively linked to his current living situation and the legal constraints placed on him. O had considered specific methods of how he might end his life (although without a plan), demonstrating a level of rumination that was highly atypical and

dangerous for an 11-year-old. Compared with F, he was further down the line with his suicidal ideation. It did not appear to be bravado. Whereas F saw himself as a good person in bad circumstances, O saw himself as bad. He perceived the legal system not as a protector of his welfare but as the mechanism of his confinement. O's self-deprecating internal narrative was highly damaging to his development, which was a common byproduct of being caught in a protracted legal battle. He identified so strongly as an American boy that he could not develop, rather his mental energy was entirely consumed by the legal battle and his desire to escape.

[28] Living with the defender either full-time or in a shared care arrangement was not practicable. Moreover, physical compulsion was clinically contra-indicated and would further damage the relationship, possibly permanently, and would fail to safeguard his welfare, because it ignored the reality of his current psychological state. It was highly unlikely that any form of traditional therapy would be able to mitigate those severe emotional risks. O's psychological difficulties were best understood as a reactive depression with past suicidal ideation, arising from the interplay of environmental, relational, and systemic factors. Any intervention must prioritise O's need for agency, safety, and validation. A return to Lake Tahoe was a fundamental requirement for O's emotional stability and preservation of his burgeoning identity and provided the best chance of a restoration of O's relationship with the defender. The current *status quo* was not a sustainable or safe environment for O's development; he remained at high risk of long-term psychological distress through the defender's presence which was causing a great deal of hostility, psychological distress and self-loathing. In terms of the wider family unit, O was kind about I, about whom he had nothing negative to say other than that she could be annoying. When faced with the prospect of I not returning to America with him, he was

rendered speechless and could not contemplate that possibility. Sibling relationships could not be overshadowed but were fundamental, lasting longer than the parent-child relationship.

[29] Finally, as regards the abuse which the court had found to have occurred, Dr MacKinlay's position was that her report would have been the same regardless of whether the abuse happened or not. Both parents in her view had behaved in a physical way towards the children which was not acceptable.

Dr Willemsen

[30] Since Dr Willemsen's evidence largely consisted of a critique of Dr MacKinlay's reports, it is convenient to deal with it now. He placed much emphasis on the finding of abuse in the September decision. His central thesis was that the children's voices, while important, could not be considered in isolation but must be considered in a wider context, in particular, with regard to the effect which abuse could have on children, which was to affect their self-esteem and to give them feelings of self-doubt. This family presented with a complex and longstanding pattern of relational disturbance, characterised by chronic parental conflict, asymmetries in emotional functioning and the children's involvement in polarised relational dynamics. One could see from Dr Woodhouse's report (which he had found to be helpful) the trauma which I had expressed through her play and story-telling. The evidence indicated that dysfunction had predated the relocation to Scotland and subsequent separation. In that context, the findings of abusive behaviour by the pursuer were of particular psychological significance, and exposure to physical and verbal aggression was likely to have had a profound impact on the children's internal world, including their sense of safety, their capacity to process emotion and their organisation of

relationships. While the children's views may in part reflect genuine preferences and experiences, there was a "real possibility" that they were also shaped by unconscious defensive processes including identification with the more powerful or feared parent; avoidance of conflict or further aggression; and the use of splitting, whereby one parent was idealised and the other devalued as a means of managing emotional complexity. The children "may" find it difficult to challenge the pursuer about what had happened. The boys' aggression towards the defender "may" be understood as a communication of distress, rooted in feelings of anger and loss and dislocation (from America to Scotland) but also "potentially" reflecting an internalisation or mirroring of aggressive dynamics within the parental relationship. The children's emotional presentation was "consistent with" a state of heightened internal conflict and insecurity. Dr MacKinlay's report was subject to the limitations she had herself described, which precluded a holistic understanding of the children's lives and the positive and adverse factors affecting their views. When asked how O could be made to feel better, Dr Willemsen said that this was a very difficult question, to which there were a variety of solutions. The children might stay longer, "perhaps" with a view to finding a solution where shared care "may" work better. A return to America would "not necessarily" alleviate all of the problems, in particular, it would not repair the boys' relationship with the defender. However, it would be difficult to order the boys to stay with the defender, particularly given their history of direct aggression towards her. It would be possible to look at a temporary placement such as foster care, with a view to rehabilitating them back to the defender while therapeutic work took place, a process which might take months.

[31] In cross-examination, Dr Willemsen accepted that he was essentially putting forward a hypothesis in his report. He accepted that a hypothesis was something to be tested by

interviewing the children concerned, and by reference to any other documents that may be available. He agreed that his evidence would have been much stronger had he seen the children. That would have been in line with his usual methodology. There would be concerns for F whether he remained in Scotland or went to America. Dr Willemsen took from Dr Woodhouse's report that I was able to understand the conflict between her parents. It would be harmful for I, in the short term, to be separated from F and O, were they to go into foster care. Finally, Dr Willemsen agreed that something had to change and that the *status quo* was unsustainable in the longer term; there had to be some form of intervention.

Assessment of the evidence of Drs MacKinlay and Willemsen

[32] Dealing first with Dr Willemsen's evidence, I must record at the outset that he gave his evidence in a careful and considered manner, and there is no doubt that he has the necessary skills and experience to qualify him to give expert evidence to the court, and that he was doing his utmost best to give evidence which would assist the court in its task. No party suggested otherwise. However, there are at least three difficulties with his evidence, none of which are intended to imply any criticism of Dr Willemsen. The first is that, due to constraints of time, his report concerns only O. The second is that he did not interview any of the children. That is not his fault, since he requested, but was refused, access to them, seemingly more to do with the logistics of arranging visits rather than for any ulterior motive. Nonetheless, the fact that he has not interviewed the children has meant, as he himself conceded, that his opinions were less confidently stated than might otherwise have been the case. This has given rise to the third difficulty, which is that, as senior counsel for F submitted, the language of Dr Willemsen's report is couched in terms of possibility, rather than probability. The inevitable consequence is to lessen the weight that can be attached to

his evidence. Nothing that he said was contentious, insofar as it bears upon what *might* affect a child's views, but his evidence forms a very shaky basis indeed upon which to form an assessment that the children's views in this case are anything other than genuine, standing the counter-evidence of those psychologists who have interviewed the children, Drs MacKinlay and Woodhouse. It is significant that Dr Willemsen himself agreed that the current situation is intolerable and that something has to change.

