

Sheriff - Fort William and Oban - 2016/17

Civil Case Study

The following information was provided to applicants in advance of their interview

[1] You are presiding over an action of divorce in which the fact of the irretrievable breakdown of the marriage is not in dispute and the respective financial claims of the parties have been resolved by agreement, the key elements having been reduced to a Joint Minute. The only issue remaining in dispute between the parties relates to the arrangements for residence and contact in respect of the children D P (a boy), born 14th February 2008 and A P (a girl), born 28th October 2009. The matter is before you for proof. The evidence has concluded.

[2] You are provided with :

- a) Findings in Fact;
- b) A narrative of the evidence and findings on credibility and reliability;
- c) A Report by a Court appointed Reporter as to the views of the children;
- d) Submissions by Counsel for the Pursuer on the views of the children;
- e) Submissions by Counsel for the Defender on the views of the children;
- f) Submissions by Counsel for the Pursuer on the matter of residence;
- g) Submissions by Counsel for the Defender on the matter of residence;

[3] This Case Study asks you to consider first a preliminary matter relating to disclosure of the views of the children prior to hearing submissions and then the substantive issue of residence upon the basis of the information provided and the submissions of counsel.

Views of the children

[4] Please explain how you would deal with the matter of disclosure of the views of the children and give reasons with reference to authority as you consider appropriate;

Residence

[5] You have an important decision to make about the children which will affect them profoundly for the rest of their lives. The immediate impact of the decision will significantly affect the children's lives, their parents and, to a lesser extent, their

extended families both maternal and paternal. The future course of their lives will be affected by your decision. It is clear that in the course of the proof you have heard significant untruths from one or both of the parties. It is in the nature of our adversarial process of determining issues of residence and contact between parties that the court is reliant upon the evidence led by the parties in order to make important decisions about the children where their welfare is the paramount consideration.

[6] In this case you have cause to have reservations about both parents. You are asked to proceed upon the basis that the Court has concluded that the pursuer, Mr P, has been abusive towards the defender throughout their relationship and marriage and that he has lied in the course of the proof. There is no suggestion, however, that he has been directly abusive towards the children and some indication that he is a good dad. The defender has experienced some instability in her life in recent years, on her evidence, as a consequence of the abuse she has suffered at the hands of the pursuer. The evidence has disclosed, though, that at one time her drink problem was such that she was apparently neglecting the children to the extent that a neighbour was moved to report the matter to social services as a child protection matter. She seems to have put that behind her. An allegation of a serious assault on the pursuer's mother remains unresolved but leaves a certain suspicion and unease.

[7] Despite these imperfections you have to make a decision about the children. Deciding to do nothing about residence and leaving matters as they are will still be a significant decision.

[8] Please explain how you would deal with the children, the orders, if any, that you would make and your reasons.

You have 15 minutes to address the Interview Panel on both matters. It is for you to decide how you wish to attribute the time. There will be 5 minutes for follow up questions.

CP v HR or P**Findings in Fact**

1. The parties are as designed in the Instance. They were married in Cyprus on 14th November 2005. They have two children, DP, born on 14th February 2008 and AP born on 28th October 2009.
2. This Court has jurisdiction.
3. The parties separated on 16th March 2014. Following separation the children, DP and AP, resided with their father within the former matrimonial home at 6 Acorn Crescent, Anytown.
4. The defender gave an undertaking not to remove the children from the care of the pursuer or any third party to whom the pursuer entrusted the care of the children.
5. Contact between the defender and the children was regulated by the interlocutor of 19th December 2014. It provided for contact each Wednesday at 3:30 p.m. or after school during term time until 7:00 p.m. and each Saturday from 12 noon until 5:00 p.m.
6. Contact was increased by the agreement of parties. Residential contact was provided for by the interlocutor of 20th March 2015 every alternate Friday from 3:00 p.m. to Sunday at 5:00 p.m. The interlocutor also provided for daytime contact every Wednesday from 3:00 p.m. until 7:45 p.m. and on alternate Thursdays between the same hours. Additional Easter holiday residential contact was agreed between the parties.
7. Parties agreed contact arrangements during the school summer holidays of 2015 whereby the defender enjoyed residential contact with the children during two separate week periods in July and August with weekly residential contact from Wednesday at 8:00 a.m. until Thursday at 7:00 p.m. Contact reverted to the arrangement provided by the 20th March 2015 interlocutor after

the school holidays. Those arrangements were reiterated in the interlocutor of 21st August 2015 and continued to the date of proof.

8. The Christmas 2015 holiday was shared, the children staying with the defender from 22nd December after school until 12:00 noon on Christmas Day, and on 1st January 2016 at 3:00 p.m. until 5th January at 7:45 p.m.
9. The pursuer was 21 years old when he first met the defender who is two years older. The defender was employed with Thomas Cook as a Travel Consultant. Prior to joining the Army the pursuer was sometimes engaged in casual work such as handing out fliers at the weekend for a Stirling nightclub.
10. The defender was still residing with her parents. The pursuer resided there with her from time to time. The pursuer showed a tendency then to be aggressive and controlling towards the defender.
11. The defender became easily aggressive. An incident occurred on the day of the defender's grandmother's funeral. The parties, who were not yet married, another relative, Bertha, and the defender's mother were in a car driven by the defender's father. They stopped in Stirling for one of the ladies to draw cash from an ATM at about 9:00 or 10:00 p.m. Two of the women alighted, went to the ATM and returned. Three youths aged about 14 to 16 were sitting nearby. The pursuer jumped out of the car, went over to the group of youths, head-butted one of them and seriously assaulted another. He then returned to the car saying that they had passed some derogatory remark about one of the women.
12. Conversations took place from time to time between the defender's father and the pursuer's father in which the pursuer's father expressed concern regarding his son's aggressive behaviour and his hope that he would sort himself out possibly by joining the Army.
13. The pursuer joined the Army in about 2002. He attained the rank of Sergeant First Class. He received training in the Royal Signals and went on to become an instructor.

14. The parties married on 14 November 2005 having met around five years beforehand. They moved to Cyprus where the pursuer was stationed and remained there for about a year.
15. The defender had been working as a Sales Manager with Thomas Cook earning around £35,000 per annum. She had bought a small flat in Falkirk. She left Thomas Cook on the move to Cyprus and took a career break for about a year.
16. The defender secured part time employment as an Insurance Broker with NAAFI Financial in Cyprus. She retained that employment when the pursuer was posted to Germany in around March 2006. The company changed its name to Force Financial. The defender was made redundant but secured a post with Towergate Wilson, again as an Insurance Broker. She retained this employment when the parties moved to Blandford, Dorset, in the south of England upon the pursuer's posting there in about October 2007. The parties remained in Blandford for about three years until the pursuer's final posting to Northern Ireland in March 2011.
17. Whilst in Blandford the pursuer was not deployed on operational duties and was therefore able to enjoy more regular hours.
18. Both children were born whilst the parties lived in Blandford. DP, was born on 14th February 2008 and AP about eighteen months later on 28th October 2009.
19. Whilst stationed in Blandford and in his role as a trainer the pursuer was committed each working day to classes, working from 08:15 a.m. until 4:30 p.m. . Subsidised nursery placements for the children became available on two mornings per week. At all times during the working day when the children were not at nursery the defender was their only and primary carer.

20. On many if not most days the pursuer came home from work but went straight out again for Tug of War Training until around 6:30 p.m. and it was his frequent practice to go back out to socialise with his team mates. He was often involved in competitions at week-ends. The pursuer became involved with a band and took time to rehearse with them on a regular basis. The defender was the primary carer of the children whilst the parties were stationed at Blandford from 2007 to 2011.
21. The pursuer was posted to Northern Ireland in about March 2011. His working hours were from 08:00 a.m. until 06:00 p.m. He was back on operational duties and capable of deployment at any time. There was no Tug of War Team or band in Northern Ireland.
22. Whilst the parties were in Northern Ireland the basic arrangements for care of the children did not change. The defender remained their primary carer.
23. The pursuer started an affair with another woman whilst the parties were in Northern Ireland. It lasted for a period of several months during 2012.
24. From March to June of 2012 the pursuer moved out of the marital quarters he shared with the defender and children to single accommodation. During that period the defender was the sole carer of the children.
25. The parties attempted a reconciliation in June 2012 at which point the pursuer returned to the matrimonial home.
26. On Monday 13th June 2012 the defender felt the need to take time for herself to 'clear her head'. The pursuer was at that time still denying his affair and telling the defender that she was imagining it, that she was 'crazy' and 'cookie'. The defender packed a small bag. This elicited a violent reaction from the pursuer who pushed her back, grabbed her arm and said she was not leaving, that he would not let her go. He had to go to work. The defender took the children to nursery and then telephoned the pursuer to tell him that he would have to collect the children. She walked to the camp gate leaving

the car for the pursuer and took a taxi to a hotel, not telling the pursuer where she was. The pursuer became concerned and involved the Military Police. They traced the defender to her hotel and spoke to her. She returned the following day.

