

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT LERWICK

[2019] SCLER66

LER F17/18

JUDGMENT OF SHERIFF IAN HAY CRUICKSHANK

in the cause

MK (Assisted Person)

Pursuer

against

TDD

Defender

**Pursuer: Thompson; Thompson Family Law  
Defender: McAlpine; Anderson and Goodlad**

**Lerwick, 18 June 2019**

The Sheriff, having resumed consideration of the cause, Finds the following facts to have been admitted or proved:

- (1) The parties lived together and were in a relationship between September 2005 and August 2014. There is one child of the relationship namely Alice<sup>1</sup> born 19 August 2010. Alice is 8 years of age.
- (2) Both parties hold parental rights and responsibilities in relation to their daughter.
- (3) Prior to, and following, the parties' separation the pursuer was, and continues to be, Alice's main carer.
- (4) The pursuer is a German citizen. She is 46 years of age. She graduated as a veterinary surgeon in 1997. She became a Doctor of Veterinary Medicine in 2000.

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<sup>1</sup> Pseudonyms are used in this judgement for the child, her school, her local area and for other children who are family members.

She has lived and worked in Shetland since 2004. She is currently self-employed as a veterinary surgeon.

- (5) The defender is 51 years of age. He has lived and worked in Shetland most of his life. He is employed as a farmer and also is a self-employed crofter.
- (6) Alice has dual UK and German nationality. She is currently in Primary 4 at Asta Junior High School.
- (7) In December 2017 Alice was formally diagnosed as having selective mutism. Alice's condition was diagnosed by a consultant clinical psychologist, Dr Celina Kelley. Dr Kelley is based in Shetland.
- (8) Selective mutism is a severe anxiety disorder. It usually starts in childhood and, if untreated, can persist into adulthood. The condition often appears in pre-school but can also appear in the first two years of school.
- (9) With appropriate handling and treatment most children are able to overcome selective mutism. The older a child is when diagnosed the longer it may take to overcome selective mutism. The earlier a child with selective mutism is treated the better. If the condition goes untreated it can lead to the child developing a fear of school and can lead to truancy.
- (10) Children with selective mutism do not speak in almost every social situation. They do not speak to people they do not know. At home, or in a familiar environment, they can use language in an entirely normal way. In school they can appear apathetic or shy and generally don't speak, or speak very little, to fellow students or teachers. They can come across as anxious or nervous.

- (11) Following Alice's diagnosis of selective mutism she attended play therapy for a period of 9 months. This therapy was paid for by the defender. During this period of therapy Alice did not speak to the therapist involved.
- (12) Alice currently receives treatment for her selective mutism with Mrs Elizabeth Leslie who is a member of the Child and Adolescent Mental Health Services ("CAMHS") team in Shetland. Mrs Leslie is a registered nurse, a qualified counsellor and systems practitioner.
- (13) Mrs Leslie has no specialist qualification in relation to the treatment of selective mutism. Mrs Leslie works with Alice for one hour per week on an approximate fortnightly basis.
- (14) Mrs Leslie is currently using a cognitive behavioural therapy technique to develop her relationship with Alice and to encourage Alice to communicate with her. There has been use made of a graded exposure technique by meeting in different places and environments. These have included meetings at a play park and in the foyer of the Clickimin Leisure Centre in Lerwick.
- (15) The therapy undertaken by Mrs Leslie is supervised by Dr Kelly, the clinical child psychologist who diagnosed Alice. Mrs Leslie discusses Alice's treatment with Dr Kelly every 3 to 4 months.
- (16) Over the past 2 years there have been approximately 36 sessions between Alice and Mrs Leslie. The pursuer has accompanied her daughter to all sessions with the exception of one recent session when the defender attended.
- (17) Alice has developed a good relationship with Mrs Leslie over the past 2 years. Alice is now happy to spend the majority of the time in each session in the company of Mrs Leslie without the pursuer being present in the treatment room.

- (18) There is no health professional based in Shetland with specialist training in the treatment of selective mutism. The CAMHS team in Shetland is limited in the services it can provide and there is no service level agreement with other CAMHS teams elsewhere. Any decision to “buy in” a specialist service for Alice would require a managerial decision from CAHMS.
- (19) Following initial diagnosis Alice was referred to a Speech and Language Therapist, namely Lauren Walterson of the Speech and Language Therapy Department of NHS Shetland. The referral was made by MS, the head teacher at Asta Junior High School. Ms Walterson met with the pursuer and Alice in early 2018.
- (20) Ms Walterson liaised with Mrs Leslie of CAHMS and Poppy Neild, additional support needs outreach teacher, as she was aware that both of these individuals were involved with Alice’s care. Discussion took place as to the appropriate route for treatment. A decision was reached for Alice’s treatment to remain with CAMHS.
- (21) On 22 January 2018 Ms Walterson wrote to the pursuer summarising their discussions and outlining Alice’s current treatment and support. The letter concluded by advising the pursuer that if she wanted further support from Speech and Language Therapy then she should contact the Department. If Ms Walterson did not hear from the pursuer within four weeks of the date of the letter she advised she would discharge Alice from the service but, should there be further concerns in the future, Alice could be re-referred at any time.
- (22) Neither the pursuer, nor the defender, has sought to have Alice re-referred to the Speech and Language Therapy Department of NHS Shetland.
- (23) There are therapists on the UK mainland who have specialist training in the treatment of selective mutism. The pursuer has made some enquiry into the

availability of specialist treatment. She contacted a therapist based in England. The therapist suggested she could travel to Shetland to meet Alice. The pursuer ruled this out as being inappropriate given that the therapist would only visit for a short period and backup treatment would not necessarily be delivered in Shetland.

- (24) Neither the pursuer, nor the defender, has called upon NHS Shetland generally, or CAMHS specifically, to explore the possibility of referring Alice to a therapist specialising in selective mutism.
- (25) Alice attends Asta Junior High School. She is nearing the end of her time in Primary 4. Alice is coping well at school. She has a small circle of friends and is able to take part in class activities and lessons. The current school environment at Asta does not pose a particular difficulty so far as Alice's selective mutism is concerned, albeit that there have been occasions when communication has been difficult. On at least one occasion Alice was distressed and the pursuer had to collect her from school because Alice had wet herself. This had occurred because Alice had been unable to speak and ask to go to the toilet.
- (26) Asta Junior High School provides nursery, primary and secondary education up to Secondary 4 level for children in its locality. Its pupils range in age from 3 to 16 years of age.
- (27) Alice has various additional supports provided at Asta Junior High School. She has assistance from an additional support needs teacher. Presently Alice has limited support for literacy. Her literacy skills have improved significantly. She attends a nurture group to help with her social skills. Following an issue identified by Alice's PE teacher she attends a motor skills group with other children. Both groups meet on a regular basis.