[33] By contrast, I do accept the evidence of Dr MacKinlay, who was not only also an impressive witness, but she also had the inestimable advantage over Dr Willemsen of having interviewed both boys. She did not dispute that anything hypothesised by Dr Willemsen *could* be the case, but she had detected no evidence that it *was* the case. She stood robustly behind her conclusions. She made reasonable concessions, particularly in respect of the limitations of her reports. In that regard, there was perhaps something of a tension between her repeated assertion that all she had prepared were views reports, and the actual content of her reports, which as previously pointed out included a psychological assessment of the views expressed. I consider that Dr MacKinlay has the necessary skills and experience to make such an assessment, which was not hindered by her not having spoken to anyone other than the boys. I am fortified in that conclusion by the fact that her views about the genuineness of the boys' views largely coincided with the previous evidence of Dr Edward, and the evidence of Dr Woodhouse about I. Insofar as Dr MacKinlay might have suggested from time to time what she considered was best for the boys (as did Dr Woodhouse in relation to I) that is, of course, ultimately a matter for the court.

The pursuer

[34] The pursuer's evidence was unusual inasmuch as part of his evidence-in-chief was given by affidavit, part of it was adduced by counsel for F, who had also called him as a witness, and part of it was then given on his own account as a party litigant. Insofar as he sought to reopen findings in fact previously made by Lady Tait (such as whether there was domestic abuse, or whether the move to Scotland was to be a trial), I either did not allow him to do so, for the reasons previously explained, or have disregarded any evidence which did slip through the net. Another chapter of his evidence, elicited by the defender in cross-examination, was directed at the difficulties which have existed between the parties since the date of the September decision, particularly in relation to the care of the child I, which has little bearing on the core issues which the court must decide and so I attach little weight to that evidence (or, for that matter, to the defender's voluminous evidence on that subject). Its relevance is chiefly to the difficulties which the parties share in communicating with each other, of which there is no doubt.

[35] In his affidavit, the pursuer said that he had been asked by F's legal representatives to address two main issues, being, first, his plans for where he intended to live in the immediate future; and, second, the contact between F and the defender following the September decision. As foreshadowed in the preceding paragraph, he did not manage to confine himself to that brief, and included some irrelevant material such as his difficulties in having child maintenance paid by the defender, and his renewed assertion that the move to Scotland had only ever been intended to be a year-long adventure. He also devoted some space to discussing his previous employment in Lake Tahoe and why he lost it, again not strictly relevant, save insofar as it sheds light on his future prospects should he return there.

[36] The pursuer did relevantly contrast his putative future life in Lake Tahoe with his life should he remain in Scotland. In the former scenario, his immediate wish is to return to Lake Tahoe with all of the children, by no later than the beginning of June 2026. His hope (according to his affidavit) is to obtain a full-time position at the Boys and Girls Club of Lake Tahoe, where he previously worked. A letter from the CEO of that club dated 9 March 2026, lodged in process, confirmed that to an extent, although made clear that full-time *summer* positions are available, starting on 22 June 2026, which could lead to part-time year-round opportunities, which was not quite the impression given in the affidavit. The pursuer would receive priority for rehiring and would have to pass a full background check. He could work as a ski-instructor in the winter. Beyond that, the pursuer wishes to resume his teacher training, which he previously began, but which he had to leave in October 2025 as a consequence of the September decision. On qualifying as a primary school teacher, he would expect to earn US\$75,000 per annum. Additionally, he derives income from “his” Airbnb business which involves letting out the property adjacent to the family home (although, as he was later constrained to accept under cross-examination by the defender, that business is owned by a company in which the pursuer and defender have an equal interest). By way of contrast, he said that his prospects in Scotland were poor. It was not practicable to retrain as a primary school teacher here, because places on the course were limited; the course took longer – 18 months as opposed to a year; and job opportunities in the area where he resides were scarce. The pay was also less than in America. He had applied for numerous jobs without success, and it was difficult for a man of his years (at age 58) to gain employment. All that was available was low-grade employment in a supermarket, which necessitated shift work and anti-social hours, not compatible with life as

a full-time parent. He had no realistic prospect of returning to his previous career in the film industry, as the defender had contended he might.

[37] When pressed on what he would do if he were not permitted to return to America with the children, the pursuer essentially prevaricated and did not give a clear answer, other than that it would be a very difficult decision: his head told him that he must return to America, where he could earn money and keep the house going until the boys were able to return of their own volition (whether the child I would similarly wish to return on attaining the age of 16 was not explored in evidence and is more of an open question). However, his heart told him to remain in Scotland. He would discuss it with the children, as he had done prior to Lady Tait's opinion, when the joint decision had been that if the case were lost, he would return to America in any event (which, self-evidently, he did not do).

[38] The pursuer also elaborated on what life would be like for the children should they return. He had established that school places were available for all of them. F and O would be welcomed back by the sports teams for which they had previously played, and would be seen as returning heroes. Ideally, F could return before the end of May 2026, so that he could participate in football trials, to enhance his prospects of joining a better team. I was able to return to the Brownies. After-school care was available for all children, in the event the pursuer had to work until 5pm.

[39] In relation to the second issue he had been asked to address, contact since Lady Tait's decision, the pursuer devoted much of his affidavit to criticising the defender for her refusal to agree what he perceived as reasonable requests for holiday contact with I, and to the fact that the defender did not agree that she could spend F's birthday with him. However, since it is conceded that the present arrangement regarding I works reasonably satisfactorily, and since the court is not being asked to regulate holiday or birthday contact if the current

shared-care arrangement for I is to continue, I do not propose to discuss that evidence.

Insofar as the boys are concerned, the pursuer's position is that he has always encouraged them to see the defender, but their attitude towards her has grown increasingly hostile due to, as the boys (and apparently the pursuer himself) see it, her continuing selfishness and focus on her own needs. F told the pursuer on the day of the September decision that he had slapped the defender on the face. In the first week of November 2025, the pursuer had, by arrangement, driven O to the defender's home on the Monday and Wednesday, and F on the Tuesday and Thursday, but those visits had not gone well, the boys staying for such a short time that they either arrived back at the pursuer's home before he did, or a very short time later. Another set of visits was arranged for late November 2025, but they appeared to go equally badly. In a telling paragraph of his affidavit (paragraph 107), the pursuer said that the children "never understood why it appeared as if Lady Tait didn't listen to them.

During the initial proof, they repeatedly asked if they could attend court to speak to the judge themselves, wanting to tell her 'the truth'." However, I observe that Lady Tait made clear, in plain English, that she *had* listened to the boys' views and explained why she could not accede to them, as the pursuer should know if he has read the September decision.

[40] In his evidence-in-chief on his own behalf, the pursuer denied that he had ever described the day of separation to the children as Pearl Harbour Day, something mentioned by Dr MacKinlay. He referred to the different standards of proof required for a finding of abuse in a civil case and in a criminal trial, which is true insofar as it goes but is of no consequence for the purposes of these proceedings. He made an impassioned plea as to why he and the children felt trapped in Scotland, a foreign country in which none of them had any desire to be, and which (paraphrasing) was worse than both America and England.

