



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 72

F103/24

OPINION OF LORD BRAID

In the cause

JN

Pursuer

against

SN

Defender

Pursuer: Scott, KC; SKO Family Law Specialists

Defender: Clark, KC; Balfour + Manson LLP

8 August 2025

Introduction

[1] The parties were married in Scotland on 23 July 2016. They lived together until they separated in October 2022, and they have remained apart since that date. There are three children of the marriage: L, aged 10; J, aged 5; and O, aged 4. In this action, the proof in which called before me, the pursuer seeks decree of divorce from the defender on the ground that the parties have been separated for more than 2 years. That is not opposed, the necessary facts have been established by affidavit evidence and decree of divorce falls to be granted. The parties' competing financial claims have been resolved by agreement, and their respective conclusions in respect of those claims fall to be dismissed. Likewise, the

parties have been able to agree what the future care agreements for their daughter L should be, namely, that she should reside with the pursuer and that she should have contact with the defender every Friday from education (or, during school holidays, from 4.00pm) until Saturday at 7.00pm. I am satisfied on the evidence that those arrangements accord with her best interests, and pay due regard to her views, and an order giving effect to that agreement also falls to be made. Since the evidence was led, the parties have also agreed that during holidays they should care for J and O equally, week about, with the exception of Christmas, when, year about, J and O will reside with one party on Christmas Eve until 1.00pm on Christmas Day, and with the other from 1.00pm on Christmas Day until 1pm on Boxing day. Again, I will give effect to that agreement. The pursuer also sought a non-molestation interdict against the defender; that matter, too, has been resolved, by the defender having undertaken to the court that he will not molest the pursuer by, reading short, placing her in a state of fear and alarm or distress or by entering any place where she resides without her express permission in writing.

[2] The sole remaining issue for the court to resolve, on which the parties went to proof, is what should be the normal term-time care arrangements for the parties' two sons, J and O. The parties have already litigated this issue in the sheriff court, where, after a previous proof, the sheriff made an order for shared care on a 4-weekly cycle, whereby, broadly speaking, all three children stayed with the parties week about, from 4.00pm on a Friday until 4.00pm the following Friday, with the pursuer having non-residential contact with O on Mondays and Tuesdays in the weeks when the children were in the defender's care. That order also divided holidays between the parties equally, on a 2-yearly cycle, with one party having the first half of each holiday and the other the second half. The pursuer in the present action appealed that decision, the appeal being remitted to the Inner House of this

court, but the appeal was refused (see 2024 SLT 1153). The current arrangement has now operated for more than 2 years.

[3] Notwithstanding the sheriff court decision, it is common ground that the care arrangements for the children are at large for this court to decide of new, this court now having exclusive jurisdiction in relation to the children by virtue of: section 10 of the Domicile and Matrimonial Proceedings Act 1973; section 11 of the Family Law Act 1986; and section 15 of the 1986 Act, in terms of which the existing orders made by the sheriff will cease to have effect insofar as an order of this court makes different provision for the children. As it happens, the parties agree that the week-about arrangement no longer meets the children's best interests. In relation to L, a different arrangement has already been agreed, as noted above. Insofar as J and O are concerned, however, the parties have been unable to reach agreement as to what the future care arrangements should be. There is no dispute that it is in the interests of the boys to spend significant amounts of time with each parent, in order that they may have a meaningful and loving relationship with both, but the parties propose that that be achieved in different ways. The arrangement proposed by the pursuer, in line with a suggestion (I use that word advisedly) made by a consultant clinical psychologist, Dr Louise Potter (of whom more later) is that J and O reside with her, other than from after education on a Tuesday to start of education on a Thursday, and from after education on a Friday until 7.00pm on a Saturday, during which times they would reside with the defender. In numerical terms, over a 14 day period, that could be described (commencing on a Saturday with the pursuer) as 3:2:1:1:3:2:1:1. The defender, for his part, proposes a 2-weekly cycle, whereby (week 1) the boys would be cared for by the pursuer from after education on a Monday until education on a Wednesday; by the defender from after education on a Wednesday until education on a Friday; by the pursuer from after

education on Friday until education on the Wednesday in week 2; and by the defender from education on that Wednesday until education on the following Monday. I will refer to that as the 2:2:5:5 proposal.

[4] During the course of the proof, it emerged that one of the problems with the current week-about (or 7:7) arrangement is the length of time that the children require to spend away from the parent who does not have the responsibility for their care that week. Since neither party's proposal is acceptable to the other, the evidence also explored, to an extent, whether a 4:3 arrangement might be workable. By the submissions stage, senior counsel for the pursuer said that although Dr Potter's suggestion remains the pursuer's preferred option, she would not seek to dissuade the court should it come to the view that 4:3 would better serve the interests of the children, that is, with the pursuer having the care of the children from 7.00pm on a Saturday until education on a Wednesday; and the defender having their care from then until 7.00pm on Saturday. That is her fall-back position. For his part, the defender's fall-back position (as refined in the course of oral submissions) is that the pursuer have the care of the boys from (week 1) Sunday at 4.00pm until Wednesday at education; the defender from education on Wednesday until Saturday at 1.00pm; and (week 2), the pursuer from Saturday at 1.00pm until Wednesday morning at education; and the defender from education on Wednesday until Sunday at 1.00pm (the 3:3:4:4 proposal).