27. The pursuer's career in the Army came to an end at the end of 2012. In about January of the following year, 2013, he took up civilian employment with ION.
28. Having decided to leave the Army the pursuer was engaged in a long process of resettlement and de-kitting and this involved some periods away from home on courses. He attended monthly courses in Hereford. He went on a stag trip for a week and skiing trip for two weeks during this time.
29. From about 2008 he abused anabolic steroids in order to enhance his performance in the tug of war team. He bought them off the internet and kept them in the fridge. The partial credit card statement forming 6/5/1/ of Process shows payments of £173 and £77.90 relating to steroid purchases. The pursuer told the defender's mother, a former nurse, that on one occasion he nearly had to 'phone her because he nearly had a heart attack from taking too much and that he got a fright. The defender's parents were aware of the pursuer's use of anabolic steroids. The defender's father wrote to the Army about it and his concerns regarding the pursuer's use of the substance. The parties' respective fathers discussed the pursuer's use of steroids.
30. The pursuer secured employment with ION in January of 2013. The defender stayed on in Northern Ireland for five months until May 2013. She located and arranged the purchase of a new family home in Scotland. She was the sole carer for the children during this period. During that five month period there was only one period of weekend contact between the pursuer and his family. The pursuer was working offshore from time to time during this period.
31. The parties acquired the former matrimonial home at 6 Acorn Crescent, Anytown largely through the efforts of the defender. The house was not ready and from May to June 2013 the defender and children stayed during the week with the defender's parents so that DP could go to school and at week-ends

the pursuer's parents' farm at Braefell so that they would see their father. The pursuer was unavailable by reason of work commitments to help with the move and so the defender more or less single handedly undertook the move to the new home.

32. From about June until the end of August 2013 the pursuer was working offshore and the defender was the sole carer of the children.

33. The children are well balanced, bright and cheerful, both doing well at school and apparently unscathed at least outwardly by the enmity between their parents.

34. The defender was subjected to physical abuse from the beginning of their relationship and throughout the marriage.

35. An episode occurred before the parties were married when the defender returned from a holiday with the pursuer and was seen to have two black eyes. It is reasonable to infer that these were the consequence of an assault by the pursuer.

36. There was an occasion before marriage on a visit to the Duck Bay Marina when the pursuer lost his temper and kicked the defender's car denting a door panel.

37. An incident occurred in April 2005 in Akritiri, Cyprus, when the defender suspected the pursuer of an affair and this resulted in the pursuer charging at the defender in the apartment and pushing her with force so that she fell back. She put out her hand to save herself but fractured her wrist and had to be taken to hospital in Limasol.

38. In May 2011 the parties were at the pursuer's parents' home, the farm at Braefell. They had had a day at the zoo with the children. All of the adults had taken drink. In the kitchen the defender was sitting on a stool by the island. There was a discussion about the family dog and the defender was

expressing some concern that it might bite the children if they were to pester it by pulling its ears. She denied any suggestion that she was saying the dog should be put down. On the defender's account she said to the pursuer 'please back me up on this' at which he 'blew up' and punched the defender in the ribs causing her to fall onto the tiles. In the morning she could not breath, was in extreme pain and required to be taken to hospital where she was found to have fractured ribs.

39. The defender suffered a head injury in September 2013. She was in AP's bedroom checking and tucking her in when the pursuer appeared in the doorway, grabbed her head and 'smashed it down on the bed'. This resulted in a laceration and profuse bleeding. It was done in front of the child.

40. Verbal abuse, offensive remarks, name calling including insults as to her appearance and standing was a constant and progressive feature throughout the relationship which became worse as time passed. He used words like 'lazy', 'fat', 'ugly', 'damaged goods', 'scum'.

41. When the parties returned to Scotland in 2013 the pursuer's aggression and verbal abuse was a constant, daily feature of life for the defender. She felt as though she was walking on eggshells the whole time. It was especially bad and the pursuer was most liable to show verbal aggression when they were at his parents' home. There was verbal abuse every single day and physical abuse three or four times per week.

42. In relation to the pursuer's affair in Northern Ireland the defender undertook counselling to help process it but the pursuer only went once. He kept shouting at the defender and told her 'to get over it'.

43. By December 2013 the defender was completely drained and experienced a complete emotional collapse. It was a gradual process and not attributable to any single occurrence. It started though with the pursuer returning home in about August 2013 and by September of that year the pursuer felt she could not cope any more.

44. On 5th December 2013 the parties had an argument in the course of which the pursuer was abusive and offensive to the defender. While she was brushing her teeth in the bathroom there was a slight struggle as a consequence of which the pursuer was struck on the head with the toothbrush leading to a small laceration. He called the police and this resulted in the defender pleading guilty to a charge of assault for which she was admonished.
45. The parties separated following an incident on 16th March 2014 when it is alleged the defender attacked the pursuer's mother.
46. The marriage between the parties has broken down irretrievably and there is no prospect of a reconciliation.
47. An incident occurred on 14th May 2016 at a time when the proof in this action was in progress. It was a day for the defender's contact with AP but the pursuer had emailed to say she was unwell, was being kept off school, and suggesting that contact be cancelled and rearranged. The defender went to the pursuer's home which is still the former matrimonial home at Acorn Crescent and insisted upon seeing her daughter. The child was brought down by Ms H, the pursuer's partner. The defender was at the door with her mother by her. AP reached her arms out to her mother who did likewise. The pursuer grabbed the defender by the arm. He was aggressive. He said something to the effect that he had told the defender that she would get her for extra time on Tuesday. The pursuer grabbed hold of the defender and swung her round, pulling and shoving her. He pushed the door and it caught the defender's ankle.
48. For a time, in 2013 in particular, the defender was abusing alcohol. She misused alcohol whilst in Northern Ireland in 2011–12 but it was not a problem and did not become a problem until she returned to Scotland in 2013. She attended Alcoholics Anonymous. She did not meet the criteria for diagnosis as an alcoholic.

49. Whilst pregnant the defender consumed no alcohol.
50. A neighbour, Mrs T, noticed the defender with a bruised face at a time when the pursuer was still away and was told by the defender that she had been up in the night and walked into a door.
51. During a 4 to 6 week period in the summer of 2013 there were a few episodes which caused concern. The children DP and AP were seen out in the evening as late as 11:15 p.m. apparently unsupervised, DP seen lifting a drain cover and leaning in. AP was seen one evening wandering quite far from her home. Neighbours saw AP one lunchtime with an ice cream she said was her lunch.
52. One morning at 6:45 a.m. DP came to a neighbour's door in pyjamas. He and AP were there most of the day. They came round regularly and were never called for by their mother. Sometimes they were there 12 to 15 hours.
53. One evening in October 2013 at about 5:30 p.m. the neighbour Mrs T was approached by the defender who was quite confrontational. She gave the impression that she had been drinking a lot of alcohol and her speech was slurred. Mrs T took the decision after many weeks to contact Social Services following an incident when she noticed that DP and AP had been left in the car for about half an hour and were banging on the windows. Around this time the pursuer came back home.
54. On an occasion in February 2014 the pursuer's mother came to the door of the neighbour Mrs T in a state of great distress, soaking wet and with blood on her lip and head. She had one shoe on. She stated to Mrs T that she had been attacked by the defender and stated 'she is going to kill me'. The defender came to the door asking where AP was. She was in the house and Mrs T reported that the defender said 'please don't phone the police'. Mrs T in fact immediately telephoned the police and an ambulance. The defender had been drinking.

55. The defender no longer has a problem with alcohol. She does not abuse alcohol.

56. There is ample, suitable accommodation for the children within the pursuer's home. He, along with Ms H his partner, is able to meet the day to day needs of the children.

