



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 69

F57/18

OPINION OF LORD BRAILSFORD

In the cause

ZR

Pursuer

against

SPR

Defender

Pursuer: Speir; Gilson Gray LLP

Defender: Scott QC, Brodies LLP

16 July 2021

[1] This is an action of divorce. The parties were married at Glasgow on 25 August 2002. There are three children of the marriage. Only one child, ZZR, who was born on 27 July 2012 remains under the age of 16 years. The parties separated on 19 May 2017 which is agreed to be the “relevant date” for the purposes of the Family Law (Scotland) Act 1985 (“the 1985 Act”).

[2] The action has a lengthy procedural history. Conveniently a full history of that procedural background is narrated between paras [3]-[16] in a note previously issued to parties¹ and need not be repeated herein.

¹ Number 158 of process

[3] In terms of the pleadings the pursuer seeks decree of divorce based on the parties non-cohabitation for 2 years or more; a residual order providing that ZZR reside with him for stipulated periods, which periods when totalled amount to essentially shared care with the defender. There are two further ancillary conclusions for interdict and interim interdict which were no longer live by the date of proof.

[4] The defender seeks a residence order that ZZR “reside principally” with her. Additionally she had six further conclusions relative to financial provision on divorce and a conclusion for interdict relative to the pursuer’s financial assets.

[5] The defender’s financial conclusions were a live issue until settled extra-judicially immediately prior to the proof. The terms of settlement were contained within a joint minute² lodged on 10 September 2020.

[6] At the commencement of the proof I was informed by parties that there was no dispute in relation to the granting of decree of divorce, subject to the court being satisfied that the requisite period of non-cohabitation was proved. It followed that at the outset of proof the issue remaining for the court at proof was the question of the residence of the child ZZR.

[7] In relation to the first conclusion, for divorce, I am satisfied that the parties have been separated since May 2017. This is based on the evidence of the pursuer and of his mother.³ I accordingly consider that it is appropriate to pronounce decree of divorce in terms of the pursuer’s first conclusion.

² Number 153 of process

³ See affidavit of pursuer dated 1 September 2020 at paragraph 3 and affidavit of his mother, SB or SBR, dated 1 September 2020 at paragraph 2

Statutory framework

[8] The law applicable to the outstanding issue in this action is to be found in section 11 of the Children (Scotland) Act 1995 (“the 1995 Act”). That provision 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—
- (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’);
- (3) The relevant circumstances mentioned in subsection (1) above are—
- ...
- (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.
- (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.”

Evidence

[9] The pursuer provided evidence relative to the matters remaining at issue by way of an affidavit dated 1 September 2020. The affidavit was supplemented by oral evidence and the pursuer was cross-examined.

[10] In addition affidavits were tendered on behalf of the pursuer by SB or SBR, MHR and SR. Reports were tendered from Dr Alison Harper and Alan Robb. Counsel for the defender elected to cross-examine none of these witnesses. Reports were also tendered from Dr Mary Keenan Ross and Professor Andrew Bradley but these witnesses were not tendered for cross-examination.

[11] The defender provided evidence by way of affidavits dated 11 February 2019, 3 July 2019, 31 August 2020 and 23 October 2020. The affidavits were supplemented by oral evidence and she was cross-examined.

[12] In addition affidavits were tendered from GF, NS, AR, SR, MRA and YR. Counsel for the pursuer cross-examined only AR and MRA. Reports were tendered from Dr Lisa Reynolds and Dr Boyd, counsel for the pursuer electing not to cross-examine either of those witnesses. An affidavit was tendered for AS but this witness was not made available for cross-examination.

[13] Beyond those sources of evidence it should be noted that the court had the benefit of six Child Welfare Reports which dealt with the views of ZZR in relation to the issues of his residence and contact. These were a report by an advocate dated 9 September 2018⁴ and five reports by a different advocate dated respectively 28 October and 20 November 2018, 8 July 2019 and 20 December 2019 and 20 August 2020.⁵

⁴ Number 10 of process

⁵ Numbers 13, 44, 55 and 116 of process

(i) Pursuer's case

(a) The pursuer

[14] The pursuer's affidavit dated 1 September 2020 was adopted as part of his evidence at proof and he was cross-examined on the terms thereof. The affidavit dealt with matters that go beyond the issue of the residence of the child ZZR with which the court is now concerned.

