

SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLANDS AT KIRKWALL

[2023] SC KRK 15

KIR-F24-19

JUDGMENT OF SHERIFF IAIN W NICOL

in the cause

DM

Pursuer and Respondent

against

JH

Defender and Minuter

**Pursuer and Respondent: Ms S Sutherland, D & DH Law, Solicitors, Kirkwall**

**Defender and Minuter: Mr G Moss, Moss and Kelly, Solicitors, Glasgow**

KIRKWALL, 2 May 2023

The Sheriff having resumed consideration of the cause MAKES the following

findings-in-fact:

[1] The defender/minuter is the mother of J, an 8 year old boy born 21 October 2014.

They reside together in Kilwinning, Ayrshire.

[2] The pursuer/respondent is the father of J and lives in Orkney.

[3] Both pursuer and defender live with partners. The pursuer has no children residing with him. The defender has a 5 year old daughter, S, half-sister of J, residing with her.

[4] Following proof which commenced in November 2020, this court issued a judgment on 7 May 2021 a) confirming that a contact order should be made enabling the pursuer to have residential contact with J b) making a residence order whereby J is to reside with the defender c) granting a specific issue order allowing the defender to relocate with J from

Orkney to Kilwinning, (which relocation took place on 14 May 2021) and d) appointed a child welfare hearing to discuss the precise details of the contact order to be made in favour of the pursuer.

[5] The main focus of the proof leading to the judgment on 7 May 2021 was whether the specific issue order to relocate should be granted. The court left it to the parties to agree the specific terms of residential contact to which the pursuer would be entitled. Agreement was reached between the parties on the pursuer's entitlement to contact in advance of the child welfare hearing on 25 May 2021.

[6] As a result of the agreement reached between the parties in relation to the pursuer's contact entitlement, this court made a contact order on 25/5/21 for the pursuer to have contact with J a) every second weekend during term time b) 1 week during the Easter holidays, c) 3 weeks during the Summer holidays d) 1 week during October holidays e) half of the Christmas holidays alternating between Christmas and New Year with J spending Christmas 2021 with the pursuer; said contact to take place on Orkney unless otherwise agreed between the parties; with the defender being responsible for the costs, arrangements and travel with the child to and from Orkney unless otherwise agreed.

[7] The interlocutor of 25/5/21 was pronounced approximately eleven days after the defender relocated with J from Orkney to Kilwinning.

[8] Term-time contact in terms of the interlocutor of 25 May 2021 took place until around April 2022 for one or two nights at a time, mainly at weekends. In April 2022 the defender unilaterally altered the contact arrangements, reducing the pursuer's residential contact with J in Orkney from every second weekend during term time to approximately once a month. The reason given by the defender to the pursuer for the change was that the defender could not afford to continue paying for flights every second weekend.

[9] On occasion, J has suffered stress-related migraines, felt sick and tired when making the journeys between his home and Orkney.

[10] Since the interlocutor of 25 May 2021 was pronounced, the defender has reached an agreement with the father of her daughter, S, whereby S's father has exercised contact to S in Orkney on the same dates as the pursuer exercises contact to J.

[11] Since April 2022, on the occasions when contact between the pursuer and J has lasted for only one night the contact has often felt rushed, with the pursuer trying to fit as much into the contact periods as possible knowing that no further residential contact will be exercised for approximately one month.

[12] J has expressed a view that he wishes to have contact with the pursuer more frequently than once per month.

MAKES the following findings in fact and law:

[13] It is in the best interests of J that periods of face to face contact between J and the pursuer in Orkney during school term-time take place more frequently than once per month.

[14] It is in the best interests of J that periods of contact between J and the pursuer in Orkney during school term-time last longer than one night at a time provided J is not regularly removed from school early on a Friday for the purposes of contact.

[15] Having regard to the welfare of the child as the court's paramount consideration, it is better for the child that the contact order granted on 25 May 2021 be varied than that no order to vary should be made.