57. There is adequate accommodation for the children within the defender's home. She is able to meet the day to day needs of the children.

CP v HP

Narrative relating to views of the children, the evidence and findings on credibility and reliability

(For the purposes of this case study you are asked to accept the findings by the Court on matters of credibility and reliability as if they were your own)

Views of the children

[1] The children, D and A, are 8 and 6 years of age respectively. They are not of an age at which the law presumes either of them to be of a sufficient age and maturity to form a view but, nonetheless, in reaching decisions on matters of residence and contact relating to them, the Court was required, so far as practicable, to have regard to their views, if they wished to express them, taking account of their respective ages and maturity¹. The Court already had the benefit of Mr D's earlier report which highlighted a degree of equivocation and indecision in the children as to their preferences.

[2] The Court considered that it was appropriate and necessary to obtain the further views of the children having heard suggestions from witnesses as to what the children's more definite views now were. The Court directed Mr D to undertake this task and to ascertain the views of the children if they wished to express those views. The Court further directed him to ascertain whether the children were prepared to give permission for their views to be disclosed.

[3] The supplementary report by Mr D was available by the time of the penultimate day of the proof. Mr D described having arranged to meet with the children within the Family Mediation contact centre, a very fitting location devoid of the formality of Court or the Sheriff's chambers. The children remembered him and readily allowed themselves to be left alone with him. He went on to describe a cheerful and relaxed encounter with the children, partly over a game of pool, during which they did both express their views in quite simple ways. They both indicated quite firmly, however, that they did not wish to have their views disclosed.

¹ s.6(1)(b) Children (Scotland) Act 1995

[4] The Court indicated to parties through the Sheriff Clerk and in advance of submissions that it would not allow disclosure of Mr D's report before submissions and that it would assist the Court to hear submissions on the matter of disclosure. The Court heard submissions on this matter at the close of the evidence on the sixth day of the proof.

[5] *For the purposes of the case study you are placed in the position of the presiding Sheriff who read the report and noted that both children indicated unequivocally that they wished to reside with their mother but they would still like to see their dad. They said that they felt a bit scared of their dad sometimes. They were at one in saying that they did not like Ms H, dad's new partner. They were 'forced' to kiss her goodnight, to love her and hug her. Dad said she was here to stay. They liked it on grandad's farm when dad let them drive the quad bike and when they went to the dry ski slope. He let them hold his gun and pretend to shoot it. At times like that he was a great dad and great fun. They were both very clear that they did not want their views to be disclosed. They were scared about what dad would say if he knew.*

Arrangements for residence and contact

[6] The parties separated on 16th March 2014 and from that date the children, D and A, resided with their father within the former matrimonial home at 6 Acorn Crescent, Anytown. The children's residence there was not regulated by any order of this court but at an earlier stage in these proceedings the defender gave an undertaking not to remove the children from the care of the pursuer or any third party to whom the pursuer entrusted the care of the children. The only aspect which has been regulated by orders of this court is that of contact.

[7] Formal contact resumed in accordance with the interlocutor of 19th December 2014 in terms of which the defender saw the children each Wednesday at 3:30 p.m. or after school during term time until 7:00 p.m. and each Saturday from 12 noon until 5:00 p.m.

[8] The parties quite soon agreed that contact should be increased to include residential contact. The interlocutor of 20th March 2015 provided for residential

contact every alternate Friday from 3:00 p.m. to Sunday at 5:00 p.m. They further agreed that the children should enjoy daytime contact with their mother every Wednesday from 3:00 p.m. until 7:45 p.m. and on alternate Thursdays between the same hours. This was exercised in advance of the weekends when there was no residential contact. Parties also reached some agreement on additional residential contact during the forthcoming Easter holidays.

[9] A spirit of co-operation on the matter of contact continued with arrangements for contact during the school summer holidays of 2015 being agreed. The interlocutor of 26th June records that the defender was to enjoy residential contact with the children during two separate week periods in July and August with weekly residential contact from Wednesday at 8:00 a.m. until Thursday at 7:00 p.m. Contact reverted to the arrangement provided by the 20th March 2015 interlocutor after the school holidays and that was in fact reflected in a fresh interlocutor of 21st August 2015 at which time CG, Solicitor, was appointed to provide a report on the proposed arrangements for the care and upbringing of the children and to obtain their views. That same pattern of contact has continued and remains in place. It was reiterated in the interlocutor of 13th November 2015 which remains the governing interlocutor. Parties have, hitherto, been able to agree the arrangements for holiday contact, effectively sharing the school holidays equally. The Christmas 2015 holiday was shared with the children staying with their mother from 22nd December after school until 12:00 noon on Christmas Day, and on 1st January 2016 at 3:00 p.m. until 5th January at 7:45 p.m.

Witnesses, credibility and reliability

[10] The Court heard evidence from the pursuer, his partner JH, his father GP, a former neighbour LT and KS, D's Primary School teacher.

[11] The defender gave evidence and the Court heard also from LD and FW, both friends of long standing, her father IR and her mother MR.

[12] During the course of the proof an incident occurred on 14th May 2016 at 6 Acorn Crescent, Anytown, which resulted in the pursuer's arrest and became the subject of a summary prosecution against him on a charge of assault against the defender. The defender was still giving her evidence in chief and able to address the

episode in the course of her evidence. It was agreed that the pursuer should have the opportunity of leading evidence in replication and so he and his partner JH were recalled on the sixth day of the proof, after the defender closed her case, to give further evidence restricted to the issues arising on 14th May 2016.

[13] Some stark issues of credibility and reliability of witnesses arose, especially in relation to the parties themselves. On certain matters the Court heard accounts that were so much at odds that they could not be reconciled. This led to the regrettable conclusion that one of the parties and certain witnesses were telling lies. In a case such as this concerning the welfare of young children this is of grave importance on two levels. It raised a serious question as to where the priorities of the lying parent were where the paramount consideration for the court is the welfare of the children. It rendered the already delicate and difficult task of identifying, assessing and weighing the relevant factors for deciding the issues of residence and contact significantly more difficult and heightened the risk of adversity for the children.

[14] There lay at the heart of this case serious allegations by the defender of longstanding and relentless domestic abuse including physical abuse by the pursuer throughout the parties' relationship and marriage. The pursuer denied that any abuse occurred. One of them was being untruthful.

The pursuer

[15] The pursuer was 21 years old when he first met the defender who is two years older. Whereas she had a full time position with Thomas Cook as a Travel Consultant the pursuer appeared to have a somewhat aimless existence and was at one point earning money by handing out fliers at the weekend for a Stirling nightclub. There was a time before the parties were married and before the pursuer joined the Army when he spent quite a lot of time staying with the defender at the home of her parents. The Court heard from IR, the defender's father, that he found the pursuer then to be an aggressive person, always starting arguments. He would find his daughter in tears. The pursuer would bang doors and storm off in a bad mood not to be seen for a couple of days. He referred to conversations he had with the pursuer's father, GP, about the pursuer in the course of which Mr P acknowledged issues concerning his son and his wish to try and get him into the Army. He and his son had

come to loggerheads, there was aggression but they had never come to blows. The defender's mother described the pursuer then as 'harum skarum' having good and bad days. She did not think the relationship between her daughter and CP the best match and thought the pursuer was aggressive and controlling. This impression of the pursuer was at odds with the evidence of his father who denied that his son was quick tempered or had problems with anger management.

[16] In answer to a quite open and unobjectionable question as to whether the pursuer was aggressive in nature Mr R spoke of an occurrence which had caused him concern. It was a matter of which no notice had been given in the pleadings and which none were anticipating. It came after the pursuer and his father had given evidence and so was not put to them. Mr R explained that it was the day of his mother-in-law's funeral before the parties were married. He, his wife, his daughter, the pursuer and another relative, Bertha, were in the car. They stopped in Stirling for one of the ladies to draw cash from an ATM. Two of the women alighted, went to the ATM and returned. Three youths aged about 14 to 16 were sitting nearby. He stated that C jumped out of the car, went over to the group of youths, head-butted one of them and seriously assaulted another. He then returned to the car saying that they had passed some derogatory remark about one of the girls. Pressed in detail during cross examination Mr R stated that it was at about 9:00 or 10:00 p.m., two of the ladies had got out of the car for one of them to get cash and when they got back into the car C 'flew from three feet away and head-butted one of them off his feet'. He disagreed that the youths were as old as 17 or 18 or that there had been no more than an exchange of words. He expected the episode to have been picked up on CCTV and reported to the police but nothing came of it. The incident alarmed him and he was puzzled that the relationship between the parties developed as it did. He again made reference to talks he had with the pursuer's father who told him 'different things about raising C' and how he thought he would straighten himself out.

