

SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT ABERDEEN

[2022] SC ABE 22

ABE-F492-19

JUDGMENT OF SHERIFF IAIN W NICOL

in the cause

AGNIESZKA MARIA NOWAK or GACEK

Pursuer

against

PAWEL JAN GACEK

Defender

Pursuer: G Moss; Moss and Kelly

Defender: G Masson; Blackadders

Aberdeen, 18 August 2022

The Sheriff having resumed consideration of the cause MAKES the following findings-in-fact:

- [1] The parties were married in Krakow, Poland on 4 June 2011.
- [2] The parties were joint tenants of a property at Short Loanings, Aberdeen, AB25 2TA from around 2006 until January 2018 when the defender's name was removed from the tenancy and the pursuer became the sole tenant.
- [3] During the period of the marriage, up until 16 December 2017, the pursuer and defender cohabited as man and wife except during various short-lived periods of separation which always resulted in a resumption of cohabitation.
- [4] The parties continued to have marital relations when cohabiting until December 2017.

[5] The parties have not had marital relations since December 2017.

[6] The photograph forming part of the pursuer's Third Inventory of Productions, number 5/2/31 of process, is a photograph of the defender wearing his wedding ring on his ring finger of his left hand which he posted on his Facebook page on 1 October 2017.

[7] During the period 2014 to November 2017 the parties went on various holidays, both abroad and in the UK either as a family or with friends. During these holidays they slept in the same bedroom and had marital relations.

[8] The parties did not go on any holidays together after 16 December 2017.

[9] The pursuer claimed state benefits as a single parent in 2014 during a period when the parties had temporarily separated. She continued to do so in 2015, 2016 and 2017 despite the parties resuming cohabitation.

[10] The defender's joint liability for council tax for the property in Short Loanings, as far as Aberdeen City Council was concerned, ceased on 10 August 2014.

[11] Number 5/3/38 of process, forming part of the pursuer's Third Inventory of Productions is the pursuer's P45 issued by Paul Build Ltd.

[12] The pursuer was an employee of Paul Build Ltd until 21 January 2018 when her employment terminated as a result of her resignation due to her employer ceasing to pay her wages in December 2017.

[13] Paul Build Ltd was and is a construction company operated by the defender.

[14] The pursuer's P45 is dated 22 January 2022. The address for Paul Build Ltd on the P45 is stated as the parties address in Short Loanings, Aberdeen.

[15] In 2017 the parties purchased a property in Krakow, Poland. Title to the property is in the joint names of the parties.

[16] The pursuer reported the defender to the police on several occasions during the period 2014 to 2017 due to the pursuer's concerns regarding the defender's behaviour towards her.

[17] Between early 2015 and August 2015 the defender was subject to bail conditions to the effect that he should not contact the pursuer or return to the property at Short Loanings, Aberdeen. The defender failed to adhere to said bail conditions and returned to the property to cohabit with the pursuer within days of the bail conditions being imposed.

[18] The defender purchased a property at Rose House, Hazelhead, Aberdeen in November 2015, the title to which was in his sole name. He did so as an investment for the parties with the intention of renting out the property.

[19] The property at Rose House, Aberdeen was rented out to friends of the parties for several months after November 2015. They vacated the premises as the property was in need of renovation and they were unhappy with the standard of living conditions.

[20] Aberdeen City Council granted permission to allow the property at Rose House, Aberdeen to be converted from a two bedroom property to a three bedroom property.

[21] The pursuer contributed a sum of at least £4300 towards the purchase price of the property at Rose House, Aberdeen. She did so by transferring that sum from her bank account to the defender's bank account on 12 November 2015.

[22] Production 6/1/3(ii) of the defender's First Inventory of Productions is a summary of evidence prepared by the Crown in relation to an incident in 2017 which resulted in the defender being charged and convicted of an offence under

Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. The summary of evidence states that the parties separated about August 2014 but is incomplete in so far as it fails to include reference to the fact that the parties had resumed cohabitation after that date.

[23] The defender received a charge notice in respect of his BMW motor vehicle registration AD55 AZR. The charge notice is dated 20 March 2018 and addressed to the defender at the property in Short Loanings, Aberdeen.

[24] The pursuer travelled to Poland for Christmas several days after 16 December 2017 accompanied by the parties' children. During the time she was abroad the defender attended at the Short Loanings property to remove his belongings.

[25] The parties ceased to cohabit on 16 December 2017.

MAKES the following finding-in-fact and law: the relevant date in terms of Section 10(3) of the Family Law (Scotland) Act 1985 is 16 December 2017.

