



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 98

F32/22

OPINION OF LORD STUART

In the cause

CD

Pursuer

against

ND

Defender

Pursuer: Donachie; SKO Family Law Specialists

Defender: Clark; Aberdeen Considine & Co (for Miller Samuel Hill Brown Solicitors)

1 November 2024

Introduction

[1] This is an action for divorce and financial provision at the instance of the husband.

This opinion follows a proof in connection with establishing the “Relevant Date”, that is, the date upon which the parties ceased to cohabit, which, in the circumstances of this case, means the date when they ceased to live together as man and wife. I will return to the law in respect of defining and interpreting the Relevant Date below.

[2] The parties were married in America on 20 August 1998. There are four children of the marriage. I will call them Simon, Andrea, James and John to make them real whilst respecting their anonymity. Only John is under the age of 16. The family moved to

Australia in 2013, a move facilitated by the pursuer's employer. In August 2016 the pursuer returned to Scotland with his continuing employment. Simon returned to Scotland with the pursuer. Between August 2016 and January 2020 the parties and children spent time together and communicated with each other. Considerable evidence of the time spent together and the communications between the parties was led in support of the parties' respective arguments regarding the Relevant Date. The pursuer argued that the Relevant Date is 30 December 2017. The defender argued the Relevant Date is 6 January 2020.

[3] On the evidence presented to me and the submissions made, I find that the Relevant Date is 6 January 2020.

The relevant law

[4] The legal framework that governs financial provision on divorce is contained in the Family Law (Scotland) Act 1985 ("the Act"). One of the functions of the Act is to guide the court in identifying and fair sharing the net value of the parties' matrimonial property. So far as pertinent to this opinion, section 10 of the Act provides:

“(1) In applying the principle set out in section 9(1)(a) of this Act, the net value of the matrimonial property ... shall be taken to be shared fairly between persons when it is shared equally or in such other proportions as are justified by special circumstances.

(2) Subject to subsection (3A) below, the net value of the property shall be the value of the property *at the relevant date* after deduction of any debts incurred by one or both of the parties to the marriage [my emphasis] ... —

(a) before the marriage so far as they relate to the matrimonial property ..., and

(b) during the marriage ...,

which are outstanding at that date.

(3) In this section '*the relevant date*' means whichever is the earlier of—

- (a) subject to subsection (7) below, the date on which the persons *ceased to cohabit* [my emphasis];
- (b) [not relevant]"

[5] Section 27(2) of the Act provides:

"For the purposes of this Act, the parties to a marriage shall be held to cohabit with one another only when they are in fact *living together as man and wife*. [my emphasis]"

[6] The leading authority in cases relating to the relevant date is *HS v FS* [2015] CSIH 14.

At paragraph [16] the Lord Justice Clerk (Carloway) giving the judgment of the Second

Division stated regarding the approach of the Lord Ordinary:

"He applied himself to the correct legal test in that regard in adopting the formulation set out in *Banks v Banks* [2005] Fam LR 116 (Lord Carloway at para [33]), viz:

'The task of the Court is to determine when the parties ceased to cohabit, having regard to the statutory provision that cohabitation occurs only when parties are 'in fact living together as husband (*sic*) and wife'. That is, as the provision itself states, a matter of fact. The ultimate determination of the issue must depend upon the particular circumstances of a given case. As a generality, the Court must look at the issue objectively; no doubt taking into account the illustrative factors mentioned by Professor Clive [The Law of Husband and Wife (4th edn, 1997)]. There may, of course, be many others which emerge as relevant. The intention of the parties cannot be determinative of the issue. In that sense, there is no absolute requirement for one of the parties to have decided that the marriage or relationship has run its course or that such a decision should have been communicated by one party to the other. However, the intention of the parties and any communication of them to each other may be relevant factors in the equation.'"

[7] Those "illustrative factors" can be found at paragraph 21.075 of *Husband and Wife*

(4th Ed, 1997) and include: the amount and nature of time spent together, living together

under the same roof, sleeping together, having sexual intercourse together, eating together,

having a social life and other leisure activities together, supporting each other, talking to

each other, being affectionate towards each other, sharing resources, sharing household

tasks and child-rearing tasks and so on. As Professor Clive also notes at paragraph 21.075, no one factor will be conclusive on its own.

