Summary sheriff 2016
Civil Case Study

[1] You are asked to hear two competing motions in a family action. The pursuer's motion number 7/2 of Process is for an *interim* residence order in her favour in terms of section 11(2)(c) of the Children (Scotland) Act 1995 in respect of the children of the parties' marriage, RT (born 8/6/07) and KT (born 2/12/08), an *interim* order for contact with the defender who resides in the USA and a specific issue order in respect of dental treatment.

[2] The motion for the defender number 7/3 of Process is in three parts; matters having already been determined in other proceedings before a court of the United States of America, this court should refuse the pursuer's application in terms of section 14(1) of the Family Law Act 1986; *esto* the court does not refuse the pursuer's application, for a sist of these proceedings in terms of section 14(2) of the Act and, finally, this court being *forum non conveniens*, for dismissal or a sist of these proceedings.

[3] You decide to be addressed first in relation to the defender's motion. You are provided with the following papers:

1. Initial Writ
2. Initial Writ as adjusted
3. Defences as adjusted
4. Motion for pursuer
5. Motion for defender
6. Summary of basic facts
7. Defender's List of Authorities
8. Statement of Facts not in dispute
9. Submissions for defender
10. Submissions for pursuer

[4] For the purposes of the Case Study you will not be given copies of the quite voluminous supporting documentation presented by parties including the quite extensive court order first issued by the Michigan Court, then by the Tennessee Court and Affidavits of parties and others as they have little bearing upon the issues before you. You are satisfied,

however, and counsel for both parties agree that nowhere in any of those papers do the expressions ‘welfare of the children’ or ‘views of the children’ appear. The approach of the Courts in the USA appears to have been one of using the language of the rights of the parents and, for the purposes of this case study, you cannot be satisfied that issues have been considered through the prism of the welfare of the children as the paramount consideration. The views of the children have not, at any stage, been sought or considered. A statement of undisputed facts accompanies these papers.

Please address the following questions. You should allow 15 minutes for your response:

1. **The existing orders by the courts in Michigan and Tennessee respectively appear to have been made without regard to the welfare of the children as the paramount consideration or the views of the children. They are, nonetheless, sophisticated and comprehensive orders by competent courts. Do you consider that in addressing the matter of jurisdiction and *forum non conveniens* you need to have regard to the welfare principle and the views of the children? If so how would you address that issue?**
2. **Which court, Tennessee or Anytown Sheriff Court, is best placed to make decisions in relation to the arrangements for residence and contact in respect of these children? Please explain what factors you have taken into account?**
3. **What orders if any would you make in respect of these motions? Please give brief reasons.**

SHERIFFDOM OF

Court Ref:

(Adjusted as 12 April 2016) INITIAL WRIT

In causa

residing at

PURSUER

against

residing at

DEFENDER

The pursuer respectfully craves the Court:-

1. To make a residence order in terms of section 11(2)(c) of the Children (Scotland) Act 1995 providing that the children born 8 June 2007 and born 2 December 2008 reside with the Pursuer; and to make an interim order.

2. To make an order in terms of section 11(2)(d) of the Children (Scotland) Act 1995 providing that the children born 8 June 2007 and born 2 December 2008 have contact with the Defender as such times as to the Court seems appropriate; and to make an interim order

3. To grant a Specific Issue Order in terms of Section 11(2)(e) of the Children (Scotland) Act 1995 that the children, born 8th June 2007 and born 2nd December 2008 be accompanied by either of the parties, or such third party as mutually agreed in writing between the parties or by order of the Court, on all travel between Scotland and the United States of America in order to facilitate the defender's contact with the children, and to grant said Order ad interim.

4. To dispense with the requirement of intimation of this Action on the said children in terms of Ordinary Cause Rule 33.7(1)(h).

5. To find the defender liable to the pursuer in the expenses of this Action.

CONDESCENDENCE

1. The parties are as designed in the instance. The parties were married in Sandals, Antigua in 2006. The parties have two children together, namely born on 8th June 2007 and born 2nd December 2008. Both children were born in the United States of America ("the USA"). The relevant principal Birth Records (equivalent of Extract Certificates of Birth) are produced.

2. The parties separated in 2011. At the time of separation, the parties were living in in the USA due to the defender's employment. Following separation, the parties agreed the terms of financial provision on divorce and agreed that the pursuer would relocate back to Scotland with the children. The parties were divorced on 2nd November 2012 by the Circuit Court for the County of Wayne Family Court Division in the State of in the USA (hereinafter referred to as the " Court"). A copy of the amended Consent Judgement of Divorce dated 10th January 2013 is produced herewith (hereinafter referred to as the "Divorce Judgement") and referred to for its terms which are incorporated herein *brevitatis causa*. In particular the Divorce Judgment provided that the Pursuer had been the children's primary care giver since birth and would relocate back to Scotland with the children. In relation to the parties' parenting time the Divorce Judgment provided that the Defender would have the children in the US for approximately 14 weeks per year while the Pursuer would have care of the children in Scotland for the remaining weeks of the year. The Divorce Judgement (on page 3) provides that the Court shall retain jurisdiction with regard to any issues of custody. In 2011, the pursuer and the children moved to Scotland. The children have lived in Scotland since then. Since 2011 the children have resided for approximately 38 weeks of the year in Scotland. They are habitually resident in Sheriffdom of They are principally resident with the pursuer at the address in the instance. In the first

part of 2015, the defender moved to ' in the USA. Neither party nor the children remain in USA. On the expiry of 90 days from mid March 2016 no court will be seised in relation to the children to whom this action relates. The orders sought in this writ seek to regulate on a formal basis the children's residence with the Pursuer, to vary the Defender's contact with the children and to regulate the manner of the children's travel to and from the USA for contact. As the children are habitually resident in Scotland and within the Sheriffdom of this court and have been for approximately four years this court has jurisdiction to make and regulate arrangements for the residence of the children and for their contact with the Defender and arrangements relative to that contact. In any event it is in the children's best interests that this court makes and regulates arrangements for the children. The Pursuer is applying to the Court to allow transfer the proceedings before that court based on lack of jurisdiction and that is no longer a convenient forum. Copy application is produced. In or around March 2016 the Court determined it no longer had jurisdiction with regard to matters pertaining to the welfare of the children. It however determined that it would retain jurisdiction for 90 days from around mid March to "allow the jurisidictional issue to be litigated". An undated copy of the order of the Court decreeing that it no longer has exclusive, continuing jurisdiction over child custody determination will be produced. The Defender has raised proceedings in and seeks to seise the jurisdiction of the courts in ' The Pursuer has been notified of a hearing in that is due to take place on 22 April 2016. The Pursuer intends to challenge the jurisdiction of the court in on the basis that the children are habitually resident in Scotland. In any event given the children's habitual residence in within the jurisdiction of this court, this court is the most appropriate forum to regulate matters in relation to the welfare of the children. No permanence Order (as defined in section 80(2) of the Adoption and Children (Scotland) Act 2007) is in force in respect of the said children.

3. In light of the said children's ages, it would not be appropriate to intimate these Proceedings to them by means of a Form F9. In the circumstances, the requirement to intimate this Action to the said children should be dispensed with as second craved.

4. The parties operate a care arrangement in relation to the children as detailed in the Divorce Judgement. The children reside with the Pursuer in for approximately 38 weeks of the year and have done so since around 2011. The children go to school in Scotland. The regard Scotland as their home and the USA as the place they go to in their holidays to see their father. The children are in the defender's care during the following school holidays periods every year – February week, Easter holidays, Summer holidays, October holidays and every alternate Christmas. The Divorce Judgement provides that the defender shall be responsible for the travel costs associated with transporting the children back and forth between Scotland and the USA. On 18th January 2013, the Court ordered the pursuer to collect the children at the end of their contact with the defender, and for the defender to be responsible for making the travel arrangements and meeting the cost of said travel. A copy of the said order is produced herewith and referred to for its terms which are incorporated herein *brevitatis causa.* In the event that the defender is not able to collect the children from Scotland at the commencement of contact as per the said order, the pursuer accompanies the children to the destination selected by the defender in either the USA or Canada.

5. As hereinbefore condescended upon the children are habitually resident in Scotland and have been since around 2011. Since birth the Pursuer has been their primary carer. The children have been educated in Scotland. They currently attend They are settled there and are achieving their academic milestones. The children spend their weekends in and around their home in They take ski-ing lessons at the dry slope in The children have friends close to their home and at school. They are happy and healthy and well looked after by the Pursuer. The Pursuer seeks a residence order regulating the children's residence with her. As hereinbefore condescended upon orders regulating the children's welfare and custody were subject to the jurisdiction of the Court. That court will no longer have jurisdiction in relation to the welfare of the children after 90 days from mid March. It currently only retains jurisdiction for the limited purpose of allowing jurisdiction to be seised elsewhere. Although the care arrangements for the children have been comparatively settled for a number of years the Pursuer has long been apprehensive that the Defender will try to retain the children in the USA. The Pursuer believes that the Defender wishes to try to change the current arrangements for the care of the children and in particular seeks a ruling from the court in changing the current care arrangements. A copy of an

application by the Defender to the court in ("the Court") will be produced. The Defender is attempting to seise the jurisdiction of the Court. To do that the Pursuer believes the Defender will have to persuade the Court that the children are habitually resident in . An order from the Court decreeing, among other things, that the children are habitually resident there would mean that the Pursuer would have limited legal protection to ensure the children's immediate return to Scotland in the event they were wrongfully retained within the USA. This would not be in the children's best interests. The children's primary carer has always been the Pursuer. The children have lived in Scotland with the Pursuer for the majority of their lives. They are happy and settled living with the Pursuer in Scotland. The children regard their Pursuer's house as their home. It is in the best interests of the children that this court pronounces an order regulating their residence with the Pursuer. Such an order would formalise the current status quo that was until recently regulated by the Divorce Judgment from the Court. Given the Defender's attempt to seise the jurisdiction of the Court and to invite it to make orders regulating the welfare of the children it is necessary that an order regulating the children's residence with the Pursuer be made by this court to ensure the preservation of the status quo that has operated and continues to operate in the children's best interests. In order to ensure the children's continued stability and security such an order would be better made than not made.

