

SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT FORFAR

[2023] SC FOR 37

FFR-F235-19

JUDGMENT OF SHERIFF JILLIAN MARTIN-BROWN

in the cause

ID

Pursuer

against

KC

Defender

Pursuer: Sharpe (Adv.); T Duncan and Co
Defender: Allison (Adv.); D'arcy Price Law

Forfar, 31 January 2023

Introduction

[1] In this case the pursuer, who is the father of G, sought an order for residential and non-residential contact with G. The defender, who is the mother of G, opposed the making of that order.

Findings in Fact

[2] G was born on 9 March 2014. At the time of the proof she was 8 years old.

[3] The pursuer is G's father. At the time of the proof he was 35 years old.

[4] The defender is G's mother. At the time of the proof she was 33 years old.

[5] The parties and G all live within the jurisdiction of this court.

[6] The parties are not and never have been married to each other. Both parties have parental rights and responsibilities in relation to G.

[7] The pursuer is employed full time. He lives in in a two bedroomed flat in Angus. He previously lived outwith the UK. He came to Scotland in 2009.

[8] The pursuer and defender began a relationship in around November 2011 and it came to an end in around November 2012. The parties subsequently reunited and the defender became pregnant with G in around June 2013. The parties ceased to be in a romantic relationship prior to G's birth. They lived together as friends until about February 2015.

[9] The defender married in November 2016. She and her husband have three children together. The defender lives with her husband and children in Angus.

[10] The defender home schools all of her children. In January 2020 a home visit was carried out where it was observed that there were sufficient resources for G and there were no concerns. G was never enrolled in primary school.

[11] G was often unwell as a young child. She suffered from eczema. She generally slept well but often woke up crying.

[12] On one occasion after November 2016, G told the defender that she kissed the pursuer with an open mouth.

[13] On one occasion G cried when she went to the toilet and told the defender her "bottom" was sore. G and the defender used the term "bottom" to refer to their genital area and buttocks. The defender's mother, examined G's genital area and thought it looked okay.

[14] At times, G's genital area was quite red. On more than one occasion there was green discharge in G's underwear. The defender took G to see her General Practitioner ("GP") in

around March 2017 and a swab was taken. The defender presumed there was nothing to be concerned about in the absence of any follow up from the GP.

[15] G was potty trained before she turned two but still needed a nappy overnight until she was three and a half years old. The defender washed G's genital area in the morning and sometimes put Vaseline on. On one occasion, G was very upset when she changed her.

[16] On one occasion, G told the defender that the pursuer was stinging her bottom in the bath when he washed her. G would not let the defender wash her genital area.

[17] The defender accompanied the pursuer on a holiday abroad in June 2018 for two weeks to allow G to see her paternal grandparents and external family. The defender stayed in separate accommodation throughout the visit and G stayed with the pursuer and his family.

[18] During the trip, G was upset and would not allow the defender to wash her genital area.

[19] On one occasion subsequent to the trip abroad, G went to the toilet and was upset. G did not want the defender to wash her genital area. G said to the defender "Don't put your finger in the hole." The defender asked "Who does that?" G replied "Daddy."

[20] On one occasion after the trip abroad, the defender was changing her other daughter on a mat when G said "Don't stick your finger in the hole Mummy, that might hurt [her]." The defender asked "What does Daddy say?" G said "Maybe we will put a little bit of cream in here too."

[21] On one occasion the defender was either washing G or putting Vaseline on her genital area and G said to the defender "You can put your finger in the hole if you want to."

[22] On one occasion the defender observed the pursuer had his hand in his pocket when playing badminton with his niece, who was two or three years old.

[23] On one occasion the defender observed the pursuer back out from a bathroom when she entered. He had been bathing G.

[24] G has always resided with the defender. The pursuer had regular, unsupervised contact with G most weekends, often residential, until September 2018. Prior to September 2018, the defender did not think that G was being sexually abused by the pursuer and allowed unsupervised contact to take place. Supervised contact took place from September 2018, supervised by the defender or a member of her family.

[25] On one occasion after September 2018, G kissed the defender with an open mouth. The defender asked "You said someone else kisses like that?" G said "No." The defender told G "Daddy does." G said "Yes." G said "My slavers and Daddy's slavers mix and I spit in the sink." G said "My tummy on Daddy's tummy." G said "My bum hugs Dad's bum."

[26] On one occasion when the defender was with her son in the bathroom, G said "That's where pee comes out." The defender asked G how she knew that and she replied "My Daddy told me." The defender asked what Daddy's looked like and G drew on a bit of paper and made a gesture in the air that could be interpreted as phallic in nature.

[27] On one occasion after September 2018, the defender saw G on a trampoline with the pursuer. G said "My Mummy says you're not allowed to sting my bum anymore."

[28] On one occasion, the defender was talking to G about massages. G said that the pursuer massaged her. The defender asked what she meant and G put her hand under the defender's top and massaged her shoulders.

[29] Contact took place in January 2020, supervised by the defender. The defender stopped supervised contact in January 2020 when she was advised by her solicitor to do so and to report G's statements to the police.

[30] The defender contacted Police Scotland on 29 January 2020 to report G's statements.

[31] A child protection investigation commenced on 30 January 2020. A multi-agency Initial Referral Discussion (“IRD”) took place. This was attended by representatives from Police Scotland, Social Work Investigations Team, Health and Education. It was decided at the IRD that a safety plan should be instigated and the pursuer be informed that an allegation had been made and he was to have no contact with G.

[32] Aileen Burness is a social worker with qualifications in child protection. She has received training in relation to carrying out a joint investigative interview (“JII”). She considered G was capable of undergoing a JII based on her language skills and her understanding of things.

[33] On 30 January 2020 PC Kayleigh Skinner and social worker Aileen Burness carried out a JII with G. The JII began at 14:24 and concluded at 15:30. The audio length was 67 minutes. There was one break to allow G to go to the toilet at 15:04. The JII recommenced at 15:14.

[34] The protocol for JIIs was not adhered to during the JII. G was not told at the start of the JII how long it would take. PC Skinner and Aileen Burness refused to terminate the JII when G indicated she wanted to see the defender. The JII continued for longer than it ought to have done.

[35] At times during the interview, G appeared fed up. She moved about during the JII and was at times very unsettled. She fidgeted and at times was not focused. The toilet break was quite long. G asked during the JII how much longer it would last and said she was fed up.

[36] After the toilet break in the JII, G indicated in response to questions about bath time at the pursuer’s house that “He has different soap.” She said “It can go right in there, right, right in.” She pointed to her vulva. She said “Because it’s not stingy, it can go right in your

bum and your back bum. It's not stingy at all." She said "Because it's not stingy because all other soaps are very stingy to go in your bum." When asked "So, is the soap stingy at Mum's house?" she replied "Yes."

[37] As a result of the JII, Aileen Burness had concerns that something of a sexual nature could have happened to G. She intimated those concerns to the defender. The defender's view was shifted as a result of social worker Aileen Burness' concerns.

[38] Police interviewed the defender. He received legal advice in advance of his police interview and answered "no comment" to all the questions, as advised. No charges were brought against him.

[39] On 2 March 2020, Sheriff Murray ordered interim contact to take place for four periods of two hours' duration supervised by and to take place at Relationships Scotland. That contact did not take place due to COVID-19 restrictions, which resulted in the closure of the contact centre.

[40] Between May and June 2020, five video calls took place on a weekly basis, lasting around 30 minutes, between the pursuer and G.

[41] The defender sent videos, photographs and updates to the pursuer's family abroad.

[42] On 10 November 2021 Sheriff Harris ordered four periods of contact for one hour's duration to be supervised by and take place at Relationships Scotland. Four supervised contacts took place between G and the defender at a Child Contact Centre on 18 June 2022; 25 June 2022; 2 July 2022; and 9 July 2022. The contacts lasted an hour and were supervised by a member of staff from Relationships Scotland. No further contact has taken place since then.

[43] A report was prepared and submitted to the court by the Child Contact Centre Manager, dated 28 August 2022. She reported that overall, contact appeared positive. She

reported that G looked relaxed and at ease throughout each visit. She reported that G did not display any signs of uneasiness when approaching the pursuer for assistance and that contact looked natural.

[44] G expressed her view in May 2022 to Child Welfare Reporter Ms Elaine Sym in respect of the pursuer that she “missed him so much” and “would love to see him again.”

[45] G coped better than the defender expected with court ordered contact. She was happy to go and see the pursuer and enjoyed the session.

Findings in Fact and Law

[46] Having regard to the welfare of G, there should be direct contact between the pursuer and G.

[47] It is better for G that an order for contact be made than that no order should be made.

Procedural History

[48] Unfortunately, this case has a lengthy procedural history, partly due to the pandemic and practical issues. The initial writ was warranted on 23 October 2019. Defences were lodged and a child welfare hearing was assigned for 12 February 2020. The child welfare hearing of 12 February 2020 was continued until 26 February 2020 for an interpreter to be present for the pursuer. The interpreter did not attend and the child welfare hearing was continued until 2 March 2020 for an interpreter to be present.

[49] At the child welfare hearing on 2 March 2020, it was accepted by both parties that no criminal proceedings were to be brought against the pursuer. Sheriff Murray made an interim order for supervised contact at Relationships Scotland and requested a report on the operation of contact. On 24 March 2020 Sheriff Murray, having regard to the pandemic,

discharged the hearing assigned for 29 April 2020, sisted the cause and fixed a review on 12 August 2020. On 10 August 2020, on the unopposed motion of the pursuer Sheriff Murray recalled the sist, discharged the hearing previously assigned for 12 August 2020 and assigned a child welfare hearing on 2 September 2020.

[50] On 2 September 2020, having considered the parties' written submissions, Sheriff Murray suspended the operation of interim contact, discharged the child welfare hearing assigned for 2 September 2020 and assigned 23 September 2020 as an options hearing. On 21 September 2020, on the unopposed motion of the pursuer Sheriff Murray discharged the hearing assigned for 23 September 2020 and continued the options hearing to 21 October 2020 to enable the pursuer to adjust his pleadings.

