OUTER HOUSE, COURT OF SESSION

[2025] CSOH 13

F25/23

OPINION OF LORD STUART

In the cause

NF

Pursuer

against

AF

Defender

Pursuer: Party, Bain as lay representative
Defender: Bowan KC, Cartwright; MHD Law solicitors
***Curator ad litem*: Allison; Millard Law solicitors**

5 February 2025

Introduction

[1] In this action, remitted from the Sheriff Court at Edinburgh, the parties seek orders in respect of their children. This opinion follows proof.

[2] The parties entered into a relationship in 2000 and were married on 20 September 2014. There are two daughters of the parties' relationship. I will call them Mary and Anne to make them real whilst respecting their anonymity. Mary was born on 17 June 2008. Anne was born on 21 September 2011. In order to represent the interests of Mary and Anne, the court appointed Ms Shewan *Curator ad litem*. Ms Shewan entered proceedings and

participated in the proof. Given that Mary has now turned 16, the court no longer has power to make any orders sought in relation to her.

[3] Following proof, the pursuer sought a residence order requiring Anne to reside with him, which failing an order for direct contact between himself and Anne. The defender sought a specific issue order allowing her to remove Anne from the UK for a period of up to 21 days in each calendar year without requiring to seek the pursuer's prior consent to that removal.

[4] Notwithstanding that, on the basis of the evidence and the productions to which I was referred, I have reached my conclusion in relation to the respective orders sought without any real hesitation, a considerable amount of the evidence led before me has caused me some concern from the perspective of the best interests of Anne and Mary. That concern is twofold. Firstly, Anne and Mary's understanding of their father's actions, both before and after their parents separated might not be accurate and I consider it in their best interests to understand the factual circumstances disclosed by the evidence led before me. Secondly, on the basis of the evidence before me, there is a strong suggestion that the pursuer and his relationships with Anne and Mary have suffered significantly and, again, I consider it in Anne and Mary's best interests to know that. As was submitted by counsel for the *curator ad litem* (the advocate I appointed to represent Anne and Mary's best interests in these proceedings) after hearing the evidence in this case, Anne and Mary would benefit from being disabused of any material misapprehensions they are under, particularly regarding their father.

The relevant legal framework

[5] The orders sought by the parties relate to parental responsibilities and rights and, as such, are governed by the legal framework set out in the Children (Scotland) Act 1995 ("1995 Act"). So far as relevant to my decision, the 1995 Act provides as follows:

> **"1.— Parental responsibilities**
> (1) Subject to Section 3(1)(b), and (d) and (3) of this Act, a parent has in relation to his child the responsibility—
> (a) to safeguard and promote the child's health, development and welfare;
> (b) to provide, in a manner appropriate to the stage of development of the child—
> (i) direction;
> (ii) guidance,
> to the child;
> (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
> (d) to act as the child's legal representative.
> but only in so far as compliance with this Section is practicable and in the interests of the child.
> (2) *'Child'* means for the purposes of—
> (a) Paragraphs (a), (b)(i), (c) and (d) of Subsection (1) above, a person under the age of sixteen years;
> …
>
> **2.— Parental rights.**
> (1) Subject to Section 3(1)(b), and (d) 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.
> (3) Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in Subsection (6) below.

(4) The rights mentioned in Paragraphs (a) to (d) of Subsection (1) above are in this Act referred to as *'parental rights'*; and a parent, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those rights.

…

(6) The description of a person referred to in Subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right mentioned in Paragraph (a) or (c) of Subsection (1) above; except that, where both the child's parents are persons so described, the consent required for his removal or retention shall be that of them both.

(7) In this Section, *'child'* means a person under the age of sixteen years.

11.— Court orders relating to parental responsibilities etc.

(1) In the relevant circumstances in proceedings in the Court of Session … 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'*);

(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'*);

…

(2A) An order doing any of the things mentioned in subsection (2) is to be regarded as an order in relation to at least one of the matters mentioned in subsection (1).

(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—

…

(ii) has parental responsibilities or parental rights in relation to the child;

…

…

(5) In subsection (3)(a) … above 'person' includes (without prejudice to the generality of that subsection) the child concerned; but it does not include a local authority.

…

(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

(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.

…

(10) Without prejudice to the generality of paragraph (b) of subsection (7) above, a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view for the purposes both of that paragraph and of subsection (9) above.

…"

[6] As set out in section 11(7)(a), when considering whether or not to make an order under section 11(1) and what order (if any) to make, the court 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. Further, section 11(7)(b) requires, so far as practicable, the court to give the child an opportunity to express a view in relation to the orders sought and, if the child does seek to express a view, have regard to that view.

[7] In terms of judicial interpretation of section 11(7), in the case of *NJDB* v *JEG* [2012] SC (UKSC) 293, Lord Reed observed at paragraph 31:

> "When the court is requested to exercise its discretion to make an order under section 11 of the 1995 Act, it is required, as I have explained, to regard the welfare of the child as its paramount consideration, and it must not make any 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: section 11(7)(a). The central issue in such a case is therefore the effect of an order upon the welfare of the child. In carrying out the duties imposed by section 11(7)(a), the court is required to have regard to a number of specified matters, including the need to protect the child from any abuse (defined as including any conduct likely to give rise to distress), and the need for the child's parents to co-operate with one another: section 11(7A)-(7E). In addition to the matters specified in the Act, the court will also require to consider any other matters which bear directly upon the issues focused in section 11(7)(a), such as the child's needs and any harm which the child is at risk of suffering. The court is also required to have regard to the views of the child, so far as those may be ascertainable: section 11(7)(b). Against that background, a judgment will most clearly address the central issue in the case if it focuses directly upon the factors which are relevant to the court's exercise of its discretion, rather than concentrating primarily upon the myriad questions of fact which may be in dispute, many of which may be peripheral

> to that central issue. It is of course essential that the court's findings on any relevant matters of fact should be made clear, but that can be done within the ambit of a judgment whose primary focus is upon the central issue, and which in consequence demonstrates the nexus between that issue and the findings of fact."

[8] In *White* v *White* 2001 SC 689, (a case referred to twice by Lord Reed in *NJDB* with apparent approval) the Lord President (Rodger), with whom the other members of the First Division agreed, in discussing the proper judicial approach to section 11(7)(a) said at para [21]:

> "The court must consider all the relevant material and decide what would be conducive to the child's welfare. That is the paramount consideration. In carrying out that exercise the court should have regard to the general principle that it is conducive to a child's welfare to maintain personal relations and direct contact with his absent parent. But the decision will depend on the facts of the particular case and, if there is nothing in the relevant material on which the court, applying that general principle, could properly take the view that it would be in the interests of the child for the order to be granted, then the application must fail."

[9] Counsel for the *curator ad litem*, also made reference in his submission to the obligations on the court to act in a manner that is compatible with the respect for the family life of both parents and their children under Article 8 of the European Convention on Human Right ("the Convention") and the balancing of competing interests between parents and children. In *White* v *White*, at paragraphs 24 and 25, the Lord President (Rodger) wrote:

> "24 … [T]he European Court has held that the obligations on a State may involve the adoption of measures designed to secure respect for family life even in the sphere of relations between individuals, including the provision of an adjudicatory and enforcement machinery protecting individuals' rights. In all respects regard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties. See *Glaser v United Kingdom*, at para 63. More particularly, the obligation of the national authorities to take measures to facilitate the non-custodial parent's contact with his children after divorce is not absolute and any obligation to apply coercion must be limited since the interests, as well as the rights and freedoms, of all concerned must be taken into account. More particularly, the best interests of the child and his or her rights under art 8 of the Convention must be considered. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance: *Glaser* , at para 66. In *Elsholz v Germany*, the court had already observed (at para 50) that a fair balance must be

> struck between the interests of the child and those of the parent and that 'in doing so particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular, the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development.'
>
> 25. These passages are sufficient to suggest that the structure of our law complies with the requirements of art 8 since it respects family life and contains provisions enshrined in legislation for balancing the competing interests of the various members of the family. In making regard for the child's welfare the paramount consideration, sec 11(7)(a) is in conformity with the approach laid down by the European Court."

Accordingly, where the court, in making a decision under reference to section 11(7) of the 1995 Act, follows the guidance of the United Kingdom Supreme Court and Inner House of the Court of Session cited above, it will correctly apply the test in section 11(7) of the 1995 Act and act in accordance with any competing interests of parents and children and their respective rights to family life.

The relevant evidence

The pursuer

[10] Throughout the principal part of this case and at proof the pursuer acted on his own behalf. A Ms Bain was given permission by the court to act as the pursuer's lay representative at proof. The pursuer had lodged an 80 page statement and some 204 productions. At the outset of his evidence in chief the pursuer adopted his statement. The statement contained a considerable degree of detail, a reasonable amount of which was supported directly or by reasonable inference, from productions referred to in the statement. Some parts of the pursuer's statement were more material than others to the "live" issues at proof. The first half of the statement addressed the parties' relationship prior to separation. The pursuer sets out the early stages of the parties' relationship. He seeks to explain where

and over what the parties argued. He describes what he calls the defender's fears and "red lines", beyond which the defender would accuse him of acting in an abusive or threatening manner and as a result of which he incrementally lost his autonomy or ability to discuss issues freely with the defender. The pursuer narrates at some length his involvement with parenting Mary and Anne, stating, and giving examples in support of the fact, that he was fully involved with both children and that his parenting style was more relaxed than the defender's. The pursuer specifically acknowledges that the defender "was always a loving parent committed to what she believed best for her children" and that she "was a committed parent devoted to the children's education but [their] approaches were different." The pursuer acknowledges that:

> "right to the end of their relationship [the defender's] creativity in all kinds of ways was one of her attributes that [he] enjoyed and cherished and often complemented to friends with pride."

