

SHERIFFDOM OF GRAMPIAN, HIGHLANDS AND ISLANDS AT ELGIN

[2022] SC ELG 21

F28-20

JUDGMENT OF SHERIFF PAUL REID

in the cause

JC & MH

Pursuer

against

RJ

Defender

**Pursuer: D Adams; Cockburns, Solicitors  
Defender: S Bell, Advocate; Moir and Sweeney, Solicitors**

Elgin, 4 August 2022

FINDINGS IN FACT

*The Child*

1. BJ was born on 19 June 2017. He is now aged five.
2. BJ resides with the pursuers at their address in the instance in Town A.
3. BJ has resided with the pursuers since 4 September 2019.
4. BJ is the son of the defenders.
5. BJ was removed from the care of the defenders by Social Workers acting on behalf of Moray Council in October 2017. He lived with foster carers until moving in with the pursuers on 4 September 2019.
6. A Looked After Child review held in July 2018 recommended permanence for BJ.

7. Following the recommendation of permanence for BJ, the pursuers requested that they be considered as kinship carers for BJ.
8. That request was approved by a kinship panel convened by Moray Council in June 2019.
9. BJ is subject to a Compulsory Supervision Order (CSO).
10. It is a condition of the CSO that BJ reside with the pursuers.
11. It is a condition of the CSO that BJ have at least six hours of contact per week with BJ.
12. The CSO has been confirmed at successive Children's Hearings.
13. The CSO is not due to expire.
14. BJ currently attends nursery five days per week in Town A.
15. BJ is due to start primary school in Town A in August 2022. A number of his peers from nursery are due to start at the same primary school.
16. If BJ were to reside with the second defender, he would attend primary school in Town B.
17. BJ is a happy child who is meeting all of his developmental milestones.

#### *The Child's Immediate Family*

18. The first defender (LC) was BJ's mother. She died on 24 January 2021. LC was the daughter of the first pursuer (JC).
19. The second defender (RJ) is BJ's father. He lives with his partner (EM) at the address in the instance in Town B.
20. JC is the maternal grandmother of BJ.

#### *The pursuers and their property*

21. The pursuers (JC and MH) have been together for 21 years. They live together at their address in the instance in Town A.
22. The pursuers live in a three bedroom house in Town A.

23. BJ has his own bedroom in their house.
24. AC is a half-brother of BJ. AC is a child of LC. His father is not RJ. AC has been adopted by the pursuers.
25. AC lives in the same house as BJ.
26. BJ and AC have a very close relationship.
27. KM is a half-brother of BJ. KM is a child of LC. His father is not RJ.
28. KM lives with his father but visits the pursuers for an overnight stay once per month.

*The pursuers' routine*

29. JC has principal responsibility for the care of BJ and AC.
30. The pursuers run a business in Town D. JC usually works in the business two days a week. She has reduced the amount she works since BJ started living with the pursuers.
31. MH works five days per week. He usually returns home between 18:00 and 19:00. The family normally eat together. MH is involved in the bath and bedtime routine of BJ.
32. MH works a half day on a Wednesday. He collects BJ from nursery on that day.
33. JC has two sisters. Each look after BJ and AC for one day per week. JC works on those days. She normally returns from work at around 18:00. The days JC works vary depending upon when her sisters are able to look after the children.

*RJ and EM's property*

34. RJ and EM have two children. Both of those children reside with them at their house in Town B.
35. EM has four children from a previous relationship. Three of those children reside with her and RJ at their house in Town B.
36. RJ and EM live in a three bedroom house in Town B.
37. BJ shares a room with two of his half-siblings when he has residential contact with RJ.

38. An application on behalf of RJ and EM for a larger house has been made and is supported by their social worker.

*Contact between BJ and RJ*

39. BJ spends one night every fortnight with the second defender at his house in Town B.
40. BJ is collected from Town A at around 15:00 on Friday afternoon and returned to Town A at 18:00 on Saturday afternoon.
41. Transport between Town A and Town B is by means of a taxi funded by the Local Authority.
42. In the event of the CSO being discharged, funding for the taxi will likely cease.
43. Until March 2022, BJ spent two nights (Friday afternoon to Sunday afternoon) every fortnight with the second defender at his house in Town B.
44. Residential contact was reduced at a Planning Meeting in March 2022 and, in part, was in response to feedback from BJ.

*Social work involvement*

45. Kelly Taylor is a social worker that has been involved in the care of BJ since February 2018.
46. In March 2022, Kelly Taylor authored an assessment entitled "*Together or Apart? Assessing Siblings for Permanent Placement Report.*"
47. The Report recommended that BJ remain resident with the pursuers and AC.
48. Ann Holt is a social worker that specialises in kinship care.
49. Ann Holt has supported the pursuers since they applied for kinship care. She has met them fortnightly.
50. Ann Holt has never been to RJ's house and has never seen BJ engaging with RJ or the other members of RJ's household.
51. Lisa Riches is a social worker that has been involved with EM for around six years.

52. Following the start of the relationship between RJ and EM, EM's children were placed on the Child Protection Register. This was a consequence of RJ's troubled past, which included substance abuse issues and convictions for domestic abuse.
53. Lisa Riches prepared a parenting capacity assessment.
54. The conclusions of that assessment resulted in EM's children being removed from the Child Protection Register.
55. There is no ongoing social work involvement with any of the children living with RJ and EM.

*Other facts*

56. Town A and Town B are approximately 20 miles apart. There is no direct public transport between the towns. To get from Town B to Town A, it is necessary to first get a bus to Town C and then get another bus to Town A. The journey takes approximately 90 minutes. There is limited public transport on a Sunday.
57. RJ is awaiting the return of his driving licence. Once returned, he will have access to a car. This will significantly shorten the time it takes to get from Town B to Town A.
58. RJ is a good and attentive father. He is capable of raising BJ.
59. The pursuers are good and attentive parents to BJ (and AC). They are capable of raising BJ.
60. There is no meaningful or effective communication between the pursuers and RJ.
61. BJ is settled in his current home.

**FINDINGS IN FACT AND LAW**

1. Having regard to BJ's age and maturity, it is not practicable or appropriate to seek his views in respect of the orders sought.
2. That having regard to the best interests of BJ, and in the circumstances of this case, it would be better for BJ that the Court makes orders under s.11 of the 1995 Act than it makes no orders at all.

3. That it is in the best interests of BJ that a full set of parental rights and responsibilities be conferred upon each of the pursuers; and it is better for BJ that that order be made than no order be made.
4. That it is in the best interests of BJ that a residence order be made in favour of the pursuers; and it is better for BJ that that order be made than no order be made.
5. That it is in the best interests of BJ that a contact order be made in favour of the second defender (the precise terms of which shall be determined at a further hearing); and it is better for BJ that that order be made than no order be made.

THEREFORE

Before pronouncing a final interlocutor, fixes a hearing on a date to afterwards be fixed for the parties to address the Court in respect of the precise terms of the interlocutor to give effect to the Court's findings.

**NOTE****Introduction**

[1] BJ is, by all accounts, a happy and thriving a five-year-old boy. He currently lives (in what I shall refer to as “Town A”) with his maternal grandmother, JC, and her partner, MH. He has done so since September 2019. BJ is the child of LC and RJ. LC was his mother and is the daughter of JC. She died in 2021. RJ is his father. He now lives with his new partner, EM. They live in what I shall refer to as “Town B”, which is around 20 miles from Town A. RJ and EM have had two children together. EM has four children from a previous relationship, three of whom live in the house with RJ and EM. In this action, JC and MH (the pursuers who may also be referred to, for ease of reference, as the grandparents) seek an order conferring parental rights and responsibilities upon them and a residence order to the effect that BJ shall reside with them. That application is opposed by RJ. In the first instance, he urges the Court to make no orders. If, contrary to that, the Court is prepared to make orders, he seeks a residence order to the effect that BJ shall reside with him, failing which he seeks a contact order.