[51] On 19 October 2020, having considered the written submissions for the parties, Sheriff Murray closed the record, allowed parties a proof of their respective averments and assigned 4 November 2020 as a pre-proof hearing. On 4 November 2020, Sheriff Murray appointed the cause to a two day diet of proof on the issue of whether any person perpetrated abuse on the parties' child, and if so, whom, on dates to be afterwards assigned. Of consent, Sheriff Murray ordained the defender to lead at said diet.

[52] The pre-proof hearing of 24 February 2021 was continued to 10 March 2021 for investigations. In a Note appended to the interlocutor, Sheriff Murray raised practical issues relating to a WebEx proof involving the use of an interpreter for the pursuer and his brother. On 10 March 2021, Sheriff Murray discharged the diet of proof assigned for 19 and 26 March 2021 as it would not be possible to hold the proof in open court. He continued the cause to 7 April 2021 to review whether COVID-19 restrictions had been relaxed to enable a new date to be assigned.

[53] On 6 April 2021, having considered the written submissions for the parties, I discharged the hearing scheduled for 7 April 2021 and in lieu assigned 19 May 2021 as a procedural hearing to review COVID-19 restrictions with a view to fixing diets for an in-person proof. On 19 May 2021, having considered the written submissions for the parties, on joint motion I continued the procedural hearing to 30 June 2021 for an update on the availability of in-person proofs due to the requirement of interpreters making the case unsuitable for WebEx.

[54] On 29 June 2021, on the pursuer's unopposed motion I discharged the hearing previously assigned for 30 June 2021, closed the record, found the circumstances of the cause to be exceptional in that two interpreters and a video link were required and allowed parties an in-person proof of their respective averments on 17 September 2021. I assigned a pre-proof hearing on 25 August 2021. On 25 August 2021, Sheriff Reekie on joint motion ordained the defender to lead at the diet of proof and directed all evidence to be in-person due to the exceptional circumstances of the case, particularly the requirement for interpreters.

[55] On 17 September 2021, I granted the defender's motion to discharge the proof. There were a number of issues that required to be resolved between the parties prior to proof, including the order of witnesses and disclosure of the JII. I assigned 1 November 2021 as a diet of proof and a pre-proof hearing on 6 October 2021 to address the outstanding issues.

[56] On 6 October 2021 on joint motion I continued the cause to a further pre-proof hearing on 20 October 2021 to obtain an update regarding disclosure of the JII prior to the proof. On 20 October 2021, on the defender's unopposed motion I discharged the diet of proof previously assigned as the defender was not sufficiently prepared, having not yet

been able to view the JII. I assigned 10 November 2021 as a procedural hearing in order to address the outstanding issues.

[57] On 10 November 2021, Sheriff Harris certified the proceedings as suitable for the employment of junior counsel. On the pursuer's opposed motion, Sheriff Harris recalled the suspension of the interim contact pronounced in the interlocutor of 2 March 2020 so that the pursuer could have supervised contact with G at Relationships Scotland. He assigned a procedural hearing on 8 December 2021 to address the outstanding issues. In a Note appended to the interlocutor, Sheriff Harris explained that contact had been suspended and then had never taken place in light of the pandemic and the unavailability of supervised contact within contact centres. The pursuer had not seen G for some 20 months and was concerned that the lack of contact was allowing a new status quo to emerge which excluded him from G's life.

[58] On 8 December 2021, on the pursuer's unopposed motion I continued the cause to a procedural hearing on 19 January 2022 to identify the availability of counsel and obtain funding from the Scottish Legal Aid Board. A proof was assigned on 20 May 2022. I ordered a child welfare report to seek the views of G. A joint minute of admissions was agreed and lodged by the parties.

[59] The proof began on 20 May 2022. Evidence was led over six days from five witnesses as follows:

1. KC, defender and mother of G, on 20 May 2022 and 29 August 2022.
2. MC, maternal grandmother of G, on 30 August 2022 and 2 September 2022.
3. Aileen Burness, social worker, on 2 September and 4 November 2022.
4. ID, pursuer and father of G, on 18 October 2022.
5. DD, paternal uncle of G, on 4 November 2022.

[60] Written submissions were lodged with the court and oral submissions were heard on 12 December 2022.

Background Facts and Circumstances

[61] The pursuer sought a contact order in respect of G which increased gradually as follows:

1. Week 1 – Monday and Wednesday from 5.30pm until 7.30pm.
2. Week 2 – Monday and Wednesday from 5.30pm until 7.30pm.
3. Week 3 – Monday and Wednesday from 5.30pm until 7.30pm.
4. Week 4 and every week thereafter – Monday and Wednesday from 5.30pm until 7.30pm and from Friday at 5pm until Saturday at 4pm.

[62] All of the contact sought was to be unsupervised. As far as holiday contact was concerned, the pursuer was seeking two weeks in summer, preferably in July, to fit in with his work commitments. He also sought contact over Christmas and October but not Easter. Since G was home schooled by the defender, contact did not have to fit in with school holidays.

[63] The defender was opposed to contact with the pursuer on the basis that it was not in G's best interests. *Esto* the court concluded that it was in G's best interests to have contact, the defender maintained that contact required to be professionally supervised at all times. The impracticability for supervised contact to take place indefinitely militated against any contact at all.

[64] G was born on 9 March 2014. At the time of the proof she was eight years old. Her views had been obtained by Ms Sym, child welfare reporter. In her report lodged on 16 May 2022, Ms Sym reported that G missed her Dad and wanted to see him again.

[65] Relationships Scotland provided a report in relation to supervised contact between 28 May and 9 July 2022. In summary, overall contact appeared positive, G looked relaxed and at ease throughout each visit. She did not display any signs of uneasiness when approaching her Dad for assistance. Contact looked natural. The pursuer and the defender were respectful towards one another and focused only on G.

Defender's Case

Evidence of the Defender

[66] The defender was 33 years of age. She first met the pursuer in November 2011 when he worked locally. Their relationship concluded before G was born on 9 March 2014. When G was born, the parties were living together in separate rooms so that the pursuer could be involved with G as much as he would if the parties were still in a relationship. The pursuer subsequently moved out of the defender's house but was able to come to the defender's house and see G as much as he could. The defender was G's principal carer and the pursuer had a good relationship with his daughter G.

[67] The defender married her husband in November 2016. Contact arrangements between the pursuer and G continued as before, with the pursuer coming round after work and seeing G before she went to bed and residential contact when he was not working at weekends. If the pursuer was working, then he would just come to the defender's house when he was available. G was always happy to go for contact, was always pleased and

excited to see the pursuer and spoke fondly of him. The defender did not see anything between G and the pursuer that had caused her concern.

[68] There did come a point when the defender had some concerns. The first thing was when G mentioned she kissed her Dad with an open mouth. The defender could not remember when that was. She discussed it with her husband, who said that children say these sort of things. The defender just left it and did not think any more of it. She did not recall if she raised it with the pursuer.

[69] G seemed to be quite unwell a lot when she was little. She was often a little bit rundown and suffered from eczema. She slept well from the age of one but would wake up in the morning crying. The defender remembered her husband saying that was a bit odd. The defender's child was born in May 2017 so it must have been after that. The defender could not say if that crying had any relation to contact or not having contact with the pursuer.

[70] When G came back from contact with the pursuer, she used to come back very dark eyed and tired. The defender raised with the pursuer whether she was going to bed early enough. The pursuer said that G was not always going to bed at 7.30pm, sometimes she was going to bed a bit later. The defender often gave the pursuer food for G to eat and the pursuer was always agreeable to everything that the defender said.

[71] On one occasion G cried when she went to the toilet. She told the defender that her "bottom" was sore. The defender and G used the word "bottom" to refer to their genital area and buttocks and sometimes used the terms "front bottom" and "back bottom". Often G was complaining of her bottom being sore after coming home from the pursuer's house. The defender took G to see her Mum, who was a nurse. The defender's mother examined G's genital area and thought it looked okay.

[72] At times, G's genital area was quite red. The defender noticed greenish discharge in G's underwear more than once but she could not say if it was as many as four or five times. The defender asked her Mum if that was normal and was told that children sometimes experienced such things. The defender accepted that a swab had been taken when G went to the GP in relation to her discharge. She presumed it had been found to be perfectly innocent because she never heard back from the GP. She took from the lack of response from the GP that there was nothing sinister about that.

[73] The defender discussed the discharge with the pursuer and asked if he was washing G properly, if she was wiping herself, what soap she was using and whether G had consumed orange juice. Based on text messages with her mother, this must have been around March/April 2017. The pursuer said that he and G often visited the park and suggested perhaps using the slides was causing her bottom to be sore. The defender presumed that the pursuer was referring to a friction injury. The pursuer was a clean person so she thought there was a reasonable explanation.

[74] G was potty trained before she turned two but still needed a nappy overnight in bed until she was three and a half years old. The defender would wash G's genital area in the morning and sometimes put Vaseline on. On one occasion when the defender changed G she was very upset and the defender found that odd.

[75] On one occasion G said that her Dad was stinging her in the bath. The defender could not remember when G had made that statement. It may have been when she was bathing her and did not want her mother to wash her. She said that her Dad was stinging her bottom. The defender raised this with the pursuer and reminded him to be careful. The defender was aware that if soap got in that area it would irritate the area and be very sore. The defender recalled that she was never scared to let her mother wash her genital area,

whereas G was almost hysterical about it. The defender assumed that G meant her front bottom. G did not say front bottom or rear bottom but just would not let the defender wash her genital area. The defender got the impression that G was talking about her vaginal area. G was very distressed and upset and would not let the defender wash her. The words used were "my Daddy stings my bum when he washes me" or words to that effect.

[76] Prior to the trip abroad in summer 2018, the defender thought that bathing became a big problem. She could not say how many times G indicated that Daddy was stinging her bottom. G was washing her whole body herself.