[8] I agree with the observation of Lord Turnbull in *Bain v Bain* [2008] CSOH 95 at paragraph [10] that “examples of decisions arrived at by other judges in other cases may not be of particular assistance.”

The evidence

[9] The evidence led at proof consisted of two joint minutes of admissions, various affidavits, supplemented by oral evidence and various productions. The first joint minute agreed various dates and other incidental factual matters. The second joint minute agreed the provenance of, and explained the sender and receiver of, various text messages and photographs lodged in process. I acknowledge that some time has now passed from my hearing the proof and the issuing of this opinion. In setting out the evidence of the various witnesses I have reviewed my notes from proof and the witnesses’ respective affidavits, cross referencing these to other relevant affidavits and the productions in the case. Given the extent of the evidence led, this has been a particularly time consuming task.

Evidence led by the pursuer

[10] Given that I have rejected the pursuer’s asserted Relevant Date, I will address his evidence in more detail. The pursuer had prepared a substantial affidavit (189 paragraphs), which he adopted in evidence. This was supplemented by considerable further oral evidence in both examination-in-chief and cross-examination.

[11] A summary of the pursuer’s affidavit is as follows. The parties moved to Australia in 2013. This was facilitated by the pursuer’s employer. Given the time difference between

the UK and Australia the pursuer worked most evenings. As a result, the parties did not go out often. At the weekend they would go out as a family. John was born in 2011. He would sleep in his parents' bed, on and off, until he was around 10 or 11 years old. The default position was that the pursuer and defender would share a bed but the pursuer would sometimes sleep in the spare room if John got into their bed. The pursuer and defender set up a joint bank account with the National Australia Bank (NAB) into which the pursuer's salary was paid. Between 2013 and 2015 the pursuer travelled from Australia to the UK for work. In 2015, the pursuer's employer asked him to return to the UK. The defender initially agreed to return to the UK. A few months before they were due to leave Australia the defender told the pursuer that she wanted to stay in Australia. In August 2016 the pursuer returned to the UK with Simon, who was by then 16 years old. The defender and the other three children remained in Australia. The defender and three children came to Scotland over Christmas 2016. The pursuer and defender did not share a bed but got on well. They did not broach the subject of the defender returning to Scotland. The pursuer set up a TSB bank account in his sole name when he moved back to Edinburgh in 2016. His salary was paid into this TSB account. That was a conscious decision as the pursuer wanted to separate his finances from the defender as the defender had decided to stay in Australia. On 23 September 2017 the pursuer became aware of a text message sent to the defender by another man, which suggested that the defender "was involved with" another man (the text message is lodged in process and given its terms I infer that the pursuer means sexually involved with). The pursuer discussed the messages with a friend (that friend is the witness referred to below as SB). SB had previously had difficulties in his own marriage and had discussed these with the pursuer. SB suggested that the pursuer speak to a lawyer. Towards the end of September 2017, the pursuer obtained legal advice from a Scottish

solicitor and thereafter, when in Australia whilst on holiday with the family in early October 2017, sought legal advice from an Australian lawyer. Whilst at home in October 2017 the pursuer discovered further text messages (these may be from a different person and are also sexual in nature). On the last day of his time at home in October 2017 the pursuer confronted the defender about the messages. The defender assured the pursuer that it was just “a hobby”, that nothing had happened, that she was not having an affair and that she would stop texting people. Whilst at home in October 2017 the parties shared a bed and were intimate.