[16] THEREFORE, sustains the pursuer's first plea-in-law in part and sustains the defender's first plea-in-law in part; varies the interlocutor of 25 May 2021 by deleting the words "Every second weekend during term time" and substituting:

Term time contact on the following dates: 29/4/23 to 1/5/23, 27/5/23 to 29/5/23, 17/6/23 to 18/6/23, 16/8/23 to 20/8/23, 15/9/23 to 17/9/23, 17/11/23 to 20/11/23, 9/12/23 to 10/12/23, 20/1/24 to 21/1/24, 9/2/24 to 12/2/24, 9/3/24 to 10/3/24, 4/5/24 to 6/5/24, 25/5/24 to 27/5/24 and 22/6/24 to 23/6/24 and in each subsequent school year on dates to be proposed by the Defender no later than 1<sup>st</sup> April each year representing similar durations and frequency; reserves all questions of expenses.

**Background:**

[17] This action relates to an application by J's mother, the defender, to vary, in part, a contact order entitling J's father, the pursuer, to have residential contact with J. The proof on the Minute to Vary was heard on 11 April 2023. The evidence consisted of Affidavits from both parties, supplemented by their oral evidence. There was no joint minute. Written submissions were lodged by both parties 7 days after the conclusion of the proof.

**Case history:**

[18] The original proof in this case commenced in November 2020 to determine a) whether the defender was entitled to a residence order and a specific issue order to allow her and J to relocate from Orkney to Kilwinning and b) whether the pursuer was entitled to a residential contact order. In a written judgment of this court dated 7 May 2021 the residence order and specific issue order were granted. The defender and J relocated to Kilwinning on 14 May 2021. The court also held that the pursuer was entitled to a contact order without determining the specifics of the order at that time.

[19] In the judgment of 7 May 2021, the sheriff fixed a Child Welfare Hearing to take place on 25/5/21 so the court could be addressed on the specific contact arrangements for J to see his father in Orkney. In advance of the CWH, the parties reached agreement on the contact arrangements and an interlocutor was pronounced on 25/5/21 to reflect that agreement whereby the Pursuer became entitled to exercise contact to J:

- a) every second weekend during term time
- b) 1 week during the Easter holidays
- c) 3 weeks during the Summer holidays
- d) 1 week during October holidays
- e) half of the Christmas holidays alternating between Christmas and New Year with J spending Christmas 2021 with the Pursuer;

said contact to take place on Orkney unless otherwise agreed between the parties; with the defender being responsible for the costs, arrangements and travel with the child to and from Orkney unless otherwise agreed.

[20] The defender seeks to vary only paragraph a) above i.e. the contact every second weekend during term time.

**Views of the Child:**

[21] The views of J had not been previously sought. In the lead up to the proof I canvassed the issue of obtaining J's views with parties' agents. J is 8 years old. The pursuer confirmed he supported J's views being taken. The defender indicated she was neutral on the issue. I considered it essential to endeavour to ascertain whether J wishes to express a view and if so establish what that view was. I therefore arranged for J, who was, in any event in Orkney on the morning of the proof, to visit me in chambers with the sheriff clerk present. I found J to be an articulate, polite and friendly child. He knew why he was coming to see me and was aware of his mother's application to vary the contact arrangements so that he would visit Orkney to see his father less frequently but for longer periods at a time. He was keen to express his own view on the matter. He spoke fondly of the time that he spends with the pursuer. He clearly enjoys his contact visits and spoke of

the fact that he and his father play together, go out to the park, visit extended family, go fishing (although he did say he wasn't a great fan of that) and, on the crucial issue, made it very clear that he wanted to see his father face to face in Orkney more often than once per month. He did not express any concerns in relation to travelling although he was not specifically asked whether he had ever been sick when making the journeys. There was no indication that J had been pressurised into expressing the views which he did. I was entirely satisfied, having regard to J's age and maturity, that he was in a position to express his own views and those views should be taken into account in reaching a decision.

**The defender's case:**

[22] The basis for the defender's application to vary the term time contact, as reflected in Statement of Fact 3 in her Minute, and spoken to in her affidavit and oral evidence, was that there had been a material change of circumstances since the interlocutor of 25/5/21 was pronounced. In particular she could no longer afford to pay for flights to take J to Orkney every second weekend due to a "substantial" increase in the cost of travel and the general increase in cost of living.

