SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2021] SCGLW 012

F935/13

JUDGMENT OF SHERIFF ANDREW M MACKIE

in the cause

M

Pursuer and Respondent

against

M

Defender and Minuter

Glasgow 17 April 2018

The Sheriff, having resumed consideration of the cause, Finds the following facts admitted or proved:

(1) The parties were formerly in a relationship for a period of 5 or 6 years prior to separating in late 2010/early 2011. For most of that time they resided in Glasgow.

(2) The parties are the parents of the children David (a pseudonym), born in 2009 and Sarah (a pseudonym), born in 2010 (hereafter "the said children").

(3) The said children live with the defender and minuter (hereafter referred to as "the minuter"). The minuter and the said children are habitually resident within the jurisdiction of this court. Glasgow Sheriff Court has jurisdiction.

(4) No permanence order (as defined in section 80(2) of the Adoption and Children (Scotland) Act 2007) is in force in respect of either of the said children.

(5) During parties' relationship the pursuer and respondent (hereafter referred to as "the respondent") was verbally and physically abusive towards the minuter. On one occasion the minuter required hospital treatment after an assault upon her by the respondent. The minuter required to use crutches for a period of time after said assault.

(6) During parties' relationship, while they lived in Glasgow, the respondent was involved in the supply of illegal drugs. He has no criminal conviction in respect of same. The minuter was aware of this conduct. After David's birth, the respondent relocated from Glasgow to Fife for his own safety. As a consequence of his drug dealing the respondent's safety was under threat from a drug dealer to whom the respondent owed around £14,500. The minuter was aware of the reason for the respondent relocating to Fife. The minuter remained in Glasgow with David where she lived with her parents.

(7) After the respondent relocated to Fife the parties' relationship continued, initially. The minuter travelled to Fife with David and stayed with the respondent there each alternate weekend. After Sarah was born the minuter travelled to Fife with the said children and stayed with the respondent there each alternate weekend.

(8) Parties' relationship subsequently broke down due to the respondent being unfaithful. Following the breakdown of parties' relationship the respondent sought contact with the said children. The minuter was agreeable to the respondent exercising contact with the said children in Glasgow. The respondent did not wish to travel to Glasgow to exercise contact with the said children at that time as he still feared for his safety. No contact arrangements were agreed by the parties.

(9) In the summer of 2013, more than two years after he last had contact with the said children, the respondent raised an action in this court in which he sought orders under section 11 of the Children (Scotland) Act 1995 (hereafter referred to as "said 1995 Act") in respect of the said children. The orders sought by the respondent included orders for contact with the said children.

(10) Following receipt of a bar report from Ms S, solicitor, in January 2014, the court made an order for interim contact between the respondent and the said children on a fortnightly basis at a contact centre. No contact took place between the respondent and the child Sarah following the making of said interim order.

(11) During 2014 the respondent had two contact visits with the child David at a contact centre. Thereafter, direct contact between the respondent and David was stopped due to the upset being caused to David by said contact.

(12) The said proceedings were thereafter concluded on 3 November 2014 by decree being granted finding the respondent entitled to letterbox contact with the said children. Contact between the respondent and the said children is presently regulated by said decree of this court.

(13) The respondent has had no direct contact with the child Sarah since around early 2011. The respondent has had no direct contact with the child David since the two contact visits at the contact centre during 2014.

(14) The respondent has parental responsibilities and parental rights in respect of the child David but not in respect of the child Sarah. The respondent is not named as her father on Sarah's birth certificate. The respondent craved parental responsibilities and parental rights in respect of Sarah in the action which he raised

during 2013. His said crave was dismissed on 3 November 2014 when decree was granted in his favour in respect of letterbox contact with the said children.

(15) On 16 September 2015, the respondent pled guilty to a contravention of section 1 of the Sexual Offences (Scotland) Act 2009. He pled guilty to the rape of a former partner. Said former partner is the mother of the respondent's youngest child who is now aged three years. On 16 September 2015 the respondent was sentenced to a period of imprisonment of 3 years and 6 months from that date in respect of said offence.

(16) After the respondent was sentenced in September 2015 the minuter asked the respondent's mother about the respondent's conviction. The respondent's mother denied that the respondent had been convicted of rape despite knowing that the respondent had been convicted of rape. The respondent's mother does not believe the respondent is guilty of raping his former partner, despite the respondent having pled guilty to the charge.

(17) On 20 May 2016, the minuter lodged a minute with this court seeking an order in terms of section 11(2)(a) of said 1995 Act depriving the respondent of his parental responsibilities and parental rights in relation to said child David. The minuter also sought the recall of the order of 3 November 2014 finding the respondent entitled to letterbox contact with the said children. Warrant for intimation of said minute was granted on 26 May 2016 and intimation upon the respondent was effected on 15 June 2016. The respondent thereafter consulted his solicitors in respect of said minute.

(18) Following said consultation with his solicitors, the respondent sent a card addressed to the said children care of their maternal grandfather. The respondent

posted said card around 11 July 2016. This was the first attempt by the respondent to exercise letterbox contact with the said children in terms of said order of the court dated 3 November 2014.

(19) The said card was delivered to the minuter's father. He passed said card on to the minuter. In the card the respondent had written "love you both"; "from daddy"; and "love you millions". The said card also contained pre-printed messages on the front and inside of the card telling the said children that the respondent was thinking of them.

(20) The minuter was shocked to receive said card. She consulted her solicitors for advice. She did not show said card to the said children.

(21) During December 2016 the respondent sent a Christmas card addressed to the said children care of the minuter's father. The minuter's father passed said card on to the minuter who gave it to the said children. The child David said that he did not want to read the card. The minuter told the child David that he needed to read the card. The minuter then read the card to the said children and told them that it was from (the respondent). The child David thereafter put said card in the bin. The minuter retrieved the card from the bin and has kept it for the said children. Following receipt of said card the child David became angry and kicked furniture in his home. The child David experienced some nightmares following receipt of said card.

(22) During March 2017, the respondent sent a birthday card to the child Sarah. The minuter gave the card to Sarah who read the card and then put it in the bin. Sarah displayed no emotional reaction to receipt of said birthday card.

(23) During April 2017, the respondent sent a birthday card addressed to the child David care of the minuter's father who passed said card on to the minuter. The minuter gave said card to David. David became upset and cried after receiving said birthday card from the respondent in April 2017.

(24) When the minuter gave David said birthday card David asked her why she had to keep giving him the cards from the respondent when David did not want them. The minuter told the said child that she had to give him the cards, otherwise she might get into trouble. The minuter's father told David that the minuter had to give him the cards or she would get into trouble with the police.

(25) The respondent has sent no further cards, letters or other items to the said children since April 2017. He agreed, at the court hearing on 19 January 2018, not to send anything else to the said children, pending judgment being issued in this case.

(26) The respondent was released from custody, on licence, on 15 June 2017. While on licence he was prosecuted in respect of the possession of cannabis. He was convicted of said offence. His licence was recalled as a result and he was returned to custody on 10 October 2017. The respondent was due to attend a parole hearing on 17 January 2018 but applied to have his parole hearing postponed on the basis that the evidential hearing in these proceedings had been assigned for 17 and 18 January 2018. His application was granted and the respondent's parole hearing was postponed until 6 February 2018.

(27) The respondent has a number of other previous convictions at summary and solemn level. During 2014 the said Ms S carried out some investigations and obtained a schedule of the respondent's criminal convictions from Police Scotland. Item 12 of process is the respondent's schedule of criminal convictions for the period

from August 2003 until April 2014. Said schedule discloses that the respondent was convicted of more than twenty criminal offences during said period, including such offences as breach of the peace, possession of drugs and weapons, theft by housebreaking and assault and robbery.

(28) On 13 March 2017, the court appointed Ms S as child welfare reporter and instructed Ms S to obtain the views of the child David in respect of contact with the respondent. Ms S completed her report on 15 May 2017 and lodged it with the court on 16 May 2017. Said report, comprising number 18 of process, represents an accurate account of the views expressed by David to Ms S.

(29) David told Ms S that he wanted the respondent to leave him alone; that he did not want to see the respondent again; and that he did not want to receive anything from him, such as cards. David told Ms S that he has a sore feeling in his stomach when he thinks about the respondent and that the respondent had driven past said child's home on a motor bike and that the said child had been frightened. David told Ms S that he worries about the respondent coming to his home.

(30) During his discussions with Ms S David began to curl up into the foetal position when talking about the respondent.

(31) During August 2016 the child David was referred by his Primary School for a play therapy assessment. He was referred to play therapy as he sometimes seemed to be having difficulties at school with his peers and appeared very needy of his class teacher. His class teacher also felt that David was preoccupied at times.

(32) Ms McL, a play therapist with a Link Project, met with David on three occasions to enable her to prepare a play therapy assessment in respect of David.

During said assessment process David told Ms McL that he sometimes had dreams which kept him awake or woke him up and so he found it hard to sleep.

(33) Ms McL's recommendation was that David be offered play therapy sessions and David himself indicated to Ms McL during the assessment process that he wished to continue to attend play therapy.

(34) Between October 2016 and June 2017 David attended 28 play therapy sessions with Ms McL. He did not mention the respondent during any of said play therapy sessions despite Ms McL having allowed him the opportunity so to do and despite Ms McL having encouraged him so to do. During one or two of said sessions David referred to the minuter's current partner as his dad.

(35) During their sessions Ms McL noted some regression in David's behaviour after December 2016.

(36) Since the parties separated the respondent has not sought to exercise his parental rights in respect of the child David, except through these proceedings, and has not sought to interfere with the exercise by the minuter of her parental rights in respect of the child David.

(37) On one occasion in 2015, prior to his imprisonment on 16 September, while riding one of his motor bikes, the respondent saw David in the street close to the home of his maternal grandfather. The respondent did not attempt to speak to David.

(38) The respondent also saw the said children in the street on two occasions during 2017 after his release from custody, on licence. On one of these occasions he saw the said children close to his mother's home. The respondent did not attempt to speak to the said children on these occasions.

(39) The minuter believes that the respondent should be deprived of his parental rights and his parental responsibilities in respect of David because the respondent is a convicted rapist.

(40) The said children are unaware of the respondent's conviction for rape and his imprisonment.

FINDS IN FACT AND IN LAW:

(1) It is not in the best interests of the said child David for the respondent to have letterbox contact with the said child.