THEREFORE, in consequence of the foregoing finding, sists the cause for a period of three months to enable parties to identify the nature, extent and value of the matrimonial assets and liabilities as at the relevant date and to enter into negotiations with a view to resolving the pursuer's crave for a capital sum; assigns a procedural hearing to take place on 8 December 2022; reserves all questions of expenses meantime.;

Note

[1] This is an action for divorce on the grounds of the defender's unreasonable behaviour, with a crave by the pursuer for a capital sum. Parties were unable to agree the relevant date in terms of Section 10(3) of the Family Law (Scotland) Act 1985. Therefore, prior to consideration of the pursuer's claim for a capital sum, a preliminary proof was held

over two days, 20 May 2022 and 6 July 2022, for the relevant date to be determined. The pursuer's position is that the relevant date is 16 December 2017. The defender's position is that the relevant date is in September 2014.

[2] The preliminary proof was conducted virtually using the WebEx platform. The evidence led consisted of Affidavit evidence from the pursuer and defender and sworn translated statements from the pursuer's sister and niece. Each adopted their Affidavits or sworn statements as evidence in chief. Additional oral evidence was led from all four witnesses. The native language of all who gave evidence is Polish and the services of an interpreter were used when the pursuer, her sister and niece gave evidence. No interpreter was utilised in relation to the defender's evidence. No shorthand writer had been booked by the pursuer and therefore I instructed the recording of evidence using the WebEx recording functionality. Connection and sound difficulties were encountered on the second day. Accordingly, I requested that the recording of the second day's evidence be sent to me for my consideration prior to the preparation of this judgment. In addition, parties were ordained to draft written submissions, exchange them, revise them if appropriate and lodge them with the court.

[3] For data protection reasons I have omitted the full postal addresses of the properties which are referred to in this judgment.

The Legal Position

[4] The law in relation to determining the relevant date is clear and can be summarised as follows:

[5] For the purposes of Section 10 of the Family Law (Scotland) Act 1985, the "relevant date" is defined in Section 10(3) as meaning whichever is the earlier of:

(a) subject to subSection (7) below, the date on which the persons ceased to cohabit;

(b) the date of service of the summons in the action for divorce ...

[6] The Initial Writ was served by sheriff officer on the defender on 21 August 2019 which post-dates the dates when each party aver they ceased to cohabit. Therefore Section 10(3)(a) applies.

[7] SubSection (7) states that:

“for the purposes of subSection (3) above, no account shall be taken of any cessation of cohabitation where the persons thereafter resumed cohabitation, except where the persons ceased to cohabit for a continuous period of 90 days or more before resuming cohabitation for a period or periods of less than 90 days in all.”

In other words, if there has been a period of separation of at least 90 continuous days followed by a period or periods of reconciliation totalling 90 days or less, then the earlier date of separation constitutes the relevant date. If those criteria are not met then the earlier date of separation is ignored and the relevant date is the final date of separation.

[8] In my opinion, subSection (7) above is only engaged if evidence is led, and accepted by the court, which allows the court to determine the length of any period when the parties ceased to cohabit, the length of any periods of reconciliation and when those periods occurred. In the absence of such accepted evidence, findings in fact (and in law) on these issues cannot be made and the applicability of Section 10(7) does not arise. That is the position in this case.

[9] In terms of Section 27(2) of the 1985 Act “... the parties to a marriage shall be held to cohabit with one another only when they are in fact living together as man and wife” .

[10] The approach to be taken by the court in considering this issue was as set out by Lord Carloway in *Banks v Banks* 2005 Fam LR 116 at paragraph 33, followed in the recent Sheriff Appeal Court decision of *McLeish v McLeish* [2022] SAC (Civ) 12:

“[33] The task of the Court is to determine when the parties ceased to cohabit, having regard to the statutory provision that cohabitation occurs only when parties are ‘in fact living together as husband and wife’. That is, as the provision itself states, a matter of fact. The ultimate determination of the issue must depend upon the particular circumstances of a given case. As a generality, the Court must look at the issue objectively; no doubt taking into account the illustrative factors mentioned by Professor Clive. There may, of course, be many others which emerge as relevant. The intention of the parties cannot be determinative of the issue. In that sense, there is no absolute requirement for one of the parties to have decided that the marriage or relationship has run its course or that such a decision should have been communicated by one party to the other. However, the intention of the parties and any communication of them to each other may be relevant factors in the equation.”