[12] In December 2017 the pursuer and Simon flew to Australia to spend Christmas/New Year with the family. On 24 December 2017 the pursuer became aware of a text message where the sender stated he wished that he was with the defender and concluding the message with a kiss. Over the following days the pursuer became aware of further messages, from which the pursuer inferred that the defender was having an affair with another man/men. The family engaged in various activities. Between 25 and 30 December 2017 Simon and Andrea told the pursuer that the defender had the Tinder App on her telephone. During this conversation Simon told the pursuer that before returning to Scotland in 2016 he, Simon, heard John ask the defender whether she was having sex with other men to which the defender replied of course not. Later, in 2023, Andrea told the pursuer that after the pursuer had returned to Scotland (which I take to mean in 2016) the defender had been seeing other men. On 30 December 2017 the pursuer confronted the defender about the text messages and Tinder profile. The defender denied that she was “doing anything”. The pursuer examined the defender’s telephone. The pursuer accessed dozens of different messages from different streams. The messages were extremely graphic, including images. The pursuer was “beyond angry”. The messages were completely fatal to

the parties' marriage. The defender had lied. There was no trust anymore. The pursuer absolutely ended the marriage there and then. It was clear to the pursuer that the defender knew the marriage was over. The confrontation became heated. The pursuer said to the defender the marriage "was done" and walked out of the room.

[13] Leaving the terms of the pursuer's affidavit for a moment, various themes are repeated throughout the pursuer's evidence from the point of this confrontation between the parties. I cite these at this stage, not to downplay them but to avoid repeating them as I set out the pursuer's evidence. Firstly, it is accepted by both parties that the subject matter of the text messages or the parties' marriage being "done" was not raised again during the period between the parties' disputed relevant dates, namely 30 December 2017 and 6 January 2020. Secondly, regardless of the nature and tone of interaction between the parties, the pursuer's motivation was merely to keep relations civil in order that the pursuer could see his children. Thirdly, at no point after 30 December 2017 did the pursuer and defender share a bedroom or a bed. Fourthly, again, irrespective of the nature and tone of any interaction between the parties, the pursuer was clear that the parties had separated on 30 December 2017.

[14] Returning to the pursuer's affidavit, for the remainder of the holiday, until the pursuer and Simon returned to Scotland on 2 January 2018, the pursuer and defender did not speak. The pursuer slept on a sofa bed on the upstairs landing. That continued to be the case for every holiday when the pursuer returned to Australia. The pursuer made reference to a photograph lodged (6/32 of process) that was of the landing where he was sleeping. After the argument the parties did not kiss or even touch each other. The last time the parties had sex was around the week before Christmas 2017. The family had been invited to a New Year's event at a friend's house. The pursuer said he did not want to go. The

children became upset. The pursuer relented and went with the family. The family attended a firework display later that night. The pursuer stayed away from the defender. The family went to a Thai restaurant on New Year's Day. 7/19/1 of process is a "selfie" taken by Andrea of her and the pursuer. The family walked to and from the restaurant. The pursuer walked separately from the pursuer as he did not want to be near her.

[15] The pursuer first had sex with another woman in December 2018. His first relationship was with a work colleague beginning in October 2019. In November 2019 the pursuer spent the night with a former colleague. The former colleagues were aware that the pursuer was separated, otherwise they would not have become involved with him.

[16] The pursuer explained to his brother-in-law in around February/March 2018 what had happened. The pursuer's brother-in-law told the pursuer's sister and the pursuer discussed it with her a couple of months later. The pursuer's sister and brother-in-law are witnesses in the case and I refer to their evidence below. The pursuer told Simon shortly after the separation, possibly at the airport going home. Andrea told the pursuer in August 2023 that she knew the parties had separated. The pursuer asked Andrea if she knew at the time and Andrea said she did and that she knew the defender was seeing other men. The pursuer can't recall if he told the younger children. He wanted to keep things civil for their sake. He did not want to start a legal battle with the children in the middle as he was desperate to maintain his relationship with them.

[17] Following December 2017, the pursuer did not seek further legal advice. He had previously been advised that an immediate divorce would be difficult and expensive. However, waiting for two years would mean obtaining a divorce would be more straightforward. Accordingly, he thought he would just wait two years and "sit it out". Further, and importantly, everything for the pursuer was about what was best for the

children. It was always about the kids. The pursuer was worried that the defender would withdraw the children from him.

[18] All interactions from 2018 onwards were around the children. The parties did not, for example, catch up about how their day was. There was no intimacy or sharing of feelings. Interactions became “transactional” and “entirely child focused”. There was no chit chat. The parties stopped exchanging gifts for birthdays although would sometimes send a happy birthday text. They did not celebrate their wedding anniversary. They did not celebrate New Year as they used to. After separating the parties began separating their finances. The pursuer set up his own bank account in the UK with the TSB. They made substantial purchases without consulting each other, for example the pursuer purchased a property in July 2019 and the defender purchasing a new car and moving rental property.

