

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT DUNDEE

[2024] SC DUN 23

DUN-F91-23

JUDGMENT OF SHERIFF JILLIAN MARTIN-BROWN

in the cause

PD

Pursuer

against

SS

Defender

**Pursuer: Allison; Harper Macleod LLP**  
**Defender: Hegarty (Sol); Rollos Solicitors**

DUNDEE, 23 January 2024

**Introduction**

[1] In this case the pursuer PD, who is the father of J, sought a residence order in terms of section 11(2)(c)(ii) of the Children (Scotland) Act 1995 providing that J's primary residence be with him. The defender SS, who is the mother of J, opposed the making of that order.

**Findings in fact**

[2] J was born on 15 December 2019. During the course of the proof he turned 4 years old. He was too young to understand proceedings or express a view. He was due to start school in August 2024.

[3] The pursuer PD was 39 years old at the time of the proof. He was employed by a private company.

[4] The defender SS was 25 years old at the time of the proof. She was employed by a public service. She has had several jobs throughout the parties' relationship and since their separation.

[5] The parties' relationship commenced in or around 2017. It ended in or around October 2019. J is their only child.

[6] Prior to separation, the parties lived at PD's property in Glasgow.

[7] Following the parties' separation, SS and J left the pursuer's property in Glasgow to stay with her grandfather in Fife. SS' grandfather was in his eighties. PD did not consent to the relocation. SS did not return with J to live in the Glasgow area.

[8] Following the parties' separation, the parties attempted to discuss and agree childcare arrangements for J. There was a regular and consistent pattern of childcare for J with PD having him from Thursday until Sunday every weekend. PD also had regular time with J over and above that. PD maintained a spreadsheet of his residential contact with J. In 2022 he exercised residential contact for 184 nights, ie slightly more than one half of the year.

[9] PD was willing to facilitate weekend contact with SS in the event that she wished to attend a special occasion or event, provided that he was given sufficient notice by her.

In 2022, SS asked PD for contact with J at the weekend on three occasions.

[10] SS was willing to agree to additional residential contact for PD. PD had exercised additional residential contact with J from Thursday 6 July 2023 - Sunday 16 July 2023; from 31 July 2023 - Sunday 6 August 2023; and from Sunday 8 October - Sunday 15 October 2023. If PD had an emergency and needed SS to watch J, she was willing to do so without hesitation.

[11] PD resided in a comfortable property which was well furnished and suitable for J's needs. J had his own bedroom. There was a secure back garden in which J could play. PD's home was close to nursery and J's paternal grandmother's home.

[12] PD travelled from Glasgow to Fife to return J until the arrangements were formally changed by interlocutor dated 18 April 2023. SS previously collected J from Powmill.

[13] Since around July 2021, J attended nursery in Glasgow on Fridays from 09.00 until 16.30. He had many friends in the nursery. He was happy and content. J attended sports in Glasgow on Saturday mornings.

[14] Since around January 2023, J attended nursery in Fife from 09.00 until 15.00 on Mondays to Thursdays. He had many friends in the nursery. He was happy and content. He was progressing well and meeting all his milestones.

[15] J's attendance at nursery was beneficial for his development. Cross boundary funding was approved between South Lanarkshire Council and Fife Council to facilitate the arrangement.

[16] In around February 2022 SS entered into a new relationship with AL.

[17] SS went on holiday to Poland with her mother around March 2022.

[18] SS went on holiday to Turkey with AL around April 2022.

[19] SS went on holiday to Arran with AL in June 2022.

[20] SS went on holiday to Ibiza with AL on 18 August 2022. She did not inform PD of her plan to travel to Ibiza. She contacted PD whilst she was in Ibiza to advise him that she had lost her passport.

[21] AL was physically abusive towards SS in Ibiza in August 2022. He pushed her away from him. He ripped up her passport and smashed her phone. A mug in their apartment was also smashed.

[22] SS did not return to Scotland until 29 August 2022. PD cared for J whilst she was in Ibiza. SS offered for her family to care for J until she returned from holiday.

[23] PD requested details of AL's address in around November 2022. SS provided a false address. She subsequently provided PD with AL's address on 12 December 2022.

[24] On 16 December 2022, PD received a telephone call from SS' sister. He was informed that SS had been assaulted by AL during an overnight hotel stay in Edinburgh. J was in the care of SS in terms of the usual pattern of childcare.

[25] During the incident in Edinburgh in December 2022 AL grabbed SS' phone, blocked her exit, punched her in the face, threw her to the ground and kicked her to the head. She sustained bruising and a burst lip.

[26] PD kept J in his care from 15 December 2022 until 25 December 2022. SS was distressed and shaken by the assault. PD facilitated regular FaceTime contact with SS during the period he had J in his care following the incident.

[27] AL was arrested and subsequently charged and subject to bail conditions.

[28] J was at risk during the time that SS was in a relationship with AL from June 2022 until December 2022.

[29] SS had worked with Women's Aid since the end of her relationship with AL on 17 December 2022. She had not had any contact with him since then.

[30] SS documented the nature of her relationship with AL on her TikTok account.

[31] Following the incident in December 2022, SS returned to Fife to live at her mother's address in Fife with J. It was a two bedroomed flat. SS' brother also lived at their mother's house. J has lived at five different addresses since he was born.

[32] In around June 2022, SS proposed to PD via parties' respective agents that weekly residential contact changed to alternate weeks. PD was not agreeable to the proposed

change. Despite SS' proposal, no change was implemented and PD continued to exercise contact with J on a weekly basis.

[33] In around September 2022, SS again proposed to PD via parties' respective agents that weekly residential contact changed to alternate weeks. PD was not agreeable to the proposed change. Despite SS' proposal, no change was implemented and PD continued to exercise contact with J on a weekly basis.

[34] In around October 2022, PD proposed that the parties attend at Family Mediation. SS agreed. The process was unsuccessful.

[35] On 30 January 2023, SS again proposed to PD via parties' respective agents that weekly residential contact changed to alternate weeks. PD was not agreeable to the proposed change. Despite SS' proposal, no change was implemented and PD continued to exercise contact with J on a weekly basis.

[36] On 9 February 2023, PD travelled to Fife to meet SS in terms of the usual weekly pattern of contact. He saw her car as he was driving to a nearby coffee shop before contact took place. She saw his car too. Contact was denied by SS. She continued to refuse weekly contact thereafter. PD exercised contact each alternative weekend. SS unilaterally changed the status quo.

[37] On 24 February 2023, PD attempted to contact SS to enquire into J's wellbeing. She did not return his messages or calls. PD was informed by J's nursery in Fife that he was not at nursery.

[38] SS offered PD non-residential contact midweek. PD required to travel approximately 120 miles from Glasgow to Fife and return so that was impractical for him.

[39] It was in the best interests of J that both parents were actively involved in his care and upbringing.

[40] Both parents had a positive influence on J's life which would assist him to develop his sense of identity and self-esteem as he grew up.