[23] In her evidence she explained that from around end May 2021 until around September 2021 she would regularly take J out of school early on a Friday, every second weekend, to fly from Glasgow airport to Orkney to facilitate the pursuer's contact with J. The defender and J usually returned home on the Sunday. The head teacher of J's primary school expressed concern at the amount of time J was missing from school on a Friday afternoon. On one occasion the defender booked a flight from Edinburgh airport to Kirkwall so they could travel later on a Friday but due to traffic congestion she missed the flight and lost around £500 in plane fares. No contact was exercised by the pursuer that

weekend. The defender did not consider flying from Edinburgh to be a viable option as it would still require J to be collected from school no later than 2.00pm on a Friday to get to Edinburgh airport on time for a 6.15pm flight. He would miss 1 hour 15 minutes of important school time and would arrive in Orkney at bedtime, tired and hungry. To leave any later risked missing the flight.

[24] From around September 2021 until around April 2022 the defender flew with J from Glasgow to Kirkwall early on a Saturday, every second weekend, returning home the following afternoon, meaning that J would see his father for little over 24 hours on each visit.

[25] From April 2022 until the date of proof i.e. 11 April 23, contact has operated on different dates to those set out in the interlocutor of 25 May 21. These alternative dates were unilaterally imposed by the defender as follows:

30/4/22 to 2/5/22

3/6/22 to 5/6/22

4/7/22 to 25/7/22 (school summer holidays)

27/8/22 to 28/8/22

17/9/22 to 19/9/22

17/10/22 to 23/10/22 (school October holidays)

19/11/22 to 22/11/22

30/12/22 to 8/1/23 (school Christmas holidays)

10/2/23 to 14/2/23

3/4/23 to 10/4/23 (school Easter holidays)

[26] Therefore, with one exception (between 28/8/22 and 17/9/22) the frequency of contact in Orkney in the last year reduced to once every four weeks at best, and on one occasion there was a gap of almost seven weeks (14/2/23 to 3/4/23). The pursuer did however visit J

in Ayrshire during March 2023 and booked into a local hotel for 2 nights so J could stay with him there. That visit was paid for by the pursuer.

[27] The defender has put forward proposals for the pursuer to exercise contact to J in Orkney, with the defender continuing to pay for travel on the dates outlined in the table below between 11 April 2023 and 8 August 2024. The columns shown for No. of days/nights, gap until next contact and comments have been added by me to assist the analysis of the proposals. The defender has suggested that contact beyond 8 August 2024 for the following school year shall be proposed by her no later than 1 April 2024 (and presumably by 1 April in each subsequent year):

<b>Dates</b>	<b>No. of days/nights</b>	<b>Gap until next contact</b>	<b>Comments</b>
29/4/23-1/5/23	3 days / 2 nights Sat to Mon	3 weeks 5 days	School closed on Mon 1/5
27/5/23 -29/5/23	3 days / 2 nights Sat to Mon	4 weeks 5 days	School closed on Mon 29/5
30/6/23 - 21/7/23	22 days / 21 nights	3 weeks 5 days	<b>Not term time – part of Pursuer’s summer holiday entitlement</b>
16/8/23 - 20/8/23	5 days / 4 nights Wed to Sun	3 weeks 5 days	16 <sup>th</sup> August is last day of summer holidays. 17 <sup>th</sup> and 18 <sup>th</sup> are In service days when the school is closed to pupils
15/9/23 - 17/9/23	3 days / 2 nights Fri to Sun	4 weeks 1 day	Child at school on Friday 15/9