[19] In July 2011 the pursuer received shares from his employer, which he split the allocation of with the defender. In June 2017 he received further shares, which he retained in his own name. In December 2018 the parties received pay outs from the pursuer’s employer. The pursuer had his funds paid his into his TSB account. The pursuer did not tell the defender that he had received a payout. The defender’s payout was paid into the parties’ joint UK bank account (First Direct). Had the parties not been separated the pursuer would have had his payout paid into the parties’ joint account. In September 2019 the defender purchased a new car. She did not consult the pursuer. The pursuer only became aware of the purchase when the defender asked him to sign relevant documentation.

Various productions are lodged regarding this. The parties rearranged various subscriptions, for example Foxtel and Amazon Prime.

[20] In terms of holidays, the children were very important to the pursuer and he “would do anything” to maintain his relationship with them. The parties’ lives completely changed

when the defender refused to return to Scotland in 2016 and split up the family. Since then, the parties lived separately. After 2017 that was even more so. The pursuer was willing to go on holiday with and see the defender on his trips to Australia to continue to have access to the children without legal recourse. The pursuer was concerned that the defender might stop him seeing the children. The pursuer cited a number of examples of when the defender had done such things in the past, including the cruise booked by the defender for January 2020. When the pursuer was in Australia the pursuer and defender would not eat breakfast or lunch together. The only time they would eat together would be at dinner. The pursuer would have dinner with the defender, whether at home or going out, so that things were kept steady and normal for the children. The pursuer stayed in the family home when in Australia because that was where the children were.

[21] In July 2018 the family went to Florida on holiday. The pursuer had previously promised to take the children to Florida. During the holiday the parties were civil towards each other. The parties did not share a room or a bed. They did not have sexual relations or do anything as a couple. If the family left the estate on which their villa was located it had to be by car, so they would go as a family. The pursuer did other activities alone with the children. The defender did not include a picture of the pursuer in her Facebook post relating to the holiday (see 7/21 of process). The pursuer met the cost of the holiday via his MBNA credit card as he did not want anything to disrupt his ability to see the children.

[22] The pursuer and Simon returned to Australia for Christmas/New Year 2018/19. The pursuer slept on a sofa bed on the landing of the house. John slept in the defender's bed. Other than family activities the pursuer and defender did nothing together. The defender went out with her friends. The family went away together. If the pursuer did not go, there was a risk that the defender would take the children away without the pursuer. The family

went up the Hamilton Island in Queensland. The defender sat alone on the plane. On the flight the defender complained of fainting fits. Given the defender had drunk alcohol on the plane the pursuer drove her to the hospital. The pursuer did not assist the defender physically, nor was he supportive or affectionate towards the defender. Tests undertaken seemed to show that the defender had low blood pressure because she was not eating. In relation to production 7/30 of process, the defender's Facebook posts, the pursuer suspected that the defender had not told her friends about the parties' separation and perhaps she was pretending everything was normal. The photos did not reflect reality.

[23] In July 2019 the defender and younger three children visited the pursuer and Simon in Edinburgh. The pursuer paid for this. The pursuer's employer paid for the flights. The pursuer's flat had three bedrooms. The defender slept with John. The parties did not share a bed. The parties barely spoke to each other. The defender visited Stobo Castle with her mother and Andrea. The pursuer visited his mother with the other children, and they went to the Farne Islands. The family did go out together, for example to Edinburgh Castle and the National Museum. The family went out for dinner twice at the invitation of the pursuer's mother.

[24] The pursuer visited Australia for Christmas 2019, and this was a particularly difficult trip. The pursuer had planned to spend his birthday in Australia and had arranged to fly back to the UK on 11 January 2020. The defender had purchased matching pyjamas for everyone to wear over Christmas 2019. The pursuer wore them on the basis that the defender said the children would enjoy it. The younger children were excited to wear them. Simon was not. The family did not engage in any family activities other than eating Christmas dinner. The defender went to a New Year's party with her friends. Unknown to the pursuer the defender had booked a cruise for herself and the younger three children

beginning 6 January 2020. When raised in correspondence the defender suggested to the pursuer that he “just go on and book it”. The pursuer did not understand what the defender meant as he had no details of the cruise. When the defender and three younger children left on the cruise the pursuer and Simon returned to Scotland on 7 January.