[41] J was registered for dental treatment in Glasgow.

[42] J was registered as a temporary patient with PD's GP in Glasgow.

[43] The interim order for indirect FaceTime contact dated 18 April 2023 was varied on SS' opposed motion on 29 August 2023. FaceTime contact was scheduled for Wednesdays in the week when PD did not exercise residential contact with J at 18.30.

[44] Since 30 October 2023, PD had been exercising residential contact according to the following pattern:

- Weeks 1, 2 and 3: from 14.45 on Thursday until 16.45 on Sunday, with PD collecting J from nursery on Thursday and SS collecting J from PD's house on Sunday.
- Week 4: indirect contact via a FaceTime/video call on Wednesdays at 16.30 for 30 minutes.

[45] PD worked from home and had access to family support if required. His mother lived around 30 - 45 minutes' drive away from his home. His sister was 13 miles away as the crow flies. His brothers were in Falkirk 25 minutes' drive away. His mother was employed full-time but could often work from home.

[46] SS' workplace was around 20 minutes from her home. She worked on a 17 week roster and knew her shifts well in advance. The majority of her shifts were either 07.00 until 13.00 or 08.00 until 17.00. She did not work any nightshifts. Her employers had been flexible in relation to her childcare and worked around J's routine. Shift swaps were dependent on the goodwill of others.

[47] SS had regular family support. SS had the support of her mother who lived 5 minutes away. Her mother's job was flexible so she was able to assist with childcare at any time. SS' grandfather lived 15 minutes away and was able to help out at any time. SS had the support of her sister who lived 25 minutes away. She also had the support of close friends.

[48] Both parties' support networks were more than sufficient to ensure that J was well cared for at all times. SS' mother and grandfather had greater availability compared to PD's mother and sister. SS' family also lived slightly closer to her than PD's family lived to him.

### **Findings in fact and law**

[49] Having regard to the welfare of J, it was better for J that an order for primary residence be made than that none should be made at all.

[50] J's primary residence should be with his mother, the defender SS.

### **Procedural history**

[51] Evidence was led from the following witnesses:

1. PD, father of J, in person on 30 October 2023.
2. FA, paternal grandmother of J, in person on 30 October 2023.
3. EQ, paternal aunt of J, in person on 30 October 2023.
4. EH, Glasgow nursery manager, by affidavit.
5. GR, Glasgow nursery keyworker, by affidavit.
6. SS, mother of J, in person on 30 October 2023 and 6 November 2023.
7. LN, maternal grandmother of J, in person on 6 November 2023.
8. JS, maternal aunt of J, in person on 6 November 2023.

9. NC, headteacher at Fife nursery, by affidavit.

[52] Parties lodged an extensive joint minute of agreement, relevant parts of which are included in my findings in fact. Parties lodged written submissions and oral submissions were made by way of WebEx on 22 December 2023.

### **Background facts and circumstances**

[53] J was born on 15 December 2019. During the course of the proof he turned 4 years old. Both parties were agreed that he was too young to understand proceedings or express a view.

[54] Both parties accepted that J's residence should be shared and that the party without primary residence would have J residing with them on a four weekly basis as follows:

- Weeks 1, 2 and 3: from 14.45 on Thursday until 16.45 on Sunday, with the parent without primary residence collecting J from nursery on Thursday and the parent with primary residence collecting J from the other's house on Sunday.
- Week 4: indirect contact via a FaceTime/video call on Wednesdays at 16.30 for 30 minutes.

[55] That particular pattern of shared residence had been in place since 30 October 2023 for PD.

[56] A specific issue order allowing SS to take J to Disneyland Paris from 28 November 2023 until 1 December 2023 was the subject of agreement in advance of the proof. Parties also reached an agreement on summer and October holiday contact.

[57] Though parties reached an agreement alternating Christmas Day on a yearly basis, they could not reach agreement upon which of them would have Christmas Day this year.



I made an order in relation to alternating Christmas Day on 22 December 2023 after hearing oral submissions.

### **Pursuer's evidence**

#### *Evidence of PD*

[58] The pursuer PD was 39 years old. He swore an affidavit dated 30 October 2023, which he adopted and elaborated upon in oral evidence. He was employed by a private company.

[59] PD was in a relationship with SS and they lived together in Glasgow until their separation in October 2020. At that time PD worked long hours full-time in hospitality. Due to his shifts, he initially started seeing J from Thursday until Monday or Tuesday each week. He collected and returned J from Fife.

[60] Following the separation there was a regular and consistent pattern of childcare for J with PD having him from Thursday until Sunday every weekend. PD also had regular time with J over and above that. He was able to respond to last minute requests from SS to take J, which he was always happy to do. Sometimes that involved juggling work commitments or asking his mother to help.

[61] In order to be in a better position to respond to last minute requests, PD changed job in May 2021 to have more flexibility. He generally travelled to Fife to collect and return J. SS rarely collected J from Glasgow. Sometimes the parties would meet at Powmill. Following a court order, handovers took place with PD travelling to Fife to collect J and SS coming to Glasgow to collect J.

[62] PD felt that SS prioritised socialising and holidays over J and regularly relied upon PD to care for J. SS did not call to speak to J when she was away or ask about his well-being.

[63] In about February 2022, SS started a new relationship with AL. PD was concerned about her relationship with him. SS went to Arran with AL in June 2022. There was adverse weather that weekend and SS told PD she was stuck in Arran. PD did not know if that was truly accurate. She got back to the mainland on Monday and had to travel through to the Glasgow area on her way back to Fife but did not come for J until the Tuesday because she said she was returning straight back to work and would pick him up later in the week.

[64] In August 2022 SS went to Ibiza with AL but did not tell PD that she was going away. J was in PD's care in terms of the usual Thursday to Sunday pattern but SS ended up not coming home for over 10 days. PD cared for J while she was away but if he had received notice of her plans in advance, he could have accommodated that better with his work commitments. SS told PD she had lost her passport, which he had since discovered to be a lie.

[65] In December 2022, SS' sister told PD that AL had ripped up SS' passport when they were in Ibiza and had assaulted her. PD was concerned that by continuing in a domestically abusive relationship, SS had placed J in a potentially dangerous situation.

[66] SS started mentioning changing the current childcare pattern to every second weekend in about June 2022. Her solicitor wrote to PD's solicitor asking about changing the weekend contact to every second weekend contact. PD did not agree with this change because J was in a settled routine. He had never stopped SS seeing J at the weekend if she wanted to do so. He indicated that if SS wanted to do something in particular with J at the weekend that could be arranged but in 2022, she only asked to do so on three occasions. Childcare arrangements therefore continued as they had always been despite SS' request.

[67] SS asked again in September 2022 to change the weekend arrangement but she did not take any steps to implement the change and things continued as they had always been despite SS' request. PD did not consider it to be in the best interests of J to make a change.