- (28) Alice is benefitting from her continued involvement with both the nurture group and the motor skills group.
- (29) Following Alice's diagnosis of selective mutism there was involvement with Ms Poppy Neild, an additional support needs outreach teacher. Ms Neild has had "one to one" sessions with Alice during 2018 to encourage her to interact with Ms Neild. Ms Neild has also observed Alice in the classroom and has observed Alice engaging in learning, speaking with teachers and her peers and being able to negotiate her turn during classroom activities.
- (30) Following diagnosis of selective mutism the school placed Alice on a "stage 2" footing for the "getting it right for every child" programme ("GIRFEC"). This means that outside professionals become involved in, and contribute to, GIRFEC meetings. Those attending and contributing at these meetings include the pursuer, the defender, Mrs Leslie, Ms Neild, Alice's class teacher, her additional support teacher and the head teacher.
- (31) GIRFEC meetings have reviewed Alice's progress, and assessed her ongoing needs and requirements, every 3 to 4 months since February 2018.
- (32) The most recent GIRFEC meeting convened on 5 February 2019. The defender's production 6.1.5 is a copy of the accurate minute of the meeting taken by MS the head teacher.
- (33) Both the pursuer and defender attended the meeting on 5 February 2019 as did Alice's class teacher and MS. Neither Mrs Leslie nor Ms Neild attended but both sent comments and observations about Alice's progress. Alice was reported to be doing well in class. Her spelling had improved and her spelling age matched her actual age. Alice was receiving extra support with new maths concepts. The

defender reported that Alice was getting on well with her extended family and that she had met some of these family members at the swimming pool. The pursuer reported that Alice had found maths homework challenging at times and could panic with this. The pursuer reported that Alice worried about changes in routine and she had struggled with private swimming lessons. It was agreed that the class teacher and MS would speak to the PE teacher about Alice's anxieties about swimming.

- (34) The actions to follow upon the GIRFEC meeting of 5 February 2019 were recorded as follows:

"Liz – continue to work with Alice in Lerwick. Liaise with this information to the school.

Cheryl – continue to build Alice's confidence in class and work with Ingrid Smith with transition for P5 in August 2019.

Janis – continue with Nurture group. Continue working on Alice's literacy skills.

Continue with Motor Skills group

Poppy – continue to be a familiar face and liaise with school staff.

All people involved in Alice's life – highlight the positives to Alice."

- (35) The next GIRFEC review was scheduled for 4 June 2019.
- (36) The pursuer has no family members or family support in Shetland.
- (37) The pursuer wishes to relocate to Germany with Alice. She wishes to relocate to Recklinghausen. The pursuer's parents have a property there which includes a two bedroom flat which would be made available to the pursuer.
- (38) The pursuer's production 5.2.1 at page 12 is a photograph of her parents' property and shows the location of the flat which is available to the pursuer. A floor plan of the flat is also reproduced.

- (39) Alice's first language is English. She speaks primarily in English but understands German. She can speak in German to an extent but, to German "ears", this is with a British accent. The pursuer speaks to her daughter mainly in German. They read books written in German together and watch German television. The pursuer has been teaching her daughter German grammar and spelling.
- (40) The pursuer has other family members in and around the Recklinghausen area. This includes her brother and Alice's 5 year old cousin, Jacob.
- (41) Alice has no difficulty communicating with her maternal grandmother. She experiences some difficulty in communicating with her maternal grandfather and needs time to adjust. Alice has a good relationship with her maternal uncle. Alice has not had direct contact with any of her maternal family members for some time.
- (42) The pursuer has researched schooling in the Recklinghausen area. She narrowed her preferred options down to 9 schools, 5 being mainstream schools and 4 operated by Rudolf Steiner. Of all of these the pursuer would wish for Alice to attend Grundschule Im Hinsberg which is located about 500 metres from her parent's house. It is within 5 minutes walking distance. The pursuer has not visited this school but her parents have done so. The school provides extra German lessons to assist non-native German speaking pupils with adjustment and transition. The school also runs "language camps".
- (43) The pursuer's production 5.2.1 at page 13 shows three photographs being external views of the school, Grundschule Im Hinsberg.
- (44) In the event that the pursuer was to relocate to Germany with Alice she would, at some time in the future, seek employment as a veterinary surgeon. She has no offer of employment in Germany at this time. It would not be her intention to seek



employment immediately but she would seek to ensure that her daughter was accustomed to her new school and would assist in her daughter's transition.

- (45) In Shetland the pursuer earns on average £1,000 per month from self-employment as a veterinary surgeon.
- (46) Alice, or the pursuer on Alice's behalf, is currently in receipt of Disability Living Allowance.
- (47) The pursuer has discussed her relocation with her parents. Her parents will assist her financially following a move to Germany but the pursuer has not discussed this in detail with her parents and currently does not know the extent of the financial support which they would offer.
- (48) The pursuer wishes to relocate to Germany because she believes her daughter can get different and better treatment for selective mutism in Germany to that available in Shetland. There are 4 therapists in the Recklinghausen area who treat selective mutism. The pursuer has approached one such therapist, namely Renate Kaufmann.
- (49) Renate Kaufmann is a certified speech therapist. She has been based in Recklinghausen since 2003. She underwent further training in mutism and is a member of "Mutism self-help". Since 2005 she has treated approximately 50 mute patients. Presently she has 5 patients with selective mutism between 4 and 25 years of age. In Germany there is a network of therapists who have specific training in treating mutism. Frau Kaufmann is part of that network which provides an opportunity for parents to seek advice by telephone and provide information to allow parents to make further decisions about their child's treatment.
- (50) In the event that the pursuer is allowed to relocate with Alice to Recklinghausen a therapy place will be available at Frau Kaufmann's practice.

- (51) To date, Frau Kaufmann has neither met nor assessed Alice for treatment purposes.
- (52) The pursuer and her daughter currently live in close proximity to the defender. His principal place of work is about 4 miles from his croft. He lives approximately 1 mile from the pursuer's home. The defender lives in close proximity to Asta Junior High School. The parties live in or around Dale which is a small rural community. The village itself comprises a small local authority housing estate, a shop, a garage and a health centre.
- (53) The defender has members of his extended family in the Dale area. His sister and two brothers live at different locations within a 5 mile radius. Alice's selective mutism leads her to have some communication difficulties with the defender's siblings. There have been incidents which led to Alice having communication difficulties with the defender's sister but these difficulties are currently resolved.
- (54) Alice gets on well with her older cousin, Helen, who also attends Asta Junior High School but she currently has less contact with Helen as she is now in the secondary department of the school. Alice also gets on well with her older cousin, Ruben.
- (55) The defender experienced difficulties at school and was anxious about communicating with others. On leaving school he was unable to speak to people in social situations. The defender was never formally diagnosed with any condition in this respect. The defender's ability to communicate has improved in adulthood.
- (56) Since 2019 the defender has enjoyed both residential and non-residential contact with his daughter. Prior to commencement of this action the defender enjoyed non-residential contact which was limited to a Saturday or Sunday afternoon. Following commencement of this action contact has been regulated by court order. The parties have been able to agree exact times and dates for contact, particularly during the

lambing season, being an activity which Alice enjoys with her father. Easter holiday contact led to the defender seeing his daughter every day during the holiday period, which coincided with the lambing season, between the hours of 10.30 am and 6 pm.