[41] In response to cross-examination for the curator, the pursuer conceded that I was benefitting from the present arrangement whereby she spent an equal amount of time with both parents, although he was reluctant to concede what is obvious, namely, that her experience was signally different from that of the boys. He maintained that she did not like Scotland. He thought that both I and the boys benefitted from spending time with each other, and that it was in their best interests to be together. He agreed that if I were to be living in a different continent from one of her parents, it would be in her best interests to have significant holiday contact with the other, which would entail transatlantic air travel: the logistics of that would have to be worked out but would be achievable.

[42] The pursuer was then subjected to extensive cross-examination by the defender, much of which, though conducted in an entirely professional and proper manner, was irrelevant, just as much of the pursuer's evidence-in-chief had been. Insofar as relevant, he did not remember how he had explained the September decision to the children. He had gone back to America on the day after the judgment was issued (a decision on his part of which the defender was highly critical) because there were important matters in relation to his employment and the Airbnb business which he had to attend to. He had originally intended to go earlier, but had delayed his visit because he knew that the decision was due to be issued. He had told F that his slapping the defender was wrong. The boys knew that the pursuer disapproved of their swearing at, or being disrespectful of, the defender. He conceded that he had on occasion taken the boys out of school, without the defender's knowledge or permission, to attend, among other things, a football coaching event; and that he had not given the true reason to the schools.

[43] Although the pursuer was reluctant to make concessions which he perceived as being against his interest, or to give a straight answer to what he would do if the children

are unable to return to America, and although his parenting conduct is not immune from criticism (such as in taking the boys out of school for no good reason; and his apparent failure to attempt to explain the September decision to the boys), I have accepted the bulk of his evidence as credible and reliable. In particular there is no doubt that he loves all three children and that he will be able to care for them should they all return to America.

Lady Tait herself observed that there was no suggestion that he should not be involved in their care.

The defender

[44] The defender's witness statement extended to some 44 pages of single-spaced text, much of which was irrelevant to the issues now before the court. I have disregarded those parts of her statement which refer to events which took place before the date of the September decision, save insofar as they found their way into findings-in-fact. Much of the statement bears upon the difficulties which the pursuer and defender have in effectively communicating with each other, or co-operating in relation to arrangements for the child I, to which I have already alluded. In this section, I will try to confine myself to a discussion of the defender's evidence insofar as relevant. It is appropriate to begin by noting, and underlining, what the defender stated at the outset of her affidavit (and again at the end), namely that her overarching aim is to protect the children, whom she loves dearly, which I accept. In line with that aim, the defender is root-and-branch opposed to the children returning to America with the pursuer. That is because of the need recognised by Lady Tait that she be present in the children's lives as a protective factor against the abuse previously perpetrated by the pursuer on at least two of the children, and abuse of her which they have witnessed. As the defender pointed out on more than one occasion, evidence of past abuse

gives rise to a risk of future abuse. While she recognises that, as a matter of fact she has not been a protective factor in relation to the boys since the September decision (and for that matter, for a considerable period before then) and that there is no realistic prospect of their returning to her care in the near or even foreseeable future, the defender's solution is for the boys to go into foster care, as they have said is their preferred option, or to live with an unspecified family member should the pursuer return to America without them. This, she believes, would allow therapeutic work to be done away from the influence of the pursuer, which would repair the fractured relationship such that the boys would then move into her care willingly. Shared care between the parties, in line with the original decision, would then be achievable. While the defender acknowledges that the boys love the pursuer, she also believes that their views have been influenced by him, and by the trauma they must have experienced through witnessing, and being the victims of, abuse and that they are afraid to do anything other than align themselves with the pursuer. She was highly critical of aspects of the pursuer's parenting, such as his decision to return to America within 48 hours of the September decision, leaving the boys in Scotland to cope alone; and his having taken the boys out of school for no good reason (on which I have already commented).

[45] As regards the boys' unacceptable behaviour towards her, F swore at her abusively on the day after the September decision. Whenever O sees her, he crosses to the other side of the road, gives her the middle finger and makes an abusive racial slur. F notices her attendance at football matches in which he is participating but chooses to ignore her. She had tried to engage them in activities when they had visited, such as going for an ice-cream or playing crazy golf, but her suggestions had been shot down, the boys instead rattling off accusations against her. F's behaviour has been less rigid, but even she can appear hostile at

first when transitioning from the pursuer's care. In contrast to the boys, I appeared relieved on being told the outcome of the September decision. The defender does not believe that the children's hostility towards her can be attributed solely to her refusal to agree to their returning to America. Before the separation she had a close and loving relationship with all three children. Despite their rejection of her she had tried to maintain contact with the boys by sending text messages and leaving notes outside their flat. Not only have the boys rejected her, they have rejected her extended family and friends, with whom they previously enjoyed a good relationship, refusing to see German members of the family when they visited Scotland in August 2025.

[46] As regards the boys' (and I's) wish to go back to America the defender did not dispute that they missed aspects of their lives there, but she questioned what truly motivated them, and the extent to which they were simply aligning with the pursuer's desire to go back out of fear of repercussions. She disagreed with Dr Mackinlay's evidence, but, in reference to Dr Willemsen's report, considered that it was important to understand the family dynamics to explore what had influenced the children's views. Although she did not take the boys' suicidal ideation lightly, their poor mental health was not new but had existed since December 2024. However, the most recent reports from the school were that both boys are doing well, are not in psychological distress, interact as expected, have friends and that F's poorish behaviour is not outside of the norm. She devoted some space to explaining why the parties had been unable to agree upon a therapist, but since the parties agree that therapy is now unlikely, I do not consider it fruitful to explore which, if either, party bears responsibility for that.

[47] In her parole evidence, the defender explained the restraining technique as described to Dr MacKinlay did not involve pinning them down but was something she had done to

restrain the boys from fighting with each other, as she did not have the strength to separate them in any other way. It was not something of which she was proud.

[48] In cross-examination, the defender said that she had not come easily to the view that the boys should go into foster care (or live with a family member) but she felt that it was ultimately for the best. She acknowledged that F was not motivated in Scotland and not in a good place but questioned why that was. She disagreed with Dr MacKinlay's opinions. America was not a magic bullet. The boys could have done activities such as ski-ing, sailing or paddleboarding but had chosen not to. That said, she agreed that it was untenable for the boys to live with her at the present time, nor in their best interests. She agreed that if required to stay in Scotland F would be at risk of causing harm to himself. However, she could not be the one to look herself in the mirror and say that she allowed her children to go back to America with an abuser. She agreed that the current situation was intolerable and that there had to be a change. In cross-examination by counsel for the curator, she expanded upon I's life in Scotland, and all the positives about it.