6. As hereinbefore condescended upon since around 2011 the children have exercised approximately 14 weeks contact per year with the Defender. With the exception of the weeks' contact in October and in February that has to date taken place in Edinburgh that contact takes place in the USA. The children spend on average 8 weeks every summer in the USA. They spend 2 weeks every Easter holiday in the USA. The children spend 2 weeks every alternate Christmas in the USA. Now that the youngest child is 7, the Defender intends that the contact weeks in February and October should be spent in the USA as per the Divorce Order. The current contact arrangements were reached when the children were much younger and no longer operate in the children's best interests. The children now have a much stronger view of their own identity and their home and wish to spend more of their holiday time at their home in Scotland. During the summer contact of 8 weeks the Defender sends the children to camp. The children do not enjoy camp. They have no friends there. As they reside in Scotland they do not have much in common with the other children at camp. The Defender's work is such that neither he nor his wife can personally look

after the children during the 8 weeks summer contact. Further, the children and the Pursuer have not enjoyed a summer holiday together for a number of years. The Pursuer would like to enjoy a summer holiday with the children. The children cannot see their friends throughout the summer. This is not in their best interests. The Pursuer seeks an order to the effect that the Defender should be entitled to four weeks contact with the children during the summer holidays. An order to that effect would enable the children to re-adjust to their lives in Scotland before the school term commences and would enable them to enjoy a holiday with the Pursuer and spend some time with their friends. While the children generally enjoy their contact with the Defender at Easter and on each alternate Christmas, in the years when they have to travel to the USA at Christmas and Easter they are tired. The journey from Scotland to ' takes 15 hours one way. The children are especially tired on their return to Scotland as a result of the time difference between Scotland and and it can take them some time to re-adjust. As the children get older there is a risk that their school-work will suffer if they are tired at the start of the school term. The Pursuer seeks an order that the Defender should be entitled to either 2 weeks Christmas or Easter holiday contact in the USA in each year. It will not be in the children's best interests to travel to ' for a week in October and February. The Pursuer seeks an order that if the Defender wishes to continue to exercise contact with the children in October and in February that such contact should be exercised in Scotland. The Pursuer accepts that the children enjoy contact with their father and intends to continue to promote and facilitate such contact. The Defender will not voluntarily agree to change the current contact arrangements notwithstanding they no longer operate in the children's best interests. It is therefore necessary that this court make an order regulating the children's contact with the Defender. Given that contact with the Defender has long been part of the children's lives such an order would be better made than not made.

7. In 2014, the defender sought an order from the ! Court to allow the children to travel to and from the USA as unaccompanied minors. Copies of the defender's motion to allow the children to travel as unaccompanied minors and the pursuer's response to the motion are produced herewith and referred to for their terms which are incorporated herein *brevitatis causa.* The ! Court refused this application. On 23rd February 2016, the defender's American agent intimated to the pursuer's American agent that she is once more instructed to file a motion with the '

Court to seek an order for the children to travel to and from the USA for the purpose of contact as unaccompanied minors. The motion was finally intimated on 1st March 2016. A copy of the motion and notice of hearing are produced herewith and referred to for their terms which are incorporated herein *brevitatis causa.* The motion will be heard on or around 18th March 2016. The children are too young to travel from Scotland to the USA without a familiar adult companion. United Airlines, which flies direct from Scotland to New York will only accept children on its unaccompanied minors' scheme for direct flights. United Airlines does not fly direct from Scotland to Memphis. The flights on all other carriers flying from Scotland to Memphis require two changes of plane. The typical flight time from Edinburgh to Memphis is in excess of 15 hours. It is not in the children's interests to travel unaccompanied in these conditions. It is in the children's best interests that a Specific Issue Order be granted for them to be accompanied by either of the parties or such third party as mutually agreed in writing by the parties or by order of this court, on all forms of travel between Scotland and the USA in order to facilitate the defender's contact with the children, as craved. It would be better for such an Order to be granted than no Order be granted at all.

PLEAS IN LAW

1. It being in the best interests of the children to reside with the Pursuer, and such an order being necessary and better made than not an order for residence and interim residence should be granted as craved.

2. It being in the best interests of the children to continue to have contact with the Defender and such an order being necessary and better made than not an order for contact and interim contact should be granted as craved.

3. The Specific Issue Orders being necessary and being in the best interests of the children, decree should be granted as craved, and said order should be granted *ad interim*.

IN RESPECT WHEREOF

[redacted]

.....

Enrolled Solicitor for the Pursuer

TEL:
FAX:
REF:

(10)

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SHERIFFDOM OF'

Court Ref: J

(Adjusted as ~~12 April~~ 27 May 2016) INITIAL WRIT

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In causa

, residing at

PURSUER

against

, residing at

DEFENDER

The pursuer respectfully craves the Court:-

1. To make a residence order in terms of section 11(2)(c) of the Children (Scotland) Act 1995 providing that the children born 8 June 2007 and born 2 December 2008 reside with the Pursuer; and to make an interim order.

2. To make an order in terms of section 11(2)(d) of the Children (Scotland) Act 1995 providing that the children : born 8 June 2007 and born 2 December 2008 have contact with the Defender as such times as to the Court seems appropriate; and to make an interim order

3. To grant a Specific Issue Order in terms of Section 11(2)(e) of the Children (Scotland) Act 1995 that the children, born 8th June 2007 and born 2nd December 2008 be accompanied by either of the parties, or such third party as mutually agreed in writing between the parties or by order of the Court, on all travel between Scotland and

the United States of America in order to facilitate the defender's contact with the children, and to grant said Order ad interim.

3. To dispense with the requirement of intimation of this Action on the said children in terms of Ordinary Cause Rule 33.7(1)(h).

4. To find the defender liable to the pursuer in the expenses of this Action.

CONDESCENDENCE

1. The parties are as designed in the instance. The parties were married in Sandals, Antigua in 2006. The parties have two children together, namely born on 8th June 2007 and born 2nd December 2008. Both children were born in the United States of America ("the USA"). The relevant principal Birth Records (equivalent of Extract Certificates of Birth) are produced.

2. The parties separated in 2011. At the time of separation, the parties were living in in the USA due to the defender's employment. Following separation, the parties agreed the terms of financial provision on divorce and agreed that the pursuer would relocate back to Scotland with the children. The parties were divorced on 2nd November 2012 by the Circuit Court for the County of Wayne Family Court Division in the State of in the USA (hereinafter referred to as the " Court"). A copy of the amended Consent Judgement of Divorce dated 10th January 2013 is produced herewith (hereinafter referred to as the "Divorce Judgement") and referred to for its terms which are incorporated herein *brevitatis causa*. In particular the Divorce Judgment provided that the Pursuer had been the children's primary care giver since birth and would relocate back to Scotland with the children. In relation to the parties' parenting time the Divorce Judgment provided that the Defender would have the children in the US for approximately 14 weeks per year while the Pursuer would have care of the children in Scotland for the remaining weeks of the year. The Divorce Judgement (on page 3) provides that the Michigan Court shall retain jurisdiction with regard to any issues of custody. In 2011, the pursuer and the children moved to Scotland. The children have lived in

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4. The parties operate a care arrangement in relation to the children as detailed in the Divorce Judgement. The children reside with the Pursuer in for approximately 38 weeks of the year and have done so since around 2011. The children go to school in Scotland. The regard Scotland as their home and the USA as the place they go to in their holidays to see their father. The children are in the defender's care during the following school holidays periods every year – February week, Easter holidays, Summer holidays, October holidays and every alternate Christmas. The Divorce Judgement provides that the defender shall be responsible for the travel costs associated with transporting the children back and forth between Scotland and the USA. On 18th January 2013, the Michigan Court ordered the pursuer to collect the children at the end of their contact with the defender, and for the defender to be responsible for making the travel arrangements and meeting the cost of said travel. A copy of the said order is produced herewith and referred to for its terms which are incorporated herein *brevitatis causa*. In the event that the defender is not able to collect the children from Scotland at the commencement of contact as per the said order, the pursuer accompanies the children to the destination selected by the defender in either the USA or Canada.