- (57) Currently, in terms of a court order dated 26 April 2019, the defender has contact every second Wednesday after school on a non-residential basis (when contact does not coincide with CAMHS meetings), and for residential contact one night each weekend. There have been at least two recent occasions where contact has spanned a two night period.
- (58) With one exception, which was due to a misunderstanding, the pursuer has cooperated and observed the court orders granted in relation to interim contact.
- (59) The defender and his daughter have shared interests. Alice has a passion for farming. She enjoys working with sheep. She has her own small herd of sheep on the defender's croft. During the Easter holiday period she spent lengthy periods of non-residential contact participating in the lambing season. During this period Alice was in contact with some other farm employees. She became confident enough to start speaking to one of these employees.
- (60) The defender and his daughter enjoy swimming. There are small local pools but they also attend the main Island swimming pool in Lerwick. On occasion they are joined in this activity by Gideon. Alice enjoys Gideon's company during swimming.
- (61) In the event that the pursuer is permitted to relocate to Germany the defender seeks periods of residential contact in Shetland. He is prepared to travel to Germany for weekend contact on a regular basis, being every 4 to 6 weeks, but has concerns about periods away from Shetland because of his farming interests. He does not know the Recklinghausen area and does not speak German.

- (62) In the event that the pursuer is not permitted to relocate to Germany the defender seeks extended periods of residential contact.
- (63) The pursuer does not believe that it is in Alice's best interests for her to have more than one overnight stay with the defender at present.
- (64) The parties do not communicate easily. In the past they have not communicated effectively regarding Alice, and in particular they have not been able to discuss in detail Alice's selective mutism or its ongoing treatment. Communication between the parties will remain difficult in the foreseeable future.
- (65) Alice has a strong and loving bond with the pursuer. She also has a strong and loving bond with the defender. Both parents provide support to Alice and are aware of the problems she faces as a consequence of her selective mutism.
- (66) Alice has benefited from contact with the defender. Contact has been positive and no particular difficulties have arisen during either residential or non-residential contact.
- (67) Alice is happy and well settled in the Dale area. She currently has an educational support package which is reviewed regularly. She is progressing at school and is coping well in her current school environment.

### **Finds in Fact and Law**

- (1) That it is not in the best interests of Alice to relocate to Germany and have her principal residence with the pursuer there at this time.
- (2) That it is not in the best interests of Alice to grant the specific issue order sought by the pursuer.

- (3) There is no need for a residence order to be granted in relation to the residence of Alice.
- (4) Taking Alice's welfare as the paramount consideration it is not better that either a residence order or a specific issue order be made rather than no orders be made at all.
- (5) That it is in the best interests of Alice to have contact with the defender on both a residential and non-residential basis.
- (6) Taking Alice's welfare as the paramount consideration it is better that an order for contact be made rather than no order be made at all.

#### **Finds in Law**

- (1) A specific issue order in terms of section 11(2)(e) of the Children (Scotland) Act 1995 stating that Alice is permitted to relocate with the pursuer to relocate to Germany not being in the best interests of the said child should be refused.
- (2) An order in terms of section 11(2)(c) of the Children (Scotland) Act 1995 that Alice should reside with the pursuer being in the circumstances unnecessary should be refused.
- (3) An order in terms of section 11(2)(d) of the Children (Scotland) Act 1995 being in the circumstances necessary should be granted.

Therefore:

Repels the defender's motion to exclude as inadmissible the lines of the pursuer's evidence heard under reservation; Repels the pursuer's first and second pleas in law; Sustains the defender's first and second pleas in law; Repels the defender's third plea in law; Sustains

the defender's fourth plea in law and in terms thereof grants a contact order whereby the Defender shall have contact with the child Alice each Wednesday from 4pm until 7pm, each alternate weekend from Friday after school until 6pm on Sunday, for one week during each of the Easter and October school holidays, for two weeks during summer school holidays, for such period or periods as the parties shall agree during the Christmas holiday period each year and for such other periods of residential and non-residential contact as the parties shall mutually agree ; Finds no expenses due to or by either party.

## NOTE

### Introduction

[1] In this action the principal issue for determination is whether an 8 year old girl with selective mutism should continue to live in Shetland or relocate to Germany with her mother, the pursuer.

[2] The pursuer, who is a German citizen, seeks a residence order and a specific issue order allowing her to relocate to Recklinghausen. The defender has lived and worked in Shetland most of his life. He opposes the relocation.

[3] The second issue for determination is, whether there is to be a relocation or not, what level of future contact with the defender is in the child's best interests.

[4] The pursuer's position on record, and in evidence, is that the primary reason for relocation is because treatment for selective mutism in Germany is better than the treatment currently being provided in Shetland which she considers is inadequate and ineffective. She also argues that her standard of living would improve in Germany and her ability to earn more as a veterinary surgeon would also benefit her daughter. She would return to live close to her parents and other family members.

[5] The defender does not accept that it would be in Alice's best interests to relocate to Germany. He is concerned as to how Alice would cope with the transition given her selective mutism and other current educational needs. Whilst he confirms he would travel to Germany to exercise contact, in addition to periods of contact he seeks in Shetland, he does not accept that the proposed relocation would promote or allow for the level of contact which he considers necessary in Alice's best interests. If the event that the permission to relocate is refused, the defender argues that the periods of contact he currently enjoys should be extended.

[6] This matter called before me for proof over 3 consecutive days, being 28, 29 and 30 May 2019.

[7] The proof was conducted by the parties' legal representatives in an often heated atmosphere borne out of the adversarial nature of the proceedings. Frequent objection on behalf of the defender was taken to the admissibility of various lines of evidence. Objection was taken to the authenticity and provenance of a report translated from German into English and whether the same could be regarded as the report of a skilled witness entitled to express opinion evidence. Further, issues arose regarding the use, and suitability, of a German interpreter who was required to interpret the evidence of German witnesses giving evidence via a video link from Germany.

[8] Having heard evidence and parties' submissions at a hearing on evidence I made *avizandum*.

**The Proof – Objections, skilled witnesses and practical difficulties**

[9] Before considering the evidence in detail, it is necessary to comment on various objections taken in relation to the evidence and to issues which arose whilst taking evidence from witnesses in Germany via a video link and with the services of a German interpreter.

***Defender's objection to proposed lines of evidence***

[10] At an early stage in the proof, Counsel for the defender timeously objected to various lines of evidence which the pursuer sought to lead. The objection was that there was no record for these lines of evidence. It was submitted that all that was pled was effectively an “*M v M* (2008) checklist”, a practice which had been disapproved of in later cases. For example, the pursuer on record simply averred that “the child will have better access to medical assistance for her selective mutism” and that she would receive “better medical treatment in Germany” without averring any more detail to explain why access was better or what made the treatment better. Similar criticisms were raised in relation to issues of schooling, accommodation and prospects of employment. It was, in Counsel’s submission, “proof by ambush” and that there was no fair notice of the pursuer’s case on record.

[11] In response, the solicitor for the pursuer argued that the pleadings were sufficient to allow these lines of evidence to be led. Whilst accepting that in certain respects averments on record were “thin” it was argued that there was sufficient averment to give the defender notice of the case and, in particular, notice of the reasons why the pursuer argued that the proposed relocation was in the best interests of the parties’ daughter. I was referred to the case of *Girvan v Girvan* 1988 SLT 866 where the First Division of the Inner House held that the welfare of the child was the paramount consideration and that “procedural and legal niceties” had to give way to common sense and reality.