[15] The pursuer gave a history of the family's residence following marriage, which was not controversial. In short the parties resided with the pursuer's parents at their address in Glasgow for approximately 5 years after marriage. During that period the two elder children of the marriage were born. In addition to the parties, the pursuer's parents, the pursuer's brother and sister also resided at the said home. In July 2007 the parties and the two children of the marriage born at that time moved to Northampton to enable the defender to complete her training as a general practitioner. At the conclusion of the defender's training the parties and the two children returned to Glasgow, to a house which had been acquired in that city. This house remained the parties' matrimonial home until the date of separation in 2017.

[16] In relation to the children of the marriage the pursuer deponed that he had been actively involved in their care since each of their births. During the period when the parties lived in Northampton, at which time the two elder children were relatively young, and the defender was working full-time as a GP trainee, the pursuer's position was that he looked after the two children if they were not at nursery.⁶ His position in relation to the children on the family's return to Glasgow in 2008 was that initially the defender was employed in a GP practice in Motherwell. By this time the two elder boys were at school. The pursuer said

⁶ Pursuer's affidavit at paragraph 7

that he would take the children to school and pick them up from school “when required”.⁷ When the child ZZR was born and had started attending nursery it was the pursuer’s position that he would take that child to nursery and pick him up. It was also his position that with all three children he would be involved in such caring tasks as changing their nappies, bathing them and putting them to bed.⁸ The two elder boys initially attended a local authority primary school but subsequently attended a fee paying school in Glasgow. The youngest child, ZZR the subject of the current action, attended the same fee paying school as his brothers from the outset of his school education.

[17] Following the parties’ separation the pursuer deponed that he did not have contact with any of the children for a period of “maybe ... a week or to”.⁹ Thereafter a cousin of the defender acted as a community mediator between the pursuer and defender, the outcome of this mediation being that an arrangement was put in place whereby the pursuer would take the children to and from school on Tuesdays and Thursdays. In addition to this the pursuer took the two elder children to football training. He took ZZR swimming. He attended at the former matrimonial home “... a couple of evenings a week”.¹⁰ Arrangements for picking up and dropping off the children were said to have been arranged by exchange of text messages between himself and the defender. His position was that the “... messages were for the most part cordial and were in relation to the children and trying to see them more often.”¹¹ The pursuer further stated that at this time he would take the children to his parents’ home where they would spend time with himself and their grandparents.

⁷ Pursuer’s affidavit at paragraph 8

⁸ Pursuer’s affidavit at paragraph 8

⁹ Pursuer’s affidavit at paragraph 13

¹⁰ Pursuer’s affidavit at paragraph 13

¹¹ Pursuer’s affidavit at paragraph 13

[18] The current action was raised in August 2018 and the pursuer's position was that since that time "contact has operated largely as ordered by the court."¹² The pursuer deponed that the defender had been "a bit obstructive" in relation to the operation of contact.¹³ Notwithstanding that observation his position was that up until the onset of the Covid-19 pandemic and the restriction on social meeting in March 2020 he had taken all three boys to school each Tuesday and Thursday. In relation to ZZR he took him to maths tuition after school on Tuesday and then took the child to his parents' house where he would be given his evening meal. He would then return the child to the defender at around 7.30pm. On Thursdays the pursuer would again pick up ZZR from school and return to the boy's grandparents' house. He would again receive his evening meal and then do his homework at that house until being returned to the defender again at or about 7.30pm. At this stage the pursuer was also seeing ZZR on one Saturday from 12 noon to 8.00pm and the following weekend from Friday at 5.00pm until Sunday at 5.00pm. He conceded that this arrangement for the weekends was potentially inconvenient to the defender and recognised that there was merit in what he understood to be the defender's position to have uninterrupted time with ZZR, who would be in the company of his elder siblings, on some weekends.¹⁴

[19] Following the onset of the Covid-19 pandemic the pursuer's position was that his contact with ZZR was reduced. Between 3 April and 23 April 2020 the pursuer stated that he had "... some direct non-residential contact" with ZZR¹⁵ but this was terminated by the defender because she had concerns about the pursuer's family not adhering to social

¹² Pursuer's affidavit at paragraph 15

¹³ Pursuer's affidavit at paragraph 15

¹⁴ Pursuer's affidavit at paragraph 16

¹⁵ Pursuer's affidavit at paragraph 21

distancing guidelines. In fairness the pursuer accepted that his parents "... households observance to the guidelines in respect of the coronavirus pandemic were not as strict as they should have been."¹⁶ There was a consequent gap in contact until 21 July 2020 when direct contact resumed. Residential contact was resumed on 31 August 2020.