5. As hereinbefore condescended upon the children are habitually resident in Scotland and have been since around 2011. Since birth the Pursuer has been their primary carer. The children have been educated in Scotland. They currently attend . They are settled there and are achieving their academic milestones. The children spend their weekends in and around their home in They take ski-ing lessons at the dry slope in . The children have friends close to their home and at school. They are happy and healthy and well looked after by the Pursuer. The Pursuer seeks a residence order regulating the children's residence with her. As hereinbefore condescended upon orders regulating the children's welfare and custody were subject to the jurisdiction of the Michigan Court. That court will no longer have jurisdiction in relation to the welfare of the children after 90 days from mid March. It currently only retains jurisdiction for the limited purpose of allowing jurisdiction to be seised elsewhere. Although the care arrangements for the children have been comparatively settled for a number of years the Pursuer has long been apprehensive that the Defender will try to retain

Scotland since then. Since 2011 the children have resided for approximately 38 weeks of the year in Scotland. They are habitually resident in Sheriffdom of They are principally resident with the pursuer at the address in the instance. In the first part of 2015, the defender moved to in the USA. Neither party nor the children remain in Michigan, USA. On the expiry of 90 days from mid March 2016 no court will be seised in relation to the children to whom this action relates. The orders sought in this writ seek to regulate on a formal basis the children's residence with the Pursuer, to vary the Defender's contact with the children and to regulate the manner of the children's travel to and from the USA for contact. As the children are habitually resident in Scotland and within the Sheriffdom of this court and have been for approximately four years this court has jurisdiction to make and regulate arrangements for the residence of the children and for their contact with the Defender and arrangements relative to that contact. In any event it is in the children's best interests that this court makes and regulates arrangements for the children. The Pursuer is applying to the Court to allow transfer the proceedings before that court based on lack of jurisdiction and that Michigan is no longer a convenient forum. Copy application is produced. In or around March 2016 the Court determined it no longer had jurisdiction with regard to matters pertaining to the welfare of the children. It however determined that it would retain jurisdiction for 90 days from around mid March to "allow the jurisidictional issue to be litigated". An undated copy of the order of the Court decreeing that it no longer has exclusive, continuing jurisdiction over child custody determination will be produced. The Defender has raised proceedings in and seeks to seise the jurisdiction of the courts in . The Pursuer has been notified of a hearing in that is due to take place on 22 April 2016. The Pursuer intends to challenge the jurisdiction of the court in on the basis that the children are habitually resident in Scotland. In any event given the children's habitual residence in within the jurisdiction of this court, this court is the most appropriate forum to regulate matters in relation to the welfare of the children. No permanence Order (as defined in section 80(2) of the Adoption and Children (Scotland) Act 2007) is in force in respect of the said children.

3. In light of the said children's ages, it would not be appropriate to intimate these Proceedings to them by means of a Form F9. In the circumstances, the requirement

the children in the USA. The Pursuer believes that the Defender wishes to try to change the current arrangements for the care of the children and in particular seeks a ruling from the court in changing the current care arrangements. A copy of an application by the Defender to the court in ("the Court") will be produced. The Defender is attempting to seise the jurisdiction of the Court. To do that the Pursuer believes the Defender will have to persuade the Court that the children are habitually resident in An order from the Court decreeing, among other things, that the children are habitually resident there would mean that the Pursuer would have limited legal protection to ensure the children's immediate return to Scotland in the event they were wrongfully retained within the USA. This would not be in the children's best interests. The children's primary carer has always been the Pursuer. The children have lived in Scotland with the Pursuer for the majority of their lives. They are happy and settled living with the Pursuer in Scotland. The children regard their Pursuer's house as their home. It is in the best interests of the children that this court pronounces an order regulating their residence with the Pursuer. Such an order would formalise the current status quo that was until recently regulated by the Divorce Judgment from the Court. Given the Defender's attempt to seise the jurisdiction of the Court and to invite it to make orders regulating the welfare of the children it is necessary that an order regulating the children's residence with the Pursuer be made by this court to ensure the preservation of the status quo that has operated and continues to operate in the children's best interests. In order to ensure the children's continued stability and security such an order would be better made than not made.

6. As hereinbefore condescended upon since around 2011 the children have exercised approximately 14 weeks contact per year with the Defender. With the exception of the weeks' contact in October and in February that has to date taken place in Edinburgh that contact takes place in the USA. The children spend on average 8 weeks every summer in the USA. They spend 2 weeks every Easter holiday in the USA. The children spend 2 weeks every alternate Christmas in the USA. Now that the youngest child is 7, the Defender intends that the contact weeks in February and October should be spent in the USA as per the Divorce Order. The current contact arrangements were reached when the children were much younger and no longer operate in the children's best interests. The children now have a much stronger view of their own identity and their home and wish to spend more of

their holiday time at their home in Scotland. During the summer contact of 8 weeks the Defender sends the children to camp. The children do not enjoy camp. They have no friends there. As they reside in Scotland they do not have much in common with the other children at camp. The Defender's work is such that neither he nor his wife can personally look after the children during the 8 weeks summer contact. Further, the children and the Pursuer have not enjoyed a summer holiday together for a number of years. The Pursuer would like to enjoy a summer holiday with the children. The children cannot see their friends throughout the summer. This is not in their best interests. The Pursuer seeks an order to the effect that the Defender should be entitled to four weeks contact with the children during the summer holidays. An order to that effect would enable the children to re-adjust to their lives in Scotland before the school term commences and would enable them to enjoy a holiday with the Pursuer and spend some time with their friends. While the children generally enjoy their contact with the Defender at Easter and on each alternate Christmas, in the years when they have to travel to the USA at Christmas and Easter they are tired. The journey from Scotland to ' takes 15 hours one way. The children are especially tired on their return to Scotland as a result of the time difference between Scotland and ' and it can take them some time to re-adjust. As the children get older there is a risk that their school-work will suffer if they are tired at the start of the school term. The Pursuer seeks an order that the Defender should be entitled to either 2 weeks Christmas or Easter holiday contact in the USA in each year. It will not be in the children's best interests to travel to ' for a week in October and February. The Pursuer seeks an order that if the Defender wishes to continue to exercise contact with the children in October and in February that such contact should be exercised in Scotland. The Pursuer accepts that the children enjoy contact with their father and intends to continue to promote and facilitate such contact. The Defender will not voluntarily agree to change the current contact arrangements notwithstanding they no longer operate in the children's best interests. It is therefore necessary that this court make an order regulating the children's contact with the Defender. Given that contact with the Defender has long been part of the children's lives such an order would be better made than not made.

7. In 2014, the defender sought an order from the I Court to allow the children to travel to and from the USA as unaccompanied minors. Copies of the defender's

motion to allow the children to travel as unaccompanied minors and the pursuer's response to the motion are produced herewith and referred to for their terms which are incorporated herein *brevitatis causa.* The Court refused this application. On 23rd February 2016, the defender's American agent intimated to the pursuer's American agent that she is once more instructed to file a motion with the Michigan Court to seek an order for the children to travel to and from the USA for the purpose of contact as unaccompanied minors. The motion was finally intimated on 1st March 2016. A copy of the motion and notice of hearing are produced herewith and referred to for their terms which are incorporated herein *brevitatis causa.* The motion will be heard on or around 18th March 2016. The children are too young to travel from Scotland to the USA without a familiar adult companion. United Airlines, which flies direct from Scotland to New York will only accept children on its unaccompanied minors' scheme for direct flights. United Airlines does not fly direct from Scotland to Memphis. The flights on all other carriers flying from Scotland to Memphis require two changes of plane. The typical flight time from Edinburgh to Memphis is in excess of 15 hours. It is not in the children's interests to travel unaccompanied in these conditions. It is in the children's best interests that a Specific Issue Order be granted for them to be accompanied by either of the parties or such third party as mutually agreed in writing by the parties or by order of this court, on all forms of travel between Scotland and the USA in order to facilitate the defender's contact with the children, as craved. It would be better for such an Order to be granted than no Order be granted at all.

8. On 7th March 2016 the Pursuer received a message from the Defender via Our Family Wizard ("Family Wizard"). Family Wizard is a service that the parties have been ordered by the Michigan Court to use to communicate and discuss matters in relation to the children. The said message from the Defender advised that he had taken the children to a local dentist. The Defender claimed that the dentist had reported that teeth were "in poor shape". Eight of her teeth had problems. Four required fillings, two needed crowns and two needed "root canals". The Defender claimed that the dentist had advised that the root canals were an immediate problem. would need to take antibiotics if she had to wait until her return to Scotland to have the treatment carried out. The American dentist took Xrays of mouth. Believed and averred frequent X rays carry the risk of future associated health risks. The Pursuer was shocked to learn of the dentist's report. She was concerned that was due to return to Scotland within a day of receiving an anaesthetic. was only 7 years old at the time. The Pursuer was concerned that

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anaesthetic has an associated risk of complications that could become life threatening. She requested that the Defender not have the treatment carried out. That copies of the dentists report and x-rays be returned with the children. The Pursuer advised that she would have the children's own dentist look at teeth. Copy of said communications is produced herewith and is referred to for it's terms which are ~~are~~ incorporated herein *brevitatis causa*.

9. When the Pursuer collected the children on 14th April at the end of contact with the Defender she discovered that had been prescribed antibiotics. had been taking said antibiotics since her appointment with the Defender's dentist. The Pursuer took to see a local dentist, of dental care based in Ms examined teeth and was also provided with sight of the x-rays taken by the Defender's dentist. The Pursuer was advised by Ms that had good oral hygiene. That there was no sign of dental infection therefore the antibiotics were not needed. may need a "pulpotomy", which is baby tooth root treatment but it was not required immediately. returned shortly after the initial examination and had a filling and fissure seal to two of the effected teeth. has further appointments with Ms to complete the treatment needed to her upper left D. The Pursuer has been advised that this treatment can be carried out without the need for general anaesthetic. That general anaesthetic carried more risks than benefits for treating a baby tooth molar. Copy letter provided by the said briefly detailing her recommendations and initial treatment to teeth is produced herewith and is referred to for it's terms which are held to be incorporated *brevitatis causa*.