[49] I accept the defender's evidence as credible and reliable and, as stated earlier, that she is motivated out of concern for the boys' welfare. I accept, in particular, her evidence about the "pinning technique" which she deployed on occasion to stop the boys from fighting with each other, which, despite the best efforts of counsel for the second minuter to persuade me otherwise, is of no real relevance to the issues before the court. It is not why the boys wish to reside with the pursuer and to return to America, nor is it the reason why she is unable to function as a protective factor in respect of abuse which might be perpetrated by the pursuer. However, that is not to say that I accept the defender's evidence about what is best for the boys. Although she is clearly eminent in her own branch of medicine, and is, as she said, well-versed in reading, understanding and questioning

reports, she is not a psychologist and I attach no weight to her evidence insofar as she sought to challenge, or disagree with, Dr MacKinlay's conclusions. Equally, her view that foster care would be best for the boys because it would lead to therapy which would in turn lead to a restoration of the relationship with her son appeared, with respect, to be based upon wishful thinking rather than upon any realistic evidence-based assessment of how foster care would come about, what it would entail, how long any therapy would last and what its outcome would be. I also cannot attach any weight to the suggestion that the boys live with a family member. No such person was identified, or was that possibility canvassed with either boy, nor indeed raised at any time before the defender gave her evidence.

The curator

[50] The curator explained how she had gone about fulfilling her remit. She had met I to take her views, and had also spoken to both the pursuer and the defender. In summary, I's views were that although there were good aspects to life in Scotland, she would like to go back to America because it was warmer, she liked the school and there were things she could do that she did not do in Scotland. She enjoyed spending time with each parent, and sometimes missed one when with the other. Her ideal scenario would be to be back in America with both parents and her siblings, and to spend time with both parents, but when it came to a choice between living in America with her father and brothers, or remaining in Scotland with her mother, she preferred the former option. Having conducted her enquiries, the curator's interim view had been that it was in I's best interests to retain all of her existing relationships and to have as much contact as possible with her parents and brothers. If the minute to vary were refused, it would be in I's best interests for the shared-care arrangement to continue (and, if the pursuer was no longer in Scotland, for him to have extensive holiday

contact). If the relocation order were granted for the boys, it would be in I's best interests to return to America, even with the defender remaining in Scotland but to spend as much of the holiday periods as possible with the defender. Having instructed Dr Woodhouse and perused her report, and listened to the evidence, nothing had happened to cause her to reconsider that view. If the defender also relocated to America, the shared-care arrangement should continue. In cross-examination by the defender, the curator said that insofar as her report had recorded what she had been told, it was accurate.

[51] Although subjected to various points of criticism by the defender, I accept the curator's evidence for what it was: an account of I's views. The curator has properly served I's interests by entering the court process. Thereafter, the decision as to what best serves I's interests lies with the court.

Dr Woodhouse

[52] Dr Woodhouse has extensive experience as a chartered psychologist. She explained that she worked slightly differently from other psychologists who had been involved with the children, in particular by including the parents in her assessment. Consequently, having met both parents and all three children so as to understand the impact of I's relationships, her report was not simply a views report. I, whom she met on two occasions, presented as a bright, engaging and able child who loves animals and imaginative play. She enjoys the shared-care arrangement and was clearly relaxed in the company of the defender, with whom she showed many positive interactions. There were four elements to the assessment, with which I engaged fully: (1) psychometrics; (2) clinical interview; (3) family drawing and a (4) story stem assessment profile (SSAP). I has a vocabulary well above most children of her age, while her ability to reason and think at an abstract level is typical for her age. She

has awareness of emotions and an age-appropriate understanding of current circumstances. Her scores relating to anxiety and mood were well within the normal range. In her clinical interview, she said that she feels loved by both parents. Her first wish is to go back to the United States to look for her cats. She has good friends in school in Scotland and is good at her work. She has clear memories of her time in America and was not simply relying on others to remind her. The best thing about going back to America would be to see her friends again, where she would really like to be, albeit she would miss the friends she has in Scotland. Using an age-appropriate approach (involving two flags and playmobil toys), various options were put to I. She was clear that dad going back to America on his own would not work as F and O would “cry their hearts out” and would probably run away. Her best option would be the whole family back in America, with all children moving between her parents, which she thought was unlikely. The second-best option was the whole family back in America, with her moving between her parents as now. Her third best option was to be back in America with her dad and brothers, with holiday contact with her mother. It was questionable whether she understood the distance between Lake Tahoe and Scotland, although she knew it took a long time to travel, or what it would be like to be separated from either parent for a long period. Dr Woodhouse observed that I’s views had been expressed consistently.

[53] The family drawing done by I was significant in that it showed her reliance on her siblings and dog to form the core of her family, with her parents added after. I’s stories for the SSAP were, in summary, about parents failing to notice what their children needed, in which children rather than adults dealt with problems, revealing ever-present feelings of threat and fear, aggression between adults and catastrophic endings resolved by magical solutions. This indicated that I’s insecurity construct and disorganisation construct were

extremely high for her age. The results suggested a failure of I's parents to recognise her needs. Contrary to what Dr Willemsen had suggested, the stories were not indicative of I having witnessed domestic abuse, but they reflected her understanding of relationships. Although both parents were committed to their children and wanted what was best for them, both also demonstrated multiple examples of failing to think about the children as individuals. The prolonged conflict within the family had impacted on I and on the ability of both parents to prioritise the children in their parenting. There was capacity to show sensitivity and love for I, but this could get lost in conflict, which impacted on I's development. Siblings and peers are more reliable when help is needed. She could suffer from extreme anxiety. I needed a resolution to ensure no long-term harm.

[54] In considering the various options for future care, Dr Woodhouse noted that all outcomes for the children would cause some degree of harm. The question was which would cause the least harm. Reliance on her brothers was central to I's identity and family. I's assessment had brought out how significant her sibling relationships were; they were not peripheral, as can sometimes be the case, but were central to her thinking about family. I's preference was for shared care, but in America. Her next stated preference, to move to America with her father and brothers, had been reached reliably. Remaining in Scotland with the defender alone would not ultimately work for I in the longer term. She could probably manage it in the short term but it would become increasingly difficult in the longer term, and the underlying stress that she currently dealt with on a day-to-day basis might become too much for her, which could result in her opting out of one parental relationship or the other. In terms of potential longer-term harm, the continuation of the current context would impact on her relationships in the future. A return of only her father to the United States would cause considerable harm, particularly standing the impact it would have on

her brothers. A return of everyone to America except her mother would allow I to maintain three of her important family relationships. Although not ideal, she could maintain her relationship with her mother through video calls and holiday contact. Whatever the court's decision, there should be careful planning about endings in Scotland. As regards abuse, Dr Woodhouse said that she had considered the findings of abuse. However, abuse was not apparent in her assessment of I: nothing had emerged that suggested I was fearful of the pursuer or adapting to his behaviour. If there were persistent child protection concerns or abuse, she would expect considerably more issues to have arisen, for example by the school picking up on matters. Had I been used to a violent and aggressive parent, it would come out in her play but it did not. There was nothing that concerned her relating to I. When Dr Woodhouse was asked what the impact on I would be should her brothers go into the care system, she responded that the question did not require a psychologist to answer: any separation from her siblings in that way would be so damaging that it should not even be a consideration. It would also seriously risk damaging I's relationship with the defender. If the parents were living in different continents, it would be in I's best interests to have direct contact with the parent with whom she did not reside.