[20] Notwithstanding the crave for a residence order the pursuer's position at proof was modified and restricted in that he sought residential contact including holiday contact. His position was that it would be appropriate that ZZR have contact with him for one half of school holidays. He accepted that this need not involve consecutive weeks.

(b) SB or SBR

[21] The pursuer's mother confirmed that following the parties' marriage they resided with her and her husband at their home in Glasgow until 2007. She also confirmed the parties' residence in their own home in Glasgow from 2008 until the separation in 2017.

[22] The tenor of this witness's evidence was they did not see much of the parties when they lived in their own house in Glasgow. She did speak to the pursuer's contact with the children, and in particular ZZR, after the parties' separation. She confirmed that ZZR had stayed overnight at her house, with his father, following the separation until lockdown in 2020. Her evidence was that the pursuer "... had an excellent relationship" with his son. She described how contact was operated until lockdown. She was generally supportive of the pursuer's position in wishing residential contact to ZZR.

¹⁶ Pursuer's affidavit at paragraph 21

(c) *SR*

[23] SR is the pursuer's sister. She deponed that after the parties' marriage she "... didn't really communicate for 10 years" with her brother but during this period did see him at family gatherings.¹⁷ In relation to the period following the parties' separation she deponed that the pursuer and ZR have a "special, brilliant relationship".¹⁸ She was supportive of the pursuer's wish for residential contact.

(d) *MHR*

[24] MHR is the pursuer's father. His affidavit was confined to evidence relative to the financial claims in this action which, as aforesaid, have been resolved between the parties.

(e) *Dr Alison Harper*

[25] Dr Alison Harper is a chartered clinical psychologist. She produced two reports.¹⁹ Dr Harper's initial brief was to consider a psychological opinion obtained on behalf of the defender. The issues with which this part of Dr Harper's report were concerned were no longer an issue by the time of proof and therefore do not require to be considered.

[26] The remaining parts of Dr Harper's report and evidence was a consideration of the content and style of electronic messaging between the parties in 2018 and 2019. These messages were produced.²⁰ Dr Harper considered these messages as being of relevance in providing a real-time account of communications between the parties from which she felt able to form certain views. In essence her view was that "these messages are not indicative

¹⁷ Affidavit of SR dated 1 September 2020 at paragraph 2

¹⁸ Affidavit of SR at paragraph 3

¹⁹ Number 6/211 of process, report dated 3 March 2020 and number 6/212 of process, reports dated 3 August 2020

²⁰ Number 6/189 of process

of [the pursuer] holding any power or displaying any form of coercive control. Indeed it would appear that [the defender] holds control.”²¹

(ii) Defender's case

(a) The defender

[27] The defender swore three affidavits. She was cross-examined.

[28] There was no material dispute between the pursuer and the defender in relation to the chronology of their marriage. The defender's evidence covered issues relating to her views to the pursuer's exercise of parental responsibility in respect of the two elder children of the marriage who are no longer subject to the jurisdiction of the court. The defender's view was that the eldest child of the marriage appeared to her to have had a difficult relationship with his father, the pursuer. She considered that the eldest child was critical of his father's parenting. Her view was that there was no meaningful relationship between the pursuer and this child. In relation to the second child the defender gave evidence in relation to a number of incidents which, she said, caused that child to be anxious or afraid. As a result of this her view was that the second child also had a poor relationship with his father.

[29] More generally the defender was of the view that there was poor cooperation between her and the pursuer in relation to the children. Her evidence was that they had met rarely since the commencement of these proceedings. She said they did not speak on the telephone. Her evidence was that communication was confined to texts. She said that the pursuer was hostile towards her. She said that contact with the pursuer made her anxious. She has on a number of occasions required to visit her general practitioner and has been

²¹ Number 6/212 of process entry number 18

diagnosed with an adjustment disorder with mixed anxiety and a depressive reaction. This condition has detrimentally affected her ability to work.

