SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2021] SC EDIN 47

EDI-F1139-13

NOTE BY SHERIFF T WELSH QC

In the Minute for Contempt

in the cause

B (AP)

Pursuer/Minuter

against

A (AP)

Defender/Respondent

ALASDAIR DOCWRA, Curator *ad litem*, to the child D

Party Minuter

Pursuer/Minuter: Fairgrieve;
Defender/Respondent: Wild;
Party Minuter: Cheyne advocate

At Edinburgh 13 July 2021; the sheriff having resumed consideration of the cause, finds A was in contempt of court while acting with her husband M, who is not a party to these proceedings, in that, between 25 February 2019 and 18 July 2019, she deliberately and wilfully refused to obtemper the final order of 25 February 2019 in respect of contact awarded to B with D; which contempt was to her certain knowledge and complicity articulated by M (1) to D's paternal grandfather P in a telephone conversation on 1 March 2019 and (2) to D's Curator *ad litem* in a 10 page document at a meeting on 14 March 2019; and discerns.

The following facts were agreed between the parties in a Joint Minute:

1. The parties are as designed in the instance.

2. The parties were in a relationship for a period of approximately nine months, which ended in or around November 2012 prior to the birth of the parties' child.

3. The parties never married.

4. There is one child of the parties' relationship, namely D, born in 2013.

5. At the date of Minute for Contempt Proof (6 July 2021) D shall be 8 years 2 months of age.

6. The Pursuer is the father of the said child, he is not named on the said child's birth certificate.

7. The Defender is the mother of the said child.

8. The said child resides with the Defender in the Sheriffdom of Lothian and Borders and has done so since birth.

9. The Pursuer has diagnoses of Recurrent Depression and Asperger's Syndrome.

10. The Defender has a diagnosis of Emotionally Unstable Personality Disorder and separately Chronic Fatigue Syndrome/M.E. The Defender is prescribed medication to alleviate her mental health issues, principally anxiety and mood fluctuation.

11. A five-day Proof was conducted at Edinburgh Sheriff Court on 21 January 2019 consecutive to 25 January 2019.

12. Sheriff Holligan issued his Judgement on 25 February 2019.

13. The present Minute has, as its subject matter, the Defender's alleged failure to obtemper the Court Order of 25 February 2019

14. On 1 March 2019, M, husband of the Defender telephoned P, the father of the Pursuer and Minuter.

15. The Agent acting on behalf of the Defender withdrew from acting on or about 5 March 2019.

16. On 25 March 2019 the Pursuer and Minuter's Minute for Interdict against Removal was warranted at Edinburgh Sheriff Court.

17. At Edinburgh Sheriff Court on 2 April 2019, Sheriff Tait granted Interim Orders interdicting the First Respondent and Defender from taking D, out of the Sheriffdom of Lothian and Borders except with the written consent of the Minuter and Pursuer or by further Order the of Court.

18. On 24 April 2019 the Pursuer and Minuter's Solicitor wrote to the Defender and Respondent.

19. On 14 May 2019 Sheriff McFadyen continued the Interim Orders granted in terms of the Interlocutor of 2 April 2019.

20. On 26 June 2019 Sheriff Braid continued the Interim Order from 2 April 2019.

21. At Edinburgh Sheriff Court on 2 July 2019 the Defender and Respondent was represented by a new Solicitor, namely Mr. Agnew of Latta & Co.

22. Mr. Agnew withdrew from acting for the First Respondent on or about 11 July 2019.

23. At Edinburgh Sheriff Court on 5 August 2019, Sheriff Holligan appointed Ms. Helen Pryde as Curatrix *ad litem* to the Defender on account of the Defender's likely incapacity to instruct a Solicitor.

24. On 20 November 2019 a Psychiatrist's Report was presented which confirmed the Defender and Respondent's incapacity to retain the services of a Solicitor. On the same date the Curatrix *ad litem* was appointed to lodge answers with the court no later than 4 December 2019.

25. In addition, at Edinburgh Sheriff Court on 20 November 2019, Sheriff Tait ordered a continuation to a procedural hearing on 6 January 2020 to allow reintroduction of contact and to establish further procedure.

26. At Edinburgh Sheriff Court on 6 January 2020 Sheriff McFadyen noted that the curator *ad litem* for the child would facilitate indirect contact and endeavour to facilitate direct contact between the Pursuer and the child.

27. At Edinburgh Sheriff Court on 19 February 2020 Sheriff Holligan considered that the Defender and Respondent could give an Undertaking, revocable on giving a reasonable period of notice to the Pursuer. Sheriff Holligan also stated that the Order previously granted by him still stands until recalled or varied.

29. At Edinburgh Sheriff Court on 4 March 2020 Sheriff Holligan sisted the Pursuer/Minuters Minute to Vary on account of the Defender and Respondent giving an undertaking not to relocate without the consent of the Court.

30. On 13 March 2020 the Pursuer/Minuter enrolled a Motion to allow the Minute of Contempt to be received and to fix a Court timetable.

31. At Edinburgh Sheriff Court on 23 March 2020 Sheriff Stirling *ex proprio motu* sisted the Minute for Contempt.

32. At Edinburgh Sheriff Court on 24 September 2020 Sheriff Stirling resumed consideration of the cause, recalled the sist, fixed a timetable for this Minute for Contempt.

33. At Edinburgh Sheriff Court on 2 November 2020 Sheriff Stirling instructed the Curatrix ad litem appointed to the Defender to obtain a full psychiatric assessment of the Defender/First Respondent.

34. The Report prepared by Jim Craig; Consultant Psychiatrist dated 8 December 2020 insofar as it answers the questions fixed by Sheriff Stirling in her Interlocutor of 2 November 2020 which requests the Report address the following: -

(a) Whether or not in the opinion of the Psychiatrist the Defender is incapable of instructing a Solicitor to represent her interests;

(b) Whether she has the capacity to understand that she must comply with Court Interlocutors ordering contact between the said child D and the Pursuer, whether she has the capacity to understand that wilful refusal to comply with Court Orders may amount to Contempt of Court for which imprisonment is sanction, and whether or not there is any psychiatric reason to explain why the Court Orders for contact have not been obtempered; and

(c) Whether the Defender is suffering from a psychiatric condition which adversely affects her ability as a parent, and if so, the likely effect of that on the child is agreed.

35. At Edinburgh Sheriff Court on 14 December 2020 Sheriff Stirling appointed the Curatrix *ad litem* for the Defender/Respondent to lodge a Minute for recall of her appointment.

36. At Edinburgh Sheriff Court on 6 January 2021 Sheriff Holligan fixed a court timetable for answers and adjustments.

37. At Edinburgh Sheriff Court on 15 February 2021 Sheriff Holligan closed the Minute for Contempt Record and allowed a Proof.

38. At Edinburgh Sheriff Court on 17 March 2021 Sheriff Flinn made orders relative to the conduct and management of the proof .

39. At Edinburgh Sheriff Court on 8 April 2021 Sheriff Corke ordered a Joint Minute of Admissions to be lodged and reserved the question of relevance of witnesses or documents

to further cause and continued consideration of the verbal motion made by the defender that the child give evidence.

40. At Edinburgh Sheriff Court on 20 April 2021 Sheriff Corke refused the Defender/Respondents notice for a child witness and ordained the Curator *ad litem* for the child to relay the child's views.

41. At Edinburgh Sheriff Court on 23 April 2021 Sheriff Corke ordered the Curator *ad litem* to take the child's views and prepare a short report and continued the issue admissibility.