(2) It is better for the said child David that an order be made reducing the respondent's contact with the said child to nil than that no order be made.

(3) It is in the best interests of the said child David for the respondent's parental responsibilities and parental rights in respect of the said child to be suspended.

(4) It is better for the said child David that an order be granted suspending the respondent's parental responsibilities and parental rights in respect of the said child than that no order be made.

(5) It is not in best interests of the said child Sarah for the order for letterbox contact between the respondent and the said child to be varied to nil.

(6) It is not better for the said child Sarah that the order for letterbox contact in favour of the respondent be varied to nil than that no order be made.

THEREFORE, (1) Grants crave one for the minuter insofar as (i) suspends the respondent's parental responsibilities in respect of the child David M (born 2009) in terms of sections 1(1)(a), (b), (c) and (d) of the Children (Scotland) Act 1995 and (ii) suspends the respondent's

parental rights in respect of the said child David M (born 2009) in terms of sections 2(1)(a), (b), (c) and (d) of said 1995 Act; (2) Sustains the first plea-in-law for the minuter to the foregoing extent; (3) Repels the first plea-in-law for the respondent insofar as inconsistent with said suspension; (4) Grants crave two for the minuter but only insofar as Varies the order of court dated 3 November 2014 by directing that the respondent shall no longer be entitled to letterbox contact with the child David and by varying the contact to which the respondent is entitled in terms of said order in respect of said child David to nil; (5) Sustains the second plea-in-law for the minuter insofar as said plea-in-law relates to the said child David; (6) Repels the second plea-in-law for the respondent insofar as it relates to the said child David; (7) Refuses the second crave for the minuter insofar as it relates to the order for letterbox contact between the respondent and the child Sarah; (8) Repels the minuter's second plea-in-law insofar as it relates to contact between the respondent and the child Sarah; (9) Sustains the respondent's second plea-in-law insofar as it relates to contact between the respondent and the child Sarah; and (10) Finds no expenses due to or by either party.

A M Mackie

SHERIFF

NOTE:

[1] I heard evidence in respect of the minute and answers in these proceedings on 18 January 2018. Evidence was led for the minuter from the minuter herself, from the minuter's father and from Ms McL, play therapist with a Link Project. Evidence was led for

the respondent from the respondent himself and from Mrs McG, the respondent's mother. Parties entered into a brief joint minute of admissions, comprising number 19 of process.

[2] A summary of parties' submissions is annexed to this judgment, comprising the Appendix hereto. I have largely preferred the submissions for the minuter to those for the respondent in respect of both craves for the minuter. I have preferred the submissions of the respondent to those of the minuter in respect of the issue of letterbox contact with the child Sarah.

Assessment of Minuter's Witnesses

First witness - The minuter

[3] I found the minuter to be a generally credible and reliable witness. Her evidence was generally clear and consistent. She appeared to have good recall. For the most part she gave her evidence in a calm and straightforward manner. The minuter appeared to give careful consideration to the questions posed by both agents and appeared to be giving straightforward responses. She did not appear to be obviously dissembling during her evidence nor did she appear to be prone to exaggeration.

[4] The minuter generally maintained her composure throughout evidence. She became upset when recounting the verbal and physical abuse to which she had been subjected by the respondent during parties' relationship. The respondent denied ever having assaulted the minuter. I rejected his denials, preferring the evidence of the minuter which I assessed as credible and reliable.

[5] The minuter explained in the course of her evidence that, during parties' relationship, the respondent had had to relocate to Fife because of threats to his personal safety arising from a drug debt which he owed in respect of his involvement in the sale or

supply of illegal drugs. The respondent accepted that this had been the case. The minuter went on to explain that, for a time, parties' relationship had continued after the respondent's relocation. The minuter had travelled to Fife each alternate weekend, initially with the child David and later with both of the said children, to stay with the respondent for the weekend. Parties' relationship ended after the minuter found out that the respondent had been unfaithful.

[6] Following the end of parties' relationship the minuter said that she had not, initially, sought to prevent the respondent from having contact with the said children. She had refused to continue to take the said children to and from Fife for contact with the respondent but had indicated that the respondent could have contact with the said children in Glasgow. The respondent had declined to exercise contact in Glasgow because he continued to fear for his personal safety should he return to the city.

[7] During cross-examination it was put to the minuter that she had denied contact to the respondent after parties' relationship had ended and the respondent had had to raise these proceedings. The minuter denied that was the case and her position is borne out, to some extent, by the respondent's averments in the initial writ lodged with the court on 25 June 2013. In condescendence 3 the respondent avers that the minuter did offer to facilitate contact between the respondent and said children at a contact centre in Glasgow. Although the respondent makes reference to the minuter withdrawing said offer, the respondent also avers that he was not in a position to accept such an offer as he did not consider it would have been safe for him to travel to Glasgow at that time.

[8] I accepted the minuter's evidence in respect of the child David's reactions to receiving cards from the respondent in December 2016 and April 2017. The minuter gave her evidence in this regard without obvious embellishment. Her evidence was that only

David had demonstrated anger and upset following receipt of said cards. The minuter did not seek to suggest that the child Sarah had been upset by receipt of cards in December 2016 and March 2017. In fact, she said, candidly, that Sarah had shown no emotional reaction to receiving the card from the respondent in March 2017.

[9] The minuter's evidence in respect of David's reactions to receiving cards from the respondent was supported, to some extent, by the evidence of Ms McL, the play therapist, who worked with David over a period of around nine months and by the evidence of the minuter's father, Mr M. Ms McL confirmed that David's presentation during play therapy had been more "muted" after Christmas 2016. Mr M confirmed that David had been upset and crying following receipt of the card from the respondent in April 2017.

[10] The respondent's agent submitted that the minute makes no reference to the respondent having sent no letters, cards or other communications to the said children since November 2014. While that is true, it is also true that the respondent did not send any cards or other communications to the said children until after he had received service of the minute in these proceedings on 15 June 2016 and had taken legal advice in respect of same. Accordingly, when the minute was first lodged with the court, David had not received any cards from the respondent and had not yet displayed the concerning behaviours described by the minuter upon receiving same.

[11] The minuter was candid in her evidence as to her motivation for lodging the minute seeking to (i) deprive the respondent of his parental rights and responsibilities in respect of David and (ii) vary the final contact order granted on 3 November 2014 to nil. The minuter summarised her position towards the end of her evidence-in-chief. When asked to outline her concerns about the respondent, in the context of asking the court to deprive him of his parental responsibilities and parental rights in respect of the child David, the minuter said:

> "My concerns are that he's a convicted rapist and who in their right mind would want him to have anything to do with their kids … fair enough he wasn't a rapist before but he is now".

The minuter made it clear, on more than one occasion during her evidence, that her primary motivation for lodging the minute had been the respondent's conviction for raping his former partner.

Second witness for the minuter – the minuter's father

[12] Mr M gave evidence in a calm and clear manner. He appeared to do his best to answer all questions put to him in a straightforward and forthright manner. He did not appear to be confused or to be obviously dissembling at any stage during his evidence. I found Mr M to be a credible and reliable witness.

[13] Mr M described David as usually happy go lucky. However, Mr M was present when the minuter gave David the birthday card from the respondent in April 2017. Mr M confirmed that David became distressed upon receipt of the card and that the child put the card in the bin from where the minuter retrieved it. It was clear from Mr M's evidence that this behaviour was out of character for David. Mr M said that the first time he had seen David "really upset" had been when David had received the birthday card from the respondent.

[14] Mr M's evidence was that the minuter had told David that she had to give him the birthday card and that she had told him the card was from his dad.

[15] Mr M confirmed that, during parties' relationship, he had seen the minuter on crutches at one time and the minuter had told him that she had been assaulted by the respondent. Mr M's evidence appeared balanced and measured and he did not display any

obvious antipathy towards the respondent, notwithstanding his evidence about the assault on the minuter.

Third witness for the minuter – Ms McL, Play Therapist

[16] Ms McL gave her evidence in a calm, clear, straightforward and professional manner. She appeared to have good recall. I found her to be a credible and reliable witness.

[17] Ms McL is a play therapist employed by a Link Project, a charity working in partnership with schools and nurseries in Glasgow. Ms McL has a diploma in play therapy from Strathclyde University. In her role as a play therapist she provides additional emotional support to children attending schools and nurseries in one area of the city who are referred to the service for additional support.

[18] David was referred by his school to the play therapy service in August 2016, prior to any cards from the respondent being given to him. The referral arose out of his behaviour at school, both in the classroom and in the playground. Ms McL carried out an assessment process in respect of the referral. She met with David on three occasions during this process, at the end of which she recommended that David be provided with individual, non-directive play therapy. During the assessment David confirmed that he wished to attend at play therapy.

[19] Ms McL met with David on around 28 occasions, usually weekly, between October 2016 and June 2017. She assessed that David had made progress during therapy sessions between October and December 2016 but that he regressed somewhat after Christmas 2016. Ms McL found that David was more muted during play therapy sessions after Christmas 2016 and that he had, more often, wanted to play games seen as "safer" which did not allow creative or imaginative expression.

[20] Ms McL confirmed that David had told her, during the assessment process, that he found it hard to sleep and that sometimes he had dreams which kept him awake or woke him up.

[21] By June 2017 Ms McL was satisfied that David had done as much as he could in play therapy. Towards the end of June 2017 David told Ms McL that he felt less worried and that he was sleeping better.

Respondent's Witnesses

First witness – the respondent

[22] At times the respondent gave his evidence in a clear and straightforward manner and did not appear to be obviously dissembling. At other times it appeared that the respondent was intentionally dissembling and was an unreliable historian.

[23] During his evidence in respect of his involvement in criminal offences and in respect of his previous convictions, the respondent appeared open and straightforward when answering questions posed by agents and by the court. For the most part, he readily acknowledged his involvement in criminal activity.

[24] However, when he was asked about the minuter's account of domestic violence during parties' relationship, the respondent initially equivocated before going on to make an outright denial. During examination-in-chief he was asked whether he had been violent towards the minuter. Having answered all previous questions in a straightforward and forthright manner, the respondent initially equivocated by saying: "I don't feel that happened" before going to describe parties' relationship as "volatile but never violent". The respondent's agent restated the question, perhaps as a result of the respondent's initial

response being somewhat equivocal. On the second occasion when he was asked whether he had ever been violent to the minuter, the respondent replied "Not at all".