[11] In *Bain v Bain* 2008 Fam LR 81, an Outer House decision of Lord Turnbull, it was undisputed that following an argument, the defender left the family home to live in a flat owned by the parties in December 2004. The pursuer accepted that the defender had continued to live there but visited the pursuer at the matrimonial home, sometimes staying for short periods and she regularly stayed with him at the flat. Over a 2½ year period they had holidayed together, looked at properties together as well as celebrating birthdays and anniversaries before separating permanently in May 2007. The pursuer argued that she and her husband had lived together as husband and wife throughout that period albeit in unconventional circumstances. The court rejected that argument holding that the parties had been in a recognisably conventional marriage up to the time the defender left to stay in the other property and thereafter the parties had been living separately but contemplating reconciliation. It is of some significance that correspondence had passed between the parties’ solicitors which the court held supported the defender’s position that there had been a cessation of cohabitation in December 2004. These included three letters from the

pursuer's own solicitor to the defender's solicitor between March 2005 and May 2007 stating the pursuer considered the marriage to have broken down irretrievably.

[12] I observe that there was no evidence led in the present proceedings relating to any correspondence which had passed between agents for the parties as to when they separated.

[13] Lord Turnbull stated at paragraph [10] of his judgment:

“The question of when the parties ceased to cohabit is one of fact to be determined having regard to Section 27(2) of the Family Law (Scotland) Act 1985, which provides that the parties to a marriage shall be held to cohabit with each other only when they are in fact living together as man and wife. It is a matter to be decided objectively. Accordingly, the examples of decisions arrived at by other judges in other cases may not be of particular assistance. However, what is clear from the cases to which my attention was drawn is that the nature of the relationship which existed between the parties during the period of admitted cohabitation may be a factor which casts light on the nature of any subsequent relationship. So in the case of *Banks v Banks* Lord Carloway held that throughout a period of years when a husband worked abroad and often stayed in hotels on his return to Scotland, the parties could still be categorised as living together as husband and wife. This was because of the similarity of this relationship to the one which existed prior to his departure. The parties had long prior to his departure ceased to have sexual relations and spent little or no time together, with the pursuer working constantly and living much of the time in hotels. By contrast, in the present case, the parties lived in a recognisably conventional marriage up until December 2004. The defender's encounter with a prostitute during 2003 clearly triggered a deterioration in their relationship. Although the pursuer made efforts to keep their marriage intact the discoveries which she made at the end of 2004 were sufficient to underpin the lack of trust already present. From that point onwards an obvious and quite radical alteration in their relationship occurred. Various entries in the pursuer's diaries, as explained by her in evidence, to my mind confirmed that thereafter they were living separately but contemplating reconciliation. Accordingly I was satisfied, on the balance of probabilities, that the parties ceased cohabiting as at 15 December 2004 and that this is the relevant date for the purposes of Section 10(3)(a) of the Family Law (Scotland) Act 1985.”

[14] In *Brown v Brown* 2003 GWD 19-588, a decision of Lord McCluskey in the Outer House, the husband claimed that he and his wife had not lived together since 1991 when he left to live with another woman. He moved back into the matrimonial home in 1996, but denied that he had resumed cohabitation with his wife at that stage. The accepted evidence was that after 1996 the husband had stayed irregularly in the matrimonial home, but during

these periods the husband and wife slept in the same room and were having marital relations. The court held that although the husband had been absent on many occasions (and was conducting an affair), the overwhelming evidence was that there had been a resumption of cohabitation.

[15] Therefore it is clear that various factors may be relevant such as the parties living arrangements, whether these changed and if so when, whether the parties continued to have marital relations and whether any cessation of marital relations coincided with the date when one party avers the cohabitation ceased, the parties' financial circumstances and whether and when those changed, the parties intentions as to whether their relationship amounted to cohabitation or not and the circumstances surrounding any periods of separation and reconciliation. Correspondence from solicitors stating that one party considers the marriage to be at an end may be informative without being determinative. There is no checklist. Other factors can and often do apply. Where there are competing factors, some of which support the position being adopted by one party and some support the position being adopted by the other (as will almost always be the case) it is the duty of the court to objectively assess all factors, balance them and determine, on the balance of probabilities, when the relevant date was.

Submissions for the pursuer

[16] The pursuer's position was that as a result of frequent violence directed at her by the defender during the course of the marriage, the parties had various periods of separation when the defender would leave the matrimonial home for short periods of time ranging from a few days up to a month. On each occasion the defender would ask the pursuer to take him back and she agreed on each occasion. The position changed when she found out

that the defender was cheating on her on 16 December 2017. On confronting the defender, the pursuer told the defender that the marriage was over and they have not lived together or had marital relations since then.