[68] Communication with SS had always been difficult. His texts were often ignored or answered after having to chase SS for a response. He suggested family mediation in around October 2022 but that was unsuccessful. PD perceived that SS did not respect his role as J's father and thought that his relationship with J was secondary to her relationship with J.

[69] When SS returned to work from maternity leave, she had several jobs between November 2020 and June 2022, most of which included weekend working. SS made demands and changed the locations, times and rules about pick-up and drop off to control the situation and not for the benefit of J.

[70] PD believed the trigger for SS pushing for a change was control and money. The Child Maintenance Service assessed PD as having to pay a lot more than he was actually due to pay. PD provided CMS with a spreadsheet of overnight contact to clarify matters, to which SS eventually agreed. It took several phone calls back and forth and for solicitors to write a joint letter to CMS to confirm the correct position.

[71] Around November 2022 PD became aware that SS and J were living with AL. He asked for AL's address on more than one occasion to carry out a domestic abuse check, which he did not receive until 12 December 2022.

[72] On 16 December 2022 PD received a call from SS' sister to tell him that SS had been violently assaulted during an overnight stay in Edinburgh with AL. J was in PD's care that weekend and stayed with him until Christmas Day. J had regular FaceTime calls with his mother during that period. SS had a burst eardrum and bruises and they made sure her

face was positioned in such a way that J did not see the injuries. PD returned J to SS on Christmas Day and was reassured by the bail conditions in place for AL.

[73] PD accepted that SS was the victim of AL's abuse but felt she had made poor choices and put J in danger. SS maintained her relationship with AL despite his abuse of her and downplayed the extent of his abuse. On one occasion J put his hands round his paternal grandmother's neck and told her he was going to strangle her. Following the separation, SS posted on social media making reference to sexual abuse and being controlled, abused and assaulted for a year by AL. She also made reference to AL drinking and taking drugs all day.

[74] Following her separation from AL, SS moved to her grandfather's house. He was in his eighties and PD did not think he was fit and able to properly care for an active toddler. SS then moved into her mother's address, which was not suitable because there was not enough room for J. SS now appeared to have a property in Fife but had not told PD anything about that property. PD was concerned about how permanent her living arrangements were.

[75] SS' use of social media concerned PD. In one post PD was referred to as a "horrible controlling BD" which he presumed stood for baby daddy. That was upsetting for PD because he had only ever acted in the best interests of J. Whilst they were no longer in a relationship she was not an abandoned single mother with nobody looking out for her or for her son. PD had always been and would continue to be a regular and consistent presence in J's life but SS did not appear to acknowledge or recognise this. It also showed she did not appreciate or did not care about the consequences for PD's privacy or J's privacy.

[76] SS signed up to feature in an online article about the benefit of having her grandfather in J's life and the time they spent living together. A video of J and her

grandfather had been uploaded online which went viral. The video gained over 3.6 million views and almost half a million likes. PD was worried information could get into the hands of the wrong people and place J in danger.

[77] SS had posted provocative and inappropriate pictures of J on her TikTok including showing his bare bottom wearing what appeared to be SS' underwear, which she appeared to find funny. She posted a picture of J on TikTok where she dropped him on his head whilst on a trampoline together with the caption "ways to die". She made reference in a post to the hashtag ADHD but had not told PD anything about J being investigated for ADHD.

[78] SS enrolled J in nursery in Fife in January 2023. J had already been going to nursery in Glasgow since 2021. When SS enrolled J in nursery in Fife she did not keep PD informed of what she was doing and attempted to change the nursery funding in place without telling him.

[79] At the end of January 2023 SS tried again to change the contact arrangements to every second weekend. PD did not agree.

[80] On 9 February 2023 PD arrived in Fife to collect J as usual and witnessed SS driving recklessly with J in the car. He contacted the police and asked them to carry out a welfare check. From that date onwards SS stopped PD seeing J from Thursday to Sunday every week. She ignored PD's messages and calls.

[81] On 24 February 2023 PD had to contact J's nursery to ask after him as SS was not keeping him updated. He was told that J was not at nursery so PD contacted the police again to carry out a welfare check.

[82] The sheriff made an interim order at a child welfare hearing on 18 April 2023 to say that SS was to phone him on a Wednesday at 16.30 by FaceTime to allow him to speak to J

during the weeks that he was not seeing him at the weekend. SS had not stuck to that court order. Calls were frequently late or cut-off. Often she had friends in the background which made PD feel uncomfortable and interfered with his quality time with J. J was often distracted or tired or about to have his dinner. SS had specifically suggested that the calls should take place at 16.30 because that was the best time for him taking into consideration his routine with getting dinner, having a bath and going to bed. SS then asked the court to change the time of the FaceTime call to 18.30 despite previously saying that was too late for J's routine.

[83] Further problems came to light in July 2023. PD was due to speak with J on Wednesday 26 July 2023 but the call did not take place. PD learned from SS' social media that she had started training with her current employer. He had no idea where J was or who was looking after him at that time.

[84] PD made enquiries with the Fife nursery and was told that SS' friends sometimes collected J. He did not know who they were. He was worried about where J was during the week, who was looking after him and whether he was being passed from pillar to post with no continuity. SS would ask anyone but PD to help with looking after J.

[85] PD was concerned that J was not in a settled routine at the Fife nursery. SS posted on TikTok that on one occasion she decided to skip nursery to have a beach day with J. She was taking J to Paris during term time.

[86] If J were to have primary residence with PD, he could provide him with a settled and consistent routine. He had the flexibility to meet his changing needs. He could ensure that SS was a regular part of J's life and that she was kept updated about all matters relating to his welfare and well-being. He did not have any faith that SS would do that for him. SS was isolating him from J's life and that was not in his best interests.

[87] PD had additional time with J in July, August and October 2022 but had to ask through his solicitor. SS had also offered him the opportunity to see J mid-week for a few hours in the afternoon but that was impractical because it was a journey of approximately 120 miles from Glasgow to Fife and back.

[88] PD worked from home and his employer allowed him to be flexible for J. He had lots of long established friends at nursery in Glasgow and had been going for over 2 years. There was a feeder school for J's nursery. Most of the children from his nursery would be going to that school so it would be the best start for J. J had a cousin who went to the school. There was also a Catholic primary school in the area. Both schools had a well-established excellent reputation for learning and opportunities. PD was able to personally take J to school and collect him every day. There was also an option for J to go to private school in Glasgow.

[89] J had his own bedroom at PD's house. It was a safe, comfortable and established home. He had everything he needed there. There was a safe, enclosed garden with a locked gate. There was CCTV.

[90] SS did not attend to registering J with a dentist. PD did that in Glasgow and had taken him for his first check-up. SS did not keep PD updated about J's health. He had to send a text message to ask about J's skin condition. On one occasion SS told PD that J had been seen at the GP for a urine infection. PD sent several text messages over a period of a week asking her how J was and what medication he was taking. It took her 6 days to reply. SS frequently sent J to him in clothes or shoes that were too small. On occasions J had marks on his feet because his shoes were too tight.