[17] The Court found Mr R's account of this incident entirely credible. The Court also believed his explanation of the general context of conversations with the pursuer's father about his concerns regarding his son's aggressive behaviour and hope that the Army would sort him out. The discrepancy between the reported expressions then of concern on the part of GP regarding his son's aggression and

the tenor of his evidence in this proof in which he denied any such characterisation of his son leads the Court to the view that in Court he was at best minimising or was in denial about that aspect of the pursuer's makeup and at worst being dishonest about it. There was, therefore, an impression of a quite immature, volatile and sometimes aggressive young man living between his parents' and his then girlfriend's parents homes. The only evidence of any employment he had at that time was from the defender regarding the distribution of publicity fliers at the weekend for a nightclub. There was no evidence of any other employment, further or vocational training nor of engagement in his father's engineering business at that time. He would, of course, go on to join the Army where he appears to have found some fulfilment.

Steroid use

[18] The pursuer was a member of the Army tug of war team and became its captain. An allegation was put to him during cross examination that from about 2008 he abused anabolic steroids in order to enhance his performance with the tug of war team, that he bought the drugs by ordering them online and administered them by injection. He gave a flat denial of having ever used such drugs and pretended indignation at the suggestion, asserting that he had ten and a half years of clear drug tests.

[19] The Court later heard convincing evidence from the defender to the effect that the pursuer openly used steroids, that he bought them off the internet and kept them in the fridge. He ordered and re-ordered the drugs according to her. She witnessed him administering the drug and observed the enhancement of his physical build; she 'saw the bulk go on'. The defender attributed heightened aggression, mood swings and change of personality which she observed in the pursuer to his use of steroids. She spoke to the partial credit card statement forming 6/5/1/ of Process and identified payments there of £173 and £77.90 as relating to steroid purchases. She explained that he had done a lot of research into the use of steroids. She suggested that his mother and father were aware of his use of steroids and that he even took the drugs in front of them. The defender's mother, MR, a former nurse, spoke of her awareness of the pursuer's use of steroids and recalled a particular occasion when he spoke to her about it. She remembered him saying that he nearly had to 'phone

her because he nearly had a heart attack from taking too much and that he got a fright'. Mrs R was characteristically vague about the precise date of the conversation but as to its occurrence her recollection was clear.

[20] The Court considered that the defender's evidence on the pursuer's use of steroids had the ring of truth about it. Her description of his use of the drugs, ordering online, keeping in the fridge and re-ordering did not have the character of something she had made up. Had it been made up it seemed unlikely that she would have risked making herself a hostage to fortune with unnecessary references to his parents' awareness of his use of the drugs. It was nothing to the point that the pursuer's father denied any reference to or knowledge of steroid use by his son. The pursuer's complete denial created an irreconcilable difference between his evidence and that of the defender on this subject. One of them was lying. If the defender was not telling the truth the Court would have to postulate that her evidence on the matter was a complete fabrication. More than that the Court would have to conclude that she conspired with her mother to present this evidence and that her mother's evidence was part of the fabrication. The Court did not consider this to have been the case. It found Mrs R to be a patently honest and sincere witness and believed the defender.

[21] The defender's father, I R, gave credible evidence of remembering his wife discussing with him her conversation with the pursuer about the near overdose of steroids. He went further, though, and spoke of the dim view he took of the pursuer's cheating for the Braemar Games through his use of the drugs and of writing to the Army about it. The pursuer's use of steroids was the subject of a 'good heart to heart' he had with 'G', the pursuer's father who, according to Mr R, was upset about his son's use of steroids.

[22] This telling body of evidence shone a light on the pursuer's propensity to lie for his own self interest and his ability to do so quite plausibly. It was one of the factors which led the Court to the view that on matters on which the parties gave differing evidence it should prefer the evidence of the defender. There were others which are discussed in their own context within the body of evidence as a whole.

The marriage and care of the children before separation

[23] The Court heard evidence from both parties regarding their marriage. The pursuer's evidence was characterised by his overstating his role in the care of the children and denigrating the defender at every opportunity in relation to her alleged abuse of alcohol and purported inability to properly care for the children. He could not properly reconcile the picture he sought to paint of a mother unfit through her abuse of alcohol to properly look after the children with long periods when it was obvious that she alone was looking after the children quite adequately, when he entrusted the care of the children to her, not least, during the time of his affair in Northern Ireland and on the move back to Scotland of which more later. Where the evidence of the parties differed on this aspect the Court preferred the evidence of the defender.

[24] The parties married on 14th November 2005 having met around five years beforehand. It appeared that the pursuer's decision to join the Army in about 2002 was taken at quite short notice and in fact the defender described it as 'coming out of the blue'. His career in the Army appeared to go well. He attained the rank of Sergeant First Class and that was his rank when he left the Army in 2013. He received training in the Royal Signals and went on to become an instructor. It appeared that, especially latterly, during the Northern Ireland posting, he was working in the field of communications but in sometimes highly confidential circumstances. For much of his time in the Army he was a trainer. It was about March 2005 when the parties moved to Cyprus where they were to stay for about a year. The defender had been working as a Sales Manager with Thomas Cook earning around £35,000 per annum and had in fact bought a small flat in Falkirk. She left Thomas Cook on the move to Cyprus and took what she described as a career break for about a year. She then secured part time employment as an Insurance Broker with NAAFI Financial in Cyprus, employment she was able to retain when the pursuer was posted to Germany in around March 2006. She told the Court that the company changed its name to Force Financial. The defender was made redundant but secured a post with Towergate Wilson, again as an Insurance Broker and this was employment she was able to maintain when the parties were to make their next move on the pursuer's posting to Blandford, Dorset, in the south of England. It was about October 2007 when the posting in Germany came to an end and the move to

Dorset took place. This was to be quite a settled period in Blandford where the parties remained for about three years until the pursuer's final posting to Northern Ireland in March 2011. According to the defender the pursuer had a role as a Trainer whilst in Blandford, was not deployed and was therefore able to enjoy more regular hours. It was in Blandford that they started a family.

[25] Both children were born whilst the parties lived in Blandford although the Court heard from the defender that she was pregnant with D before they left Germany. The first child, D, was born on 13th January 2008 and A about eighteen months later on 29th September 2009. The defender continued her employment and became the Manager for the South of England of Towergate Wilson. She could not continue her employment after the children were born because, she explained, it was not possible; the pursuer was not able to look after the children and furthermore he could be deployed at any time without notice. It became more sensible for the defender to stay at home with the children.

[26] The pursuer's description of a high degree of participation in the care of the children was undermined by the evidence of the defender regarding his work pattern and leisure activities centred on the Tug of War Team, the NAAFI and, later, his music group. The extent to which the pursuer sought to talk down the level of his commitment to the Tug of War Team as a modest commitment with occasional tournaments was implausible against the defender's evidence, which the Court believed, his role as Captain and his use of steroids in respect of which he remained in denial throughout the proof. Again the Court preferred the evidence of the defender.

[27] Whilst stationed in Blandford and in his role as a trainer the pursuer was committed each working day to classes, working from 08:15 a.m. until 4:30 p.m. There came a point at which the parties were able to avail themselves of subsidised nursery placements for the children on two mornings per week. The Court accepted that at all times during the working day when the children were not at nursery the defender was their only and primary carer. The Court accepted the evidence of the defender that on many if not most days the pursuer came home from work but went straight out again for Tug of War Training until around 6:30 p.m. and that it was his

frequent practice to go back out to socialise with his team mates. He was often involved in competitions at week-ends. The defender suggested that it was every single week-end during the summer. She stated also that he took his role as Captain very seriously and was, in effect, out every night training and socialising with his team. The Tug of War team was his priority, she said. The defender denied this and suggested that he was at home much more than suggested by the defender, participating in the care of the children. The Court found this implausible. The Court was satisfied that in general terms the defender was the primary carer of the children whilst the parties were stationed at Blandford from 2007 to 2011. The pursuer could and did rely upon the defender to fulfil the role of homemaker and primary carer of the children to be able to go to work each day and to participate in his passion of Tug of War as well as the social aspects of and around that pastime. He became involved with a band and took time to rehearse with them on a regular basis.