10. The Pursuer received a further message from the Defender on 7th April 2016 in response to her request that no dental treatment be carried out. In said message the Defender advised that he would be taking the children back to his dentist when they return to the USA for their next contact period. This is to check that the treatment has been carried out. The Pursuer is concerned that said dentist will not agree with the treatment that has received as there appears to be a difference in the approach of the dentist in the USA and the dentist in with whom the child is registered as a patient. The Pursuer is concerned that will receive further treatment and that this may involve anaesthetic and further X rays. As hereinbefore averred general anaesthetic carried more risks than benefits for treating baby tooth molars. This would not be in the best interest of It is not in the best interests of or to undergo treatment by different dentists in different countries

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particularly where those professionals are not working together in a coordinated way. It is in the children's best interests that a Specific Issue Order be granted for no dental treatment to be carried out on the children in the USA without prior consent of the Pursuer save in the event of a dental or medical emergency. Given the difference of opinion in relation to the appropriate dental treatment for it is necessary that the order sought should be granted. It would be better for such an Order to be granted than no Order be granted at all.

~~7.~~

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PLEAS IN LAW

1. It being in the best interests of the children to reside with the Pursuer, and such an order being necessary and better made than not an order for residence and interim residence should be granted as craved.

2. It being in the best interests of the children to continue to have contact with the Defender and such an order being necessary and better made than not an order for contact and interim contact should be granted as craved.

3. The Specific Issue Order third craved being necessary and being in the best interests of the children, decree should be granted as craved, and said order should be granted *ad interim*.

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4. The Specific Issue Order fourth craved being necessary and being in the best interests of the children, decree should be granted as craved, and said order should be granted *ad interim*.

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~~3.~~

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IN RESPECT WHEREOF

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.....

Solicitor for the Pursuer

Tel:

Affidavit (9) 3 At bar 30/3/16

SHERIFFDOM OF

Court ref no:

DEFENCES

in the cause

, residing at

PURSUER

against

, residing at
, United States of America

DEFENDER

ANSWERS

1. Admitted

2. Admitted that the parties separated in 2011. Admitted at the time of separation, the parties were living in USA due to the Defender's employment. Admitted following separation, the parties agreed the terms of financial provision on divorce and agreed that the Pursuer would relocate back to Scotland with the children under explanation that the agreement reached incorporated a further agreement as to extensive contact operating between the children and the Defender in the United States of America. Admitted the parties were divorced on the 2nd November 2012 by the Circuit Court for the County of Wayne Family Court Division in the State of in the USA. Admitted the divorce judgment provided that the Pursuer had been the children's primary care giver since birth and would relocate back to Scotland with the children. Admitted in relation to the parties' parenting time, the divorce judgment provided that the Defender would have the children in the USA for approximately 14 weeks per year while the Pursuer would have care of the children in Scotland for the remaining weeks of the year. Admitted that the divorce judgment (on page 3) provides that the Court

will retain jurisdiction with regard to any issues of custody under explanation that the divorce judgment also makes provision that this matter shall be governed by the laws of the State of and of the United States of America. Admitted in 2011, the Pursuer and the children moved to Scotland. Admitted that the children have lived in Scotland since then. Admitted that since 2011 the children have resided for approximately 38 weeks of the year in Scotland. Admitted they are habitually resident in the Sheriffdom of Admitted they are principally resident with the Pursuer at the address in the instance. Under explanation that it was in June 2015, admitted the Defender moved to in the USA. Admitted neither party nor the children remain in USA. Admitted the Pursuer applied to the Court to transfer the proceedings before that court based on lack of jurisdiction and that Michigan is no longer a convenient forum. Admitted in or around March 2016, under explanation that it was in April 2016, the Court determined that it no longer had jurisdiction with regard to matters pertaining to the welfare of the children. Admitted that it determined that it would retain jurisdiction for 90 days to "allow the jurisdictional issues to be litigated" under explanation that this was from mid-April 2016. Under explanation that the Court in USA has already determined that it has jurisdiction and shall exercise that jurisdiction in relation to matters concerning the welfare of the children, admitted that on the expiry of 90 days from the date of the Court order no court would, otherwise, have been seized in relation to the children to whom this application relates. Admitted the orders sought in this Writ seek to regulate on a formal basis the children's residence with the Pursuer, to vary the Defender's contact with the Pursuer and to regulate the children's travel to and from the USA for contact under explanation and with reference to the averments hereinafter that the orders already made in the Court and recognised in the Court include such formal orders and offer a competent jurisdiction to the parties in which they can seek a proper adjudication of any dispute in relation to variation of those orders. Under explanation that the Sheriff Court at jurisdiction is held concurrently with

the Court and with reference to the averments hereinafter that the Sheriff Court at should not exercise its jurisdiction, admitted that as the children are habitually resident in Scotland and within the Sheriffdom of this Court this court has jurisdiction to make and regulate arrangements for the residence of the children and for their contact with the Defender and arrangements relative to that contact. Admitted the Defender has raised proceedings in and seeks to seize the jurisdiction of the Court under the explanation as hereinafter given that on 25th April 2016 the Court determined that it has and shall exercise such jurisdiction. Admitted the Pursuer was notified of the hearing in the Court under explanation that she failed to challenge the jurisdiction of that court. Admitted no Permanence Order is in force in respect of the children. *Quoad ultra* denied. Explained and averred that the children have resided within the jurisdiction of Sheriff Court only since January 2016. Prior to January 2016, they were habitually resident in from 2012. Explained and averred that on 25th April 2016 the parties were each represented at a hearing before the Court at which the issue of jurisdiction was considered and properly adjudicated upon. The Court has determined that it has "jurisdiction over all matters concerning the minor children ... and is the most convenient forum for the enforcement and/or modification of the orders (which are extant in the courts of the United States) and all matters related to the children." The written order confirming that decision as dated 26th April 2016 is produced and referred to for its terms. The Pursuer has not appealed against the decision of the Court of 26th April 2016 that it has jurisdiction and that it shall exercise that jurisdiction and, in terms of law, she is now precluded from contesting that jurisdiction. Accordingly, Sheriff Court and the Court have concurrent jurisdiction. As part of its decision of 25th April 2016, the Court enrolled eleven previous orders as made by the Court and which concern the welfare of the children. Enforcement of those orders now lies within the jurisdiction of the Court and the orders are binding on the parties. The said orders are produced and referred to for

their terms. As a consequence of the eleven previous orders addressing the welfare of the children, matters concerning the children's residence with the Pursuer and the contact which they have with the Defender have been determined by another court. Failing it being concluded that these matters have been determined by another court, those proceedings are continuing in another court. Detailed arrangements have been made by way of those Court orders in circumstances where the parties were properly represented and presented competing arguments. Either of the parties may competently seek variation of those orders by way of an application to the Court. As such, the jurisdiction offers the parties an appropriate jurisdiction in which to seek modification of orders which are binding upon them. A Sheriff at Sheriff Court cannot vary the terms of the orders which are extant in USA. In the event of a Sheriff at Sheriff Court making any order in respect of the welfare of the children, it will run concurrently with the orders now enrolled in In the event that any order made by a Sheriff in is in the same practical terms as an order which is extant in the Court, it will serve no purpose. In terms of the order of the Michigan Court of 2 November 2011 divorcing the parties and the order amending same dated 10 January 2013, it was determined that the parties have joint legal custody but the children would reside in Scotland with the Pursuer. In practical terms, such an order replicates a residence order as would be issued by a Scottish Court the consequence of which would be that parental responsibilities and rights remain shared by the parties but one party regulates the child's residence. As such, as the Defender does not dispute that the children should be resident with the Pursuer and legal formality is given to that arrangement by way of the extant Court order of 2 November 2011 as amended on 10 January 2013, an order in terms of the Pursuer's first crave will serve no purpose and is not necessary. The issue of the children's residence has already been determined by another court. Further, the Court has already adjudicated upon the matter addressed in the Defender's third crave and the order of that Court dated 15 April 2016 is referred to for its terms. Matters concerning the children's travel between