[55] I found Dr Woodhouse to be an impressive witness. Her conclusions in relation to I make objective sense, and have a rational basis, being supported by established methods and thorough assessment of I in the wider family context. Dr Willemsen and Dr MacKinlay both commented favourably on her report. I accept her evidence, with the caveat, as with Dr MacKinlay (and the curator), that the ultimate decision as to what best serves I's interests lies with the court.

Submissions

[56] Each party lodged written submissions, expanded orally, to which I have paid full regard. The following is a brief summary of the salient points.

First minuter (F)

[57] Senior counsel for the first minuter submitted that the interlocutor of 30 September 2025 should be varied by awarding sole residence of all three children to the pursuer, and by granting a specific issue order permitting the pursuer to relocate to America with all three children. In relation to F specifically, there had been a material change of circumstances, namely, his extreme reaction to the September decision and the fact that it had not been carried out, nor could it be: the defender had not been, and could not be, a protective factor as envisaged by Lady Tait, nor was there any prospect of therapeutic work being carried out. That entitled the court to revisit the arrangements for his welfare. When considering F's welfare, the provisions in section 11 of the 1995 Act were overlaid now by the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 which required public authorities, including the court, to act compatibly with the UNCRC, in particular Articles 3, 8, 29 and 31. This required a holistic view to be taken of F's welfare, extending to areas of particular concern to him, being his identity, mental health, educational attainment and recreation. The court should accept Dr MacKinlay's evidence. The best opportunity to alleviate F's distress and sense of loss was to return him to America.

The second minuter (O)

[58] Senior counsel for the second minuter aligned herself with the first minuter's submissions, although, for her part, did not find it necessary to rely directly upon the

provisions of the 2024 Act, on the basis that section 11 of the 1995 Act, and in particular the welfare test, properly applied, encompassed all UNCRC obligations in any event. She placed some reliance on the defender's "pinning technique", which, she submitted, had to be viewed as relevant alongside the finding of abuse by the pursuer. As with F, there was clear evidence from Dr MacKinlay that O's view was genuine. It was untenable to have in place an interlocutor which was unworkable, so, at the very least, sole residence of O (and F) should be awarded to the pursuer. The court should go further and grant the relocation order. All three siblings should be kept together. Finally, large parts of the defender's witness statement were inadmissible and should be ignored.

Third minuter

[59] Senior counsel for the third minuter submitted that all of the evidence before the court suggested that there must be a change. In I's case, the change was not the September decision in itself, nor the effect which it had had on her, but the effect of that decision on F and O, and I's inability, according to Dr Woodhouse, to cope with the *status quo* in the long term. Although the court could not depart from the findings-in-fact in the September decision, the factual matrix had changed. As regards UNCRC, the 2024 Act did not add anything to the 1995 Act interpreted in a UNCRC-friendly manner. One issue with which the court would require to grapple was whether it was able to make an order which was fully in I's best interests, standing Dr Woodhouse's evidence that none of the options on the table fully served the children's interests and it was a question of choosing the least bad option. The curator's position, having heard all the evidence, was that all three children should return to America with the pursuer. Although that was not the best outcome for I – which would be a shared care arrangement in America – it was the option which would

do her least harm. Not only was there no evidence before the court that it would be in the best interests of any of the children for them to be split up, and to reside in different continents, the evidence all pointed to it being strongly in each child's best interests to remain together as a sibling group. Turning to the issue of contact, it was in I's best interests that she have a minimum of six weeks residential contact per annum with the defender.

Pursuer

[60] The pursuer also aligned himself with the motion made by the first minuter. He submitted that the present arrangements did not support the children's welfare. The views expressed by F and O were genuinely held and were clear and consistent: they wished to return to America. They were clinically supported by the evidence of Dr MacKinlay and should be afforded considerable weight. Likewise, Dr MacKinlay's evidence should be accepted. Both boys had expressed suicidal ideation. O presented as a particularly high risk of suicide, if compelled to remain in Scotland. The prognosis in Scotland for the boys was extremely poor and return to America was the only viable option. As regards the finding of abuse, that was as may be, but neither Dr MacKinlay nor Dr Woodhouse were concerned that any of the children showed any signs of abuse-induced trauma, and none of the children had complained of feeling unsafe in the pursuer's care. As for the defender's suggestion in evidence that the boys go into foster care, the preponderance of the evidence did not support that, and it would not be in their best interests. I, too, should be permitted to return to America. All three children should remain together. He accepted that in that scenario, I should have at least 6 weeks contact per annum with the defender.

The defender

[61] The defender moved the court the court to refuse to allow the children to relocate to America, in which event, however, the court should vary the residence order for F and O, shared residence being unworkable. The court should make no change in respect of I. If the court was not with the defender on that primary motion, but allowed the children to relocate to America, then shared care should remain in place albeit on the understanding that it would operate on a limited basis due to the constraints placed on the defender due to her work commitments and her current lack of a visa to visit America. Subject to that last caveat, she would spend as close to 50% with the children as possible. In any event, she would wish more than 6 weeks contact per annum. She would be able to rearrange her work commitments so as to allow her two months off work at a time [this matter was not explored in evidence]. In support of her motion, the defender focussed on the abuse which was previously found to have occurred. Dr MacKinlay's reports were deficient, in that on her own account the process of triangulation, an essential part of the methodology, had not been possible and she had not discussed the effect which abuse might have had on the boys, a major failing in her report. Dr Willemsen's evidence, that there was a real possibility that the boys' denial of abuse was because it was too painful for them to revisit, should be accepted. There was a possibility that the children identified with their father to manage their own anxiety and that they had become compliant with his wish to return to America. It was not possible to rule out parental alienation, and it was for the court, not psychologists, to determine whether parental alienation had taken place or not. Dr Woodhouse's claim that I's assessment using stem-stories showed no sign of trauma was contradicted by Dr Willemsen's evidence that they did. There had been no exploration of how relocation with the pursuer would impact upon the children, without the presence of the defender as a

protective factor, as envisaged by Lady Tait. The US was not the “magic wand” which it had been portrayed as. Finally, if the court’s decision was that the children should return, the defender agreed that all three children should return as soon as possible. She would facilitate I’s farewells by arranging a party with her friends before the end of term. She would also allow the dogs to go back with the family (the pursuer having full time care of the dogs at present in any event).