The parties' married on 20 September 2014. In around the summer of 2018 the parties engaged in counselling. This involved a number of individual sessions with the same counsellor before the parties had a joint session with the counsellor. The pursuer narrates that it became clear to him at that joint session the defender had told the counsellor things the defender knew to be false. This was the first time in the parties' relationship that the defender had ever suggested in his presence important falsities about their relationship that both she and he knew to be false. Thereafter the pursuer became concerned and attempted to discuss with the defender her plans, suggesting that it would be better for the children if they had a planned separation. On 2 February 2019 the pursuer departed on a business trip. By email timed and dated 09.25am on 4 February 2019 the defender wrote to their company's business manager requesting keys to the business premises (63/196 of process is a copy of the email). At 09.21am on 5 February 2019 the defender sent a text message to the

pursuer asking what time he would be home and at 09.22am the pursuer replied, "Maybe 6-7" (63/147 of process is a copy of these text messages). The pursuer arrived home shortly after 6.00pm at which point the defender had vacated the house with the children. A lot of the children's clothes and some of their favourite possessions had also been removed. The pursuer and defender exchanged brief messages thereafter on that day. On 7 February 2019 the pursuer attended a school show in which Mary had a part. After the show Mary "ran straight to me to receive my congratulations and shared extended hugs." That was the last time the pursuer spoke to Mary. The pursuer states he could not imagine anything that the defender could use against him, but he references two contemporaneous emails to friends dated 6 and 7 February 2019 (63/154 and 63/147 of process) where he expresses concern that the defender "will go hardcore", "play dirty" or be "uncompromising".

[11] At around 09.00am on 8 February 2019 the police rang the pursuer's doorbell. After a few hours of searching the pursuer's house the police arrested him, saying they had found illicit pornographic materials (the "illicit materials"). Had the pursuer been remotely aware that illicit materials were in the house, he would have urgently disposed of them. The pursuer states that during his interview by the police, the police confirmed that they had found disks containing indecent materials, that the defender had told them where to look but that the defender had "gone out of her way" to assure the police that she had no reason to suspect contact abuse. At interview the pursuer said that he had nothing to do with the materials being downloaded or the disks being made and that he had not known they were in the house. He had no interest in such materials. The pursuer declined to respond to a question from the police whether he, the pursuer, was accusing the defender of planting the materials. The pursuer felt he was acting in the best interest of the parties' children. The pursuer's telephone was seized and examined by the police and returned to him having

been found to be "clean". The pursuer's trial in relation to possession of the illicit materials was delayed, mostly due to Covid. During the delay the pursuer decluttered his house, during which time he found a number of items that would be used at trial in his defence, and which helped him being acquitted. The pursuer was tried in connection with the illicit materials between 7 to 14 June 2021. He was acquitted by the jury. The defender had testified at his trial. The defender gave evidence that she found the disks containing the illicit materials by chance on 4 February 2019, when packing in preparation for leaving the house with the children. At his trial the pursuer's defence made reference to two notebooks containing "to-do" lists written in the defender's handwriting (see 63/155 and 63/156 of process). These dated from 2010 and 2015. The pursuer's defence also referred to distinctive overlaps between elements of the illicit materials and notes made by the defender (and to a more limited extent himself) in connection with the defender's ideas for a television programme project. The pursuer referred to various documentary productions, including 63/157, 63/168 to 63/172. I infer from the pursuer's statement that the defender's interest in her The Company project stopped in or around 2003.

[12] The pursuer states that the defender had showed him images contained on CD or DVD disks in or around late 2002. The purser was shown images on three separate occasions. The images became increasingly severe on each occasion. On the third occasion the defender showed the pursuer images from six to ten discs over a period of about an hour, which included moving images of child pornography and child abuse. The pursuer cried at times. He was horrified and distraught and protested that the images were illegal. The defender's purpose was to determine whether the pursuer would be a risk to any children they might have. The defender removed the disks from a black case like the one found by the police on 8 February 2019. The defender told the pursuer she would destroy

the disks immediately. In 2015 the pursuer was disposing of various media when he found a black CD/DVD case. Inside were disks he thought he recognised. The pursuer discussed the disks with the defender. The defender told the pursuer that they were disks she had made in around 2002 that she had forgotten to throw out. The pursuer states that he "never saw the folder or disks again until the police showed [him] them on 8 February 2019."

[13] The pursuer's statement contains reference to what was referred to at the proof as "atypical sexual practices". A number of productions are referred to, for example 63/159 to 63/167. From the pursuer's statement these references appear to relate to the period prior to the children's birth. I do not consider them to be materially relevant to the issues before me and, accordingly, I do not narrate what is said about them further.

[14] The pursuer's statement also addresses allegations made against him regarding his behaviour towards the children, including allegations of sexual abuse of his daughters. I will return to these when I discuss the source of the allegations and the potential ramifications of the allegations. At this stage it is sufficient to state that there is no credible evidence of the pursuer ever being involved with any sexual abuse, or indeed any abuse, in connection with his children.

[15] The pursuer's statement goes on to discuss the defender's baseless reports to the police, the defender entering, without the pursuer's permission or notification to the pursuer, the house in which the pursuer was then living, the defender seeking to influence the children against him, including giving the children inappropriate and false information, coaching the children and the defender blaming the pursuer for adverse events in the defender's life (and thereby the children's lives), all under reference to a significant number of productions lodged in support. Again, whilst the matters raised by the pursuer in connection with these issues are, I accept, unquestionably matters of considerable

importance and relevance to the pursuer insofar as his own experiences and might well have relevance elsewhere in my assessment of this case, insofar as relevant to my assessment *of the pursuer* vis-a-vis the issues before me, this evidence is not material.

[16] The pursuer states that prior to the parties' separation, he had a healthy relationship with both Mary and Anne. In relation to contact between himself and the children after the parties' separation, as set out above, the pursuer last spoke with Mary on 7 February 2019, two days after the parties separated. The pursuer last saw Anne in June 2022 when he met her at a café following Anne expressing a desire to see her father. The pursuer has had no direct or limited indirect contact with either Mary or Anne and has been denied any meaningful information or involvement in relation to all aspects of the lives of both children, for many years.

[17] The pursuer gave brief oral evidence in chief to supplement his statement. Beyond reiterating matters covered in his statement, the pursuer described Mary as bright, intelligent, playful, strong-minded and strong willed. He described Anne as being emotionally intelligent, very loving, playful and sometimes naughty (which I interpreted as being said with a degree of fondness). Anne's defining characteristic was in her social relationships. Before separation, the pursuer enjoyed a fantastic, quite normal, loving and enjoyable relationship with both children. In relation to the incident that was recorded in some of the documentary materials and the defender's affidavit, the pursuer confirmed that he had been working upstairs. The children and defender were downstairs. There was a kerfuffle downstairs. The defender called his name. He went downstairs to the living room where Mary was engaged in a physical altercation with the defender. Mary had lost her self-control. Mary was around 5 or 6 at the time. The pursuer put his arm around Mary to control her. The pursuer "manoeuvred" Mary upstairs and put - not threw - her on her bed.

The pursuer told Mary that she could come downstairs again once she had calmed down, which Mary did after a short period. Mary subsequently apologised for her actions. The pursuer also subsequently apologised to Mary. That was the only such time something like that happened with Mary. The pursuer denied ever hitting Anne. In response to the specific question put, the pursuer confirmed he had never hit Anne as asserted by the defender.

[18] In cross-examination by counsel for the defender, it was put to the pursuer, under reference to the reports prepared by Dr MacKinlay (to which I return below), that any orders for contact between the pursuer and Anne would be detrimental to her welfare. The pursuer stated that he accepted that for reasons profoundly misguided both Dr MacKinlay and the *curator ad litem* had reached that conclusion. The pursuer stated that whilst his relationship with the defender might have completely broken down from the defender's side, it had not from his side. The pursuer was not trying to hurt the defender. He would like to engage in mediation with the defender. The pursuer denied being responsible for the illicit materials. The pursuer confirmed that he did not initially tell the police that the illicit materials were the defender's because he did not, at that time, know what was happening and, subsequently, he wanted to protect the children and the defender. In relation to the pursuer's position that the defender had showed him the illicit materials in 2002/2003 in connection with the parties having children together, counsel for the defender put to the pursuer that the letter from the Reproductive Medicine Service at Edinburgh Royal Infirmary dated 15 August 2001 (7/14 of process), which narrated that "[the defender] is keen to be pregnant", and the letter from the Edinburgh Fertility & Reproductive Endocrine Centre, dated 16 December 2002 (7/13 of process), demonstrated that the pursuer's position

was a lie. The pursuer disagreed. Counsel for the defender put to the pursuer that he, the pursuer, had inappropriately touched Anne. The pursuer denied the assertion.