[91] When PD was with J they did as much as they could fit into their time together. They visited family, took trips up north, went to Aviemore and saw the Cairngorms.

Routine was very important. J knew his boundaries. PD taught J manners. J was a Marvel fan like PD. He was a very clever, fun, friendly and super smart boy. He was inquisitive and funny.

[92] In cross-examination PD accepted that J was now at nursery full-time, which was a change in his circumstances compared to attending nursery for one day per week in Glasgow. With some hesitation, PD accepted that meant that J was therefore spending less time with his Mum doing activities or seeing his maternal family. He did not think it was reasonable for her to ask for a change in the current contact arrangement on that basis. He felt that SS had adequate quality time with J.

[93] He accepted that AL was no longer part of SS' life. PD also accepted that there was an ongoing criminal case against himself in relation to SS, which made communication difficult. PD did not accept that he was intimidating in his text communications.

[94] PD accepted that his mother lived around 30 - 45 minutes' drive away from him. His sister was 13 miles away as the crow flies. His brothers were in Falkirk 25 minutes' drive away. His Mum was employed full-time but could often work from home.

[95] PD did not think it was unreasonable for him to ask for additional days at short notice when his contact had fallen on a bank holiday and did not accept that SS may have made her own plans for bank holidays.

#### *Evidence of PD's other witnesses*

FA

[96] FA swore an affidavit dated 30 October 2023, which she adopted and elaborated upon in oral evidence. She was J's paternal grandmother and PD's mother. She was employed by a Health Trust in England.



[97] She gave evidence about SS' pregnancy and the parties' separation. FA also spoke to the lack of communication between the parties. She felt that SS did not keep PD updated about important matters concerning J, for example J got several chest infections and PD would ask SS to take J to the doctor but she would not keep him updated. She thought that SS' communication with PD had got worse over time.

[98] FA confirmed that PD had changed his job from working in hospitality to working in recruitment to give him a steadier family focused lifestyle with J. PD had every weekend off. His work pattern was Monday to Friday. He could work flexibly around J's routine and needs.

[99] SS had several jobs during her relationship with her son and after they separated. Her work arrangements were erratic and she never sustained her jobs. She worked in several locations including Dunfermline, Kirkcaldy, St Andrews and Edinburgh. She was dependent upon PD's goodwill to accommodate caring for J at short notice. SS could be quite demanding with PD about location of handovers to suit herself.

[100] FA perceived that the motivation for restricting PD's time with J was all about control and money rather than what was best for J. There had been a shift in SS' approach because she had now acquired a house and had a regular income from PD. She wanted a child and no longer wanted PD to be a part of that.

[101] In 2022, SS started a relationship with AL which caused FA concern. In or around October or November 2022, there was an incident when J grabbed PD around the throat and said he was going to choke him. J also did that with FA.

[102] SS never asked PD to help with childcare now, whereas she used to ask him all the time. She found SS very divisive and stubborn. SS posted regularly on social media and that was the only way that PD knew what was going on a lot of the time.

[103] PD looked after all of J's basic needs. He had taken J to get his haircut and chose the hairdresser carefully so that it was not distressing for J. PD had registered J with a dentist in Glasgow and took him to check-up appointments. He registered J with a GP in Glasgow on a temporary basis because he was concerned about SS not taking J regularly. PD made sure J had properly fitting clothes and got J's feet measured frequently. SS regularly sent J in shoes that were too small for him.

[104] PD enrolled J into nursery in Glasgow very early on in July 2021. PD recognised it was important for J to socialise. J knew lots of children at the nursery and had always been popular.

[105] PD's house was ideal for J. He had an enclosed garden with a locked gate. He had his own room and everything he needed was there, such as his toys and books.

[106] FA had no concerns about her son's ability to provide proper care for J. She fully supported PD seeking primary residence. J's time with PD being reduced had not created a positive change in J.

[107] PD had an excellent support network. FA had taken on a contract where she had flexibility. PD's sister was also flexible as she worked from home. They were a close family.

[108] In cross-examination, FA accepted that she did require to travel for work but maintained that she could be very flexible to assist PD if required. She did not accept that because J was now attending nursery in Fife that would affect the time that PD was able to spend with him.

EQ

[109] EQ swore an affidavit dated 30 October 2023, which she adopted and elaborated upon in oral evidence. She was J's paternal aunt and PD's sister. She was employed as a marketing director.

[110] PD saw J very regularly until SS changed the arrangements in January 2023. SS eventually returned to work after maternity leave but she was in and out of work for periods of time so she would leave J with PD a lot of the time at very short notice. There was no continuity of care for J. SS never had the type of job that could offer stability and routine for J. SS' strong point had never been communication. There was always an expectation that PD would change his plans regardless of the short notice given to him to do so.

[111] EQ felt that SS prioritised her plans and her personal life. She felt SS had significantly reduced PD's time with J to minimise his contact and maximise the pay-out for her bank account in child maintenance.

[112] There was a real shift when SS met her former partner AL. PD was concerned for his son's well-being as a result of information about AL being a domestic abuser. After the incident in December 2022, J was with PD for some time while AL was charged.

[113] SS reduced PD's contact to every second weekend from the beginning of January 2023. SS had asked to change the contact pattern to every second weekend long before she actually did it but she never followed through with it until then.

[114] PD was an incredibly hands-on Dad. PD engaged in activities with J and spent quality time with him. PD made sure that J was registered with a dentist in Glasgow and also saw a GP in Glasgow.

[115] J regularly came to PD wearing shoes that were too small for him. PD made sure that J got new shoes and new clothes. He made sure that J's basic needs were taken care of all time. PD was a very thoughtful Dad.

[116] EQ thought that it was in the best interests of J to have his primary residence with PD. There was more consistency with PD. He was willing to communicate with SS about J but she did not do the same for him. SS now appeared to be looking to anyone but PD to care for J, even friends but she was happy to take the money from him.

[117] PD's time with J had been significantly diminished, which had a detrimental effect on the time that extended family got to see J. It was always rushed. Friday evenings or Saturdays were J's only real opportunity to spend time with his paternal cousins, aunts, uncles and grandparents. Sundays and Thursdays were transition days. J had separation anxiety.

[118] PD was big on maintaining his routine. He was very particular about J's routine, his diet and his sleeping pattern.

[119] PD worked from home and had a stable job. He had a great deal of flexibility. EQ and her husband both worked in Glasgow and had a huge amount of flexibility in their roles. She had no concerns about PD's ability to provide proper care for J. PD's house was a good set-up and had a garden which was completely enclosed and safe. J had his own room and the house was geared up for J with everything he needed.

*EH*

[120] EH swore an affidavit dated 26 October 2023, which was not subject to cross-examination. She was the nursery manager in Glasgow. J had attended since

July 2021 every Friday, until 2023 when it was reduced to every second Friday. His attendance at nursery was very consistent.

[121] EH spoke to PD at drop off or handover. He was always pretty positive and very eager. He took the time to talk things through. She found him to be an open and honest parent.