42. The Curator *ad litem* prepared a report regarding his meeting with the child, the discussions he had with the child, the child's views and the Curator *ad litem* assessment of same. Said report which is dated 28th April 2021 is lodged in process.

43. At Edinburgh Sheriff Court on 26 May 2021 Sheriff Sheehan discharged the Pre-Proof Hearing fixed for 10 June 2021 and assigned of new 18 June 2021 on account of the parties agreeing to engage with Jackie Young family psychotherapist to explore the re-introduction of contact and improved communication

44. At Edinburgh Sheriff Court on 3 June 2021 Sheriff Sheehan made an order requiring the pursuer and defender to attend with Jackie Young, family therapist for two initial sessions in order that the viability of family therapy as an alternative to proofs could be ascertained.

45. At Edinburgh Sheriff Court on 18 June 2021 Sheriff Holligan discharged the proof fixed for 28 & 29 June 2021 as the family therapy procedure took longer to begin and there was not enough time for the preparatory work to be done prior to the proof and fixed 6 & 7 July 2021 as a proof.

46. The terms of the emails from Jackie Young, Family Psychotherapist contained in the Second and Third Inventory of Productions for Alasdair Docwra, Curator *ad litem* dated 16 June 2021 and 30 June 2021 are agreed.

At proof on 6 and 7 July 2021 I found the following facts proved:

47. The interlocutor of 25 February 2019, transgressed, is a final order after proof in a contact dispute. It entitles B, the biological father, of the child D:

> "to exercise Contact with D, to take place for a period of eight weeks at a Contact Centre thereafter, for Contact outwith the Contact Centre for a period of two hours per fortnight, such Contact to be supervised by such person or persons as the parties may mutually agree and in the event of no agreement, supervision shall be undertaken by the parents of the Pursuer"

48. At the 5 day contact proof in January 2019 the child's biological mother A, opposed direct contact. During the proof A was supported by M her husband. B was supported by P, his father. After the judgment of 25 February 2019 was pronounced, P, as paternal grandfather to D got in touch with M to arrange contact. P had been involved in the court case and wanted direct contact to start in terms of the final order, for the benefit of both B and D. Via text message P arranged for M to telephone him on 1 March 2019. M trusted P. He was on good terms with P and could communicate with him. P covertly recorded the telephone conversation because pre-proof there had been very many prior attempts at arranging contact which had come to nothing and sometimes it was suggested by M that P had misunderstood the arrangements made. On this occasion, P tape-recorded the conversation so there could be no doubt. He did not intend to trap M.

49. The telephone conversation between M and P on 1 March 2019 was transcribed and is contained in production 5/10/1 for the Pursuer. The tape recording of the conversation

was played during the evidence of P. The accuracy of the transcript was not substantially disputed by M during his evidence although he did dispute its meaning in an important respect. Some minor omissions, which the transcriber found inaudible, were noted. The sense, meaning and content of the transcription are discernible from the document itself and when read in the context of the other findings in this case. During the recorded telephone conversation M conveyed to P the views of A and M as husband and wife about the judgment and final order of 25 February 2019. Some of the things M said are the following:

i. "……essentially we knew that it, if it ruled to the point of direct that we would refuse…"

ii. "….so essentially like, the bottom line is that we're not gonna be like, arranging anything with the contact centre and we're not gonna be taking her…."

iii. "….like I said the main thing is to just establish a communication between us and trying to arrange something that's not, that's not direct contact just cos the bottom line is that we're not gonna arrange that, we're not gonna take her……"

iv. "….we're just not cooperating in any way, like I said,……"

When M spoke in the plural he spoke on behalf of himself and A, his wife. A was aware of this joint position and entirely complicit in it.

50. Following the telephone conversation, e-mails were exchanged between the Curator *ad litem* and M. A face-to-face meeting was set up between D's Curator *ad litem* and M on 14 March 2019. At that meeting M presented the Curator *ad litem* with a document which is lodged in process and runs to some 10 pages. It is headed "*Comments from M on Sheriff Holligan's report".* The document contains a series of criticisms identifying issues that according to the author are in dispute or were overlooked by the sheriff in his judgment. The document is headed with the following paragraph:

i. "This is a collation of phrases from the report that A and I disagree with and have thoughts on. This was done to clarify our position as we don't feel that we were truly heard. It is not an attempt to disrespect anyone involved nor to imply any incompetence." Page 2

ii. "Irrelevant to B seeking contact we as a family do not want to stay in Edinburgh for much longer." Page 8

iii. "As far as contact being a part of this, it only makes sense that an indirect approach will be viable as it can ensure there are no gaps during transitioning to a new place and will avoid having to afford large costs and time spent on travelling to meet, or for direct contact to start and then stop again" Page 8

The document ends with the following *"My suggestion":*

> "To negotiate a form of indirect contact between B and D with a direct line between P and myself to find out the boundaries, frequency, content etc."

When M wrote in the plural he wrote on behalf of himself and A, his wife. A was aware of this joint position and entirely complicit in it.

51. Following the meeting the Curator *ad litem* made a contemporaneous entry in his file dated 14 March 2019 in the following terms:

> "Attendance at office with M, who had agreed to come in to see me. Speaking to M about the present situation. Noting with great disappointment that M and A consider the Sheriffs decision to be wrong, and they have no intention of obtempering the decision. They thought that they might be quite interested in indirect contact; they certainly don't intend to accommodate any direct contact. They have family plans which they consider will take them away from Edinburgh, and therefore contact really isn't possible anyway because it does not fit in with their plans. M passed me a bundle of documents which are essentially their criticism of the Sheriffs decision. Prominent amongst these documents is their clear intention to move away from Edinburgh. M has been in touch with P, but simply to discuss with him how indirect contact might work. It is clear that they have no intention of doing direct contact or even indirect."

52. In April 2019 the Minuter returned the case to court in the form of a new Minute seeking interdict of removal of D from the jurisdiction and enhanced parental rights and responsibilities. Thereafter, at a hearing before Sheriff Holligan on 2 July 2019 he pronounced the following order:

"The sheriff, having heard parties' procurators and the curator ad litem and on the joint motion to vary, varies order made in the judgement of 25th February 2019 in respect of the child D born [redacted] 2013 and ad interim orders contact with the said child as follows:

i) on 9th July 2019 the defender's husband [M] will bring the said child to meet her paternal grandparents [P and H] between the hours of 11am and 12 noon at the National Museum of Scotland in Chambers Street, Edinburgh,

ii) on 11th July 2019 the child D shall have contact with the paternal grandparents [P and H] with the defender's husband [M] between the hours of 12 noon and 2pm at the National Museum of Scotland in Chambers Street, Edinburgh,

iii) on 16th July 2019 the child D shall have contact with the paternal grandparents [P and H] and the pursuer [B] between the hours of 12 noon and 2pm, one of the paternal grandparents to collect and return the child to the defender's home,

iv) on 18th July 2019 the child shall have contact with the paternal grandparents [P and H] and the pursuer [B] between the hours of 12 noon and 2pm, one of the paternal grandparents to collect and return the child to the defender's home.

appoints the defender to lodge answers, if so advised, to the pursuer's minute, number 33 of process, within 21 days from this date and continues the cause for a hearing thereon on 5th August 2019 at 10am"

53. There were then three attempts to establish contact with D between 9 July and 18 July 2019. These were initiated to try to establish contact first with P and H [the paternal grandparents], as a bridge to contact with B.