*Decision in relation to objection to lines of evidence*

[12] It is true to say that the pursuer's pleadings were not as detailed as I have seen in other relocation cases. The reasons averred by the pursuer in support of relocation were pled in a checklist style, which mirrored the checklist adopted by Sheriff Morrison in the case of *M v M* 2008 Fam LR 90. There were relatively brief averments in support of each factor contained in that checklist.

[13] I decided to repel the objection under reservation of all questions of competency or relevancy. I concluded that it was appropriate to hear these lines of evidence under reservation as to admissibility. The objection was renewed at the hearing on evidence.

[14] Ultimately, I did not find the defender's objection to be well founded. Having given further consideration to the objection I repelled it and considered the evidence admissible. Whilst pleadings were not detailed they were, in my judgement perfectly sufficient to give the defender notice of the pursuer's case. As observed in MacPhail, *Sheriff Court Practice*,

"When deciding whether the defender has been given fair notice of the pursuer's case the court will consider the matter broadly, and will regard a complaint of lack of fair notice as justifiable only if it is likely to result in material prejudice to the defender" (MacPhail, *Sheriff Court Practice*, third edition, paragraph 9.29).

[15] In this case, the pleadings were sufficient for me to be aware of the reasons for the relocation albeit that they lacked detailed specification. The defender's position was that relocation was not in Alice's best interests and averred, in detail, why Alice's best interests were better served by remaining in Shetland as opposed to Germany. I could identify no material prejudice to the defender.

[16] I would comment that the case of *Girvan* was of no particular assistance to the pursuer. The issue for the court on appeal in *Girvan* related to the Sheriff's decision to

dismiss an action *ex proprio motu* as incompetent given that the action craving access had proceeded by way of an initial writ when the Sheriff considered the governing court rules required the application to be by minute. In that context it is understandable why the court commented that procedural and legal niceties had to give way to common sense and reality.

[17] Furthermore, in my judgement, in a case where there is a dispute regarding what is in the best interests of a child it is appropriate to reflect on all that has been discussed and brought to the attention of the court, and to the attention of the parties, during the whole court process. The proof is the end of that process. I had the benefit of being involved at all stages of this action. There had been 6 child welfare hearings between 21 May 2018 and 26 April 2019. There had been an options hearing on 1 February 2019. There had been a case management hearing on 1 March 2019 at which the parties had diligently lodged a joint minute of the case management conference which had been held by telephone on 28 February 2019. That joint minute addressed, amongst other issues, the issue of whether there was any dispute as to the admissibility of evidence – no issue was identified. Finally, there had been a pre-proof hearing which had been continued to 1 May 2019 to ensure that video links could be established to allow evidence to be taken from witnesses in Germany. The parties had timeously exchanged witness lists and lodged productions. Prior to the commencement of proof neither I nor the defender could argue that they did not know what factors were to be presented in evidence by the pursuer as supporting the proposed relocation.

[18] That said Alice's welfare requires me to decide whether the proposed relocation is in her best interests. I must decide the case on the evidence which is presented to me and draw my conclusions from what I can infer and establish from the evidence. In my judgement, it still remained a matter for the pursuer to decide upon the nature and extent of the evidence

she sought to lead. As I comment below, the pursuer had the onus to furnish the court with material potentially capable of justifying the making of the orders she sought.

*Difficulties encountered with the interpretation of evidence*

[19] There were difficulties with the interpretation of evidence. The pursuer's agent had instructed a German interpreter to attend to assist in translating the evidence of RK and Renate Kaufmann, the pursuer's mother and a speech therapist respectively. Both were to give evidence from Germany by video link.

[20] The situation encountered was not ideal. Initially, at the outset of evidence being given by Frau RK she complained that she could not hear the interpreter. The interpreter was moved to another microphone location in the court room.

[21] I began to have some reservations as to whether questions were being interpreted *verbatim*. I observed that the interpreter was attempting to translate some fairly lengthy questions without having noted these for her own reference. There were occasions when there was dialogue between Frau RK and the interpreter which was not being interpreted for the court's assistance. I reminded the interpreter of her duties in both respects. At one point the interpreter interpreted a response from Frau RK in which she asked if her daughter, the pursuer, could interpret for her because she was having a difficulty in understanding the interpreter whose German was being spoken with an English accent.

[22] The pursuer's solicitor sought an adjournment as his client had raised an issue with him. I considered it appropriate to invite the parties' legal representatives into chambers to ascertain the difficulty. The pursuer's solicitor advised me that his client had confirmed the translation was not accurate. The pursuer was a native German speaker. The pursuer's

solicitor made no further motion at that time but sought a brief adjournment to consider matters. I was content for this to be allowed.

[23] The case then called in court. The pursuer's solicitor advised that his client had instructed that she was not prepared to have the interpreter continue. I was advised that enquiry had been made of the Company who supplied the interpreter as to whether another interpreter could be made available to attend at Lerwick the following day. A telephone call was awaited to ascertain this. The pursuer's solicitor went on to advise that if another interpreter was not available he would not make a motion to adjourn the proof to a later date. He stated that an interpreter would not be required if Counsel for the defender was content not to cross examine Frau RK and if it could be possible to reach agreement that the written report of Frau Kaufmann be regarded as her evidence-in-chief.

[24] In response, Counsel for the defender stated that it was a matter for the pursuer how she wished to proceed. He would be objecting to any motion to adjourn the proof as three days had been assigned for this matter and his client was not legally aided. He stated that he was content not to cross examine Frau RK if no further evidence was to be led from her. With regard to the report of Frau Kaufmann, provided the translation, which was not certified, could have its provenance established, subject to deletion of certain parts which he submitted were opinion evidence and inadmissible, then he believed it would be possible to accept the report, in redacted form, as the evidence-in-chief of the witness and cross examination, subject to client's instruction, might not be necessary.

[25] It became known that a replacement interpreter could not be made available. The pursuer's solicitor, having considered and responded to Counsel's submissions in relation to the written report and having considered my ruling in relation to the requested redaction of the report, confirmed it was his intention to proceed.

[26] Given how events unfolded I formed no concluded view as to whether there was an insurmountable difficulty with the interpreter. Following upon the matter being discussed in chambers I was not called upon to make any further independent enquiry into this matter.

*Objection taken in relation to report and witness to be regarded as a skilled witness*

[27] Following the above difficulty consideration was given to the report of Frau Kaufmann and whether it could be accepted as her evidence-in-chief. Counsel's position was that the report could not be considered as the report of a skilled witness entitled to give opinion evidence. He referred me to the case of *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 in which the Supreme Court gave consideration to the admissibility of opinion evidence as opposed to factual evidence and the considerations which governed the admissibility of skilled evidence.

[28] The pursuer's solicitor confirmed that it was his intention to lead Frau Kaufmann as an expert witness. Having stated that, the pursuer's solicitor confirmed he was prepared to consider relying on the report in redacted form.