[25] The respondent was then asked about a specific incident which resulted in the minuter sustaining injuries which affected her mobility and required her to use crutches for a period of time. The respondent's account of this incident was wholly unconvincing. He recalled the minuter sustaining an injury to her leg. He said this had been caused when the minuter's jacket got caught in a car door causing the minuter to fall. The respondent was in the car. The respondent said that the minuter had been unhappy that the respondent was going out with a friend and that the parties had had "a discussion on the street" prior to the minuter's jacket being caught in the door of the car driven by the respondent's friend. The respondent denied any knowledge of what had happened after the minuter fell to the ground. He said, in a somewhat offhand manner "I wasn't around to know what happened after that".

[26] The respondent acknowledged that he was aware of the minuter subsequently requiring to mobilise with the use of crutches but said that he did not know how the minuter got the crutches or what had happened to her. I rejected his evidence in respect of this lack of knowledge on his part as implausible. At the time of this incident the parties were in a relationship. The respondent knew what had caused the minuter to fall. His evidence that, although he was aware his partner was on crutches, he did not know how she obtained them or what had happened to her, was not credible.

[27] Further, I rejected the respondent's evidence that, in the period between contact ceasing in 2011 and the raising of the present proceedings in 2013, the minuter did not offer the respondent contact with the said children in Glasgow. The respondent said that such a discussion "never occurred" or he would have come to Glasgow to see the said children. In

fact, in the respondent's initial writ in these proceedings, the respondent confirmed in condescendence 3 that an offer had been made by the minuter to reinstate contact at a contact centre. In the same condescendence the respondent avers that he was granted legal aid and raised proceedings craving contact in early 2012 but subsequently abandoned those proceedings as he was apprehensive that former drug associates residing in Glasgow might confront or assault him were he to travel to Glasgow for court hearings or to exercise contact with the said children.

[28] I rejected the respondent's evidence that the minuter had never offered to facilitate contact between the respondent and the said children in Glasgow. I accepted the minuter's evidence that, in the months after parties' separation, she was happy for the respondent to visit the said children in Glasgow and that she made an offer of contact in Glasgow which the respondent refused. His refusal may have been on the basis of concerns for his personal safety, as the respondent explained during his evidence that those concerns had been sufficiently serious to cause him to relocate to Fife.

[29] By the time the respondent raised the original action in 2013 there had been no contact between the respondent and the said children for a period in excess of two years. I formed the view that the respondent lacked commitment to maintaining contact with the said children during said period. When he was asked about the delay in raising the action the respondent said that he wanted to try to sort contact arrangements out with the minuter. When he was asked what steps he had taken he said simply that it had "never happened".

[30] When he was pressed to say what he had done during this two year period towards maintaining contact with the said children, the respondent said that he had been living with his new partner's parents and had had to focus on getting his own property and moving into a new property with his new partner. It appeared to me that the respondent had lacked

the motivation to pursue the issue of contact for a significant period in the early lives of the said children.

[31] The respondent confirmed that he had attended a contact centre in Glasgow on three occasions during 2014 but that he had only had contact with the child David on two occasions. The respondent was told on the third occasion that the said child was too upset for contact to take place and no further contact took place at said centre due to said child's upset. The respondent volunteered that during the second contact visit the said child wanted to leave but that the visit was not cut short. The respondent was critical of the minuter having been in attendance at the two contact visits which did take place. There had been no communication between the parties and the respondent felt that, when he spoke to David, the child would look at the minuter to see if he could answer and what he could answer. The respondent accepted that David did speak to him "eventually".

[32] The respondent accepted that, following the order of the court being granted on 3 November 2014 allowing letterbox contact between the respondent and the said children, he had sent no cards, letters or other communications to the said children prior to sending a card in July 2016. The respondent accepted that he had sent said card to the said children after he had consulted with his solicitor following service of the minute in these proceedings. The respondent said that he had not sent any previous cards, letters or other communications to the said children because he had been told by his mother that the minuter had said that if anything was sent by the respondent it would be put in the bin and the said children would not receive it.

[33] For the reasons set out below I rejected the evidence of the respondent and that of his mother in this regard. I consider the respondent showed a lack of motivation in maintaining letterbox contact with the said children between November 2014 and service of the minute

in June 2016. It was only after receiving certain legal advice that the respondent began to exercise the letterbox contact which he had been allowed some 20 months before.

[34] I also rejected the respondent's evidence that he did not know whether he had been outside the minuter's home as he did not know the location of her home. I considered his evidence in this regard to be implausible. It was also contradicted by the evidence of his mother. In response to questions from the court, the respondent's mother denied that she had told the respondent the minuter's address but volunteered that he knew her address in any event.

[35] Accordingly, I found the respondent not to be a credible or reliable witness in respect of a number of matters.

Second witness for the respondent – Mrs McG, the respondent's mother

[36] Mrs McG was a partisan witness. Her antipathy towards the minuter was obvious and palpable. At times she was evasive and obstructive during her evidence. On one occasion she sought to mislead the court.

[37] Mrs McG confirmed that, after the parties' relationship ended, she continued to have contact with the said children and that this contact continued for several years. She said initially that the minuter had terminated her contact with the said children after the respondent was sentenced in September 2015. Mrs McG said she was given no explanation for the cessation of contact and that she had no idea why contact stopped.

[38] Subsequently, during her evidence, Mrs McG confirmed that the minuter had, in fact, allowed contact between Mrs McG and the said children to continue until January 2016. Mrs McG also subsequently conceded, reluctantly, that she had lied to the minuter about the respondent's conviction for rape.

[39] During examination-in-chief Mrs McG gave an account of a meeting she had had with the minuter after Halloween in 2017. Her evidence was that, during their meeting, the minuter had said to Mrs McG that Mrs McG should have told the minuter that the respondent had been imprisoned due to an offence of rape. When recounting this meeting Mrs McG appeared to accept that the minuter had previously come to her and asked her about the respondent's conviction and that Mrs McG had lied about it. Mrs McG said that, when the minuter had asked about it, she had told her "No, because there wasn't any truth in it but he still got sentenced for it anyway".

[40] It became clear in the course of her evidence that Mrs McG did not believe the respondent had raped his former partner, despite his guilty plea. Mrs McG said, during cross-examination, that she would be surprised if the respondent had accepted, during his evidence in these proceedings, that he had raped his former partner and went so far as to say that the respondent had pled guilty to the charge of rape as a result of having been blackmailed by his former partner.

[41] During her evidence Mrs McG also said that the respondent had attempted letterbox contact with the said children prior to July 2016, despite the respondent's own evidence that the first card he had sent was in July 2016. It appeared that Mrs McG was prepared to say anything which would show the respondent in a better light. Her insistence that he was not guilty of the rape charge and that he had attempted to exercise letterbox contact with the said children prior to July 2016, despite the respondent's evidence to the contrary, were two examples of such conduct.

[42] In respect of her attempt to mislead the court, during cross examination Mrs McG said, on two occasions, that the minuter had never asked her why the respondent had been imprisoned. In response to questions from the court seeking to clarify this apparent

contradiction with her evidence in chief, Mrs McG departed from her evidence that the minuter had never asked her about the respondent's conviction and imprisonment. However, Mrs McG said that the only time the minuter had asked her about the respondent's custodial sentence had been during their meeting after Halloween 2017.

[43] Given that Mrs McG was asserting that the minuter had not asked her about the respondent's conviction and custodial sentence for a period of more than two years after the imposition of same and given the apparent contradiction of that position with her evidence in chief, I reminded Mrs McG that she was on oath and that she had given an account, during her examination-in-chief, about the minuter asking her about the respondent's conviction at a much earlier time. Mrs McG reflected on her evidence and said that when the respondent was sentenced for rape in September 2015, the minuter had asked Mrs McG if the respondent had been convicted of rape and Mrs McG had denied it.

[44] Despite her earlier evidence that she had been given no explanation for the cessation of contact between herself and the said children and that she had no idea why contact ceased, I concluded that Mrs McG had, in fact, known why the minuter had terminated contact between Mrs McG and the said children. Contact had been terminated by the minuter after she had discovered that Mrs McG had lied to her about the respondent's conviction for a serious sexual offence.

[45] I formed the view that the evidence of Mrs McG was, generally, unreliable and I rejected her evidence that the minuter had told her, around August 2015, that if the respondent sent any cards or other items to the said children that the minuter would put them in the bin and they would not reach the said children. I consider the evidence of Mrs McG in this respect was calculated to seek to justify the failure on the part of the

respondent to exercise letterbox contact with the said children from 3 November 2014 until July 2016.

Discussion

[46] On 20 May 2016, the minuter lodged with the court her minute to vary the final order granted in these proceedings on 3 November 2014. Said final order found the respondent entitled to letterbox contact with the said children. The minuter seeks the recall of the said contact order and seeks an order, in terms of section 11(2)(a) of said 1995 Act, depriving the respondent of all of his parental responsibilities and all of his parental rights in relation to the child David.

[47] The statutory basis for applications after final decree for the variation of section 11 orders is set out in section 11(13) of said 1995 Act. This has been described by Sheriff Holligan as "rather a slender foundation and confers the right to seek a variation more by implication than by clear direction" (*SA* v *DA and MF*, unreported, Edinburgh, 23 July 2015) with which view I respectfully agree.

[48] Nonetheless, the statutory power to vary a section 11 order is contained within said section 11(13) of said 1995 Act and the appropriate rules of court, for the Sheriff Court, are Rules 33.44 and 33.65 of the Ordinary Cause Rules 1993. Ordinary Cause Rule 33.65 applies in the present case.

[49] Neither section 11(13) of said 1995 Act, nor the said rules of court, refers to the material change of circumstances test, although reference is made to such a test in *Sanderson* v *McManus* 1997 SC (HL) 55 (per Lord Hope of Craighead at page 63) and in *Donaldson* v *Donaldson* 2014 CSIH 88 (per Lady Smith at paragraph 19).

[50] Absent a material change of circumstances the minute would simply amount to a request that the court reconsider the same facts. Absent a material change of circumstances there would be no factual basis upon which to disturb the status quo if evidence has previously been led and assessed by the court.