[19] In cross-examination by counsel for the *curator ad litem*, in connection with the pursuer's evidence regarding the distinctive overlaps between elements of the illicit materials and notes made by the defender in connection with the defender's ideas for a television programme project, the pursuer confirmed that he was not suggesting that either he, or the defender, had any personal interest in the practices depicted in the notes nor the illicit materials. In response to counsel for the *curator ad litem* questions regarding the appropriateness and practicality, from the perspective of Mary and Anne's welfare, of orders requiring them, or at least Anne, to reside with the pursuer, the pursuer emphasised that he wanted Mary and Anne to understand, as they had wrongly been led to believe, that their father did not abuse them, is not a predator or a paedophile and that he did not want to damage the relationship between them and their mother. The pursuer acknowledged that such an approach involved substantial challenges. Regardless, it was in Mary and Anne's best interests to rebuild their lives on a factually accurate basis. The pursuer was willing to co-operate with the defender in the best interests of Mary and Anne. Direct contact between Mary and Anne and the pursuer was not impossible.

[20] The pursuer was briefly re-examined but none of the matters covered are material to my decision.

[21] The defender had prepared an affidavit, which she adopted in evidence. The defender described the pursuer as a coercive controller. By 2017 the parties' relationship had become incredibly toxic. During the last 2 years of their relationship the defender was very concerned about the pursuer's relationship with Mary. He angrily shouted at her. He would frog march her upstairs with her arm twisted behind her back. He would lecture her

for hours. He would threaten excessive punishments. After the defender left the family home in 2019, Mary told the defender that the pursuer had forced her upstairs with his hands around her throat or dragged her upstairs by the hair. The defender states that a clinical psychologist who was counselling her and who had carried out a risk assessment with the parties advised her that the pursuer was abusing her and that that abuse escalated to Mary (I note the defender's productions do not appear to contain a production of any risk assessment or such advice). The defender states that the pursuer also angrily shouted at Anne. The pursuer's physical punishment of Anne was when she was naked. The defender states that twice, in the defender's presence, the pursuer hit Anne on the vulva, seemingly out of frustration. In relation to the illicit materials, the defender states that on 4 February 2019, when she was preparing to leave the family home she discovered computer discs of indecent images of children. The defender also saw that there were folders named with things that seemed to relate to bestiality. The defender telephoned a helpline on the morning of 5 February 2019. They advised to get to safety and call the police from the place of safety. The defender was traumatised by what she saw on the discs. Once the defender had left the family home she reported the discs to Police Scotland. Mary and Anne were interviewed by Police Scotland officers and social workers in March and May 2019. Following the first interview Anne told the defender more about games where the pursuer would seek to get Anne to remove his dressing gown to see his genitals, or where they would touch each other's genitals. The defender states that Anne reported to the defender that the pursuer had put his fingers in her anus and vagina. The defender reported these further allegations to social workers. The defender states that on an occasion when Mary was 3 years of age the defender witnessed the pursuer on a bed with Mary when Mary touched the pursuer's erect penis. The defender states that on 5 February 2019 she reported

to Police Scotland what she had witnessed. The defender states that the pursuer's allegations in relation to the defender showing the pursuer the illicit materials is a lie. The parties actively started to try and conceive from April 2001, before the pursuer asserts the defender showed him the illicit materials in around 2002/2003. Thereafter the defender's affidavit addresses her care for the children since the parties' separation and makes extensive reference to the SHANARRI principles of childcare, which the defender says she implements with Mary and Anne. I do not consider it necessary to narrate what the defender states in her affidavit in connection with her application of these principles.

[22] The defender was cross examined on behalf of the pursuer. In relation to finding the discs containing the illicit materials, the defender stated that she had had a discussion with her mother between 11.00am and 4.00pm on 4 February. The defender told her mother she was going to leave. The defender wanted to leave before the pursuer came back from his business trip. The defender was getting important things together, including photographs she had taken of the children. The defender went into the room she described as the pursuer's office (a description of the room the pursuer did not agree with in his evidence). There were lots of discs on the floor. As she bent down to look through them, she noticed a black folder on the printer table. She immediately felt happy that these might be family photographs they had lost. The defender found the discs at 6.00pm. She returned to the discs at around 10.00pm, after the children had gone to bed. The discs had names on them like "16" and "teens" and names of children, so the defender decided to look at them. The defender became increasingly concerned by what she saw. She felt like she had been punched in the stomach. The defender looked at the discs between 10.00pm and 6.00am. She felt she had to keep going. She looked at 14 or 15 discs. The defender decided to take photographs of the files on her laptop screen using a digital camera. The defender

subsequently tried to give the police the memory card from the camera. The defender stated that the police told her not to give them the memory card but to email the photographs to the police. The defender stated that she tried to email but she could not. The defender stated that she called 101 and that she was told not to email and that the police would get back to her but did not. The defender stated that she did not give the memory card to the police and that she cut it up after the pursuer's trial, so no longer had it. The defender stated that she thought the files were from before the parties' relationship. She told the police that the files were dated 1997 and 2002. Ms Bain referred the defender to the defender's police statement dated 5 February2019. The defender accepted, contrary to her evidence, there was no mention of names of children in her police statement. Likewise, the defender accepted there was no mention of file photographs nor mention of the defender being told to email the photographs to the police. Likewise, the defender accepted that there was no mention of her dating the photographs to 1997. Ms Bain then referred to paragraph 13 of the defender's affidavit (narrated above), where the defender states that when Mary was 3, she, the defender, witnessed Mary touching the pursuer's erect penis and that the defender had reported this incident to the police when she gave her statement on 5 February 2019. Ms Bain referred the defender to her police statement dated 5 February where there is no reference to the incident involving Mary and, further, that the defender expressly stated, "I have never been concerned about [the pursuer's] intentions, between him and our children". The defender stated in response that she told the police about the incident involving Mary, but the police did not write it down. Ms Bain pointed out to the defender that the defender's affidavit did not record that, notwithstanding the defender had told the police about the incident involving Mary, the police had failed to note this. Whilst Ms Bain might not be familiar with police statements, I note the statement recorded that it was

signed [by the defender] by way of authentication. The defender conceded in evidence that there were no documents before the court, by which I understood to mean productions or affidavits other than the defender's, which supported the defender's assertions regarding the pursuer's parenting behaviour in relation to the children, nor was there anyone the defender could name that she might have told. Ms Bain next cross-examined the defender in relation to the allegation contained in paragraph 6 of the defender's affidavit regarding the defender witnessing the pursuer hitting Anne's vulva when Anne was a toddler. The defender stated that she had told the police about this when giving her statement on 5 February 2019. Ms Bain questioned the defender on why the defender's statement of 5 February 2019 did not contain a reference to this allegation and the defender stated that the police had dismissed the allegation under chastisement. The defender could not remember whether she had reported the concern to the social work department (the productions lodged in process from the social work department do not appear to contain a report of this concern). The defender also accepted that there was no evidence from pre-separation of the parties suggesting poor parenting by the pursuer.

[23] In cross-examination by counsel for the *curator ad litem*, the defender accepted that on 8 March 2019 she reported previously unreported allegations against the pursuer because the defender wanted the police to be aware of the new allegations before Mary's Joint Investigative Interview. In relation to the reported allegation of the pursuer hitting Anne's vulva, the defender accepted that, in addition to an absence of a reference to it in her police statements, there was no reference either in the produced social work records. The defender explained that she did not think she had ever been asked about it (I considered that to be an odd answer because in the absence of any report to the police or social work department, it would not be likely that either would know to ask about it). Counsel for the *curator ad litem*

referred to the defender's police statement dated 28 February 2019, in which the defender made reference to the various video tapes on which she stated the pursuer had recorded women without their knowledge, and questioned why the defender had not mentioned the tapes to the police when she made her statement on 5 February 2019. The defender replied that these tapes were not foremost in her mind. Leaving, the defender stated, was about abuse and finding the illicit materials. Again, I found that an odd answer. In her statement of 5 February 2019, the defender makes no allegations of abuse and expressly states that she had no concerns regarding the pursuer and their children. The defender confirmed that she had no prior knowledge of the illicit materials, that the illicit materials were not locked away or hidden, that they were not password protected and that the only reason the defender was able to view the illicit materials was because she had recently purchased a DVD drive. The defender confirmed that 63/158 of process contained Amazon order details for the DVD drive, that the DVD drive was ordered on 28 January 2019, was ordered through the defender's private account, and was sent, marked "Private", to the parties' business address. In relation to the family photographs the defender stated she was searching for when she found the illicit materials, the defender confirmed that she did not find the family photographs. Counsel for the *curator ad litem* next asked about the defender's evidence that she had taken photographs of her laptop screen showing the file structures of the illicit materials, which photographs were saved onto an SD card. The defender's evidence was that she took the photographs because the pursuer might return to the house and destroy the illicit materials. The defender confirmed that she had destroyed the SD after the pursuer's trial in June 2021, some 2 years after the commencement of these civil proceedings, in which the defender knew the pursuer was asserting that the illicit materials belonged to the defender, as the pursuer had done at his trial. The defender sought to explain that she

did not think that the photographs saved onto the SD were relevant to these civil proceedings. Nor did the defender explain why, given her concern that the pursuer might destroy the illicit materials, she left the illicit materials in the house when leaving, rather than handing the illicit materials to the police directly. Turning to the handwritten notes lodged at 63/157 of process, in answer to questions from counsel for the *curator ad litem*, the defender confirmed that the writing was her handwriting and that what was written by the defender was consistent with the types of images shown in the illicit materials. Whilst the defender accepted she had told Mary the reason the parties separated was because the defender had found the images of "men having sex with children" (I note that, the defender did not accept that the social work record of Mary's JII used the word paedophiles in inverted commas), the defender did not accept that this information played a material part in Mary's strong opposition to contact with the pursuer.