[17] The pursuer submitted that the following factors supported a finding that the relevant date was 16 December 2017:

- a. The parties went on holiday on numerous occasions between 2014 and 2017 but did not go on holiday together after December 2017.
- b. The pursuer was employed by the defender's construction company, Paul Build Ltd until January 2018 when her employment was terminated.
- c. The pursuer contributed the sum of £7300 to the purchase price of the property at Rose House, Hazelhead, Aberdeen in November 2015, a property which she contends was purchased as an investment for the parties.
- d. The parties continued to have marital relations up to December 2017 including during the various family holidays.
- e. The defender was issued with a charge notice in respect of his BMW motor vehicle dated 20 March 2018 which was addressed to him at the matrimonial home at Short Loanings.
- f. The parties purchased, in joint names, a property in Krakow, Poland, in the summer of 2017 to provide them with somewhere to stay when visiting family in Poland.
- g. the witnesses who gave evidence for the pursuer, namely her sister and niece corroborate the pursuer's position that the parties continued to cohabit with one another until December 2017.

h. that the overall circumstances of the case, looked at objectively, point to the parties continuing to cohabit until 16 December 2017 and the court should determine that to be the relevant date.

Submissions for the defender

[18] The defender's position was that the parties separated in August 2014 when the pursuer reported the defender to the police. The defender, on being charged, was told by the police not to return to the matrimonial home and stay away from the pursuer. He asked the pursuer to allow him to return home but she refused on this occasion and as a result they permanently separated. It was submitted by the defender that the following factors supported his position that the relevant date was in September 2014:

- a. the pursuer had been selective in the contents of her Affidavit in so far as it related to the parties' history and that failing to present information to the court which had a bearing on the parties relationship taints her credibility.
- b. the pursuer is recorded in a 2017 summary of evidence prepared by the Crown as having stated to the police that she and the defender separated in 2014 and offered no reasonable explanation for the discrepancy.
- c. the pursuer claimed state benefits as a single person in 2014 and continued to claim them thereafter which shows a propensity to mislead authorities.
- d. the pursuer's complaint to the police in 2014 which resulted in the defender being required to stay away from the pursuer and the former matrimonial home marked a crucial change in the nature of the parties' relationship.
- e. the defender, for extended periods, was subject to bail conditions which required him on various occasions to stay away from the matrimonial home.

- f. the defender resided at other addresses as a result of separating from the pursuer.
 - g. the defender purchased the property at Rose House in November 2015 in his sole name as a place for him to stay.
 - h. the defender ceased being registered for Council Tax liabilities at the property at Short Loanings in 2014
 - i. the pursuer made criminal complaints against the defender in relation to a number of incidents in 2015 and 2017.
- J the nature of the relationship after 2014 was one where the parties lived separate and discrete existences, where frequent complaints of abuse were made by the pursuer against the defender resulting in criminal charges.
- k. the defender paid for numerous family holidays in the hope that it would lead to a reconciliation, and to spend time with his children and the only reason the pursuer went on them was to personally benefit from the financial resources of the defender.
 - l. the property purchase in Krakow came about as a result of the defender wishing to invest sensibly to benefit himself and his family. The purchase required the involvement of the pursuer as she was the person connected to the seller.
 - m. the fact the pursuer's employment in the defender's business was terminated and she was issued with a P45 coincided with the complete breakdown of the relationship when the defender formed a relationship with a friend of the pursuer.
 - n. the relationship which existed between the parties between September 2014 and December 2017 was a relationship of convenience in terms of 1. the children's

relationships with their father, 2. the nominal involvement of the pursuer in the defender's business, 3. the property purchase in Poland and 4. the parties' sex lives.

Discussion

[19] The evidence can be broken down into the following issues:

The purchase by the defender of a property at Rose House, Hazelhead Aberdeen in November 2015

[20] The pursuer's position was that the property at Rose House was purchased as an investment for the family. It was undisputed that the property was rented out for several months to friends, but because of the need for renovations and their unwillingness to continue occupying the premises due to the unacceptable living conditions, they moved out. An application was made to the Council for permission to convert the property from two bedrooms to three. That was granted. From the time of purchase through to December 2017 the pursuer and defender cohabited together as man and wife in the matrimonial home in Short Loanings. She contributed to the purchase price of Rose House and submitted that the defender only moved into that property when he formed a relationship with a friend of the parties in December 2017. The defender's position was in stark contrast. He denied that the purchase was an investment, but instead the property was purchased as a place for him to stay and for somewhere for him to see his children, given that he had been living in various temporary locations such as friends' houses since separating from the pursuer in 2014. He had stayed at Rose House consistently since November 2015. That is despite the fact that he accepted seeing his children at Short Loanings and staying over there for "one or two nights at a time". The defender, when asked about the contribution to the purchase price of Rose

House by the pursuer, replied with a question, asking “Where do you think she got the money from?” He contended that he was living in Rose House when it was being renovated. The defender stated that the pursuer would regularly take their children to see him at Rose House but that all changed in December 2017 when she found out about his relationship with their friend.