54. On 9 July 2019 D and M met P and H outside the National Museum of Scotland in Edinburgh. M took D there. She was 6 years old at that time. D was upset. The contact did not last more than a few minutes. A was not present. P and H did their best to settle D and get her inside by showing her photographs of times they were together and offering her a cold drink but to no avail. D would not go in the building and the contact was aborted.

55. Two days later on the 11 July 2019 contact was tried again. This time M took D early and met P and H in the café. P and H were able to initiate the contact. M's role was to supervise. D engaged very well with her grandparents and the contact session was positive with D making a strong physical bond with P, climbing on his shoulders holding hands, being relaxed and showing P and H her favourite places in the museum.

56. On 16 July 2019 P and H went to D's home to collect her. When they were outside they were told by phone that D did not want to come to contact. The contact was aborted.

57 On 18 July 2019 contact was again tried and P and H went to A and M's home to collect D for a contact session. P went inside. D appeared upset. She said she would not go and didn't want to see B. The visit terminated in acrimonious circumstances. P was accused by A and M of not having D's best interests at heart. P left when asked to go.

58. There has been various attempts to organise indirect contact since July 2019 and B has not seen D since 2018.

The Issue

[1] A and B were in a 9 month relationship. It became toxic. They had one child D born in 2013. A cannot bear to be in the same room as B. Both A and B have mental health issues. A has some physical health issues. A has now married M. They have a baby called E. B wants to see his daughter D. The parents, despite 6 years of court process could not agree that. A proof was heard before Sheriff Holligan. He heard evidence from all interested parties over 5 days in January 2019. He ordered direct contact to B with his daughter D in a written judgment on 25 February 2019. That did not take place. B now petitions the court for an order for A to be found in contempt of court and for her to be punished for her contempt because he says she has no intention of allowing him direct contact with D and

wilfully frustrates the court order at every turn. A denies she is in wilful contempt of the order. Her position is that both she and M have tried to encourage D to go for contact but she will not go. I heard a Webex proof on 6, 7 and 9 July 2021 on the question of contempt of court. I note some of the salient aspects of the evidence below but it is not comprehensive and is only my note of what was said. It is bound to be incomplete. I hope it is accurate in the main. I should note that because A cannot bear to be in the same room as B, B followed the proof from Mr Fairgrieve's office but did not screen share at any time and was not seen by A or me. He did not give evidence. The proof was allocated to me on Friday 2 July 2021. I was told that a motion was heard by the court to convert the Webex contempt proof to a socially distanced proof in person. That motion was refused. I have had no dealings with the case prior to 6 July 2019.

The Webex Proof

The Pursuer and Minuter's proof

P

[2] P gave evidence. He is the father of B. He explained he was retired. He had been Head of a Physics Department at a secondary school and his wife had been a Headmistress. He adopted his affidavit in which he described the background to the case, the telephone conversation on 1 March 2019 and the three contacts in July 2019. This affidavit evidence was supplemented by oral testimony. He said there had been a long history of aborted contacts. Sometimes with just hours or minutes to go before they were scheduled. This was before the proof in January 2019. He attended the proof. He said the failure to establish contact was very painful for himself and his wife but especially for B his son. He said his gut feeling was that contact would not go ahead after the proof. However, he was prepared

to try and establish contact first to D with his wife H and that then progressing to contact for B. He said he and his wife were prepared to supervise contact. He was suspicious because of the history of unsuccessful contact pre-proof. He explained that texts passed between himself and M after the judgment of 25 February then M phoned him on 1 March. P said he recorded the call covertly because in the past it was said he had got dates times and details wrong about possible contact arrangements that then fell through, so he wanted to be sure about the details. It was not a trap but intended to be an *aide memoire.* The tape was played during his evidence and he spoke to the content and accuracy of the transcript. The tape was objected to. [I allowed the evidence subject to competence and relevance but counsel later withdrew her objection during submissions, rightly, in my view, standing the decision in *Sutherland* v *HMA* [2020] UKSC 32 on appeal from [2019] HCJAC 61] P said he was shocked by what M was suggesting on the tape. He was surprised by the sudden shift to indirect contact away from the sheriff's decision. Part of what is said in the transcript/call is:

i. "……essentially we knew that it, if it ruled to the point of direct that we would refuse…"

ii. "….so essentially like, the bottom line is that we're not gonna be like, arranging anything with the contact centre and we're not gonna be taking her…."

iii. "….like I said the main thing is to just establish a communication between us and trying to arrange something that's not, that's not direct contact just cos the bottom line is that we're not gonna arrange that, we're not gonna take her……"

iv. "….we're just not cooperating in any way, like I said,……"

[3] In cross-examination by Mr Cheyne, P identified the voice on the tape as M and said he understood M to be referring to A when he spoke in the plural using terms like "we" and "our". Ms Wild in cross-examination asked if he knew A had medical problems. He said he knew she had issues. He said he thought A and M had no intention of carrying out the court order. He conceded that A and M were possibly in shock after the judgment. In fact, he said

they were all in shock (I took him to mean all those affected by the case) with the whole process of proof and pre-proof. He accepted when put to him that M had assisted in arranging 2 contacts at the museum by bringing D there. He said somehow A had got the wrong impression about the second contact [11 July 2019] which he said was delightful. A had texted him about the second contact which she said had not gone well. This was untrue he said. In fact it went extremely well. He described it as a delight and a joy to be with D who clearly settled and bonded with her grandparents and enjoyed the experience. She was climbing on his shoulders with great enthusiasm, holding him by the hand unprompted and showing her grandparents her favourite places in the museum. He said that the contact of 16 July was called off by A and that at the aborted contact of 18 July 2019, when he went to the house with H to collect D, he was told by A that the contact of 11th July had gone badly. He couldn't understand that. He was disappointed M did not explain how well the contact went. M acted as a supervisor at contact. At the museum he was constantly looking at his watch. The witness recalled an occasion at one pre-proof contact when he went on a child's roundabout with D and M came on as well. He said M must have reappraised his view of how successful the contact was on 11 July. Mr Fairgrieve indicated that was all the evidence he intended to call but *ab ante* adopted the evidence of the Curator *ad litem,* who was then called by Mr Cheyne.

The Curator ad litem and Party Minuter's Proof

Alistair Docwra Curator ad litem to the child D

[4] The Curator *ad litem* adopted the terms of his affidavit. He said he worked within Family Law for thirty-four years. As part of his role as a Family Law solicitor, he is appointed as a Child Welfare Reporter and also Curator in cases in relation to children. In

addition, he is also appointed as a Safeguarder and Curator in cases that involve adults who lack capacity. He explained he has held these offices for at least twenty-five years. He has been involved in this case about D since in or around early 2014. He was originally appointed Child Welfare Reporter. He was appointed Curator *ad litem* to D on or about 9 November 2015. He spoke to parts of his affidavit. He explained that at the meeting of 14 March 2019 M was "arrogant and imperious". He was taken to para 4 of his affidavit in which he stated:

> "The issues around the pursuer having contact with D were ultimately decided following a proof which took place before Sheriff Holligan in January/February 2019. Sheriff Holligan decided that, having regard to D's welfare, there ought to be contact between B and D. Further, in the whole of D's circumstances, it was better that an order be made than no order be made. The Sheriff also awarded limited parental rights and responsibilities. Sheriff Holligan's Judgement is detailed and carefully considered. Notwithstanding the cautious approach adopted by the Sheriff regarding the reintroduction and development of contact between B and D, contact has never taken place as per the decree. My involvement as D's curator has continued as provided for in Sheriff Holligan's Judgement and also following service of the Minutes that have been lodged in this case."