[25] The last time the pursuer was in Australia was January 2020 as the Covid-19 lockdown followed. International travel restrictions were lifted in Australia in February 2022. The pursuer raised court proceedings in April 2022. Andrea visited the pursuer in Scotland in 2023.

[26] The pursuer’s affidavit was supplemented by a significant amount of evidence-in-chief from the witness box. A reasonable proportion of this related to ground covered in the pursuer’s affidavit. The rest appeared to be an attempt to draw the sting from cross-examination. I will address this element of the pursuer’s evidence below when I summarise his cross-examination. The pursuer set up his TSB account in the UK after around 6 months from returning (in August 2016) because he was surprised that the defender did not back down and return to UK. The pursuer thought it was appropriate to disentangle the parties’ finances. Around 6 months after returning to the UK the pursuer was changed to a UK salary. The pursuer’s UK salary could be paid into a UK bank.

[27] The pursuer was cross-examined. In what was, notably at the time and more so on re-reading and reflection, a destructive cross-examination, counsel for the defender examined, chronologically and objectively, the various productions lodged and the pursuer’s position in respect of these. The pursuer agreed that as at August 2016 there was no sense of separation as a couple. His clear position was separation did not occur until December 2017 and therefore for around 16 months after the pursuer had returned to the UK the parties remained as a couple making adaptations to allow the marriage to continue.

The pursuer agreed that they continued to holiday together and planning a future together. The pursuer agreed that if anyone had suggested that he had separated during this period [August 2016 to 30 December 2017] they would be wrong. The pursuer confirmed that he set up the TSB bank account at the time he transferred to a UK contract but did not accept that he had told the defender he set up the TSB bank account for tax purposes. The pursuer agreed that on 30 December 2017 the parties had a volcanic, short-lived argument about the messages sent and received by the defender. The pursuer confirmed that his position was that he told the defender that their marriage was over. The pursuer confirmed that the parties did not discuss the matter again, nor did they discuss again that the marriage was over or that they had separated. The pursuer stated that he could not understand how the defender could say that she did not understand from the exchange that the marriage was over. The pursuer accepted that there was a difference between a discussion about the defender's behaviour and the pursuer telling her that their marriage was over. The pursuer accepted that post December 2017 holidays, sharing childcare and communications were as before, and that in communications with the defender there was no use of the words separation or end of marriage.

[28] Counsel for the defender spent some time examining the correspondence between the parties. For example, 7/61.1 of process is a text from the pursuer to the defender dated 4 January 2018. It was signed off with an "x". The pursuer accepted that this was a sign of affection, and that the defender was entitled to receive it as such. The pursuer accepted that it was a benign message regarding going for dinner (it also discussed the weather in Scotland). 7/61.2 of process contained the message dated 8 January 2018 "How was your first day back ...?", which the pursuer accepted was a message inspiring a conversation that did not involve the children and was private between the pursuer and defender. 7/61.3 of

process was a message from the defender to the pursuer dated 10 January 2018, wishing the pursuer a happy birthday and asking the pursuer what his plans for the day were. The pursuer accepted that there was no sense of separated spouses. 7/61.4 of process was a message from the pursuer to the defender dated 10 or 11 January 2018 containing “Missing you ... sleep well. X”, which the pursuer accepted was a statement of affection between husband and wife and that it was reasonable for the defender to receive it that way.

7/62.1 was a message from the pursuer to the defender dated 12 February 2018 containing “Sleep well x”, which the pursuer accepted was also an expression of affection between husband and wife and that it was reasonable for the defender to receive it that way.

7/63.1 of process was a message – a red heart emoji – dated 14 February 2018 (Valentine’s Day). Given the time difference between the UK and Sydney, the pursuer agreed that he had sent the message on 13 February at 8.11pm so that it would arrive in Sydney early on 14 February. The pursuer accepted that it was reasonable for the defender to receive the message as a gesture of affection and that the defender responded “... thanks happy v day”.