[29] The parts of the report to which Counsel objected were as follows. On page 2 of the report Frau Kaufmann stated "Mutism therapy can only be provided by therapists who have additional training in this field. It is very particular and individual". On page 3 it was stated "A change, whether changing day care centres, moving schools or moving house always provides an opportunity for the child to overcome their verbal inhibition". Finally on page 4 it was stated:

"Simple speech therapy is not at all enough to overcome mutism. In my view, Alice's current therapy is not sufficient to enable her to overcome the mutism. Alice

needs special mutism therapy to enable her to develop further. The longer mutism persists, the more chronic it becomes”.

[30] The report in question did not contain any information as to whether Frau Kaufmann had seen any medical or other notes specific to Alice. It was accepted that she had never met Alice.

*Decision in relation to the report and extent to which it could be presented in evidence*

[31] In the case of *Kennedy* the court identified four matters to be addressed in the use of expert evidence. These are (i) the admissibility of such evidence; (ii) the responsibility of a party’s legal team to make sure that the expert keeps to his or her role of giving the court useful information; (iii) the court’s policing of the performance of the expert’s duties; and (iv) economy of litigation – (at paragraph [38] of the judgement). The court acknowledged that the skilled witness can give expert factual evidence either by itself or in combination with opinion evidence. Four considerations govern the admissibility of skilled evidence; (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and expertise; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert’s evidence. These considerations apply to both skilled evidence of fact and to opinion evidence – (at Paragraph [44]). The skilled witness must demonstrate to the court that he or she has relevant knowledge and skill to give either factual evidence, not based exclusively on personal observation or sensation, or opinion evidence –(at paragraph [50]).

[32] Having carefully considered this matter I concluded that, on the information available, Frau Kaufmann could give evidence to fact only. It was not appropriate for

opinion evidence to be given and, accordingly, if the report was to be treated as the evidence-in-chief of Frau Kaufmann it could only be regarded as such under redaction of the passages to which Counsel had taken objection.

[33] On this basis, the pursuer's solicitor moved for the written report to be treated as the evidence-in-chief of Frau Kauffman. On an undertaking being given by the pursuer's solicitor to lodge in process documentation to establish the provenance of the translated report Counsel for the defender made no objection and confirmed he did not seek to cross examine Frau Kaufmann. Thereafter the Pursuer closed her case.

### **The views of the child**

[34] It is important in this case to record the stages at which I gave consideration to obtaining Alice's views.

[35] When the writ was lodged a warrant was sought to intimate the proceedings on the child so that her views might be taken. I noted Alice was only 7 years of age at the time the warrant was sought. The writ contained an averment that the child had sufficient maturity to express her views. I did not immediately accept that to be the case. In addition to Alice's young age there was also an averment stating that the child had been diagnosed with an anxiety disorder, namely selective mutism. There was no further averment explaining what that would mean for Alice. I therefore granted a warrant of citation which postponed intimation of the action upon Alice "pending the lodging of a notice of intention to defend and pending being further addressed on the appropriateness of intimation given the child's age and medical condition".

[36] The issue of formal intimation of the action upon Alice was not re-visited but the issue of obtaining Alice's views was considered at various stages of the court process. On

record, it was averred that Alice had expressed a view that she wished to move to Germany. The defender had an averment to the contrary and that Alice had expressed the view that she wished to remain in Shetland. The pursuer's position was that Alice had expressed a view and wished the court to take this into account. Given Alice's selective mutism obtaining Alice's views through a child welfare reporter or by meeting me had been ruled out. It was conceded that Alice would not talk if asked to do so in these circumstances. There had been consideration given to having Alice's view taken by her head teacher but again this was ruled out.

[37] Ultimately, having addressed this matter at length on various occasions prior to proof I concluded that in the particular circumstances of the case it was not practicable to obtain Alice's views. In any event, in reaching that conclusion, I made it clear to the parties that, given Alice's age, and the primary reason given for Alice's relocation being the availability and effectiveness of medical treatment, the weight I could attach to Alice's views would be extremely limited.

### **The Evidence at Proof**

#### *Evidence for the Pursuer*

[38] The pursuer gave evidence at length. She called as witnesses Mrs Elizabeth Leslie and her mother Frau RK. The redacted report of Frau Kaufmann was accepted as her evidence in chief.

#### *The Pursuer*

[39] I found the pursuer, in the main, to be generally credible and reliable with some exceptions as I have noted below.



[40] The Pursuer spoke of her life in Shetland where she had resided since 2004. She spoke of her daughter's selective mutism, when it had been diagnosed, the treatment she had been receiving and the difficulties her daughter continued to encounter in various social settings. It was clear that the pursuer had researched the causes, the triggers and the treatment for selective mutism. She stated that her research had confirmed that 7 out of every 1000 children could be affected by the condition. She spoke of emailing the defender following diagnosis but of getting no response. She spoke of communication between them as having been problematic, and that communication remained difficult. She confirmed that the defender had paid for play therapy for Alice which continued for 9 months but, for the whole period, Alice had been unable to speak to the play therapist. In the pursuer's opinion, the treatment available in Germany would provide better access to specialist therapists, shorter distances to travel for treatment and shorter waiting times for treatment to be provided.

[41] It was clear that the pursuer had no doubts or reservations about her proposed move to Germany. She explained what accommodation would be available, what her plans for employment were and about the school she preferred for her daughter. She was forcefully of the opinion that relocation to Germany would have huge benefits for her daughter. She was also of the opinion that her daughter would cope with a move to Germany and stated that she would ensure her daughter was settled in school before seeking employment. She accepted that there would be uncertainty for Alice but she did not appear to consider Alice would struggle significantly with the proposed move. I found the pursuer's evidence in this respect to be overly optimistic. After all, in the most recent GIRFEC meeting it was the pursuer herself who was recorded as stating that Alice worried about changes in routine.

[42] The pursuer was vigorously cross examined. She accepted that the defender loved his daughter and that Alice loved her father. It became clear, however, that the pursuer sought to qualify what she thought of the father daughter relationship. When asked if they had a close loving relationship she said this was so “within limits”. When asked if Alice enjoyed spending time with the defender she stated on numerous occasions that Alice “could not cope” with residing with the defender for more than two nights at a time. I had reservations about the pursuer’s reliability in relation to how she viewed her daughter’s relationship with her father and the benefits that contact offered Alice.

[43] One aspect of the pursuer’s evidence which caused concern was the extent to which the pursuer had sought to have her daughter’s views considered. Prior to the proof consideration had been given on various occasions as to whether Alice’s views should or could be taken. Ultimately I had concluded that it was not practicable to obtain these views. I had also expressed my opinion that the weight I could attach to such views would be extremely limited. Notwithstanding that, it became clear in her evidence that the pursuer had recorded Alice’s views and had given this to her solicitor. In fairness the pursuer’s solicitor had not sought to use this in any way but, on cross examination, the pursuer confirmed she had recorded Alice, with her daughter’s knowledge, and stated that her daughter had been “desperate” for her views to be heard. She said that her daughter knew the recording was to be given to the pursuer’s solicitor who she told her daughter was the person who would help the pursuer in court. The pursuer also gave evidence to the effect that Alice had been “furious” that the sheriff had not wanted to have her views heard.