[51] Accordingly, in such proceedings, the starting point must be to assess whether, in fact, there has been a material change of circumstances, looked at from the perspective of the welfare of the child concerned (section 11(7)(a) of said 1995 Act). In this case the court requires to determine whether there has been a material change of circumstances since the decision of 3 November 2014.

[52] It was the joint position of parties that the respondent did not exercise the letterbox contact to which he was found entitled by the order of the court, dated 3 November 2014, until July 2016. For the reasons set out above I rejected the evidence of the respondent's mother that the respondent had endeavoured to exercise letterbox contact with the said children prior to July 2016.

[53] The respondent accepted that he had not sent a card or any other communication to the said children until after he had received service of the minute in these proceedings and until after he had consulted his solicitors in respect of said minute. The minuter accepted that she had not shown the first card sent by the respondent, in July 2016, to the said children. Instead, she had taken said card to her solicitors and it was subsequently lodged as a production in these proceedings.

[54] When the minuter lodged the said minute with the court, the respondent had failed to exercise letterbox contact with the said children for a period of more than 18 months.

[55] It is difficult to see how this would amount to a material change of circumstances as the respondent had not previously exercised letterbox contact with the said children. No

evidence was led that the said children had been aware of the court order of 3 November 2014, nor was any evidence led that said children were aware of the failure on the part of the respondent to exercise such letterbox contact. No evidence was led that the said failure on the part of the respondent had caused any upset or distress to the said children.

[56] Aside from the respondent's failure to exercise letterbox contact as allowed by the said order of the court dated 3 November 2014, the only other averments on the part of the minuter in respect of a material change of circumstances relate to the respondent's conviction in respect of a charge of rape under section 1 of the Sexual Offences (Scotland) Act 2009 for which he received a sentence of imprisonment of 3 years and 6 months on 16 September 2015. On the basis of said conviction the minuter averred that the respondent is not a fit and proper person to be involved in the life of the child David and that it is not in the best interests of David for the respondent to have parental responsibilities and parental rights in respect of said child. The minuter further averred that it would be in the best interests of David for the respondent to be deprived of his parental responsibilities and parental rights in respect of said child.

[57] The respondent's conviction for a serious sexual offence in September 2015 and the significant custodial sentence imposed upon the respondent by the High Court clearly comprised a change of circumstances since the court granted the order of 3 November 2014. Further, although there were no averments on the part of the minuter relative to the reactions of the said children to receiving cards from the respondent (as no such cards were received until after service of the minute in these proceedings) evidence was led from the minuter, without objection, in respect of (i) the receipt of four cards from the respondent addressed to the said children and (ii) the reactions of the said children upon receipt of the three cards which were passed on to them by the minuter. The receipt of cards addressed to

David after service of the minute and his alleged negative reactions thereto would also constitute a change of circumstances since the court granted the order on 3 November 2014. Taken together with the respondent's said conviction, I was satisfied that the minuter had demonstrated there had been a material change of circumstances since the order of 3 November 2014 was made.

The orders sought by the minuter

(i) Crave 2 - Recall of the contact order made on 3 November 2014

[58] Although the minuter's crave for recall of the contact order granted on 3 November 2014 (effectively a crave to vary contact to nil) is crave 2 for the minuter, it ought, in my view, to be considered before consideration is given to the minuter's first crave to deprive the respondent of all of his parental rights and parental responsibilities in respect of David. The decision of the court in respect of the parental right of contact between the respondent and David will inform, at least in part, the decision of the court relative to the minuter's crave for deprivation of all of the respondent's parental rights and parental responsibilities in respect of David.

[59] The order made by the court on 3 November 2014 directed that the respondent was to be allowed letterbox contact with the said children. The respondent accepted that he did not exercise any such contact until after he had consulted with his solicitors following service of the minute in these proceedings. Service was effected on the respondent on 15 June 2016. The respondent, therefore, chose not to exercise contact with the said children, in terms of the court order of 3 November 2014, for a period in excess of eighteen months. For the reasons set out above, I rejected the evidence of the respondent's mother that the minuter had told her, around August 2015, that any cards or other items sent to the said

children by the respondent would not reach them but would, instead, be put in the bin. Even if I had accepted the evidence of the respondent's mother in this regard, the respondent made no attempt to explain why he had not exercised letterbox contact with the said children between November 2014 and August 2015. He sent no letters, cards or other messages to the said children during said period.

[60] I concluded that (i) the respondent failed to exercise letterbox contact with the said children between November 2014 and July 2016 without reasonable cause or explanation and (ii) his failure to exercise such contact in terms of the court order of 3 November 2014 demonstrated a lack of commitment and motivation on the part of the respondent to maintaining contact with the said children. It is clear that the respondent was prompted to begin exercising letterbox contact with the said children only following consultations with his solicitor after service of the minute in these proceedings.

[61] Between July 2016 and April 2017 the respondent sent four cards addressed to the said children to the home of the minuter's father. The minuter's father passed each of the cards on to the minuter. The respondent accepted that he had been aware of the address of the minuter's father since prior to the contact order being made by the court on 3 November 2014. Accordingly, the respondent could have sent cards or other items to the said children care of the minuter's father prior to July 2016 but chose not to do so.

[62] The minuter accepted that she had not given the said children the first card sent by the respondent. The said card was posted on or around 11 July 2016 and received by the minuter's father after that date. I accepted the minuter's evidence that she had been shocked to receive the card; that she had, thereafter, consulted her solicitors for advice; and that she had not shown the said card to the said children.

[63] Thereafter, the respondent sent three further cards addressed to the said children care of the minuter's father. The minuter's father passed each of these cards on to the minuter who gave the cards to the said children. The said children displayed different reactions to receiving these cards from the respondent.

[64] During December 2016 the respondent sent a Christmas card to the said children. The minuter gave the said card to the said children. I accepted the minuter's evidence that David reacted angrily to receiving said card; David acted out by kicking cupboards in the minuter's home after receiving said card; and David started to have nightmares again after receiving said card. I accepted the evidence of Ms McL that she had noted some regression in David's behaviour during play therapy sessions after December 2016, following his receipt of said card.

[65] The minuter received another card for David shortly after David's birthday in April 2017. I accepted the evidence of the minuter's father that he had been present when the minuter had given David this card and that David had been "really upset" by receiving it and had cried.

[66] David's reactions to receiving said cards were quite different to those of Sarah. The minuter gave no evidence that receiving the Christmas card in December 2016 and a birthday card in March 2017 had had any adverse effect on Sarah. The minuter said that Sarah had opened the birthday card from the respondent in March 2017 and had then "binned it". The minuter said that Sarah had displayed no emotional reaction to receiving said card. The minuter said that Sarah does understand that the cards are being sent by her birth father but that she does not acknowledge that the respondent is her birth father.

[67] For the reasons set out above, I accepted the evidence of the minuter in respect of the reactions of the said children to receiving cards from the respondent in December 2016 and

in March and April 2017. I am satisfied that, when one takes into account the credible and reliable evidence from the minuter (which is supported to some extent by the evidence of her father and by the evidence of Ms McL, the play therapist) there has been a material change of circumstances since the order of the court was granted on 3 November 2014 in that the said child David has been adversely affected by the letterbox contact exercised by the respondent in December 2016 and April 2017.

[68] David's reactions to receipt of the cards from the respondent in December 2016 and April 2017 are consistent, to some extent, with his reactions to the direct contact allowed by the court and which took place between David and the respondent during 2014 within a contact centre. The respondent did not dispute that David had been distressed within the contact centre when said direct contact took place. In fact, the respondent volunteered that, during the second contact visit within said centre, David had asked to be allowed to go home but the visit was not cut short. The respondent confirmed that on the third occasion David attended at said centre he had refused to see the respondent. Direct contact between David and the respondent was, thereafter, terminated.

[69] I accepted the evidence that (i) David has been distressed by both the direct contact and the letterbox contact with the respondent which has previously been allowed by the court; (ii) David has become angry after receiving cards from the respondent; (iii) David has demonstrated aggressive behaviour at home after receiving cards from the respondent; and (iv) David has had recurring nightmares after receiving cards from the respondent.

[70] Furthermore, I accepted that, in his discussions with Ms S, the child welfare reporter, David made it clear to Ms S that (i) he did not want to see the respondent; (ii) he did not want to receive cards or anything else from the respondent; (iii) he worried about the respondent coming to his home; and (iv) he had been frightened by the respondent driving

past David's home on a motorbike. I also accepted that, in his discussions with Ms S, David told Ms S that he has nightmares and that he is frightened by these, although he cannot remember what they are about when he wakes up. David also told Ms S that sometimes when he has nightmares he has the same "sore feeling" in his stomach he has when he thinks about the respondent.

[71] It was of concern to note that, when David talked about the respondent with Ms S, David, in her words: "began to curl up on the settee into the foetal position". David only resumed a normal sitting position after Ms S moved the conversation on to matters other than contact between David and the respondent.

[72] The respondent's position is that (i) the minuter has influenced David against him; (ii) David's behaviour in the contact centre was influenced negatively by the minuter; and (iii) David's views, as expressed to Ms S, were influenced negatively by the minuter. The respondent bases his said position on (i) the minuter having demonstrated to the said children that she was unhappy that the respondent was exercising letterbox contact and (ii) David being unable to explain why he does not like the respondent or why he is frightened of the respondent (paragraphs 35 and 37 of the Appendix hereto refer),

[73] The respondent submits that the minuter's unhappiness with letterbox contact was obvious from her evidence and from the manner in which she communicated his cards to the said children. The respondent asserts that this has led to her views about such contact being passed on to the said children. In particular, the minuter has told the said children that passing on the respondent's cards is something she has to do otherwise she will get into trouble. This makes it clear to the said children that this is not something she is doing of her own free will and that she does not wish to do it.

[74] The only evidence about the manner in which the minuter communicated the cards from the respondent to the said children came from the minuter and her father. During her evidence the minuter recounted, in a matter of fact way, how she had given the said children the cards received from the respondent after July 2016. I accepted her evidence in this regard. There was no evidence before the court that the minuter had said anything negative about the respondent or had said anything negative about the operation of such contact when passing on said cards to the said children. Equally, the minuter did not volunteer that she had said anything positive about the cards or about the respondent to the said children when giving them the said cards.