[5] Given the closeness of the competing positions, and that the parties have, in the boys' short lives, litigated this issue once already, in the sheriff court (and beyond), and given that both agree that the other is an important figure in their sons' lives, and that the boys should spend significant amounts of time with both parents, it is unfortunate that this matter has been litigated yet again, particularly when (a) much of the evidence concerned matters not truly germane to the issue the court must resolve, which is, what arrangement for the boys'

care best meets their welfare needs; and (b) it is evident from Dr Potter's evidence that the parties continuing to be at loggerheads over the children's care is harmful to the children.

[6] In addition to the parties themselves, I heard evidence from, for the pursuer:

Dr Potter; Dr Lisa Reynolds, also a psychologist; Silke Erkes, a social worker; CT, the pursuer's mother; and TT, the pursuer's brother; and, for the defender: NS and AM, who are the defender's sisters. The case does not turn on credibility and reliability but I found all the witnesses to be credible and generally reliable, if in some instances a little partisan. The defender came across at times as defensive and had a tendency to minimise his past poor behaviour. Neither party wasted an opportunity to do down the other, although as the defender said at one point in his evidence, with no apparent sense of irony, it is time now to stop the blame game, a sentiment which I heartily endorse. (It is early days, but developments since the evidence was led do show some encouraging signs of a rapprochement.)

The legislative framework - the Children (Scotland) Act 1995

[7] Because the pursuer is seeking decree of divorce, the court must consider the arrangements for the children and whether to exercise the power under section 11 of the Children (Scotland) Act 1995 to make orders in respect of the children. Section 11(7) to (7E) provides:

" ...

- (7) Subject to subsection (8) below, in considering whether or not to make an order under subsection (1) above and what order to make, the court—
 - (a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and
 - (b) taking account of the child's age and maturity, shall so far as practicable—

- (i) give him an opportunity to indicate whether he wishes to express his views;
 - (ii) if he does so wish, give him an opportunity to express them; and
 - (iii) have regard to such views as he may express.
- (7A) In carrying out the duties imposed by subsection (7)(a) above, the court shall have regard in particular to the matters mentioned in subsection (7B) below.
- (7B) Those matters are—
 - (a) the need to protect the child from—
 - (i) any abuse; or
 - (ii) the risk of any abuse, which affects, or might affect, the child;
 - (b) the effect such abuse, or the risk of such abuse, might have on the child;
 - (c) the ability of a person—
 - (i) who has carried out abuse which affects or might affect the child; or
 - (ii) who might carry out such abuse, to care for, or otherwise meet the needs of, the child; and
 - (d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under subsection (1), would have) those responsibilities.
- (7C) In subsection (7B) above—
 - ‘abuse’ includes—
 - (a) violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress;
 - (b) abuse of a person other than the child; and
 - (c) domestic abuse;
 - ‘conduct’ includes—
 - (a) speech; and
 - (b) presence in a specified place or area.
- (7D) Where—
 - (a) the court is considering making an order under subsection (1) above; and
 - (b) in pursuance of the order two or more relevant persons would have to co-operate with one another as respects matters affecting the child, the court shall consider whether it would be appropriate to make the order.
- (7E) In subsection (7D) above, ‘relevant person’, in relation to a child, means—
 - (a) a person having parental responsibilities or parental rights in respect of the child; or
 - (b) where a parent of the child does not have parental responsibilities or parental rights in respect of the child, a parent of the child.”

[8] Notwithstanding the young age of the two boys, as discussed more fully below, the court did give them the opportunity to express their views, through the medium of a child welfare reporter, the aforementioned Dr Louise Potter. That was in line with current

thinking about the rights of all children, including the very young. Article 12 of the UNCRC is to the effect that a child who is capable of forming his or her own views must be given the right to express those views freely in all matters affecting the child, the views being given due weight in accordance with the age and maturity of the child (which is broadly what section 11(7)(b) of the 1995 Act provides, but in its General Comment No 12 (2000 – The right of the child to be heard) – at paragraph 21, the UN Committee on the Rights of the Child emphasised that article 12 imposes no age limit on the right of the child to express her or his views, and discouraged States Parties from introducing age limits either in law or in practice which would restrict the child’s right to be heard in all matters affecting her or him; going on to say that full implementation of article 12 requires recognition of and respect for non-verbal forms of communication).

The evidence

[9] As I have already alluded to, much of the evidence consisted of the parties bemoaning the perceived shortcomings of the other. I do not consider it necessary, or productive, to rehearse all of that evidence, given that it is not contended that either party is incapable of caring for the children and that although neither is slow to accuse the other of parenting deficits manifesting in different ways, each accepts that it is in the children’s interests to have a strong, loving and meaningful relationship with the other, despite his/her alleged defects. That is entirely appropriate: clearly, both parents love the children deeply and, as they have demonstrated over the years since their separation, both are capable of discharging their parental responsibilities and exercising their parental rights, albeit they have different parenting styles. For much the same reason, evidence from the defender’s sisters commending his parenting abilities is of no assistance in determining which of the

various regimes canvassed in the evidence, and in submissions, best serves the children.