Northern Ireland

[28] The posting to Northern Ireland took place in about March 2011. It appeared that the pursuer became disillusioned with Army life at around this time and, according to the defender, he was unhappy with that particular posting. The pursuer's career came to an end at the end of 2012 and in January of the following year, 2013, he took up civilian employment with ION. And so the pursuer's time in Northern Ireland was relatively short, less than two years, but it was to be quite a fraught time for the parties and their marriage.

[29] The pursuer's working hours from day to day were longer from 08:00 a.m. until 06:00 p.m. and there was a crucial difference from his time in Blandford that he was back on operational duties and capable of deployment at any time. There was no Tug of War Team or band in Northern Ireland and it appeared that those commitments ceased. Notwithstanding the loss of those demands on his time the defender denied that as a consequence the pursuer spent any more time at home with her and the children. He was often 'off camp' she said. The Court heard no evidence to suggest that the basic arrangements for care of the children changed or that the defender ceased to be their primary carer.

[30] The pursuer started an affair with another woman. The defender suggested that it lasted from about January 2012 until about June of that year. The pursuer did not deny the affair but said it was for a shorter period. The duration of the affair is immaterial to the present matter. What is not in dispute is that from March to June of that year the pursuer moved out of the marital quarters he shared with the defender and children to single accommodation. During that period the defender was the sole carer of the children.

[31] The parties attempted a reconciliation in June 2012 at which point the pursuer returned to the matrimonial home. This coincided, however, with his decision to leave the Army, a decision which the defender insisted, the pursuer took on his own. That did not matter for the present proceedings but it did appear that from then until the end of the year the pursuer was engaged in a long process of resettlement and de-kitting and this involved some periods away from home on courses. The defender stated that these took place in Hereford every month. In addition, the defender stated, the pursuer was away, once for a week on a stag trip and for a two week skiing trip to France during that period from June to December 2012. The precise details of the pursuer's comings and goings were of little importance. It sufficed that the Court was satisfied that there was substance to the defender's assertion that she continued to be the primary carer of the children and for significant periods during 2012 was their sole carer.

[32] Then came the move back to Scotland. First of all the pursuer secured employment with ION in January of 2013. The defender, however, stayed on in Northern Ireland for five months until May 2013 while she undertook the task of identifying and arranging the purchase of a home for the family in Scotland. She was the sole carer for the children throughout this difficult period. The Court accepted the defender's evidence to the effect that during that five month period there was only one period of weekend contact between the pursuer and his family.

[33] This simple narration of the bare facts of the parties' marriage and care arrangements for the children belies the fact that the time in Northern Ireland was difficult for both parties and at times highly stressful. In June 2012 the parties attempted a reconciliation following the pursuer's affair. On Monday 13th June 2012

the defender felt the need to take time for herself to 'clear her head'. The pursuer was at that time still denying the affair and telling the defender that she was imagining it, that she was 'crazy' and 'cookie'. The defender packed a small bag. This elicited a violent reaction from the pursuer who pushed her back, grabbed her arm and said she was not leaving, that he would not let her go. He had to go to work. The defender took the children to nursery and then telephoned the pursuer to tell him that he would have to collect the children. She walked to the camp gate leaving the car for the pursuer and took a taxi to a hotel, not telling the pursuer where she was. It was not surprising that the pursuer became concerned and involved the Military Police. They traced the defender to her hotel and spoke to her. She returned the following day. While the defender may not have exercised the best judgement in relation to that episode it falls short of amounting to a cause for a more general concern regarding her ability or suitability to look after the children.

Back to Scotland

[34] The parties acquired the former matrimonial home at 6 Acorn Crescent, Anytown largely through the efforts of the defender. The house was not ready and from May to June 2013 the defender and children stayed during the week with the defender's parents so that D could go to school and at week-ends the pursuer's parents' farm at Braefell so that they would see their father. The pursuer was unavailable by reason of work commitments to help with the move and so the defender more or less single handedly undertook the move to the new home. From about June until the end of August 2013 the pursuer was working offshore and the defender found herself more or less on her own looking after the children. The defender was using alcohol to excess and ultimately this was to play a significant part in the parties finally separating on 16th March 2014.

[35] This analysis of the chronology of the parties' marriage and the arrangements for the care of the children satisfied the Court that it could accept the submission by counsel for the defender that the defender was the primary carer for the children throughout their lives prior to the separation of the parties in March 2014. The Court heard evidence from the parties but especially the maternal grandparents to the effect that the children were well balanced, bright and cheerful children both doing well at school and apparently unscathed at least outwardly by the enmity between

their parents. The Court considered it appropriate to infer that this was not the product of their parenting since March 2014 but a tribute to their parenting throughout their lives both before and after the separation of the parties. And so just as it appeared at least outwardly that the children were unscathed by their parents' conflict, so were they unscathed by their mother's period of excessive alcohol use discussed more fully below. The Court also heard evidence from the defender and her parents to the effect that the children expressed a wish to live with their mother and not their father and his new partner. The issue at the heart of this litigation was, however, the allegation of domestic abuse of the defender by the pursuer throughout the parties' relationship and marriage and the associated question whether the children are affected or might be affected by such abuse.

Allegations of domestic abuse

[36] There was reason to believe that the defender was subjected to physical abuse from the beginning of their relationship and throughout the marriage. The Court heard from LD and FW, both friends of the defender of long standing, 20 years and more, of an episode before the parties were married when the defender returned from a holiday with the pursuer and was seen to have two black eyes. She disclosed, albeit reluctantly, that it was the pursuer who had caused the bruising and neither witness was in any doubt that the injury they saw was caused by the pursuer. They did not, of course, witness any assault by the pursuer as was elicited in cross examination by Mr F, but there was no reason not to believe the evidence. The pursuer herself spoke of another occasion before marriage on a visit to the Duck Bay Marina when the pursuer lost his temper and kicked the defender's car denting a door panel. When asked by her counsel why she married him when he had been violent she responded that she had asked herself the question many times but she loved him, every time there was an explanation or justification for what happened and he always said he was sorry. She explained that for her when he was good he was 'really, really good' but he could 'blow up'. She said that if she did not 'push his buttons' he would not react as he did and so she saw it as her fault. This response chimes with the evidence of L D and F W who spoke of the defender's sense of shame and minimising the incident.

[37] Verbal abuse, offensive remarks, name calling including insults as to her appearance and standing was a constant and progressive feature throughout the relationship which became worse as time passed. He used words like 'lazy', 'fat', 'ugly', 'damaged goods', 'scum'. When the parties returned to Scotland in 2013 the pursuer's aggression and verbal abuse was a constant, daily feature of life for the defender. She felt as though she was walking on eggshells the whole time. It was especially bad and the pursuer was most liable to show verbal aggression when they were at his parents' home. In relation to the pursuer's affair in Northern Ireland the defender undertook counselling to help process it but the pursuer only went once. He kept shouting at the defender and told her 'to get over it'.

[38] The defender described the pursuer's verbal abuse and aggression to her whilst they were in Northern Ireland as 'pretty constant' but once back in Scotland after the so called reconciliation there was verbal abuse every single day and physical abuse three or four times per week. The defender was terrified of the pursuer coming home in the car not knowing what he was going to be like. When asked why she did not report the pursuer's conduct to the police she explained that he always apologised and she had a sense that if she herself behaved better it would be alright.

[39] An incident occurred in April 2005 in Akritiri, Cyprus, when the defender suspected the pursuer of an affair and this resulted in the pursuer charging at the defender in the apartment and pushing her with force so that she fell back. She put out her hand to save herself but fractured her wrist and had to be taken to hospital in Limasol. This was a matter spoken to by her father who did not witness the occurrence but recalled a discussion about it with the defender. The defender denied any suggestion that she was drunk. The Court found her account and her father's evidence all to have a ring of truth.