[30] The defender further expressed trenchant views in relation to the suitability of the pursuer as a person able to offer appropriate parental direction and guidance to ZZR. She gave evidence that during the course of the marriage the pursuer had displayed poor self-control, citing three occasions when he lashed out at objects injuring both himself and the objects or furniture which he struck. She also stated that he was aggressive and made threats and used aggressive behaviour towards her and was abusive to her. She asserted that the pursuer was involved in damage to cars belonging to her family. Beyond this she cited as adverse adminicles indicative of the pursuer's inability to provide appropriate parental direction the pursuer's mendacity, exemplified by the court's adverse findings on his reliability and credibility in relation to his financial affairs and an occasion when he failed to pay the children's school fees without, in her view, adequate explanation. She also gave evidence of her belief that the pursuer used cocaine and cannabis.

[31] The defender also expressed concerns about the pursuer's ability to ensure the child's safety if he was in the pursuer's care. This fear was founded first upon a complaint ZZR had made about being frightened when in a car when the pursuer was driving erratically. Beyond this she was concerned that the pursuer had been aggressive and angry in the evening if he was tired to the distress of ZZR. On a differing basis she was concerned that the pursuer had health concerns which might reduce his ability to care for ZZR's safety. In that regard she noted that in the course of giving evidence on 10 September 2020 the pursuer became ill and required to be assisted from the witness box and an ambulance was called to court. There was a further occasion in February 2019 spoken to by the defender when the pursuer had returned ZZR to her care during a period of contact because he

required to admit himself to hospital in relation to his heart complaint. The defender's concern was that ongoing conditions with his heart might interfere with his ability to care safely for ZZR.

(b) *GF*

[32] GF is depute rector at the school attended by all three children. She gave evidence concerning the two eldest children of the marriage. She said that the defender had always been "very on-board with the children".²² GF was made available for cross-examination but the pursuer elected not to subject the witness to cross-examination.

(c) *NS*

[33] NS has been employed for a number of years as a cleaner by the defender in her house. She deponed that she had extremely limited contact with the pursuer having seen him, and then briefly, on only two occasions. Beyond that she spoke in positive terms about the defender's relationship with her children and the level of care that she exhibited towards them NS was made available for cross-examination but the pursuer elected not to exercise this opportunity.

(d) *AR*

[34] AR is the defender's brother. He deponed about his knowledge of the defender's separation from the pursuer. He was summoned to a family meeting at the time of the separation. His evidence was that the defender was "in a state of disbelief about what

²² Affidavit number 145 of process at paragraph 6

happened".²³ He also said that the defender had at that time made allegations about things the pursuer had done to the defender. He finally spoke to financial assistance that he and other members of his family had provided to the defender following her separation. AR was made available for cross-examination but the pursuer did not avail himself of this opportunity.

(e) SR

[35] SR is the defender's sister. In her affidavit she deponed about the history of the parties' relationship and marriage. She provided positive evidence in relation to the defender's care for the children of the marriage. She confirmed that the two elder children have very little contact with the pursuer. She "... did believe that it was important for the boys to see [the pursuer]" but expressed concerns that as ZZR got older his father, as she suggested he had done with the elder boys, might take less interest in him. The witness was made available for cross-examination but the pursuer did not avail himself of this opportunity.

(f) MRA

[36] MRA is the defender's brother-in-law. He spoke to an occasion in May 2018 when his evidence was that the pursuer contacted him wishing to speak to him about his and the defender's eldest son. MRA said that the pursuer took objection to his speaking to the boy on an occasion when they met at the principal mosque in Glasgow at Friday prayers. He said that the pursuer was aggressive to him. Beyond this MRA gave evidence that on 13 December 2018 he and his wife were going to bed in their house in Glasgow. He said that

²³ Affidavit number 143 of process at paragraph 2

they heard noise outside. His evidence was that he saw three men running away from his car and his wife's car. Both cars had been attacked their windows smashed, panels damaged and tyres slashed. He said that the incident was reported to the police. He said the next morning when he was dropping his child off at school, the same school attended by the pursuer's children, he saw the pursuer "... looking at me, smiling and laughing and again he was trying to provoke and intimidate me." He said that "I just know he is responsible for these attacks." The attacks he was referring to were the attacks on his and his wife's car.