Senior counsel for the pursuer objected to that evidence as inadmissible, being opinion evidence proffered by lay witnesses but given that this is not a competition between the parties as to who is the “better” parent, and that neither party’s commitment to the children and ability to care for them is in dispute, the evidence which was objected to does not add anything in any event and I have attached no weight to it.

[10] There are, however, some discrete factual issues to which I do need to refer before turning to the evidence of Dr Potter.

The children

[11] First and foremost it is necessary to say something of the children, who are at the heart of the dispute and whose welfare is of paramount importance. L is aged 10 and was described by the pursuer as very girly, loves cats, likes music, friends and clothes. J, aged 5, was described by the pursuer as “lovely” and “cuddly”. He is possibly on the autistic spectrum but that possible diagnosis has not been confirmed. Remarkably, he is teaching himself Spanish from his iPad, apparently with some degree of success. O, aged 4 is also a “lovely little boy” who loves fast cars and watching Paw Patrol on television. For whatever reason, both boys have been developmentally delayed, and in particular J’s commencement in primary 1 was delayed by a year from August 2024, when he could have started, until August 2025. That decision appears to have been well-made, since he has progressed well over the last year and is now ready for primary school. O is still developmentally delayed in his communication skills, albeit the defender disputes that.

The arrangements for L

[12] Although I am not asked to make any decision about L, it is important to record that the reason agreement was reached to vary the week about arrangement in relation to her was that several months ago she stopped attending for contact. Dr Potter ascertained her views, which were to spend more time at the pursuer's house, and in particular to spend the school week with the pursuer, with weekend time with the defender, and the agreement reached by the parties reflects those views. L thus spends every Friday night, through to Saturday at 7.00pm, with the defender. That is relevant when it comes to deciding what is best for the boys, since account should be taken of the need to preserve their relationship with L (and *vice versa*), bearing in mind that at least until L opted out of the week-about arrangement, she and the boys were living together 100% of the time.

The rape allegation: the appeal to the Inner House

[13] The focus of the appeal to the Inner House was the justiciability and relevance of an allegation by the present pursuer that the defender twice raped her in 2022 by commencing sexual intercourse when she was asleep. The Inner House held that while allegations of rape were justiciable in civil proceedings, proof or otherwise of the rape allegations was not essential to determine the issue between these parties, it not being maintained that the father (ie, the defender in this action) should have no or minimal contact to the children as a result of the behaviour alleged. The Inner House also observed that the opportunity should be taken at case management hearings in family actions to restrict evidence to that required to determine the core dispute between the parties. Notwithstanding that clear steer, the pursuer's averments in this action repeat that allegation, which the defender denies. However, notwithstanding that the averment has been made, the pursuer does not contend

that the allegation, if proved, has any bearing on the defender's ability to care for the children, and the issue between the parties – how, precisely, shared care should operate – is as narrow as it was in the sheriff court action. In line with the Inner House guidance, the relevance of the rape allegation was canvassed at a pre-proof hearing in the present action, when senior counsel for the pursuer stated that she did not intend to lead evidence in support of the allegation. The minute of proceedings duly recorded that:

“[t]he court's decision will therefore be reached without regard to the issue of whether the pursuer was or was not raped by the defender, which is not germane to the issues which the court does have to decide.”

[14] In line with that position, the pursuer did not attempt to lead any evidence that she had been raped by the defender. However, her senior counsel maintained the position (hinted at during the pre-proof hearing) that the fact that the allegation had been made in the first place was in some way relevant; she submitted that while there had been no “need” to prove it, the allegation, along with that of coercive control, remained there in the background. Senior counsel for the defender took issue with any notion that the rape allegation could be part of any consideration of the issues in some form of, as she put it, atmospheric existence, which was entirely at odds with the Inner House guidance and the order that the rape allegation ought not to be part of the evidence in the case, as well as being prejudicial to the defender.

[15] On this matter, I agree with counsel for the defender. The pursuer is not entitled to have her allegation of rape considered in some amorphous way via the back door by asserting that the allegation is “there in the background”. The fact is that the allegation was and is not relevant to the issues between the parties. (I technically did not so order, but would have done so had the pursuer's senior counsel not made the concession she did at the pre-proof hearing; and the position was made clear in the minute of proceedings.) If the

truth or otherwise of the allegation is not germane to the issues in dispute, then, equally, the fact of the allegation having been made is neither here nor there. That is an end to the matter. It would be as unfair to the defender to proceed on the basis that the pursuer had made an allegation which might be true, as it would be to the pursuer to proceed on the basis that she had made an allegation which might be untrue. Accordingly, I simply ignore the averment of rape as if it had not been made.

Abuse/coercive control

[16] Conversely, *evidence* (emphasis added), of abuse and coercive control is relevant, and to the extent it is accepted must be taken into account, as mandated by, and to the extent outlined in, sections 11(7B) to (7D) of the 1995 Act. The parties have agreed by joint minute that the defender has the following domestically-aggravated convictions, and disposals (as clarified by the productions in the pursuer's ninth inventory of productions, including his schedule of previous convictions):

- (i) A conviction after trial, dated 20 June 2023, for an offence under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, committed on 22 October 2022, in respect that the defender, in terms of the summary complaint, "did shout and swear, utter offensive remarks and act in an offensive manner". On 20 June 2023, a non-harassment order (prohibiting the defender from approaching or contacting or attempting to approach or contact the pursuer) was imposed for a period of 2 years, subsisting until 20 June 2025 and sentence was also deferred until 18 December 2023 presumably for good behaviour, although neither the joint minute nor the productions disclose what happened on that date.