[44] Indeed, a recurring theme in the pursuer’s evidence was the extent to which she had discussed matters with Alice. This was particularly so when it came to the issue of contact. Whilst the pursuer stated in evidence that she would promote and encourage contact, and

that she understood the requirement to observe and obtemper any court order in this respect, I was left with the impression that the pursuer would defer to Alice when it came to whether or not, and to what extent, contact would operate. For example, whilst agreeing that the defender could have contact in Germany, and that the defender could have extended periods of contact in Shetland, it would depend on what the pursuer considered Alice felt she could cope with. She stated in evidence that she would consult Alice in relation to this and Alice's views would be taken into account by the pursuer. I accept the pursuer stated it was Alice's anxiety disorder which affected the issue of contact and that Alice needed more preparation than non-affected children to be ready for contact. However, having given allowance for this understandable view I concluded that the pursuer's evidence about her intention to promote contact lacked credibility. I concluded that the pursuer would rely on Alice's views very heavily when determining whether, and on what basis, contact would operate in the future.

*Frau RK*

[45] The limited evidence taken from Frau RK was credible and reliable. In substance, however, it simply confirmed that Frau RK knew her daughter wished to relocate to Germany because she wanted to access treatment for Alice's selective mutism. It also meant that the pursuer could be close to her family. A two bedroom apartment was available and it was confirmed that the pursuer's parents were prepared to help financially. The extent of financial assistance was not further explored. Frau RK confirmed she had visited the school proposed for Alice which was close to her home. She spoke of a place being available from September 2019. No further evidence was led regarding the school.

*Mrs Elizabeth Leslie*

[46] Mrs Elizabeth Leslie provided evidence of her involvement with Alice and the current treatment she was providing as part of the service at CAHMS. Mrs Leslie explained the extent of her involvement and the current cognitive behavioural technique being used. Mrs Leslie confirmed that the school environment was not posing a particular problem for Alice. She was aware of the pursuer's contention that there had been no improvement outside school but Mrs Leslie could not comment on that other than her observations of Alice where she had been involved in graded exposure out with CAMHS offices.

[47] Mrs Leslie also readily accepted she had no specialist qualification in treating selective mutism. She could confirm her belief that she had seen improvements in Alice during her involvement but couldn't say whether that was due to her input or otherwise. She spoke to the fact that Alice had bonded well with her and could communicate with her. As the therapy sessions had progressed it was no longer necessary for the pursuer to be in the same room for all of the session. Alice was content and relaxed in Mrs Leslie's company. Mrs Leslie confirmed that the defender had accompanied Alice to one session and stated that, in her opinion, it would not be a problem if he wanted to become involved in the ongoing treatment. Mrs Leslie did not know what specialist treatment could be accessed but knew it would be a management decision as any such service would require to be "bought in".

[48] I had no hesitation in finding Mrs Leslie to be a credible and reliable witness.

*Frau Renate Kaufmann*

[49] I have already commented in general terms regarding the evidence of Frau Kaufmann. From the terms of her report I took the information which forms findings in fact (8) to (10) and (36) to (38).

[50] It was clear that Frau Kaufmann had never met nor had she assessed Alice. Accordingly, there was nothing in this evidence which explained what treatment was proposed in Germany or what it would consist of in Alice's case.

[51] Frau Kaufmann gave two examples of how children she had treated had dealt with particular situations causing them difficulties. One example related to a 5 year old boy who could not speak to his teacher. Therapy seemed to be too late to give necessary advice to the teacher in question. The boy's parents decided on another school and Frau Kaufmann spoke of a guidance session with his future teachers and shortly thereafter the boy spoke to these teachers and other children. The second example referred to a girl who spoke to only one other girl in her class and not to her teachers. Frau Kaufmann gave advice to the girl's teacher who was eager to help. The girl also attended therapy weekly and after a short time she began to communicate with Frau Kaufmann, games being used as a method to encourage the girl to speak.

[52] I found that there was little detail given in the examples provided by Frau Kaufmann. Other than the frequency of treatment I could not conclude exactly how treatment in Germany would proceed. Further there was no comment as to how treatment in Germany varied from treatment being given in Shetland other than the fact that Frau Kaufmann had a certain degree of specialist training in dealing with the condition. In addition, the examples given referred to helping children experiencing difficulties in a

school environment. The evidence before me suggested that Alice's selective mutism did not cause a particular difficulty in her current school environment.

[53] Whereas I treated the evidence as credible and reliable it lacked specific information or conclusions about proposed treatment for Alice. There was nothing in this evidence which allowed me to make any findings in fact as to how treatment for Alice would be assessed or delivered in Germany or in what way it would be better.

### *Evidence for the Defender*

[54] The Defender gave evidence on his own behalf. He called as witnesses Poppy Neild and MS.

### *The Defender*

[55] The defender spoke of his personal circumstances and his relationship with his daughter. He spoke of his shared interest with his daughter of farming and described her as a "hands on girl" and that she was very happy in the farm environment. He spoke to his daughter having her own small flock of sheep and of her taking responsibility for their care. He spoke of the fact that his daughter had always lived in a rural area. He spoke of his love, and pride, for his daughter and the fact that he wanted to spend more time with her.

[56] The defender gave evidence to the effect that he had been anxious in his youth when communicating with others. He stated that, on leaving school, he had found he was unable to speak to people. There had never been a formal diagnosis but he stated that things had improved for him in adulthood and that, given his own experiences, he sympathized with Alice as he knew what she was going through.

[57] The defender spoke of his concerns for Alice if she moved to Germany. He did not think she would cope well with such a major change. He stated he knew nothing about her proposed school and had not been consulted about the proposed choice of school. He stated his daughter was slow to make friends but that she had established a friendship group at her school. He thought she would find it difficult to make new friends.

[58] The defender explained that he had extended family in the Dale area. He readily accepted that Alice had had some communication difficulties with some of his siblings, particularly following an incident with his sister, but he confirmed this was now resolved.

[59] The defender spoke about current contact arrangements. Since he had started getting contact on a Wednesday evening he had been able to help Alice with her homework. He spoke about their shared activities such as swimming. He spoke of the contact Alice had enjoyed at Easter and her involvement with the lambing season. He explained that Alice had been in contact with staff members on the farm. He gave an example of Alice having been in the lambing shed when she saw that a lamb was hungry. She had fetched a bottle of milk and got hold of the person responsible for feeding the lamb. The following day Alice had started talking to that employee.

[60] The defender gave evidence at length as to the contact regime he thought would be of benefit to Alice. This included a concession on his part that, in the event of there not being relocation, he was happy for Alice to be with the pursuer each Christmas and if plans included a trip to Germany he would assist with payment to meet the cost. He spoke of concerns about exercising contact in Germany but hoped he would be able to travel there every 4 to 6 weeks.

[61] At one point in his evidence the defender stated that, in the future, he would like to have regular meetings with the pursuer to discuss their daughter's progress. He stated that he wanted to "repair bridges that have been damaged".