(g) YR

[37] This witness is the middle child of the parties. He spoke to a number of occasions when he said he had been concerned or frightened by his father's conduct.

Submissions

(i) The pursuer

[38] The pursuer's submission on the sole issue remaining for the court's determination was that it was appropriate, necessary and in the best interests of ZZR to continue to have contact with his father.

[39] In support of this position counsel argued that prior to the parties' separation the pursuer had a normal parental loving and close relationship with all three children of the marriage. He was engaged in all aspects of their upbringing albeit it was recognised that in some matters, education and schooling were exemplified, the defender took the lead in discharging parental responsibilities. At the time of separation parties were initially able to manage contact with the assistance of mediation conducted by a community representative. The submission was however that this broke down because of the defender's unwillingness

to extend it to include residential contact. Notwithstanding this difficulty the pursuer had, it was submitted, maintained personal relations with the two elder children of the marriage initially by court order but more recently through the free exercise of choice by these persons.

[40] It was also submitted that the defender accepted that it was in the best interests of ZZR to both preserve and develop a good relationship with his father. There was no opposition in principle to the issue of contact. Since March 2019, and notwithstanding the difficulties created by the Covid-19 pandemic, contact had been maintained between the pursuer and ZZR. This was initially both non-residential and residential contact albeit in the more recent past there had only been non-residential contact. No welfare issues had been raised by the defender in relation to the exercise of such contact.

[41] Any health concerns that the defender had in relation to the extent the pursuer's health might impede his ability to care safely for the child, were capable of being managed by the imposition of conditions. In relation to the applicable law my attention was drawn to sections 1, 2 and 11(1) and (7) of the Children (Scotland) Act 1985 ("the 1985 Act"). Whilst my attention was drawn to these statutory provisions it was submitted to be trite that cases involving children will inevitably turn on their own facts and circumstances. It was acknowledged that case law was of limited assistance in these circumstances. It was accepted that any cases referred to were only of general assistance. Notwithstanding that important caveat my attention was drawn to five decisions.²⁴

[42] In considering the evidence against the background of his general submissions and the law counsel initially acknowledged that, with particular regard to the pursuer, there

²⁴ *White v White* 2001 SC 689; *J v J* 2004 Fam LR 2; *Perendes v Sim* 1998 SLT 1382; *Brannigan v Brannigan* 1979 SLT (Notes) 73 and *H v H* 2010 SLT 395

were issues of reliability and credibility. Counsel acknowledged, as in fairness had his client whilst giving evidence, that adverse findings of credibility had been made against him in relation to financial aspects in the present case. It was acknowledged by counsel that the pursuer had been subject to extensive cross-examination in relation to issues relating to his disclosure of financial issues. The position on behalf of the pursuer was that, contrary to the position adopted by counsel for the defender, it was wrong to conflate the accepted issues of trust in relation to financial matters as a relevant component in respect of care of the children. In that regard it was observed that notwithstanding the pursuer's admitted lack of candour at an earlier stage in these proceedings relative to his financial dealings and disclosure thereof to the defender and the court the parties had ultimately been able to agree a resolution of the financial claims in this case. Other aspects of the pursuer's financial dealing which had been raised during the course of evidence, there was particular reference to the failure to meet a payment of school fees at the due date, were either unsubstantiated or explained in evidence in an acceptable way by the pursuer.

[43] Having regard to the foregoing considerations it was submitted that the proper focus for the determination of issues and creditability and reliability should be to consider how the parties respectively approached important evidence relating to the welfare of their children, particularly ZZR. In relation to that the court was invited to consider the pursuer's evidence of those matters truthful, balanced and insightful. It was said that the pursuer's evidence displayed an understanding of the needs of his children, particularly ZZR. It was submitted that there was no basis for concluding that the pursuer was incredible or unreliable in relation to his evidence relative to the children.