- (ii) A conviction dated 10 November 2022 for breach of a condition of the bail order imposed on 24 October 2022 not to approach or contact the pursuer, in respect that on 8 November 2022 the defender repeatedly entered an address and attempted to approach or contact the pursuer, to which he pled guilty on 10 November 2022 and was fined £150 with a victim surcharge of £10; and was made the subject of a non-harassment order imposed for 1 year (which, *inter alia*, prohibited him from contacting or attempting to contact the pursuer except by telephone, email or text message in relation to the children).
- (iii) A conviction dated 19 December 2022 for breach of the non-harassment order imposed on 10 November 2022, with a bail aggravation, and a separate conviction for a further breach of the bail condition imposed on 24 October 2022, in respect that the defender repeatedly contacted the pursuer on 17/18 December 2022, sentence being deferred to 30 January 2023, 14 March 2023, 23 May 2023, and then 20 June 2023 when a Community Payback Order with 160 hours of unpaid work was imposed in respect of both matters.

It was also agreed in the joint minute that the defender was charged with a further breach of a non-harassment order alleged to have occurred on 23 August 2023. This went to trial and the charge was found not proven.

[17] What the convictions show is that the defender offended against the pursuer on 22 October 2022 by shouting and swearing at her. That was around the date of the parties' separation. Pending trial he was placed on bail on 24 October 2022 with a condition not to approach or contact her. He breached that condition twice within the space of about 2 months, the second occasion also amounting to breach of the first non-harassment order

imposed upon him. Although showing scant regard for orders of the court at that time, he appears to have managed to comply with the non-harassment orders since.

[18] Although there is extensive reference in Dr Potter's report to other allegations of abuse and coercive control levelled by the pursuer against the defender, and the pursuer's senior counsel asserted that there was a background of coercive control, the fact is that other than evidence about post-separation non-criminal conduct by the defender in relation to unilaterally changing the care arrangements for the children and taking money from the pursuer's bank account (which I deal with separately below), there was no other evidence of abusive behaviour committed by the defender towards the pursuer during the course of the marriage.

[19] That said, the defender, in the course of his evidence minimised the gravity of the conduct which resulted in the convictions referred to, claiming that they were "not serious" offences, and that his criminal behaviour consisted of swearing at the pursuer once. For the avoidance of doubt, I do not accept that the offences were not serious, nor, standing the terms of the summary complaint which led to the section 38 conviction, can I accept that the sum total of the defender's conduct consisted of the uttering of a single swear word.

Notwithstanding that they occurred in the wake of the parties' separation, the offences were all correctly characterised as being aggravated by domestic abuse, as that term is properly understood in modern-day Scotland (as the law reflects). The defender's conduct falls squarely within the definition of "abuse" in section 11(7C) of the 1995 Act. The court must therefore have regard to that conduct in applying the principles set out in section 11. It is not contended by the pursuer that there is any need to protect the children from abuse, or from the risk of abuse, directed towards them, and in that context it must be acknowledged that the defender has not offended since December 2022; nor does the pursuer contend that

the defender's past abusive behaviour affects his ability to care for, or otherwise meet the needs of, the children. However, section 11(7B)(d) is relevant, in that abuse of the pursuer by the defender may affect the ability of the pursuer to carry out her caring responsibilities. That is a factor which points towards the desirability, so far as possible, of limiting the extent to which the parties are required to come into contact with one another, since the pursuer is afraid of the defender (arising from his past conduct towards her), although there are some positive tentative signs that civilised communication is beginning to take place. The abuse does not otherwise have a bearing on which of the regimes under discussion should be preferred, although it does underline the necessity for the defender to adhere to whatever arrangement is put in place by the court.

[20] Counsel for the pursuer went further, and submitted that one reason for not favouring the defender's favoured 2:2:5:5 proposal was that it was another example of the defender exercising control over the pursuer; whereas the pursuer had been prepared to accept Dr Potter's "recommendation" (as counsel categorised it), the defender (unreasonably) was not so prepared but had to have his own way. However, I think that is going too far. If the 2:2:5:5 arrangement were the one which best served the children's interests, then it could not amount to coercive control for the defender to have pursued it and for the court to give effect to it; conversely, if it is not the best arrangement, then it will not be approved in any event. As will be seen, I do not in fact favour that arrangement, but that is because I consider there to be a better one, rather than because the defender is unreasonably pursuing a coercively controlling course of conduct. The 2:2:5:5 arrangement has positive, as well as negative aspects, and is not so outlandish that the defender has acted unreasonably in, or should be criticised for, seeking an order in those terms.