[2] For the discussion that follows, and having anonymised each of the people involved, it may be helpful to set out at the start who the main people are and their relationship to BJ:

JC	Mother of LC and grandmother of BJ.
JM	Partner of JC.

AC	The youngest son of LC who has been adopted by JC and JM.
LC	Mother of BJ and AC and daughter of JC. She died on 24 January 2021.
RJ	Father of BJ.
EM	Fiancé of RJ
DC	Sister of JC
EB	Sister of RJ

[3] For the reasons that follow, I have reached the view that it is in the best interest of BJ that the following orders are made:

- a. A full set of parental rights and responsibilities be conferred upon the pursuers;
- b. That a residence order be made in favour of the pursuers; and
- c. That a contact order be made in favour of RJ.

In reaching those conclusions, I have had careful regard to the submissions, both written and oral, that were made on behalf of each of the parties. I have not set those submissions out at length, but they inform, and underpin, the discussion that follows.

### **Procedural Matters**

[4] There are three preliminary observations worth recording. First, ten witnesses were heard in the two days. That so many witnesses could be heard in that period of time was a consequence of the work involved preparing the case, including affidavits for each of the

factual witnesses and the effective and focused way in which each witness was examined. The parties are to be commended for that. Secondly, the pleadings are fairly brief. Whilst economy of pleading is to be encouraged, the proof ended up covering matters which were not at all foreshadowed in the pleadings. Neither party took objection when that happened, no doubt with an eye on the need for a decision on this matter before BJ starts school in August. Again, that sort of practical approach is generally to be appreciated. But it did mean that witnesses were having to give positions on matters such as possible contact arrangements in respect of which little advance notice had been given. With hindsight, a more fully pled case may have assisted. Finally, the efficient hearing of the evidence was in spite of, and not because of, the WebEx platform. Several witnesses had to travel to the Court to give evidence, via WebEx, from a room in the court building due to unreliable internet connections. In most instances, this only became apparent as attempts were made to start their evidence. Other issues arose in respect of access to documents and availability of reliable technology to witnesses. Experience in this case is yet another reminder that whilst WebEx has its place in allowing cases to be heard when that would otherwise not be possible, it remains an inferior means of conducting an evidential hearing.

### **The Evidence**

[5] Oral evidence was heard from 10 witnesses. In this section of the judgment, I propose to summarise that evidence. The first five witnesses were called on behalf of the pursuers. Affidavits were lodged for each of the witnesses, although some were more than a year old. Events having moved on, those witnesses agreed that where their oral evidence was inconsistent with their affidavit, their oral evidence should be preferred. No adverse

comment was made by either party in respect of the credibility or reliability of any of the witnesses.

### *JC*

[6] JC is 52 years old and lives with her partner, MH. She works part-time in MH's business. Two of her grandchildren, BJ and AC, live with them. AC is three years old. AC has been adopted by JC and MH, having been born to LC. BJ has lived with JC and MH since 4 September 2019. He lives with them as part of a kinship care arrangement and in accordance with the terms of a Compulsory Supervision Order ("CSO"). An affidavit dated 2 June 2021 had been lodged on her behalf and was adopted in evidence. Her evidence-in-chief largely updated the contents of that affidavit to reflect the passage of time.

[7] Much of the background evidence given by JC is uncontroversial. When BJ came to live with the pursuers, they already had AC living with them. JC and MH had offered to be kinship carers for BJ when the issues of permanence proceedings was raised. That application was protracted and involved two appeals. JC had not anticipated taking on the children at her stage in life but did so when it appeared that BJ would be placed on the adoption register. She (and MH) wanted to be able to provide him an upbringing within his own family. It has meant that JC has reduced the amount she works considerably. Her sisters look after the children one day each which allows JC to work on those days. She can also work at home a bit if necessary. BJ is due to start primary school in August at the primary school in Town A. He currently goes to nursery five days a week. BJ and AC get on well. BJ was described as "*a really good big brother*" and the brothers are "*best friends*".

[8] JC lives in a three bedroom house with MH and the children. BJ has his own room and AC still shares with the pursuers. The third bedroom is used as a spare room for guests

and visitors. That includes KM, who is another child of LC. He is 12 years old and lives with his dad. But he visits the pursuers for an overnight stay once a month. Whilst the pursuers have formally adopted AC, LC disavowed any intention of seeking to adopt BJ in time. By seeking the residence order, she hoped to provide BJ with a good and stable life. He is a child that is never good with change and she hopes to provide him some stability. BJ is due to start school with his peers (who he has been at nursery with) and has “*come on leaps and bounds*” recently.

[9] Current contact between BJ and RJ is once a fortnight. The CSO provides for a minimum of six hours. In practice, that has been from 15:00 on a Friday until 18:00 on a Saturday. In the spring of 2022, that arrangement was put in place which was a reduction from what was happening before, which saw BJ spend two consecutive nights with his dad. Contact had been intermittent recently. JC was not sure of the reasons for that but believed it was, in part at least, due to ill health on the part of RJ. Communication between the pursuers and RJ was said to be non-existent. But, for JC’s part at least, she would prefer for them to have a functioning relationship for the sake of BJ. Her perception was that the problem rested with RJ.

[10] In cross-examination, the delay in JC and MH having their application for kinship care approved was explored but that is not relevant to the issues before the Court. In respect of what proposals JC would have for maintaining contact between BJ and RJ in the event of the pursuers being awarded residence (a matter that was not canvassed in any detail in either the affidavit or examination-in-chief), JC had no real fixed proposals. She suggested the current arrangement, by which BJ spends one night a fortnight (Friday into Saturday) with his father and some non-residential contact during the week in the first instance. It seemed to me to be clear that in essence JC was saying she would be led by BJ. If he wanted

to spend more time with his father, they would hope to be able to do that. She was opposed to BJ spending every weekend with RJ, primarily, it seemed, for the effect that would have on BJ's relationship with his younger brother, AC. But overall, JC seemed to be responsive to BJ wishes and what was necessary to ensure that BJ had a proper relationship with his father. JC was clear, in her affidavit and in oral evidence (including under challenge), that her and MH bear no animosity towards RJ and are motivated only by the best interests of BJ. So far as JC is concerned, nothing in her evidence or how she gave it cast doubt on that so far as she is concerned. I return to MH below. JC also accepted that there was no relationship between the pursuers and RJ.

### *MH*

[11] MH is also 52 years old and he lives with JC. They have been in a relationship for 21 years. MH runs his own business in the local area. An affidavit dated 2 June 2021 had been lodged on his behalf and was adopted in evidence. His evidence-in-chief largely updated the contents of that affidavit to reflect the passage of time. Much of his evidence corroborated that given by JC in respect of the household arrangements and how BJ and AC came to live with them. I have not repeated that narration.

[12] MH works in a nearby town ("Town D") and so it is primarily JC that looks after BJ. However, he has a half day on a Wednesday and so picks BJ up from nursery, which BJ likes. Other days, he usually gets home between 18:00 and 19:00 and the family have a meal together. He is involved in the bath and bedtime routine of the children.

[13] MH explained that the process of being approved as a kinship carer was a relatively protracted one. It took less than two years but took longer than expected. From his perspective, that was due to concerns about how he and JC would manage any ongoing

relationship with LC (who was then still alive) and the relationship with RJ. In cross examination MH was challenged about the reasons for the delay in approving the kinship carer application and his general relationship with RJ. It is clear that there is no love lost between the pair. When asked about the lines of communication with RJ, he said there were “*absolutely none*”. He did maintain, however, that the pursuers were not the block to communication. Throughout, with the one exception discussed below, MH kept returning to the best interests of BJ. In particular, when challenged in respect of what contact arrangements he would support in the event a residence order was granted in favour of the pursuers, it was clear that he would be led by BJ in that respect. He had no fixed position. He was supportive of contact between BJ and RJ. When asked, in cross-examination, what he would propose, he suggested the status quo but equally recognised that increasing contact between BJ and RJ, so long as BJ was happy with that, would be appropriate. The position adopted by MH struck me as largely child-centric.