[40] In May 2011 the parties were at the pursuer's parents' home, the farm at Braefell. They had had a day at the zoo with the children. All of the adults had taken drink. In the kitchen the defender was sitting on a stool by the island. There was a discussion about the family dog and the defender was expressing some concern that it might bite the children if they were to pester it by pulling its ears. She denied any

suggestion that she was saying the dog should be put down. On the defender's account she said to the pursuer 'please back me up on this' at which he 'blew up' and punched the defender in the ribs causing her to fall onto the tiles. In the morning she could not breathe, was in extreme pain and required to be taken to hospital where she was found to have fractured ribs. She was challenged in cross examination for having stumbled and fallen through her own drunkenness as suggested by the pursuer and his father but denied this. The Court believed the defender's account. It considered that there was reason to believe that the pursuer's father had demonstrated a tendency to minimise his son's aggressive behaviour towards the defender and his aggression generally. The defender's account did not appear to have the characteristic of a fabrication and her reference to comments by the pursuer's father at the time that he 'hated to see C like that to you' rang true. The Court was reinforced in that view having regard to Mrs R's report of an exchange she had with GP, the pursuer's father, when she asked him why he could watch his son break her daughter's ribs to which he replied, according to her, 'I'm sorry. I shouldn't have allowed it. I should have spoken up.' She said that this was part of a conversation in which he seemed quite down as his wife was not well. The Court did not think this was made up.

[41] The defender suffered a head injury in September 2013 when she stated she was in A's bedroom checking and tucking her in when the pursuer appeared in the doorway, grabbed her head and 'smashed it down on the bed'. This resulted in a laceration and profuse bleeding. It was done in front of the child. It appears not to be disputed that the pursuer suffered the laceration but again the pursuer alleged that it was associated with the defender's drinking, that she had concealed a bottle in the child's bed and suffered the injury after stumbling and falling while inebriated. The Court found the defender's account to be credible.

[42] It was difficult to fully understand and articulate the impact of the pursuer's constant domestic abuse on the defender. She did not tell her family about the full extent of it because she was scared to do so. The defender described herself as being 'on her hands and knees' with the constant fear and uncertainty of what the pursuer would do next but coupled with the paradoxical feeling that she still loved him. It is not necessary for me to analyse the evidence of the defender's parents in

detail to observe that they both disclosed an awareness and suspicion of domestic abuse from an early stage in the relationship between the parties. Mr R was lost for words when asked why he never reported matters to the police. He conceded that he felt he had failed his daughter. This in the context of a relationship he had with both the pursuer and his father and conversations about the pursuer's anger issues all of which though generalised nonetheless lent credence to other evidence I heard of the domestic abuse and discussed above.

[43] By December 2013 the defender described herself as feeling completely drained and of having experienced a complete emotional collapse. It was, she said, a gradual process and not attributable to any single occurrence. It started though with the pursuer returning home in about August 2013 and by September of that year she felt she could not cope any more.

Defender's conduct

[44] The defender was drinking too much. On 5th December 2013 she and the pursuer had another argument in the course of which, on her account, he was abusive and offensive to her. While she was brushing her teeth in the bathroom there was a slight struggle as a consequence of which the pursuer was struck on the head with the toothbrush leading to a small laceration. He called the police and this resulted in the defender pleading guilty to a charge of assault for which she was admonished.

[45] The parties eventually separated following an incident on 16th March 2014 when it was alleged the defender attacked the pursuer's mother. The defender denied such an attack. The pursuer's mother was unable to attend at court through ill health and so the evidence in relation to this matter was somewhat inconclusive. It related to an isolated incident at a time when the defender was in a vulnerable state. Having regard to the whole body of evidence available to the Court it was a matter which the Court considered had little bearing upon the final outcome. That date, however, marked the final separation of the parties. They did not reside together after that date and there was no prospect of a reconciliation.

14th May 2016

[46] An incident occurred on 14th May 2016 at a time when the proof in this action was in progress. The pursuer was charged with assaulting the defender and the matter went to trial. The Court was unaware of the outcome. The Court had the benefit of hearing the evidence of the pursuer and Ms H and that of the defender and her mother. The incident itself had little bearing upon the overall outcome of the action but was of considerable significance in relation to the issue of credibility and reliability of parties and witnesses.

[47] The most impressive witness on the matter was found to be Mrs MR. Her demeanour and presentation was that of someone who was completely honest and doing her best to give a reliable account of all that she saw. It was a day for the defender's contact with A but the pursuer had emailed to say she was unwell, was being kept off school, and suggesting that contact be cancelled and rearranged. The defender may not have exercised the best judgment in going round to the pursuer's home which is still the former matrimonial home at Acorn Crescent and insisting upon seeing her daughter. The child was brought down by Ms H. The defender was at the door with her mother by her. On Mrs R's account A reached her arms out to her mother who did likewise. The pursuer grabbed the defender by the arm. At first she said right arm and then changed to refer to the left arm. He was aggressive. He said something to the effect that he had told the defender that she would get her for extra time on Tuesday. Mrs R then described her daughter 'getting taken literally by her arm and he was burling her around'. She described the pursuer grabbing hold of HP and swinging her round, he was pulling and shoving at HP. He pushed the door and it caught the defender's ankle. The defender offered a similar account of A with her arms out saying 'mummy'. She described the pursuer saying, 'no you're not getting her', grabbing the defender by the left arm and pulling her round. She said, 'give me her or I'll call the police'. There was a reference to Ms H laughing and saying something to the effect that it was a civil matter and of no interest to the police. The defender and her mother returned to the car and waited for the police. The detail of the events preceding and after the alleged assault was largely irrelevant.

[48] The pursuer and Ms H gave evidence in replication having been recalled for that purpose. The pursuer described Ms H getting A out of bed. She was in a slumber and Ms H was in front. He stated that the defender 'breinged right in, pushed Ms H, gripped A by the hips and tried to rip her, rip her'. He described Ms H sitting to put A's shoes on. A was still bleary eyed and the defender said, 'give me my daughter, I don't care about shoes, give me my daughter'. He described Ms H having A on her hip having put on her shoes and the defender grabbing A by the right arm and jerking her so hard that she pulled her onto the floor. Ms H grabbed the door handle and shut the door. The defender took her telephone and said, 'you just assaulted me'. In describing A the pursuer made a gratuitously melodramatic reference to the photograph of a young child victim of the Syria conflict which had recently appeared in the media. He worked himself up in the witness box and became tearful in his demeanour.

[49] Ms H described having A on her hip. The defender 'lunged forward and grabbed A by her two arms'. She said A still had her arms around her neck and the defender stepped back. The defender said to the pursuer, 'you just assaulted me I'll call the police'.

[50] These two accounts were irreconcilable in certain important respects. It was Mrs R who gave the most credible account in a straight forward manner albeit with slight imperfections in the detail. The defender's account was consistent with that and, if anything, understated the element of physical contact by the pursuer. The Court found the pursuer to be unduly emotive and at times melodramatic in his demeanour and gained the impression that he was endeavouring to paint a picture adverse to the defender but favourable to his interest rather than a straight forward account of what happened. Ms H's account was similar but missing the highly significant element of the child being jerked onto the floor. The Court came to the regrettable conclusion that on this matter the pursuer and Ms H were not telling the truth. The pursuer had already given the impression of one who will tell lies plausibly in his own interest. The Court believed that is what he had done in relation to this matter. The particular circumstances in which this occurred with the child present and in relation to a matter of contact raised concerns about the pursuer's ability to

prioritise the best interests of the children over his own desire to secure an advantage over the defender.

Defender's use of alcohol

[51] The defender acknowledged that for a time, in 2013 in particular, she was abusing alcohol. She admitted under cross examination that she misused alcohol whilst in Northern Ireland in 2011–12 but it was not a problem and did not become a problem until she returned to Scotland in 2013. She denied that she had always been someone who was greedy with alcohol. She denied that she could ever have been categorised as an alcoholic or that she was an alcoholic. This appeared to be borne out by the evidence of friends who had known her for many years, LD and FW. They did not shirk from the fact that the defender had always been a social drinker and may be said to enjoy socialising but had no concern that the defender had a problem with alcohol. Her parents especially her father gave a similar impression that the defender was a normal young woman who enjoyed socialising and this involved alcohol but not that she abused alcohol as a young woman or had a problem with it. There was no body of evidence beyond that of the pursuer to suggest that the defender had any issue with alcohol at any earlier stage in her life.

[52] The defender had the insight to realise that she needed help in addressing her abuse of alcohol and attended Alcoholics Anonymous. That experience reassured her and the Court accepted that she did not meet the criteria for diagnosis as an alcoholic. The pursuer made the valid observation that whilst pregnant she consumed no alcohol and so for a period of around three years that was her status.