[21] Finally, I should say something about the reference in the joint minute to the not proven verdict, since it is not clear what I am expected to take from an agreement that the defender was found not to have acted in a particular way. The pursuer's evidence was that she could not understand why the defender had gone to her house on a Wednesday, which he had attributed to mixing up his days. She clearly felt aggrieved that she had had to give evidence in that case and that the defender had been acquitted. The defender for his part agreed that his defence had been that he had mixed up his days, and, equally clearly, considered that his acquittal was an end to the matter. There is some merit in both parties' positions. Whether the defender was in breach of his non-harassment order or not, the pursuer was correct to the extent that the defender ought not to have gone to her house on a Wednesday (which was not a day she had any of the children) since he had no reason to be there. In the context of his past behaviour, she would naturally have found that alarming. On the other hand, whatever this court may think of the excuse advanced by the defender, the sheriff, who had the advantage of hearing the evidence, obviously entertained a reasonable doubt such that he found the charge not proven, which is, as juries are told day and daily, a verdict of acquittal no different in effect from one of not guilty. The defender can scarcely be blamed, therefore, for taking the matter to trial and avoiding a criminal conviction (particularly since, had he been convicted, he might well have been facing a custodial sentence). The best that can be said about this incident is that it occurred almost 2 years ago, and it does not attract any significant weight when it comes to assessing the best interests of the children in the here and now.

Withdrawal of £1,000 from the parties' joint bank account in December 2024

[22] I could have dealt with this under the umbrella of coercive control but it deserves a chapter of its own since, in many ways, it is the (non-criminal) incident which reflects least well on the defender, because it impacted not only the pursuer, but also the children. In brief, the parties still maintain a joint bank account. In practice, only the pursuer uses it. Her wages are paid into it, and among other things, she pays the mortgage from it. On 24 November 2024, the very day that her wages were credited to the account, the defender withdrew £1,000. That left the pursuer in straitened circumstances in the lead up to Christmas, and she had to seek charitable aid from a variety of sources, which she found difficult and embarrassing. The defender did not dispute having withdrawn the money, which he sought to justify by saying, variously, that he was under financial pressure too and had rent to pay; that it was a joint account; that he also had to buy Christmas presents for the children; and that the pursuer had bought a 40" TV for Christmas (which was not put to her in cross-examination). Even if all of that is true, none of it excuses his having taken what was, in effect, the pursuer's money from the account for his own purposes. That was bound to cause the pursuer distress and hardship and to impact upon the children. All of this is bound up with the defender's obvious resentment that the pursuer claims all of the child benefit for the children, with the consequence that he is not in receipt of any child benefit despite, so far, having had equal care of them. In the modern vernacular, one can see where the defender is coming from in that regard, but even if the pursuer is also acting unreasonably, two wrongs do not make a right, and the defender ought not to have acted as he did. I do consider that this was an example of the defender exercising coercive control over the pursuer, and in the interests of the children as much as the pursuer, that must not be repeated. Taking a child-centred approach to all of this, it is evident that both parties are

struggling financially, which is bound to affect the children. Neither should be doing anything to make the life of the other (and, by extension, the life of the children when in that other's care) harder.

The changing of/non-adherence to child-care arrangements

[23] The pursuer gave evidence that the defender had not always adhered to the court order (and, somewhat inconsistently, that he had not agreed to variations which she had proposed). One major grievance was in relation to the summer holidays in 2024, when the defender was due to have the children for the first 3 weeks. The pursuer felt that was too long for her to be away from the children, and proposed that the parties simply continue with the week-about arrangement. The defender did not agree to that, but he had insisted on returning them to her for the first week. He then wanted to keep them on the fourth week of the holidays, which should have been her week, which she did not agree to; but he returned them anyway. She accepted that the end result was that she had the children for 4 weeks, and the defender two, but said that as a result of the confusion, she had to change shifts which she had booked, and ended up having to take a week off work unpaid.

[24] The defender had a different perspective. He said that he had the children in the week leading up to the holidays. Had he exercised contact for the first 3 weeks, as the order provided, he would then have had them for four consecutive weeks. He therefore thought it was reasonable (a) that the pursuer instead have the first week and (b) that in return, he should instead have the fourth week. Given the criticism of the defender elsewhere in this opinion, and the undesirability of the children being 4 weeks away from either parent, he deserves some credit for, in this instance, adopting a reasonable stance at the outset, and it is

not difficult to see why he felt aggrieved that the net result of his offer was that he lost a week with the children to which he was entitled.

[25] To the extent that there was a problem last summer, in some respects the difficulties arose from the order itself and because seemingly no-one had anticipated that it might not be a good idea for the party who had the children in the week before the holidays also to have the first 3 weeks. It is unfortunate that the parties were unable to foresee this difficulty before it arose and agree a sensible compromise (as, in fact, they did this year). Happily this should not recur since there will not be a week-about term time arrangement in future, and during holidays, the boys are only to be with either party for a week at a time. Accordingly, the mishap over last summer's holiday contact is of no moment in deciding the future arrangements for the children.

[26] Some time was also taken up in evidence over the defender's having taken all three children to Northern Ireland to visit his family in February of this year, without having sought the pursuer's permission or having given her much, if any, in the way of advance notification of his plans. While it may be true, as the defender said in evidence, that permission is not strictly required, it is not unreasonable that if either parent intends to take the children on a trip, particularly one which involves a flight, the other parent is informed as a matter of courtesy. The trip itself was enjoyed by the children, and it is not disputed that it is in the children's interests to maintain links with their paternal family in Ireland, just as it is in their interests to maintain links with the maternal side of their family. In other words, the defender is not to be criticised for having taken the children to Ireland, so much as for the manner in which he went about it. Since the pursuer does not argue that the defender should not be allowed, as a matter of principle, to take the children to Ireland, again the evidence about the Irish trip in February is of no real assistance in deciding what

the future care arrangements should be, but, again, it underlines the need for both parties to communicate better than they have managed to date.