[21] I did not find the defender’s position to be credible. He gave his evidence in a somewhat belligerent fashion, was on occasion evasive and very defensive. That could of course have been because, as suggested by his solicitor, he was so outraged at the position being put forward by the pursuer that his indignation spilled over. However it was not disputed that the property was initially rented out to friends and the only reason they moved out was because of the living conditions. Further, I consider the application to the Council for permission to convert the property at Rose House from a two bedroom property to a three bedroom property is inconsistent with the defender’s stated position that the property was somewhere for him to stay because he had nowhere else to stay and more consistent with the property being purchased as an investment to rent out. It was also undisputed that the pursuer had contributed to the purchase price of Rose House – the amount was originally stated as being £7300 although the bank statement showing the payment from the pursuer to the defender was for £4300 and he did not dispute that a payment was made. In any event, based on my view of other factors, as discussed below, which has led me to the conclusion that the defender was cohabiting with the pursuer between 2014 and 2017, I prefer the pursuer’s evidence on this issue.

Holidays

[22] The pursuer's position was that the parties, with their children or friends, went on various holidays abroad or in the UK between 2014 and 2017. This was because they remained as a cohabiting couple. When on holiday they slept in the same bed and had marital relations. Since December 2017 they have not gone on holiday together. The pursuer accepted that in the main, the defender paid for the holidays. That is not surprising as the impression from the evidence of the parties was that the defender had control of significantly greater resources to pay for holidays than the pursuer. The defender's position was that he harboured the hope of reconciling with the pursuer and considered that taking her on holiday might lead to a successful reconciliation. That is despite him stating under cross examination that "after 2 or 3 days on holiday we'd have massive arguments." If the defender was intent on using holidays as a means of reconciling with his wife, it is highly unlikely that he would repeatedly take her on holiday over a three year period when they are supposed to be separated, knowing that within days of the holiday commencing, it would degenerate into "massive argument". The defender accepted that he and the pursuer had marital relations on holiday. The defender stated under cross examination that it was only up to 2016 that he was hoping that he could save his marriage, yet accepted that he continued to go on holiday with the pursuer, including to Holland and Poland in July 2017 and London with friends in November 2017. He also stated that the holidays were a means of spending time with his children for two weeks at a time instead of once a fortnight at Rose House, but then stated that he has hardly had any contact with his children since the end of 2017, as "she is stopping me". If he was so keen to maintain contact with his children and one of the main driving forces for paying for family holidays was to see his children for prolonged periods, the court might have expected evidence to be led as to the

efforts which the defender has made since 2017 to maintain contact with them. No such evidence was led. I was entirely satisfied that the holidays which the parties went on were undertaken whilst they were a cohabiting couple and not for the reasons stated by the defender.

Marital relations

[23] In addition to the defender accepting that the parties had marital relations whilst on holiday, he further accepted that the parties had marital relations “many times” up to December 2017. The pursuer’s unchallenged evidence was to the effect that the parties had not had marital relations since December 2017. The defender explained his position by stating that there was nothing wrong or unusual with a man having marital relations with the wife he was separated from and indeed he had been sleeping with other women including prostitutes since 2014. The pursuer denied being in any other sexual relationship up to December 2017. Allegations were made by the defender in his Affidavit that he had heard that the pursuer had a number of boyfriends between 2014 and 2017, that she was looking to date men from websites and made specific reference to a chef from Inverness called Paul, who the pursuer had a relationship with. This was all denied by the pursuer. No supporting evidence was led by the defender from any corroborating witness and nothing was lodged and referred to by way of social media posts or the like, which supported these allegations. Whilst corroboration is of course unnecessary, I considered the defender’s allegations to be speculative and without substance. There was nothing that led me to prefer the defender’s evidence on these matters over the pursuer’s denials.

[24] An objection was made by the defender’s agent to a question put to the pursuer as to when the parties ceased to have marital relations. I repelled the objection and allowed the

question. By the time the objection was made, the pursuer had already been asked, without objection, about whether she and the defender had marital relations during their various holidays and she had answered affirmatively. The issue was also raised by the pursuer in paragraph 14 of her Affidavit where she stated that the parties had not had marital relations since December 2017 and in any event, the issue of marital relations is one of the potential factors to be considered in the general dispute, as outlined on Record, as to when the parties ceased to cohabit. I took the view that the question could not have come as any surprise to the defender and as such should be allowed.