16/10/23 – 22/10/23	7 days / 6 nights	3 weeks 5 days	<b>Not term time – part of Pursuer’s October holiday entitlement</b>
17/11/23 – 20/11/23	3 days / 2 nights Fri to Mon	4 weeks, 5 days	School closed on 17 <sup>th</sup> and 20 <sup>th</sup> Nov.
23/12/23 – 30/12/23	8 days / 7 nights	5 weeks, 6 days	<b>Not term time – part of Pursuer’s Christmas holiday entitlement</b>
9/2/24 – 12/2/24	4 days / 3 nights Fri to Mon	3 weeks, 5 days	School closed on Friday and Monday
9/3/24 – 10/3/24	2 days / 1 night Sat to Sun	3 weeks, 3 days	Saturday and Sunday
3/4/24 – 10/4/24	8 days / 7 nights	3 weeks, 3 days	<b>Not term time, part of Pursuer’s Easter holiday entitlement</b>
4/5/24 – 6/5/24	3 days / 2 nights Sat to Mon	2 weeks, 5 days	School closed on 6 <sup>th</sup> May
25/5/24 – 27/5/24	3 days / 2 nights Sat to Mon	3 weeks 5 days	School closed on 27 <sup>th</sup> May
22/6/24 – 23/6/24	2 days / 1 night Sat to Sun	3 weeks, 4 days	
18/7/24 – 8/8/24	22 days / 21 nights		<b>Not term time, part of Pursuer’s Summer holiday entitlement</b>

[28] The defender gave evidence to the effect that the proposed dates were being proposed because a) they would avoid J having to be removed from school early on a Friday afternoon, something she was reluctant to do as Friday afternoons consist of free writing time which J enjoys and is needed to promote his development - the defender stated that J has fallen behind in his literacy skills and the free writing time along with the tests which go

with it are beneficial to his learning b) they would allow him to spend longer in Orkney during each visit and the contact time would therefore be less rushed and of a better quality, allowing J to do more when he is there c) it would cut down the amount of travelling which J has to undertake - he has on occasion suffered stress-related migraines, has become sick and is tired, reducing the pleasure of the contact visits. The defender denied that she is trying to reduce the pursuer's contact, simply trying to improve the quality of the contact for the foregoing reasons. The dates which she has proposed have been chosen with reference to when J's primary school is closed for bank holidays, in-service days and the like to minimise loss of schooling.

[29] The defender made it clear in her evidence that she is entirely in favour of the pursuer exercising as much contact to J as he wishes. She considers it is in J's best interests that he sees as much of his father as possible as they have a very positive and fulfilling relationship. She indicated however that she would need the pursuer to pay for any additional contact arrangements beyond that which she is now proposing, whether that involves the pursuer travelling to Kilwinning or J travelling to Orkney, as she cannot afford to pay any additional costs herself.

[30] The defender also gave evidence to the effect that she has another child, a 5 year old daughter, S, who lives with the defender and J. CM is the father of S. CM and the defender have agreed that CM will exercise contact to S in Orkney on the same dates as the pursuer has contact with J. As such, the defender has travelled with S and J to Orkney on the dates listed in para [25], mainly by aeroplane but on occasion during school holiday periods by driving to the north of Scotland and taking the ferry to Orkney, for both fathers to exercise contact to their respective children. If she was expected to travel to Orkney with J on

different dates to those when she travels with S she would find that unworkable and unaffordable.

[31] The defender spoke to the documentation lodged with her inventories of productions namely bank statements showing the amounts she paid for flights and ferry crossings from December 2020 to February 2023. Broadly speaking, the monthly costs for travel since the defender changed the contact dates in April 2022 amount to £450 per month which includes the cost of travelling with S as well as J. As at 11 April 2023, the defender's income and expenditure on a monthly basis is as shown in the defender's fourth inventory of productions, page 22/1. Her net income per month is £1950 and expenditure amounts to £1554 per month of which an allowance is made for the cost of flights in the sum of £450.

The defender's current partner has his own income and does not contribute towards the cost of the contact arrangements.

[32] The defender accepted that some cost savings could be made if flights were booked further in advance but due to her financial situation she cannot afford to book more than one month in advance.

[33] No evidence was led to show the cost of travel to Orkney prior to the evidence being led in the original proof. Any increase in cost of travel in the last year or so appears to be minimal, with plane fares increasing by only a few pounds per person. No evidence was led to indicate the date when S began to accompany the defender and J on their trips to Orkney.