[77] Abroad, the defender put G in a bath and she was very upset and would not allow the defender to wash her. She was very defiant. The defender had gone with G abroad to see the pursuer's family for two weeks. The defender raised the issue with the pursuer, who said that G was washing her bottom herself.

[78] On one occasion, G came home from the pursuer's house and went to the toilet. She was upset again. The defender asked G if she needed her to look and give her a wash to see if everything was okay but G did not want the defender to go near her or wash her. G said to the defender "Don't put your finger in the hole." The defender said "Who does that?" G said "Daddy". That was after the trip abroad.

[79] On one occasion after the trip abroad, when the defender was changing her other daughter on a mat, G said "Don't stick your finger in the hole Mummy, that might hurt [her]." The defender was quite taken aback. She asked G why she said that and why she would do that. The defender assumed that G was exploring herself and had maybe hurt herself or something like that. She did not think any more of it. The defender thought that all children explore themselves and she would just say "Don't be doing that," and that was it. The defender could not think of anything that would explain the phraseology "in the

hole". The defender presumed that G was taking about her front area. The defender was changing her other daughter who was lying on her back on the mat as normal. The defender asked "What does Daddy say?" and G said "Maybe we will put a little bit of cream in here too." From what the defender understood, that was what the pursuer had said to G.

[80] The defender did not want to think that G was being sexually abused by her father. That was the last thing she wanted to think. The defender had a close relationship with her own father, who was gentle, kind, caring and loving. She never thought that anything like that would happen.

[81] At that point, the defender avoided contact between G and the pursuer and made sure that he always saw G at her house and that it was always supervised. She probably spoke about it with her Mum. She took a couple of weeks to think about what she was going to say to the pursuer. She told the pursuer what G said and asked him what his explanation was. The pursuer gave the same explanation again and said that G was a liar. The defender replied that does not explain why G would say that specifically and the pursuer said that was not true.

[82] Subsequently, the defender's mother had advised her to write things down as it was getting to be too much in her head. By writing them down, she did not think about them as much. She did not date what she wrote, she just wrote things down on whatever bits of paper she had at hand. She wrote them from memory as quickly as she could so that they were still clear in her head. She thought she wrote them within a few minutes. She had noted that the pursuer said G is lying about every single word she has told you.

[83] The defender felt that G was very truthful, almost too truthful. She would tell people that the defender's husband was her Stepdad and when she was born etc. The defender did not see how G could lie about what she said. The defender could not see any other way than

to believe what G had said. The pursuer still maintained he was not cleaning G's genital area. She thought it probably would have made a difference if he had accepted he might have cleaned her too roughly. He did not say anything like that. He said he was not washing her.

[84] The defender continued to allow supervised contact to take place. She hoped that what she suspected was not true. G enjoyed time with her Dad and she did not want to take anything away from her because G had not done anything wrong. She did not want to believe anything like that could happen but she could not leave it alone. She took advice from her Mum only. She did not report the event to the police for G's sake. She did not want G to be in the public eye or for anyone to look at her. She tried to do the best for G. After reporting the matter to the police subsequently, she realised how much help and relief was available. She now thought that she should have reported it straight away.

[85] On another occasion, G said "You can put your finger in the hole if you want to." The context was that the defender was either washing G or putting Vaseline on her genital area. At that point, the defender and her mother decided that G should put cream on herself. The defender was cleaning her at the time. She had not yet made physical contact with G's genital area. The defender never used the phraseology hole. They only referred to bottom, front bottom or back bottom and that was it. The defender could not remember if she spoke to the pursuer after the third occasion that G spoke to her in that way.

[86] Contact moved to supervised at around the start of September 2018 after the trip abroad. Contact was supervised by the defender and then after time by her parents or her husband. The pursuer would take G to the park and contact would be supervised there.

[87] Looking back over all her interactions with the pursuer, with the benefit of hindsight the defender thought that on occasions the pursuer had behaved a little oddly. On one

occasion, the defender observed the pursuer playing badminton with his niece who was aged two or three years old and he had his hand in his pocket. The defender found that a bit odd. In retrospect, she was now concerned that the pursuer was aroused. Perhaps he was just nervous playing badminton. She accepted that there could be an innocent explanation for that. She did not speak about that with the pursuer.

[88] On another occasion, the pursuer was in the bathroom with G when she was quite little. She was swimming on her tummy. The pursuer stood up and backed towards the defender and left the room when she came in. It was an odd way for him to act.

[89] On one occasion during supervised contact, the defender had her son on her knee. G kissed the defender with an open mouth. The defender said to G "You said someone else kisses like that." G said "No." The defender said "Daddy does." G said "Yes." She went on to describe naked cuddles with her Dad. She said "My slavers and Daddy's slavers mix and I spit in the sink." She then said something about kissing tummies or something like that. The defender asked G if she meant blowing raspberries. G said "My tummy on Daddy's tummy." She then said "My bum hugs Dad's bum." The defender felt she was going to be sick and phoned her mother. Since the defender and G used the word "bum" to refer to her genital area and buttocks, the defender was not clear in her mind what G was referring to when talking about Daddy's bum hugging G's bum.

[90] On one occasion when the defender had her son with her in the bathroom, G said "That's where pee comes out." The defender asked how did she know that and she said "My Daddy told me." The defender agreed with the suggestion that G was referring to her son's penis but the defender did not use words like that. The defender asked G what Daddy's looked like and she drew on a bit of paper and made a gesture in the air. The defender agreed with the suggestion that the shape of the gesture and the drawing was

phallic in nature. The defender spoke to the pursuer about G seeing him naked and he said G had never seen him naked. He accepted he had slept in the same bed as G and that sometimes he was topless but maintained she had never seen him naked.

[91] On one occasion during supervised contact, G was on a trampoline with the pursuer. The defender saw G say to the pursuer "My Mummy says you're not allowed to sting my bum anymore." The defender saw the pursuer look out of the corner of his eye at her. She was about five metres away. The defender said nothing to the pursuer at that time but thought it was good that G was sticking up for herself. The defender accepted that perhaps she should have said something then but she did not know what to do.

[92] On another occasion the defender was talking to G about massages and G said that her Dad massaged her. The defender asked what she meant and G put her hand under the defender's top and massaged her shoulders. That was alarming to the defender because the pursuer said that was how he got in the mood while they were in a relationship. That was a way that he would initiate encounters.

[93] The defender was advised to stop contact by her solicitor in January 2020. She had not stopped contact prior to that even though things were getting more difficult. The defender felt uncomfortable in the pursuer's company and her parents were helping with contact. The pursuer did not want to come to the defender's house anymore so he had to take G out and the defender would meet him at the local park or at soft-play. The defender's parents helped to take some weight off her. During that time, the defender was really ill and suffered from panic attacks and pleurisy. The defender attributed the panic attacks to everything that was going on and worrying. By this time she had two other children. The defender was able to take care of them and feed them but she felt quite

stressed and grumpy. She got very nervous and suffered from panic attacks and a tight chest. Her husband had noticed the difference in her presentation.

[94] The trigger for reporting matters to the police was the advice that she was given in January 2020. The police took her seriously and interviewed the defender and then G. They interviewed the pursuer. Aileen Burness from social work was involved and PC Kayleigh Skinner. The defender gave the police everything she had, including her handwritten notes. She was satisfied her statement to the police was accurate.

[95] In advance of G's interview, the defender spoke to PC Kayleigh Skinner and social worker Aileen Burness about what she should say to G and whether she should go into any detail. They did not want the defender to say anything about it so the defender told G she was going for an appointment and would be in the next room and that two ladies would speak to her and play with her and so on.

[96] From memory, the defender thought she had been told that G disclosed something of concern. She could not remember if she was told details or just about gestures. The defender had been hopeful that she was wrong before the interview but when social worker Aileen Burness and PC Kayleigh Skinner came back thinking the same thing, that made the defender think that something must have happened. It was at that point that her view shifted. She was shocked. It took her breath away that they believed that something had happened.

[97] The defender had not really had panic attacks or anything like that prior to the last two years. She had suffered sleepless nights and was a bit less trusting. The household had been made a bit more stressful. The defender was snappy when she spoke to her children at times.

[98] There had been two familiarisation sessions prior to the supervised contact ordered by the court. The defender was really worried about how G would be affected psychologically because she missed her Dad and basically had her heart broken. The defender was trying to protect her and did not want contact to begin and for G to be reunited with her Dad, only to have to go through all of that again if the decision was made that she should not have contact.

[99] G actually coped better than the defender thought. She was happy to go and see her father. She enjoyed the session. She was unsettled in her sleep for a few nights after the session. After the first session, G really lashed out at her husband, hitting him and being really aggressive towards him. Perhaps she was feeling guilty about calling him Dad and seeing him like a Dad. That was only after the first session. After the remaining sessions, G was a little more reserved and was obviously thinking deeply. She was off her food and a bit more clingy. The defender accepted that in general terms contact went well. The defender knew it would go well and that G would be happy to see her Dad. The pursuer doted on G.

[100] The defender would not be reassured if the court decided that nothing had happened. She would remain very concerned and very worried. She could not envisage any future situation where she would accept that nothing had happened because of the opinion of Aileen Burness after the JII. She would find further supervised contact distressing. However, the defender indicated she would accept whatever decision was made by the court. She just wanted G to be safe.

[101] In cross-examination, the defender accepted that she and the pursuer had quite a lot of respect for one another and had been able to co-operate with each other in the past. They had both worked together for G. The defender indicated that she would agree with

whatever decision the court made in relation to contact. If an order was made for contact then she would co-operate with the pursuer. She agreed that G was a bright and articulate child, who was desperate to see her Dad.

[102] The defender denied being an overly anxious parent. She denied being hypersensitive. She thought it was appropriate to travel with G abroad to have contact with her father and her father's family.

[103] The defender accepted that following the comments made by G, she was shocked. She could not say that she believed at the time that G's father put his finger in G's vagina. She was 30 weeks pregnant with her third child at the time. It was a stressful situation. She allowed unsupervised contact to continue because the defender's mother and husband also rationalised with her that it probably was not the case that G had been abused. She did not report the allegations to the police because she did not want people to judge G. She wanted to keep her safe. She now realised that that was the wrong decision. She was trying to protect her daughter.