[27] Finally, a not inconsiderable portion of the pursuer's case was directed towards other instances where the defender had not kept to the existing arrangement, which the defender then sought to justify in his own evidence. I do not find it necessary to make any findings in fact about who was to blame, if anyone, that having no bearing on whether the defender should, in future, have the children for 6, or 7, nights in every 14 (and, if the former, which 6 nights those should be). Suffice to say, again, that it is essential that both parties adhere to whatever arrangement is ordered to be in place, subject to any prior contrary agreement which they might reach to accommodate particular circumstances.

Trauma

[28] The pursuer led evidence from Dr Lisa Reynolds, Psychologist, who spoke to a report which she had prepared in which she expressed the opinion that the pursuer suffers from complex PTSD as a result of a previous abusive relationship with a man other than the defender, and emotional abuse at the hands of her father. She experienced the core symptoms of complex PTSD, including intrusive images and re-enactments of abusive events in her life during which she believed the events were happening again, there being a variety of triggers but mainly occurring when she felt scared and threatened. She reported suffering from symptoms of depression and low moods during the weeks without her youngest children (*viz*, the boys). She suffered from anxiety and chronic pain. Her symptoms were exacerbated by, *inter alia*, periods when she had no contact with her children; contact with the defender and his family; and incidents when the defender did not adhere to contact arrangements. Her difficulties did not impact upon her ability to care

for and parent her children. However, Dr Reynolds was at pains to stress that she was not an expert in child and adolescent psychology/psychiatry and was not in a position to make any recommendations as to contact.

Dr Louise Potter

[29] As previously noted, Dr Potter is the clinical psychologist appointed by the court as a Child Welfare Reporter to obtain the children's views and to undertake certain further enquiries, including whether any of the children showed any effects of abuse; whether any of them had additional support needs that had a bearing on the current arrangements for their care; and whether there were positive or negative factors deriving from the current arrangements. She duly prepared a child welfare report, to which she spoke in her evidence.

[30] In summary, Dr Potter's conclusion was that contact and quality time with both parents was in the interests of all three children. Much of her report is devoted to L and why she held the views she did. As regards domestic abuse, Dr Potter said that the parties' toxic relationship was harmful to all three children, and that both parties must endeavour not to involve the children in their personal differences. In relation to J and O, Dr Potter's conclusion, underpinned by attachment theory, and drawing upon the nursery's report that drop-offs by the defender ran smoothly whereas those by the pursuer were more chaotic, with the boys being reluctant to leave her, was that they were showing signs of anxiety when separated from the pursuer, suggesting a strong bond with her and a fear that they might not see her again. That led to what I take to be the key finding of Dr Potter's enquiries - which, to their credit, both parties have accepted - that long periods (viz, periods of 7 days or more) away from either parent were not wise if they could be avoided and that

the week-about arrangement was not conducive to their welfare at this stage of their young lives, albeit she recognised in her oral evidence that the present arrangement also had its advantages.

[31] Of particular interest in Dr Potter's report is the section where she discusses how she attempted to elicit the views of J and O. She primarily undertook that task by conducting the Bene-Anthony Family Relations Test (FRT). She explained that the FRT (which she said is not a test as such, but a method of exploring children's feelings) consists of a series of cards, representing the important members of the child's family (as identified by the child), which the child must place in the post-box of one or more figures, there also being a post-box for Mr Nobody. The test divides children's feelings into outgoing, to describe those going from the child into the family member, and make the child a loving, ambivalent or hostile individual; and incoming feelings for the child, which depend both on life experiences and on the child's system of defences. The FRT divides these into the "actual" reality of emotions people have towards the child and the child's psychic reality of emotions perceived as the child wants or needs them to be. If no family member fits a particular card, that card can be posted to Mr Nobody. There are two sets of cards, for older and younger children respectively, the latter being children under the age of about 7.

[32] Dr Potter reported that J was intrigued by the FRT cards. He began by hugging the Dad card. His chosen family members were himself, the pursuer, the defender, L and O. He did not evince positive feelings for either parent, which was sad. In relation to incoming feelings, he felt love and warmth come from the defender. Because he was not otherwise engaging by this stage of the meeting, Dr Potter also conducted the older-child "test" with him, but no real conclusions could be drawn from that given his age and the lack of any research into the use of those cards on younger children. She then played the "thumbs up"

game with him. J gave both nursery and the defender's house a thumbs down, but he gave the pursuer's house a double thumbs up. He also said that he was sad at Dad's house.

Dr Potter agreed in cross-examination that those answers "could" have been because he was missing the defender in the week she saw him, when he was being cared for by the pursuer, although she did not think that was what he was trying to convey. Her overall conclusion with regard to J was that it was complicated to know what exactly he was trying to communicate. Given his possible autistic spectrum diagnosis, there was something to be said for every week being the same for J.