Paul Build Ltd

[25] It was undisputed that the defender operated a construction business, a limited company known as Paul Build Ltd. The company employed the pursuer, paying her a modest wage, whereby she assisted the defender with administrative tasks such as dealing with invoices and receipts. It was also undisputed that she remained an employee of Paul Build Ltd throughout 2017 and continued to receive wages up to December 2017. The pursuer's position was that the defender stopped paying her wages when they separated and she was therefore forced to resign to seek alternative employment. The company issued her with a P45 on 22 January 2018, the day after her employment terminated. The defender's position was that he had continued to employ the pursuer after they had separated to pay her some money for the benefit of her and their children. He stopped doing so in December 2017 because it was clear that was when there was a total breakdown in the parties' relationship. As noted above, the defender had stated under cross examination that it was in 2016 when he gave up all hope of a reconciliation which leads me to conclude his position on the pursuer's continued employment up to January 2018 is

implausible. I consider this to be another factor supporting the pursuer's position. For the sake of completeness, the pursuer's submissions make reference to items 36 and 37 of the pursuer's Third Inventory of Productions (payslip and document entitled Employer's Summary). These were not referred to in the pursuer's Affidavit or put to any witness during their oral evidence. They have not been considered by me as there is no evidential basis for doing so.

Summary of Evidence in criminal case

[26] One factor which, on the face of things, suggested that the parties had ceased to cohabit in 2014 was the "Summary of Evidence" lodged as part of the defender's First Inventory of Productions, number 6/1/3(ii) of process. The author of the document was not called to give evidence. There was no joint minute agreeing what it purported to be nor any authentication of the document. Indeed it is not clear who prepared the document. It was put to the pursuer in evidence. She agreed it bore the date 1 September 2017. She was referred to the first paragraph where it states "Witness Agnieszka (sic) Gacek and accused were married about June 2011, and they separated about August 2014." The accused referred to is the defender. Mr Masson took the pursuer through the first four paragraphs of the document to confirm the incident in question was on 1 September 2017 (albeit there is an error in paragraph 2 where the person preparing the Summary of Evidence has recorded that the accused "left about 0130hrs on Friday 2 August 2017 ..." when that should say Saturday 2 September 2017. The pursuer accepted in her evidence that the Summary of Evidence is a record of what she had told the police but it seems obvious that she would not have told the police that her husband left the incident at 0130 hours on Friday 2 August 2017, as that is the wrong month and wrong day of the week. Without the author of the

document being called to speak to confirm that its terms are as narrated by the pursuer to the police officer, I consider the document has limited evidential value. It is not a statement or transcribed interview. It is simply a paraphrased account of what the pursuer is supposed to have said to the police at the time she was interviewed and is designed to give the defence the salient aspects of the evidence which the accused will face in a prosecution. The pursuer's position on being questioned further was that whilst they separated in August 2014, there were many occasions when the parties separated, they were never long separations, the defender always apologised and, as a result, they always reconciled. It was put to the pursuer that is not what the Summary of Evidence suggests, to which she replied that it was a lie. She did not elaborate or say that the police had been told that the parties had reconciled following the 2014 charge but she was clearly stating that the terms of the Summary of Evidence were not accepted by her. The Summary of Evidence is one factor that requires to be considered in the balancing exercise which the court requires to undertake when objectively assessing the evidence as a whole. Due to its limited evidential value and the various other factors which I consider support the pursuer's position, I am left with significant doubts that the Summary of Evidence is a full and accurate account of what the pursuer told the police in September 2017.

Purchase of property in Krakow, Poland in 2017

[27] The parties jointly bought a flat in Krakow, Poland in July or August 2017. The pursuer's position was that this was to provide a place for them to stay when visiting family in Krakow (the pursuer's father lived next door to the flat). The property purchase was not referred to in the defender's Affidavit but in his oral evidence the defender denied it was bought as a place for the family to stay when visiting Poland. His evidence was to the effect

that it was a good investment as it was bought for a good price after a friend of the pursuer's family had passed away. The pursuer did not contribute to the purchase price of that flat, despite it being bought in joint names. The defender's somewhat contradictory evidence was then to the effect that it was a "place for me to come and see the kids next to where her father lives".

[28] Under cross-examination the defender reiterated that the property was purchased as a good investment for the future for his children and to make it easier for the grandparents in Poland to see their grandchildren. The defender did not offer any explanation as to why the property was purchased in joint names of the parties approximately three years after he contends they separated. It may well be that the purchase of the flat will prove to be a good investment in the long run. That is not the issue. The issue is why the defender would add the pursuer's name to the title of the property in Poland in July/August 2017 if they had been separated for the best part of three years. I consider that on the balance of probabilities, it is most unlikely that he would have done that if the parties had ceased to cohabit in September 2014.

BMW Charge Notice

[29] The pursuer's Affidavit, in paragraph 15, refers to the defender having been sent a Charge Notice incurred on 6 January 2018 in respect of his BMW motor car. It further states the notice was sent to "our home" which I take to mean the property at Short Loanings. The Charge Notice is not referred to in the defender's Affidavit and neither party were asked anything about it during their oral evidence. On the basis that this aspect of the pursuer's Affidavit went unchallenged, I am able to infer that the defender's address on the DVLA database in January 2018 remained as the matrimonial home in Short Loanings. Had the

defender moved into Rose House in November 2015, he would have been legally obliged to notify DVLA of his change of address and the Charge Notice would have been sent to him there. I consider this to be another factor supporting the pursuer's position that the defender continued to cohabit with the pursuer up to December 2017.