In his affidavit at para 5 the affiant stated:

> "Sheriff Holligan, in his Judgement, made a finding in fact that contact between B and D had been successful, and further, that activities have been undertaken. D has been happy to see B, albeit latterly she was reluctant to attend. This accords with my own observations of contact. The last direct contact involving B and D took place in February 2018 at the museum in Chamber Street, Edinburgh. The contact between D and B that I observed on that occasion was positive. The meeting between D and her dad was a very happy one. I observed D and B getting on well together. There was no indication that D was scared of her father. I left the visit feeling quite positive that such progress had been made. All was well. I had no cause for concern. I was very surprised, therefore, when contact ceased operating. I was also very surprised to learn that D was stating that she was frightened of her father. It seemed to me that something had had to have happened in the period between the last contact visit and D making such statements. I saw nothing during the many contacts I observed that suggested D was frightened of her father or, indeed, that B had behaved in a way to alienate or scare D".

The affiant was then taken to para 10 of the affidavit where he deponed:

> "10. I met with M at my office on 14 March 2019. It became clear to me early on in the meeting that both M and A considered Sheriff Holligan's decision to be wrong and, further that they had no intention of obtempering the decision. M advised that they might be quite interested in arranging indirect contact but they had no intention of accommodating any direct contact. I was told that the family had plans which they considered would take them away from Edinburgh and, in such circumstances, contact wasn't really possible as it did not fit in with their plans. M passed to me a document which ran to ten pages. This document was essentially their criticism of Sheriff Holligan's Judgement. It was clear from that document that M and A intended to move away from Edinburgh with their children."

The witness then spoke to his file note for this meeting. He said certain possible cities were mentioned by M as places the family would move to, Liverpool being one of them. He formed the impression that the move was imminent. He said that M indicated contact wasn't really possible because the family were moving away. The witness said he was annoyed. He had seen contact in excess of 5 occasions between B and D. He said he met A on many occasions to discuss contact between D and B. However A herself had never witnessed contact between B and D. He said he couldn't explain why the mother had set her face against contact and the only go between was M. He said he could see no basis for criticising the sheriff's judgment. He said the child benefits greatly from her relationship with the father whom he described as "bright, intelligent and amusing". He said that at contacts B had turned up with "games to play and stories to tell". He was referred to para [41] of the judgment of Sheriff Holligan which states:

> "…..The defender (A) and M consider that A's marriage to M and the birth of [their own child E (D's younger sister)] combine to form what they consider to be a family unit and, it appears to me, they consider that B has no role to play in that unit. M has expressed a wish to adopt D with the result of excluding B permanently from D's life."

In cross-examination, by Mr Fairgrieve, he described a vignette which occurred during one of the contacts at the museum where B has held D up in the rooftop garden terrace above the

planted "flowers of Scotland" in their baskets, to see the Edinburgh skyline being careful to hold her safely away from the edge of the balcony, thereby showing risk awareness and love and affection for the child. He also described an occasion in April 2021 when he met with D on the Meadows and she showed curiosity about her father. The Curator was confident that if supported and encouraged the child would see her father. He assumed she was dissuaded from seeing her father. The child would benefit greatly from maintaining a relationship with her father.

[5] In cross-examination by MS Wild, he explained that A's solicitor Lucy Millard withdrew from acting for her after the proof. He said M and A grew distant from him because of his evidence at the proof. At the meeting of 14 March 2019 both he and M were "blunt and civil". He said that after the proof he thought M might come round to accepting the judgment. He thought his relationship with A and M was spoiled because of his evidence at the proof and he thought it was at that time better that others become involved in establishing contact between A and B. He said he thought P and H were good choices to facilitate contact. They were both retired schoolteachers, they understood children and they were interesting personalities. He said that within days of the judgment he was doing his best to get things moving again. He said every attempt was made to set up the contact mechanism Sheriff Holligan had ordered at a contact centre but A "obdurately refused" to engage. The defender [A] "simply refused to contemplate it". He said the contact centres were closed in 2020 because of the pandemic. A book and a card were sent by B and he went through the present with D. She was happy with it. It was a children's encyclopaedia. At that meeting there was some discussion about names. D referred to B as "dad" sometimes and M as "dad" sometimes. She knows and understands that B is her father. He

said he did not believe it was D's determined intention not to see her dad. Mr Cheyne indicated he intended to call no further evidence and closed the Party Minuter's Proof.

The Defender and Respondent's Proof.

A gave evidence

[6] On the second day of the proof A gave evidence by Webex link from her home. Ms Wild asked her 2 questions in chief. Firstly, did she have any professional assistance to set up contact at a contact centre after the judgment, to which the answer was "No" and secondly had she any personal experience of setting up such contact which received the same answer. Thereafter the witness adopted her affidavit.

[7] In cross-examination by Mr Cheyne for the Curator of the child, it was put to the witness that she gave evidence at the proof. She agreed but suggested she was not in a good mental or physical condition and said she "didn't want to say everything". In any event, counsel put it to her in robust terms that she had her say before the sheriff and she got the judgment. The witness agreed. It was put to her she didn't like the decision. The witness prevaricated and said she got the jist of the decision. It was put to her she understood the decision. She said "she was not in a good state of mind and found it hard to take thing in". It was put to her that her mental state didn't prevent her from understanding the terms of the judgment. She said she didn't understand the judgment fully, "in the broad". She was asked if she discussed the judgment with her husband and her lawyer. She said she did. When asked if she had asked her husband to go and see the Curator after the judgment she avoided the question and said "she had a new born and was recovering at the time". When asked if the 10-page document given by M to the Curator represented her views as well as her husbands she said immediately "I don't have any of these documents". This was a

Webex proof and the documents had to be printed off by the witness at her home. After a short adjournment Mr Cheyne resumed. The witness denied that she knew what M was going to discuss with the Curator on 14 March 2019. When it was put to her that she knew full well and discussed what was going to be said to the Curator she again avoided the question and said "I had nothing to say to Mr Docwra". When the terms of the 10-page document were put to the witness she immediately said "I didn't see it", "I didn't read it", "M has his opinions which he wrote down". When it was put to her the contents of the document were her views as well she instantly replied "I cant speak to that. I didn't write it or read it." When asked if she agreed with the content of the 10-page document she parried with the questioner and asked him "if he could go through the document?" When asked if she agreed with the decision of the sheriff she said "I believe there may have been a different decision had it not been for the Curator". She denied she did not make the child ready for contact and said her husband was doing that. She said her lawyer made it clear she should go with the sheriff's decision. When asked why she did not appeal she said she did not know she could appeal and was unfamiliar with the court processes. She said "I don't recall the word appeal being used but Lucy made it clear there was nowhere we could go". She said she was told the terms of the decision must be obeyed. She said she couldn't remember exactly what was said about appeal. She said she had discussions with the grandparents about possible contact at the Edinburgh Christmas Market. It was put to her she didn't want contact to take place, that she sent her husband to the Curator knowing what was in the document and what he would say and that the threat to leave Edinburgh was used against the grandparents. This was all denied.