[104] The defender accepted that she had slapped G once. The defender had been slapped once by her own mother when she was a teenager. The defender also accepted that her husband had smacked G.

[105] In re-examination the defender indicated that if she knew then what she knew now, she would have dealt with matters differently.

Evidence of the Defender's Other Witnesses

MC – G's Grandmother

[106] MC was 61 years old at the time of the proof. She was a retired clinical nurse. The defender was her youngest daughter. The defender's parenting style was firm but loving.

She considered that the defender and her daughter G had a warm loving relationship and that G could go to the defender for anything. She accepted that her daughter could be overly anxious at times and had experienced difficulties in the past. She accepted that her police statement was accurate.

[107] MC felt quite proud of her daughter managing to co-parent with the pursuer. She felt that the defender was putting her daughter first. The defender delighted in the joy G showed meeting up with her Dad and would encourage her to speak about him. There was no acrimony between the defender and the pursuer.

[108] When the defender was on holiday abroad with G, her husband and her new baby, MC received a phone call from the defender. She was distressed and very upset. G was exhibiting signs and symptoms of being very uncomfortable. The defender felt unable to comfort G to get her to calm down and said that G was not right. The defender was struggling to work out what was going on and how to deal with G. From memory, MC thought it had something to do with bathing.

[109] When the defender returned home from abroad she had managed to calm G down. She discussed matters with the defender and there always seemed to be a reasonable explanation for anything that came up. Things happen and there are symptoms that children have due to a variety of different reasons. MC and the defender did not want to think that anything else was going on. MC tried to allay the defender's fears but inside she felt worried as well. The concerns that the defender had were pain on passing urine on occasion and not letting the defender wash her. MC accepted that G's health was affected by a number of issues in her younger years. She did not think that the defender was unduly anxious about health concerns.

[110] The defender had discussed discharge in G's underwear with MC. There was a perennial issue about G being washed and soap being stingy. There were skin issues in the family.

[111] In around May 2018, MC's sister-in-law had died. At that time the defender phoned and was deeply distressed and told MC of disclosures G had made of a sexually inappropriate nature. MC felt really distressed and upset. As a result of that, contact became supervised. It was very hard to believe that something like that had happened in their own family by someone they had welcomed into their family. It was hard to get their heads around whether something had actually happened.

[112] MC did not want G to feel that she had done anything wrong and felt reporting the matter to the police was a step too far. She did not want G to be branded. She did not want her innocence marred. It was felt that it could be managed because G was very young. MC felt it was her fault that the defender had not taken things further until the pursuer raised a court action for contact. MC had not been aware of how much support was available until things were out in the open. MC knew people who had experienced abuse in their childhood and it had marred their existence and she did not want that for G. MC regretted her decision. She did not want to believe that G had been abused.

[113] Arrangements were made for contact to be supervised. Things came to a head because of difficulties with the other siblings and their routines and the pursuer working during harvest. Contact ceased when the pursuer went to a solicitor and sought residential contact.

[114] MC was aware that G had been interviewed. Her understanding was that police and social work felt some behaviours and answers from G indicated some sexual awareness that she should not have and a feeling that something may well have happened but there was no

proof and therefore there was nothing they could do. They could not go into court and charge the pursuer but would speak to him.

[115] Over time MC and the defender concluded the best thing would be if G did not see the pursuer. It was when they got professional advice from other people believing that something had happened that they knew for sure. Every time G said something, the defender was deeply concerned and believed her daughter. It got to the point that it did not matter whether the allegations were true or not. The defender could not take the chance.

[116] The whole process had almost destroyed the defender. She suffered from panic attacks. She was very distressed about supervised contact. The defender was an adult woman and if the court decided there should be contact then the defender would do that to the best of her ability. She had already demonstrated how reasonable she could be in so many other ways. MC thought it would put a strain on the defender and her family life and her marriage and possibly even MC's relationship with the defender but the defender would do what G needed to do and what was right for G. Contact in the future would make the defender's life difficult in so many ways.

[117] In cross-examination, MC accepted that unsupervised contact had continued after G made comments. At that stage they had concerns but were not absolutely sure what had happened.

[118] MC accepted that if matters had been reported to police at the time, then G could have been examined for evidence. She accepted that any penetration to any degree of a very young child might cause serious internal damage. MC accepted that there was an element of concern about G being judged if matters had been reported to the police at the time.

[119] MC accepted that the defender's children were home schooled. MC felt strongly that the children should be in school instead and that was an example of her daughter making up her own mind.

[120] When matters were reported in 2020, it felt out of their hands. Professionals indicated the concerns that they had.

[121] MC had a conversation with the defender and her husband after the interview and they both took appropriate steps to enlighten themselves as to whether smacking was a reasonable course of action. MC did not agree with it.

[122] In re-examination, MC indicated that she thought that medical examination of G would be invasive and distressing and she did not want G to feel as if anything had happened that should not have or that she had done anything wrong. She did not want her to deal with the consequences of knowing that something was wrong. G knew the difference between right and wrong.

Aileen Burness – Social Worker

[123] Aileen Burness was 57 years old at the time of the proof and was a social worker. She held a post-graduate qualification in child protection from 2010. She completed JII training in 2007 which lasted nine days. She had refresher training every two or three years for a half day or full day. She probably did around three JIIs per week.

[124] The referral for this case came through police because an allegation had been reported. Mum had reported that she was concerned about some behaviours and comments that G had made to her over a period of time. Mrs Burness found the defender to be appropriate in all her dealings with her. She was upset and concerned about her daughter and whether something had happened. She was concerned about social work being

involved but all parents would be. Mrs Burness' main question was why had the defender not reported it earlier? The defender replied she wanted to keep G safe and did not want anyone to view her differently because of the comments that had been made. She was worried about the stigma and decided to keep it within the family. Mrs Burness made it clear that she did not agree with that as a social worker but she understood why the defender made that decision. Mrs Burness did not have any concerns about the defender's motivations. The defender informed Mrs Burness that her solicitor had told her that the information shared required to be reported and should have been reported earlier. The defender was candid and co-operative.

[125] An initial referral discussion took place. That was to decide if G was interviewable because she was five years old. It was decided that G was interviewable based on her language skills and her understanding of things.

[126] It was necessary to adapt some of the protocol at the beginning if it was felt that a child did not fully understand, rather than following the script. Normally Mrs Burness would stick very much to the script. When Mrs Burness reviewed the footage of the JII she remembered that it had been changed slightly to reflect G's age and stage of development.

[127] On watching the video of the JII, Mrs Burness indicated that during the JII, Mrs Burness' interpretation of G's hand gestures was that she was pointing to her vagina and anus. Later on in the interview PC Kayleigh Skinner clarified what G meant by reference to her back bum and front bum.

[128] Mrs Burness accepted that at certain times G said that she missed her Mum and seemed fed up. It was a fine balance to try to get the information she had to share in light of her young age. Her toilet break was quite long. Looking back, perhaps the interview had been longer than it should have been.

[129] At the time, Mrs Burness felt that G was being truthful. She felt that it was possible something sexual had happened to G because of her pointing at her vaginal area so many times, not just her groin. She was very much pointing to her vaginal area.

[130] Mrs Burness did not take anything from G saying she loved her Daddy. In Mrs Burness' experience, children who had been sexually abused or harmed in any way could be quite protective of their parents regardless of what had been done to G. They can be abused and still love and care about them.

[131] If something had happened, G may not understand. It may be later that she would understand. Trauma left an impact in the brain. Usually when children become teenagers and understand sexual relationships, that was when children realised that what happened to them was not right.

[132] Mrs Burness shared the report with the defender. The defender indicated some parts were not accurate in relation to the timeline. At the time, the defender was still saying that she could not believe that the pursuer would do this and that she did not think he would do this. Mrs Burness considered whether there was an innocuous explanation but the gesturing and continued emphasis by saying "right in" made her think something more than just a parent washing a child had happened.

[133] Following the interview, referral was made to Incredible Years and responsibility was passed on to the named person for younger children. That was because during the interview G made reference to her Mum slapping her.

[134] In cross-examination, Mrs Burness indicated she was aware of the protocol for JIIs. She felt that she went into the interview with an open mind. She accepted she did not tell G how long the interview might take at the start. She agreed that the interview should never

persist beyond the point when the child is no longer capable of sustaining concentration and shows signs of tiredness or is overly distressed.

[135] Mrs Burness agreed that another problem in JIIs was that of confirmation bias. She disagreed that she was guilty of conformation bias with G. She accepted that leading questions should be avoided and open free narrative should be used as much as possible. She accepted that the pace of the interview should be dictated by the child and that attention span can affect the length of the interview. She accepted that if a child wanted a break that should never be linked to a reward in an effort to extract or confirm information.

[136] Mrs Burness felt that she responded to G's tiredness or request for a break in terms of the guidelines. It was a balance of decision making during the interview about the seriousness of the interview and the push for more information. If a child was clearly giving information which caused concerns about safety, then it was her job to find out if anything had happened to G and if her life was at risk. Mrs Burness took a professional decision that G was interviewable and continued until she felt that she was not. She rejected pushing G and pressuring her to confirm information already given to her from other sources.

[137] Mrs Burness accepted that the protocol had not been fully followed due to G's age and stage. G was young but not too young to be interviewed. The protocol was adapted to meet her development. In Mrs Burness' professional opinion, the protocol needed to be adapted because it was quite wordy. G was not keen to speak when they broached the subject of her Dad but the rapport building section was fine. Any child would be reluctant to speak and that was the purpose of the rapport building.

[138] Mrs Burness denied being under pressure to confirm the narration given by the defender. She disagreed that she and PC Skinner fell far short of professional practice. She accepted that G moved about during the interview and was at times really unsettled. She

did not know if G's concentration was not great or if G was avoidant. There could be other reasons for her fidgeting and not being focused; she could be anxious.