Pursuer's claim for state benefits as a single parent

[30] The pursuer claimed state benefits as a single parent in 2014 during a period when the parties had temporarily separated and she was left with no financial support. The pursuer's position in her oral evidence is that she called HMRC to inform them that she and her husband had reconciled, though did not elaborate on when that was, or what HMRC did in response. She claimed state benefits as a single parent in 2016 and 2017 because her husband "left her many times". It is clear to me that the pursuer was claiming benefits as a single parent when she and the defender had reconciled and resumed cohabitation. She ought to have terminated her benefits claims, but failed to do so. I formed this view taking into account the various other factors which support the pursuer's position that the parties ceased to cohabit permanently on 16 December 2017.

Removal of defender's name from council records re council tax liability at for Short Loanings

[31] The pursuer, during cross examination, was referred to the defender's First Inventory of Productions item 6/1/1 of process which is a letter from Aberdeen City Council to the defender's solicitor dated 2 March 2020. In paragraph 2 of that letter it states that "I can advise that our records show Pawel Gacek's joint liability for council tax at the above address (the Short Loanings property) ended on 10th August 2014."

[32] The pursuer stated that the defender had asked her to have his name removed from the Council's records for council tax liability at Short Loanings, as they were concerned that if he purchased another flat, the Council would terminate the tenancy at Short Loanings. It was put to the pursuer that the defender bought Rose House in November 2015, not 2014 so he would not be concerned about the impact the purchase of another property would have on their tenancy in 2014. The pursuer's response was that the defender was planning to buy a flat in 2014 and the removal of his name from the council records was to pre-empt that. It was not until 2018 that the defender's name was removed from the tenancy agreement after the pursuer enlisted the help of Women's Aid.

[33] The defender's position in paragraph 7 of his Affidavit was to the effect that when he moved out of Short Loanings in 2014 he stopped paying council tax for the property. The council's letter of 2 March 2020 states that there is no liability in his name for the council tax charges at Rose House, but the defender's position was the council were wrong in stating that and he had been paying council tax for Rose House since taking occupation in 2015. It seemed most likely to me that the couple had positively considered the potential implications that purchasing another property would have on their tenancy at Short Loanings. The pursuer did not hesitate in stating her position on this. She did not appear to be searching for an explanation and gave the impression of being entirely credible and reliable in the evidence she gave. The position was supported to some extent by the fact that the defender remained a joint tenant at Short Loanings until 2018 ie until shortly after the time the pursuer contends they separated permanently.

Photograph of defender

[34] The photograph forming part of the pursuer's Third Inventory of Productions, number 5/2/31 of process, is a photograph of the defender wearing his wedding ring on his ring finger of his left hand, which he posted on his Facebook page on 1 October 2017. The photograph is referred to in the pursuer's Affidavit at paragraph 15. Neither party was asked about the photograph in their oral evidence and, in particular, the defender was not asked during examination in chief to give an explanation as to why he was wearing his wedding ring on the ring finger of his left hand. Whilst no evidence was led to confirm the date the photograph was taken, a reasonable inference can be drawn, in the absence of contrary evidence, that the defender was publicly holding himself out to still be married on 1 October 2017. If the parties ceased to cohabit in 2014, the court might have expected to be provided with an explanation as to why the defender posted a photograph on Facebook on 1 October 2017, some three years after the date the defender contends he separated, of himself wearing his wedding ring.

Periods of separation followed by reconciliation

[35] Whilst the pursuer gave evidence that there were approximately ten periods of separation between 2014 and December 2017, ranging from one or two days at a time up to three months on one occasion, there was no evidence as to when those temporary separations arose. Whilst it was the defender's position that he continuously lived at an address in the Seton area of Aberdeen for an eight month period, he gave no clear evidence as to when that was. It could be inferred that he was referring to the period when he was on bail with conditions to stay away from Short Loanings and the pursuer, prior to the purchase of Rose House. The court may have expected witness evidence to be led from the

person whose property the defender was residing in to support the defender's position, but no such evidence was led. The defender's evidence was also to the effect that he had purchased a flat in November 2015, to have somewhere to stay given that he had been staying in unsuitable living conditions following the parties' separation in September 2014. However the pursuer gave clear evidence that when the defender was subject to bail conditions, he would ask her to allow him to return home and within days she had relented and they reconciled. Her evidence was to the effect that she did so because she loved the defender and wanted the marriage to work. I accepted the pursuer's evidence on this as being entirely credible and reliable and is corroborated by the evidence of her niece, Ms Palka, discussed below. I therefore do not accept the defender's evidence that he lived elsewhere for a continuous period of eight months.