[53] By the end of 2013 she admitted that she was consuming about a bottle of wine a night before the pursuer came home from work. Despite this admission the Court had reason to consider that she understated the extent of the problem and the full extent of her alcohol consumption. The Court heard evidence from her former neighbour at Acorn Crescent, LT which gave the troubling impression that the defender's alcohol consumption was impacting upon her parenting responsibilities towards D and A. Ms T was an Investment Manager with two children of her own just a little older than D and A. She explained that in the neighbourhood there were a lot of families with children of similar ages. There was a lot of play outside. D was the

same age as her daughter and in the same class at school. They got on well and played together. She recalled that when the defender moved in to the house next door at number 6 it was her understanding that the pursuer was 'away in the Arctic Circle'. The defender introduced herself. D and A were regular visitors to Mrs T's garden which was set up for children with a trampoline and paddling pool. While she found the defender to be very friendly and approachable she began to develop concerns regarding her use of alcohol. The defender had, of course, returned to Scotland with the children in May 2013 but was unable to move into the new house until June of that year. She had coped with the move more or less single handedly as the pursuer was working away offshore.

[54] Mrs T first noticed the defender with a bruised face at a time when the pursuer was still away and was told that she had been up in the night and walked into a door. It was a beautiful summer, she remembered, and during a 4 to 6 week period she recalled there were a few episodes which caused her concern. The children D and A were seen out in the evening as late as 11:15 p.m. apparently unsupervised, D seen lifting a drain cover and leaning in. Arriving home from work one evening Mrs T and her husband saw A wandering quite far from her home. They saw A one lunchtime with an ice cream she said was her lunch.

[55] One morning at 6:45 a.m. D came to the door in pyjamas. He and A were there most of the day. They came round regularly and were never called for by their mother. Sometimes they were there 12 to 15 hours. Once the children went back to school in August 2013 Mrs T spoke with the defender who acknowledged the situation of her children being fed by Mrs T and the neighbours across the street and who explained that she was not thinking straight. Mrs T thought the defender seemed depressed and invited her to join her in an exercise class but this was declined.

[56] Eventually Mrs T stopped D and A from playing in her house but said that this was misinterpreted by the defender. She recalled one evening in October 2013 at about 5:30 p.m. she was approached by the defender who was quite confrontational. She had the impression she had been drinking a lot of alcohol and her speech was slurred. She described her as 'really drunk'. Mrs T took the decision after many

weeks to contact Social Services following an incident when she noticed that D and A had been left in the car for about half an hour and were banging on the windows. Around this time the pursuer came back home. Mrs T kept her distance though allowed the children to play. She recalled hearing 'lots of arguing and confrontation' and then once there were police vans there.

[57] Mrs T described a particular incident which she thought occurred in about February 2014. She was aware that the defender was not meant to be near the house and I have inferred this was a reference to special conditions of bail following the 5 December incident. The pursuer's mother came to the door in a state of great distress, soaking wet and with blood on her lip and head. She had one shoe on. She stated to Mrs T that she had been attacked by HP and 'she is going to kill me'. The defender came to the door asking where A was. She was in the house and Mrs T reported that the defender said 'please don't phone the police'. Mrs T in fact immediately telephoned the police and an ambulance. She thought the defender had been drinking.

[58] The defender's explanation for developing a problem with alcohol is directly related to the constant verbal and physical abuse she stated she suffered at the hands of her husband. She had suffered a complete emotional breakdown. When challenged in cross examination she attributed her resorting to alcohol not to having an alcohol problem but to having a problem with abuse at the hands of the pursuer and depression. She denied that her problem with drink became the reason the children came to reside with the pursuer. She stated that it was because of his constant bullying, his affairs and not being there that she took to drink. She did so for comfort and claimed that she was unwell due to his actions.

[59] The historical analysis of the marriage and the arrangements for care of the children discussed above lent support to the proposition that the defender's problem drinking was a late occurrence during the period leading up to the parties' separation. The evidence was not so clear as to offer a definitive start but was more consistent with the notion that it was a problem which developed over time. It seemed clear that the defender was struggling with her use of alcohol shortly after she moved to Scotland with the children and into the former matrimonial home at

Acorn Crescent. She acknowledged that prior to that and during the parties' time in Northern Ireland she was drinking too much.

[60] There was much in the evidence to support the proposition advanced on behalf of the defender that her problematic phase with alcohol was short lived and now a thing of the past. Her parents recognised that there was an issue their daughter required to address and, in order to do so, she moved out of the parental home where she had resided after the separation. To her credit the defender engaged with Alcoholics Anonymous but was assured after a time that she was not a person who fell within the recognised criteria of an alcoholic. Her reduction in the use of alcohol permitted the establishment of contact with the children to the point at which it included significant periods of residential contact on a regular basis. This development appeared to have coincided with a coming to terms with the true nature of the defender's relationship with the pursuer and a growth in self-confidence and self-esteem. The Court could not conclude on the basis of any authoritative opinion evidence that the defender overcame her over use of alcohol by addressing her attitude to and relationship with the pursuer but could properly have regard to her own evidence suggesting that this was a significant factor.

Impact of domestic abuse and implications on care of children

[61] The abusive nature of the defender's relationship with and marriage to the pursuer were not in doubt. There was little direct evidence of the children being present during episodes of abuse although two particular incidents involved A. The first was in September 2013 when the defender sustained a head injury at the hands of the pursuer in A's presence in bed. The second was during the more recent incident of 14th June 2016 when she was present and the subject of the argument. The Court could infer that the children were aware of their father's aggression and mood swings, of the tensions between their parents resulting from those and that they were not unaffected by these factors.

Capacity to care for the children

The care arrangements for D and A to the date of proof indicated that both parties were able to attend to the day to day needs of the children who, despite the troubles between their parents, appeared to have remained outwardly unscathed. The quite

generous arrangements for residential contact which had been in place for some months supported the impression that the defender was well able to meet her parental responsibilities including those of a more serious nature such as the completion of homework. She had engaged well with the school. The pursuer too, with the support and assistance of his partner, had done the same. The loss of trust between the parties indicated that an arrangement for the care of the children which would require a high degree of co-operation between the parties would be unlikely to succeed. The episode of 14th June 2016 was an eloquent illustration of that.

AP v HP**Submissions by Counsel for the Pursuer on disclosure of the views of the children**

[1] Counsel for the pursuer urged the Court to allow disclosure of the views of the children. The pursuer's position was that he respected the wishes of the children not to disclose their views but wanted to know what those views were. He added that it was difficult for him to make full submissions on the matter without knowing what the views of the children were whilst acknowledging that it was a matter ultimately within the discretion of the Court. He directed the Court to the case of *McGrath v McGrath* 1999 S.L.T. (Sh. Ct.) 90 for guidance as to the appropriate test to be applied in deciding whether to allow disclosure of the views of children. This was a decision of Sheriff Principal Bowen in which at p.92H to 93C-D can be found his reasoning in support of the proposition that the starting point is the fundamental principle that a party is entitled to disclosure of all materials and next that consideration should be given to whether disclosure of the material would involve a real possibility of significant harm to the child.

[2] The Court raised the question whether the matter of disclosure or not of the views of the children against their wishes engaged their Article 8 rights under ECHR and whether, on the question of disclosure or not of their views against their wishes, Article 6 was engaged. There was some acknowledgement that Article 8 might well be engaged.

AP v HP**Submissions by Counsel for the Defender on disclosure of the views of the children**

[1] Counsel for the defender indicated that the defender was content for the views of the children not to be disclosed and for their wishes in this regard to be observed. He did not have an answer to the Article 6 and 8 questions the Court had raised but observed that the case of McGrath had been decided in a pre ECHR age, possible ECHR issues had not been discussed and that might be a basis upon which that decision could be distinguished. It was not binding upon this Court being a decision of the Sheriff Principal of a different Sheriffdom. He further submitted that the case of Dosoo v Dosoo 1999 S.L.T. (Sh. Ct.) 86 which was considered in McGrath could be distinguished on its facts in respect that the two boys who were the subject of those proceedings had instructed solicitors and the action was only at the closing of the Record stage so that the decision in contemplation was not final. He mentioned in passing that the nature of the discussion in that case suggested that in fact the views of the boys were known.