Decision

The law

The Children (Scotland) Act 1995

[62] By section 11(1) of the 1995 Act the court has power to make orders relating to parental responsibilities and parental rights. Section 11(2)(c) of the Act then provides:

“(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 (any such order being known as a ‘residence order’);
- (e) an order regulating any specific question which has arisen, or may arise, in connection with any of the matters mentioned in paragraphs (a) to (d) of subsection (1) of this section (any such order being known as a ‘specific issue order’);”

[63] Section 11(1) and (3)(a) and (b) read together allow the court to make an order under section 11(2) in the “relevant circumstances”, which include when an application is made by

a person claiming an interest, and when no application has been made but the court considers it should make an order.

[64] Pausing there, I am satisfied that those provisions are sufficiently wide to enable the court to make an order concerning the child I, even though she does not herself, through her curator, formally seek any variation. Certainly, no party contended otherwise.

[65] Thereafter, section 11 sets out the criteria for making any order. These were set out in the September decision, and I do not find it necessary to set them out at length again here.

In summary, they are as follows:

- the court must regard the welfare of each child as the paramount consideration in relation to that child (section 11(7)(a));
- no order may be made unless it is better for the child to do so than not to do so (section 11(7)(b));
- the court must, so far as practicable taking account of the child's age and maturity, have regard to his or her views (section 11(7)(b));
- the court must have regard to the need to protect the child from abuse or risk of abuse (section 11(7A) to (7C));
- the court must consider whether it is appropriate to make an order where in pursuance of the order two or more parents would have to co-operate (section 11(7D) and (7E)).

[66] No special considerations apply when considering whether or not to grant a specific issue order allowing one party to relocate with the child: a presumption-free approach must be taken, in accordance with the court's duty to regard the welfare of the child as the paramount consideration: *M v M* 2012 SLT 428; *Donaldson v Donaldson* 2014 Fam LR 126,

Lady Smith at [27]. It is not appropriate to formulate a list of applicable factors, due to the fact-sensitive nature of such cases: *MCB v NMF* 2018 SCLR 660, Lady Wise at [6].

[67] Insofar as abuse, or the risk thereof is concerned, I would refer to my own comments in *JU v NU* 2026 Fam LR 10 at para [8], referred to in submissions by counsel for the curator. In particular, the definition of abuse is very wide: the court must consider the effect which abuse or the risk thereof might have on the child (section 11(7C)(b)); and the ability of a person who has carried out abuse which affects or might affect the child, or who might carry out such abuse, to care for, or otherwise meet the needs of, the child (section 11(7C)(c)).

[68] Finally, and for completeness, section 11(13) provides: “Any reference in this section to an order includes a reference to...an order varying...an order”.

The UNCRC (Incorporation) (Scotland) Act 2024

[69] Section 6 of the UNCRC (Incorporation) (Scotland) Act 2024 makes it unlawful for a public authority, which includes a court, to act, or fail to act, in connection with a relevant function, in a way which is incompatible with the UNCRC requirements. A relevant function includes by virtue of subsection (2) a function that is (a) within the legislative competence of the Scottish Parliament to confer on the authority and (b) is conferred by (among other things) an Act of the Scottish Parliament or a rule of law not created by an enactment. Although senior counsel for the petitioner sought to persuade me otherwise by reference to subsection (4) and to the case of *Lord Advocate’s References* [2025] HCJAC 2 in a criminal context, on the face of it section 6 does not apply to this case, since the 1995 Act is not an Act of the Scottish Parliament nor is the court exercising a power conferred by a rule of law not created by an enactment. However, it is unnecessary to decide the point since, as all parties agree, section 11 of the 1995 Act must in any event be applied in a

UNCRC-friendly manner. Section 11 already requires the court to have regard to the child's views (*cf* UNCRC Article 12); and goes further than Article 3 by providing that the child's interests are to be the paramount, rather than simply a primary, consideration. Insofar as the UNCRC requirements direct the court's attention to: respect for the right of the child to preserve his identify (Article 8); the right to the highest attainable standard of health (Article 24); the right to education directed to development of personality, talents and mental and physical abilities to their fullest potential (Article 29); and the right to play and recreational activities and to participate in cultural life (Article 32) – these are all matters to which the court should have regard in any event in taking a holistic view of welfare when applying section 11. The one matter which the UNCRC requirements, if applicable, would add to our domestic law would be a requirement to have regard to the welfare of one child as a primary consideration, when that child is indirectly affected by a decision relating to a different child: *Petition of X* [2026] CSOH 15, 2026 SLT 239. However, as will be seen that makes no practical difference in this case, where a decision is to be taken in relation to all three children at the same time, and where their interests all point to the same conclusion.

Material change in circumstances?

[70] Although it is commonly stated that there must be a material change in circumstances before a court may vary a decision reached after proof in a family action, counsel for the curator made helpful and detailed submissions on this issue. The starting point is that no decision about parental rights or responsibilities is a final decision, because the child's welfare remains open to further consideration by the court throughout childhood: *Sanderson v McManus* 1997 SC(HL) 55 at 58E (in a passage which also referred to the ability

to make a fresh application to the judge at first instance on the ground of “a” change in circumstances).

[71] In *S v S* 1965 SLT 131, the pursuer lodged a minute craving the court to vary access to the parties’ daughter, which had previously been agreed by joint minute disposing of the action. The defender argued that the minute was irrelevant because there was no averment of any change in circumstances since the joint minute had been signed justifying a change from what had been agreed. Lord Kissen rejected that argument, observing, at pp 132-133 that he was not satisfied that a change of circumstances, in the narrow sense, was a necessary prerequisite to the competency of such a minute, going on to state that it may be that the results and experience of an agreement regarding access show that some other provisions be more in the child’s interests. However, in that case, there were in any event sufficient averments of a change in circumstances as to merit inquiry.

[72] That case was under a previous statutory regime. The law in respect of minutes to vary is more recently discussed in *Wilkinson & Norrie, The Law Relating to Parent and Child in Scotland* (3rd edition, 2013), where the authors state the following at paragraph 8.51:

“As s.11 orders in general are seldom, and residence and contact orders never, truly permanent, a subsequent application to the court is not subject to the plea of res judicata and so there may be a succession of orders. *There is no formal requirement regulating the conditions on which a second or subsequent application will be entertained* (emphasis added), but making repeated applications would seem to be an abuse of process in the absence of a material change in circumstances. Section 11 of the Children (Scotland) Act 1995, which entitles the court to make any order relating to parental responsibilities, parental rights, guardianship or the administration of a child’s property as it thinks fit, expressly includes the right to vary or discharge an earlier order.”

[73] The purpose of minutes to vary was considered by the Sheriff Appeal Court in *AND v KWL* 2021 Fam LR 123. At para [15], the Court (comprising Sheriff Principal Anwar, and Appeal Sheriff Holligan and Appeal Sheriff Cubie (as he then was) said:

“[15] 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.”