[8] Mr Fairgrieve cross-examined. Sections of the judgment were put to the witness and it was suggested to the witness she thought the sheriff got it wrong. She avoided the

question and said, "I believe he made his decision based on recommendations". That then became "I didn't agree with aspects of his decision". It was put to her she had no intention of allowing contact. She denied that. When asked why she didn't appeal the decision she said, without a pause or a blush, "…..I didn't know there was an appeal process. I didn't know how that worked". The Curators belief that contact is in the best interests of the child was put to the witness. She said "I believe he is incorrect in a lot of what he is saying". It was put to her that she states in her affidavit that she had medical problems physical and mental at the time of the proof and thereafter. She was asked why there is no medical evidence in this process to vouch that for the period between February and July 2019. She had no answer to give and said she didn't know why. In her affidavit she asserts M was very involved in the meetings. In her affidavit she states she wasn't really taking it all in at the time. She states "When I get really stressed I get confused and it was hard to cope with". She stated she wasn't aware of any conversations between M and P. In the affidavit she says the 10-page document represents M's views alone. She only looked after D and E. She said she didn't understand a lot of the things going on. At the hearing of 2 July 2019 she stated in her affidavit that she was at court though unwell. By this stage Mr Agnew was representing her. She felt forced to agree contact at that stage, she stated in the affidavit. The affidavit says "I wasn't in a great position to argue given my health issues". Following that hearing Mr Agnew stopped acting for her. A great deal of the affidavit deals with events after July 2019, the appointment of the witness's own Curatrix *ad litem* and subsequent attempts to arrange indirect contact and how D has reacted to these. Towards the end of the affidavit the witness says:

> "I never set out to disobey the court order. I feel I have done everything within my capability to encourage D to have contact with B….I kept encouraging D but she kept exploding each time I tried. I didn't feel had (sic) anyone professional around to help

> with D to help when things were becoming very difficult. The idea that I would malevolently disrespect the order of a sheriff horrifies me. I have only reacted to preserve the welfare of my daughter when I have seen how things have developed since the Proof."

With regard to the attempted contacts in July the affidavit gives the affiant's version of events which is that the child did not want to go on 16 July and 18 July. She says there was a scene when P came to the house on 18 July 2019. During cross-examination by Mr Fairgrieve she repeatedly denied she was the author of the 10-page document. She said M took things into his own hands. She denied any knowledge of the telephone conversation of 1 March 2019 and said that M was acting without her permission. She said she now agrees that there should only be indirect contact between B and D. She said that in March 2019 she didn't know that she was meant to set up contact in a contact centre. She didn't know how to do that. She admitted she was written to twice by Mr Fairgrieve's firm to get in touch to organise contact at a contact centre. She did not answer the letters or get in touch with Mr Fairgrieve. She said that after June 2019 when Mr Agnew withdrew she was phoning solicitors to try to get legal representation. She was completely frustrated and could get no legal advice. It was put to her that she would not allow the grandparents to supervise contact but wanted M always to be there. She said "D doesn't have a comfortable relationship with the grandparents" It was then put to her that she heard P in evidence state what had happened at the museum on 11 July 2019 with D "climbing all over him" and having a good time. She said "P was lying about that". I asked her if her evidence was, that P had perjured himself. Without pause or reflection her answer was "Yes". When asked why there was such a change in D at the attempted contact of 18 July she said "D was not coping". She said she had used all sorts of mediums and ways to make D go for contact but it didn't work. It was put to her that she wilfully failed to obey the court order of 25

February. She disagreed. In re-examination she said she did not know why Lucy Millard withdrew from acting for her.

Helen Pryde Curatrix ad litem to A

[8] The Curatrix explained she was appointed on 5 August 2019. Her appointment was terminated in December 2020 after A was independently psychiatrically examined and the need for a curator was found no longer to be necessary. Her evidence related to the various endeavours to commence indirect contact with a view to building on that to establish direct contact well after the final order. She is a very experienced Family Lawyer. She ceased practice in 2010. She has been providing bar reports and acting as Curatrix in family cases for over 20 years. She said she had never heard A discourage D from contact with her father. In cross-examination by Mr Cheyne she explained her role was to protect the interests of the client (A). He asked if she ever suggested the final order should have been appealed, if A was dissatisfied with it. The Curatrix explained that by the time of her involvement the appeal days had lapsed. The focus then was on establishing indirect contact as a precursor to direct contact between D and B. She said that as time passed the child was getting older and they were trying to find a way to start indirect contact. She said A and M didn't like the judgment. She said they mentioned they might appeal but the Curatrix told them they were out of time. She understood that in terms of the court order direct contact had to take place and the grandparents were trying to help with that. She said that by the time she became involved the situation had changed and she favoured indirect contact as the route to direct contact. She couldn't see a way round indirect contact. She never saw a contact between A and B and was only told by A about how D was prepared for contact. It was suggested to her that contact didn't work because A had set her face against

this. The curatrix said she did not get the impression that A "was wholly against direct contact". She said A was confused. She was well aware of what contempt was. Sometimes she was able to reason sometimes not, she said. The Curatrix said she told A what the sanctions were for failure to obey the order. She said all the agents were trying to resolve the problem. She said the child was of an age where she had a view and she didn't want to go for contact. In cross-examination by Mr Fairgrieve, the witness said by the time she became involved the matter had moved on beyond the judgment. She said she told A supervised contact should take place. She said A's capacity to reason fluctuates. The witness said it was her idea to introduce indirect contact as a way to direct contact. The witness said there was an incident between the Curator and herself about who should represent A's views to the court. She said you cannot make a 5 or 6 year old child attend contact if she is completely distressed. It was put to her that the Curator's reports indicated that direct contact did not distress the child. She said "his reports were prior to that". In re-examination she said she had a meeting with D and the Curator and D was delighted with the suggestion of indirect contact.

M

[9] M gave evidence. He adopted his affidavit. He said he met A in November 2015. They moved in together in May 2016. They married in June 2017. They have a child E born in late 2018. There were complications to the pregnancy he states in his affidavit. He said A was "wiped out by the pregnancy" in the affidavit. At the time of the proof A had lost her psychiatric nurse, she was on new medication and her psychiatrist had changed. When the judgment came out, he said the solicitor came round to give them a copy. A was distraught. He says in the affidavit that he took the initiative to call P on 1 March 2019. He thought it

would be best to call P as he "is usually calm". He continued that his concern was that D gets distressed when "*we*" encourage her to try to see B. He deponed in the affidavit that he proposed indirect contact as the way forward. Within a day he got an e mail from the Curator to arrange a meeting with him. He said the Curator was asking if A was going to disobey the court order. He said "I was very careful not to indicate this as being true as I didn't believe it to be the case I could see Alistair *(sic)* (the Curator) was trying to get me to say it was". He says he handed the Curator a document he made which detailed errors of fact in the judgment which was a big concern "…as I believed that if these had been addressed then the sheriff would've made a different decision and was my basis for why I was asking P to consider indirect contact…" The document contained "…..my own views and not A's and she had no role in creating it." The affidavit then relates M's version of what happened at a court hearing in May 2019. He denied there was any truth in the suggestion that he had told the curator the family was moving to England. He narrates a lengthy telephone dispute with P and H on 22 June 2019. He explains his side of what happened at a court hearing on 26 June 2019. He explains that at a child welfare hearing on 2 July 2019 "we" met A's new solicitor Chris Agnew for the first time. During the negotiations that went on before the hearing setting out the timetable and details in the interlocutor of 2 July 2019, he said he did not feel Chris Agnew was representing them properly. He said A didn't feel she made the decision to agree the timetable in the interlocutor but that Chris did. On this occasion M was not allowed to represent A in the courtroom but P was there to represent B. He said that D was unhappy when told about the proposed museum meetings. The affidavit states:

> "Once the order had been made we told D what was going to happen with seeing her grandparents then B. She wasn't happy when we told her. I think she became distressed when we told her."