[139] In hindsight, Mrs Burness acknowledged that the interview had gone on too long potentially. It was a balance between the information for the referral and what G was sharing at interview. She accepted it did look like she had ignored G's request to speak to her mother. She accepted she had told G that she would see her mother in a second once they had finished speaking. She accepted she may have created the impression that the interview would be over very quickly. She accepted that was not true because the interview had gone on for 67 minutes in total, including the break. She was trying to balance concerns for child safety. She disagreed that pressure had been put on G. It was a balancing process. She accepted that G, as a five year old, was having to ask Mrs Burness and her colleague how much longer the interview would last and that she was fed up. Mrs Burness did not think the interview should have been stopped due to the seriousness of the allegations. It was her duty to make sure any information came out.

[140] Mrs Burness accepted that the communication after the interview could have been worded better. It was an overview for parents.

[141] Mrs Burness did not expect the disclosures about the defender's husband smacking G's bum. She did not think there was a requirement to report that once the context around it had been established. She did not minimise the smacking. Action was taken within the family and they had engaged in parenting work.

[142] In re-examination Mrs Burness indicated that from the information Mrs Burness had, G's body language and behaviour, she had concerns that something of a sexual nature had happened. She did not *know* that something had happened, just that something *could* have happened.

Joint Investigative Interview

[143] A JII took place on 30 January 2020 between 14:24 and 15:30. A transcript of the JII and a DVD recording of the JII were lodged as productions. The audio length was 67 minutes.

[144] Having watched the DVD recording, G appeared to me to be clearly fed up during the JII. She moved about and was at times very unsettled. She fidgeted and at times was not focused. There was one break to allow G to go to the toilet at around 15:04. The JII recommenced at 15:14. The toilet break was therefore quite long at around 10 minutes.

[145] Prior to the toilet break, when asked if she had any worries when she had sleepovers at the pursuer's house, G said "No", but went on to say that the defender's husband was "the hardest smacked bum I ever saw." When asked what made her cry, G said "smacked bums and stuff" and "My Mum gives me slaps me in the face."

[146] It was after the toilet break that in response to questions about bath time at the pursuer's house G indicated "He has different soap." She said "It can go right in there, right, right in." She pointed to her vulva. She said "Because it's not stingy, it can go right in your bum and your back bum. It's not stingy at all." She said "Because it's not stingy because all other soaps are very stingy to go in your bum." When asked "So, is the soap stingy at Mum's house?" she replied "Yes."

[147] G was not told at the start of the JII how long it would take. PC Skinner and Aileen Burness refused to terminate the JII when G indicated repeatedly that she wanted to see the defender; was tired; or wanted the JII to finish. G was told that the interview was nearly finished and that just a few more questions were to be asked but this was inaccurate.

Pursuer's Case

Evidence of the Pursuer

[148] The pursuer was 35 years old and employed full-time. He worked all year round. He was from outwith the UK and would return home for two weeks during the summer at the end of June / beginning of July and from mid-December until the end of January. He lived in a two bedroom council flat. His brother stayed with him from September until December. The pursuer first came to Scotland in 2009. He had been working in his current employment since July 2014. His future plans were to remain in Scotland as much as he could so that he could see his daughter G, who was now eight years old.

[149] The pursuer described his relationship with G as very good. She was everything that he had in Scotland and was his reason to stay in Scotland. She made him happy and G was always happy with him. G always looked forward to seeing him and staying with him. He felt they had a really good relationship.

[150] The pursuer denied ever sexually assaulting G.

[151] The pursuer had not had contact with his daughter for a lengthy period of time. Supervised contact had been ordered by the court. The pursuer was very excited and the contact had been really nice. G came to contact and drew a card for the pursuer. She gave the pursuer a hug and the pursuer hugged her back. G was shy initially, then spoke more and was eventually the same as she was before. G was happy during the recent face to face contact. The pursuer had said he wanted to buy a gift for G and she had said that she "did not need anything Daddy, I just want you."

[152] The pursuer would like any contact with his daughter. The court should not be concerned in relation to overnight contact because the pursuer hadn't done anything. He would never hurt his daughter.

[153] The pursuer had contact with other children, including the defender's nieces. No-one had ever raised a complaint or concern.

[154] There was a trip abroad in summer 2018. The pursuer went abroad and then the defender, her husband and sister came to visit for 10 days.

[155] The pursuer got on okay with the defender's husband. The pursuer did not really speak to him much as he was quite quiet but there were no problems. The pursuer thought the defender's mother was a great person and a great Granny to G. G's Grandad was great too. The pursuer thought they were really nice people and he always had a good relationship with them. They told him that he would always be part of their family and he felt very wanted and appreciated. All the defender's family had been really nice to him.

[156] When G arrived abroad, it had been a long journey. She was over excited and stressed so she slept with her Mum the first evening. After that, G came and stayed with the pursuer. She had her own bed beside the pursuer's bed. The pursuer's parents, his younger brother and two cousins also stayed in the house. It was a big house.

[157] No concerns were raised about the way that the pursuer was handling G at bath time. The pursuer showed his mother how to bath G because it was a plastic bath with a shower. During bath time, the pursuer followed the instructions the defender gave him. He would fill the bath, check it was cold enough, let G get in, leave her soaking for a long time and give her something to play with in the bath. He had a bowl or a jug so that she could pour water over her body. After a while, the pursuer would put soap on G so that she could wash herself. He would tell her to stand up and put soap on her legs.

[158] The pursuer never put soap in between G's legs. He gave her the soap so that she could wash in between her legs. After she had done that he would tell her to sit down and wash her bum. That was it.

[159] Washing G's hair was quite stressful because she would get shampoo in her eyes and had long hair. After bathing, he would get towels for G and put clothes on her.

[160] There was never an occasion when washing G that the pursuer's finger went inside her anus or her vagina. He would never sexually abuse his daughter.

[161] The pursuer produced a number of birthday cards and Father's Day cards from G. G was good at drawing and writing.

[162] The first time that the defender raised an issue with the pursuer was at the beginning of September 2018. The pursuer and his brother woke up on Saturday morning and went to a coffee shop to have something to eat. The pursuer asked to see G and the defender texted back that she was busy. The pursuer said that was okay and when could he see her and the defender said she did not know. That was surprising so there were texts back and forward and the pursuer thought that something must be wrong. The defender was eight or nine months pregnant at the time and thought that it might not be easy for her to make arrangements every day.

[163] That night the defender told the pursuer that G said to her that the pursuer had said something like "You put your finger in her hole." That was the start of it. She was very upset and he was as well. The pursuer asked the defender if she was seriously suggesting that he had sexually abused his daughter. The defender said she was not saying that, she was just explaining what G had said to her and that she had to take action. The defender told the pursuer that she had to protect her daughter and from now on he would not see G unless his contact was supervised.

[164] That was between 5 and 10 September 2018, a few months after coming back from abroad. Prior to that, the pursuer had unsupervised overnight contact after they returned from the holiday abroad until September 2018. That was why it came as such a shock. The

defender was saying that something had happened abroad and yet he still had unsupervised contact with G. He did not understand why the defender did not take action at an earlier stage if she thought that he had hurt G.

[165] The defender brought up other things that evening. She told the pursuer that G had been upset and crying after contact with him, which had been overheard by the defender's husband. The pursuer was surprised that the defender's husband was not giving evidence in this case.

[166] The pursuer asked the defender if she was really accusing him of doing something like that. She said she was not saying that the pursuer was guilty of such things, she was just explaining what G had said. The pursuer thought that because the defender was eight or nine months pregnant at time that perhaps she was emotional. That had happened with G. The pursuer did not want to get a solicitor. He was thinking that after the defender had her baby then things would resolve.

[167] Supervised contact took place thereafter at the defender's house or G's Granny's house. The pursuer was patient and calm because he knew he was right. He had never kissed G with an open mouth. He did not like slavers in his mouth or anything like that.

[168] Supervised contact did not feel nice. The pursuer accepted it because he knew the defender and believed he would be able to persuade her that he had not done anything wrong to his daughter and felt that the defender had taken a wrong decision because she was pregnant and he knew how emotional she could be. When he went to the defender's house, it was like nothing had happened. He was invited in, they would sit and have tea. The pursuer found that very confusing and a difficult time. The defender would make something to eat and the pursuer would play with G in the living room. The defender would leave the pursuer alone with G, albeit not for a long time. The pursuer was having

contact with G from November 2018 as often as the pursuer was free. That was almost every Monday, Wednesday and Friday. Sometimes contact was not suitable because the baby was unwell so sometimes the pursuer would see G at her Granny's house or go to the park and go for a walk and the defender's husband would follow him. That was not nice. The pursuer realised for the sake of himself and his daughter he had to do something and that was why he had raised the court action.

[169] The pursuer went to see his solicitor in June 2019. The defender was angry when she found out he had spoken to a solicitor. The pursuer explained he had to do so for G's sake.

[170] Supervised contact stopped in January 2020 when police came to speak to G and came to the pursuer's house. The only contact the pursuer had had with G since January 2020 over the course of two and a half years was the four hours ordered by the court. Two previous sheriffs made interim orders but they were never given effect. The pursuer had a video conversation in 2020 and was supposed to have supervised contact at a contact centre but that was cancelled due to the pandemic. The pursuer spoke with G on video five times. The defender insisted that the conversation stopped after 30 minutes. The pursuer saw no evidence that G was upset during such calls. She was happy. He did not understand why the defender had told the sheriff that G was upset after seeing him on video because that had led to the cancellation of supervised contact and discussion about G going to see a child psychologist due to nightmares. The pursuer felt that G was happy.

[171] The police came to the pursuer's flat and said that allegations had been made against him by the mother of his daughter. He was told he could not go around other children whilst matters were investigated. He attended the police centre by himself and no charges were made. Aileen Burness, social worker, did not keep in contact with him. If she had, the pursuer would have said to her that she had only heard one side and he thought she was

biased. The pursuer felt that if Aileen Burness had spoken to him then she would think differently about him.