[34] In relation to the views of J, the defender indicated that she did not think J appreciated that more frequent, shorter contact is of a lesser quality than what she is proposing. The defender stated that the "new" arrangements have been in place for a year now and have worked well. J has not been asking why he is not seeing his father every second weekend and the arrangements which have been in place since April 2022 have

allowed him more time to do things in Kilwinning which he would not otherwise have been able to do such as attend friends' birthday parties. In addition he has face-time contact with the pursuer every week, usually a Wednesday evening, which can last for several hours.

[35] The defender accepted under cross examination that she had made the suggestion to pay for all travel arrangements when the contact order was made in 2021. She accepted that by her own schedule of income and expenditure she has around £400 of disposable income each month after bills and other commitments are paid but this allows her to pay for "extras" such as attending the local book fair with the children, paying for ice creams and the like. She said that she has at times felt like she was "teetering on the brink" financially.

**The pursuer's case:**

[36] The pursuer has lodged a Minute for Contempt in relation to the defender changing the contact arrangements, which minute proceedings are currently sisted pending the determination of the minute to vary. The pursuer's position was that he felt that he had no choice but to go along with the defender's new proposals and exercise contact on the dates mentioned above.

[37] The pursuer lives with his partner in Orkney. He confirmed that he would like to see J as often as possible but accepted in his evidence in chief that there was a need to be "practical with costs" which I took to mean that he accepted that the defender faced financial pressures in paying for the travel arrangements to Orkney. He also accepted that the contact which he is entitled to in terms of the interlocutor of 25/5/21 meant they were in a rush to do everything in the allocated time and did not allow them to relax and play with J's toys.

[38] The pursuer accepted that the defender had been very accommodating in letting him see J whenever he wanted to and did not expect her attitude to change. He understood that the defender was facing financial pressures in paying for the cost of travel but disputed that the cost of travel had materially changed since the contact order was granted.

[39] The pursuer shared the defender's concerns about taking J out of school early on a regular basis on a Friday afternoon, accepting that could be detrimental to his learning but felt that if it happened on an occasional basis it would not be detrimental. He confirmed he does not want J to leave school early every second Friday.

[40] The pursuer indicated that he has 30 days annual leave per annum. He schedules his leave around the contact arrangements. He does not work weekends and is therefore always available for weekend contact. He has worked significant amounts of overtime in the last year which has permitted him to take extra time off work during the week whenever contact days fall on a non-weekend day. The overtime is not guaranteed and he therefore cannot predict whether he will be able to continue building up days in lieu which can be taken to spend with J.

[41] The pursuer stated that "in some respects longer periods together are better but it would be nice to have a couple of weekends extra". His real concerns a) were the lengthy gaps between some of the contact visits - he considered there were a number of gaps which could be filled and b) he felt that the new proposals meant contact would have to be exercised significantly more on weekdays when he could not guarantee time off work. If he was unavailable, J would need to be looked after by other members of the pursuer's family such as J's grandmother who lives in Orkney.

[42] The pursuer's employment requires him to travel to Peterhead on several occasions between January and April each year to oversee the fit out of vessels. On an occasion in

February 2022 and again in March 2023, he rented a car and drove to Kilwinning to collect J and they stayed together in a hotel for 2 nights, paid for by the pursuer. It took him 6 hours to drive from Peterhead to Kilwinning and the contact ended on the Sunday afternoon. The pursuer indicated he has commitments in Orkney i.e. he has a partner and if he is working away on the mainland and then travels down to Kilwinning to exercise contact his partner is left on her own for prolonged periods. Such arrangements were also expensive given that he had to hire a car and pay for a hotel.

[43] The pursuer accepted there had been occasions when J had been sick when travelling to Orkney but did not “think it bothered J that much”.

[44] It was suggested to the pursuer under cross examination that J was used to not seeing him every second weekend over the past year. The pursuer denied that and felt that J had missed spending time with him although the basis for saying that was not elaborated upon.