[75] The minuter denied all suggestions that she had made it clear to the said children that (i) she did not like the respondent; (ii) she was unhappy when the respondent was allowed direct contact with the said children in a contact centre; and (iii) she was unhappy when the respondent began exercising letterbox contact. The minuter said, repeatedly, during her evidence that she had not imposed her views in respect of the respondent on the said children. During examination in chief she said that she does not speak about the fact that she does not get on with the respondent; that she keeps this private; and that she does not think this is something which the said children need to know. I accepted the minuter's evidence in this regard.

[76] During her evidence the minuter said that, when she gave the said cards to the said children, she referred to them as being from the respondent (using his first name) rather than from "dad". Although the evidence of the minuter's father was that the minuter had referred to the respondent as David's father in April 2017 when she gave David the birthday card from the respondent, I preferred the minuter's evidence in respect of this matter. The

minuter was adamant that, when passing on said cards to the said children, she had referred to them as being from the respondent (using his first name) rather than as being from "dad".

[77] I accepted the minuter's evidence in respect of the said children's respective reactions to receiving said cards. In particular, I accepted her evidence that the child David (i) told her that he did not want the cards sent by the respondent; and (ii) asked her why she had to keep giving him the said cards. I also accepted her evidence, and that of her father, that the minuter told David, in April 2017, that she had to give David cards from the respondent. I also accepted the minuter's evidence that, in April 2017 (i) she had told David that if she did not give him the said cards she would get into trouble and (ii) her father had told David that if she did not give him the said cards the minuter would get into trouble with the police.

[78] The minuter did not, in my view, approach the sharing of the said cards with the said children as well as she could have done. The minuter should have set matters in context for the said children by referring to the respondent as their birth father, rather than by his first name. Further, in the proper exercise of her parental responsibilities in respect of the said children, the minuter ought to have endeavoured to minimise any upset on the part of the said children following receipt of said cards by encouraging the said children to view it as a positive thing that the respondent wished to keep in touch with them.

[79] However, I do not consider that this, in itself, is sufficient to explain the basis for David's views or reactions. Although I have concluded that the minuter could have approached said letterbox contact in a more positive manner and that, when challenged by David about why she had to give said cards to him, she could have encouraged him to view the said contact in a more positive manner, I rejected the respondent's submissions that the

minuter had influenced David negatively towards the respondent in respect of the operation of both direct contact and letterbox contact.

[80] Notably, the position is different as between the two children in respect of their reactions to letterbox contact with the respondent. One might have anticipated that, if the minuter was intent on influencing the said children against the respondent, she would have ensured that both of the said children had been negatively influenced. There was no evidence led that Sarah has been adversely affected, in any way, by receipt of the cards from the respondent. Indeed, it was conceded by the minuter's agent that letterbox contact did not appear to be operating to the detriment of Sarah (paragraph 17 of the Appendix hereto refers). In relation to the minuter's crave to recall the contact order in respect of the child Sarah, it was ultimately submitted on the minuter's behalf that her crave in this respect should be granted not on the basis that recall of the order would be in the best interests of Sarah but, rather, on the basis that it would not be in David's best interests for letterbox contact between the respondent and Sarah to continue. I deal with that submission below.

[81] I have found that (i) David has become angry and upset after receiving cards from the respondent; (ii) David's behaviour during play therapy regressed somewhat after December 2016, following receipt of the Christmas card from the respondent; (iii) David was troubled by nightmares following receipt of said Christmas card; and (iv) David has expressed clear views to the child welfare reporter that he wants no contact of any kind with the respondent.

[82] I have also considered the history of contact between the respondent and the said children from David's perspective. David will be nine years of age in April 2018. David was less than two years of age when the parties separated. There was then no contact of any kind between the respondent and David for around three years. David was reintroduced to

the respondent at a contact centre in Glasgow where he met the respondent on two occasions around the summer of 2014. David refused to meet with the respondent on a further occasion. Direct contact between David and the respondent was thereafter terminated due to the upset being caused to David by said direct contact. Thereafter, prior to the respondent being sentenced in September 2015, David saw the respondent riding a motor bike close to David's home. There was no further direct or indirect contact between the respondent and David until December 2016 when a Christmas card from the respondent was passed to the said children. David received one further card to mark his birthday towards the end of April 2017.

[83] There is credible and reliable evidence before the court, which I have accepted, that David has been upset by the exercise of letterbox contact by the respondent. The said child's views have been taken by a child welfare reporter and David has expressed a clear view that he does not wish any form of contact with the respondent. His body language during the meeting with the child welfare reporter gave me cause for concern, being suggestive of a child in a state of distress or withdrawal when discussing the respondent. Despite his relatively young age, I have given some weight to his views in respect of contact, given the upset which has been caused to David by the previous operation of direct and letterbox contact with the respondent.

[84] In terms of sections 11(7A)–(7E) of said 1995 Act the court shall have regard to the need to protect the said children from any abuse or the risk of any abuse which affects, or might affect, the said children. In addition the court requires to have regard to the effect which such abuse, or the risk of such abuse, might have on the said children. The definition of abuse is set out in section 11(7C) of said 1995 Act.

[85] The minuter was verbally abused and assaulted by the respondent during parties' relationship. The respondent is serving a custodial sentence for the rape of a subsequent partner. The respondent has, therefore, subjected more than one partner to domestic abuse and such abuse has included violent behaviour. The respondent gave no evidence that he had sought or received any counselling in respect of such behaviour or in respect of anger management issues, nor did he give any evidence that he had completed any domestic violence programmes. In view of his violent nature I have assessed that the respondent presents a risk of abuse to the minuter and that such abuse might affect the said children were the parties to come into contact with each other.

[86] Letterbox contact has been exercised, hitherto, by the respondent without the parties coming into direct contact with one another and without any direct communication between the parties being required. Provided such arrangements continue, I have concluded that the risk of abuse to the minuter can be avoided and that the risk of such abuse affecting the said children can also be avoided.

Decision in respect of the minuter's second crave

[87] Regarding the welfare of David as the court's paramount consideration, I have concluded that it is in his best interests for the contact order made by the court on 3 November 2014 to be recalled in respect of David and that it would be better for David that such an order be made than that no order be made at all. In arriving at this decision, I have taken into account that it is generally in the interests of children to know both of their parents; that it will not generally be in their interests to be deprived of a relationship with one of their parents; that it will not generally be in their interests to lose the opportunity to know that parent at first hand as this may result in the loss of information and knowledge

that will go towards the formation of the children's identities; that it is generally not in the interests of children to increase the likelihood of their being unable to get in touch with and/or form a relationship with that parent later in life; and that it is generally not in their interests to lose the opportunity to know grandparents and other relatives of that parent. Notwithstanding the foregoing, in the particular circumstances of this case, David having been repeatedly upset and distressed by the operation of letterbox contact with the respondent, I have determined, regarding David's welfare as the paramount consideration, that it would be in the best interests of the said child for the contact order granted on 3 November 2014 to be recalled and contact with David varied to nil. I have determined that (i) it is in David's best interests for the order second craved by the minuter to be granted and (ii) it would be better for David that said order sought by the minuter be made than that none be made at all.

[88] In respect of letterbox contact between the respondent and the child Sarah, the minuter's evidence was that (i) Sarah had said, in December 2016, that she did not want the Christmas card from the respondent; (ii) Sarah had shown no emotional reaction to receipt of the birthday card sent by the respondent in March 2017; and (iii) Sarah had put the birthday card in the bin after looking at it. However, taken as a whole, the minuter's evidence was that the letterbox contact with the respondent had had no detrimental effect on Sarah. In view of the minuter's evidence in respect of the operation of said letterbox contact it was difficult to understand the basis on which the minuter sought to recall the contact order in respect of Sarah. The only issue relative to letterbox contact between the respondent and Sarah appeared to be the apparent lack of commitment shown by the respondent in the period after the order was made on 3 November 2014 until service of the minute.

[89] The minuter's agent submitted that contact between the respondent and Sarah should, nonetheless, be varied to nil as it was difficult to consider the said children in isolation from each other for the purposes of the minuter's second crave. The minuter's agent submitted that it was likely that, if Sarah continued to receive cards from the respondent, David would know about it, given the said children live in the same property and are close in age. The minuter submitted that this would not be in David's best interests. I rejected that submission in all the circumstances of this case. There was no evidence before the court that David was distressed or adversely affected, in any way, by Sarah's receipt of a birthday card from the respondent in March 2017. In any event the court requires to consider what would be in the best interests of each of the said children, treating them as individuals and regarding the welfare of each individual child as the court's paramount consideration.

[90] The respondent failed to demonstrate any commitment to either of the said children in the period from 3 November 2014 until service of the minute in June 2016 by failing to exercise letterbox contact with the said children. Following a consultation with his solicitors, after service of the minute, the respondent decided to send cards to the said children. Apart from the first card, sent by the respondent in July 2016, which the said children did not see, the respondent has sent cards to the said children at Christmas 2016 and for their birthdays during 2017. The said children have reacted quite differently to the cards which have been sent by the respondent. David has reacted angrily and has been caused distress by the operation of such contact. Sarah has not been so affected. There is no evidence before the court that the continued operation of letterbox contact between the respondent and Sarah would cause upset or distress to Sarah or that such contact would cause further upset and distress to David. In these circumstances I am unable to conclude that recalling the order for

letterbox contact with Sarah would be in her best interests or that it would be better for Sarah that an order recalling the order for letterbox contact granted on 3 November 2014 be made than that none should be made at all.

(ii) Crave 1 – Deprivation of the respondent's parental responsibilities and rights

[91] The respondent has parental responsibilities and parental rights only in respect of the child David. The minuter seeks an order in terms of sections 11(1) and 11(2)(a) of said 1995 Act to deprive the respondent of all of those responsibilities and rights. The minuter asserted that such an order should be granted on the basis of the respondent's conviction for rape. I rejected that proposition and accepted the submission made by the respondent's agent that the court ought not to proceed to deprive the respondent of parental responsibilities and parental rights in respect of David solely on the basis that the respondent has been convicted of rape.

[92] Deprivation of one's parental responsibilities and parental rights in respect of one's child does not automatically follow a criminal conviction, even if such a conviction relates to harmful conduct towards one's child. Had Parliament intended that to be the case, such a legislative provision could have been made. As with all orders sought under section 11 of said 1995 Act, there must be an evidential basis for such an order and, in considering whether or not to make such an order and what order to make, the terms of section 11(7) of said 1995 Act apply. The court shall regard the welfare of the child as its paramount consideration and shall not make any such order unless it considers that it would be better for the child concerned that the order be made than that none should be made at all. The court shall also have regard to any views expressed by the child concerned. Accordingly, in considering whether to make such an order depriving the respondent of his parental

responsibilities and parental rights, the court ought not to proceed solely on the basis that the respondent is a convicted criminal.