[122] J was a happy child who interacted well and was very sociable. He enjoyed taking part in activities and was keen to get involved in any learning opportunities. J was always clean and well-dressed. She had no concerns at all about J's presentation and engagement.

[123] From feedback from other staff members and her discussions with PD, there had been a major shift in J's behaviour since the change from every Friday to every second Friday. J was more emotional. She had witnessed J's behaviour multiple times. PD had to make a big effort to settle J. J could be clingy with his Dad at the initial arrival to the nursery. PD always made an effort to settle J, which was nice to see. J and his father appeared to have a close relationship.

GR

[124] GR swore an affidavit dated 26 October 2023, which was not subject to cross-examination. She was employed as a keyworker at the Glasgow nursery for J. She saw J every second Friday. It used to be every Friday until earlier in 2023.

[125] J was a great wee boy and very sociable. He had many friends in the nursery. He was happy and content.

[126] Since the change to every second week, J struggled to part from his father. PD would spend time settling J, sometimes 10 to 15 minutes. She felt that PD handled the situation well.

**Defender's evidence***Evidence of SS*

[127] SS was 25 years old at the time of the proof. She swore an affidavit dated 3 October 2023, which she adopted and elaborated upon in oral evidence. She was employed by a public service.

[128] She was in a relationship with PD from around 2017. She moved to Glasgow from Fife to live with him in around April 2018. J was born on 15 December 2019. The parties separated in around August 2020 when J was 8 months old. J and SS returned to live with her family in Fife after the parties separated.

[129] Since separation, J had always exercised regular contact with his father. At first PD was employed in hospitality and had contact with J overnight either on a Monday until Tuesday or Tuesday until Wednesday each week. Soon after he started his current job, his work pattern changed to Monday to Friday from 09.00 until 17.00. As a result, the contact arrangement changed to each weekend. At that time, J was not at nursery midweek and SS was not working midweek and the arrangement worked well. She was able to spend quality time with J midweek.

[130] J was due to start nursery in Fife full-time in January 2023 so in June and September 2022 she proposed changing the contact arrangement to every other weekend to get J into a routine and be able to spend quality time with J at the weekend. Otherwise, she would only ever see J for a couple of hours to put him to bed midweek. J often asked to do activities like going to the safari park, which she could not do midweek. SS offered PD additional midweek contact in addition to every other weekend but he rejected that.

PD would only agree to every weekend. SS' view was that the weekly arrangement was no longer in J's best interests long-term.

[131] In around November 2022, the parties attended mediation but that was unsuccessful.

[132] In February 2023, as J had started nursery and PD was refusing to work with SS to find an arrangement that worked for J's new circumstances, she refused to agree to contact every weekend. Since that date PD had exercised contact every other weekend from Thursday after nursery until Sunday afternoon. PD then raised a court action seeking residence or residential contact every weekend.

[133] Ever since J was a baby he had never lived in Glasgow full-time, nor had he lived full-time with PD. A change in residence would completely uproot J from his settled environment and the routine that he had always known. SS did not agree that residential contact every weekend was in J's best interests any longer so she required to defend the action.

[134] On 18 April 2023 the court made an order for alternate weekend residential contact along with additional midweek FaceTime calls on a Wednesday evening. That was the arrangement until 30 October 2023 and SS had no issue with it. J was in a stable routine and he was able to spend time with his father on a regular basis. Since the parties lived so far apart, she could not see how any other contact would work practically. That was especially so when J started school and had other commitments. The current arrangement would need to be amended from Thursday to Friday until Sunday when J started school.

[135] SS believed J should continue to reside primarily with her. J had resided primarily with her in Fife since he was 8 months old. It was all he had ever known. When they first moved to Fife in 2020 they stayed with her grandad. J loved living with his great grandad and that worked well. In around November 2022 J and SS moved in with her then boyfriend

AL. Due to a domestic incident in December 2022 this only lasted a few weeks before she moved out and AL was charged by the police.

[136] SS had no contact with AL since the incident and had no intention of ever contacting him again. J was not present during the incident, nor did he witness any domestic incidents in the short time he and SS lived with AL and he was never left alone with him. AL was currently on bail conditions not to approach or contact SS and the trial would take place soon. She did not believe she would ever see him again.

[137] In November 2022 J and SS moved in with her mother temporarily while SS waited for a council house. That took a while to be assigned and then she had to make sure it was suitable for J and her to move into. They moved into their home in March 2023 and had been there since. It was a two-bedroomed home, well-furnished with a small front and back garden. J had his own bedroom full of toys and books. It was 2 minutes from J's nursery and 5 minutes from primary school, which he was due to attend in August 2024. SS' mother lived 5 minutes away and J's nursery friends lived closed by. J was very settled and happy living in their home.

[138] J loved going to nursery and SS always got glowing reports from the nursery staff. He had made friends there and was excited to start school within the next year. He always talked about his friends. The nursery had a mobile app and uploaded pictures of J at nursery. He was always smiling and engaged in the pictures. PD had access to that app as well.

[139] SS did not have any information on the nursery that J attended in Glasgow on a Friday and did not get updates from them. Although she did not have any concerns, she did not know how often he went or if he was enjoying it. J had not mentioned any friends from



Glasgow. During the past few weeks, J had said he had not been to nursery in Glasgow but she thought that was him just telling fibs given his young age.

[140] SS thought it was better to have J remain residing primarily in Fife so that he could start primary school with his friends that he spent most of the week with in an area he was comfortable in and knew well.

[141] SS believed she had more family support in Fife than PD had in Glasgow, which was beneficial for J. She had no concerns with PD's family and believed they loved and cared for J. SS had the support of her mother who lived 5 minutes away. She saw J on a daily basis and J had a very close bond with her. Her mother's job was flexible so she was able to assist with childcare at any time and gladly did so. Her grandfather lived 15 minutes away and was also able to help out at any time. J and SS used to live with him so J loved spending time with him. SS also had the support of her sister who lived 25 minutes away and the support of close friends who were willing to help at the drop of a hat. J was comfortable around them. J had nursery friends nearby that he would hopefully go to school with in August.

[142] SS was aware that PD did not have family close by in Glasgow. His mother lived in around 45 minutes away and his brother lived in Falkirk. His sister lived in Glasgow but she and her husband worked long hours so would not be as available to help with childcare. PD worked from 09.00 until 17.00 every weekday. If he was successful in obtaining primary residence, SS was concerned that PD would have to rely on nursery or after school clubs more than she would with family support. She worried that J would have to attend nursery or clubs from 08.00 until 18.00 every day, which at his age would not be in his best interests compared to living in Fife where he would be able to be cared for after nursery and after school by SS or her family in his own home.