**Decision:**

[45] Following the conclusion of evidence it seemed to me that various concessions had been made during the course of the evidence which had the potential for the parties to reach an overall agreement on when contact should take place. I therefore indicated that whilst I was ordaining parties to lodge written submissions within 7 days, (as requested by the parties given that evidence concluded late in the afternoon), I encouraged them to continue a dialogue to see whether matters could be resolved between them. If they could, a joint minute could be lodged within the 7 day period but failing that I would make avizandum and issue a written judgment. No such joint minute was lodged.

[46] It was readily apparent from the evidence that the parties to this action are loving, caring parents who were both keen for the pursuer to exercise as much contact with J as possible. They both gave their evidence in a measured manner recognising the viewpoint of the other. Issues of credibility and reliability do not arise.

[47] The defender's case largely focusses on what she argues to be a material change in circumstances since the original order was granted. It is of note that apart from quoting the terms of Section 11(7) of the Children (Scotland) Act 1995, nowhere in the defender's submissions is there mention of the welfare of J being the paramount consideration. It is true to say that the defender's submissions conclude by stating that the proposed variation is in J's best interests by ensuring that J continues to see his father on a regular basis during term time with the advantage that this would involve fewer trips to Orkney for J and would mean J is spending longer on each visit with the pursuer but the clear underlying basis for that is the defender's contention that she can no longer afford to pay the costs of taking J to Orkney every second weekend.

[48] This raises 3 questions:

1. does there require to be a material change in circumstances before the court can or should grant a variation to a contact order?
2. if the answer to question 1 is yes, has there been such a change so as to justify, in terms of the welfare principle and any other relevant consideration, granting the variation sought in whole or in part?
3. if the answer to question 1 is no, should the variation none-the-less be granted in whole or in part having regard to the welfare principle and any other relevant consideration?

As discussed below, in the circumstances of this case, I consider the answer to question 1 is no (at least in the context where the specific terms of the existing contact order was granted based on an agreement between the parties and not judicially determined) and the answer to question 3 is yes.

[49] Section 11 (2)(d) of the 1995 Act empowers the court to make an order regulating the arrangements for maintaining personal relations and direct contact between a child... and a person with whom the child is not or will not be living (a “contact” order).

[50] Section 11 (7) provides that in considering whether or not to make [such an order] the court a) shall regard the welfare of the child concerned as it’s paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all and b) taking account of the child’s age and maturity, shall so far as practicable:

- i. give him an opportunity to indicate whether he wishes to express his views
- ii. if he does so wish, give him an opportunity to express them; and
- iii. have regard to such views as he may express.

[51] Section 11(13) states that any reference in this section to an order includes reference to an interim order or an order varying or discharging an order.

[52] Whilst precedent inevitably is based on the specific facts of each case, some underlying principles can be derived from case law dealing with minutes to vary. I was referred, in the pursuer’s written submissions, to the following:

*KW v DG* 2016 F.A.M. L.R 22 - a decision of Sheriff Mundy in Falkirk Sheriff Court where he stated at para [16] when discussing an application to vary:

“It appeared to be accepted by both sides that a material change of circumstances was necessary before the order could be varied. That may be the practical approach in many cases. However I do not think it appropriate to couch the test in those terms

as it is suggestive of a legalistic and almost mechanical approach to an issue which has at its heart the welfare of the child. I would prefer to say that for an order under s11 to be varied it may normally be expected that there is a change of circumstances which bears upon the issue of where the best interests of the child lies. That said, even if there is such a change, it must remain in the discretion of the court to grant or refuse the order having regard to the welfare principle.”

[53] *M v M* 2012 SLT 428, is a decision of an Extra Division of the Inner House and therefore binding on this court. At para [9], quoting from dicta in the House of Lords decision from a Scottish appeal in the case of *Sanderson v McManus* 1997 S.C. (H.L) 45, Lord Emslie stated:

“...it can in our opinion be said with confidence that the requirements contained within s 11(7) of the 1995 Act effectively preclude reliance on any presumptive rule or guideline tending to favour the wishes or interests of either parent. ....Moreover, the weight to be given to such wishes or interests must, as with any other factor, be such weight as the court deems appropriate in the particular circumstances of an individual case. In the end the welfare and best interests of the child or children concerned are paramount, and fall to be judged without any preconceived leaning in favour of the rights and interests of others.”