[172] In cross-examination the pursuer indicated that G was a truthful child. However there was an occasion in summer 2019 when the pursuer received a text message from the defender saying that G had told her that he had a girlfriend who had a little boy. The pursuer was surprised to hear that because it was not true and told the defender. So the pursuer was not calling G a liar but she had told a lie about that. The pursuer had never had a girlfriend.

[173] The pursuer thought that the defender was a truthful person. He had a good relationship with her. They occasionally had arguments but nothing serious. He loved the defender when they were in a relationship together. She did not obstruct contact after they separated. The defender was keen to keep routines in place because she was that kind of person. The pursuer had to agree to that. The pursuer thought that the defender wanted what was best for G but the pursuer thought it was best for G for him to be a part of her life as well. At the time that the defender stopped unsupervised contact, she was pregnant and may have been in a heightened emotional state. The pursuer just wanted to resolve things because he knew nothing had happened. It may have been that the heightened emotional state caused the defender to interpret things in a different way.

[174] The pursuer denied ever putting his finger in G's vagina or anus. When she was younger, he of course changed her nappies and bathed her. When G got older, she would go to the toilet herself but sometimes he would have to help her to wipe her bum or she would ask for help with drips of urine. When bathing her, he would use soap up her legs but never put a finger in G's vagina or anus. The defender had showed him how to clean G. He used a wipe and cleaned her genital area from front to back.

[175] The only thing the defender had mentioned was G saying her bum was sore and the pursuer had suggested it might be a slide in the park. Abroad, they did not have Dove soap and it was possible that different soap could have caused her to have irritation. The pursuer had never sexually assaulted his daughter. The pursuer did not clean G over vigorously in that area. The pursuer wondered if G had simply said that it was the pursuer when asked who did that, rather than admitting she had been exploring herself.

[176] When cleaning G when changing her nappy, the pursuer would clean her from front to back in a flat hand movement. He did not use a finger and a finger could not have been accidentally inserted. G would sometimes ask the pursuer to wipe her bum but she did not say that it was sore or not to do that. The pursuer thought that the defender must have interpreted what she heard because she was very emotional. The defender didn't want pictures of G on social media because she was concerned about so many "weirdos" and did not want G to become a target from people with special interests on the internet.

[177] The incident in around September 2018 while G was playing on a trampoline was something that the pursuer had never heard. The pursuer believed if G had said that then the defender would have come and spoken to her. If G had said that, that was not true and the pursuer would have challenged her.

[178] G slept in the pursuer's bed. A few times he tried to put her in the spare room but G would say that she was scared and did not want to sleep on her own. G was always fully clothed in pyjamas. The pursuer was never naked. He had long sleeves or t-shirts in the summer. In winter he had long pyjamas. He was clothed top and bottom. There was never an occasion where one or both of them were completely naked.

[179] On one occasion when the pursuer was in the shower, G really needed to go to the toilet. She walked in and the pursuer was behind the curtain and G went to the toilet to urinate. She did not see the pursuer naked. She shouted "Daddy I am bursting for a pee."

[180] The pursuer and G had cuddles in the morning when she woke up.

[181] G referred to her private parts as her bum. She only said bum, not front bum or back bum. The pursuer had never been naked bum to bum with G.

[182] The pursuer had taken G swimming on occasion. It was possible she could have seen a penis in the changing rooms.

[183] The pursuer had never done anything to G and this was all a big misunderstanding. He hoped that the truth would come out at the end of the court case.

[184] The pursuer received legal advice in advance of his police interview and answered "no comment" to all the questions as advised. There were so many things he wanted to say but he was advised that the interview was not the right place to say them. Instead, court was the right place to say these things. The pursuer was here in court to prove that he had not done anything and to have contact with his daughter.

[185] The pursuer thought that the defender was a strong woman. Although she was G's primary carer, the pursuer and the defender were the most important people in G's life.

Evidence of the Pursuer's Other Witnesses

DD – G's Paternal Uncle

[186] DD was 33 years old. He was the pursuer's brother. He lived abroad and was currently residing with his brother in Scotland as he was working in Scotland at the moment. He first came to Scotland in 2012 and then again in March 2018, usually from September until December. He was G's paternal uncle.

[187] DD had seen his brother with G when he collected her from the defender, usually at the weekend. He was not present when G travelled abroad to see the pursuer.

[188] Whenever G was with his brother, DD described G as the happiest child ever. On occasions when she was about to leave to go back to her mother, she would say that she did not want to and that she wanted to stay with his brother.

[189] G had never said anything to him which caused him to be concerned about his brother. No other adult in his circle of friends had ever raised a concern about the way that the pursuer interacted with G. On the contrary, he would say that everyone knew the pursuer was a great father. He had never seen his brother act with G in a physically inappropriate way, nor with any other child.

[190] In cross-examination DD indicated this was the worst situation for his brother. He had not seen his child for almost three years, nor had their parents. DD felt there had been some sort of a misunderstanding. What was suggested to have happened was not true. He did not think that G was a liar but that what she said was not true.

[191] When DD was with his brother he spent a lot of time with him. They came home from work together, then would go to get G together and come back to the flat together. His brother had his own bedroom and when G stayed over at the weekend she would be in the pursuer's bedroom. He was not in the pursuer's bedroom when G was sleeping. He was not in the bathroom when his brother was helping G with toileting. He did not help to clean G or help her change clothes. However, if anything had happened, then G would presumably be distraught, she would be visibly hurt or upset. That had never happened. She had never displayed any of those signs. DD was confident that nothing had happened because he knew his brother and knew that he was not the person that he was being painted as. He had no ill feelings toward the defender because she was G's Mum.

Conclusions from the Evidence

[192] The defender gave her evidence in a straightforward manner. I observed that she was very embarrassed when discussing body parts and was uncomfortable using anatomically accurate terminology for body parts. However, I did not form the impression that she was hypersensitive or exaggerating her concerns. I accepted that it was reasonable for the defender to be concerned by the statements made by G both directly to her and relayed to her as having been made during the JII. I accepted that her apprehensions in relation to G's safety were genuinely held and evolved over time, crystallising when social worker Aileen Burness shared her concern that something of a sexual nature could have happened to G. Though she found it difficult to recall the dates when various statements were made, that was to be expected given the passage of time. I found her to be a credible and reliable witness.

[193] The defender's mother MC also gave her evidence in a straightforward manner. Though she was at times defensive about the defender, that was to be expected of a mother giving evidence about her daughter. She was candid that with hindsight, she regretted not encouraging the defender to report matters to the police at an earlier stage. She also disagreed with the defender on certain issues, such as home schooling. I found her to be a credible and reliable witness.

[194] Aileen Burness gave detailed evidence about G's JII but also JIIs generally. Though no expert report was lodged in process by the pursuer, Mrs Burness was subject to many criticisms in relation to the conduct of the JII. She explained the difficult balancing act that she attempted to carry out and accepted some criticisms, while rejecting others. She was

candid that with hindsight, the JII continued for longer than it ought to have done. I found her to be a credible and reliable witness.

[195] The pursuer gave his evidence in English and only made use of an interpreter on occasion. I observed that he sometimes provided a fuller answer when a question was asked in a more specific way than he did when a more vague question was asked. For example, in examination-in-chief the pursuer indicated that when he spoke to the police he did not have a solicitor present and when asked "Why?", he replied "I don't know." By contrast, in cross examination when he was asked if the police told him he had a right to a solicitor, he indicated that he was given the option of speaking to a solicitor but told them he didn't want one to be present during the interview because he had already spoken to his own solicitor, who advised him to answer all questions "No comment." Similarly, when asked in cross examination if he ever washed "those areas" he replied "No." Later in cross examination when asked about the occasions when G would visit him when she was too young to clean her genital area herself, he indicated that of course he changed her nappies and bathed her. When asked how he cleaned G's vulva, he replied that he used a wipe from front to back in a flat hand movement, did not use a finger and a finger could not have been accidentally inserted. I accepted that this may have been due to language differences.

[196] Overall, the pursuer gave his evidence in a straightforward manner and denied ever acting inappropriately towards his daughter, let alone sexually abusing her. I accepted that he loved his daughter and had remained in Scotland in order to have contact with her. I found him to be a credible and reliable witness.

[197] The pursuer's brother also gave his evidence in a straightforward manner, making use of an interpreter. He had never seen his brother act inappropriately with any child. Though this was the worst situation for his brother, he had no ill feelings towards the

defender because she was his niece's mother. He was candid that he was not present during all of his brother's interactions with G. I found him to be a credible and reliable witness.

Legislation

[198] Section 11 of the Children (Scotland) Act 1995 provides:

Court orders relating to parental responsibilities etc.

11 (1)

In the relevant circumstances in proceedings in the Court of Session or sheriff court, whether those proceedings are or are not independent of any other action, an order may be made under this subsection in relation to—

- (a) parental responsibilities;
- (b) parental rights;
- (c) guardianship; or
- (d) subject to section 14(1) and (2) of this Act, the administration of a child's property.

(2) The court may make such order under subsection (1) above as it thinks fit; and without prejudice to the generality of that subsection may in particular so make any of the following orders—

- (a) an order depriving a person of some or all of his parental responsibilities or parental rights in relation to a child;
- (b) an order—
 - (i) imposing upon a person (provided he is at least sixteen years of age or is a parent of the child) such responsibilities; and
 - (ii) giving that person such rights;
- (c) an order regulating the arrangements as to—
 - (i) with whom; or
 - (ii) if with different persons alternately or periodically, with whom during what periods, a child under the age of sixteen years is to live (any such order being known as a "residence order");

(d) an order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living (any such order being known as a “contact order”)

(e) an order regulating any specific question which has arisen, or may arise, in connection with any of the matters mentioned in paragraphs (a) to (d) of subsection 1 of this section (any such order being known as a ‘specific issue order’);

...

(3) The relevant circumstances mentioned in subsection (1) above are—

(a) that application for an order under that subsection is made by a person who—

- (i) not having, and never having had, parental responsibilities or parental rights in relation to the child, claims an interest;
- (ii) has parental responsibilities or parental rights in relation to the child;

...