[143] SS was presently employed in Dundee. She graduated from the training programme on 9 September 2023 and was now based full-time in Dundee. That was around 20 minutes from her home. The work pattern was very structured as they worked on a 17 week roster and she knew her shifts well in advance. The majority of her shifts were either 07.00 until 13.00 or 08.00 until 17.00. She did not work any nightshifts. Her work were very flexible with childcare and worked around J's routine. If she had to arrive late or leave early to collect or drop off J, they would let her do so. For example, recently SS had to collect J from nursery at 15.00 and her work allowed her to do so and take the rest of the afternoon off to care for him. She accepted in cross examination that details of her shifts had not been set out in her affidavit and that shift swaps were dependent on the goodwill of others.

[144] J attended nursery from 09.00 until 15.00 Monday to Thursday. On the few occasions when she was at work and J was not at nursery, SS' mother would usually care for him. Otherwise, her grandad would watch him for a few hours. That worked well and J seemed very happy and content with the care arrangements. There had not been any issues and her work did not interfere with childcare at all.

[145] If SS booked a holiday or went away for a weekend she would always try and do so when PD had J or she would ask her family to help with childcare. On one occasion in August 2022 she went to Ibiza with her partner AL. In her affidavit, SS indicated that she lost her passport and that she was unable to come home as arranged. However, in cross-examination, she admitted that her passport was ripped up by AL.

[146] SS asked PD if he would be able to look after J for a bit longer but noted that her family were available if he could not do so. She appreciated it that it was last minute and inconvenient but in the circumstances she was in a difficult position. That was not a regular

occurrence. If PD had an emergency and needed SS to watch J, she would do so without hesitation.

[147] PD refused to work with SS and reach an agreement on contact between themselves. He rejected anything she proposed. They did not communicate as he constantly belittled or tried to intimidate her. She had to get the police involved for harassment and coercive and controlling behaviour and PD had recently been charged with harassment and homophobic comments to her friend who was assisting with handovers. Therefore an order for residential contact that would work long-term was necessary to enable them to facilitate contact with as few issues as possible. She was still hopeful that in the future PD would be able to work with her and agree childcare arrangements without court intervention but at present it was not possible.

[148] SS believed an order for primary residence was necessary because even during these court proceedings, there had been occasions when PD had threatened or had refused to return J after contact. SS had always been flexible with holiday contact when given notice so there was no reason that PD could not arrange this in advance. It was unacceptable that PD could keep J against his best interests and almost hold him to ransom until SS agreed. It was clearly not in J's best interests to go against the court ordered residential contact routine. SS worried that PD would refuse to return J in the future and believed an order for primary residence was necessary. J was in a stable routine and his routine should not be changed without prior agreement. SS had hoped that it would not get to this stage but she believed the current arrangements were in J's best interests and what PD sought was not. A court order would enable J to have a stable, consistent routine and not be uprooted from the home and area where he was comfortable and settled.

[149] J was well cared for by both parents but due to their locations and work schedules, shared care was not possible when J started school. SS appreciated that overall PD saw J less than she did but could not see how any other contact arrangement would be beneficial to J.

[150] SS was cross-examined about domestic incidents in 2022 and what she posted on social media. In summary, SS accepted that AL had been physically abusive towards her in Ibiza in August 2022 and in Edinburgh in December 2022.

[151] During the incident in Ibiza in August 2022, AL pushed SS away from him. He ripped up her passport and smashed her phone. A mug in the apartment was also smashed.

[152] During the incident in Edinburgh in December 2022, AL grabbed SS' phone, blocked her exit, punched her in the face, threw her to the ground and kicked her to the head. She sustained bruising and a burst lip.

[153] She accepted that J was at risk during the time that she was in a relationship with a domestic abuser. Since then, she had worked with Women's Aid and educated herself. She had not had any contact with AL since 17 December 2022. SS documented the nature of her relationship with AL on her TikTok account.

#### *Evidence of SS' other witnesses*

*JS*

[154] JS was SS' sister. She swore an affidavit dated 12 October 2023, which she adopted and elaborated upon in oral evidence. She was 29 years old at the time of the proof and employed as a senior early years officer.

[155] JS had a very close relationship with her sister and J. She described SS as one of her best friends and talked to her every day. She saw J a few times per month and had a great relationship with him. He was very comfortable around her.

[156] JS had met PD a few times but did not know him well. When she visited the parties in Glasgow, PD was often at work. J did not appear distressed by the move from Glasgow to Fife and was immediately very settled and content. At that age he had no awareness of what was going on. Her sister had a lot of support from following separation. J had regularly always seen his father.

[157] JS was aware that her sister had been in a relationship with AL and separated because of incidents of domestic abuse. Her sister had opened up to her and she had provided support. Her sister had not had any contact with AL since separation. She was confident he was no longer a part of her or J's life. Despite the incidents of domestic abuse, she was confident J was well cared for by SS.

[158] After SS and AL separated, her sister moved to their mother's home with J until she was allocated a council house, which took around 3 or 4 months. It was a two-bedroomed flat but their mother gave up her bedroom for SS and J. It was well-furnished and comfortable and J was very happy there.

[159] SS got her new home shortly after March 2023. SS had visited this house a few times and it was very comfortable for her and J. It was a two-bedroomed home and J had his own room. It had a front and back garden. It was a 5 minute walk from J's nursery and a 5 to 10 minute walk to their mother's house. It was a five minute drive to their grandfather's house and a 30 minute drive to JS's house. J was very happy and settled there. J had lived in five homes since his birth but that had not negatively affected him in any way. He was very settled and he and SS had now lived in their permanent home for around 10 months.

[160] In cross-examination JS was asked questions about AL. She indicated she did not have concerns about her sister's judgement. She thought that at the time that her sister was with AL she was young and naïve. Domestic violence was something her sister had not

come across before and therefore her sister did not know how to react to it. Her sister was aware she had a support system and aware of how to get out of a domestic abuse situation. JS hoped that her sister would never be in that situation again.

[161] In her view, the parties needed to build up their relationship. PD could be quite aggressive and sometimes rude, whereas her sister was the type of person who shut down when she came across anything negative rather than positive. The main problem between the parties was communication.

*LN*

[162] LN was 53 years old at the time of the proof. She swore an affidavit dated 13 October 2023, which she adopted and elaborated upon in oral evidence. She was SS' mother and J's grandmother.

[163] LN had a very close relationship with SS and J but did not know PD very well. When he was in a relationship with her daughter she would see them occasionally to have dinner or when she went to go and help to care for J. They separated when J was around about 9 months old in 2020 and she had not had much contact with PD since. She sometimes saw him if she assisted with handovers for J's contact but that had only been on a few occasions.

[164] When the parties separated in around 2020, SS moved back to Fife and stayed with her grandfather. At that time PD had residential contact during the week because he worked at weekends. After a few months he got a new job and started having residential contact at weekends. At that stage SS agreed with whatever contact PD wanted to avoid a fight. PD could be quite intimidating. At that stage J was not at nursery and SS was not working midweek so she agreed to keep the peace.