[93] Further, in my view, in the context of being asked to deprive the respondent of all of his parental responsibilities and parental rights in respect of David, the court requires to consider whether to deprive the respondent of each individual parental responsibility and parental right and requires to apply the terms of section 11(7) of said 1995 Act to each individual decision.

[94] It would be helpful to set out here the provisions of sections 1 and 2 of said 1995 Act insofar as relevant to consideration of the minuter's first crave. Section 1(1) of said 1995 Act provides:

> "Subject to section 3(1)(b) and (d) and (3) of this Act, a parent has in relation to his child the responsibility—
>
> (a) to safeguard and promote the child's health, development and welfare;
>
> (b) to provide, in a manner appropriate to the stage of development of the child—
>
> (i) direction;
>
> (ii) guidance, to the child;
>
> (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
>
> (d) to act as the child's legal representative,
>
> but only in so far as compliance with this section is practicable and in the interests of the child."

Section 2(1) of said 1995 Act provides:

> "Subject to section 3(1)(b) and (d) 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."

[95] Before making the decisions required in respect of each parental responsibility and each parental right I will summarise a number of common factors which I have taken into account in making each decision. Firstly, the character of a party is routinely put in issue by a crave for deprivation of parental responsibilities and rights. Although the respondent's criminal convictions are not determinative of the issue, they require to be taken into account when considering whether such a crave ought to be granted. The respondent has convictions for more than twenty offences in the period from August 2003 until April 2014. These criminal offences include breach of the peace, possession of drugs and weapons, theft by housebreaking and assault and robbery. In addition, in September 2015, the respondent was convicted of raping a former partner. Further, the respondent admitted that (i) he had been convicted of possessing cannabis in 2017 after his release on licence and (ii) although not convicted of any offences arising therefrom, he had been involved in the supply of illegal drugs in Glasgow around the time of David's birth in 2009.

[96] It is, therefore, clear from his evidence and from his criminal convictions that the respondent has resorted to violence in the past and that he has done so in a domestic situation. It is also clear from his evidence and from his previous convictions that he has previously been involved in the supply of illegal drugs and that he has had illegal drugs in his possession as recently as during his period of release on licence between 15 June and 10 October 2017.

[97] Secondly, in respect of contact between the respondent and David I have concluded that the respondent has demonstrated a lack of motivation and commitment to maintaining contact with David for significant periods of time during David's life to date. The parties separated when David was less than two years of age. There was then no contact of any kind between the respondent and David for around three years. The respondent raised the

original action in June 2013, after a period of more than two years had elapsed since he last had direct contact with David. In relation to the letterbox contact allowed by the court on 3 November 2014, I have concluded that (i) the respondent failed to exercise letterbox contact with the said children between November 2014 and July 2016 without reasonable cause or explanation and (ii) his failure to exercise such contact in terms of the court order of 3 November 2014 demonstrated a lack of commitment and motivation on the part of the respondent to maintaining contact with the said children. It is clear that the respondent was only prompted to begin exercising letterbox contact with the said children after he had been served with the minute in these proceedings and after he had consulted with his solicitor in respect of the minute.

[98] Thirdly, as set out in paragraphs 21 and 23 of the Appendix hereto, the minuter accepted that there is no evidence before the court that the respondent has abused the parental rights and parental responsibilities which he has in respect of David. Further, there is no evidence before the court that the respondent has interfered with the minuter's exercise of her parental rights and parental responsibilities in respect of David. In respect of the parental right to have David live with him or otherwise to regulate the child's residence (as set out in section 2(1)(a) of said 1995 Act) there was no evidence that the respondent had attempted to enforce this right in the past or that he intended to do so in the future. There was no evidence that the respondent had ever sought to interfere with the exercise of the minuter's parental right to have David living with her. The evidence was that the respondent had only sought to exercise his parental right of contact with David in the past.

[99] However, the respondent's lack of interference in the past does not relieve the minuter of her obligations in terms of section 6(1) of said 1995 Act which provides:

"A person shall, in reaching any major decision which involves—

> (a) his fulfilling a parental responsibility or the responsibility mentioned in section 5(1) of this Act; or
> (b) his exercising a parental right or giving consent by virtue of that section,
> have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child's age and maturity, and to those of any other person who has parental responsibilities or parental rights in relation to the child (and wishes to express those views); and without prejudice to the generality of this subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view."

[100] At present, when the minuter is reaching any major decision which involves (i) fulfilling a parental responsibility, such as safeguarding and promoting David's health, development and welfare (for example, making major decisions in respect of medical treatment) and (ii) exercising a parental right, such as determining where David is to reside, she requires to have regard to the views of the respondent in terms of section 6(1) of said 1995 Act. These statutory duties are qualified, to some extent, in that the minuter only requires to have regard to the respondent's views, if he wishes to express them and, if he does so wish, the minuter only requires to have regard to his views "so far as practicable". It is generally understood that this statutory provision obliges each party with parental responsibilities and parental rights in respect of a child to consult with all other parties holding such responsibilities and rights in respect of major decisions relative to the matters referred to above. These obligations do not, however, derogate from the terms of section 2(2) of said 1995 Act which provides that:

> "Subject to subsection (3) below, where two or more persons have a parental right as respects a child, each of them may exercise that right without the consent of the other or, as the case may be, of any of the others, unless any decree or deed conferring the right, or regulating its exercise, otherwise provides."

[101] In The Law Relating to Parent and Child in Scotland (3rd Ed) at page 198 at paragraph 6.11 Professor Norrie refers to the interplay between these statutory provisions in the following manner:

> "For most children parental responsibilities and parental rights are vested in both parents. In that case, the rights and authority of each are equal and exercisable by either without the other. So each enjoys parental power severally. Some advantage is thereby given to the parent who takes the initiative. His or her acts are effective regardless of the attitude of the other parent. Both do, however, have an (imperfect) obligation to consult the other in making "major decisions" on the fulfillment or exercise of parental responsibilities or parental rights, and in the event of disagreement application may be made to the court for an order relating to parental responsibilities, parental rights, guardianship or the administration of the child's property."

[102] Finally in this context, I would observe that sections 2(3) and 2(6) of said 1995 Act provide, respectively:-

> "(3) Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6) below."

> "(6) The description of a person referred to in subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right mentioned in paragraph (a) or (c) of subsection (1) above; except that, where both the child's parents are persons so described, the consent required for his removal or retention shall be that of them both."

In view of my decision relative to the minuter's second crave, the respondent would no longer appear to fall within the definition of a person whose consent is required for removal of David from the United Kingdom, unless the respondent could successfully argue that he is exercising his parental right to regulate David's residence, in terms of section 2(1)(a) of said 1995 Act, by allowing David to reside with the minuter. I heard no submissions on this issue and make no further observations thereon. It is the case that the respondent's consent has hitherto been required for any such removal while he has been exercising his parental right of contact in respect of David.

Views of the child

[103] Fourthly, David's views were taken on 10 May 2017 by the child welfare reporter, Ms S. David told Ms S that he did not want anything from the respondent; that the respondent had driven past his home on a motorbike and had frightened him; that he was scared of the respondent and that he has a sore feeling in his stomach when he thinks about the respondent; that he does not want to see the respondent; that he does not want to write to the respondent; that he does not want the respondent to write to him or to send him any cards; and that he wanted the respondent to leave him alone. Quite understandably, given his age and level of maturity, David told Ms S that he did not know whether, in the future, he might want to see, speak to or write to the respondent, although he did not think that he would. Although David was not asked, directly, to express his views on the minuter's first crave, it is clear from Ms S's report dated 15 May 2017 that David appears to be frightened of the respondent; that he does not want anything from the respondent; and that he does not want any form of contact with the respondent.

Decisions in respect of parental responsibilities and parental rights

(i) parental responsibility and parental right in respect of contact

[104] For the reasons set out above in respect of the minuter's second crave, I have concluded that it is not in David's best interests for him to have any form of contact with the respondent at the present time. I have given particular weight to the upset and distress caused to David by the exercise of (i) the direct contact and (ii) the letterbox contact which has previously been allowed by the court. I have also given some limited weight to the views expressed by David to Ms S. In that context I have considered whether it would be better for David that the respondent be deprived of the parental responsibility, set out in

section 1(1)(c) of the said 1995 Act, and the parental right, set out in section 2(1)(c) of the said 1995 Act, to maintain personal relations and direct contact with David on a regular basis or whether it would be better for David that an order for something less than deprivation be made or that no order be made.

[105] For the reasons set out above in respect of the respondent's character, his criminal conduct and his lack of motivation in respect of contact with David and regarding David's welfare as the paramount consideration, I have concluded that it would be in David's best interests, at this time, for an order to be granted suspending the respondent's parental responsibility and parental right in respect of contact. As well as having accepted the evidence of the negative effect on David's emotional wellbeing of the contact with the respondent, I accepted the evidence that David has been distressed by the mere presence of the respondent in the area of David's home. I was particularly concerned by Ms S's description of David's presentation during their meeting when discussing the respondent. I consider it would be better for David that an order be made suspending the respondent's parental responsibility and parental right of contact at present. I consider such a suspension would be in David's best interests and that the minuter would be able to reassure David as he grows and matures that, in addition to the contact order having been recalled, the court has gone further and made the order for suspension. I consider that it would be better for David that such an order be made, rather than no order be made, so that he can be reassured that the respondent has no legal entitlement to make or seek contact with David at the present time. I hope that this will lessen David's anxiety about the respondent.

[106] I have not deprived the respondent of the parental responsibility and parental right of contact at this stage as I was not persuaded that it would be better for David for such an order to be made. I have taken into account that David himself cannot, at this stage, know

whether he might wish to re-establish some form of contact with the respondent in the future. I have also taken into account the minuter's submissions that David is likely to know about the ongoing letterbox contact between the respondent and Sarah. He may, therefore, become more curious about the respondent as he grows and matures, particularly in light of his awareness of the ongoing letterbox contact between the respondent and Sarah. I do not consider that depriving the respondent of this parental responsibility and parental right would be in David's best interests at this time nor would such an order be necessary nor would it be the minimum intervention.