At 7/63.2 and 63.3 of process the defender accepted that the parties sent each other a series of messages about having a Tiffany bracelet he had given to the defender repaired. The pursuer messages “Why don’t we go on Sunday? Can walk across the bridge and get an ice cream?” The message is timed and dated at 06:34, 15 February 2018 Sydney time, which equates to around 7.30pm UK time on 14 February. The pursuer did not agree with the suggestion by counsel for the defender that his message was suggestive to a wife and playful, stating that it was a simple reference to the children. 7/64.1 of process, the pursuer accepted, was a message dated 21 February 2018 from the pursuer to defender signed off with an “X”. 7/65.1 of process contains the messages, from the pursuer to the defender from 22 February 2018 “Looking forward to coming home ...” and from 25 February 2018, when

the defender was leaving after his visit to Sydney, "Really don't want to go ... See you soon xxx". 7/66.2 of process contained the message, dated 1 March 2018, "Speak later x". The pursuer accepted these messages contained gestures of support and affection.

[29] It was a matter of agreement that the image shown at 7/68.1 of process is a photograph of flowers and a card sent by the pursuer to the defender on 3 April 2018 on the occasion of the defender's birthday. The pursuer agreed that card was typed into an online order by him. Counsel for the defender reminded the pursuer of his evidence-in-chief where he had stated that the card was sent on behalf of the children and suggested if that was the case the card would have read "mum"; a suggestion the pursuer agreed with. The pursuer confirmed that he had addressed the card to "[defender's first name]". Counsel for the defender suggested to the pursuer that the flowers were not from the children but were a bouquet from him to the defender, received by the defender in a public place, and constituted a strong suggestion of an indication of love. A suggestion the pursuer agreed with.

[30] 7/10.1 of process contains further messages between the parties. One message, again dated 3 April 2018, is of a card with hearts on it. Counsel for the defender suggested that this was unmistakably a statement of love and affection of husband to wife on her birthday; a suggestion the pursuer accepted. The pursuer also accepted that the message contained no suggestion of separation. Further messages in 7/10.1 of process concerned planning for a family holiday. Counsel for the defender suggested to the pursuer that these messages showed a unity of purpose as a couple. The pursuer responded that such holidays were how he saw the children. In response, counsel for the defender suggested to the pursuer that he could go to Australia and holiday alone with the children and that there was no suggestion he had ever tried to do so. The pursuer accepted both propositions.

[31] Under reference to the pursuer's evidence that the family holidayed in Florida in July 2018 because the pursuer had promised the children this holiday before 30 December 2017, counsel for the defender pointed out to the pursuer that correspondence contained in 7/10.1 and 10.2 of process from June 2018 showed that plans for a family holiday were still not finalised at that time. The pursuer agreed. The pursuer also agreed that there was no suggestion in the correspondence that there had been a promise in December 2017 of a holiday in Florida. It is a matter of agreement that the family holidayed in Florida from 11 July 2018 to 26 July 2018. The pursuer agreed that on each and every outing they went together as a family of six. Counsel for the defender referred the pursuer to 7/2.1 of process, a photograph taken Universal Theme Park on 13 July 2018. The pursuer agreed that the photograph showed him standing next to the defender with his arm around the defender's right shoulder. Given the photograph at 7/2.1 of process and the nature of the correspondence between the parties, counsel for the defender challenged the pursuer on his evidence that he did not share a bedroom with the defender on the holiday. The pursuer said he was certain that he did not share a bedroom with the defender. The pursuer said that the defender shared with John. Counsel for the defender put to the pursuer that if Andrea and James said everything was normal on the holiday, including that their mum and dad shared a bedroom, they were being untruthful. The pursuer answered that things were normal for post December 2017 and that, insofar as sharing a bedroom, the children were not being truthful, they were "misremembering". Counsel for the defender asked whether the pursuer tolerated the defender to allow interaction with the children. The pursuer said he was civil to allow interaction with the children. Counsel for the defender put to the pursuer that kisses on messages, hearts and flowers were inconsistent with mere civility, a proposition that the pursuer accepted. Counsel for the defender put to the pursuer that the

parties had sex during the holiday in Florida. The pursuer denied this. The pursuer agreed with the proposition that holidays were traditionally intimate times but said that this was the case before December 2017.