In the affidavit M explains his version of what happened at the national Museum on 9 July 2019. D was, he says, in the affidavit uncomfortable and upset. P and H tried to reassure her. D according to M said she wanted to go home and didn't want to see P and H. H suggested they go inside and get something to drink. M says he tied to encourage D but she refused. He says various attempts were made by P and H to settle and reassure D including showing pictures they had of her with them when she was happy. This was all to no avail and the attempt at contact failed. The affidavit goes on to describe M's account of the contact of 11 July. He says he went in early to the Museum to the café so that the problems outside the building which occurred on the 9 July would not repeat. He said he reassured D. He said D was misbehaving and acting:

> " …..more childish than her own 6 year old self; hitting the grandparents' hands, scribbling on then ripping up paper napkins and suggesting that her favourite room in the museum was the baby room when typically it is where the animals and tree with animals is on the top floor. Her voice was always more babyish. Speaking higher pitched than usual and with a wide open mouth. This behaviour was ignored and dismissed by P and H."

He makes no mention of the physical bonding between P and D, spoken to by P in his evidence. On the 16 July the affidavit states that D would not get ready for contact that day with P and H. The contact was aborted. On 18 July the affidavit suggests D was again unwilling to go for contact. This time P came into the house. There was an argument between P, A and M, The contact did not take place. The affidavit then describes how the focus moved to indirect contact with the introduction of Helen Pryde as Curatrix for A. The affidavit details the events of 2020 and how the pandemic affected the process. The affidavit recounts what happened at various meetings and D's reaction to a card and present from B.

[10] In cross-examination Mr Cheyne asked M about the 10-page document. M said he and A did not discuss the document other than in broad terms. He didn't show A the

document. He said the document contained observations on the sheriff's judgment. He said "Had the sheriff heard all the evidence he would have made a different decision". He said A was upset by the decision and indirect contact would have been a better way to proceed. He said he himself did not want direct contact between D and B. It was put to him the 10 page document represent both his own and A's views. He denied that. He denied he did not prepare D for contact. He said he took D to the museum twice. It was put to him he wanted to exclude B from contact and that his intention was to move to England, as the curator noted at the time and as is obvious from the 10-page document. He denied that. He explained no one told them they could appeal the judgment. He said his instinct was to settle the case. The sheriff didn't get the whole story. M said he wanted to open a line of communication with P. He said he wanted to open a dialogue with P about indirect contact. Mr Cheyne put it to the witness that what was going on here was B didn't fit into the cosy family unit M had with A, D and E. That was why B was being cut out of contact because the intention was indeed to move to England and adopt D. This was denied.

[11] In cross-examination by Mr Fairgrieve, M said he wrote the document but didn't discuss it with his wife. M accepted that after a 5 day proof the sheriff decided B could have supervised direct contact with D. However, M did not consider that was in D's best interests. M said if D wants to see B that's different. He said it would be better that "we have contact details and if D wants to see B then that's different". With regard to the transcript of the telephone call on 1 March 2019 he said he was not going to deny it. There were some words that were hard to make out. He said he apologised for using the word "refuse" in relation to direct contact. He said he knew there was an order for direct contact and apologised for undermining that. With regard to the museum visit of 11 July 2019 he said P lied to the court about how well that contact went. He said he wanted to adopt D.

That was discussed with A. In re-examination he agreed he was protective of his wife. He said the transcript were his own views not A's and in the telephone call he was speaking for himself. With that Ms Wild closed her Proof.

Submissions

[12] Mr Fairgrieve and Mr Cheyne invited me to make a finding of contempt on the evidence. I was invited to reject the evidence of the alleged contemnor and prefer the evidence of P and the Curator *ad litem's* evidence and reach my decision on the basis of the documents and affidavits lodged. Ms Wild submitted that her client was not proved to be wilfully in contempt of the order. She also suggested the interlocutor of 22 July 2019 was irregular being an order to vary a final order and her client could not be in contempt of an incompetent or irregular order of court [Macphail: *Sheriff Court Practice 3rd ed* 2.19 *Paxton* v *HMA* 1984 SLT 367]

Discussion

Some preliminary issues.

[13] All parties accepted at the outset that the standard of proof was the criminal standard of proof beyond reasonable doubt. I used that standard when considering if the alleged contempt is proved against A. Some discussion took place during submissions about how to deal with the evidential connection between the alleged acts of M and the culpability of A for contempt, if there was contempt at all. The Pursuer and Minuter has raised proceedings against A alone. However, in my opinion, the net could have been cast wider and there would have been no legal bar to M being had up for contempt along with A on the facts averred, if proved. I put that matter aside, as the Minute does not include M *qua*

contemnor. There was some discussion about whether vicarious contempt arose, or could M be liable as agent for A or for acting in association with M. The question of the application of the criminal concert rule to the evidence was discussed. Having considered these questions I am of the opinion that concepts like concert, vicarious liability and agency do not assist. Contempt of court is a jurisdiction *sui generis*. My task is to decide if A is in contempt of court. I have decided that she could be, if there was evidence I accepted to support a finding she was acting in conjunction with her husband M, even though he is not convened as a formal party to the proceedings and is not named in the Minute. M has been very closely connected with the proceedings as he represented A on many occasions during the pre-proof stage of the process. He was never formally appointed as a lay representative of his wife in terms of the rules of court but seems to have appeared to represent her. If a future Minute were thought necessary a contempt could competently, in my opinion, be libelled against him alone even although he is technically a stranger/third party to the action, or while acting with A, if there was evidence to support that.

The witness assessment

[14] I require to make a judgment about the witnesses. I found P to be honest credible and reliable. He answered all the questions he was asked, thoughtfully and with care and deliberation. He was cautious and measured in the evidence he gave. I am sure he is profoundly exasperated by the length of this process in D's case. I also thought he was severely shocked by what M suggested in the telephone call of 1 March 2019. I do not believe he perjured himself before me and it was a grave and irresponsible calumny to suggest he did. The Curator *ad litem* also impressed me. He came over as deeply thoughtful and caring in the responsibility he had undertaken towards D. He was greatly experienced

and clearly desperately anxious to secure a good and lasting positive result for D from the litigation. He gave his evidence in a sincere and compelling manner even to the extent of illustrating what he meant with practical examples like the vignette he volunteered about his observations of the bond he saw between B and D at the rooftop garden of the museum. I accepted the evidence of Helen Pryde, to a point. I do not doubt she was honest and reliable and gave her evidence in a professional way. However, she came into the case after the alleged contempt occurred. I did not consider her evidence assisted me in making my judgment about what happened in this case between 25 February and 18 July 2019. With regard to A, I did not believe her. I found her to be a dishonest and manipulative witness. She gave evidence via Webex from the safety of her own home. I watched her very carefully when she gave her evidence. I am convinced she was rehearsed in her evidence especially to say immediately and repeatedly when asked that she knew nothing about the content of the 10-page document and the phone call of 1 March 2019. She came across as evasive and prevaricative. I think she relished all of the attention this case has given her. I think she is selfish and lacks insight into what is in the best interests of D. She accused P of perjury but in truth she was the perjuress. I think she was entirely complicit in both the telephone call and the 10-page document. With regard to M he struck me as immature and naïve. I believe he is happy to have and cares for D as part of his young family. However, he has no time for the baggage D brings with her in the form of her father B. Understandably he sides with his wife in regards to the rights and wrongs in relation to the toxic relationship she had with B and he may well be exasperated with this case and the length it has taken. However, he lied to me when he said the use of the plural terms in the transcript of the 1 March 2019 and the 10 page document he took to the Curator, had nothing to do with his wife. In the context

of the facts I found proved it is, in fact laughable, to suggest that he did not speak for both himself and A in both documents.