Scotland and the USA were also the subject of earlier determinations of the Court, specifically by orders dated 18 January 2013 and 10 June 2014. On 15 April 2016, the Court adjudicated on the matter addressed in the Pursuer's third crave in favour of the Pursuer and in a way which is consistent with that crave and, accordingly, an order in terms of the Pursuer's third crave will serve no purpose and is not necessary. The only matter which may be considered to be in dispute between the parties is the Pursuer's second crave. The orders enrolled in the Court make detailed provision for the regulation and operation of contact between the children and the Defender. If a Sheriff in Sheriff Court was to make an order in terms of the Pursuer's second crave which was in practical terms identical to the enrolled orders before the Court then such an order would serve no purpose and would not be necessary. If a Sheriff in Sheriff Court was to make an order in terms of the Pursuer's second crave which conflicted with the provisions in the enrolled orders in the Court, competing orders would exist regulating the contact between the children and the Defender. It is contrary to the welfare of the children for the court to create uncertainty as to the operation of contact. It is in the best interests of the children that one court adjudicate the issues pertaining to their welfare. As the Court has already determined the nature and extent of contact which is to operate by way of orders now enrolled in and the parties have a proper judicial process in which any modification of that may be sought, Sheriff Court should refuse to exercise its jurisdiction and either dismiss or sist these proceedings. Further, Sheriff Court is neither the appropriate nor most convenient forum in which the dispute between the parties should be adjudicated. The children were born in the USA. Although habitually resident in Scotland, the children are US citizens. The true dispute between the parties relates to the exercise of contact between the Defender and the children which contact shall take place for the overwhelming majority of the time in the United States of America. Accordingly, the Pursuer seeks to engage the jurisdiction of Sheriff Court in order to adjudicate on the operation of contact which contact will be

actually exercised in the United States of America, a country in which a court already has jurisdiction and in which there are extant orders regulating the dispute. The eleven decisions of the Court as enrolled in and the further order of the Court dated 15 April 2016 were issued in properly convened judicial proceedings at which both parties were represented and fully participated. The orders make provision for matters pertaining to the children which are not part of these present proceedings. Such provision includes the detailed specification of parental co-operation as set down in the orders of 2 November 2011, 13 January 2013 and 18 January. Further, such provision includes that the parties must use '*Our Family Wizard*' to communicate in terms of the order of 18 January 2013. '*Our Family Wizard*' is a secure website which allows parties to communicate directly with one another. The parties' attorneys and the presiding judge has access to the *Our Family Wizard* communications as exchanged by the parties when determining matters of dispute between the parties. A Sheriff in Sheriff Court would not have access to this information when determining the matters at issue. ~~in a way which records such communications to be overseen by the court if necessary.~~ The parties have used '*Our Family Wizard*' to communicate with each other and to address arrangements for the welfare of the children. It would be contrary to the welfare of the children for the order ordaining the parties to use this service to be superseded. The terms of the extant Court order of 2 November 2011 as amended on 10 January 2013 set out in detail how custody and contact arrangements are to operate. In addition, the parental cooperation order made by the Court on 18 January 2013 sets out how the parties require to cooperate with one another in order to serve the welfare of the children. The detail of such orders would not be replicated in an order made by a court in Scotland. The arrangements as set down in the Court orders of 2 November 2011, 10 January 2013 and 18 January 2013 have operated successfully and in the best interests of the children since the orders were made. It would be contrary to the welfare of the children for the detail of the orders of 12 October 2011, 10 January 2013 and 18

January 2013 to be superseded or sit in conflict or inconsistently with a competing court order issued in this jurisdiction. When making decisions, the Courts in the United States have access to recordings and transcripts of all earlier court hearings which have taken place concerning the welfare of the children. Access to such recordings and transcripts is of importance to determining the matters at issue as a presiding judge will be able to consider the terms of submissions and concessions made in earlier hearings. Such recordings and transcripts will include the hearing before the Court on 15 April 2016 during which the pursuer stated to the judge that she did not intend to seek any change to the defender's parenting time with the children. The pursuer's second crave is in direct conflict with her statement to the presiding judge on 15 April 2016. The Court will have ready access to the recording and/or transcript of that hearing. A Sheriff in Sheriff Court shall not have such access and will be deprived of the information which would otherwise be available to the Court. The absence of information in the form of the *Our Family Wizard* communications and the transcripts and recordings of earlier hearing is likely to prejudice the administration of justice between the parties. The history of decision making in the Courts in and is such that the welfare of the children has been properly and appropriately promoted by judicial decisions. There is no reason to conclude that the children's welfare would not continue to be properly and appropriately promoted by judicial decisions in In circumstances where the matters in question between the parties have already been determined in other proceedings, this court should dismiss the case. In the absence of dismissal, in all of the circumstances, it is appropriate that the matters raised in the Pursuer's craves continue to be regulated by the extant orders in . The Pursuer has submitted herself to the jurisdiction of the Courts in the USA for five years during which time orders have been considered in a due legal process and made in the interests of the children. In all the circumstances, there is no reason why this court should exercise a jurisdiction which would conflict with the concurrent jurisdiction of another court in which extant orders already regulate the

matters at issue. In all of the circumstances, the Court is the more convenient court for the matters in dispute to be determined. The Court is the court which is the natural and appropriate court in which the matters would be justly determined. As matters have been determined in the Courts in the USA, these present proceedings are unnecessary and incur unnecessary expense for and inconvenience to the parties. This court should decline to exercise its jurisdiction.

3. Admitted.

4. Admitted the parties operate a care arrangement as detailed in the Divorce Judgment. Admitted the children reside with the Pursuer for 38 weeks of the year and have done so since around 2011. Admitted the children go to school in Scotland. Admitted the children are in the Defender's care during the following school holiday periods each year – February week, Easter holidays, Summer holidays, October holidays and every alternate Christmas. Admitted that the Divorce Judgment provides that the Defender shall be responsible for the travel costs associated with transporting the children back and forth between Scotland and the USA. Admitted on 18 January 2013 the Michigan Court ordered the Pursuer to collect the children at the end of their contact with the Defender and for the Defender to be responsible for making the travel arrangements and meeting the cost of said travel. Admitted that in the event that the Defender is not able to collect the children from Scotland at the commencement of contact as per the said order, the Pursuer accompanies the children to the destination selected by the Defender in the USA or Canada. The children's respective views as to how they consider Scotland and the USA are not known and not admitted. *Quoad ultra* denied. Explained and averred that the arrangements as regulated by an order of the Michigan Court and now enrolled in work in the best interests of the children. When necessary, the Court has determined issues which have arisen in connection

with the practicality of the operation of contact. There is no reason to conclude that the Court would fail to do likewise.

5. Admitted that the children are habitually resident in Scotland. Admitted that since birth the Pursuer has been their primary carer. Admitted that the children have been educated in Scotland under explanation that they attended pre-school education in the USA before their relocation to Scotland. Admitted that they currently attend . Admitted that the Pursuer seeks a residence order regulating the children's residence with her under explanation that such an order is not necessary as a consequence of the existing regulation of matters in accordance with the orders from the Michigan Court and because the Defender has never sought to disrupt the children's residence with the Pursuer. Admitted the orders regulating the children's welfare and custody were subject to the jurisdiction of the court. Admitted that the Court will no longer have jurisdiction in the welfare of the children after 90 days from mid-March 2016 under explanation that has now confirmed that it has jurisdiction and has enrolled the orders there. Admitted that the children's primary carer has always been the Pursuer. Not known and not admitted that they are settled in Scotland and achieving their academic milestones. Not known and not admitted that the children spend their weekends in and around their home in Not known and not admitted that they take skiing lessons on the dry slope in . Not known and not admitted that the children have friends close to their home and at their school. Not known and not admitted that they are happy, healthy and well looked after by the Pursuer. Not known and not admitted that they are happy and settled living with the Pursuer in Scotland. The views of the children are not known and not admitted. *Quoad ultra* denied. Explained and averred that when the Court indicated that it would not retain jurisdiction, the Defender applied to the Court for it to seize jurisdiction in order that the orders could be enrolled there with a view to same being enforceable. The Defender has not sought to vary the children's residence.

The Defender does not seek to vary the children's residence. The Defender considers that the orders now enrolled in serve the best interests of the children and, other than in respect of the practicalities of the operation of contact as opposed to the extent of same, the orders do not require variation. It is not necessary for the Court to conclude that the children are habitually resident there in order for it to have jurisdiction in respect of extant orders which are enrolled there. The Pursuer's fears in respect of the implications of holding jurisdiction are unfounded. In consequence of the Court enrolling the orders including the Divorce Judgment, there is an enforceable order in place in to the effect that the children will reside with the Pursuer in Scotland. Regulation of that by way of a residence order in Scottish proceedings is unnecessary. It is not better that such an order is made than that no order be made at all.

6. Admitted since 2011 the children have exercised approximately 14 weeks contact each year with the Defender. Admitted that with the exception of the weeks' contact in October and in February each year, which October and February contact has taken place in , the Defender's contact with the children takes place in the USA. Admitted the children spend on average 8 weeks every summer in the USA. Admitted the spend 2 weeks every Easter in the USA. Admitted the spend two weeks every alternate Christmas in the USA. *Quoad ultra* denied. Explained and averred that the contact arrangements as set down in the orders of the court operate in the best interests of the children. The Pursuer has never sought to vary the extent of contact by making an application to the or courts. The contact which the Pursuer now seeks to prevent from operating would be contact which would operate in the USA where the court orders are extant. In the absence of the Pursuer applying to the court to vary the orders extant there, those orders would continue to be enforceable there. The existence of competing court orders regulating parental contact would be contrary to the welfare of the children. The existence of competing court

orders would cause the children and the parties unnecessary confusion. The existence of competing court orders would likely lead to disputes between the parties as to the operation of contact which disputes have not existed during the concurrence of the court orders. If the Pursuer's concerns as to problems with the operation of contact are legitimate, which is denied, then the Pursuer's remedy lies in petitioning the Court to vary the terms of the existing order. There is no reason to conclude that the court would fail to give proper weight to the Pursuer's submissions in this respect.