[24] Under reference to 63/138 of process, counsel for the *curator ad litem*, confirmed with the defender that Anne participated in her first JII on 12 March 2019, at which she is recorded as having made no relevant disclosures, that the defender then reported to social work that Anne made new, sexual, disclosures to her, the defender, after her JII on 12 March and then further new, sexual, disclosures on 25 March 2019, a few days before Anne participated in a second JII on 28 March 2019, but at which Anne is recorded as making limited disclosures and none of an apparently sexual nature. The defender stated that Anne's absence of relevant, sexual, disclosures was because Anne was embarrassed.

[25] In relation to the direct contact between Anne and the pursuer at the café in June 2020, the defender confirmed that she was unaware that the contact was to take place. The defender confirmed that Dr MacKinlay reported to the defender that the contact went well, and that Anne wanted to see her father again (I discuss the evidence of Dr MacKinlay,

including the reports prepared by Dr MacKinlay, in more detail below). The defender also agreed with counsel for the *curator ad litem* that Anne's opinion on contact between the day of the contact and one week later, when Anne had a further meeting with Dr MacKinlay was "entirely different". The defender did not accept that one thing that had changed between Anne's stated change of position was that the defender had given Anne information about photographs the defender had found. The defender stated that Anne had been "ambushed" (I presume the defender meant regarding seeing her father), that after the contact Anne spoke to the defender and the defender knew Anne needed to "know what was going on". The defender accepted she had told Anne that she had found photographs of naked children and that the pursuer had been taken to jail as a result of the photographs. Contrary to what Dr MacKinlay records Anne as telling Dr MacKinlay, the defender denied mentioning a "box" to Anne or referring to handwriting on a box.

[26] Counsel for the *curator ad litem* referred to Mary's statement to Dr MacKinlay that Anne, when aged 10 or 11, had stated to Mary she had seen the pursuer viewing illegal images (see paragraph 15 of Dr MacKinlay's report dated 8 November 2023, 85/16 of process). The defender confirmed it was her position that Anne had also told her, the defender, that she had seen the pursuer viewing illegal images. The defender then elaborated that quite recently after Anne's second JII, Anne told the defender she had seen a naked girl and a lady. Anne demonstrated their physical position as being "on all fours". Anne also told the defender other things. This was in June 2021. Thereafter, the defender stated that in July 2021, Anne told the defender that she saw a girl being raped by a much older man. The defender stated that she was "shocked" that Anne knew what the word raped meant and asked Anne what she meant by it. The defender also stated that her mother (the children's grandmother) overheard Anne and Anne's cousin in the bath when

Anne said that you can get pregnant by sitting on your boyfriend's lap without pants on and that she, Anne, saw this on her dad's computer. Counsel for the *curator ad litem* asked the defender whether the defender had reported these further disclosures from July 2021 to the social work department. The defender didn't think she reported them. In relation to Anne's disclosures from June 2021 the defender stated that she did report these to the social work department but that she could not recall to whom. Counsel for the *curator ad litem* referred the defender to the documents produced by the social work department and lodged with the court. Counsel asked the defender, and the defender accepted, that the social work records contained no mention of these further disclosures by Anne, whether June or July 2021. The defender also accepted that she had not mentioned these further disclosures in her own affidavits nor were the disclosures referred to in the pleadings before the court on her behalf.

[27] Finally, the defender felt resentful and angry towards the pursuer. She disliked his behaviour and was not favourably disposed towards the pursuer. Mary and Anne knew that the defender did not want them to have contact with the pursuer. The defender thought that she could not insulate the children from her own feelings if they were to have contact with the pursuer. The parties had been unable to co-operate with decisions regarding the children.

[28] The defender was briefly re-examined. The defender stated that she had reported to both the social work department and police Anne's further disclosures from June and July 2021.

[29] The defender also called Gavin Templeton in evidence. Mr Templeton had been called as a witness for the Crown at the pursuer trial. Mr Templeton was a forensic police officer and had examined certain computers and the discs seized by the police when they

searched the pursuer's house on 8 February 2019. As I understood the Crown's intentions in calling Mr Templeton at the pursuer's trial, it was to seek to establish that the "creation dates" of the discs containing the illicit materials pre-dated the parties' relationship and by inference were in the possession of the pursuer. At trial a forensic expert, James Borwick, was led on behalf of the pursuer. My understanding of the evidence of both Mr Templeton and Mr Borwick, as recorded in the transcripts of the evidence at trial, is that dates from 1993 and 1995 given by Mr Templeton for the "creation dates" associated with the illicit materials was a misinterpretation by Mr Templeton. Put short, where images were burned to discs, they would lose their creation dates and that their last modification dates would often incorrectly appear or be interpreted as their creation date. A last modification date could predate the actual burn date. Accordingly, the 1993 and 1995 creation dates hypothesised by Mr Templeton were a misinterpretation, nor were they the dates that the images were burned to the discs. Mr Templeton's evidence in relation to batch dates was, for the same reason, undermined.

[30] The pursuer objected to Mr Templeton being called as a witness at the proof before me. Following discussions with the pursuer and counsel for the defender, I allowed Mr Templeton to give evidence but restricted to the evidence that was elicited at the pursuer's trial. Particularly, given the restriction on the scope of Mr Templeton's evidence, as I understood it, Mr Templeton was called at the proof before me to address or "answer" the criticisms made against him at trial, or to put it another way, have another bite at the cherry. Mr Templeton adopted his statement. In his statement Mr Templeton appears to recast his asserted creation dates as between 19/3/2001 and 8/7/2003. Mr Templeton had been asked to comment on Mr Borwick's evidence from the pursuer's trial. Mr Templeton's short paragraph addressing this question takes matters no further forward. Mr Templeton

thereafter referred to other matters discussed at the trial, including batch dates. Having reviewed the transcripts of the evidence led at trial and Mr Templeton's statement, in my judgment, matters have not been materially advanced. Indeed, it seems to me that the creation dates - whatever this phrase is used to describe - now post-date the parties' relationship and for reasons that I will come on to discuss, on that basis, I find this evidence of little, and no material, evidential value.

[31] The *curator ad litem* called Dr MacKinlay. Dr MacKinlay is a Chartered Clinical Psychologist. The family courts are familiar with Dr MacKinlay, and I have no hesitation in confirming that Dr MacKinlay's relevant expertise and experience qualify her to give the skilled opinion evidence she has to assist the court in this case. Dr MacKinlay prepared three reports. The first dated, 28 April 2022, is a psychological assessment regarding contact. The second, dated 5 July 2022, addresses contact between Anne and the pursuer. The third, dated 8 November 2023, updates Dr MacKinlay's first report given the passage of time. Looked at holistically, Dr MacKinlay's reports, and her oral evidence, which I will come to shortly, broadly address two issues. The first part is Dr MacKinlay's *psychological assessment* of Mary and Anne (necessary to allow Dr MacKinlay to understand how Mary and Anne have and are likely to respond or react to the question of contact with the pursuer). The second is Dr MacKinlay's *opinion* regarding how Mary and Anne have and are likely to respond or react to contact with the pursuer, offered to assist the court in understanding the consequences, from a welfare perspective, of any orders the court might make. No party raised any concern that Dr MacKinlay is not eminently qualified to undertake the first part of her remit. Accordingly, it is not necessary for me to narrate that part of her evidence, which I will therefore not do, again to respect Mary and Anne's privacy.

[32] With those introductory observations, counsel for the *curator ad litem*, after inviting Dr MacKinlay to adopt her three reports, which she did, confirmed with Dr MacKinlay that her overall recommendation in this case was that there should be no direct contact between Anne and the pursuer.

[33] Counsel for the *curator ad litem* first asked Dr MacKinlay about the relevance of possession or ownership of the illicit materials. Counsel hypothesised three possible scenarios: (1) that only the pursuer had knowledge of the illicit materials, (2) that both the pursuer and defender had knowledge of the illicit materials and (3) that only the defender had knowledge of the illicit materials. In relation to hypothesis (1), if the court formed the view that a risk to the children arose, there ought to be a risk assessment. Supervision of any contact would be appropriate. A typically protective parent would not want unsupervised contact, and some allowance should be given for the responses of such a protective parent. In relation to hypothesis (2), if both the pursuer and defender had knowledge of the illicit materials and the defender told the children that it was the pursuer who had such knowledge, that could constitute direct emotional abuse of the children by the defender. Under this hypothesis if the intention of the defender to bring the illicit materials to the attention of the police was to alienate the pursuer, it could be emotionally and psychologically abusive of the children. However, the children believe that the defender is truthful. If that belief was undermined, it could remove the children's trust in the defender and be undermining for the children. In relation to hypothesis (3), that the defender alone had knowledge of the illicit materials, the conclusions under this hypothesis would be the same as hypothesis (2).

[34] Counsel next asked Dr MacKinlay about the effect on the children of repeated and escalating allegations of physical abuse of them by the pursuer (albeit I note that the

allegations made latterly include allegations of a sexual nature). Dr MacKinlay's opinion was that such actions could involve greater emotional abuse (bordering on sexual abuse) by the defender of the children. If the children were repeatedly interviewed and examined - falsely - that could be highly abusive and raise significant concerns about the ability to parent safely. However, 5 years had passed, and any harm was not now sexual but emotional.