[14] There is perhaps one qualification to that. In cross-examination, MH was also asked about the practical arrangements for BJ attending contact with RJ. There is no direct public transport link between their respective towns and the local authority currently funds taxis. In the event that funding was withdrawn, MH was asked about what, if anything, he would do to facilitate BJ having contact with RJ. MH was clear that he would not transport BJ to and from contact with his father. To use his words, “*I am not a taxi service for [RJ].*”

Recognising that the whole situation will be an emotional one, added to by the stress of giving evidence under cross-examination, it is a response which casts in a different light the comments in MH’s affidavit that he harbours no animosity towards RJ. The tone and body language with which he answered this passage of evidence were not redolent of someone with such a benign view of RJ. It also casts in a different light the statement in the affidavit

that he simply seeks to act in BJ best interests. Approaching the question of transport from that perspective, MH was being asked if he would be a “taxi service”, to use his language, for BJ and not RJ. Whilst the point should not be overstated, it is a passage that underscores the importance of co-operation between RJ, on the one hand, and JC and MH on the other, to ensure that BJ has the best possible relationship with both sides of his family. It is a passage which also underscores the need to take some of the comments in the affidavit with a pinch of salt.

***Kelly Taylor***

[15] Kelly Taylor is a children and family social worker employed by Moray Council. She has worked in that role for over ten years. She has been involved with BJ since February 2018. She is a long term worker and was assigned to BJ when it became apparent he would be unable to return home. Throughout BJ’s time in foster care and kinship care, Ms Taylor has been responsible for ensuring his needs were met and properly safeguarded. She explained that BJ had been outwith parental care since October 2017. She then explained the social work department “*gave the parents two years to evidence a change in lifestyle and behaviour but it did not change.*” At that point, adoption was considered but the pursuers offered to take BJ for kinship care. She supported the pursuers making the current application. She explained that it is not normal for a child to remain subject to a CSO and this application could secure normality and stability for BJ.

[16] Ms Taylor was very positive about how BJ was doing. He was doing “*remarkable well*” and was “*thriving*”. He has secure attachments to both of the JC and MH as well as AC who lives with him. BJ was meeting all of his milestones and was, in Ms Taylor’s words

*“doing absolutely brilliant”*. She advised that no concerns had been expressed by the social work department about BJ’s overnight contact with RJ.

[17] In March 2022, Ms Taylor had prepared a sibling assessment, which looked at the relationship between BJ and his various siblings. When asked who the assessment was for, Ms Taylor explained that it was for the Court and to provide it with further information. She adopted the terms of the assessment without offering to qualify or correct it in any way. In the assessment, she concluded that it would be very traumatic for BJ to be separated from AC. If a residence order was to be made in favour of RJ, regular contact with the maternal family was said to be *“absolutely essential”*. In speaking to the report, Ms Taylor advised that BJ enjoyed seeing his dad but also that he always said he does not want to return home to dad. She also explained that BJ had consistently told the social work team that he did not want to move in with his dad. In cross-examination, it emerged that those comments had not been made to her but to Kelly Griffiths, who was said to be an independent advocate. No evidence from Ms Griffiths was led or presented. Ms Taylor also explained that she had a concern about how BJ would adapt to living in a house with so many other children. She said that having had limited experience of RJ’s home and acknowledging that communicating with him had been difficult. She described that lack of communication as RJ *“not prioritising [BJ]’s needs”* but I am not sure that was an entirely fair comment or one that she was particularly well placed to make. I note that the information for the assessment was said to have been gathered from direct observations of BJ and AC; views of BJ’s kinship carers; views of RJ and EM; view from BJ and AC; and direct discussions with other professionals involved with BJ and AC. Conspicuous by their absence are BJ’s other half-siblings, that reside with RJ. It was not explained how a sibling assessment could be completed and reach a conclusion without any apparent engagement with all of the siblings.

Given residential contact with RJ, where BJ was staying with the other siblings, had been happening for some time, the basis for the comment that BJ *“does not currently have a relationship with those siblings”* was unclear. No explanation was offered for that view, which seems difficult to reach in the absence of any views from those half-siblings or observing them with BJ. As noted below, it is a conclusion that is inconsistent with RJ’s unchallenged evidence that BJ gets on well with his half-siblings. I also note that Ms Taylor expresses the view in the report (p 4) that BJ *“talks positively about his time with his father and Paternal family and expresses his excitement to see his father.”* That sits uneasy with the statement that he has no relationship with those siblings and her oral evidence that BJ does not want to return home to his dad. As explained below, it is another example of where some care has to be taken about the reliance to be placed on some of Ms Taylor’s evidence.

[18] In the course of preparing the assessment, Ms Taylor met with RJ and his fiancé at their home. She recorded the following (and described the meeting in oral evidence as a *“very very positive conversation”*):

*“[RJ] engaged well throughout the meeting and was clear that he wanted [BJ] to move to his care as soon as possible. During this session, [RJ] was able to reflect on his past adverse behaviour patterns of substance misuse, violence and frequent prison terms and acknowledged why this was not acceptable for a child. [RJ] was able to acknowledge his relationship with [BJ’s] mother was volatile and the detrimental impact this had on [BJ’s] safety and wellbeing. [RJ] talked about having positively turned his life around and his wish to start his own business. The house was appropriate and his 2 young children [NJ] and [CJ] were present and appeared well cared for. The writer understands that the [local] Social Work Team visit [RJ] and [fiancé] home regularly and note no concerns in relation to the standard of care provided to the children residing within the household.”*

Views are also recorded in the assessment from Diane Barber who is designed as BJ’s health visitor. I did not hear from her and those views could not be tested. I have not placed any weight upon them. Ann Holt also records views. I did hear from her and deal with her evidence below.

[19] Ms Taylor obviously cares for BJ but also obviously has a clear view as to what is in his best interests (namely, a residence order being made in favour of the pursuers). That appeared to colour her evidence at points and, accordingly, requires it to be treated with a degree of caution. In both examination-in-chief and cross-examination, there was a clear impression of Ms Taylor having an attitude of RJ having had his chance to be a father and events having now moved on. In examination-in-chief, having been asked whether she agreed that it is often a default position to place children with their natural parents, she said:

*“He had two years to change his life style and was unable to do that. He continued to use substances and perpetrate violence.”*

Whilst she accepted that continuing contact between RJ and BJ was important, I was left with the clear impression that Ms Taylor took the view that RJ had had his chance to father BJ. That, of course, would be an entirely inappropriate view to have formed and would run contrary to the State’s obligation to seek to promote the reunification of a family unit: e.g. *Strand Lobben and others v Norway* (2020) 70 EHRR 14 at paras 208. Whilst recognising that a past inability to care for children is a *relevant* factor when considering the feasibility of family reunification (e.g. *North Lanarkshire Council v KR* 2018 Fam LR 92 at para 64), it is not determinative. It was accepted that RJ had made significant progress. It was not clear, however, that the possibility of reunification had been approached with an appropriately open mind. In particular, it was not clear that the sort of regular (and necessarily meaningful) contact between social workers and natural parent that is expected had been maintained (e.g. *W v United Kingdom* (1988) 10 EHRR 29 at para 64). Separately, in cross-examination, Ms Taylor went out of her way to give an answer that could only have been intended to prejudice RJ. Having been asked whether an allegation against RJ had been investigated, she first explained that there was insufficient evidence to charge RJ but went

on to say she “*found* [the person who made the allegation] *very credible given* [RJ’s] *extensive history of domestic violence.*” For a professional witness who by her own admission had given evidence “*a lot*” and understood that it was not for her to venture opinions on credibility and go well beyond the bounds of the question she had been asked, it is inconceivable that the extended answer was given inadvertently. Instead, I was left with the clear impression that it was an attempt to discredit RJ. The answer was entirely inappropriate. It should not have been given. Furthermore, with her experience of giving evidence, Ms Taylor must have known it should not have been given.