The Finding of Contempt debate

[15] There was discussion about whether the welfare principle enjoyed paramountcy in these proceedings for contempt. In my opinion, at this stage, it does not. The principle that is now primarily engaged is the right of the court to vindicate its own procedure and punish those who wilfully defy or knowingly frustrate the order of the court. Parties referred me to *AB, CD* v *AT* 2015 SC 545 and the decision of Lord Malcolm:

> "29. In Muirhead v Douglas it was made clear that whether a failure to obey a court order amounts to a contempt of court depends upon all the relevant facts and circumstances. The failure is not automatically a contempt. As Lord Cameron said (p 18), 'the position and duties of the parties alleged to be in contempt are necessarily material considerations.' There must be a deliberate lack of respect for or defiance of the authority of the court."

In *Robertson* v *HM Advocate*, a decision by a bench of five judges, the law of contempt was fully considered, as was its relationship to art 10 of the ECHR. The Lord Justice Clerk Gill at 2008 SLT, p1158; 2008 SCCR 20, para 29, of his opinion, said this:

> "Contempt of court is constituted by conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law itself, whether in civil or criminal proceedings (Her Majesty's Advocate v Airs, Lord Justice General Emslie at page 69."

In this regard, the paramountcy principle while always, a material consideration (A v N [Committal Refusal of Contact] (1997) 2FCR 475), is, in matters of contempt, outweighed in favour of the common law principle that the court has a positive duty to vindicate its own

procedures otherwise, the administration of justice would be seriously undermined and might fail completely, in which case litigants would be left without an effective remedy. If there is a motion for punishment by the Minuter, following my finding of contempt, then the welfare principle, in my opinion, is re-engaged.

[16] The final order of 25 February 2019 which is allegedly disobeyed is not merely declaratory but conferred certain limited rights on B. It is in the following terms and entitles B:

> "to exercise Contact with D, to take place for a period of eight weeks at a Contact Centre thereafter, for Contact outwith the Contact Centre for a period of two hours per fortnight, such Contact to be supervised by such person or persons as the parties may mutually agree and in the event of no agreement, supervision shall be undertaken by the parents of the Pursuer"

That order was directive and in my opinion coercive. By that, I mean the order did not simply declare a general right to contact, say at some reasonable time, which in my view would not be enforceable by committal proceedings [Borrie and Lowe: *The Law of Contempt* page 170 6.29 where they quote Lady Hale in *The View from The Court* where she said referring to contact orders and their terms "It is therefore important to take sufficient care to get them right in the first place"]. Instead, this order makes specific provision for contact to take place over 8 weeks, at a contact centre, thereafter for supervised contact out with the contact centre for 2 hours per fortnight to be supervised by a person to be mutually agreed by A and B and failing such agreement by the paternal grandparents P and H to perform that task. The order was clear and unambiguous and as such is enforceable. More than that at Statement of Fact 6 and 7 the Minuter relies on the terms of the interlocutor of 2 July 2019. This order again in my view is clear and unambiguous. That too is a coercive order, which is enforceable by committal proceedings. Further Ms Wild did not suggest to me that these orders were unenforceable through ambiguity or that her client did not understand them.

Rather she argued that A had no professional help to set up a contact session and because of her ill health, she was not wilfully in defiance of the order and had a reasonable excuse. Nor, was it argued, that A had insufficient or inadequate notice of the contempt alleged against her. In my view she has had ample notice.

[16] However, a more fundamental point emerged in this case with relation to the nature of the alleged contempt. Mr Fairgrieve and Mr Cheyne argued, that no matter what the final order and the subsequent variation of the final order were, A had not just failed to obtemper the orders, but significantly, she never had any intention of obeying the orders at all, between 25 February 2019 and 18 July 2019, because A and M did not agree with the judgment that direct contact should be awarded to B. Accordingly, in essence the Minuter alleges, not just, that A failed to obtemper the two orders but underlying that failure was a wilful intent to disobey any order which entitled B to direct contact with D.

[17] Having heard argument on 9 July 2021 I took time to reflect and indicated I would give my judgment on 13 July 2021.

The Decision

[18] I am satisfied beyond a reasonable doubt in this case, on the evidence I heard including the affidavits and productions that A was in contempt of court while acting with her husband M, who is not a party to these proceedings, in that, between 25th February 2019 and 18 July 2019, she deliberately and wilfully refused to obtemper the final order of 25 February 2019 in respect of direct contact awarded to B with D; which contempt was to her certain knowledge and complicity articulated by M (1) to D's paternal grandfather P in a telephone conversation on 1 March 2019 and (2) to D's Curator *ad litem* in a 10 page document at meeting on 14 March 2019.

[19] I find it inconceivable that M was not articulating a joint position between himself and A in the telephone call and the 10 page document. The inference to be drawn from the facts established in this case is not only reasonable but irresistible. I am completely satisfied A was fully complicit in the joint intention to frustrate the final order. The motivation for this contempt is also obvious. The relationship between A and B was toxic. I was told Sheriff Holligan found there was bilateral abuse in the case. There appears to have been a criminal court case in which B pled guilty to an offence and not guilty to others. The precise details do not matter here because I am dealing with contempt by A and not contact for B. For whatever reason this wound between A and B has not healed. The only thing they now have in common is D. A's marriage to M has altered the factual dynamic in the case. M wants to adopt D. If that happened B could be cut out of the picture completely. Life however, is not that simple. B wants a relationship with his daughter and D is curious about him and has responded well to contact with him and his parents. B is not a danger to D. All of these events conspired to create the necessary pre-conditions for A acting with her husband to wilfully defy the final order of the court, frustrate the variation of direct contact contained in the interlocutor of 2 July 2019 and demonstrate quite blatant and egregious contempt of court. Hatred, selfishness, obdurate stubbornness on the part of A, wilful blindness and an ulterior motive on the part of M to adopt D and rid himself of the B problem, in his new family, have all combined to drive this contempt. Having reached the conclusion beyond reasonable doubt that there was clear contempt of court, I considered the submission Ms Wild made that there was a reasonable excuse based on medical grounds and the contempt was not wilful. I asked, as did Mr Fairgrieve, where was this medical evidence in relation to the period between 25 February 2019 and 18 July 2019? Ms Wild said there was none and the matter appears to have been overlooked, both by her and those

instructing her. That rather kind conclusion is not one shared by me. The evidence is not there because it does not exist. There is no reasonable medical excuse in this case or none placed before the court beyond the bald assertions of A and M about A's health and psychological condition. Accordingly, I remain clear in my conclusion that the conduct complained of was deliberate and wilful. I touch on the motives later. Further, I did not consider A needed any professional help to set up a contact visit at a contact centre. I believe she simply did not engage with the process envisaged by the final order because she did not agree with it and was prepared to defy it with M.

[20] Ms Wild suggested that the order of 2 July was incompetent or at least irregular. At first blush, I thought there might be something in this. However Mr Fairgrieve informed me that in April 2019 a Minute was lodged seeking interdict because of the fear was that A and M were about to relocate to Liverpool or Manchester. The Minute also sought extended parental rights and responsibilities for B. I have seen the Minute and it seeks parental rights and responsibilities in terms of sections 1(1)(a), (b) and (d) and sections (2)(1)(b) and (d) of the Children (Scotland) Act 1995. In terms of s 11(2)(d) of that Act the court has a wide discretion to grant such contact orders as it considers fit, in the circumstances of the case. I am conscious that it might be said that albeit the court has a wide discretion to make orders there was on the facts of this case no material change which justified making a variation of the final order, so soon after 25 February 2019, accordingly the interlocutor of 2 July 2019 was incompetent or at the very least irregular. For reasons I give later I am not persuaded that the variation of 2 July 2019 is material to the determination of the breach, whatever its status.