(ii) parental right in respect of residence

[107] For the reasons set out above in respect of the minuter's two craves and having considered all of the evidence, I have concluded that it would not be in David's best interests for the respondent to exercise his parental right to have David living with him or otherwise to regulate David's residence in terms of section 2(1)(a) of said 1995 Act. Both parties have this parental right at present and, in terms of section 2(2) of said 1995 Act, each of them may exercise this right without the consent of the other, absent a decree or deed providing otherwise, subject to the obligation set out in section 6(1) of said 1995 Act to have regard to the other party's views in reaching a major decision. There is no such decree or deed in this case. The minuter does not have a residence order in her favour.

[108] In all the circumstances of this case, regarding David's welfare as the paramount consideration, I have concluded that it would be in David's best interests to prevent the respondent from exercising this parental right in the future. David has been in the care of the minuter since birth. He has not lived in family with the respondent for more than seven years and has had very limited contact with the respondent during that period. The

respondent has demonstrated little commitment and motivation towards maintaining contact with David during said period. David is frightened of the respondent and wishes to have no contact of any kind with the respondent. While the respondent has not hitherto sought to exercise his parental right of residence in terms of section 2(1)(a) of said 1995 Act, there is nothing to prevent him from so doing in the future were he to conclude that David should no longer reside with the minuter. It would be contrary to David's best interests and would be emotionally damaging for him were the respondent to act on such a conclusion. Further, in the event of the death of the minuter, the respondent would be the only party with the parental right of residence in respect of David. I do not consider that would be in his best interests.

[109] I have concluded that it would not be in David's best interests for the respondent to continue to be able to exercise this parental right should he choose to do so and that it would be better for David that an order be made suspending this parental right rather than no order be made at all. In my view suspension of this parental right would be consistent with the minimum intervention principle and granting an order for deprivation would not be necessary.

[110] In coming to this conclusion I have given particular weight to the respondent's lack of commitment towards David during the child's life to date; the respondent's criminal conduct over many years; and the respondent's involvement with illegal drugs over a significant period of time. I have also attached some weight to David's views in respect of contact with the respondent.

(iii) parental responsibilities and parental rights in terms of sections 1(1)(a)&(b) and 2(1)(b) of said 1995 Act

[111] I do not consider that the respondent should have the ability to exercise the parental responsibilities to safeguard and promote David's health, development and welfare or to provide, in a manner appropriate to David's stage of development, direction and guidance to him, nor do I consider that the respondent should have the ability to exercise the parental right to control, direct or guide, in a manner appropriate to David's stage of development, David's upbringing. In coming to this conclusion I have taken into account the respondent's lack of commitment to David for significant periods of time during his childhood to date, as well as the upset and distress caused to David by the direct and letterbox contact previously allowed by the court. In addition, I have taken into account that the respondent previously subjected the minuter to domestic abuse, which included domestic violence, as well as the respondent's involvement in other criminal conduct.

[112] As the respondent will have no contact with David in view of the foregoing decisions, I do not consider that the respondent should be involved with the minuter in any decisions regarding David's health, development or welfare. I am satisfied that the minuter will make all necessary decisions in respect of these matters on the basis of what would be in David's best interests. Standing the background, the respondent at this stage should not have a say in what is best for the child.

[113] I am satisfied that David is frightened of the respondent and that he would be caused emotional upset if the respondent sought to provide David with direction or guidance or to control, direct or guide David's upbringing in any way. I consider the minuter would also be distressed by any such attempts on the part of the respondent and that David would be likely to be adversely affected by any such distress on the part of the minuter. That would

not be in David's best interests and it would be better for David that an order be made suspending these parental responsibilities and this parental right than that no order be made at all. In my view suspension of these parental responsibilities and this parental right would be consistent with the minimum intervention principle and granting an order for deprivation would not be necessary.

(iv) the parental responsibility and parental right to act as David's legal representative

[114] In respect of the respondent's parental responsibility and parental right to act as David's legal representative (as set out in sections 1(1)(d) and 2(1)(d) of said 1995 Act), I have concluded that it would be in David's best interests to make an order suspending this parental responsibility and this parental right and that it would be better for David that such an order be made rather than no order be made at all. Parties made no specific submissions in respect of these matters but, insofar as such responsibility and right might well extend beyond administration of a child's estate and may include such matters as the provision of consent to medical treatment and other matters relative to a child's health, development and welfare (see Norrie at paragraphs 5.31 and 5.32 of The Law Relating to Parent and Child in Scotland (3rd Ed)), I consider that, on balance, it would be better for David that an order be made suspending this responsibility and this right for the reasons set out in the immediately preceding paragraphs relative to the parental responsibilities and parental rights in terms of sections 1(1)(a)&(b) and 2(1)(b) of said 1995 Act. It would not be in David's best interests for the respondent to have any say in respect of the provision of consent to medical treatment for David nor would it be in his best interests for the respondent to have any right to determine other matters relative to David's health, development and welfare for the reasons set out above. In my view suspension of this parental responsibility and this parental right

would be consistent with the minimum intervention principle and granting an order for deprivation would not be necessary.

Expenses

[115] Parties were agreed that, whatever the outcome, there should be a finding of no expenses due to or by either party and I have so found.

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

GLW-F935-13

APPENDIX TO JUDGMENT OF SHERIFF ANDREW M MACKIE

in the cause

M

PURSUER and RESPONDENT

against

M

DEFENDER and MINUTER

PARTIES' SUBMISSIONS

A **Submissions for defender and minuter**

[1] The minuter's solicitor invited the court to sustain the first and second pleas-in-law for the minuter and to repel both pleas-in-law for the pursuer and respondent. The minuter moved the court to grant both of the minuter's craves.

[2] In respect of the minuter's second crave, the court should vary the final order granted in the original proceedings on 3 November 2014 finding the respondent entitled to

letterbox contact with parties' two children by recalling said order or varying the contact previously allowed to nil. In coming to any decision the paramount consideration for the court is the welfare of the said children.

[3] The parties had separated around 2011 when the said children were very young. The minuter did not subsequently allow contact between the respondent and the said children. The respondent did not pursue contact with the said children until 2013. His evidence had been that he had prioritised other matters.

[4] In the original proceedings interim contact between the respondent and the child David had been allowed by the court for a period of time within a Contact Centre. At that time the said child was 4 or 5 years of age. These attempts at direct contact between the respondent and said child had been unsuccessful. The minuter's evidence had been that the said child had shown distress as a result of said contact visits taking place. No direct contact had taken place between the respondent and the child Sarah.

[5] Following the termination of interim contact between the respondent and said child David at the Contact Centre, no further direct contact had been allowed by the court and the original proceedings had concluded on the basis of an order being granted in favour of the respondent for letterbox contact with the said children.

[6] A period of nearly two years had elapsed before the respondent sent any form of written communication to the said children. His explanation for his failure was that he had been told that anything he sent to the said children would not be passed to them. Further, the respondent had not sent any card or any written communication to the said children until after he had been served with the minute in these proceedings and had met with his solicitor to discuss same.

[7] In addition, the respondent had not sent any cards or other written communications to the said children since April 2017. The respondent had, over a significant period of time, failed to show commitment to the said children by failing to maintain letterbox contact with them.

[8] The minuter's evidence had been that the said child David had been distressed upon receiving cards from the respondent. The minuter's father had witnessed the said child David being upset following receipt of the card sent to said child by the respondent in April 2017. The court should find the evidence of the minuter and her father to be credible. The minuter had spoken to the said child David being distressed but did not claim that the child Sarah had been distressed following her receipt of cards from the respondent in December 2016 and March 2017.

[9] The Play Therapist, Ms McL, had spoken to the said child David having been anxious and also spoke to a change in his demeanour after Christmas 2016 which was around the time the respondent had sent a card to the said children.

[10] In addition to the distress exhibited by said child David upon receipt of the cards from the respondent, there was a lack of any relationship between the respondent and said child as well as a lack of interest on the part of said child in respect of the respondent. Over an extended period of time, while the said child David was being seen by Ms McL, the Play Therapist, the said child made no mention of the respondent.

[11] Further, when the said child David had spoken to Ms S, the Child Welfare Reporter, he had confirmed to Ms S that he did not want to have any contact with the respondent and that he was scared of the respondent. He told Ms S that the respondent had driven past his house on a motor bike and that that had frightened him.

[12] The respondent claimed in his evidence that he was not aware of the minuter's address. His evidence in this respect had been contradicted by his mother's evidence. Mrs McG said in her evidence that the respondent did know where the minuter lived. The court should find the respondent and his mother not to be credible witnesses. Their evidence differed in a number of important respects. Further, the respondent's mother confirmed during her evidence that she had lied to the minuter about the respondent's conviction for rape.

[13] The respondent's position was that the minuter had influenced the said children in respect of their views regarding contact with the respondent. However, said child David had told Ms S, the Child Welfare Reporter, that the minuter had talked with him about writing to the respondent. David told Ms S that the minuter had told David that it was up to him and that he could do what he wanted and that she would help him, whatever his decision was.

[14] The said child David told Ms S that he was frightened of the respondent but was unable to say why. This indicated that said child had not been told anything negative about the respondent by the minuter. Said child David had been able to tell Ms S about having had nightmares and a sore stomach when thinking about the respondent. It has been significant that, when talking about the respondent with Ms S, said child David had curled up in a foetal position. It would be in the best interests of the said child David for the order dated 3 November 2014 in respect of letterbox contact to be varied to nil.

[15] The said child Sarah does not know the respondent. Continued contact between the respondent and said child Sarah would be of no benefit to said child.

[16] On the basis the minuter has alleged that she was the victim of domestic abuse by the respondent, the court requires to have regard to the provisions of sections 11(7A)-(7E) of the

Children (Scotland) Act 1995. In particular, the court requires to have regard to whether it would be appropriate to make an order in terms of section 11(1) of said 1995 Act, given that the parties would have to cooperate with one another as respects matters affecting the said children. The court should accept the evidence of the minuter that she had been subjected to abuse by the respondent during their relationship. In view of the respondent's previous behaviour, parties would not be able to cooperate in respect of the operation of letterbox contact. The minuter's agent acknowledged that the operation of letterbox contact did not require a great deal of cooperation between the parties, particularly where items would not be sent directly to the minuter but via a third party.