[20] Whilst recognising that those who have had a long term professional involvement with a child are bound to have personal views about what is in that child’s best interests, those views must not colour the professional views they provide to the Court. Ms Taylor had a wealth of valuable, first hand, information to convey to the Court. It is regrettable that some of that must now be approached with a degree of caution having revealed at points in her evidence a willingness to in essence advocate a particular outcome.

### ***Ann Holt***

[21] Margaret Ann Holt, known as Ann Holt, is also a social worker with Moray Council. She specialises in kinship care and has worked in that area for around eight years. Her role is to support the kinship carers, in this case the pursuers. She was not involved in the assessment of the pursuers for kinship caring. She visits them fortnightly and attends any Children’s Hearing reviews to support the pursuers. It is normally JC that she meets with. Her impression from these meetings is that the pursuers are doing well and that BJ is a happy and settled little boy. She described the pursuers as doing “*an amazing job*”. She also had the impression that BJ and AC had a good relationship. She was not aware of how

many siblings BJ on his father's side. She had never seen BJ in his father's house and engaging with those other siblings (or, for that matter, his father).

[22] Whilst Miss Holt was doing her best to assist the Court with the evidence she provided, it is important to notice the limitations of her evidence. First, it is important to take care to ensure that there is a proper evidential foundation for any opinions that she offered. That was emphasised by an exchange in respect of one particular comment. In the *Together Apart Assessment* that was prepared by Ms Taylor in March 2022, Miss Holt's views are recorded (at p 10):

*"Obviously home styles are completely different and [BJ] has reported to [JC] that he hasn't had his teeth cleaned and not had a bath in the past when he has spent the weekend at his father's home. He has also spoken about playing on the street whilst visiting dad, which is clearly not safe!"*

(I was told that the text in the report was a "copy and paste" from an email Miss Holt had sent to Ms Taylor on 28 February 2022.) Placed in the context of her oral evidence that she had never visited RJ's home, had no direct information about it and had only had limited conversations with BJ, the first sentence takes on a different complexion. In particular, it is not clear how she could have a proper basis for stating that the home styles were "*obviously ... completely different*": she has no first-hand knowledge of RJ's home. Asked about the second sentence (it being "*clearly not safe*" to play on the street), it became apparent there was no evidential foundation to that statement. Miss Holt accepted that she had never been to the house, did not know whether it was in a residential area or not and did not know how busy the road outside the house was. Unless she is suggesting that a child playing on the street is inherently not safe (which would be a surprising proposition), Miss Holt could have had no proper basis for that statement. As I understood her answers to questions from the Court, she came, somewhat reluctantly, to accept that. Secondly, Miss Holt was at pains to

emphasise at various points in her evidence that she was a kinship carer and therefore her focus was JC and MH. Her engagements with BJ appeared to be coincidental (i.e. if he happened to be in the house when she called upon, primarily, JC). She had no direct knowledge of RJ and his home environment. It was also apparent that when offering her views in February 2022, she did so without being provided with any other updated information. For example, she was not told of Ms Taylor's assessment of RJ's progress. Given Miss Holt seemed to have no direct knowledge of RJ's situation, and was provided with no updated information, it is perhaps surprising that in February 2022 she felt able to say in her email to Ms Taylor: *"I do not think it is in [BJ's] best interests to live with his father full time."* At the end of her evidence, Miss Holt advised that that statement (and indeed almost the entire section of her email headed "dad") was based on *"historical information available to me."* It cannot, therefore, be taken as a reliable guide to what is currently appropriate. The fact that Miss Holt was prepared to offer such an unqualified view in response to what she must have understood would be an important assessment, necessarily raises a doubt about how much weight can safely be carried by her evidence, beyond that which was clearly based upon her own direct observations.

[23] Accordingly, whilst Miss Holt's evidence was helpful to the extent that it provided information about the kinship caring and the capacity of JC and MH to cope in a parenting role, it can be no more than of limited assistance in undertaking the relative assessment as between JC and MH, on the one hand, and RJ on the other and determining where the best interests of BJ lie.

**DC**

[24] DC is 54 and is the sister of JC. She works full time as a residential childcare worker. She looks after BJ (and AC) one day a week. This allows JC to catch up on her work. DC does not take the children on a set day but has an arrangement that she has one day a week off so as to allow her to look after them. Accordingly, the day can vary due to her shift patterns. DC goes to JC's house to look after the children. This involves dropping BJ at nursery and then collecting him in the afternoon. JC generally returns from work around 18:00. This arrangement has been in place for almost three years. In addition to the one day a week where she cares for the children, DC explained that she popped in most weekends. She described BJ as "*a lovely wee boy*". She also described the pursuers as getting on "*really well*" with looking after the children, despite not being what they would have expected at their stage in life. Her evidence was not challenged in cross-examination.

**RJ**

[25] RJ is 37 years old. He is BJ's father. He explained that he and LC broke up a matter of weeks after the birth of BJ. Both had issues around that time with substance misuse and that resulted in BJ being removed from their care in or around October 2017. BJ was placed with foster parents at that time. He had not been supportive of the pursuers' application for kinship care based on his perception of how they had acted towards LC. His perception was that the social work department were determined that BJ would be placed with the pursuers. In his words, RJ had a lack of trust in Ms Taylor. He acknowledged that his relationship with the pursuers has not always been easy but that it had deteriorated after the death of LC. He was sceptical about the assurances given by the pursuers that they would ensure he had contact with BJ. He is keen to have BJ live with him and his new partner, EM.

They live in Town B. EM has four children from a previous relationship, three of whom live with them. So, there are already five children in the house in total. BJ was said to have a good relationship with them. EM's other child had lived with them until recently. There was some evidence from RJ (and others) about the circumstances in which that child had moved out but it is irrelevant to the issues that arise in this case. If a residence order was granted in his favour, he considered it would be in BJ's best interests to have regular contact with his maternal family. He said he would never seek to stop such contact. If a residence order is granted in favour of the pursuers, he would want to have contact at least weekly. He feels that once a fortnight is too infrequent. He would also want to see him during the week.

[26] In relation to BJ, he believed him to be doing very well and to have coped with the death of his mother well. RJ enjoys the time he has with BJ and it seems BJ enjoys being with him (and he has no reason to think BJ is unhappy elsewhere). They do a range of activities together. Currently, BJ spends one night (Friday into Saturday) a fortnight with his father. It had, until the spring of 2022, been two nights. But that had been reduced following a planning meeting where BJ had asked to only spend one night with his dad. RJ was not convinced that this was BJ's idea and it had not been encouraged by the pursuers and/or the social work department. Recent contacts had been missed due to ill-health (RJ having had a bad chest infection and pneumonia). He did not accept suggestions that BJ was not properly cared for (e.g. washed or have his teeth cleaned) when staying. He also did not accept that BJ was allowed to play outside unsupervised or in an environment that put him at risk. He explained that the distance between Town A and Town B was not far by car. By public transport, however, it took around 90 minutes as it was necessary to get a bus from Town A to Town C before changing onto a bus to Town B. There were also limited public transport

options on a Sunday. The social work department have been funding taxis to support his contact with BJ. RJ expects the return of his driving licence in early course. That should make things easier.

[27] RJ recognised that he had not had his troubles to seek in the past. He had, however, engaged with support services and has not required their support since the end of 2019. RJ's mother and three siblings live nearby. They provide him with support. BJ only has contact with them when he is with his father.