[62] The defender was also vigorously cross examined. He readily accepted that the pursuer was an intelligent, professionally qualified individual who loved and cared for her daughter. When asked if he thought the pursuer was a liar he stated that he had never known the pursuer to be a liar but he had known her to be wrong and that she had made mistakes. When asked if he had any reason to doubt that the pursuer would pick the best possible school for their daughter he said that she would certainly not deliberately pick a bad school but stated that he had been given no detailed information or evidence of what the proposed school offered. He disagreed that there had been no real progress with Alice's condition.

[63] In all material respects I found the defender to be both credible and reliable. He gave his evidence in an open and honest way. He came across as a quiet individual who undoubtedly tried to shun conflict. I formed the impression that the defender felt an element of regret that communication between him and the pursuer had been difficult and he desired to try and rectify that when it came to discussing issues regarding his daughter.

*Ms Poppy Neild*

[64] Ms Neild confirmed she was an additional support needs outreach teacher. She spoke to becoming involved with Alice in 2017. She consulted with Mrs Leslie of CAMHS and had some "one to one" sessions with Alice. She spoke of how she had explained a game to Alice who had then been able to explain the game to another. Ms Neild had also observed Alice in the classroom. She had observed Alice speaking to her class mates. She



had observed Alice taking part in learning and other activities. During a white board activity she had observed Alice negotiating her turn. She stated that in the classroom sessions she had observed Alice joining in enthusiastically.

[65] Ms Neild was involved in the GIRFEC process. She was referred to various reports and confirmed comments attributed to her to be accurate.

[66] In cross examination Ms Neild confirmed she had no professional involvement with Alice out with school. She confirmed she had probably seen Alice at community events and at the Tesco supermarket in Lerwick.

[67] I found Ms Neild to be a credible and reliable witness.

#### *MS*

[68] Evidence was taken from MS. MS is the head teacher at Asta Junior High School. He had been head teacher for 7 years and spoke to having known Alice since she first attended nursery. He also spoke to the fact that, in school, he would see Alice most days, either in the corridor, play ground or in the class room. He spoke to the fact that he would take Alice's class for certain pre-arranged periods or would cover for the class teacher if she was ill or at a training event.

[69] MS gave evidence about Asta Junior High School in general terms and confirmed that it provided education to children in its vicinity from nursery through to secondary 4. The pupils ranged in age from 3 to 16 years.

[70] MS stated that Alice was settled. He stated that she got on well with the majority of the pupils. She worked well in class and he believed she was making good progress. He stated Alice had some friends, not a wide circle of friends, but a circle she played with and communicated with.

[71] MS confirmed the additional support that Alice had, including her participation in a nurture group to help social skills and a motor skills group. He also spoke of the GIRFEC process and how this operated for Alice.

[72] MS was asked how Alice was doing academically. He responded that she “was where she was”. She was working well at her own level. Her additional support for literacy was less involved as her literacy skills had improved. He confirmed that if Alice was assessed as requiring additional support for any particular issue it would be looked at and made available.

[73] In cross examination MS confirmed he had seen Alice on occasion out with school. He confirmed he had seen her at the swimming pool where she had not spoken to him although she would do this in school. He commented this was not unusual and that many children acted similarly out with the school environment.

[74] I had no difficulty in assessing MS to be a credible and reliable witness. He was a caring and well informed teacher who knew his pupils well. He was very conscious of Alice’s participation in her current school environment.

### **Parties’ Submissions**

[75] At conclusion of the evidence the parties’ legal representatives were content to proceed immediately to a Hearing on Evidence. The pursuer’s solicitor proceeded with oral submissions and provided various authorities for my consideration. Counsel for the Defender provided written submissions, which he expanded orally and provided further authorities.

*Submissions for the pursuer*

[76] The pursuer's solicitor moved me to sustain the pursuer's first and second pleas in law. He sought to persuade me that based on the evidence it was in Alice's best interests that a specific issue order should be granted to allow her to relocate to Germany with the pursuer. He argued it was in Alice's best interests for a residence order to be granted.

[77] The pursuer's solicitor submitted the pursuer was a credible and reliable witness. She sought to move to Germany because of the lack of appropriate treatment for selective mutism in Shetland. Evidence from Mrs Leslie confirmed there was no specialist treatment available in Shetland and this validated the pursuer's concerns. He submitted there was evidence that Alice was behind in her physical and social development. In Germany specialist treatment was readily available.

[78] It was submitted that the evidence supported the fact that after 2½ years the treatment Alice had received still did not assist her in talking to strangers and there remained problems for Alice in social environments out with school. It was submitted that the lack of progress under the current treatment regime would allow the court to draw a reasonable inference that Alice's selective mutism would not get better without specialist treatment. That treatment was available in Germany and could commence immediately.

[79] The pursuer's solicitor accepted there were draw backs in the proposed relocation but the pursuer was there to help her daughter through the transition period. He also submitted that it was reasonable to infer that the pursuer would continue to promote contact between Alice and the defender

[80] The pursuer's solicitor argued that, whatever the decision, there should be no expenses due to or by either party.

*Submissions for the defender*

[81] Counsel for the defender argued that I should repel the pursuer's pleas in law and to grant a contact order in the defender's favour.

[82] Counsel submitted that the plan to relocate was not reasonable. It had not been shown by the pursuer that it would be in Alice's best interests. It remained for the pursuer to furnish the court with evidence capable of supporting the orders sought. It was submitted that the pursuer had failed to do so and numerous omissions were outlined. For example, there was no detailed evidence regarding the proposed school placement including the German curriculum, ASN support, or class sizes etcetera. There was a lack of evidence about Recklinghausen and how it compared to the community in Dale. There was no detailed evidence of the pursuer's current financial position, or the package of support to be provided by her parents. It was unclear what deficiencies there were in the current treatment being made available to Alice in Shetland.

[83] Counsel for the defender submitted that the pursuer had failed to adduce evidence supporting the proposition that Alice was not receiving necessary treatment in Shetland and that only a move to Germany would provide such treatment. She had failed to show that she would be financially better off and that Alice would benefit from that.

[84] Counsel for the defender submitted that there was no evidence to support a residence order, residence was not in dispute and no order was necessary.

[85] Given the limited nature of contact to date, the reasons given for that, the need for parties to cooperate and lack of communication, it was better that a contact order be made rather than no order be made at all and it was appropriate for contact to be increased, the defender's position and proposals having been explored in evidence.

[86] Counsel for the defender also argued that there should be no award of expenses due to or by either party.

### **The Applicable Law**

[87] The pursuer seeks both a residence order and a specific issue order in terms of section 11(2)(c) and 11(2)(e) of the Children (Scotland) Act 1995 (“the 1995 Act”). The defender seeks a contact order in terms of section 11(2)(d) of the 1995 Act. In terms of section 11(7) of the 1995 Act, in considering whether or not to make any order which can competently be granted under section 11, 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 wish, give him an opportunity to express them; and
  - (iii) have regard to such views as he may express.”

[88] The proposed relocation in this case is to Germany. Both parents hold parental rights and responsibilities. Accordingly, removal of a child habitually resident in the United Kingdom to a country outside the United Kingdom is unlawful if a parent does not consent to the child’s removal other than by court order. (See section 2(3) of the 1995 Act.)