[165] J started nursery in Fife full-time at the beginning of 2023, therefore SS and her family were not able to spend any quality time with J because he would spend every weekend in Glasgow with his father. J would ask to do activities with them that they could not do. It was not good for him to never get to spend time with SS' side of the family to which he was very attached.

[166] SS got more confidence and stood up to PD, only agreeing to contact every other weekend. That allowed J to spend quality time with both parents. SS had never prevented contact but had tried to work round what was best for J as circumstances changed.

[167] LN saw J almost every day and was sure that he was happy and settled in his present routine. He and his mother had a great bond. They were always cuddling and joking together. J was clearly very attached to his Mum and comfortable in her company. If his primary residence was in Glasgow, then that would distress and confuse him.

[168] LN had no concerns that SS would ever get in touch with AL again. She was happy and settled in her new home and job without him. SS would never put J at risk.

[169] J attended nursery in Fife on Mondays until Thursdays. LN had dropped him off and picked him up from nursery. He had lots of friends and would run to his teachers and cuddle them when he got there. He was very popular and his friends shouted after him when she dropped him off or picked him up. J did not talk to her about his nursery in Glasgow.

[170] J and SS lived in a comfortable two-bedroomed home 5 minutes' walk from J's nursery and her home. J had his own bedroom and it was well-furnished. The home was in a quiet location with a front and back garden. They had lived there since around April 2023 and J was very settled and happy. She visited their home at least twice a week and had no

concerns about their living situation. J had lived in five homes since birth but at no point had he seemed distressed or unsettled. He had always been a happy boy.

[171] SS and J were very settled in their current home and had a lot of family support.

LN was concerned that PD did not have the same support in Glasgow. LN's job was flexible and she was able to help watch J at any time that SS might need. Her father lived a five minute drive away and could also watch J at any time. SS also had lots of friends who were more than happy to help.

[172] LN thought the court should make an order because the parties could not communicate. In an ideal world they would be able to organise contact between themselves but they could not agree. She had seen some texts from PD sent to SS being very stubborn and quite intimidating so she could understand why SS struggled to communicate with him. An order was necessary because it was better that J had a routine to which both parents stuck. Recently, J had said when he left with his father that he was coming back, as if to reassure LN and SS. She worried that instability was starting to confuse him.

NC

[173] LC signed an affidavit dated 25 October 2023. She was not subject to cross-examination.

[174] She was the head teacher of the nursery in Fife and had been in the role for around 15 months. She had been employed in childcare and education for around 30 years.

[175] J started attending the nursery in January 2023. He attended every Monday until Thursday from 09.00 until around 15.00. He was usually dropped off and picked up by either his mother or his grandmother. Every other Thursday he was collected by his father.



She had met J's Mum and grandmother on a number of occasions but had not personally met his father.

[176] Since J started nursery he had settled in very well. He was a very sociable boy and had many friends. He always seemed very happy and content. He was progressing well and meeting all his milestones. There were no concerns about J at nursery and it appeared he was very happy attending.

[177] J's mother had taken him out of nursery for a few family days, which was normal for children whose parents worked if they got some days off. Although attendance at nursery was not compulsory, J attended very regularly and had a consistent routine. If he was off sick because he was not well, his Mum would always let them know. J had been off sick with bugs which was not uncommon for children of his age being around lots of different children for the first time.

[178] If his mother did not collect him, she made the nursery aware of who would collect him and prepared J. J and the nursery were always aware of who would collect him.

A password was required if another person was needed to collect a child. That had not been used because the nursery were always aware who would be collecting him. J seemed to know his routine and was settled in it.

[179] PD had requested further information on who would drop off and collect J and had asked for a spreadsheet with specific dates. The nursery policy was not to record who dropped off a child but they did record who collected them. PD had also asked for information on any injuries J may have suffered at nursery. They made PD aware that they recorded every injury a child had, no matter how small, but the protocol was not to inform parents unless they required medical attention. The reason being that in a nursery of around 100 three to four year old children, it was not possible to contact parents for every

fall or bump. They reassured PD they would contact parents if there was a significant injury. They had also offered to send PD a weekly overview of any minor injuries J may have had but he had not responded to that offer. PD was kept fully up-to-date with J at nursery as was his mother.

[180] It was evident that J had a really loving relationship with his mother. He was confident and sure of himself around her. It was clear she loved and cared for him. LC had not met J's father personally but staff had never raised any concerns. She believed J was loved and cared for by both parents.

[181] J would attend mainstream primary school in August. He could defer for a year as he would not be 5 by then but that was not expected to be necessary because he was a confident and social boy who she expected to adjust to his school routine well. Two primary schools were available in the area. All J's friends at nursery would be in the catchment area for those schools so would attend school with him should he stay in Fife.

[182] It appeared to her that J had a well-established family routine. J always appeared happy and settled and she had no doubt that his current routine worked well for him. She had no concerns about J's care.

### **Conclusions from the evidence**

[183] I found all the witnesses to be credible and reliable overall. PD was rightly very concerned about the risk to J that had been created by SS' relationship with AL. Some of his other concerns tended to be slightly exaggerated, such as his misgivings about SS' use of social media, which was understandable given the emotions involved in this case and might also be reflective of the age gap of 14 years between the parties. He and his family appeared

to hold negative views of SS and rejected the suggestion that she wanted to spend quality time with her son at the weekend, instead perceiving that SS was motivated by money.

[184] By contrast, SS and her family appeared to have more insight into how both parties loved and cared for J equally, but the practicalities of the geographical location of the parties, coupled with a change to SS' working pattern and J attending nursery midweek, necessitated a change to the pattern of childcare that had been in place since J was a baby in order that SS could have the opportunity to spend some quality time with her son.

[185] I accepted PD's evidence that SS unilaterally changed the status quo in February 2023. I also accepted that SS made proposals to PD in June 2022, September 2022 and January 2023 that weekly residential contact changed to alternate weeks, which were reasonable proposals given the change to her working pattern.

[186] SS was clearly upset when she gave evidence about AL's domestic abuse of her. She was candid that J was at risk during the time that she was in a relationship with him. Since then, she had worked with Women's Aid and educated herself. I accepted her evidence that she had not had any contact with AL since 17 December 2022.

## **Legislation**

[187] Section 11 of the Children (Scotland) Act 1995 provides:

### **"11 Court orders relating to parental responsibilities etc.**

(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;
- (c) guardianship; or
- (d) subject to section 14(1) and (2) of this Act, the administration of a child's property.

(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—

(a) an order depriving a person of some or all of his parental responsibilities or parental rights in relation to a child;

(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 alternately or periodically, with whom during what periods,

a child under the age of sixteen years is to live (any such order being known as a 'residence order');

(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')

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

...

(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;

...

(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.”

[188] Section 2 of the Children (Scotland) Act 1995 provides:

## **“2 Parental Rights**

(1) Subject to section 3(1)(b) and (3) of this Act, a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right—

- (a) to have the child living with him or otherwise to regulate the child’s residence;
- (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child’s upbringing;
- (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and
- (d) to act as the child’s legal representative.