### *EM*

[28] EM is 31 years old and is the partner of RJ. She met RJ around four years ago and they have been living together for around three years. They have had two children. EM has four children from a previous relationship. Their current house has three bedrooms and she described it as "*busy*". It is in a residential area of Town B and what she described as a quiet street. The countryside is nearby, in particular a wooded area at the back of the house. She described RJ as a good father. He enjoys spending time with BJ when he comes to stay. And her impression was that BJ enjoys his time with his dad. She has never seen BJ upset when with his dad. She denied the suggestion that BJ would not get washed or have his teeth cleaned when staying in their house. She also denied the suggestion that BJ would be allowed to play outside without adult supervision. She does not know the pursuers and has never met them. Her evidence was not challenged in cross-examination.

### *EB*

[29] EB is 34 years old and is the sister of RJ. She visits her brother every couple of weeks and invariably sees BJ when he is staying with his father. She speaks positively about the

relationship between RJ and BJ. She acknowledges that RJ has had his troubles in the past but that he appears to have moved on from then. She notes that RJ has a close family nearby, including two brothers and his mother, as well as EB. She describes BJ as a happy child who gets on well with his dad and the other children in the house. Her only contact with BJ is when he is with his dad. When BJ stays over at his dad's, he shares a bedroom with two of the other boys. She describes RJ as "*a good father to all his children.*" There was no challenge to the substance of her evidence.

### *Lisa Riches*

[30] Lisa Riches is a social worker with Moray Council. She has worked in that role for almost eight years. She has worked by EM for around six years and has been engaged with RJ for about three years (since he started his relationship with EM). EM's children were all placed on the Child Protection Register as a consequence of RJ's troubled past. At that time, Ms Riches had prepared a parenting capacity assessment. Following completion of this assessment all of the children in the house were removed from the Register. Ms Riches explained in her affidavit (which was adopted and was the substance of her evidence) that:

*"I have seen within the three years that [RJ] and [EM] have been together in a relationship, there has been great improvements within the family home and there are now more structures, boundaries, and routines in place for the children and this has been positive for the children."*

In respect of the children, RJ is said to be good, attentive and meets their needs. She has never seen RJ with BJ so her comments relate to the children that currently live with RJ and EM. She did express some concern at the size of the current house, especially of BJ were to move to live there on a full-time basis. That said, an application for a larger house has the

support of the Social Work department. There was no challenge to the substance of Ms Riches' evidence.

### *LG*

[31] LG is 36 years old and works as a taxi driver. She has known RJ for about 20 years and has known EC for about five years. She sees them most days and has the impression they have a good relationship. She previously took RJ to pick up and return BJ so she has seen BJ with his father fairly regularly. Her impression is that RJ and BJ get on well and that BJ enjoys his time with his father. She has been in the house when BJ has been there and described him as being happy playing with his brothers and sisters. She described BJ as a "*really happy child*". In her affidavit, the terms of which were adopted, LG speaks highly of RJ as a father. She acknowledges that he has had his troubles in the past but there has been a big change. Her evidence was not challenged in cross-examination.

### *Other Evidence*

[32] No joint minute was lodged in process and so there is no formal agreement about copy documents or the like. Nor is there any agreement about the extent to which I can consider productions beyond what was spoken to by witnesses. I have proceeded on the basis that there is no point taken with the providence of any of the documents (cf.

*Promontoria (Henrico) Ltd v Friel* 2020 SC 230 at para 36: the need to flag such an issue would apply equally in the context of the present action). The parties were content with that approach. The parties were also content that I approach documents on the basis that if a witness had been referred to the document, I could have regard to the entirety of the

document rather than simply any particular passage that was put to them. That is the approach I have taken.

### *Conclusions on the facts*

[33] Findings-in-fact are set out above and those reflect the conclusions I have reached on the evidence. There are three points which were explored in evidence in respect of which I have not made factual findings. I should explain why. First, on behalf of RJ the reasons for the delay in approving the pursuers as kinship carers was explored. Much of the evidence on this was inconsistent and contradictory. Basically, the pursuers blamed RJ whilst on behalf of RJ blame was said to lie with the pursuers. Whatever the truth of it, the important point is that the pursuers were approved and have had BJ living with them for almost three years. It is unnecessary to resolve the issue and, having regard to the importance of the pursuers and RJ being able to work together in future, it would not be helpful to try and draw conclusions. Secondly, it was accepted that contact between BJ and RJ had not taken place recently. Again, how that came to be was explored in evidence. On behalf of the pursuers, it seemed to be being suggested that the lack of communication from RJ and the gap in contact reflected upon his commitment to BJ. For RJ, it seemed to reflect the fact that there had been periods of ill-health and that communication between the parties was difficult. Again, it is unnecessary to resolve the issue. The important point is that there is a history of contact and there is evidence about how BJ has enjoyed that contact. Thirdly, there were some attempts to lead evidence around the circumstances in which EM's eldest child left their home. In particular, an allegation that the child had made against RJ was mentioned (most notably by Ms Taylor in the answer discussed at para 19, above). The

evidence led was so limited that no conclusions can reliably be drawn. Accordingly, I have made no findings on the issue.

[34] Against that now established factual background, I turn to consider the issues on which the parties require a judicial determination.

### **The Issues**

[35] In essence, three issues arise for determination. First, should parental rights and responsibilities be conferred on JC and MH? Secondly, where should BJ reside? Finally, and in light of any decision on residence, what contact arrangements should be put in place? In respect of the latter, the pursuers have no averments, crave or plea-in-law for contact (even on an *esto* basis) but I did not understand RJ to take a pleading point. It is, however, an example of where the pleadings were perhaps a little too brief. RJ does take a preliminary point about whether it is appropriate for the Court to make any order standing the CSO that is in place. Before I address that, however, it is helpful to note the statutory framework.

### **Statutory Framework**

[36] Orders relating to parental rights and responsibilities are primarily regulated by s 11 of the Children (Scotland) Act 1995 (“**the 1995 Act**”). So far as relevant for present purposes, it provides:

*“(1) In the relevant circumstances in proceedings in the Court of Session or sheriff court, whether those proceedings are or are not independent of any other action, an order may be made under this subsection in relation to –*

- (a) parental responsibilities;*
- (b) parental rights;*

*...*

*(2) The court may make such order under subsection (1) above as it thinks fit; and without prejudice to the generality of that subsection may in particular so make any of the following orders –*

- ...
- (b) *an order –*
    - (i) *imposing upon a person (provided he is at least sixteen years of age or is a parent of the child) such responsibilities' and*
    - (ii) *giving that person such rights;*
  - (c) *an order regulating the arrangements as to –*
    - (i) *with whom; or*
    - (ii) *if with different persons alternatively 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");*
  - (d) *an order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living (any such order being known as a "contact order")*
- ...
- (3) *The relevant circumstances mentioned in subsection (1) above are –*
    - (a) *that application for an order under that subsection is made by a person who –*
      - (i) *not having, and never having had, parental responsibilities or parental rights in relation to the child, claims an interest;*
      - (ii) *has parental responsibilities or parental rights in relation to the child*
    - ...
    - (b) *that although no application for an order under subsection (1) above has been made, the court (even if it declines to make any other order) considers it should make such an order.*
- ...
- (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.*
- ...
- (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.*
- ...