Evidence of the pursuer's sister, Wioletta Kawula

[36] In her sworn statement translated from Polish to English the pursuer's sister states that she last spoke to the defender on the telephone on two occasions in December 2017. During one of the calls the defender reportedly stated that he was in love with another woman and wanted to "part with her sister". Ms Kawula had been expecting the whole family ie the pursuer, the defender and their two children to visit Poland for Christmas in December 2017, but the defender did not come. She stated that in May 2017 she visited Scotland for the communion of the parties' eldest son. She stated that in the later years she would see them (the pursuer and defender) at least twice a year when they went to Poland and they would call each other on a regular basis.

[37] She stated that she witnessed fights during which the defender would hit the pursuer. She referred to one particular incident as occurring on the evening of the eldest

son's communion in May 2017. She found out about the parties separation from her sister during the pursuer's visit to Poland in December 2017. She understood the reason for the separation to be that the defender "had another woman." She stated that she knew the parties were living together at Short Loanings until December 2017. It was put to her in examination in chief, that the defender's position was that he and the pursuer had not lived together since 2014 and was asked if that was possible. She denied that it was, stating that up to 2017 the parties went on holiday together, including visiting Poland for holidays and Christmas. During those visits, the parties acted as if their marriage was "normal". During cross-examination the witness confirmed that when she was talking to her sister, Ms Kawula would ask where the defender was and was told that he was at work. They would stop their conversation when he came home for lunch.

[38] During re-examination the witness agreed that if the parties had been living apart since September 2014, she believes the pursuer would have mentioned that over the telephone.

[39] Whilst the sworn statement of Ms Kawula was significantly lacking in detail, I found her to be entirely credible and, on the crucial issue of whether the parties separated in September 2014 or December 2017, to be reliable. Her evidence was based on (1) her one visit to Scotland in May 2017, (2) the regular conversations which she had with her sister between 2014 and 2017, (3) the visits the parties made to Poland between 2014 and 2017 and (4) the visit which the pursuer made without the defender in December 2017. She left me with the clear impression that she would probably have been aware if the parties had permanently ceased to cohabit in 2014. I am of the opinion that she was not so aware.

Evidence of the pursuer's niece, Klaudia Palka

[40] Ms Palka stated in her translated sworn statement that she stayed with the pursuer at Short Loanings for a period of around two months from June 2015. In her oral evidence she went further by stating that during that visit, the defender was staying with the pursuer at that address, that he lived there and went out to work. She confirmed that she had been told by the pursuer, shortly before the pursuer travelled to Poland for Christmas in 2017, that the parties had separated due to the pursuer finding out that the defender "had a lover".

[41] Ms Palka stated that during her visit to Scotland, she saw the parties kissing and hugging. The pursuer would go to the defender's work with food for him.

[42] Of significance, the defender's own Affidavit stated that he was charged with offences against the pursuer in early 2015, was placed on bail with conditions not to approach the pursuer or the property at Short Loanings and the case went to trial in August 2015. In other words, the bail conditions would have been in force during the whole of Ms Palka's stay in Aberdeen in June and July 2015. She therefore corroborates the pursuer's position that contrary to what the defender stated about living elsewhere in temporary accommodation prior to purchasing Rose House in November 2015, the defender was in fact living with the pursuer at Short Loanings in breach of his bail conditions.

[43] Ms Palka gave further oral evidence to the effect that in 2016 and 2017 she visited Scotland to stay with a different aunt but would see the parties and she was of the view they "were still together at that time". The defender would take her fishing during those visits, something the defender accepted in his evidence. She accepted under cross examination that in her sworn statement, she had stated that the defender, after coming back from work, would take his sports bag and go to the gym, coming back in the late night hours. She further stated that the defender would go out on a Saturday and come back on a Monday.

The impression was that this was a regular occurrence, but he would return within a couple of days and this was simply the norm in the parties' marriage up to December 2017.

[44] I found Ms Palka to be entirely credible and reliable throughout her evidence, including her testimony about the defender cohabiting with the pursuer in the matrimonial home during her 2015 visit to Scotland.

Conclusion

[45] Having carried out an objective evaluation of the entire evidence, balancing the various factors which arise in this case, I am of the opinion that, on the balance of probabilities, the parties ceased to cohabit as man and wife on 16 December 2017 and the relevant date in terms of Section 10(3)(a) of the Family Law (Scotland) Act 1985 is therefore 16 December 2017.