[32] Counsel for the defender then discussed the messages at 7/10.3 of process dated August and October 2018 regarding Boston. In August the pursuer wrote to the defender

“We should go to Boston. We would all be together and have more than enough money. School fees, medical and rent all paid for. Finally, can enjoy life and start saving.”

Counsel for the defender suggested that “we” referred to the family including the defender and pursuer. The pursuer responded that it “might mean [Simon] and me”. The pursuer stated he did not know why he said, “we would all be together”, “maybe pacify [the defender] about money”. Counsel for the defender suggested that “as a family” included the defender. The pursuer agreed. The pursuer agreed with counsel for the defender’s suggestion that the defender was entitled to interpret the message as an expression of unity. In the message from October the pursuer wrote “Had a look at Boston. Private schools only take kids once a year, in September with application in February. Work will pay for that. Gives time to decide, but financially much better off and no need to work at all ...” The pursuer accepted that the message suggested the defender and other three children would come and live with the pursuer and Simon and that the defender need not work. The pursuer agreed that the suggestion was that the family would settle together in Boston and that the defender would be entirely dependent on the pursuer. Counsel for the defender suggested that that is normal family life with the pursuer as husband. Against this evidence the pursuer confirmed that he understood the confusion for the defender, that she believed the parties were still married, still unified as a married couple. The pursuer accepted that his behaviour was consistent with the parties falling back together as a couple after

December 2017. Whilst the pursuer would “absolutely agree” third parties would see the parties as married he did not understand why the defender might see them as remaining as a couple.

[33] 7/40 of process contains correspondence between the parties from December 2018 regarding the payment to the defender of monies arising from the sale of shares. The pursuer told the defender that payment should be made to the parties’ First Direct bank account in the UK. Counsel for the defender put it to the pursuer that it was disingenuous to suggest that the parties had separated their finances from 2016 when they continued to use their joint account in December 2018. The pursuer refuted that suggestion explaining that, in the circumstances at the time, including advice received, there was no realistic alternative.

[34] 7/40 of process, along with 7/10.4 and 7/42 of process, also contained correspondence between the parties from early December 2018 about holiday arrangements for Christmas/New Year 2018/19 and plans for the pursuer’s birthday, including going on a cruise. The pursuer accepted counsel for the defender’s suggestion that there was enthusiasm for the cruise. The pursuer agreed with counsel for the defender that there was no suggestion in the correspondence of altered status as a couple. Counsel for the defender suggested that the correspondence was private communications regarding normal family life. The pursuer responded that it was communications regarding visits and holidays. The family did not holiday on a cruise, and it is a matter of agreement that the family went to Queensland together between 28 December 2018 and 2 January 2019. On the journey to Queensland the defender became unwell. She was taken to the hospital by the pursuer. Counsel for the defender put to the pursuer that in doing this he was, caring, loving and supportive. The pursuer accepted that he was supportive but denied that he was

affectionate. Whilst on holiday in Queensland the family visited the Barrier Reef, Hamilton Island, Palm Grove and watched fireworks on Airlie Beach. Counsel for the defender examined various photographs and the defender's Facebook postings lodged from 7/27 through to 7/30 all from the holiday. Counsel for the defender put to the pursuer that the photographs showed a happy family experience and that an outsider would see a joyful family experience. The pursuer agreed, with the caveat that such a view could be taken if it was not known that parties had separated. Counsel for the defender put to the pursuer that the defender was signalling to the world about a family experience. Again, the pursuer agreed but with the caveat that the defender was not showing their separation. The pursuer offered that "all of this" [by which I understood the pursuer's interactions with the defender, including going on what appeared to be fairly luxurious holidays as a family] was so that he could see the children. The defender was a "conduit" to allow the pursuer to see the children. The pursuer confirmed that he had not seen the youngest children since January 2020, including in the post March 2022 period after lockdown when there had/had been the opportunity to do so.