(12) *Where the court makes a residence order which requires that a child live with a person who, immediately before the order is made does not have in relation to the child all the parental responsibilities mentioned in paragraphs (a), (b) and (d) of section 1(1), and the parental rights mentioned in paragraphs (b) and (d) of section 2(1), of this Act (those which he does not so have being in this subsection referred to as the “relevant responsibilities and rights”) that person shall, subject to the provisions of the order or any other order made under subsection (1) above, have the relevant responsibilities and rights while the residence order remains in force.*

(13) *Any reference in this section to an order includes a reference to an interim order or to any order varying or discharging an order.”*

[37] For completeness, and whilst no doubt familiar to the lawyers involved, it may be helpful to note a few other provisions of the 1995 Act:

a. “Parental responsibilities” are set out in s 1 of the 1995 Act. They are the responsibility to safeguard and promote the child’s health, development and welfare; to provide, in a manner appropriate to the stage of development of the child, direction and guidance to the child; if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and to act as the child’s legal representative (s 1(1)). For the purposes of those responsibilities, a child is a person under the age of 16 (other than in respect of the responsibility to provide guidance, where a child is a person under the age of 18)(s 1(2)).

b. “Parental rights” are set out in s 2 of the 1995 Act. There are again four: to have the child living with him or otherwise regulate the child’s residence; to control, direct or guide, in a manner appropriate to the stage of development of the child, the child’s upbringing; if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and to act as the child’s legal representative (s.2(1)). For the purposes of those rights, a child is a person under the age of 16 (s 2(7)). Where two or more persons have a parental right in respect of a

child, each may exercise that right without the consent of the other (subject to any court orders that provide otherwise)(s 2(2)). In reaching a major decision involving parental rights (or responsibilities) the views of any other rights holder should be had regard to (s 6(1)).

c. Generally speaking, a child's mother automatically acquires parental rights and responsibilities (s 3(1)(a)). A child's father acquires them if he is married to, or in a civil partnership with, the child's mother at any time after the child's conception or he is registered as the child's father (s 3(2)(b)). A child's father can also acquire parental rights and responsibilities by agreement with the child's mother (s 4).

[38] Distilling that down for the discussion that follows:

- a. RJ, having been registered as BJ's father, has parental rights and responsibilities in respect of BJ;
- b. JC and MH will, if a residence order is granted in their favour, acquire parental rights and responsibilities for the duration of that order;
- c. In considering whether to make any of the orders sought by the parties, the interests of BJ are the Court's paramount consideration;
- d. No order should be made unless the Court is satisfied making an order is better for BJ than making no order at all; and
- e. In considering whether to make any order, the Court shall have regard to the extent to which RJ, JC and MH would have to co-operate with each other.

[39] Against that statutory framework, I turn to consider the issues on which the parties cannot agree.

**Preliminary Issue: whether to make any order given the CSO**

[40] BJ is currently subject to a CSO. Any order made by this Court would not have effect to the extent it was in conflict with the terms of the CSO (e.g. s 3(4) of the 1995 Act).

Accordingly, RJ submits that whilst the orders sought would be competent, they should not ordinarily be made where they would have no practical effect. For that reason, he invites the Court to refuse to grant the pursuers' (and presumably his own) craves. The practical consequence would be that BJ's life would continue to be regulated by the CSO which would be kept under review by the Children's Hearing. Should the Children's Hearing get to the point of discharging the CSO, RJ suggests an application could be made to the Court at that point. For the pursuers, in essence, it is said that the Court making the orders sought would likely lead to the discharge of the CSO and would bring greater stability to BJ's life. In that, the pursuers are supported by their social worker, who encouraged this application.

[41] It is competent for the Court to make an order under s 11 of the 1995 Act which would conflict with the terms of a CSO but in the normal case it should not do so: *Principal Reporter v K* 2010 SC 328 at para 63; approved, implicitly, by the Supreme Court: 2011 SC (UKSC) 91 at para 25. Like any order under s 11 of the 1995 Act, there are three over-arching principles (s 11(7)): (a) the welfare of the child is paramount; (b) it must be better to make the order than make no order at all; and (c) the child, if appropriate, should be given an opportunity to express his or her views. In light of the age and stage of development of BJ, the final principle is not engaged in this case.

[42] In my opinion, it is appropriate that the Court make the orders it considers appropriate under s 11 of the 1995 Act. The Court has the benefit of having heard evidence and full submissions on the matter. Whilst any order of this Court will not have immediate effect, it will allow BJ to transition from the Children's Hearing system to a more fixed

arrangement under the supervision of the Court. An order of this Court can bring a sense of longer term stability and certainty to his life. Whilst I recognise and accept that the CSO is not due to expire (that being the example given by the Inner House in *Principal Reporter v K*, above, at para 63), in my view, this is an analogous situation. Whilst ultimately a matter for the Children's Hearing, if this Court makes the order it considers appropriate then there is a realistic prospect of the CSO being discharged. At the very least, the Children's Hearing would provide a reasoned decision on why it was not prepared to discharge the CSO and an appeal against that decision would lie to this Court. On the other hand, if the Court declines to make any order there is, it seems to me, no realistic prospect of the CSO being discharged. On behalf of RJ it was submitted that from a "*practical point of view*" BJ would continue to reside with the pursuers in the event of the CSO being discharged. But it seemed to be accepted that the pursuers would have no parental rights and responsibilities in respect of BJ between the discharge of the CSO and the grant of any application to the Court (beyond those conferred by s 5 of the 1995 Act). The only person with parental rights and responsibilities would be RJ. I do not accept, as was suggested on behalf of RJ, that concerns about the legal status of BJ residing with the pursuers during any period after discharge of the CSO and before the grant of an application to the Court are "*very technical and unrealistic*". On the contrary, they demonstrate why, in my view, it is appropriate that the Court determine what would happen in the event of the CSO being discharged so that there would be continuity in the provision of care, both in practical terms but also in legal terms, for BJ. As RJ goes on to submit, BJ residing with the pursuers is an interference with his rights under Article 8 of the European Convention on Human Rights ("**the Convention**"). Accordingly, it must be "*in accordance with law*". The more informal approach suggested on behalf of RJ is not easy to reconcile with that requirement. Finally, care measures, which

would include a CSO, have been said to be “*temporary measures*” (*Strand Lobben*, below, at para 208). The approach urged upon me by RJ is not consistent with such an approach.

[43] For those reasons, I reject the submission on behalf of RJ that the craves sought should be refused and matters left to continuation of the CSO. As explained below, I am satisfied that it is better for BJ that an order is made regulating residence and contact.

Separately, having regard to his welfare, which is my paramount concern, I am also satisfied that it is appropriate that an order is made.

### **Issue 1: conferral of parental rights and responsibilities**

[44] JC and MH seek an order conferring parental rights and responsibilities upon them in respect of BJ. As explained above, BJ has been living with JC and MH for almost three years. JC is his maternal grandmother. In essence, JC and MH have stepped into the parenting role for BJ. What they seek in the first crave is essentially formal recognition of the role they have been undertaking for almost three years.

[45] In respect of the conferral of parental rights and responsibilities, I notice what the First Division said in *Principal Reporter v K* 2010 SC 328 at para 62:

*“However, when a court is asked to make an order [conferring parental rights and responsibilities], whether in general or more restricted terms, it must address three overarching principles; with the child’s welfare as the paramount consideration. It must therefore, before imposing any parental responsibility, consider whether the father is ‘meritorious’ (McMichael v United Kingdom [(1995) 20 EHRR 205], para.98) in child welfare terms. It must ask whether it would be better that the father have the particular responsibility sought and, where practicable, ascertain the child’s views on the matter. In a situation where the child and father have had a family life in terms of Art 8, it may be difficult to resist the conclusion that the father ought to have some parental responsibility, but it would be by no means impossible to do so on welfare grounds.”*

In my view, it is helpful to approach the pursuers first crave in the same manner (substituting them for the father in the quote above).

[46] There is no suggestion that the pursuers are anything other than “meritorious” in child welfare terms. Indeed, all of the evidence is positive about their contribution to BJ’s life. That being so, it falls to consider whether each of the rights and responsibilities should be conferred (noting what was said by the Inner House in *Principal Reporter v K* at para 60). It was not suggested on behalf of RJ that a “tailored” set of rights and responsibilities should be conferred. His opposition to the conferral of parental rights and responsibilities is absolute. Is it better that each of the pursuers have each of the rights and responsibilities? In my view, it is. Despite being invited to do so on behalf of RJ, I draw no distinction between the pursuers in respect of this issue. My reasons for doing so are set out at para 54, below. Both have stepped in as kinship carers for BJ and have, for the majority of his life, performed the parental role. I am entirely satisfied that it is appropriate that each of the pursuers have each of the parental rights and responsibilities conferred upon them.