[89] *M v M* 2012 SLT 428 was a decision of the Inner House. It is the leading authority in relocation cases. In delivering the opinion of the court, Lord Emslie, at paragraph 9, confirmed that in relocation cases “the welfare and best interests of the child or children concerned are paramount, and fall to be judged without any preconceived leaning in favour

of the rights and interests of others.” This case confirmed that the approach adopted in England, as enunciated in the case of *Payne v Payne* [2001] Fam 473, namely that a reasonable plan to relocate by the primary carer, including the effect of a refusal to allow relocation on the primary carer, forms no part of the law of Scotland.

[90] In a relocation case, no particular factor has any greater weight than any other. This has been referred to as a test which is “presumption free” (*Donaldson v Donaldson* [2014] CSIH 88 at paragraph [27]). In every case there is a neutral starting point and this allows the court to properly assess and observe its duty to regard the welfare of the child as the paramount consideration. That is not to say that in any given case a factor may have particular importance and should have greater weight attached. Indeed, the case of *M v M* acknowledges that there might well be cases where significant, or even dominant, weight can be attached to a reasonable relocation plan put forward by a parent who is the primary carer. To illustrate this Lord Emslie provided examples where that might be so (see paragraph [53] of the judgement). In the case of *Donaldson* the example given was the availability in each jurisdiction of some particular medical treatment or educational provision which is of direct relevance to the present case.

[91] There is no legal onus of proof upon a party seeking an order to relocate: *White v White* 2001 SC 689. That said, a party seeking to alter the *status quo* has some liability to furnish the court with material potentially capable of justifying the making of the order: *S v S* 2012 Fam LR 32, paragraph 10. Further, the party seeking to relocate must undertake the dual burden imposed by section 11(7)(a) of the 1995 Act “of showing (i) that relocation would actually be in the best interests of the children, and (ii) that, again from the children’s perspective, it would be better for a specific issue order to be made by the court than for no order to be made at all” (*M v M* at paragraph [57]).

[92] What material will be potentially capable of justifying the making of an order will be dependent on the particular facts of each case. In each and every case “scrutiny of the particular circumstances of the dispute and the child is what matters” (per Lady Wise in *MCB v NMF* [2018] CSOH 28 at paragraph 6).

[93] In the case of *Ross v Ross* [2018] SC GLA 47, at paragraph 73, Sheriff Anwar usefully observed the following:

“Unless there are circumstances which might explain why such material is not available, in the ordinary course, a parent seeking to relocate with a child must, at the very least, be in a position to place material before the court in relation to:

- (a) the proposed accommodation for the child, its suitability and affordability;
- (b) the proposed schooling arrangements for the child;
- (c) the financial means of the parent seeking to relocate and how he or she will provide for the child;
- (d) the proposals for contact between the child and the other parent;
- (e) the reasons for the proposed relocation.

Without such information, it is difficult to see how the court can properly discharge its function under section 11 of the Act.”

## **Decision**

[94] Having regard to all of the factors explored at proof, and on the evidence presented, in my judgement the pursuer has failed to discharge the dual evidential burden placed upon her. On the evidence presented I cannot conclude that the relocation would actually be in Alice’s best interests. Similarly, on the evidence presented I cannot conclude that, from Alice’s perspective, it would be better for the specific issue order to be made than for no order to be made at all.

[95] Considering the material placed before me there was insufficient or inconclusive material potentially capable to justify the making of the orders sought. I heard no evidence of the nature or type of the pursuer's current accommodation in Shetland as opposed to what was to be available in Germany. All I know is that a two bedroom flat would be made available to the pursuer in Recklinghausen. I heard no evidence of what the area of Recklinghausen consisted of, the services or activities it could provide or how it compared to the rural area where Alice had spent all of her life thus far. I heard no evidence of what the German school could provide for Alice and in what way it was better, or at least as good as what was being provided to Alice at Asta Junior High School. I heard no evidence about the type of school, the number of pupils who attended, or whether it provided primary education only. I heard no evidence of what supports would be made available to Alice to assist with her transition, other than the provision of extra German lessons. I heard no evidence of what supports would be made available to her given her wider educational support needs. I heard superficial evidence about the pursuer's current financial situation. I do not know why the pursuer's current income as a veterinary surgeon appeared so limited. By her own admission, the pursuer did not know the extent of the financial assistance to be provided to her by her parents. I heard evidence that Alice was currently eligible for Disability Living Allowance. I heard no evidence as to the extent of the benefit being paid and I heard no evidence about potential entitlement for benefits which might be awarded to Alice in Germany.

[96] The primary factor pled in support of relocation was the availability of specialist treatment for selective mutism and the fact that the current treatment available in Shetland was both inadequate and ineffective. This is a factor which would potentially have attracted dominant weight but the material placed before me does not entitle me to do so. Alice is



currently receiving treatment albeit not from a specialist in selective mutism. I accept that no specialist can be found based in Shetland. I heard no evidence of specialist treatment available on the Scottish Mainland and extremely limited evidence of specialist treatment available in the UK as a whole. Alice's condition cannot be unique in Scotland or in the UK. Yet I heard no evidence as to how selective mutism would be treated elsewhere in this country. I could not conclude that specialist treatment could not be made available to Alice whilst she continued to live in Shetland. Given the fact that Frau Kaufmann had never met or assessed Alice and could provide no detailed evidence as to what treatment she would provide to Alice, its frequency or likely duration, I could not conclude it would be better or in what way it was different to the treatment Alice was getting, or could get, in the UK. Furthermore, no evidence was presented as to whether the proposed treatment in Germany was to be privately or publicly funded.

[97] If I have wrongly concluded that the defender has failed to discharge the dual evidential burden which the law demands I would, in any event, have refused the pursuer's crave for residence as being unnecessary.

[98] Similarly, I would also have refused the application for the specific issue order as I am simply not satisfied that Alice's current treatment is either inappropriate or ineffective. Before I would have considered the possibility of allowing this relocation I would have to have been satisfied that all treatment avenues available in Scotland or the UK, whether privately or NHS funded, had been explored, considered and ruled out as inappropriate or un-workable. On the evidence available I could not have arrived at that conclusion.

[99] There is a factor to which very important weight attaches. It is an extremely important factor from Alice's perspective. That is the relationship between the defender and his daughter. I have assessed this as a strong and loving relationship. Moving forward it is

of great importance. The defender appreciates his daughter's condition and is trying to assist her with this. It is a relationship which, in Alice's best interests, should continue to develop and must be promoted now and in the future. That would be more difficult to promote following a move to Germany. A move to Germany would remove Alice from her shared interest in farming as she could not visit the defender and join in with farming activities on a regular and frequent basis.

[100] I accept that consideration needs to be given as how to best inform, and prepare, Alice for variations to contact. Given that Alice can struggle with changes in routine both the pursuer and the defender have an important role to play in this respect. I do not accept that contact should continue to be restricted to no more than one or two nights for periods of residential contact as at present. On the evidence presented to me Alice continues to enjoy contact and the time has come for periods of contact to be extended. In all respects contact is best promoted with Alice continuing to reside close to the defender in Shetland. It is also appropriate for contact to be regulated by a court order.