7. Admitted in 2014 the Defender sought an order from the Court to allow the children to travel to and from the USA as unaccompanied minors. Admitted the Court refused this application. *Quoad ultra* denied except insofar as coinciding herewith. Explained and averred that on 15 April 2016 the Court determined the Defender's application that the children travel unaccompanied to the USA at this time. The Pursuer was appropriately represented in those proceedings and her position was accepted by the court. The matter at issue has been determined by another court. There is no need for this court to determine the matter. There is no need for a specific issue order. It is not better that this court make an order than not do so when the matter has already been resolved.

PLEAS-IN-LAW

1. The matters in question between the parties having already been determined in other proceedings, this court should refuse the Pursuer's craves in terms of s.14(1) of the Family Law Act 1986.

2. There being proceedings with respect to the matters which are the subject of the Pursuer's craves continuing outside Scotland, the court should sist the proceedings before this court in terms of s.14(2) of the Family Law Act 1986.

3. It being more appropriate that the matters which are the subject of the Pursuer's craves be determined in the proceedings between the parties in , United States of America, and that it is likely that proceedings shall be taken there, the court should sist the proceedings before this court in terms of s.14(2) of the Family Law Act 1986.

4. This court being *forum non conveniens,* the action should be dismissed or sisted.

5. *Esto,* the court determines that it should exercise its jurisdiction, it being unnecessary for orders to be granted as craved by the Pursuer and it not being better that such orders should be made than not, the Pursuer's craves should be dismissed.

6. *Esto,* the court determines that it should exercise its jurisdiction, the making of a contact order regulating contact between the children and the Defender as second craved by the Pursuer being contrary to the welfare of the children in circumstances where there is an existing order in place regulating contact which operates successfully, the Pursuer's second crave should be dismissed.

IN RESPECT WHEREOF

Solicitor for the Defender
Tel:
Fax:
LP:
Ref:

4

PM Due 25/05

Form G6
Rule 15.1(1)(b)

Form of motion
SHERIFFDOM OF
Court ref. no.

SHERIFF COURT
18 MAY 2016
LODGED

MOTION FOR THE PURSUER

in the cause

[redacted] residing at

Pursuer

Against

[redacted] residing at

Defender

The Pursuer moves the court to:

1. Make an interim residence order in terms of section 11(2)(c) of the Children (Scotland) Act 1995 providing that the children born 8 June 2007 and born 2 December 2008 reside with the Pursuer;
2. Make an interim order in terms of section 11(2)(d) of the Children (Scotland) Act 1995 providing that the children born 8 June 2007 and born 2 December 2008 have contact with the Defender during the school summer holidays at such times as to the Court seems appropriate;
3. Make a specific issue order preventing the children born 8 June 2007 and born 2 December 2008 from undergoing any dental treatment other than within the jurisdiction of this court with the exception of emergency dental treatment only;
4. Fix a Hearing in respect of this motion before the date for the hearing on interim orders on 17th June 2016; and
5. In the event of opposition hereto, fix a hearing before the date for the hearing on interim orders on 17th June 2016.

List the documents or parts of process lodged with the motion:-

1. None

Date 17th May 2016
IN RESPECT WHEREOF

[redacted]
Solicitor for Pursuer

5

7/3

FORM G6

SHERIFFDOM OF

SHERIFF COURT
Sheriff Ref No. F3
20 MAY 2016
Chq £48
LODGED

MOTION

FOR THE DEFENDER

in the cause

[redacted] or [redacted] residing at [redacted]

PURSUER

against

, residing at
United States of America

DEFENDER

The Defender moves the Court to

1. In circumstances where the matters in question between the parties have already been determined in other proceedings being proceedings before the court of the United States of America, specifically by courts in [redacted] and [redacted] this court should refuse the Pursuer's application in terms of s.14(1) of the Family Law Act 1986.

2. *Esto,* the court does not refuse the Pursuer's application in terms of Part 1 of this motion, as a consequence of:

   a. proceedings with respect to the matters to which the application relates continuing outside Scotland, specifically in United States of America, and/or

   b. it being more appropriate that the matters in question between the parties be determined in the proceedings between the parties in Tennessee, United States of America, and that it is likely that proceedings shall be taken there,

   the court should sist the proceedings before this court in terms of s.14(2) of the Family Law Act 1986.

3. This court being *forum non conveniens,* the action should be dismissed or sisted.

Appendix 1

Summary of basic facts

1. (born 8th June 2007) and born 2 December 2008) are the children of and .

2. Mr [redacted] and Ms [redacted] were previously married and are British nationals. They moved to the United States in 2006 for the purposes of Mr employment prior to the birth of the children.

3. The children were born in the United States and are US Citizens. They hold both US and British passports.

4. Mr and Ms , separated in 2011 when the family remained resident in the United States. Proceedings were raised in the , Courts in order, initially, to make arrangements in respect of the children and, latterly, to deal with the parties' divorce.

5. Prior to the spring of 2016 various orders had been made over the course of the preceding 4 and a half years:

   (1) On 12th October 2011 an order was granted which, put in short terms, provided that:

   a) The children were to remain within the State of [redacted] during the concurrence of the proceedings and their passports were to be surrendered to the Court;

   b) The parties were to have joint legal and physical custody of the children; **(6/1/5A)**

   (2) On 7th November 2011 the order of 12th October 2011 was set aside and the children were allowed to move to Scotland with their mother. The parties retained joint legal custody although Ms , would have primary physical custody given that she was returning to Scotland with the children while Mr was remaining in the United States. The order made detailed provision for the practical implementation of this including provision that the children would spend 14 weeks per year in the care of Mr in the United States together with, essentially, unrestricted phone and electronic contact. The order further provided that "this custody arrangement and Order shall be governed by the laws of the State of Michigan and the United States of America and this Court shall retain jurisdiction with regard to any issues of custody or support regarding the minor children of the parties. In the event of any dispute between the

parties, they shall petition this Court for enforcement of this order or for any change."; **(6/1/5B)**

(3) The parties were divorced by order dated 2nd November 2012. Insofar as the children are concerned, the order of divorce essentially repeated the terms of the one as made on 7th November 2011 including the provision as to jurisdiction before going on to address various aspects of the practical implementation of the joint custody provision in detail; **(6/1/5C)**

(4) This order was reissued in a very slightly amended form on 10th January 2013. The amendment does not affect what had been ordered in respect of the children and, in particular, the jurisdiction provision was, again, repeated; **(6/1/5F)**

(5) Various orders of a more limited nature have been issued from time to time by the Court in Michigan dealing with fees, payment of child support and retention of passports. **(6/1/5D, E and G)**

(6) In addition to significant detail being contained within the divorce judgment and that as amended, a Parental Cooperation Order was issued on 18 January 2013 **(6/1/5H)**

(7) The parties were ordered to communicate using *Our Family Wizard* by order of 18 Janaury 2013 **(6/1/5I and J)**

(8) Specific orders have been made in respect of the practicalities of travel respectively 18 January 2013 and 10 June 2014**(6/1/5J and K)**

6. In June 2015 Mr moved from Michigan to Tennessee for employment purposes.

7. This led to further litigation in the United States in the spring of 2016

(1) In March 2016, Mr [redacted] enrolled a motion at the court in (which at that time retained jurisdiction) seeking an order that the children travel to the USA for contact unaccompanied in order to mitigate the cost of travel. Ms [redacted] opposed same and raised a question as to whether had ongoing jurisdiction given that Mr had moved from that State and in consequence that State no longer had ties to the case.

(2) On 15 April, the [redacted] court issued 2 orders. First, **(6/1/2)** refusing Mr application for unaccompanied travel. Second, **(6/1/1),** determining that "the ' County Court (') no longer had exclusive, continuing jurisdiction over the child custody determination" but retaining that for 90 days thereafter to "allow the jurisdictional issue to be litigated."

(3) Prior to that determination, Ms had already commenced the present proceedings in A hearing has been assigned to consider what orders should be granted in that process and that hearing has been assigned for 17th June 2016. No orders have yet been made;

(4) Following the order regarding jurisdiction, Mr took steps to have the court orders from the [redacted] Court enrolled in ' and for that court to assume jurisdiction. On 26 April 2016, Chancellor [redacted] made an order in the Courts enrolling foreign orders (those orders being the various orders as had been issued in ' ' and specified in 5 above). When doing so, Chancellor ' included in the Order the following provision, "This court shall have jurisdiction over all matters regarding the minor children ... and it is both the proper venue and the most convenient forum for the modification and/or enforcement of the orders set forth herein and all matters related to the children." **(6/1/3 and 6/1/4)**

(5) Ms did not challenge the enrolment of the orders in ' nor has she appealed against the decision in respect of the assumption of jurisdiction.

8. Ms ' has now enrolled a motion in the proceedings which seeks orders relating to the welfare of the children. For such orders to be made, the Sheriff Court in would require to decide to exercise its jurisdiction. The making of the orders would not negate the extant nature of the orders which are *extant* in the USA, binding on the parties and enforceable there. At least in respect of contact, Ms seeks an order which would sit contrary to the express terms of the US orders regulating this. As such, Sheriff Court is being asked to make an order which competes with an *extant* order as made by another court.