[74] The applicable test had previously been considered by Sheriff Holligan when considering whether to receive a minute to vary in *SA v DA and MF* (unreported, Edinburgh Sheriff Court, F42/08, 23 July 2015, paras [7] to [9], followed by Sheriff Stirling in *AB v JB* [2025] SC EDIN 62, paras [101] to [109]). Sheriff Holligan’s typically thoughtful analysis bears repetition:

“[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...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] [After reference to *S v S* and certain other authorities] 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."

[75] The only minor issue I would take with that passage is the assertion that section 11(13) provides the legal basis for one party seeking to reopen what would otherwise be a final order. Rather, as I read that subsection, it merely has the effect that when the court is considering an application to vary, it must apply the same approach as it does when considering an application at first instance, and it takes as a given that an application to vary is competent, perhaps on the basis that, as was said in *Sanderson*, no decision about a child's welfare is ever truly final; or perhaps because, as Sheriff Holligan also pointed out, section 11(7) is in sufficiently wide terms to permit, perhaps even to require, the court to make the order which best promotes the interests of the child, whether or not the matter has previously been considered; and that the procedural cart should not drive the welfare horse (so to speak).

[76] I take from the foregoing authorities that while, even in family actions, the principle of finality of litigation must apply to some extent – which is why, as in this case, it is not open to a party to re-open a finding-in-fact previously made – that does not preclude the court from re-examining the arrangements for the care of a child, provided that there is a welfare reason to do so. That will ordinarily require a material change of circumstances, but where the welfare of children is concerned it would be wrong to be too prescriptive as to

when the court may or may not entertain a minute to vary, provided that *something* has changed since the original decision such as to render a reconsideration appropriate.

[77] In the present case, the principal justification for reconsidering the September decision is that it has proved to be unworkable, at least in relation to F and O, in respect of whom shared residence is impractical. It was always envisaged that some form of therapeutic intervention would be necessary before the boys' relationship with the defender was repaired to the extent that they would be willing to reside with her again, and not only has that not taken place, there is no realistic prospect that it will take place for so long as the boys remain resident in Scotland. That a court order regulating residence is incapable of being implemented is in itself sufficient justification for varying it. Further, it follows from the fact that shared residence is not possible that the defender is not able to act as a protective factor, at least in relation to F and O, as was envisaged by Lady Tait at the time of the September decision, and so at least one purpose of the shared residence order (and of the refusal of the relocation order) has, as a matter of fact, failed. Further, while the court should be slow to treat mere disappointment, even displeasure, at a decision as a reason to vary it, the information before the court about the mental health consequences for the boys of their being forced to stay in Scotland, with or without the pursuer, is so extreme as to provide a further, although not the only, reason for re-appraising the children's welfare of new, having regard to the information now available, and to re-examine whether they should remain in Scotland or be allowed to return to America.

[78] I therefore find that the minutes to vary are competent, and consequently will now embark upon the exercise of consideration of the children's welfare *de novo*.

*Welfare**Abuse*

[79] Since the risk of abuse remains a factor which the court must take into account, I will begin with it. The defender is correct to say that the commission of past abuse is an indicator of risk of future abuse, although it is not the only factor to take into account in assessing that risk. The court has heard from two clinical psychologists, neither of whom has detected any sign from any of the children that they have been traumatised by any of the abuse found to have taken place. There is also some force in the observation both made, that any concerns which the defender has have not been so severe as to involve social services, notwithstanding that, as I have pointed out, the defender has not in fact acted as a protective factor in relation to F and O for well over a year. Neither of the schools attended by the children has raised any concerns in relation to any of the children. Accordingly while I must proceed on the basis that there is *a* risk of abuse (as that term is widely defined in the 1995 Act) that risk is not in this case a sufficient reason either not to award sole residence of the children to the pursuer, or to refuse relocation to America, if other welfare considerations point to either of those courses being in the children's best interests. The pursuer, having been sole carer for the boys for more than a year, and having had shared care of I throughout that time, does have the ability to meet all the children's needs.

Residence of F and O

[80] As far as residence of F and O is concerned, since, as I have found, there is no prospect of their residing on a shared-care basis with the defender, and the pursuer is capable of meeting their needs, it is but a short step to finding it appropriate to vary the previous interlocutor by awarding sole residence of them to the pursuer to reflect the

present *status quo*. It is not appropriate to continue to have in place an order of the court which cannot be complied with. That then leads on to the real issue before the court, which is whether the pursuer should now be allowed to relocate with F and O to America.

Relocation of F and O

[81] The first observation to make in relation to relocation is that this case differs from most relocation cases which come before the court inasmuch as the pursuer desires to take the children back to the country of their birth, in which they were, until relatively recently habitually resident, and where they have already had a settled life. It is significant that the boys regard themselves as having an American identity. Although the supporting evidence was in some respects patchy, I accept the pursuer's evidence that were he to return to America with the children, there would be school places for them; and that the children would be able to slot back in to activities which they did before, albeit there may have been a degree of (understandable) parental hyperbole in his assertion that they would be "returning heroes". The children would also be returning to their friends, with whom (at least in the case of F and O) they have kept in touch throughout their time in Scotland.

[82] Turning to a comparison between life in Scotland for the boys, and life in America, the starting point is to recognise the defender's point, that a return to America will not necessarily turn out to be the idyll that the boys painted to Dr MacKinlay, nor is life in Scotland necessarily as bad as they would have the court believe. By way of example, as I have observed earlier, I am in no position to judge whether one education system is better than the other, nor whether the level of soccer coaching is better in one country than the other. It is true that the former matrimonial home in Lake Tahoe would appear to offer more desirable accommodation than the pursuer's current flat, but it is by no means certain

that it will be able to be retained in the longer term. Insofar as leisure activities are concerned, the boys *could* have availed themselves of those in Scotland but have chosen not to do so. They both do have friends in Scotland with whom they “hang out”. There are undoubtedly downsides to life in America which are not replicated in Scotland, which gave rise to the parties’ decision to move to Scotland in the first place. However, notwithstanding the lack of vouching produced by the pursuer in relation either to his attempts to gain employment in Scotland, or to his employment prospects in America, I am prepared to accept that his prospects of meaningful employment are probably greater were he to return to America, than in the town where he currently resides; which indirectly impacts on the children’s welfare in his care. One potential negative to the pursuer’s not being permitted to relocate to America with the children would be the risk of his then deciding to return there in any event, leaving the children here. I do not consider that would be in the interests of any of the children. While the defender said that she would be able to reorganise her working hours so as to care for I full-time, it is unclear with whom the boys would reside in that scenario. The possibility of their going into foster care was discussed. Although the defender saw that as a positive step, that was predicated on foster care being a stepping stone for therapeutic work to be carried out. However, there is currently no evidence before the court which could lead to a finding that there is any viable route by which therapeutic work could be ordered. Certainly, there is no evidence that the boys are likely to be referred to the children’s hearing with a view to a compulsory supervision order (CSO) being made. Even if such an order were made, there is no evidence to justify a finding that therapeutic work would be one of the measures imposed by a CSO. If the boys found themselves with nowhere to stay, following the departure of the pursuer to America without them, the local authority would be under a duty to accommodate them by virtue of section 25 of the

1995 Act. There is no telling where that might be or whether the boys would be accommodated together. Against the backdrop of Dr MacKinlay's evidence regarding their respective current states of mind, and the support they would need, it is hard to see how such a course could ever be seen as being conducive to their welfare. Moreover, on the basis of Dr Woodhouse's evidence, it would also be catastrophic for I for her brothers to go into foster care. That all said, one would hope that the pursuer would himself take those consequences into account and would not in fact leave the children behind, and my assessment is that in the final analysis his heart, as he put it, would rule his head and that he would not do so. Nonetheless, the risk, however small, is there.