[17] In response to questions from the court as to why it would be better for the said child Sarah for the order of 3 November 2014 to be recalled or for contact to be varied to nil, the minuter's agent submitted that the said child did not appear to have any recollection of the respondent and there appeared to be no bond or relationship of any sort between the said child and the respondent. Although no evidence had been led that letterbox contact between the respondent and said child Sarah had caused any upset or distress to said child, there was no evidence that letterbox contact had brought any benefit to the said child. It was acknowledged on behalf of the minuter that the present letterbox contact did not appear to be operating to the detriment of said child.

[18] The minuter's agent submitted that it was difficult to consider the said children in isolation from each other. In the event of said child Sarah continuing to receive letters, cards, etc., from the respondent it was likely that said child David would know that she was receiving such communications given that the said children live in the same property and are close in age. This would not be in the interests of said child David.

[19] In respect of the minuter's first crave in which the minuter seeks an order depriving the respondent of parental rights and parental responsibilities in respect of said child David, the minuter's agent submitted that the minuter required to establish that such an order was necessary. The minuter's agent submitted that there was sufficient evidence before the court to establish that the order was necessary. There was plentiful evidence before the court that the respondent is of poor character. A schedule of his previous convictions is before the court, together with an extract of his conviction, on 16 September 2015, for rape. The respondent had been involved in the supply of illegal drugs during parties' relationship. He had admitted raping the mother of his youngest child. He had also admitted offending while on licence in respect of the said conviction for rape.

[20] Although the respondent had denied assaulting the minuter during parties' relationship, the court was invited to accept the minuter's evidence in this regard. Even if the court were to accept the respondent's evidence in respect of said allegation of assault, his account of the incident showed little regard for the welfare of the minuter.

[21] The minuter's agent submitted that the order sought by the minuter in crave one could not be made to punish the respondent for poor conduct. The minuter acknowledged that there was no evidence before the court that the respondent had abused the parental rights which he held in respect of said child David. However, the particular circumstances of this case gave rise to it being necessary for the court to grant an order depriving the respondent of parental rights and parental responsibilities in respect of said child.

[22] The respondent's family lives close to the minuter and said children. The court should accept the minuter's evidence that the respondent had driven up and down outside the minuter's home. The respondent would be able to obtain or glean information about the school attended by said child David. Given the level of anxiety and fear which had been

displayed and expressed by said child previously, the knowledge that the respondent would be aware which school was attended by the said child had the potential to cause harm to the said child. The court should find that there was a likelihood of the parental rights vested in the respondent being used in a manner which was not conducive to the welfare of the said child.

[23] The minuter's agent accepted that there was no evidence before the court that the respondent had abused his parental rights or parental responsibilities in respect of the said child's education. The minuter had been resident in her current home for some time. It would not be difficult to establish which school the said child attended. There had been no suggestion of any disturbance at the said child's school. The minuter's agent acknowledged that the thrust of the minuter's evidence had been that the respondent should be deprived of his parental rights and parental responsibilities in respect of said child David because the respondent was a convicted rapist. No evidence was led before the court to suggest that the said children were aware of the said conviction.

[24] The minuter's *esto* position was that if the court did not vary or recall the order for letterbox contact then the minuter sought to have said order varied so that she would forward photographs, together with a brief note, to the respondent on a biannual basis but that this would not be a reciprocal arrangement.

B Respondent's submissions

[25] The respondent invited the court to sustain the respondent's pleas-in-law and to repel the minuter's pleas-in-law, thereby maintaining the status quo.

[26] It was clear that the parties had separated at the end of 2010 or at the beginning of 2011 when the said children were aged around 2 years and 1 year respectively. Ultimately

the respondent raised court proceedings in which he sought contact with the said children. A final order was granted in his favour on 3 November 2014 in terms of which he was allowed letterbox contact with the said children at a time when the said children were still extremely young.

[27] The respondent's involvement in drug taking and drug dealing and the incident in which the minuter alleged she had been assaulted by the respondent had all taken place before the court made said order on 3 November 2014. It was assumed that these matters were ventilated before the court prior to the order for direct contact between the respondent and the child David in a Contact Centre was made and before said final order for letterbox contact was made. Much of the evidence led from the minuter was not relevant to whether the respondent should be deprived of parental rights and parental responsibilities in respect of said child David or indeed relevant to whether the final contact order should be varied.

[28] The minute to vary lodged by the minuter in May 2016 makes no reference to the respondent having not sent letters, cards or other communications to the said children since November 2014. Instead, said minute explains why the minuter had not implemented her obligations in terms of the order of 3 November 2014. The minute makes no reference to any emotional problems on the part of said child David or to any conduct on the part of the respondent which post-dates the court order of 3 November 2014, except his conviction for rape in September 2015. The minute is entirely predicated on the basis that the respondent has been convicted of rape and is therefore not entitled to retain the parental rights and parental responsibilities which he has in respect of said child David and should not have letterbox contact with the said children.

[29] The court had heard quite a lot of evidence about the said child David's distress which, according to the minuter, was referable to conduct on the part of the respondent.

This included the respondent driving up and down in the street where the minuter has her home and using offensive language to the minuter on one occasion. The minuter's position was that said child David had reacted badly subsequent to receiving a card from the respondent. The respondent's agent acknowledged that it may be the case that said child David has emotional difficulties and required to see a play therapist. However, it had not been established, on a balance of probabilities, that the said child's emotional difficulties had been caused by the respondent's behaviour or by the letterbox contact between the respondent and the said child.

[30] The evidence of Ms McL, the Play Therapist, was that a referral for play therapy had been made by said child's primary school in August 2016. This referral was made some 11 months after the respondent had been sent to prison. It was difficult to see how the said child's behaviour could be attributed to something which the respondent did prior to going to jail. The referral to Play Therapy had been made by said child's primary school four months before the said child received the first card from the respondent, namely, the Christmas card sent to said children in December 2016. The first card which the respondent had sent to said children in July 2016 had not been given to said children by the minuter.

[31] Ms McL had confirmed the reasons for the referral of said child to play therapy were, broadly, the said child's behaviour at school and some sleep disturbance at home. The respondent's agent submitted that the evidence in respect of the upset caused to said child David by the operation of letterbox contact was "something of a smoke screen" and was being used to justify the recall of the order for letterbox contact. Ms McL had given said child David the opportunity to raise issues with her over 28 sessions but said child had made no reference to the respondent during any of those sessions. The only reference made

by said child to "dad" during any of said sessions was a reference to the minuter's current partner.

[32] Although Ms McL had given evidence of said child David having regressed somewhat after Christmas 2016, Ms McL also spoke to the said child having been settled in the run up to the end of his play therapy sessions in June 2017. The last card which had been sent by the respondent to the said child had been received in late April 2017. According to the minuter, receipt of said card caused the said child to have nightmares every night. The respondent's agent contrasted this evidence with that of Ms McL, the Play Therapist.

[33] If the court were to accept that said child David is not receptive to receiving cards from the respondent the court should conclude that this is likely to be because of the minuter's attitude towards such correspondence. It was clear from the minuter's evidence that she is unhappy with cards being received from the respondent. The minuter's evidence had been that, when a card was received from the respondent for the said children at Christmas 2016, the minuter gave the card to the said children telling them that it was from the respondent using only his first name. The minuter also told the said children that she had to give them the card. This was likely to have created a view in the mind of said child David that this was something which the minuter did not want to do.

[34] According to the minuter, when said child David asked why she was giving him a birthday card from the respondent in April 2017, the minuter told the said child that she could get into trouble if she did not give him the card. During the minuter's evidence she also said that her father had explained to the said child that the minuter had to give him the card otherwise the minuter would "get into trouble with the police".

[35] It was clear from the minuter's evidence that she has been passing her views about letterbox contact on to the said children. It was hardly surprising that the said child David was not receptive to receiving cards from the respondent, given the last face to face contact he had with the respondent was during 2014.

[36] In relation to the respondent's explanation for not sending cards, letters, etc., prior to July 2016, the evidence of the pursuer's mother had been that the minuter had told her that she was planning to put any cards received from the respondent in the bin. The minuter had failed to send photographs and cards to the respondent and had thereby failed to cooperate with the court order of 3 November 2014. According to the minuter, she had had no address for the respondent. However, until at least January 2016, the minuter had had a working relationship with the respondent's mother whose evidence had been that even if she and the minuter had fallen out she would still have passed anything received from the minuter in respect of the said children to the respondent. This was indicative of the minuter's attitude to contact in general.

[37] The evidence of the minuter and her father that said child David was upset by receiving cards from the respondent was unreliable. It was significant that when said child was interviewed by Ms S, the Child Welfare Reporter, said child told Ms S that he did not like the respondent but could not say why. The said child was also not really sure why he was frightened of things and why he had nightmares. The said child had told Ms S that he had told the minuter that the respondent frightened him and that he did not know why. This indicated that the said child had been influenced by the minuter.

[38] The respondent's conviction for rape did him no favours but did not justify the deprivation of his parental rights and parental responsibilities in respect of said child David in the absence of any evidence that he has misused said rights and responsibilities.

[39] There was no evidence of the said child Sarah being upset by the receipt of cards from the respondent. It was said that this supported the minuter's credibility as she could have said that Sarah had been upset by receiving cards from the respondent. However, perhaps the conclusion to be drawn is that said child David does have emotional difficulties and, if he is susceptible to upset, then receipt of cards may be slightly different for him.

[40] The court should refuse the two craves sought by the minuter. In the interim, prior to the determination of this matter, the respondent had adopted a pragmatic approach. He is aware that the matter is before the court and he is aware of the suggestion that said child David has been upset following receipt of previous cards sent by the respondent. Accordingly, the respondent has refrained from sending further cards or letters in the meantime. Perhaps given the sensitivity of matters at present it would be better for the respondent not to implement the order of 3 November 2014 pending the determination of the matter by the court. If the upset on the part of said child David is attributable to the minuter's attitude towards receiving cards, then, for letterbox contact to proceed in a meaningful way, it might be preferable for a child welfare hearing to be convened for the purpose of exploring how letterbox contact should continue in the interests of said children.

C Expenses

[41] Parties were agreed that, whatever the outcome, there should be a finding of no expenses due to or by either party.