[33] As regards O, he was too young to engage with the FRT test. It was doubtful that he was able to express any thoughts about his current situation. He was not interested in drawing pictures. She tried playing the "thumbs up" game with him. He was able to answer a few questions correctly, such as whether he had a brother. When then asked what mum's house was like he gave a double thumbs up, and when asked what dad's house was like, he gave a single thumbs down. He then left the room and Dr Potter formed the view that there was not much to be gained from attempting to get him to do any more.

[34] Dr Potter also spoke to the boys' nursery teacher. She reported that J's deferred entry into primary 1 had been positive for him, in that he had developed a lot and could now turn-take in games, help with choosing songs and do other things whereby he had to take account of the needs of others, although he could still get frustrated if asked not to do something. The boys were excited to see each parent at the end of the day, and at each home they appeared well-presented and with everything that they need for the school day. Both boys made pictures for both parents. The school's head teacher reported that J was getting better at connecting words with emotions. She did not think he had autism. He did like routine, although it took a long time to get him into a routine. She said to be very wary of

the boys losing time and contact with the defender, although that comment was not explored and remains unexplained.

[35] In the discussion section of her report, Dr Potter observed that having two homes and moving back and forth is not easy for children: some managed better than others. She noted that the boys had a mixed reaction to their parents. J's FRT was interesting and mostly devoid of positive or negative feeling about either parent; it was difficult to know what to make of that, but it did not suggest to her that he was particularly unhappy in either place or that he should have a change of plan. As for O's thumbs down about the defender's house, she had no idea where that had come from or what he was driving it but he was communicating something. She went on to say, in a contradictory passage, having first commented that a whole week without seeing either parent was a long time for children so young, that J's comment that he was not happy at the defender's house, and O's thumbs down provided some evidence that they were not that happy there and she "wondered" whether cutting that down slightly might serve to make the situation better for the children.

[36] That reasoning then led Dr Potter to say that in thinking about contact arrangements, she wondered if they could live at the pursuer's house during the week and then see the pursuer after education on Tuesday until Thursday morning drop-off and then again from education on a Friday until Saturday at 7.00pm.

Parties' respective evidence on Dr Potter's proposal/counter suggestions

The pursuer

[37] The pursuer said that her primary position was that she thought it would be better for J and O to reside with her; however, she was prepared to accept Dr Potter's "recommendation", the two advantages of which were that they would not spend so long

away from her; and handovers would be easier, since they would mostly be to and from school/nursery. In the course of her evidence, she initially said that she would also be happy with a 4:3 arrangement, although she retracted that, reiterating that she preferred Dr Potter's proposal.

The defender

[38] The defender said that the present arrangements worked well and while he accepted the need for change, the change should be as minimal as possible. His 2:2:5:5 proposal achieved that. The main difficulty with Dr Potter's suggestion was that there would be too much moving back and forward between houses, which would be confusing for the boys, and J in particular, given his love of routine. Another difficulty was that it would make it more difficult for him to resume his occupation as a stonemason, since the only full days he would be able to work would be a Sunday and Monday, the former of which would be impracticable given the nature of the work. Finally, it would result in neither party ever having a full weekend with the boys, which would make it impossible for him to undertake activities such as hiking and camping, other than during holidays. It would also mean he could never take the boys to Northern Ireland to see his family.

Decision

[39] Even apart from the parties' common position on this point, there is ample evidence before me that, notwithstanding its advantages (the foremost of which is that it allows for both parties to spend full weekends with the children) the present week-about arrangement requires to be departed from. It is not operating in the boys interests in two respects: first, it is potentially harmful to them to be away from either parent for 7 days at a time on a regular

basis; and second, those weeks when the boys are not with the pursuer exacerbate the pursuer's symptoms of complex PTSD which in turn potentially impacts on her ability to look after the boys when she does have their care. The question then becomes which of the other arrangements on the table is in the boys' best interests.

The 2:2:5:5 proposal

[40] Dealing first with the defender's proposed 2:2:5:5 arrangement, it is not wholly devoid of merit. The main factor in its favour is that it would continue to allow each of the parties a full weekend with the boys. The negative features are that it would still result in the boys being away from each parent for 5 days at a time, arguably too long on Dr Potter's evidence (and that of Dr Reynolds); and that it would result in the arrangements potentially being more confusing for J. I therefore do not favour that proposal.

The Dr Potter proposal

[41] On the other hand, nor am I particularly attracted by Dr Potter's suggestion. The objections to it advanced by the defender are in my view well made, in that it is too "bitty" for want of a better phrase (or, as senior counsel for the defender more elegantly described it, too staccato). For example, it would result in kit, clothes and other belongings frequently having to go from house to house, and the constantly changing bed-time routines in the course of a single week would potentially be confusing for the boys. Additionally, just as it is in the children's interests that the pursuer's PTSD symptoms should be exacerbated as little as possible by the arrangements for their care, so, too, it is in their interests that the defender be able to resume gainful employment for his, and vicariously their, financial well-being. I confess it was not entirely clear on the evidence the extent to which he is