[35] Turning to questions regarding the children's views about contact with the pursuer, a matter that Dr MacKinlay had canvassed directly with the children on a number of occasions, Dr MacKinlay's opinion was that the views expressed by the children were genuine and based on information given to them.

[36] Although Mary is now over 16 years old and not subject to the jurisdiction of this court on the question of contact with the pursuer, Mary was clear that she did not want contact with the pursuer. Mary's views on contact were, however, relevant because they influenced Anne's views on contact.

[37] In relation to Anne, her views might be more variable. Her belief is that she is at risk of harm. That view is not based on Anne's own experiences but on what she has been told and the reactions of others. If Anne's belief was shown to be false and that she had been misled into not seeing her father, this could cause Anne significant trauma and distress in the future. If Anne lived in a household where contact with the pursuer was encouraged and she was reassured about safety, Anne would enjoy contact with the pursuer. That seemed unlikely given the defender's oral evidence.

[38] At this point counsel discussed with Dr MacKinlay Anne's direct contact with the pursuer at the café and the dispute that arose about Anne's response to the contact. Dr MacKinlay's assessment of the contact was that it went well, and that Anne was keen to

extend the contact. Notwithstanding, when Dr MacKinlay contacted the defender to inform and discuss with the defender about the meeting, the defender asserted that Anne's description of what had happened did not match Dr MacKinlay's explanation and that Anne reported the meeting was "awkward" and that she did not want to do it ever again. When Dr MacKinlay spoke to Anne again about the meeting one week later, Anne said that she "hated" the meeting and did not want to see the pursuer again. Anne said that since the meeting with the pursuer the defender had told her that the pursuer had pictures of "naked kids" in a "box", that the pursuer had been taken to "jail" as a result and that the pursuer is a bad person. Dr MacKinlay was very clear in her evidence, she took contemporaneous notes of the contact meeting and immediately after dictated everything. Anne's presentation on the day of the contact meeting and one week later were entirely inconsistent with one another. In Dr MacKinlay's opinion, what Anne described was evidence of direct and harmful alienation by the defender.

[39] Dr MacKinlay's opinion was that if Anne's household remained hostile to contact, Anne would remain in a very difficult situation. If the position of her household did not change, Anne's views on contact would not change. In this regard the maternal family had huge power. They held all the cards. Anne viewed herself at risk from the pursuer but also at risk from the defender if she did not act consistently with the defender's current messaging. Whilst the loss of the pursuer was significant for Anne, the loss of the defender and Mary would be more significant. The loss of the pursuer was a past loss; the loss of the defender and Mary would be a future loss. Given the passage of time, any harm is not sexual. Any emotional abuse is largely historical. Currently, both Anne and Mary appeared happy. Both engaged with friends. Both appeared happy at home and at school. If the court were to impose contact in that situation it would be distressing for Anne. Removing

Anne to the care of the pursuer would be very frightening for her and cause more harm. Dr MacKinlay explained that from the perspective of Anne's welfare, the issue was what was the least harmful. The status quo was the least harmful.

[40] In relation to independent support for Anne, for example some form of therapeutic input, Dr MacKinlay's opinion was that while it might be helpful for Anne, in the absence of support from the defender and Mary, any effect of such input would be easily undone over the course of the week, i.e. between therapeutic sessions.

[41] Dr MacKinlay expressed the opinion that whilst it might be difficult to decide what should or should not be shared with Mary and Anne about the circumstances of this case, it would be appropriate for Mary and Anne to have an adult explain the court's findings to them.

[42] Ms Bain cross-examined Dr MacKinlay, but the evidence elicited went materially no further than confirming Dr MacKinlay's evidence-in-chief. In cross-examination by counsel for the defender, and under reference to the hypothesis put where the defender was unaware of the illicit materials, Dr MacKinlay's opinion was that the defender's response was reasonable or justified but nevertheless inappropriate. Dr MacKinlay used the expression "justified alienation". However, once court proceedings had begun it would have been inappropriate for the defender to share any further information with the children; albeit one might have sympathy with the defender.

Submissions

The pursuer

[43] The pursuer provided a written submission, which he adopted. The pursuer submitted that he was not in possession of the illicit materials and that he has never abused

or inappropriately parented or harmed the children. The defender had alienated the children from him, made false and malicious accusations against him, was in possession of the illicit materials, sought to deny the pursuer contact with the children and has influenced the children through a false narrative such that the children have expressed the view that they do not want to have contact with the pursuer. The pursuer expressly referred to the evidence of Dr MacKinlay to support the propositions that the defender has subjected the children to purposeful and harmful alienation and subjected the children to abuse within the meaning provided by the Children (Scotland) Act 1995 such that it is doubtful whether the defender is able to recognise the truth and adapt her behaviour as is required in the children's welfare interests. The pursuer invited the court to find the defender and the defender's evidence incredible. Further, the defender led no independent evidence supportive of the allegations made by her. The pursuer referred to Dr MacKinlay's opinion that the defender held all the cards and submitted that there could be no real progress while the children remained in the same household as the defender. The pursuer also submitted that the court had a duty to remove children from an abusive home where abuse has occurred or is likely to continue. That, the pursuer submitted, suggested that the children should be removed from the defender's care. There appeared, it was submitted, two options open namely that "his Lordship" (1) "accepts the defender's power to dictate her wishes to the court … and ignores his duty to protect the children from abuse" or (2) "removes the children from the defender's care, and makes an order that she has limited (supervised) contact with [Mary] (or [Anne]) pending further work." The pursuer referred to the National Guidance for Child Protection in Scotland. The proposition of letterbox (indirect) contact was "completely unrealistic". The children/Anne would not be encouraged or allowed to enjoy it. The pursuer sought a residence order in respect of Anne.

[44] Senior counsel for the defender adopted the written submission lodged on behalf of the defender. The defender maintained her position that the evidence in relation to the illicit materials was irrelevant. If relevant, there was no evidential basis that the defender had, on the balance of probabilities, knowledge and control of the illicit materials. The pursuer's evidence suggesting the contrary was false. Everything the defender did after finding the illicit materials was justified as a mother seeking to protect her children. Under reference to the case of *West Lothian Council* v *MB* 2017 SC (UKSC) 67, if sufficient evidence in relation to knowledge of the illicit materials has been adduced, which the court accepts, the court requires to make a finding. Mr Templeton's evidence was relevant. The illicit materials had creation dates between 1995 and 2003. In addition, the creation dates being in "batches" and the materials found on devices used primarily by the pursuer all suggested, on balance, that the illicit materials were the pursuer's. The pursuer's explanation for him previously being aware of the illicit materials was incredible. The defender's narrative was both credible and reliable. The available evidence was not sufficient to allow the court to infer that the defender was aware of the illicit materials prior to 4 February 2019. Senior counsel acknowledged that Dr MacKinlay's evidence was that if the defender did know about the illicit materials the defender's subsequent conduct would amount to alienation and emotional abuse. Importantly, however, Dr MacKinlay's opinion was that any abuse was historical and any change to the status quo would not be in the children's best interests. In relation to Anne's contact with the pursuer at the café, senior counsel submitted that Dr MacKinlay appeared to have failed to consider that Anne might have lied about what happened when Anne went home after the contact. Senior counsel also acknowledged that there was insufficient to permit a finding that Anne was sexually abused by the pursuer. Irrespective of whether the court was with him on the issues of awareness of the illicit

materials and the defender's actions after 4 February 2019, the court should make the specific issue order sought by the defender and, otherwise, make no order at all. Senior counsel referred to section 11 of the 1995 Act. The defender opposed contact between the pursuer and Anne, the court having no jurisdiction in relation to Mary once she obtained the age of 16. Appropriate weight should be given to the children's views, both of whom oppose contact.

The curator ad litem

[45] Counsel for the *curator ad litem* tendered a written submission, which he adopted. At the outset counsel emphasised three points. First, the *curator ad litem* had not and did not take sides in these proceedings. Her interest lay firmly with the welfare of the children. Second, the *curator ad litem*, in advancing the welfare of the children, sought to test the evidence of both parties where relevant to that welfare. Third, in relation to the evidence more broadly, where conclusions were clear, the *curator ad litem* would express a view but where multiple inferences arose on the evidence, the *curator ad litem* sought not to invite a conclusion but rather highlight those possible inferences. Counsel made it clear that the *curator ad litem* approached the case on the basis that, all things being equal, it was in the children's best interests to have a meaningful relationship with both parents. Further, counsel acknowledged that the *curator ad litem* had played a more active role in the examination of witnesses than might ordinarily be the case and did so in the unique circumstances of this case in an effort to assist the court by eliciting evidence material to the children's welfare to assist in resolving the factual dispute between the parties. Counsel explained that the *curator ad litem* sought to restrict any expression of where the truth might lie to those matters that were material to the children's welfare. I acknowledge the difficult