(11)

7

SHERIFFDOM OF

Court ref no:

LIST OF AUTHORITIES FOR THE DEFENDER

in the cause

residing at

PURSUER

against

residing at
United States of America

DEFENDER

Regulations

1. Council Regulation No.2201/2003 (Brussels II *bis)*

Statute

2. The Domicile and Matrimonial Proceedings Act 1973
   a. Section 5
   b. Section 8
   c. Schedule 1, Paragraph 9
   d. Schedule 3, Paragraph 9

3. The Family Law Act 1986
   a. Section 2
   b. Section 5
   c. Sections 8 – 18

Text books

4. Macphail, *Sheriff Court Practice*, paragraphs 2.88 – 2.93

5. Anton and Beaumont, *Private International Law*, paragraphs 8.406 – 8.424

6. Wilkinson and Norrie, *The Law of Parent and Child in Scotland*, paragraphs 10.31 ad 10.32

Case Law

In respect of the competence of sisting/dismissing proceedings when Brussels II *bis* applies

7. *Osuwo v Jackson*
8. *JKN v JCN*
9. *A v A*
10. *Mittal v Mittal*

In respect of procedure and the merits of sisting/dismissing/*forum non conveniens*

11. *AB v CD*
12. *B v B*
13. *N v K*

Summary Sheriff 2016
Civil Case Study
Statement of Facts not in dispute

[1] All of the travel arrangements for contact in the United States are made by the defender and his wife. The flight arrangements invariably involve the children flying from Glasgow or Edinburgh to London and then to a destination in the USA, commonly New York or Chicago. The children then undertake a journey by air or car to the defender's home or, sometimes, to another 'holiday' destination such as Disney World in Orlando.

[2] The car journey from Chicago to Tennessee takes 7 hours.

[3] The defender is employed as a Health and Safety Executive with a large corporation in Tennessee. While he has a good income and is financially secure the burden of paying for flights for the children's contact visits in the USA is significant. He and his wife accordingly do their best to identify flights which will offer best value for money.

[4] The pursuer and his wife have a 3 year old daughter who is a sister to the children. They are very fond of her and enjoy seeing her.

[5] The defender communicates with the children twice per week by Skype. He insists that the pursuer be not present in the room when the children are speaking to him and his wife.

[6] When the children are in the United States on contact visits the pursuer keeps in touch by Skype. The defender has insisted on being present during such discussions and has declined requests for the children to be able to speak to the pursuer on their own.

[7] The children spend all of their school holidays with the defender and his wife in the USA. The Easter and October breaks are quite short and the children can find themselves undertaking transatlantic return flights within a matter of four or five days. On at least one occasion the defender arranged for the children to fly straight to Orlando for a four day

holiday at Disney World and back again. The defender's parents joined them from Falkirk where they live.

[8] During the long summer break the defender and his wife enrol the children in Summer Camp. Contrary to popular belief this is not a residential holiday camp. It is a day time activity centre to which the children go. They are in the company of other children of similar ages and undertake organised activities and trips. The defender works full time and has only two weeks holiday per year. He would be unable to take time off to be with the children all of the time.

[9] The pursuer always accompanies the children on flights and this is paid for by the defender. Her practice is to fly out with the children on the outward journey, return home and at the end of the contact period fly out again to collect them.

[10] The defender is Scottish and was born and brought up in Falkirk. His parents and other members of his extended family still reside there. He has not been back to Scotland for several years and not at all since the parties separated. His parents go out to the United States to visit him and his wife from time to time. They try to time their visits to coincide with the children's contact visits. During the summer break they have on occasion all gone away for a few days for a holiday trip somewhere else in the United States.

[11] The defender applied to the Tennessee Court for permission for the children to travel as unaccompanied minors but this was successfully opposed by the pursuer who had serious concerns about the children coping with a two or three leg transatlantic flight on their own.

[12] The children can undertake up to eight transatlantic flights per year, some return flights within a short period of days after the outward flight.

[13] As a consequence of the 14 week contact order made firstly by the Michigan Court and adopted by the Tennessee Court the children have no time at all in Scotland during their school holidays which are spent in their entirety in the USA. The pursuer has managed one holiday to Spain with the children for a week but had to take them out of school during term time to do this. The children are unable to spend any time during school holidays with their many Scottish friends or extended families here. They are unable to engage in any organised activities in Scotland or to pursue or develop any other interests there during the school holidays.

[14] The pursuer has no opportunity of spending time with the children on their school holidays.

[15] The children have no opportunity of engaging with their extended families in Scotland while on holiday from school.

[16] The children are registered with a Doctor and Dentist near their home in Scotland.

Summary Sheriff 2016
Civil Case Study
Submissions for Defender

[1] It was conceded by Mr A, counsel for the defender, at the outset that this Court has jurisdiction by virtue of the habitual residence of the children, R and K, being in Scotland and within the area of this Court. He did not concede that this Court should exercise jurisdiction. The motion was hierarchical in nature in respect that he first sought dismissal of the action in terms of section 14(1) of the 1986 Act but adopted an *esto* position that if dismissal was considered by the Court to be inappropriate the action should be sisted in terms of section 14(2).

[2] The factual background was not in dispute and Mr A helpfully provided a summary which is provided. The parties separated in 2011 and on 7 November 2011 an order was granted by a court in Michigan regulating the arrangements for the children whereby the parties retained, using US terminology, joint legal custody although the pursuer had primary physical custody in respect that she was returning to Scotland with the children while the defender was remaining in the USA. It appeared that the expression 'joint legal custody' was analogous to parents within the jurisdiction of this court each having parental responsibilities and rights although the children might reside with only one of the parents. The Michigan order of 7 November 2011 made detailed provision that the children would spend 14 weeks per year in the care of the defender in the USA, effectively their entire school holidays. The subsequent divorce of the parties by order dated 2 November 2012 by the same Michigan court did not disturb the arrangements for the care of the children and essentially repeated the terms of the 7 November 2011 order. A parental co-operation order was issued on 18 January 2013 which included provision for the parties communicating through 'Our Family Wizard', a secure website which allowed for communication between the parties on the practical arrangements in respect of the children in the sight of their respective representatives and the Court.

[3] The defender moved to Tennessee in about June 2015 for employment reasons and in April 2016 took steps to enrol the Michigan orders there. On 26 April 2016 an order was made in the Tennessee Court enrolling the Michigan orders and expressly accepting

jurisdiction over all matters regarding the children. The Tennessee proceedings were not opposed by the pursuer or any appeal taken against its orders. The pursuer, in the meantime, raised proceedings in this Court, the first order being dated 14 April 2016.

[4] It was explained by counsel for the defender that para. 5(6) of the Tennessee order provided for parental co-operation including a requirement that the parties communicate by 'Our Family Wizard', a secure website allowing parties a secure means of communication and recording diary arrangements. The attorneys and judge can access the site and the effect of the court order has been to render communication in this way mandatory. There is a background of significant acrimony and Mr A submitted that this particular aspect of the Tennessee order weighed heavily with the *forum non conveniens* argument as the order in the US would not work without it. The pursuer, moreover, gave an undertaking not to seek variations of the order. Unlike the Tennessee judge the Sheriff cannot have access to either Our Family Wizard or the full transcripts of the Michigan and Tennessee proceedings.

[5] Counsel for the defender emphasised that the pursuer submitted herself to the jurisdiction of the Tennessee court and before that the Michigan court. She was successful in Tennessee in opposing the defender's request for authorisation of unaccompanied minor travel arrangements for the children. Mr A did not go so far as to suggest that the Scottish Court must defer to Tennessee but he did emphasise that the Tennessee court was not surrendering jurisdiction. It was not open to the Sheriff to direct the Tennessee court what to do. Its order was extant and binding on the parties.

[6] It was submitted on behalf of the defender that by virtue of **Council Regulation (EC) No. 2201/2003 (Brussels II *bis*) Art. 3** jurisdiction with the courts of the Member State, Scotland, was mandatory. By virtue of **Art. 8** jurisdiction in matters of parental responsibility over the children, R and K, lay with the Scottish Court by virtue of the children's habitual residence in Scotland. Parties were agreed that **Brussels II *bis*** applied even if the other country was not an EU Member State (***Re* I 2009 UKSC 10**). Reference was made to **Wilkinson & Norrie para. 10.31** and **10.32** for a discussion of the options available to a Scottish Court where concurrent jurisdiction arises. Mr A concluded that there was concurrent jurisdiction between Anytown Sheriff Court and the Tennessee Court and the potential for competing orders by the two courts. Before turning to the effect of the Family Law Act 1986 Mr A made a passing reference to the concept of international judicial liaison

and its possible applicability in the present case. He referred to the case of **N v K [2013] EWHC 2774 (Fam)**, a decision by **Cobb J** in which he discussed the Office of International Family Justice, the facilitation of cross-border collaboration and direct judicial communication. He saw the N v K case as a paradigm for the application of international judicial liaison. The Family Liaison judge in Scotland is Lord Brailsford.

[7] Counsel for the defender then turned to consideration of **section 14(1)** of the **Family Law Act 1986**. It was not disputed that the matter of residence of the children has been determined and continued to be determined in other proceedings. This being so it was open to the Sheriff, in the exercise of his/her discretion, to refuse the application by the pursuer and dismiss the action. **Section 14(2)** offers the alternative of a sist of the action although the defender's primary position was for dismissal.