(7) Subject to subsection (8) below, in considering whether or not to make an order under subsection (1) above and what order to make, the court—

(a) shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all; and

(b) taking account of the child’s age and maturity, shall so far as practicable—

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

(7A) In carrying out the duties imposed by subsection (7)(a) above, the court shall have regard in particular to the matters mentioned in subsection (7B) below.

(7B) Those matters are—

(a) the need to protect the child from—

- (i) any abuse; or
 - (ii) the risk of any abuse, which affects, or might affect, the child;
 - (b) the effect such abuse, or the risk of such abuse, might have on the child;
 - (c) the ability of a person—
 - (i) who has carried out abuse which affects or might affect the child; or
 - (ii) who might carry out such abuse, to care for, or otherwise meet the needs of, the child; and
 - (d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under subsection (1), would have) those responsibilities.
- (7C) In subsection (7B) above—
- “abuse” includes —
- (a) violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress;
 - (b) abuse of a person other than the child; and
 - (c) domestic abuse;
- “conduct” includes—
- (a) speech; and
 - (b) presence in a specified place or area.
- (7D) Where—
- (a) the court is considering making an order under subsection (1) above; and
 - (b) in pursuance of the order two or more relevant persons would have to co-operate with one another as respects matters affecting the child, the court shall consider whether it would be appropriate to make the order.
- (7E) In subsection (7D) above, ‘relevant person’, in relation to a child, means—

- (a) a person having parental responsibilities or parental rights in respect of the child; or
- (b) where a parent of the child does not have parental responsibilities or parental rights in respect of the child, a parent of the child.

[199] Section 2 of the Children (Scotland) Act 1995 provides:

Parental Rights

2 (1) Subject to section 3(1)(b) and (3) of this Act, a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right—

- (a) to have the child living with him or otherwise to regulate the child's residence;
- (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;
- (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and
- (d) to act as the child's legal representative.

Authorities

[200] Parties referred me to the following authorities:

- *A v A* 2021 G.W.D. 13-189; [2020] 10 WLUK 613;
- *A v A* 2013 S.L.T. 355;
- *B v Scottish Ministers* [2010] CSIH 31;
- *CM v ME-M* 2019 Fam L.R. 125;
- *J v M* [2016] CSIH 52;
- *M v C* 2021 S.C. 324;
- *NDGB v JEG* 2012 S.C. (U.K.S.C.) 293;
- *West Lothian Council v MB* [2017] UKSC 15; and
- *White v White* 2001 SC 704.

Submissions for the Defender

[201] The defender lodged detailed written submissions, which were amplified by oral submissions. I have summarised the relevant parts thereof.

[202] The defender's primary position was that the court should decline to make any award of contact. This was a case that involved sexual abuse or inappropriate behaviour.

[203] There had been much criticism as to whether the defender had acted appropriately. That was a red herring.

[204] It was accepted, as with any young child, the statements that were made were not sharp statements of sexual abuse. It might be that there was not sufficient context for the comments themselves to suffice to make a finding of sexual abuse or inappropriate behaviour. However, in the JII, what was said was not a repetition of what was said before. There was detailed context around bathing, soap and penetrative acts.

[205] There was much criticism of the interview but that was with the benefit of hindsight. None of that criticism affected the content of the JII. G introduced the key concepts of bath time and her father using his hand and his hand going right in. The defender's position was that there could be no innocuous explanation because he did not bathe G. G repeated over and over details about bath time and soap. The pursuer's position unequivocally was that he did not bathe G at or anytime near to when she was in his care overnight. That caused real issues for the pursuer because the court had to conclude either that G had fabricated these specific statements, or that there was some kernel of truth and she had embellished beyond that. It was difficult to see how to that could lead to a conclusion of an innocuous act in light of the specific details together.

[206] Taking those factors together, that was the basis on which the defender, with much hesitation, invited the court to make a finding in fact that there had been inappropriate sexual contact.

[207] *Esto*, the defender's position was that contact would be unworkable because of her genuine and now unshakable view that something untoward had happened. That might seem exceptional but there was previous authority to that effect in the case of *JM*.

[208] The defender had told the court she would comply with an order. That was what one would expect someone to say if they were asked in court. The question was not about whether she would comply but it was more nuanced. It was about whether her compelled compliance would have a demonstrable negative risk to G. The reality was that G's primary attachment was to the defender. It was the most important relationship in her life. Contact would not operate in a vacuum. It was this defender and this defender's beliefs that had to be filtered in.

[209] The defender had been candid about her position. Her evidence was unchallenged that when she attempted supervised contact in summer, she had a panic attack and was extremely distressed. The strength of feeling in this case was similar to the case of *JM*. In that case the court accepted quite an unusual position that contact could be terminated between the non-resident parent and the child even where sexual allegations were not proved if the court considered there was a sufficient risk from the operation of contact.

[210] *Esto*, the defender's position was that if there was not enough to have a bar on contact then it should be supervised. It was reasonable to infer that supervised contact would be less difficult for her to cope with than unsupervised contact. The contact should be supervised by social work. Supervision was normally a means to an end but if the court thought it was better to have long term supervised contact or indefinite supervised contact

rather than none, then the court could take that position. It had to be done by social work because otherwise there would be cost issues for the parties and legal aid would no longer be available once the action came to an end.

[211] If the court was minded to order unsupervised contact, then the court was not in a position to order a return to overnight contact due to the passage of time. In the last three years there had been only four hours of supervised contact. In that time, circumstances had changed and it could not be assumed that G could go from that to overnight contact without any issue.

[212] There was also a procedural issue. There were authorities for the proposition that the court could not rear load any action. It was necessary for the court to make a final decision and a child welfare hearing would be possible for practical or logistical arrangements only. It was not in G's interest to go back to overnight contact.

[213] There had been little evidence about the previous operation of contact and the quality of that contact. There had been no motion for further contact since the last period in July 2022. Five months had passed where the pursuer had not sought to exercise contact with his daughter. That might be due to work. If that was the case then there might have been lengthy periods when G would not be able to have contact with the pursuer.

[214] The defender submitted that the report dated 28 August 2022 from Relationships Scotland could not be relied upon. Neither the author of that report, nor anyone who supervised the contact was called to give evidence. *Esto*, in the absence of the contact supervisor, little if any weight could be attached to the terms of the report.

[215] The court had the views of G as at May 2022, immediately prior to the commencement of the proof. That predated the reintroduction of contact during the summer. It was for the court to determine the materiality of that and whether, in those

circumstances, it was appropriate to have G's up to date views taken or rest on those previously reported. The defender conceded that G's views were likely to be generally favourable towards contact.

[216] A staged order with small nuances was possible but it would be difficult to envisage an order for a longer period progressing to residential contact. That presupposed that the first session of contact went well and the court would not be in a position to review that. Therefore, the court was in a procedural bind. The court could only hope in making an order that non-residential contact went well and was then re-assessed. What would be appropriate would be to say something like two or three hours building up to five hours. Alternatively it could be left to the parties.

[217] In reply, the defender cautioned against any assumptions of normative body language in relation to a child victim of sexual abuse. There had been no evidence in that regard and it was reckless to imply that there was a single normative presentation for a child. That had been debunked as one of the myths for adults and was even less safe in relation to a child. There had been evidence of G's age and stage in that she had not yet had any sexual prevention training. She also adored the pursuer and so would not necessarily understand what was happening was wrong.

[218] As far as changing Aileen Burness' report was concerned, the social work department's usual practice was to offer up the report for corrections to those who had not been at the meeting. It was the chronology or order that things had happened that were in dispute.

[219] The defender's views had changed over time and was a genuine evolution. There were things that she did not think anything about at the time but casting her eye back on

previous events she now had concerns. That was a good indicator that the defender was genuine in how she now felt.

[220] The lack of history of panic attacks suggested that something significant had happened to lead the defender to behave that way. The defender's mother had confirmed that the defender was not particularly anxious.

[221] It would be unprecedented to go from not even unsupervised contact to a two week block of holiday contact. No order should be made for holiday contact.

Submissions for the Pursuer

[222] The pursuer submitted that put simply, no parent had a right of veto over another. He rejected that contact was unworkable due to the defender's beliefs. In fairness to the defender, she had demonstrated candidly that contact could work. To her credit, the defender did not seek to thwart contact and stop G going to see the pursuer. That showed that the defender was capable of acting in good faith and was mentally capable of coping with contact taking place.

[223] There was no expert psychological analysis indicating a mental inability on the part of the defender in relation to contact. That submission should be rejected. The panic attacks were not challenged because the pursuer was not present at the time. He did say that he had never seen the defender have a panic attack.

[224] Indefinite supervised contact should be rejected. Who would pay for that? The pursuer earned very little from work and these things were not cheap. It would also have an effect on G. She loved her Dad and wanted to see him and would get to a point when she wondered why she always had a minder.

[225] This was not a case where any attempt at contact failed because G was kicking and screaming and refusing to go to contact. G saw her father in June or July this year and her views were recorded.

[226] There was evidence of earlier contact with G. The defender was asked questions about the first year of her relationship with the pursuer and how the pursuer acted around children and in particular his nieces. The vague suggestion that the pursuer was aroused around children was an example of the defender upping the ante in this case. This was being said and introduced in order to essentially say that the pursuer was a paedophile.

[227] So much in this case was about implication rather than being explicit. Questions were asked of the defender to see whether the pursuer was aroused around children and clearly he was not. The defender and her mother were happy for contact after the allegations were made. They controlled it but often left G alone with the pursuer and no issues arose.

[228] Thinking about what an order for contact might look like, a proposed schedule was lodged seeking contact on Mondays and Wednesdays from 5.30pm until 7.30pm for the first three weeks, moving to Monday and Wednesday from 5.30pm until 7.30pm together with Fridays at 5pm until Saturday at 4pm in week four. All of that contact should be unsupervised and hand over should be at a location which had been used as a hand over in the past and was a familiar venue for G. As far as holiday contact was concerned, two weeks in summer were sought, preferably in July. Contact was also sought in Christmas and October but not Easter. The defender home schooled G so there were no school holidays as such.