AP v HP**Submissions by Counsel for the Pursuer on the matter of residence*****Legal Framework***

[62] This Court's powers in relation to the making of residence and contact orders in respect of the children D and A are derived from s.11(2)(c) and (d) of the Children (Scotland) Act 1995. It is provided by subs.(7)(a) that the Court shall regard the welfare of the children as its paramount consideration and shall not make any such order unless it considers that it would be better for the children that the order be made than that none should be made at all. The views of the children are important and in that regard the Court is required, so far as is practicable, and taking account of the children's respective ages and maturity, to give them each an opportunity to indicate whether they wish to express their views, if so to give them an opportunity to express them and have regard to such views as the children may express². Counsel for the pursuer referred to the Inner House case of *White v White* 2001 SC 689 in which the then Lord President, Lord Rodger explained that the terms of section 11 were inconsistent with the notion that s.11(7)(a) imposes a legal *onus* on the person who asks for an order. He illustrated this by observing that the Court could make such an order whether or not it was applied for by a party and said at p.698F-G,

“In other words, such orders can be made by the court *ex proprio motu* without any application. In such a case no question of *onus* can possibly arise and yet s.11(7)(a) applies to the court which is considering whether to make the order. It follows that since s.11(7)(a) does not of itself import any kind of legal *onus* in the case where the court makes the order spontaneously, it does not import any kind of legal *onus* either in the more usual case where someone makes an application for the same kind of order.”

He added,

“The court must consider all the relevant material and decide what would be conducive to the child's welfare. That is the paramount consideration. In carrying out that exercise the court should have regard to the general principle that it is conducive to a child's welfare to maintain personal relations and direct contact with his absent parent. But the decision will depend on the facts of the particular

² **Sub-s.(7)(b)(i)-(iii)**

case and, if there is nothing in the relevant material on which the court, applying that general principle, could properly take the view that it would be in the interests of the child for the order to be granted, then the application must fail.”

[63] This approach was reinforced by the Inner House in the case of *M v M* 2011 Fam. L.R. 124 and on the question whether a legal onus of proof arises Lord Emslie, delivering the opinion of the Inner House in *S v S* 2012 Fam. L.R. 32 said this at p.34,

“... as recognised by the House of Lords in *Sanderson v McManus* 1997 S.C. (H.L.) 55 and by this court in *M v M* at 2011 Fam. L.R., p.136, para. 57, a party who seeks to alter the *status quo* must have some liability to furnish the court with material potentially capable of justifying the making of a relevant order. Even the Lord President in *White* at 2001 S.C., pp. 698-699; 2001 S.L.T., p.491; 2001 Fam. L.R., pp.26-27, para. 21, acknowledged that in the absence of relevant material on which the court could properly take the view that it would be in the interests of the child for a given order to be granted, then an application must fail. What Lord Clyde had envisaged in *Sanderson* was an evidential, as opposed to a legal, burden on the person seeking an order from the court.”

The defender seeks to reverse the arrangements for residence of the children by a residence order providing for their residence with her, and so she requires to discharge an evidential burden of proof to justify the change.

[64] The Court raised with counsel for the pursuer the terms of sub-s.(7B) of the 1995 Act which provides that in carrying out the duties imposed by sub-s.7(a) the court shall have regard to the need to protect the children from any abuse or the risk of any abuse which affects or might affect the children. The court must, furthermore, have regard to the effect such abuse or the risk of it might have on the children and the ability of a person who has carried out abuse to care for or otherwise meet the needs of the children. A further factor to which the court must have regard is the effect any abuse or the risk of it might have on the carrying out of parental responsibilities by a parent³. The pursuer’s position was very simple and straight forward. He denied that any such abuse had taken place at his hands and so the factors alluded to in sub-s. (7B) simply did not arise.

³ **sub-s.(7B)(a)-(d)**

[65] The pursuer considered that it was in the best interests of the children for the same arrangements for residence and contact to continue and asked the Court to make such orders as will preserve the *status quo*.

[66] While there was not a burden of proof as such upon the defender to justify a change of the *status quo*, there was nonetheless an evidential burden to be met justifying the change. The children were happy, well balanced and doing well at school. They enjoyed their time with their father. They were much loved by him and his new partner Ms H. They enjoyed generous residential contact with the defender and those arrangements were working well. The pursuer maintained that he played a greater part in the care of the children than the defender suggested. The reason why they came to reside and be cared for by the pursuer and his partner was the defender's problem with alcohol. The Court had heard graphic evidence of circumstances in which the defender had neglected the children whilst abusing alcohol. The increases in contact were entered into with some trepidation on the part of the pursuer who could not be sure that the defender had truly overcome her problem. There was no justification in changing what is now the *status quo* and it was in the interests of the children for it to continue.

AP v HP**Submissions by Counsel for the Defender on the matter of residence**

[1] Counsel for the defender did not demur from the statement of the legal principles advanced by Counsel for the pursuer as guiding the court's consideration of this matter but did raise the question of the duration of an order made under s.11 of the 1995 Act. There is no equivalent provision in the Act to those contained in the Adoption and Children (Scotland) Act 2007 in relation to adoption to have regard to the welfare principle 'throughout the child's life' as the paramount consideration⁴ or, ⁵in relation to permanence orders, 'throughout childhood'.

[2] He submitted, though, that long term considerations were important and should guide the court's decisions. It was not enough for the view to be taken that as the children are 'doing fine just now' the *status quo* should be maintained. He referred to a discussion of this aspect in Wilkinson & Norrie 'The Law Relating to Parent and Child in Scotland', para. 9.09 and whether long term benefits carried greater weight than benefits that are real and immediate. The authors concluded,

"Clearly there is no one answer to such questions that is "right" for every child, and one can say no more than that neither type of benefit is to be ignored. Common experience, however, suggests that the maintenance of an immediately satisfying and rewarding relationship is likely to lay the foundations of long-term psychological health. If this is so, then it may well be impossible in most cases to distinguish between the short and the long-term aspects of welfare."

These observations do not innovate upon the application of the welfare principle discussed in the cases of *White v White* and *S v S* and the point that each case must be decided upon its own facts and circumstances. The wider context Mr N asked the Court to have regard to was that until 2013 the defender was the primary carer of the

⁴ s.14(3) Adoption and Children (Scotland) Act 2007

⁵ *Ibid.* s.84(4).

children and the granting of a residence order providing for the children to reside with her would restore that earlier *status quo* to their benefit.

[3] Counsel for the defender took a quite different view from Counsel for the pursuer on the matter of the implications of sub-s.(7B) of the 1995 Act and regarded this provision of significant importance in the context of the case in which the defender alleges serious and longstanding domestic abuse. He emphasised that the sub-section refers to not just abuse but also the risk of abuse which might affect the children and so, he argued, the court should properly have regard to hypothetical and potential abuse.

[4] The defender took the opposite view to the pursuer that it was against the interests of the children to continue to reside with him and that it would be in their interests to reside with her instead. It was submitted on her behalf that this would restore the children to the position which prevailed before the parties separated of the defender fulfilling the role of their primary carer. The fundamental proposition upon which the defender founded was that it was contrary to the welfare of the children to have an abusive parent, their father, as their primary carer. The defender also believed on the evidence of the defender and her parents that if the children were to remain in residence with their father it would be against their wishes.

[5] The defender has come to terms with the defender's true character. She is no longer cowed by him or afraid of him. She has found much greater self confidence and sees that for years she was a prisoner of the abusive relationship with the pursuer. She is now assertive and independent. She no longer abuses alcohol and that has been the position for some time now. Her abusive phase with alcohol was directly related to the abuse she received at the hands of the pursuer. As she eloquently put it herself, she did not have a drink problem, she had a problem of abuse at the hands of her husband.

[6] The children were primarily looked after by the defender all of their lives until the parties separated. It was a big change for them to be looked after by their father and his new partner. It was against the interests of the children to be resident with a father who had been abusive towards their mother and who had demonstrated time

and again his inability to prioritise the needs of the children over his own personal issues. There can be little doubt that the children have been adversely affected by the abuse shown by the pursuer towards the defender. They have lived in the same house as the parties when tensions have been high and at least two incidents of violence have occurred with AP present. The children told their mother and grandparents that they want to live with her and the defender believes that is their wish. They complain about being forced to love Ms H, the pursuer's new partner. They are sometimes scared of the pursuer.