currently working, but I accept that Dr Potter's proposed arrangement would make it logistically more difficult for him to do so. The pursuer herself did not put forward any particularly cogent reasons as to why the arrangement would benefit the boys, other than that it was the one suggested by Dr Potter. However, it was merely that: a suggestion, prefaced by her "wondering" if it might be tried; and Dr Potter accepted that other regimes might work equally well. It was couched in terms of something which might be tried, since it had the advantage of reducing the number of nights away from each parent, and of simplifying handovers, but otherwise, as senior counsel for the defender pointed out, there was a certain inconsistency in Dr Potter saying, on the one hand, that the boys should reside with the pursuer during the week; and the actual proposal which would see them spending three week nights with the defender (albeit, Friday is arguably a weekend night). It is, in any event, for the court, not Dr Potter, to decide what is in the children's best interests (although, to be fair to her, she did not suggest otherwise: it is the pursuer, rather than Dr Potter herself, who seeks to elevate her somewhat tentative suggestion to the status of a recommendation).

4:3 versus 3:3:4:4

[42] There are several benefits of both the 4:3 and the 3:3:4:4 proposals. In both cases, the children would be with the pursuer every weekday until Wednesday morning at education, and with the defender from education on a Wednesday until the weekend. These proposals therefore have the benefit that each school week would be the same in terms of who took the children to school/nursery and who collected them: they achieve the aim of establishing an easy-to-follow routine for J. Both proposals also achieve the goal of limiting the number of handovers, as well as reducing the number of face to face handovers so far as possible, there

being only one such handover each week, at the weekend. Finally, both arrangements allow the boys and L to be together at the defender's home from at least Friday at 4.00pm until Saturday lunchtime, as well as when they are at the pursuer's home.

[43] The question then becomes - which brings us to the nub of the dispute in the case - which proposal is best for the boys. The pursuer's proposal would result in the boys spending slightly more time with her than with the defender, although given that holidays are to be shared equally, that is perhaps of little significance. The defender's proposal would more closely continue the shared care arrangement which has been in place for more than 2 years and would enable him to have more weekend time with the children than would be the case under the 4:3 proposal.

The boys' views

[44] Senior counsel for the pursuer submitted that having regard to the boys' views, as expressed to Dr Potter, the children should spend more time with the pursuer than with the defender because that is what they wanted. However, I consider the "tests" conducted by Dr Potter to be an unreliable basis for drawing that conclusion, particularly in the case of O, in relation to whom Dr Potter said that she did not know what he was trying to communicate in the thumbs up game. In relation to J, Dr Potter said that it was complicated to know what he was trying to communicate. It must also be observed that there is a certain inconsistency in Dr Potter's conclusions, to the extent that she said, on the one hand, that her findings from the FRT test did not suggest that J was particularly unhappy in either home or that he should have a change of plan, before going on to suggest a change of plan. It is in any event doubtful that either J or O was able to understand the full implications of what they were being asked, or to appreciate that less time with the defender might mean less

weekend time, the very time when they can undertake more enjoyable activities. One can certainly not take from the boys' views, insofar as they can be ascertained, that they favour the 4:3 arrangement over the 3:3:4:4 one, or that they wish to spend less time with the defender than they currently do.

[45] In any event, the views (to the extent that they can be ascertained) are only one factor to be taken into account and are not definitive. While the week-about arrangement is now recognised to be in need of change, that is only because of the amount of time it involves the boys being away from each parent. Otherwise, their having been cared for equally by the parties appears to have been a success in that both have progressed developmentally; both are well turned out at nursery; and both appear to be delightful children. I do not see any compelling reason to reduce the amount of time with either parent. Additionally, the 3:3:4:4 arrangement has the advantage which the 4:3 one lacks of enabling the defender, as well as the pursuer, to have some meaningful weekend time with the boys.

[46] For all these reasons I will find that during term-time, the pursuer should have the care of J and O from (week 1) Sunday at 12.30pm until Wednesday at education; the defender from education on Wednesday until Saturday at 1.00pm; and (week 2), that the pursuer should have their care from Saturday at 1.00pm until Wednesday morning at education; and the defender from education on Wednesday until Sunday at 12.30 pm. I have opted for a 12.30pm, rather than 1.00pm, hand-over every second Sunday, to allow the pursuer a full afternoon with the boys and in an attempt, on a rough and ready basis, to afford to both parties two weekend days per fortnight with O and J. This arrangement has the added advantage of the defender being able to spend some one-on-one time with L every second Saturday between 1.00pm and 7.00pm. I was told at the hearing on

submissions that holiday arrangements have been agreed up to 19 August 2025, and so week 1 will begin then (albeit, on a Tuesday).

[47] I will otherwise give effect to the parties' agreement, and find no expenses due to or by either party. As stated at the outset, decree of divorce is also granted.

Postscript

[48] All that it remains to say is that I repeat the sentiment already expressed in this opinion, and echoing Dr Potter, that, in the interests of all the children, the parties must cooperate and communicate in a more child-centred manner than they historically have achieved (recognising that they have recently begun to do so). They will, after all, require to do that for at least the next 12 years, and beyond. (It is encouraging that they have agreed that both should attend J's first day at school). On a similar theme, I also acknowledge that the arrangement which I have set in place will not allow either party to have a full weekend away with the boys during term time; and I would hope that requests in either direction for an *ad hoc* variation are sympathetically received, subject to reasonable notice being given along with details of what any proposed trip will involve.