[8] The situation was rendered more difficult by the case of **Owusu v Jackson [2005] QB 801**, a commercial action in which the Court of Justice reinforced the mandatory nature of the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters 1968 noting that it contained no express exception relating to *forum non conveniens*, that it was not open to a court of a contracting state to decline jurisdiction conferred on it by Article 2 on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action. The case of **A v A [2013] UKSC 60** contains in the speech of **Baroness Hale** at **paras. 30 – 33** *obiter* comment questioning the applicability of the decision in **Owusu v Jackson** to matrimonial proceedings. One of the cases in which **Owusu v Jackson** was distinguished was that of **Mittal v Mittal [2013] EWCA Civ 1255** upon the reasoning summarised in the rubric that the relevant legislation empowered the English courts to stay matrimonial proceedings other than proceedings governed by Council Regulation (EC) No. 2201/2003, that proceedings were only governed by Regulations if they fell within Article 19, that the reference to the Regulation in the legislation was simply intended to make domestic legislation comply with the Regulation and there was no warrant for reading it as having any greater effect. The relevant legislation was the **Domicile and Matrimonial Proceedings Act 1973, para. 9, Schedule 1** and to all intents and purposes, by virtue of **para. 9, Schedule 3**, the position was the same in Scotland. Mr A concluded that by analogy the case of **Mittal** should be followed. He referred in particular to **Lewis LJ paras. 2, 11, 24, 27 and 31-34**.

[9] Turning to the aspect of *forum non conveniens* Mr A referred to **Anton and Beaumont, 'Private International Law' para. 8.406** and **407** quoting **Lord Kinnear** in **Sim v Robinow (1892) 19R 665** at **668** to the effect that in considering a plea of *forum non conveniens* it is not a mere question of convenience. The question is where substantial justice is to be served in the interests of the parties. Counsel for the defender submitted, and it was not disputed, that the American orders have regulated arrangements between the parties for a period of years apparently effectively. The matters truly at issue between the parties relate to the nature and extent of contact where contact will be exercised primarily in Tennessee so that it was of as much interest to Tennessee as to Anytown. The matter of the children attending Summer Camp arose and Mr A suggested that a Judge in Tennessee would have a better understanding of the Summer Camp.

[10] Mr A agreed that the American orders are lacking any reference to the views of the children.

[11] In closing Mr A reiterated that the defender does not challenge the children's residence in Scotland and to suggest that he does would be to suggest that the dispute between the parties runs deeper that it does. He moved the Court, however, to allow matters to continue to be regulated by the court in Tennessee and to dismiss the pursuer's action.

Summary Sheriff 2016
Civil Case Study
Submissions for Pursuer

[1] Counsel for the pursuer, Ms C, opened by stating that there is no residence order in terms of **section 11(2)(c)** of the **Children (Scotland) Act 1995**. A *status quo* exists whereby the children reside with their mother but there is in fact no residence order and the pursuer sought the making of such an order.

[2] She explained also that as regards the maintenance order made in the US the pursuer did not seek to enforce that. If the defender continued to pay well and good but the issue of the welfare of the children was more important and should be decided in this Court. It was submitted by Ms C that both parts of the defender's motion were mutually exclusive. She questioned the assertion on behalf of the defender that he was not seeking to challenge the matter of residence by referring to his Affidavit, number 6/2/3 of Process and paras. 28 and 29 where he refers to the pursuer's unstable life and discloses the disdain with which he regards her family, their lifestyle and lack of university education. She suggested that it was disingenuous to suggest that this was no more than a dispute regarding contact. She referred to paras. 15 and 16 of the pursuer's Affidavit, number 5/4/1 of Process and the concerns expressed by her there. She held a belief that the defender sought to reverse the arrangements for residence and suggested that without any suggestion of wrongful removal it would be possible for the defender to engineer an emergency in relation to the children with a view to making an urgent possibly 'without notice' application to the court in Tennessee to change residence.

[3] Counsel for the pursuer questioned the basis upon which the Tennessee Court could have jurisdiction. She acknowledged that the pursuer had not defended or appealed the proceedings there but submitted that this was not the same as accepting the jurisdiction of the court. She suggested that there is no such thing as 'US proceedings' and that Michigan was as different from Tennessee as England from Poland. The pursuer accepted that for a number of years matters between the parties were regulated by the orders of the court in Michigan notwithstanding the residence of the children, who both have US and UK citizenship, has

been in Scotland. There were, therefore, proceedings but now, it was suggested, there was a lacuna and accordingly the pursuer now sought a residence order. The Scottish court could not be satisfied that the Tennessee Court was properly seized of the jurisdiction for the case.

[4] Should the view be taken that by not defending the Tennessee proceedings the pursuer has effectively submitted to the jurisdiction of the Tennessee court then there are proceedings in Tennessee and they are not concluded.

[5] Counsel for the pursuer argued against dismissal of the action in terms of section 14(1) of the Family Law Act 1986. She agreed with the proposition that it was doubtful if proceedings relating to children can ever be said to be concluded. There was a high degree of acrimony in the present proceedings and it was likely that some court would have to make some decisions about the children going forward.

[6] In relation to the second part of the defender's motion to sist the proceedings in terms of **section 14(2)** of the **Family Law Act 1986** Ms C submitted that the provision could be regarded as a statutory form of *forum non conveniens* (**JKN v JCN [2010] EWHC 843**).

[7] With regard to the case of **Owusu v Jackson (*supra*)** Ms C did not disagree with the analysis by Mr A. She submitted that if the mandatory provisions applied to **Brussels II *bis*** the defender's motion would be incompetent and the court could not decline jurisdiction. She acknowledged that by analogy it might be argued by virtue of the case of **Mittal v Mittal (*supra*)** that the decision in **Owusu** could not apply. She observed, however, that these were decisions by English courts which are not binding and involve the interpretation of different statutes. While there were similarities between the wording of the **Domicile and Matrimonial Proceedings Act 1973** and the **Family Law Act 1986** regarding the discretion to sist proceedings, they were not on all fours. She suggested that there are differences. Once most proceedings have concluded that is it and the matters at issue cannot be the subject of further decisions. By comparison this is not the case with children's proceedings where in Scotland parents retain parental responsibilities and rights until the children are 16 to 18 years of age. The comments by **Baroness Hale** were *obiter* in nature. Counsel for the pursuer urged caution before applying **Owusu** and suggested that the assumption should be that it does not and that the mandatory provisions of the Regulation do apply.

[8] Reference was made to **RAB v MIB [2008] CSIH 52**, a decision of the Inner House in support of the principle that the test for upholding the plea of *forum non conveniens* was not one of the practical convenience of witnesses but whether the alternative forum contended for was one in which the case may be tried more suitably for the interests of all the parties and the ends of justice. In that case the Court explained that it was necessary to look for more potent factors than mere convenience, that the English Court was clearly or distinctly more appropriate with more closely connecting factors to the marriage and the welfare of the child who was the issue of that marriage. Was the Tennessee Court more appropriate? Did the Tennessee Court have jurisdiction? Was it in the interests of all the parties for the ends of justice to be pursued there? She submitted that it was a balancing exercise. The convenience of witnesses was not a primary consideration but it was not irrelevant.

[9] In the case of **RAB v MIB** the Court had regard to the child having its closest connection to Scotland. In the present case the children have been resident in Scotland from 2011, approximately half of their lives. They were both conceived in Dundee by IVF to parents who are both Scottish. And so Scotland is where the children are most closely connected. By comparison Tennessee is where the defender moved last June and where the children have spent only one summer and one Easter. The Court was satisfied in **RAB v MIB** that the jurisdiction of Aberdeen Sheriff Court was not open to question and by similar reasoning Alloa Sheriff Court has jurisdiction and is the more appropriate forum.

[10] Ms C submitted that there are no such things as 'US orders'; it is not as simple as that. The pursuer did not challenge the jurisdiction in Michigan and if she was still in Michigan would submit to the jurisdiction of the court there. She did not concede however that it was the most appropriate forum. She found herself in Michigan where she built a relationship with a lawyer there. In deciding which court is the best forum the best interests of the children is the paramount consideration. Their school is here, they have friends here and they are registered with a doctor here. Aspects of the US orders could be replicated here. The orders of the Sheriff Court can be as detailed as parties want.

[11] With reference to the facility of Our Family Wizard it had limitations. It was not uncommon for the defender to give the least possible notice of the children's flying times and as far as the pursuer was concerned he did not comply with the spirit of the orders. The

parties do not always avail themselves of Our Family Wizard. As for access to the transcripts of the US Courts it was unlikely that this would ever be necessary or desirable.

[12] There were a number of factors favouring Alloa Sheriff Court. The children have their habitual residence in Alloa. They are well accepted here. Their life is here. The pursuer's ability to defend the Tennessee proceedings left her at a disadvantage and under the necessity of paying an $8,000 retainer to an attorney there. There were serious restrictions on self representation there. Just because she had some success it did not follow that she could effectively represent herself. The pursuer does reside and have a life here whereas she has never resided in Tennessee. The defender moved to Tennessee in 2015, did not tell the pursuer he was moving and she only found out when she took the children to the States for contact. He lost his job in Michigan and went to Tennessee to find employment. He advised Michigan that his intention was only to go to Tennessee for a short time and to return. If the defender were to lose his job again and moved to California or New York would it be in the best interests of the children for jurisdiction to lie wherever the defender was currently residing for his work compared to the place where the children were permanently residing?