[54] And at para [53]:

“What matters, in this as in any other case, is that the welfare of the children must at all times be the paramount consideration, and that the wishes and interests of either parent must receive no greater weight than they truly deserve in the circumstances”.

[55] *McGhee v McGhee* 1998 Fam. L.R. 122 was a decision from Dumbarton Sheriff Court where it was observed at para [122.56]:

“The interlocutor... which the pursuer seeks to vary in this action was not the product of a full judicial investigation into the circumstances of the parties and the children, but of an apparent agreement between the parties , followed by the formal approval of the court. In these circumstances when the court is asked to consider a variation of the original agreement, it is in my opinion of little value to look for a change of circumstances since the agreement was made. That is not in any event a prerequisite to a variation of access though plainly where there has been a full judicial inquiry a minute to vary could not hope to succeed without some change in circumstances. But where no such previous enquiry has taken place the court cannot know what factors motivated the agreement in the first place, or to what extent, if at all, the paramount statutory criterion – the welfare of the child – was invoked. In a case such as this, it is not the position, as the defender’s solicitor suggested, of the court looking at the matter ‘all over again’. The court is being invited to investigate

the matter for the first time and to make an order or decline to do so using the parameters set out in the Act.”

[56] Additional relevant cases not referred to in written submissions are:

*H v W* [2021] CSOH 97 which followed *M v M* and

*A v B* [2022] CSOH 38 which applied *M v M*

[57] This case is slightly unusual in the sense that there had been a proof, primarily concerned with the specific issue order for relocation although the court did grant a residence order to the defender and a contact order to the pursuer but left it to the parties to see whether agreement on the specifics of that contact order could be reached. An agreement was indeed reached and the court therefore formally approved the terms of that agreement. Therefore it cannot be said that the terms of the current contact order is a product of a judicial inquiry. It is unknown what contact order the court would have granted if the parties had not reached agreement. Whether or not the decision in *McGhee* is correct in relation to the need to establish a change in circumstances if the minute to vary follows on from a full judicial inquiry is not something this court needs to fully comment on. I would simply observe that the binding decision in *M v MT* together with the dicta in *KW v DG* would suggest otherwise. If there was a requirement to hold there had been a change in circumstances before a court is entitled to vary a contact order, that would have the potential for undermining the application of the welfare principle as at the date of hearing the minute to vary.

[58] For the foregoing reasons I do not consider that I require to find that any material change in circumstances, has arisen before deciding whether the minute should be wholly or partly granted. My main focus is J’s welfare and what is in his best interests.

[59] The original contact order was made in May 2021 only 11 days after the defender had relocated to Kilwinning. It pre-dated the cost of living crisis and the contact arrangements had not been tried and tested at the time the interlocutor of 25/5/21 was pronounced. I have no doubt that the parties reached an agreement at that time believing it was an arrangement which best served J's welfare. But where a relocation takes place, particularly one which involves flights on a frequent basis to take a child from one end of the country to the other, there is always going to be an element of having to see how the arrangements work in practice. The parties did not have a crystal ball when they reached agreement in May 2021. There may well be a need to review those arrangements if it is being argued that they are not, in reality, meeting the best interests of the child. Assessing how the contact has worked in practice over the last 2 years and identifying the pros and cons of the current arrangements helps inform the court as to whether a variation is in J's best interests.

[60] The circumstances which militate in favour of granting the variation sought in whole or in part are:

1. Out with school holiday periods, J has had to be driven from Kilwinning to Glasgow airport, fly to Orkney and, latterly, spend one night with the pursuer to avoid him missing any school time on a Friday afternoon. He has then had to do the journey in reverse the following day. These short visits have meant that contact has been rushed, leaving little time for activities which would benefit from more time.
2. J has on occasion suffered ill health due to the amount of travelling. Reducing the number of visits to Orkney will reduce the risk of him falling ill.
3. Extended visits would allow the pursuer more time to exercise contact in a more relaxed atmosphere, spending longer quality time with J, something which the pursuer accepted as being beneficial to the quality of contact visits.