(2) Subject to subsection (3) below, where two or more persons have a parental right as respects a child, each of them may exercise that right without the consent of the other or, as the case may be, of any of the others, unless any decree or deed conferring the right, or regulating its exercise, otherwise provides.”

## **Authorities**

[189] Parties referred me to the following authorities:

- *B v G* 2012 S.C. (UKSC) 293;
- *M v A* [2023] CSOH 80;

- *M v K* 2015 S.L.T. 469;
- *Porchetta v Porchetta* 1986 S.L.T. 105;
- *R, Petitioner* [2015] UKSC 35;
- *Sanderson v McManus* 1997 S.C. (HL) 55;
- *Strand-Lobben v Norway* (2020) 70 EHRR 14; and
- *White v White* 2001 S.C. 689.

### **Submissions for the pursuer**

[190] Detailed written submissions were lodged on behalf of PD, for which I was most grateful. In summary, the pursuer submitted that J's relationships with each of his parents were of equal importance. The status quo had come about because of decision making by the defender in her own interests. That decision had a demonstrably negative impact on J's relationship with PD, with whom he had a secure and significant attachment.

[191] J's care with SS had been marked by instability. Since unilaterally relocating to Fife with J, SS had moved a number of times with little regard for J's welfare. She had exposed J to a domestic abuser and a class A drug misuser. She had demonstrated little or no insight into those risks. There was a real and substantial risk of exposure to those risks or similarly serious risks in the future because of her lack of acknowledgement and insight.

[192] PD's circumstances were more conducive to performing the role of primary carer. SS was heavily dependent upon support of family members and others, which was likely to continue.

[193] Where the evidence of PD and his witnesses conflicted with the evidence led on behalf of SS, the court ought to prefer the evidence led on behalf of PD. SS was seeking to withhold information from the court that she considered would be unhelpful to her case,

such as the true nature of her shift patterns and the frequency of domestic abuse. The evidence of her mother and sister followed a similar pattern and the court should treat that evidence with considerable caution.

### **Submissions for the defender**

[194] Detailed written submissions were also lodged on behalf of SS, for which I was most grateful. In summary, the defender submitted that it was clear that J was well cared for and loved by both sides of his family, however SS' family in Fife was better placed to support J on a day to day basis. SS' mother was readily available to provide support and lived a 5 minute walk from SS' home. Her job as a carer was flexible and she assisted with pick up or drop off at nursery a few times per week and watching J for a few hours if required. SS also had support from her grandfather, who resided 15 minutes from her home. Her sister JS was also available to provide support when called upon.

[195] By contrast, PD's mother had to travel for her work, often to England. There may be times when she could not assist with J's care due to her work commitments. She also resided 45 minutes' drive from PD's home. His sister did not have the flexibility to assist with J's care that SS' family did. It was in J's best interests to continue to reside with SS where there was more family support. There was no significant benefit to the family support provided in Glasgow to justify a change in the status quo.

[196] While J had moved home a number of times, he was currently stable in his current home and routine. It was the stability of the residence that was important, not whether it was of permanent character. The social and family environment of J encompassed the nearby support network of SS' mother, sister and grandfather, who were all readily available to meet J's needs.



[197] SS did not seek to conceal or minimise any abuse she suffered. She readily acknowledged she did not understand nor recognise that AL was acting in a controlling nature at the time due to being a victim of domestic abuse, which was understandable and within judicial knowledge. Following the incident in December 2022, SS ended the relationship with AL. He had not been a part of her life nor J's life since that date and she now recognised the risk she had exposed J to at that time.

### **Decision**

[198] Parties had shared residence of J for a number of years. Though PD did not consent to J's relocation to Fife in 2019, the parties' arrangement whereby he had residence of J from Thursdays until Sundays as a minimum and regular time with J over and above that worked well and fitted in with the parties' respective work schedules. However, when J started nursery in Fife, the arrangement no longer worked well for SS.

[199] It is not unusual for childcare arrangements to change when a child starts nursery or school and when the parties live far apart from each other, logistical issues also have to be taken into account. It would be impractical for either party in this case to exercise contact with J for a few hours at a time after nursery or after school as some parents who live in closer proximity are able to do. It was more practical for contact to be exercised in blocks given the distance between the parties' respective homes.

[200] I considered that it was conducive to J's welfare to be able to spend quality time and take part in activities with each of his parents, rather than just one parent. I am pleased that the parties recognised this and agreed that the party with primary residence would have J one weekend out of four. However, that such an agreement was not reached until the morning of the proof was indicative of the difficulty that the parties experienced reaching a

compromise. That they could not even reach agreement upon which of them would have Christmas Day this year was a further illustration of such difficulty. I therefore determined that having regard to the welfare of J, it was better for J that an order for primary residence be made than that none should be made at all. Such an order would provide stability for J now and for when he started school in August 2024.

[201] In determining primary residence, in this particular case there were a number of neutral factors including that J had his own room in both parties' homes; had access to a garden at both parties' homes; had contact with extended family at both parties' homes; attended nursery near both parties' homes; and had friends at both nurseries that would be likely to go to the same school as J in the future.

[202] Though it was finely balanced, the main differences between the parties were the level of family support available and the physical proximity of such family support.

Whereas PD worked from home and had access to family support if required, SS worked away from home but had regular family support. While both parties' support networks were more than sufficient to ensure that J was well cared for at all times, SS' mother and grandfather had greater availability compared to PD's mother and sister. SS' family also lived slightly closer to her than PD's family lived to him.

[203] I took into account the need to protect J from domestic abuse and the risk of domestic abuse, as well as the impact of his mother's domestic abuse by AL in terms of section 11(7B).

Although J had been at risk during the time that SS was in a relationship with AL from June 2022 until December 2022, I was satisfied that SS had ended her relationship with AL and had not had any contact with him since 17 December 2022. I was also satisfied that she had engaged with Women's Aid. Had she continued in her relationship with AL, I would have considered J to have been at risk of domestic abuse.

[204] I also considered the parties' ability to co-operate with each other in terms of section 11(7D). The evidence showed that the parties had communication difficulties at times and found it difficult to compromise. However, PD indicated in his evidence that he was willing to facilitate weekend contact with SS in the event that she wished to attend a special occasion or event, provided that he was given sufficient notice by her. Similarly, SS was willing to agree to additional residential contact and indicated that if PD had an emergency and needed SS to watch J, she would do so without hesitation. I was satisfied that despite their differences in opinion as to J's primary residence and their poor communication, they were both capable of prioritising J in order to deal with matters affecting him.

[205] In all the circumstances, I was of the view that J was well cared for and loved by both sides of his family. However, SS' family in Fife were better placed to support J on a day to day basis than PD's family were. Consequently, I determined that J's primary residence should be with his mother, SS. The effect of such an order was that J would be able to spend quality time with each parent and would have stability prior to starting school in August 2024.

### **Expenses**

[206] Parties were agreed that there should be no expenses due to or by either party.