line that the *curator* and her counsel required to tread and record my gratitude to them for their thoughtful and careful approach in assisting the court. Counsel set out a number of propositions, which he thereafter expanded upon. On any factual matrix other than full acceptance of that account, the defender's reports to the police were fabricated and malicious. In making those reports, the defender caused the unjustified loss of each child's relationship with the pursuer. Since 5 February 2019, the defender has engaged in conduct that has either been calculated to destroy the relationship between the pursuer and the children, or which has been for self-serving motivations with callous disregard for the consequence of those relationships. The defender's conduct constitutes emotional abuse. There is no evidence that the pursuer has ever sexually abused either child. The defender knew, or ought reasonably to have known, this at all points from 28 February 2019 onwards when she alleged to the contrary. Anne has been influenced by the defender and Mary to believe that the pursuer is a danger to her. She will retain that belief whilst she remains living with, or otherwise exposed to, the views of the defender and Mary. Any enforced direct contact, or graduated steps to move towards direct contact, are bound to fail. A change in residence would cause Anne significant distress and, likely, harm. The loss or significant disruption of her relationship with the defender (and Mary), however unsatisfactory the court considers the conduct of the defender to have been, would be contrary to Anne's welfare. In relation to the illicit materials, counsel observed that the defender's version of events might be viewed as involving an improbable concurrence of circumstances, particularly when considered against other adminicles of evidence. Equally, counsel observed that the pursuer's account in relation to the illicit materials involved an (highly) unusual set of circumstances and one that involved at least a historical awareness of the illicit materials. In relation to the defender's allegations of sexual abuse of the children

by the pursuer, counsel submitted that it was clear from the social work records that the defender, from her second police statement given on 28 February 2019, knowingly made repeated, escalating, false allegations, which led to the children each being unnecessarily interviewed twice by police and social workers and each undergoing an unnecessary forensic medical examination. That behaviour by the defender constituted serious emotional abuse of both Mary and Anne. Further, if the court concludes that the defender was previously aware of the illicit materials and that the defender told Mary and Anne that the illicit materials were found in the (disputedly described) pursuer's office, asserting or implying that the pursuer was a paedophile and that was the reason the defender and children left the family home, this would also constitute emotional abuse. Further, either as a by-product of her attempts to influence Mary or otherwise expressly stating to Mary, the defender has caused Mary to falsely believe that the pursuer has sexually abused Anne (I note here that senior counsel for the defender expressly acknowledged that there is no evidence to support any assertion of sexual abuse of Anne by the pursuer). The effect of the defender's behaviour is the complete destruction of the relations between the pursuer and Mary and Anne. Turning to the children's present circumstances, counsel submitted that notwithstanding the damage caused to both children, through both the loss of their relationship with the pursuer and the defender's methods to bring about that loss of relationship, the evidence available suggested the children were doing well in school, socially and developmentally. There was no evidence to the contrary. Counsel expressly rejected any notion of the defender being "rewarded" for her behaviour. Counsel recognised that the children's primary attachment is to the defender with whom they have a close relationship. Counsel submitted that the children's views in relation to contact with the pursuer are recorded in the reports by Dr MacKinlay and Dr MacKinlay gave oral

evidence in relation to whether, and the likelihood of, such views changing. Mary was soon to be - and in fact now is - 16. As such any orders in respect of Mary would be pointless - and in fact are now incompetent. The evidence from Dr MacKinlay strongly suggested that an order for direct contact between the pursuer and Anne would create an unacceptable level of risk of harm for Anne with little or uncertain perceived benefit. Indirect, one-way contact at a modest frequency from the pursuer to Anne would be in Anne's best interest. The only order now sought by the defender, being the specific issue order allowing the defender to take Anne out of the country for holidays, would be in Anne's best interests and it would be better to make such an order than make no order at all. No other orders should be made. Finally, in relation to communication of the court's decision to Mary and Anne, the *curator ad litem* considered that Mary and Anne have a right to know what decision the court has taken on the headline issues and that Mary and Anne would benefit from being "disabused of any material misapprehensions they are under." To fail to do so would allow any abuse to be perpetuated.

Decision and reasons

Illicit materials

[46] Senior counsel for the defender maintained his objection that any evidence elicited by either the pursuer or *curator ad litem* relating to any question of the defender's possession of the illicit materials was irrelevant. I repel that objection. Whether the defender had any awareness of the illicit materials prior to 4 February 2019 is relevant to a proper and informed assessment of the defender's actions from her initial report of the illicit materials to the police and afterwards, which, in turn, is relevant to the court reaching a proper and informed judgment about the appropriateness of the orders sought by the pursuer. Further,

standing Lord Reed's judgment in *NJDB*, at paragraph 31 (cited above), and Dr MacKinlay's evidence regarding potential abuse arising in connection with any knowledge on the part of the defender and her actions, it is also relevant to a proper consideration of the test set out in section 11(7) of the 1995 Act.

[47] Having considered the evidence before the court, I reject as unlikely the explanations advanced by both the pursuer and defender about the circumstances in which they became aware of the illicit materials.

[48] The pursuer's position was that in around late 2002/2003 the defender had, on three separate occasions, shown him images contained on CD or DVD disks. The images became increasing severe on each occasion and, on the third occasion, included showing the pursuer six to ten discs containing very significant pornographic images over the course of about an hour. The defender's purpose was, so submitted the pursuer, to determine whether the pursuer would be a risk to any children they might have. The defender removed the disks from a black case like the one found by the police on 8 February 2019. After the third occasion the defender told the pursuer she would destroy the disks immediately. In 2015 the pursuer found a black CD/DVD case. Inside were disks he thought he recognised. The pursuer discussed the disks with the defender. The defender told the pursuer that they were disks she had made in around 2002 and that she had forgotten to throw them out. The pursuer states that he "never saw the folder or disks again until the police showed [him] them on 8 February 2019." I do not accept this explanation on the balance of probabilities. I consider the process the pursuer asserts the defender undertook to satisfy herself that any children she might have with the pursuer to be at risk to be inherently unlikely. Further, I consider it unlikely that if the images were of the severity suggested and had the affect the pursuer claims, the pursuer would have been prepared to look at the discs for an hour. The

pursuer considered the illicit materials illegal. Notwithstanding, and noting that the parties' relationship at this stage was less than 2 years old, the pursuer chose to do nothing more than ask the defender to destroy the images and thereafter did nothing further until 2015. In my judgment, that is such a disproportionately inadequate response, especially given the reported severity of the images, I consider it unlikely. The pursuer did not end the relationship, report the existence of the materials, or destroy them himself. Further, against that background, when he discovered the discs had not been destroyed as he thought, he again did no more than seek an "assurance" from the defender that she would destroy them. Again, standing the severity of the images, together with the fact that the parties would, by then, have children in the house, I consider such a response unlikely. Finally, senior counsel for the defender cross-examined the pursuer making reference to the letter from the Reproductive Medicine Service at Edinburgh Royal Infirmary dated 15 August 2001 (64/14 of process), which narrated that "[the defender] is keen to be pregnant", and the letter from the Edinburgh Fertility & Reproductive Endocrine Centre, dated 16 December 2002 (64/13 of process), suggesting that the letters demonstrated that the pursuer's position was a lie. I do not accept that criticism. The pursuer dates the apparent showing of the materials to him in later 2002. The first of the letters relied upon by senior counsel for the defenders (64/14) is dated August 2001 and is addressed to the defender's GP, the GP having referred the defender. The pursuer does not appear to have attended the referral. Whilst the letter does record that the defender is keen to be pregnant, the letter does not necessarily create the link sought to be relied upon. Conversely, the letter at 64/13 is dated December 2002, is again addressed to the defender's GP but specifically notes that both the defender and pursuer attended the referral. The inference senior counsel seeks to draw regarding both the defender and pursuer actively involved in the defender conceiving might

legitimately be drawn here, however, the letter is dated slightly after the period the pursuer alleges the defender showed him the illicit materials.

[49] The defender's position is that she knew nothing of the illicit materials until she found them by chance when looking for family photographs as part of her packing to leave the pursuer. I do not accept that explanation. It requires me to accept that the discs were left in insecure circumstances where they could be found by the defender or children. The discs were not password protected. The discs/case were in open view, albeit for how long appears unknown. The defender explained in evidence that she examined the discs for many hours. The defender took photographs of file lists because she was concerned that pursuer would return and destroy the discs. These photographs were stored on a SD card. Given such concerns, it would have been open to the defender to immediately call the police. The defender had texted pursuer at 09.21am on 5 February 2019 to confirm with him his likely time of return. The defender had, only days before leaving the family home, purchased a DVD drive, which she had sent to the parties' business address and marked "private". That DVD drive appeared necessary for the defender to read and identify materials on the discs. The defender sought to explain that she purchased the DVD drive so that she could find some family photographs to take with her when she left but her own evidence was that she did not find the family photographs. In relation to the SD card, the defender stated that she had informed the police about the existence of the SD card and photographs but following some discussion with the police, the police did not follow up and secure the SD card from the defender. There appeared to be no independent evidence before me to confirm this. The SD card did not feature at the pursuer's trial and the defender in her evidence before me stated that she destroyed the SD card after the pursuer's trial in June 2021 and some 2 years after this action had been raised. There was a material

degree of similarity between what the defender had written in her notebooks for her television programme project and the illicit materials. The defender's notebooks also contained "to do" lists and included on more than one occasion the task "hide discs". In isolation, some of these factors might not suggest a compelling conclusion but drawing all of these factors together, in my judgment, I reject the defender's explanation for her becoming aware of the illicit materials.

[50] In my judgment, on the basis of the evidence before me, and on the balance of probabilities, I consider that both the pursuer and defender had a historical awareness of the illicit materials. The similarities between the notes in connection with the parties' television programme project and the illicit matters suggests a link. It was not disputed that both parties were actively involved with discussing the themes for the proposed television programmes project. That said, there is no evidence before me consistent with any interaction by either party with the illicit materials after the time of around 2002/2003 and the parties' television programme project and after the birth of Mary until the defender reported them to the police at the time she left the pursuer. The conclusion I therefore draw, on balance, is that when the defender reported the illicit materials to the police under the explanation that she had no prior knowledge of them, she did so untruthfully.