[47] The conferral of parental rights and responsibilities was opposed by RJ on two grounds. First, it was said their conferral will serve no useful purpose whilst BJ remains subject to a CSO. For the reasons already given, I reject that submission. Secondly, it is said that the Court should “*be slow to create a proliferation of artificial parenting relationships*” where that would serve no practical purpose. Given the role that the pursuers have played in the life of BJ over the last three years, I reject the characterisation of conferring parental rights and responsibilities upon them as a “*proliferation*” of an “*artificial*” parenting relationship. On the contrary, it is formal recognition of what is, and has been for a number of years, the actual *de facto* parenting relationship that BJ has depended upon. It is also a natural extension of the responsibilities already imposed upon the pursuers by the law (e.g. s 5 of the 1995 Act).

[48] I reached my view without having considered matters through the prism of Art 8 of the Convention. But such an analysis supports the conclusion I have reached. Given how long BJ has lived with the pursuers, I would accept that they have a family life together which would fall within the scope and protection of Art 8 (a proposition that counsel for RJ did not demur from). As the Inner House anticipated in *Principal Reporter v K*, that makes the conclusion that the pursuers should have parental rights and responsibilities in respect of BJ difficult to resist. It reinforces the conclusion I have reached on this issue.

[49] For those reasons, I am prepared to grant the order first craved. That means the pursuers, as well as RJ, will now have the full suite of parental rights and responsibilities in respect of BJ. As I return to below, it is important to remember that this puts the pursuers and RJ in the same position: their rights (and responsibilities) are equal and neither has priority over the other. It is now necessary to consider to what extent the Court should, in the best interests of BJ, regulate the exercise of those rights and responsibilities.

## **Issue 2: residence of BJ**

### *Introduction*

[50] Is it best for BJ that he continue to reside with JC and MH in Town A or should BJ move and reside with his father in Town B? That question is time critical as BJ is about to start school and where he lives will determine which school he goes to. And which school he goes to will likely determine who he forms lifelong friendships with. And that will play a very substantial part in determining the opportunities that life presents to BJ. It is plainly an important, and anxious, decision in the life of this young boy.

[51] Whilst Town A and Town B are not a huge distance apart, the absence of direct public transport links make the practical distance significant. Given the consequence of any

decision on residence will be that BJ ends up with a life in either Town A or Town B, there is a parallel, in practical terms, with longer-distance relocation cases. In that context, the Inner House has made it clear that:

*“The welfare and best interests of the child or children concerned are paramount, and fall to be judged without any preconceived leaning in favour of the rights and interests of others.”*  
*M v M* 2012 SLT 428 at para 15 (Lord Emslie)

It is, in other words, a “presumption free” approach (*Donaldson v Donaldson* 2014 Fam LR 126 at para 27 (Lady Smith)). There is no list of applicable factors to be checked off or weighed: each case is fact sensitive (*GL v JL* 2017 Fam LR 54 at para 9 (Lady Wise)).

#### *Who should BJ live with?*

[52] For almost three years, BJ has lived with the pursuers. He moved to them at a time when neither of his parents were in a position to care for him. His mother has since, unfortunately, died. His father has since made changes to his life which put him in a position that he can offer to bring up his son. Given how settled BJ is in his life in Town A with the pursuers, is it in his best interests that he move to Town B and live with his father? In my view, it is not.

[53] In explaining that view, it is helpful to start by noting what was said by the Grand Chamber of the Strasbourg Court in *Strand Lobben*, above, at para 208. There the Court said:

*“Another guiding principle is that a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child. The above-mentioned positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child. In this type of care the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and*

*the parent with whom it does not live. Thus, where the authorities are responsible for a situation of family breakdown because they have failed in their above-mentioned obligation, they may not base a decision to authorise adoption on the grounds of the absence of bonds between the parents and the child. Furthermore, the ties between members of a family and the prospects of their successful reunification will perforce be weakened if impediments are placed in the way of their having easy and regular access to each other. However, when a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited.”* (internal footnotes excluded)

To similar effect, see: *Keegan v Ireland* (1994) 18 EHRR 342 at para 50; *W v United Kingdom* (1988) 10 EHRR 29 at para 62; see also: Article 7 of the United Nations Convention of the Rights of the Child. Whilst *Strand Lobben* was an adoption case, there is a parallel to the present circumstances where the Court, in substance, is being asked to determine whether BJ should be reunited with his father. It also catches one of the dilemmas in this case: as a matter of fact, BJ has lived, seemingly happily, with the pursuer for most of his life; on the other hand, RJ complains that not enough has been done by the State to reunite father and son. As the Strasbourg Court put it in *W v United Kingdom*, at para 62, the local authority process should not be “one-sided” and thus should neither be, nor appear to be, arbitrary. I am not in a position, and it would not be appropriate, to express a view on whether the local authority fulfilled their positive duty to facilitate family reunification in this case. But as I have explained above, the social work evidence that was led left me with some doubt in that regard. And I can understand why RJ has his doubts.

[54] I recognise and accept that RJ’s Art 8 rights are engaged by the proposed residence order that is sought by the pursuers. So too are a number of other Art 8 rights, including AC, RJ’s other children and the pursuers. In respect of the latter, I decline to draw a distinction between the pursuers as invited to do so on behalf of RJ. As the Strasbourg Court has recognised, marriage is not a pre-requisite of a “family life” within the ambit of Art 8: *Keegan*, above, at para 44. The pursuers have been in a relationship for over two

decades and but for the absence of a marriage certificate, there would be no issue of MH being described as BJ's grandparent. Whatever label may be attached, his Art 8 rights are engaged. He is in no lesser a position than JC.

[55] In my opinion, the approach advocated on behalf of RJ risks losing sight of the paramount consideration in this case: the best interests of BJ. Whatever other Art 8 rights are engaged, what serves the best interests of BJ will invariably, indeed may inevitably, produce an interference with any other Art 8 rights that is acceptable in terms of the Convention. Put another way, whatever right RJ has to respect for his family life, it cannot and does not trump the best interests of BJ. It is the interests of BJ that remain paramount. Although not stated in terms, implicit in the submission on behalf of RJ was that because he was BJ's father, and because the State was under a duty to work towards a child living with his or her natural parents, the *status quo* should be treated as being BJ living RJ. I do not accept that is the correct starting point. The *status quo* is BJ living, as he has done for most of his life, with the pursuers. The question is not whether there is a justification for BJ not living with his father; it is whether it is in BJ's best interests that his current arrangements be changed. Separately, RJ's approach appears to be founded upon a presumption (that a child should be raised by a natural parent) yet the Inner House has encouraged a "*presumption free*" approach to such issues (*Donaldson*, above).

[56] I am not unsympathetic to some of the arguments advanced on behalf of RJ. He is BJ's father and I accept that, all things being equal, a child should be raised by his or her parent(s). As I have explained, I have my doubts about how diligently the local authority sought, consistent with his Art 8 rights, to reunite father and son. And given there are no concerns about how RJ fathers the other children in his current house, there is no reason to doubt that he would properly father RJ. But all things are not equal. BJ has lived most of his

life with the pursuers. And it goes too far, in my view, to suggest, as was done on behalf of RJ, that there is a “*whiff of social engineering*” about the current arrangements. BJ resides with the pursuers because they stepped up as kinship carers at a point when neither of his parents could look after him, he was in foster care and permanence proceedings were about to commence. He has resided with them since. That is nothing to do with “*social engineering*”. It is a consequence of BJ’s parents being unable to care for him three years ago and then an ongoing assessment by the Children’s Hearing that it was in BJ’s best interests to remain with the pursuers.