[44] Going further counsel for the pursuer criticized aspects of the defender's evidence in relation to the pursuer and the children. It was submitted that there was an exaggeration of

the significance of alleged past conduct in relation to the older children. It was further submitted that the defender was fundamentally unwilling to credit the pursuer with any conduct, attitude or insight that might have merit. Having regard to these considerations it was submitted that the pursuer's evidence in relation to the central issue of the pursuer's ability to properly discharge his parental responsibilities in relation to the child ZZR should be approached on the basis that the pursuer's account was more credible and reliable than the defenders.

[45] Lastly the court's attention was drawn to the views of the child ZZR himself. In that regard the submission was that ZZR was clear when speaking to the reporter that he wanted to maintain a relationship with his father, the pursuer. On the last occasion he was seen by the reporter, which was shortly prior to the proof, he said that he wanted to see his father three times a week.

(ii) The defender

[46] On appreciating that the pursuer's position had modified at the submission stage and that, in particular, the case for a shared care parenting arrangement had been departed from the defender's submission became focused on the issue of contact between the pursuer and ZZR. Having regard to that consideration the principle behind the defender's submission was that the pursuer has not demonstrated effectively the ability to exercise parental responsibility in respect of the two elder children. As a matter of inference he therefore lacked the capacity to be an effective parent in relation to ZZR. Beyond that it was submitted that the pursuer was a poor role model for his son and unlikely to provide effective direction and guidance. It was lastly submitted that there were material risks to

ZZR's well-being while in the pursuer's care including questions of safety which required to be managed.

[47] There was agreement with the pursuer that the court required to have regard to the provisions of, in particular, section 11 of the 1985 Act. No dispute was taken with the pursuer's counsel's general submissions in relation to the applicability of any case law.

[48] In relation to discharge of parental responsibility and parenting capacity it was submitted that the pursuer was mendacious, inconsistent and not trustworthy. Reliance was made on the pursuer's admitted lack of candour in relation to disclosure of his financial assets at an earlier stage in this litigation and to the fact that there had been both a finding by the court that he had been incredible and unreliable in relation to disclosure of financial assets and, moreover, had accepted that finding.

[49] Reliance was further made on the fact that the pursuer had displayed aggression to the pursuer herself and on a number of occasions exercised less than complete control and behaved in a manner which caused concern and possibly fear to the children of the marriage.

[50] In relation to safety whilst it was accepted by counsel for the defender that none of the children had ever suffered significant physical harm whilst in the care of the pursuer there had, as aforesaid, been a complaint of an assault by the middle child.

[51] The pursuer's own health was relied upon as a potential aspect of a risk to the safety of ZZR when in the care of the pursuer. This submission was predicated upon the pursuer's admitted heart condition and what was said to be proven facts, that on two important occasions, once (in February 2019) during a period of contact, the other when giving evidence in court he had suffered apparent cardiac episodes which required medical intervention. The fear as expressed by counsel was that if in sole control and charge of ZZR

during any future cardiac episode, particularly if holiday contact was permitted, ZZR could be placed in a position where there was no adult to take immediate responsibility for his care and safety.

[52] In overall summary counsel for the defender's submissions were that all concerns could only properly be answered if a residence order was made providing that ZZR should reside with her. There was no objection in principle to a contact order in relation to ZZR but that should be on a non-residential basis each Wednesday after school until 7.30pm and each alternate weekend on a Saturday from 8.30am to 8.30pm.

Conclusions

(a) Credibility and reliability

[53] In my note dated 20 May 2020 I made adverse findings relative to the pursuer's reliability and credibility in relation to the disclosure of financial information in the context of financial claims in this action. Beyond that the pursuer when giving evidence in the proof with which I am now concerned expressly accepted that he had not been candid and open with the court in relation to the disclosure of his financial interests at an earlier stage in this case. Having regard to these factors there is objective evidence which not only entitles but obliges me to approach the evidence of the pursuer with caution. I am however equally obliged to consider the proposition, properly advanced by counsel for the pursuer, that it would be wrong to axiomatically conflate lack of candour in one aspect of a witness's evidence with lack of candour in another. I require to consider the pursuer's evidence in relation to the issue of care of his children and contact separately from the way in which I approached, and would have approached in proof had it remained live his evidence in relation to financial matters. When considering the pursuer's evidence in this way, critically

but with an open mind, I am bound to state that there was nothing in his demeanour when giving evidence about his children that would cause me to suspect or doubt his candour. He appeared to genuinely care for his children, including the two older ones with whom by his own candid omission he has experienced and is currently experiencing a strained relationship. It is also fair to say that he appeared to be candid in relation to a number of incidents that have occurred in the past. His position in relation to, for example, the episode where his middle child was said to be frightened by his behaviour was to acknowledge that there had been an incident but to suggest that it had been exaggerated in the telling. The circumstances of the incident would suggest that his account is not without plausibility.