[51] Having reached that conclusion, it follows from the unchallenged expert evidence of Dr MacKinlay, which I accept, the defender's actions in telling Mary and Anne that the pursuer had sole possession of the illicit materials and by reporting the pursuer's possession of the illicit materials to the police, which ultimately contributed to the alienation of the pursuer from the children, constitutes direct emotional abuse of Mary and Anne by the defender. In making that finding, I expressly acknowledge Dr MacKinlay's opinion that should Mary and Anne conclude the defender has been untruthful to them, it might

undermine their trust in the defender and be undermining for them. That, on one view, creates a "catch-22" situation. However, both Dr MacKinlay and the *curator ad litem* have expressed the opinion that Mary and Anne ought, in the interests of their welfare, to be told what the findings of the court are, whatever those findings are. I accept and agree with those opinions.

Defender's allegations against pursuer

[52] On 5 February 2019 the defender gave a statement to the police (85/4 of process). The statement was authenticated by the defender. In the statement, in which the defender gives details of finding the illicit materials, the defender states "[the pursuer] has never hit me or the children.", and "I have never been concerned about [the pursuer's] interaction, between him and our children."

[53] On 28 February 2019 the defender gave a further statement to the police (85/5 of process). This statement followed the defender returning to the family home to obtain certain items. In her statement the defender reports that the pursuer is in possession of around one hundred video tapes of surreptitious recordings of female guests at the parties' house, that the pursuer has an interest in erotic hypnosis and that the defender is concerned that the pursuer "is out on the hunt and these women are vulnerable." Notwithstanding these concerns, the defender makes no suggestion that she or the children have been or are at risk from the pursuer.

[54] In relation to the social work records (lodged as 63/128-63/137 of process), the first record, dated 4 March 2019 appears to be a "concern report" received by social work from Police Scotland. The report records the defender's initial contact and statement from 5 February. The record then refers to the defender subsequently informing to police about

"non-recurrent voyeurism" by the pursuer - the matter recorded in the defender's statement given to the police on 28 February - but also to "concerns the children may have experienced sexual abuse/inappropriate sexualised behaviour from [the pursuer]", giving two examples, one being an incident where she, the defender, had witnessed one of the parties' daughters climb over the pursuer whilst on a bed dressed in an open bathrobe where the daughter touched the pursuer's penis causing him to sustain an erection and the other where the pursuer and daughters would play a game where the children would try dragging the pursuer's bathrobe off him when he was naked underneath. The social work record expressly records that no statement was taken regarding the latter allegation and goes on to state:

> "Although allegations by [the defender] cannot be discounted, [the defender] did not account as to why she had not disclosed all this information … when she initially contacted the police. … It was also noted that the information regarding the children was not her first concern when providing this further information."

The record also records that the defender is keen for the police to interview both daughters and that at that time neither child had disclosed any sexual abuse by the pursuer.

[55] The next record is dated 8 March 2019. That record records the defender stated she wanted to share further information. It records a recollection of the children being involved in "tying up games". The defender reported a game, which she had disapproved of and in which she had intervened directly, where the pursuer encouraged the children to try and remove his dressing gown when he was naked underneath. The record confirms a telephone conversation between social work and police, who confirmed they were aware of the information. The police reported the outcome of their interview with Mary, who was very intelligent, confident and clear in her recollection and who had no recollection of the incident on the bed, or any particular games played with the pursuer as reported by the

defender. Whilst there were no concerns raised regarding Anne, given the nature of the charges against the pursuer there was a rational for interviewing Anne. A further telephone conversation took place with the defender when it was confirmed that no issues of concern were raised by Mary. The defender reiterated an expectation of a follow up by the police in connection with domestic and sexual abuse by the pursuer against her.

[56] A further record dated 8 March 2019 records the outcome of an interview with Mary. Mary reported that the defender had told her after they left the family home that she found "something", that this was "paedophiles" and that there was something else but that the defender could not tell Mary at the time. Mary could not remember any memories about games involving dressing gowns. She could not recall any memories from when she was three (which I understood to be a reference to the incident on the bed).

[57] On 12 March 2019 an interview was conducted with Anne. It is recorded that the interviewers tried to ask questions related to the allegations made by the defender, but Anne was genuine and appeared to have no knowledge of these.

[58] On 15 March 2019 there is a 'review by manager' case record. This records the defender's disclosure of the pursuer apparently grooming the children to touch his penis. It records that both children have been interviewed and neither disclosed anything of significance.

[59] On 26 March 2019 it is recorded that the defender had contacted the police the night before to advise that Anne had not been very forthcoming during her interview but had since disclosed further sexual abuse perpetrated against her by the pursuer and that the defender would like consideration to be given to a further interview of Anne.

[60] A separate record dated 26 March 2019 records a discussion between social work and the defender. The defender reports that the pursuer has been sending her pictures of naked

women, which the defender had saved. I note that these were not evidenced before me. Social work confirm that Mary made no relevant disclosures during her interview, to which the defender responds as surprising as some of the matters reported were recent. In relation to Anne, the defender reported that Anne made further disclosures immediately following her interview. The defender reported a game where Anne would try get the pursuer's dressing gown off and told the defender that she could see the pursuer's "buttbutt", meaning see him naked. A second game allegedly reported by Anne involved the pursuer and Anne chasing each other when the pursuer was naked. The instructions for the game were written down and hidden. This would happen when the defender was out or asleep and would take place in the bedroom or living room. No instructions were evidenced before me. The defender then alleged that on 25 March 2019 Anne made further disclosures. These included that the pursuer and Anne would touch each other's "front bottom" and "back bottom"; that Anne and the pursuer would put toilet paper on their fingers and touch each other; that the pursuer had put his finger inside Anne's vagina when Anne was four and that the defender had questioned Anne when the pursuer's "bum changed" and whether there was ever any fluid and that Anne reported that the pursuer would sometimes "pee and he'd go to the toilet". The defender alleged that Anne reported she had been told to keep it a secret. The defender reported a history of vulval redness in relation to Anne. She had attended the GP. Tests were undertaken that showed no signs of infection. Social work updated the police following the defender's reported allegations and it was decided that a further interview with Anne should be undertaken.

[61] On 28 March 2019 the records record a note of Anne's second interview. At that interview Anne reported playing the dressing gown game and the bum bum game. Anne reported that she had told the defender about the bum bum game. Anne stated that she

would wear pants and the pursuer wore shorts. Anne described the game as a game of hide and seek in pretend bushes in the attic.

[62] The record of the second interview with Mary from 4 April 2019 records that Mary reiterated that the defender had told her the pursuer was a paedophile and that the pursuer had sent the defender four hundred photographs of naked women. No photographs were put before me in evidence. The record notes by way of summary that Mary gave no account that raises suspicion or indication of sexual abuse, that Mary does hold a negative view of the pursuer, and that Mary has been given information about the pursuer's conduct.

[63] The records contain a summary of events and discussions as at 4 April 2019. Given the defender's report of vulval redness in relation to Anne, Anne underwent a forensic medical examination (3 April 2019), which disclosed no evidence of abuse. The defender had reported a vaginal discharge in relation to Mary and that Mary had "begun to open up" and raised whether Mary should also have a forensic medical examination. Mary underwent forensic medical examination on 8 May 2019. That examination showed no signs of clinical disorder, illness or injuries or red flags for sexual abuse.

[64] Finally, in her oral evidence, the defender alleged that Anne had disclosed to her in June 2021 that she had seen the pursuer (previously) looking at images, including a photograph of a naked girl and lady and showed the defender the position they were in, being on all fours. Anne asked the defender "what does heat mean?" and when the defender explained that it was heat from something, Anne said she saw a picture of a naked woman with an elephant, with a speech bubble from the woman saying, "I'm on heat". The defender went on to give oral evidence that in July 2021 Anne told the defender that she saw a girl being raped by a much older man. The defender also gave evidence that the defender's mother reported to the defender that she overheard Anne telling her cousin that

you could get pregnant by sitting on your boyfriend without pants on. When asked in evidence, the defender said that she had not reported these incidents to social work but then appeared to change her mind and stated that she had told social work but could not remember who or when. The defender was aware that the pursuer had recovered social work records and accepted that the records did not contain a reference to these subsequent reports. The defender also accepted that there was no reference to these later disclosures in the defender's pleadings or her affidavit.

[65] Having considered the parties' affidavits, the relevant productions and heard the parties' respective submissions, I draw a number of conclusions regarding this chapter of evidence.

i. On 5 February 2019, when the defender left the family home with the children and reported the illicit materials to the police, the defender expressly stated to the police that "[the pursuer] has never hit me or the children.", and "I have never been concerned about [the pursuer's] interaction, between him and our children."

ii. Thereafter, over the period of March to May 2019, the defender made a series of increasingly more serious allegations regarding the pursuer's conduct towards herself and the children, including allegations of penetrative sexual abuse of the children by the pursuer.

iii. Despite each child undergoing two joint investigative interviews and a forensic medical examination, neither child at interview nor the forensic medical examinations give any support for the defender's allegations. Moreover, despite being specifically questioned on the issue of potential abuse, sexual or otherwise, both children positively stated that they had no memories of any such behaviour.

iv. When giving evidence in court the defender made further, new allegations that were not mentioned in the defender's written case before the court or her sworn affidavit and despite the defender's assertions that she had told social work about the new allegations, there was no record of these new allegations in the social work records.

v. In light of above conclusions, in my judgment, the defender has engaged in a course of conduct where she has knowingly made false and increasingly serious allegations against the pursuer concerning abuse of the children, including sexual abuse, and deliberately misrepresented the children's medical symptoms in support of those false allegations, all with the intention of alienating the pursuer from the children.

vi. Notwithstanding the defender's statement to the police on 5 February 2019, when she told the police "[the pursuer] has never hit me", the defender went on the make various allegations that the pursuer had domestically abused her, including sexually abusing her. There is no evidence to support these allegations.