[83] Finally, also to be weighed in the balance is the effect on F and O of being required to stay in Scotland. On the evidence of Dr MacKinlay, which I accept, there would be a real risk to both boys, perhaps more so to O, and both would require a considerable amount of mental health support; whereas, if they were permitted to return to America, the precipitating cause of their current distress would be alleviated.

Views

[84] I next must have regard to the children's views. Standing the evidence of Dr MacKinlay, which I accept, their views are independently formed, well-articulated in a reasoned way, and do not appear to have been improperly influenced by the pursuer or to be the result of alienation. On the contrary, it is not hard to understand why the boys, being American, wish to pursue an American way of life, which might not be better than life in Scotland but which is different; and which was, until relatively recently, *their* way of life. Those views are entitled to a great deal of respect, and carry considerable weight (even more so than at the time of the proof last year, since they are now nearly 9 months older).

[85] All of this leads inexorably to the conclusion that the welfare of F and O – the paramount consideration – is best served by their not only residing with the pursuer, but being allowed to do so in America. Since there is no prospect of their parents agreeing that outcome, it is better for the boys to make such orders than not to do so. There is no need for the parties to cooperate in the implementation of that order (save insofar as timing is concerned, but the defender made clear that in the event the court was against her, she would not stand in the way of the boys returning to America as soon as possible).

[86] Accordingly, F's minute falls to be granted in respect of himself and O.

What order should be made regarding I?

[87] That then leads on to what in many ways is the most difficult question, which is whether the child I should go with them or not. In a sense, the defender has answered that question for the court, by her acceptance that the children should not be split up. However it is appropriate to give the question full consideration.

[88] It is never a happy state of affairs when, as here, the court is invited to choose the "least bad" option for a child. Most of the welfare factors are much more evenly balanced in I's case than in the case of the boys. She has settled much better to life in Scotland. There is nothing to suggest that she would miss one parent more than the other if her parents were living on separate continents. The defender is as able to care for her full-time as is the pursuer. I does not, or at least not yet, on the evidence, see herself as American with the same vehemence as her brothers. Her view that she wishes to return to America carries less weight than theirs, in view of her age; nonetheless, that *is* her view, and the court must have regard to it. Since I have concluded that the boys are to return to America, the best option for I's welfare would be for the current shared care arrangement to continue in America, but,

for the time being at any rate, that is just not possible. The factor which tips the scales in favour of allowing her to relocate with her brothers, but without the defender (as opposed to requiring her to remain in Scotland in the sole care of the defender) is the importance of her sibling relationships to her, as spoken to by Dr Woodhouse. In simple terms it would be less harmful to her to interfere with one significant relationship in her life (her mother), than three (her father and brothers). As I have already acknowledged, to her credit, the defender does not argue that the children should be separated, painful though that will be for her, since she recognises the importance of the sibling relationships to all of the children.

However, although the pursuer said that he recognises the importance of extensive holiday contact if I am residing full-time with him, it is worth emphasising that my conclusion that the pursuer should be allowed to remove I from Scotland to Lake Tahoe is reached very much on the basis that the defender should have significant, meaningful residential contact for a minimum of 6 weeks each year, ideally more, as well as indirect contact. Since it was not explored in evidence, I do not consider that I can proceed on the basis of the defender's suggestion in her submissions that I should order significantly more contact than that (for example, if she is able to secure two consecutive months leave) but I do proceed on the basis that the 6 weeks is very much a minimum, and I express the hope that the defender is able to exercise significantly more contact. She said that she would endeavour to exercise contact in America, but if that proves impossible, due to her inability to obtain a visa, then the parties will require to liaise as to travel arrangements to enable contact to be exercised in Scotland.

[89] The defender submitted that the shared-care order for I should continue on the basis that she would try to spend as close to 50% of the time with I as she could, but at the present time, on the facts found in the September decision, and the further evidence before me, that does not appear to be feasible in the short to medium term; and as stated earlier, it is not

appropriate to have in place an order which is incapable of being implemented. However, if the defender does succeed in gaining a visa entitling her to reside and work in America, my expectation is that the shared care arrangement should then resume.

[90] It follows from the foregoing that it is also better for I, than not to do so, to vary the September decision by awarding sole residence to the pursuer and by granting a relocation order in her case also.

Disposal

[91] I will sustain the pleas-in-law for the first and second minuters, and the pursuer, and repel the defender's pleas-in-law. Having done so, I will vary the interlocutor of 30 September 2025 by providing that F, O and I shall all reside with the pursuer (in I's case, to take effect from her move to America but not before; in other words, the shared care arrangement for her is to continue until then); that the pursuer is permitted to remove the children from Scotland to the United States of America; that the children's passports, currently held by the court, be released to the pursuer; that the defender will be entitled to a minimum of six weeks contact per year with the child I; and (as all parties agreed) that no expenses should be found due to or by any party, all parties having acted responsibly in this most anxious dispute concerning the welfare of children. The court was not invited to make any contact order in respect of F and O, nor would it be appropriate to do so standing the evidence. I will not make any order as to when the relocation should be permitted to occur, since different considerations apply to F and O on the one hand and to I on the other. It was a matter of agreement, should the court allow relocation, that all children should travel back to America together. Their competing interests should be weighed in the balance in deciding when that should be. The defender should be allowed to arrange a farewell party

or parties for I, as she offered to do, given her concession that the children need not stay until the end of the current school year; equally there are advantages to F of returning to America by the end of this month, if possible.

Postscript

[92] Nothing in this opinion should in any way be taken as an indication that the September decision was wrong, or that future applications by a child who is unhappy with the decision reached by the court are to be encouraged or likely to succeed. As is apparent, the circumstances of this case are highly exceptional. Although there has been a different outcome, that is because the children's welfare requires a different solution in the circumstances as they now exist.

[93] Finally, it remains a matter of regret that the boys are still estranged from the defender, to whom they were very close until December 2024 and who clearly loves them very much. I very much hope that following their return to America, with support and encouragement from the pursuer, they will in time see their way to restoring their relationship with her.