[21] However, what can be said is that there was no material change in the position with regard to D or contact between 25 February 2019 and 2 July 2019. All that had happened, in

my judgement, is that A and M had wilfully defied the final order and stated they intended moving south. As was discussed during submissions what has happened in this case, is that the sensible child-centric managerialism and flexibility which is now a characteristic of modern Scottish family law proceedings spilled over into the post final order stage of the process. After the final order what should have happened is that it should have been obeyed or appealed. Neither of these things happened. If it is not obeyed it must be enforced or varied. In this case there was no basis for variation. A and M simply refused to comply and threatened to quit the jurisdiction. There was a basis for an interdict prohibiting the child being removed from the jurisdiction and that was granted. Then, after the failure of the scheme set out in the interlocutor of 2 July 2019, it seems to me, a variety of further attempts were made to negotiate a post final order contact settlement involving the appointment of a Curatrix for A who favoured indirect contact and ignored the final order and sundry other further procedures articulated in the Joint Minute. All of this I have no doubt, was done with the best of intentions but as is well known, the road to hell is paved with good intentions. What ought to have happened but didn't, is that a Minute for contempt should have been lodged immediately the intention of A became obvious and in my view that was on 1 March 2019 after the phone call with P. Certainly by the meeting with the Curator it was as plain as a pikestaff that something was awry. By 18 July 2019 and the failure of 2 July scheme it was blindingly obvious that contempt was afoot. However, the Minute for Contempt was not lodged until March 2020. I raised this with Mr Fairgrieve. He acknowledged the Minute could have been lodged earlier. Now, more than 2 years have elapsed since the final order was deliberately disobeyed. All the while D has been subject to the jurisdiction of the court and her father has not had contact with her since 2018 for no good reason that I can discern.

[22] The conduct of A in this case abetted by M, in my view, gives organisations like Fathers for Justice and Families Need Fathers a good name because what is going on here is A and M are alienating D from her father. Throw into the mix the terrible systemic problems caused to court process and the management of cases during a pandemic, including the necessary closure of contact centres on public health grounds and it is even worse. Little wonder P might feel exasperated by what is happening. Prolonged court process and never ending delay suit A. She is happy hiding in the safety of a Webex proof at home with chaos whipping around the best interests of D. That in my view aggravates the contempt. None of this reflects well on A or M but as I say, I am dealing with contempt not contact.

[23] Part of the alleged contempt was an assertion by the Minuter, in argument and in the averments at Statement 7 that A did nothing to encourage the child to attend for contact and failed to promote contact. The failure is not focused in the crave of the Minute, that A was also in contempt by her wilful failure to prepare and support D properly for direct contact in terms of the interlocutor of 2 July 2019. There are procedural problems with this aspect of the Minuter's case. In a Minute for Contempt the responsibility for framing precisely the specific terms of the alleged contempt falls to the Minuter. The contempt must be clear and unambiguously spelt out in the crave. This case is a wilful failure to obey a court order contempt. Therefore, the contempt will largely be defined by the explicit terms of the order infringed. I cannot agree that a failure by A to properly prepare and promote contact withstands scrutiny as a potential contempt on these pleadings for a number of reasons. Firstly, such an obligation is not explicitly imposed of the final order. It is implicit. Secondly, it is not clear exactly what failure to prepare D for direct contact means or what is involved in the suggested parental duty to encourage contact with estranged parents and as

I indicate the nature of a contempt must be clear and unambiguous. Accordingly, I cannot include that aspect of the conduct complained about within the finding of contempt I have made. The matter does not end there. While that chapter of the evidence, relating to the averred failure to prepare the child for and positively promote contact, which relates to the implementation of the interlocutor of 2 July 2019, as distinct from the final order, cannot, in my view, on these pleadings, as focused framed and averred, result in a finding of contempt, I did find the evidence relating to the contact such as it was between 9 July and 18 July 2019 useful to enable me to confirm my view, with regard to the underlying issue of wilful contempt, on the part of A in relation to the final order. Failure to promote and encourage contact is bad parenting but on these pleadings I cannot conclude it amounts to a specific contempt of court although it is indicative of an underlying contemptuous attitude to the implementation of the final order which technically is where any finding of contempt must lie because of the way the final order is constructed and the crave in the Minute is framed.

The hearing of 13 July 2021

[22] At today's hearing I gave my judgment and asked Mr Fairgrieve what further procedure he envisaged. He indicated he thought it was for the court to decide that question. In the case of contempt in the face of the court where the judge observes the contempt, that is true. Here however, the process is driven by Minute and evidence has been led resulting in a judicial finding of contempt. In my opinion, in such cases there is a residual locus, which lies with the Minuter, to prosecute the Minute to the pain of punishment, subject to judicial oversight, should the Minuter be so inclined. Strategically it may well suit the Minuter's purpose to lie content with a finding. Mr Fairgrieve during discussion indicated that I might consider deferring punishment to give the contemnor an

opportunity to purge her contempt by engaging with the contact/variation process, which remains outstanding. The problem with that idea is that it falls foul of the decision in *CM* v *SM* [2017] CSIH 1 where the "Sword of Damocles" approach was specifically disapproved. I agree that approach is inappropriate in a contempt case. If punishment is to be imposed it is essential that it is swift and effective not long and lingering. Mr Cheyne for his part indicated that the Curator *ad litem* would rest content with the finding of contempt. Mr Barr indicated that there was a wider picture to consider in mitigation and the contemnor was the mother of two small children who rely on her. In the final analysis, Mr Fairgrieve, indicated that he too was content that the matter rest with a finding.

Disposal

[23] Punishment for civil contempt has been severely restrained since the Contempt of Court Act 1981 was introduced. In terms of s15 of the Act:

> "The maximum penalty which may be imposed by way of imprisonment or fine for contempt of court in Scottish proceedings shall be two years' imprisonment or a fine or both, except that—
>
> (a)
>
> where the contempt is dealt with by the sheriff in the course of or in connection with proceedings other than criminal proceedings on indictment, such penalty shall not exceed three months' imprisonment or a fine of [level 4 on the standard scale] or both; and
>
> (b)
>
> where the contempt is dealt with by the district court, such penalty shall not exceed sixty days' imprisonment or a fine of [level 4 on the standard scale] or both."

Before the statutory cap was introduced, punishment was unregulated but limited by the common law.

[24] In a case such as the present, I am content with Mr Fairgrieve's measured decision not to move for punishment, given the length of time that has elapsed since the contempt occurred.

[25] I did however explain to both A and M that if further orders of the court are not obeyed they could both be brought before the court and face being committed to prison for contempt for up to 90 days. I also informed them that such a course of action while rare was not unknown and could be repeated, subject to the bar of oppression, if the contempt persisted. I am satisfied that A (and M) have been sufficiently punished by the stress of the contempt process, for now. Mr Fairgrieve and Mr Cheyne are free to use the finding of contempt in future proceedings with regard to contact by B to D. I was told the Minute for Variation of Sheriff Holligan's final order remains live and further procedure will be set down for that. In my judgement that should be given priority standing the protracted history of this case.