It seems logical to infer that the rushed nature of the contact is at least partly due to the fact the next contact visit will not take place for a month but the proposed variation whereby most contact visits will last longer than one night, and overall reduce in number, would resolve these problems.

[61] The circumstances which militate against a variation in the terms proposed by the defender are:

1. The fact that if a variation is granted based on the defender's proposals there will be 2 periods when J will not see the pursuer in Orkney for 4 weeks 5 days at a time (29/5/23 to 30/6/23 and 20/11/23 and 23/12/23) and one period when he will not see the pursuer for 5 weeks, 6 days (30/12/23 to 9/2/24).
2. J has expressed his view that he wishes to see his father more than once a month.
3. Having regard to the pursuer's holiday entitlement and non-guaranteed extra time off work, the pursuer may face potential difficulties in arranging sufficient time off work to be able to spend time with J throughout the child's time on Orkney.

[62] In relation to the financial reasons advanced by the defender to justify the variation, these do not, in my opinion carry any great weight. The financial information lodged with the court and spoken to by the defender do not reveal any significant increase in cost of travel from the date of the original contact order until now. In any event these were costs which the defender offered to pay to facilitate contact between J and the pursuer. She has reduced the number of term-time visits significantly in the last year, principally to reduce travel costs. The schedule of income and expenditure shows the defender still has around £400 of net free income per month i.e. around £4800 per annum.

[63] I do recognise that since the original contact order was granted, the defender has reached an agreement with the father of her other child in other proceedings before this court whereby she travels with S to Orkney on the same dates as she travels with J and practically it may create difficulties for the defender if the minute to vary is refused. However, there was no clear evidence to suggest why that is relevant to the welfare principle in so far as it relates to J other than it would result in him spending additional periods of time away from his sister at weekends.

[64] In considering the evidence as a whole I am of the view that J's welfare is best served by striking a balance between the benefits of extended periods of contact for more than one night at a time and ensuring that contact usually takes place more often than once a month. This is achieved by granting the minute to vary in part by varying the dates for term time contact in line with the defender's proposals but granting the pursuer additional contact to the extent of one night in the middle of each of the 3 periods mentioned in para [61.1].

I appreciate that these 3 extra contact periods only allow for one night's contact at a time but I consider it to be in J's best interests not to go longer than 4 weeks at a time without having face to face residential contact with his father in Orkney. Of importance, the decision takes into account the views of the child which have been clearly expressed and, overall avoids him being taken out of school on a Friday afternoon except on one occasion. The pursuer has been able to schedule leave to exercise contact over the course of the last year and, whilst there is no guarantee he will be able to do so on every occasion the expectation is he will be able to do so on the vast majority of the varied dates. If for some reason he cannot, the pursuer does have his mother on Orkney who can look after J until the pursuer is available. The variation also acknowledges the position accepted by the pursuer when giving evidence

that longer periods of contact rather than mainly overnight visits are in J's best interests, a position which I agree with based on the evidence led.

[65] I will therefore pronounce an interlocutor varying the interlocutor of 25 May 2021 by deleting the words "Every second weekend during term time" and substituting:

"Term time contact on the following dates: 29/4/23 to 1/5/23, 27/5/23 to 29/5/23, 17/6/23 to 18/6/23, 16/8/23 to 20/8/23, 15/9/23 to 17/9/23, 17/11/23 to 20/11/23, 9/12/23 to 10/12/23, 20/1/24 to 21/1/24, 9/2/24 to 12/2/24, 9/3/24 to 10/3/24, 4/5/24 to 6/5/24, 25/5/24 to 27/5/24 and 22/6/24 to 23/6/24 and in each subsequent school year on dates to be proposed by the Defender no later than 1<sup>st</sup> April each year representing similar durations and frequency;"

[66] The defender's submissions invite the court, regardless of the outcome, to make a finding of no expenses due to or by either party. The pursuer's submissions are silent on the question of expenses. I will therefore reserve all questions of expenses. Parties should inform the clerk of court if a hearing on expenses is required.