[54] Having considered these matters I am not prepared to accept that there are objective reasons to find the pursuer incredible in relation to his evidence regarding care of the child ZZR or in relation to his evidence anent contact.

[55] There was a submission, relative to reliability and credibility, by counsel for the pursuer in relation to the defender. The tenor of that submission was not, as I understood it, a direct challenge to the reliability and credibility of the defender rather that she had exaggerated in relation to some of her evidence anent the pursuer's behaviour and, on a related matter, was unreasonably unwilling to give the pursuer any credit for any conduct by him in relation to the discharge of his parental responsibilities towards his children and in particular ZZR. I agree with the submission that there is no basis for an adverse finding of reliability and credibility so far as the defender is concerned. I am however prepared to accept, based on the defender's demeanour in the box and having regard to some of her evidence in relation to the WhatsApp correspondence with her husband in 2019 and 2020, that there may be some basis for considering that she exaggerated the deficits of the pursuer. Even if that be incorrect it did appear to me, again based on her evidence, that the defender

appeared either unwilling or unable to see any merit in the pursuer. Having regard to the circumstances of the breakdown of the parties' marriage, there seems no doubt on the evidence that the separation at the instance of the pursuer was entirely unexpected and unwelcome by the defender, this is perhaps understandable. The factor does however have to be considered when assessing the evidence.

(b) General

[56] I am satisfied that the generality of the evidence is relatively clear. Prior to separation both parents shared in the care of their children. As was accepted by the pursuer there were tasks in which the defender took the leading role. Education and what I might term domestic care fell into that category. Day trips and sporting activities appear to have been more the sort of tasks undertaken by the pursuer.

[57] After separation the children resided with the defender, a situation which has not changed. Although some initial non-residential contact was arranged with the assistance of a community mediator there appears to have been a reluctance by the defender to constructively engage in an extension of that into residential contact. The court required to intervene and there was what I would regard as unusually active intervention by the court in attempting to assist the extension of contact. This process met with limited success. Contact ultimately became very restricted by the older children whose choice was, having regard to their age, an ever increasing and ultimately dominant factor. Contact did however continue on both a residential and non-residential basis with the youngest child ZZR. Notwithstanding ongoing friction and difficulties in communication between the parties this has remained the situation.

[58] Notwithstanding the volume of evidence in this case I have determined that there is no reason why the pursuer should not continue to exercise contact with ZZR. The child's wishes are, as obtained by the child welfare reporter, plainly that contact with his father should continue. Whilst I accept that there have been incidents in the past which may have caused the elder children a degree of concern I also have to consider the fact that these were limited in number, the evidence available to the court may have been exaggerated having regard to the overall circumstances of the events and that none of the events concerned the child ZZR. I am not persuaded that any of these events would of themselves preclude contact. Equally I am not satisfied that concerns over the pursuer's health, primarily his cardiac issues, are of such severity that they should preclude or materially limit the amount of contact he should enjoy with ZZR. The one area where I am persuaded that this element is relevant is in relation to the claim for holiday contact. It is plain, in fact undisputed, that the pursuer has a longstanding cardiac condition. Whilst this appears to be under control it has on at least two occasions required medical intervention on an emergency basis. I am satisfied that if such an event occurred when ZZR was one his own with his father on holiday this could raise legitimate concerns regarding that child's safety. For that reason I am not prepared to sanction holiday contact without some further indication as to safety precautions which could be put in place during any holiday period, for example by the presence of a further adult person who could assume temporary responsibility for the child in the event of a medical incident.

[59] Having regard to all the foregoing I will allow the pursuer contact to the child on both a residential and non-residential basis. I would be content if the parties were to agree the times and dates of such contact of their own accord but which failing I will put the case out by order for determination of that matter.