[57] When we return to the critical question (is it in BJ’s best interests that his current living arrangements be changed?) in my opinion the totality of the evidence points to a clear answer: no. All of the evidence, led by both sides, was of a child that is happy, thriving and doing very well given the start he had in life. The current arrangements clearly work for him. It has not been suggested on behalf of RJ that there would be any positive benefit to changing the current arrangements, beyond reuniting father and son under the one roof. As the Strasbourg Court made clear in *Strand Lobben*, above, whilst that should be the ultimate aim of any State intervention it does not trump the best interest of the child concerned. In my opinion, it cannot be said on the evidence before the Court that it is in BJ’s best interests to move to his father’s house. Having concluded that parental rights and responsibilities should be conferred upon the pursuers, both the pursuers and RJ have the right to have BJ living with them (or otherwise regulate his residence). Having regard to the lack of any functioning relationship between the pursuers and RJ, I am satisfied that it is in BJ’s best interests that the question of his residence be regulated by the Court. However we got here, I am satisfied that we are in the circumstance envisaged by the Grand Chamber in the final sentence of para 208: the fact is BJ has been in his current home for so long now, and appears

to be so settled, that his interest in not having that *de facto* family situation changed again overrides RJ's interest in having his son reunited with him. In other words, it is in the best interests of BJ that a residence order is made in favour of the pursuers.

### *Conclusions on residency*

[58] Accordingly, I am prepared to grant the order sought in the second crave and make a residence order whereby BJ resides with the pursuers. I do so because I am satisfied that it is in the best interests of BJ that such an order is made. I recognise that RJ has made significant changes to his life. I also recognise that the existing children in his household were noted to be well cared for and for whom no concerns were expressed. The evidence suggests that RJ is a good and attentive father. But the question is not whether RJ could father BJ if he lived with him most of the time. The question is whether it is the best interests of BJ that he moves from his current home to his father's. Whilst reunification of a family unit should ordinarily be sought, the best interests of the child remain paramount. All of the evidence before the Court is that BJ is a very happy child who is developing well. That is a tribute to all that are involved in his upbringing. Having regard to all of the evidence before me, in my view, BJ is now so well settled in his current environment that I cannot conclude that it is in his best interests that he is removed from that environment. That is not a conclusion that I reach lightly having regard to the body of evidence supporting RJ as a good and committed father who appears to have moved on from the troubles of his past. However, in my judgment, there is, on the evidence presented to me, no avoiding the conclusion that BJ's interests are best served by granting the residence order sought by the pursuers.

### **Issue 3: contact arrangements**

#### *Introduction*

[59] Nothing in my conclusion on residence changes or diminishes the parental rights and responsibilities that RJ has in respect of BJ, beyond not having BJ living with him all of the time. He remains his father. He has all the responsibilities, and the rights, that come with fatherhood. For example, he has the responsibility, and the right, to maintain personal relations and direct contact with BJ. He has the responsibility, and the right, to play as full a part in the life of his son as he can. In particular, the pursuers are obliged to have regard to RJ's views in respect of any major decision they may take in exercise of their parental rights and responsibilities (s 6(1) of the 1995 Act). That does not confer upon RJ a veto; it is an obligation to have regard to any views. But it underscores that the care and upbringing of BJ remains a joint enterprise in which the pursuers and RJ will have to learn to co-operate. Whilst the effect of my conclusion on residence is that BJ will have a life rooted in Town A, what his father and his grandparents will have is a shared-care arrangement. That is the context in which contact arrangements fall to be considered.

#### *The current arrangements*

[60] At the time of the proof, BJ spent one night every fortnight at his father's. He was picked up from nursery (failing which, an agreed point on the High Street of Town A) at around 15:00 on a Friday and returned to the pursuers (invariably the first pursuer) at 18:00 on the Saturday (at the same point on the High Street of Town A). That arrangement has been in place since the spring of 2022 and before that BJ had spent two nights at his father's (Friday afternoon until Sunday evening). That had been reduced at a planning meeting, and it was suggested (but not accepted by RJ) that the reduction was at BJ's request. For a

variety of reasons, contact has been irregular over recent months but that appears to have been a consequence of particular circumstances rather than any lack of commitment to contact taking place.

*What contact arrangements should be in place?*

[61] As I have explained, the evidence of both Ms Taylor and Miss Holt requires to be treated with caution. Both were too quick to express views contrary to RJ's position and too slow to ensure a proper factual foundation was in place for those views. So, whilst neither was enthusiastic about anything beyond the current level of contact, both spoke very positively about BJ and his development and that, until recently, was informed, in part at least, by greater contact with his dad. It is also relevant, in my opinion, that in respect of his family with EM, RJ appears to be a good father and has progressed to the point where there is no state intervention or assistance with those children. That being so, there is no reason why BJ should not have sufficient contact to ensure a close and effective relationship with his dad. Indeed, it is in his best interests that he has such contact.

[62] That much was accepted by the pursuers in their submissions where overnight contact from a Friday evening until a Monday morning every alternate weekend was said to be appropriate. That is more than is currently in place, is more than the social workers appeared to support and is more than BJ previously had. I agree that it is in the best interests of BJ, and it is necessary to promote a proper relationship with his father, that he has at least overnight contact on alternative weekends. A step up from one night a fortnight to three consecutive nights may have to be managed so as to support BJ. I would prefer to hear any submissions the parties may have on the issue before pronouncing a final order.

[63] RJ also seeks two hours of contact with his son one evening per week. I agree that some contact during the week is appropriate. Nothing is said by the pursuers in terms about that proposal in submissions. The practicality of it may also be informed by RJ having his driving licence returned. I also do not have details of the school day that BJ will likely have or his current routine. For example, if the school day finishes at 15:00 and RJ were to collect his son from school, two hours of contact would see him return at 17:00 and in all likelihood before he has his evening meal. Before making any specific order in relation to midweek contact, I would invite further submissions (against the background that in my view at least one evening per week is appropriate).

[64] It also appeared to be accepted in evidence by the pursuers that extra overnight contact during school holidays would be appropriate. I agree. Little was said in evidence about how those holiday arrangements would work in practice. Given the evidence about the lack of any functioning relationship between the pursuers and RJ, I am not prepared to accede to the suggestion on behalf of the pursuers that holidays be left to such dates and times to be agreed between the parties. For now, at least, I am satisfied that it is in BJ's best interests that any contact order also makes specific provision in respect of the issue of holidays. Accordingly, I invite further submissions on the issue of holiday arrangements in particular.

### *Conclusions on contact*

[65] It is in the best interests of BJ that his father plays a full and active part in his life. To secure that, and having regard to the current state of relations between RJ and the pursuers, I am satisfied that it is better for BJ that an order is made by the court in respect of the issue. I am prepared to grant a contact order in favour of RJ. In principle, and subject to it always

being in the best interests of BJ, contact should, in my judgment, be greater than is currently in place. Recognising, however, the limits of the evidence before me and the fact that BJ will shortly undergo a significant change in his life when he starts school, I am not prepared to pronounce a final order without hearing from the parties further. Having regard to what I have said above, I will fix a hearing at which the parties can address me on the precise terms of any contact order (which should include arrangements for holidays as well as 'term time' arrangements). In the meantime, the current contact arrangements in terms of the CSO should continue.

### **Disposal**

[66] For the reasons I have explained, I am prepared to confer parental rights and responsibilities upon the pursuers and to grant the residence order sought by them. I am also prepared to grant a contact order in favour of RJ. Before pronouncing a final order, however, I will have the case put out for a hearing so I can hear any submissions on the precise terms of any contact order in light of the observations above. That will also be an opportunity for any party to make whatever submissions, if any, they wish to make in respect of expenses. Whilst such a hearing should be fixed as soon as is practicable, given my conclusion that I am prepared to grant the residence order sought by the pursuers, BJ should start school in Town A as otherwise planned. Pending that hearing, contact can and should continue in accordance with the CSO. In advance of the hearing, parties should lodge a written note of their proposals for contact, and any brief reasons in support, three days before the hearing. In addition, I will appoint parties to exchange with each other a draft of their proposals seven days before the hearing.