[229] The report from Relationships Scotland was not an expert report. It should be treated the same way as a child welfare report and was simply a report for the court.

[230] One month after the JII, the defender and her mother argued amongst themselves about when things happened. That did not sit well with the suggestion that the defender had produced an accurate record and that should be rejected.

[231] In relation to vaginal discharge, no conclusive explanation was given. The defender accepted that the GP advised it would clear up in a couple of days and that was what had happened.

[232] To conclude, this was essentially a factual issue as to whether some form of sexual abuse had occurred. If it was found that nothing physically inappropriate had happened between the pursuer and G then why would he not be entitled to unsupervised contact? It was as simple as that. The pursuer had a right to remain in contact with his child. It would be different if a finding was made of sexual abuse. In such a situation, at best, the pursuer could expect some limited contact, strictly supervised. However, if there was no sexual abuse then there was no reason for contact to be supervised. Any time G had been asked about seeing the pursuer, she had been unequivocal that she wanted to see him.

[233] This was a young child who was very bright and articulate. It was G who corrected the social worker in the interview.

[234] The suggestion that contact could not work because of the defender's beliefs should be rejected. The defender had shown good faith. The report from the contact centre showed that supervised contact had gone well. There was nothing in G's body language during the JII to suggest that she had been sexually abused or traumatised.

[235] Looking at matters in the round, there was no reason not to move to overnight contact. There could be a number of unsupervised contact visits and if that worked then the parties could move to unsupervised overnight contact. The pursuer was staying in the

country because of his daughter and had a two bedroom apartment. He should be able to have G overnight.

Decision

[236] As set out by Lord Rodger in *White v White* at p.697D, as a general principle it is “conducive to the welfare of children if their absent parents maintain personal relations and direct contact with them on a regular basis.”

[237] Applying that general principle, as Lord Malcolm explained in *J v M* at p.840,

“before a contrary position is taken, the court must, after carefully weighing all the relevant circumstances, identify factors which justify such a serious step and demonstrate that it is conducive to the welfare of the child.”

There is no separate test of necessity before refusing an order for parental contact.

[238] Applying those general principles to the specific facts of this case, it was necessary for me to consider the quality and weight of the evidence and to scrutinise it carefully before deciding whether to refuse the pursuer contact with G.

[239] A key feature in this case is the evidence of G. She was between the ages of two and four when she made the statements in question to the defender. She was five years old at the time of the JII. There is a considerable body of evidence from the defender, Aileen Burness and the recording of the JII as to what G said or is said to have said. No issue was taken in relation to the admissibility of the hearsay evidence of G. The question was how that evidence should be treated.

[240] In *A v A*, Lady Dorrian indicated at p.360A that:

“In a case such as this, we do not consider that it is particularly helpful to try to confine this matter to one of the credibility and reliability of the maker of the hearsay statement, especially when that person is a young child. There will be many factors which are relevant to the question of whether the hearsay can be relied upon: are the people to whom the statements are said to have been made credible and reliable? Did

they have some particular axe to grind, or animus towards the subject of the statement? Can the same be said of the actual maker of the statement? What were the circumstances in which the statements were made? Were they elicited in response to leading questions or was there an element of spontaneity? Did the people to whom the statements were made simply accept them at face value, or did they consider whether there might have been an alternative and innocent explanation for the statements? These are all factors which may have a bearing on the overall question of the weight which the fact finder may satisfactorily feel able to place on the hearsay statement.”

[241] Following that approach, I required to carefully examine the circumstances surrounding the statements made by G to the defender and in the JII.

[242] As far as the standard of proof is concerned, it was clear from *B v Scottish Ministers* that the standard was the balance of probabilities. Lord Eassie indicated at p.485 that:

“Where an allegation of criminal conduct is made in civil proceedings, the standard of proof is the balance of probabilities; but the nature of the allegation may be such as to call for evidence of quality and weight and for that evidence to be carefully examined and scrutinised in the course of the forensic process.”

[243] Though *B v Scottish Ministers* was brought under mental health legislation and made against a different factual background, the Sheriff Appeal Court indicated in *CM v ME-M* at p.131 that:

“there is nothing in the decision in *B v Scottish Ministers* which restricts its application to cases other than those brought under the 1984 Act. We consider it is a valid statement of the law in relation to assessment of evidence of criminal conduct in the course of civil proceedings where the test is one of a balance of probabilities.”

[244] I therefore considered whether the allegations in this case were proved on the balance of probabilities.

[245] The key witnesses were the parties themselves. This was not a case where some of the witnesses were plainly untruthful or unreliable. Instead, I found all of the witnesses in this case to be credible and reliable overall. I made findings in fact detailing what G said to the defender on various occasions and during the JII. I accepted that the statements were made. The issue was whether I accepted them as being evidence of the truth of what was

said to the defender and whether they meant inappropriate sexual behaviour by the pursuer towards G.

[246] I accepted that it was reasonable for the defender to be concerned by those statements and for those concerns to deepen when Aileen Burness shared her own concern that something of a sexual nature could have happened to G. However, as conceded by the defender, the statements made by G were not sharp statements of sexual abuse. Given the age of G and the nature of the allegations, that is not unexpected.

[247] Though she had thought back over all her interactions with the pursuer, even with the benefit of hindsight, the defender was only able to point to two occasions when the pursuer had behaved a little “oddly”. There was no direct evidence before me from any adult of any inappropriate behaviour by the pursuer to G, or indeed any other child.

[248] No charges were brought by Police Scotland. Social worker Aileen Burness was candid that while she had concerns that something of a sexual nature *could* have happened to G, she did not *know* that something had happened. The JII continued for longer than it ought to have done and the statements made by G were not specific statements of sexual abuse. By contrast, she did make specific statements of physical chastisement by the defender and her husband. At the time the various statements were made and at the time of the JII, G was very young.

[249] I had to decide on the balance of probabilities whether the pursuer sexually abused G. As explained by Sheriff Holligan at first instance in *CM-MJE-M* at para. 62 “It is a very serious conclusion to reach with very serious consequences. The issue is binary. I cannot conclude that something might have happened.” For the reasons I have outlined above, I did not feel able to conclude that the evidence was of sufficient weight and quality to lead me to the conclusion that the pursuer sexually abused G.

[250] Having reached a conclusion on that issue, I moved on to consider what the welfare of G required.

[251] Though the defender took issue with the weight to be attached to the report from Relationships Scotland in the absence of the author being called as a witness, the report was not an expert report. It was a factual account of observations at supervised contact for the benefit of the court. Those observations, namely that G was happy to be in the pursuer's company, were in alignment with the defender's own observations that G was happy to go and see the pursuer and enjoyed the session.

[252] Similarly, though the defender highlighted that the child welfare report in relation to G's views pre-dated the re-introduction of contact, there was no suggestion by either party that her views had changed. On the contrary, the defender conceded that G's views were likely to be generally favourable towards contact.

[253] I therefore took into account, *inter alia*, both the report from Relationships Scotland and the child welfare report in considering what the welfare of G required.

[254] I also took into account the need to protect G from any abuse or the risk of abuse; the effect such abuse or risk of abuse might have on G; the effect any abuse or risk of any abuse might have on the defender; and the need for co-operation between the parties in the pursuance of any contact order.

[255] Though the defender submitted that the strength of feeling in this case was similar to the case of *JM*, that was not borne out by the evidence. In *JM*, at p.838, Lord Malcolm noted that the sheriff at first instance in that case had recorded that the relationship between the parties and their families was "appalling", which raised questions as to whether "an appropriate climate" for contact could be established. The sheriff observed that "neither

parent could stand other and the family members held similar views.” Consequently, the sheriff considered that a child of that age was “not able to cope with such a maelstrom.”

[256] By contrast, in this case the parties had a good relationship after their separation and had been able to co-operate in the past. The defender spoke of her respect for the pursuer. The pursuer described the defender as a truthful person. He praised G’s maternal grandparents. During supervised contact, the parties were observed to be respectful towards one another and focused only on G. When asked specifically, the defender indicated that she would co-operate with the pursuer if an order was made for contact. Although she had been very distressed about the prospect of supervised contact and suffered from panic attacks, the defender was candid that G coped better than she had expected with the court ordered contact. She was happy to go and see the pursuer and enjoyed the session.

[257] Taking all of those factors into account, I therefore decided that having regard to the welfare of G, there should be direct contact between the pursuer and G and that it was better for G that an order for contact be made than that no order should be made.

[258] Having decided that there should be an order for direct contact, it was open to me to make an immediate order for unsupervised residential contact as sought by the pursuer. However, I considered that the defender and G would require time to adjust to new circumstances. Professional help might also be required to ease the transition and restore trust between the parties and their extended families. It was in G’s interest that contact was managed responsibly and constructively.

[259] Consequently, I made an order for supervised contact between the pursuer and G for up to two hours, once per week, for the first four weeks, to be supervised by the defender or a family member. The pursuer had suggested Mondays or Wednesdays between 5.30pm –

7.30pm with hand over at a neutral location, but I left that open to the parties in order that they could agree something that fitted in with both their schedules.

[260] In weeks five and six, I increased supervised contact to up to four hours, twice per week, to be supervised by the defender or a family member. That was similar to the supervised contact that the parties agreed between themselves between September 2018 and January 2020. I considered that those first six weeks of supervised contact would allow sufficient time for adjustment.

[261] From week seven onwards, contact would remain of the same duration, namely for up to four hours, twice per week, but would be unsupervised. I was conscious that this level of contact was less frequent and of a shorter duration than the pursuer sought, which was a return to the level of contact he had prior to September 2018. However, I required to issue a final interlocutor to bring this matter to an end and could not anticipate all the uncertainties which the future might hold. I did not think that it was in G's interests to order a return to unsupervised residential contact after such a long break in contact. In the event that contact goes well, it is, of course, open to the parties to reach agreement between themselves that contact should progress further.

[262] Parties were in agreement that there should no expenses due to or by either party.