Children's current circumstances

[66] Dr MacKinlay and the *curator ad litem,* albeit from different perspectives, are the independent persons responsible for investigating and bringing to the attention of the court considerations relating to the welfare and best interests of children. Dr MacKinlay, through her reports and evidence, and the *curator ad litem*, through her participation in these proceedings, state that on the information available to them, the children are doing well in school, socially and developmentally, and that there is no evidence before the court to the contrary. The children's primary carer is the defender, and they appear to have a close relationship with her.

Children's views

[67] In relation to the children's views on contact, both children have expressed the view to Dr MacKinlay that they do not want to have contact with the pursuer. In Dr MacKinlay's opinion the views expressed by the children to Dr MacKinlay were genuine on the basis of the information given to them. Mary is now over the age of 16 and the court has no jurisdiction to make orders in respect of her. However, Mary's views of contact with the pursuer are relevant because, as reported by Dr MacKinlay, Anne is influenced by Mary's views and, accordingly Anne's views on contact with the pursuer are influenced by the views Mary expresses about the pursuer. Anne believes that she is at risk from the pursuer. In Dr MacKinlay's opinion, Anne's views are not based on her own experiences but on what she has been told and the reactions of others. If Anne lived in a household where contact with the pursuer was encouraged and she was reassured about her safety, Anne would likely enjoy contact with the pursuer. If the household's hostility towards contact does not change, Anne's resistance towards contact will not change. Whilst the loss of her relationship with the pursuer was a significant factor for Anne, the threat of the loss of her relationship with Mary and/or the defender would be of more significance.

Section 11 orders re Anne

[68] As I have stated above, Mary is now 16 and, accordingly, the court has no jurisdiction to make section 11 orders in respect of Mary.

[69] In relation to Anne the pursuer seeks as residence order so that Anne resides with him. In his submission, the pursuer argues that the children, or so far as the court has jurisdiction to make orders, Anne, suffers harm whilst residing with the defender and that no progress can be made when the children continue to do so. Accordingly, the court has a

duty to remove them, or at least Anne. The pursuer submits that there appears to be two options available. The first is to accept the defender's power to dictate her wishes to achieve her goals, which ignores the court's duty to protect the children from abuse. The second is to remove the children from the defender's care and make an order for limited, supervised contact in favour the defender. Whilst that submission might appear superficially attractive, it proceeds upon a false dilemma fallacy and on a misunderstanding of the governing legislation and fails to understand the whole evidence in the case. Section 11 of the 1995 Act requires the court to regard the welfare of the children as the paramount consideration. It does not focus primarily on the parties and any power either party might or might not have to "dictate" their wishes. Further, section 11 requires that the court shall not make an 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. A consideration of the established evidence in this case highlights the relevance and effect of this latter principle. I accept that the evidence in this case supports the conclusion that the defender's actions have been abusive of the children and consequently caused them harm, not least by alienating the pursuer from them but by also leading them to believe that they have been abused by the pursuer. However, the evidence, insofar as material and accepted by the court, highlights a more complex picture than the pursuer's two options suggest. Dr MacKinlay acknowledged that the loss of the pursuer was significant for Anne. However, Dr MacKinlay also expressed the opinion that the loss of the defender and Mary would be more significant. Loss of her relationship with the pursuer was the least-worst outcome for Anne. The loss of the pursuer was a past loss, the loss of the defender and Mary would be a future loss. Given the passage of time, any abuse at the hands of the defender is now largely historical. Anne appears happy. She has friends. She appears happy at home and at school. In light of the established evidence, even

acknowledging the actions of and consequences for the parties, having regard to the welfare of Anne as the paramount consideration, it cannot be properly concluded that making a residence order in respect of Anne in favour of the pursuer would be better for Anne than that none should be made at all. The court acknowledges the apparent harshness of that outcome for the pursuer, but it is a consequence of legislation that places its paramount consideration on the welfare of the child.

[70] In the end, the pursuer did not seek an order for direct contact with Anne. Had he done so however, I would have refused to make such an order. Standing the section 11 test and a consideration of the established evidence before the court, I would have reached the same conclusion as I did with regard to the residence order sought by the pursuer.

[71] In his submission, the pursuer submitted that "the proposition of letterbox [indirect] contact is completely unrealistic." Whilst residing with the defender and Mary, Anne would not be encouraged to or allowed to enjoy any letters or cards. The pursuer did not move the court to grant an order for indirect contact. Dr MacKinlay gave evidence that in her opinion indirect contact between the pursuer and Anne should be supported albeit there should be no obligation on Anne to reply. The *curator ad litem* submitted that indirect contact between the pursuer and Anne would be in Anne's best interests. Regardless of the views expressed by Dr MacKinlay and the *curator ad litem*, I consider there to be no benefit in making an order that is not sought by either party and which is unlikely to be complied with, especially in respect of an order for indirect contact between the pursuer and Anne that might create an expectation on Anne's part only to be undermined.

[72] The defender seeks no orders in relation to residence or contact. The defender does seek a specific issue order allowing the defender to take Anne out with the UK to go on holiday. The *curator ad litem* supports the granting of such an order because, standing

agreement between the parties to the contrary, absent such an order there is a risk that there would have to be resort to litigation to obtain a relevant order on a holiday-by-holiday basis, which would be adverse to Anne's interests. It would be better to make the specific issue sought than to make no such order. Accordingly, I will make the specific issue sought by the defender.

Communication of court's findings, decisions and reasons

[73] The *curator ad litem* submitted that the children had a right to know what decision the court had reached on the headline issues and why. The *curator ad litem* also submitted that the children would benefit from being disabused of any material misapprehensions they might have, particularly regarding the pursuer. She found support for that submission in the opinion of Dr MacKinlay. Although I did not note the pursuer expressly requesting the court take such a step, it seemed to me to be implicit in the "Propositions" contained in his written submission that he wanted those propositions to be formally recognised by the court.

[74] The method by which the findings of the court could best be conveyed to the children was through Dr MacKinlay undertaking this role. Dr MacKinlay confirmed in evidence that she had previously undertaken such a role and would be prepared to undertake the role in this case. In order to assist with the explanation of the court's findings, for the reasons set out above, on the basis of the evidence I find established, I make the following findings:

i. Prior to 4 February 2019, both parties had an awareness of the illicit materials.

ii. I do not accept the explanation given by the defender about how she became aware of the illicit materials or why the illicit materials were in the family home.

iii. I do not accept the explanation given by the pursuer about how he became aware of the illicit materials or why the illicit materials were in the family home.

iv. I consider, on the balance of probabilities, that the illicit materials have a connection with the parties' television programme project and that both parties had an awareness of the illicit material from that time.

v. There is no evidence that either party actively viewed or otherwise engaged with the illicit materials after Mary's birth and before the defender interacted with them on 4 February 2019.

vi. On 5 February 2019, when the defender left the family home with the children and reported the illicit materials to the police, the defender expressly stated to the police that "[the pursuer] has never hit me or the children.", and "I have never been concerned about [the pursuer's] interaction, between him and our children."

vii. Thereafter, over the period of March to May 2019, the defender made a series of increasingly more serious allegations regarding the pursuer's conduct towards herself and the children, including allegations of penetrative sexual abuse of the children by the pursuer.

viii. Despite each child undergoing two joint investigative interviews and a forensic medical examination, neither child at interview nor the forensic medical examinations give any support for the defender's allegations. Moreover, despite being specifically questioned on the issue of potential abuse, sexual or otherwise, both children positively stated that they had no memories of any such behaviour.

ix. When giving evidence in court the defender made further, new allegations which were not mentioned in the defender's written case before the court or her sworn affidavit and despite the defender's assertions that she had told social work

about the new allegations, there was no record of these new allegations in the social work records.

x. In light of above conclusions, in my judgment, the defender has engaged in a course of conduct where she has knowingly made false and increasingly serious allegations against the pursuer concerning abuse of the children, including sexual abuse, and deliberately misrepresented the children's medical symptoms in support of those false allegations, all with the intention of alienating the pursuer from the children.

xi. Notwithstanding the defender's statement to the police on 5 February 2019, when she told the police "[the pursuer] has never hit me", the defender went on the make various allegations that the pursuer had domestically abused her, including sexually abusing her. There is no evidence to support these allegations.

xii. Irrespective of the above findings, both Mary and Anne are happy in their current circumstances and are achieving. It is not in either child's best interests to make orders that change either child's current circumstances, albeit Mary is no longer subject to the jurisdiction of this court.

[75] I will therefore grant the specific issue order sought by the defender and thereafter make no further orders. I will have the case put out by order to be addressed on any other matters arising.