[35] 7/45.2 of process is a communication from the defender to the pursuer dated 10 January 2019 "Happy Birthday [emoji]!!!! Will FaceTime soon". The pursuer stated that the defender did not take part in the call, she tended to call and give phone to children.

[36] 7/47.1 of process contains the message dated 3 April 2019 from the pursuer to the defender "Happy Birthday". Counsel for the defender put it to the pursuer that he was facilitating gifts for the defender. The pursuer stated that Andrea asked him to do so as she had no money and was upset. In the correspondence the defender thanks the pursuer for the voucher. 7/47 also contains correspondence dated 21 May 2019 regarding "plans for this year holidays", for both the school summer holiday and Christmas. Discussions continue

through 7/47 of process. Again, counsel for the defender put to the pursuer that the correspondence was, to the outside world or passer-by, indicative of normal family life. The pursuer responded that he did not know who the passer-by is and that it depended on what they knew. In 7/47.8 of process the pursuer messages the defender on 25 June 2019 that “We have also been invited to a wedding reception on 6 July if you fancy ... [Andrea] can come to.” At 7/47.9 of process the defender asks, “Do we need to bring dresses then for reception?” Counsel for the defender put it to the pursuer that when invited to a wedding – a commitment to love – he writes to the defender “we have also been invited” when it would have been entirely open to him to accept and go on his own or go with Andrea only. Counsel for the defender put it to the pursuer that the optics for the objective observer were consistent with the pursuer and defender being a couple. The pursuer replied that the work colleague who had offered the invitation did not know the parties had separated.

[37] In July 2019 the defender and three younger children travelled to Edinburgh to holiday with the pursuer and Simon. The family stayed together in the pursuer’s flat. The defender, her mother and Andrea stayed at Stobo Castle for a period. The parties sent each other photographs of what they were doing. The family went out for dinner. The pursuer confirmed that he wore his wedding ring.

[38] For Christmas and New Year 2019/2020 the pursuer and Simon travelled to Australia and stayed at the family home. On Christmas Day the family wore matching pyjamas.

Various photographs were lodged at 7/37 of process. Counsel for the defender put to the pursuer that they wore the pyjamas as a shared experience, with which the pursuer agreed. The pursuer did not agree with counsel’s suggestion that the photographs showed a typical family in harmony. The pursuer stated that it was co-parenting. The pursuer confirmed he wore his wedding ring. Counsel for the defender suggested to the pursuer that he was, by

his evidence, trying to create a misrepresentative picture; that by his actions he was conducting a deception against the defender. The pursuer “totally disagree[d]”; he did not understand how the defender could think anything other than they were separated after December 2017.

[39] Counsel for the defender put to the pursuer that by December 2019 things were changing, that he was seeing other women. The pursuer replied that he was not in a relationship but that he had seen other women. Counsel for the defender put to the pursuer that the defender and the three younger children left on the cruise on 6 January 2020 and put it to the pursuer that this was the date upon which the parties separated. The pursuer disagreed.

[40] Counsel for the pursuer undertook a reasonably brief re-examination. This essentially covered ground already covered in the pursuer’s affidavit and evidence-in-chief but was re-emphasised in light of certain elements of cross-examination. It need not be repeated.

[41] The pursuer called his sister and brother-in-law in evidence. I will refer to them as IDS and PDS. I will take their evidence together. Both adopted their respective affidavits. Both supplemented these with oral evidence, appearing remotely. The essential element of their evidence was to explain that the pursuer told them, PDS at some point in early 2018 and IDS a few months later, that his marriage was over and that he and the defender were separating. Both stated that the pursuer intended to maintain contact with the children because they were his priority. From both IDS and PDS’s respective affidavits it appears that there was no further discussion between either and the pursuer regarding his relationship with the defender. In cross-examination PDS confirmed that after 2017, probably in 2018, 2019, 2020 and 2021, they continued to have video contact with the family

in Australia at Christmas time and that that contact was “absolutely normal”. PDS remained a Facebook friend of the defender and saw the defender’s Facebook posts. Under reference to paragraph 13 of his affidavit, where PDS stated that there was nothing to make him think that the parties might be getting back together, PDS confirmed that he could not recall being aware of the parties’ family holiday to Florida in 2018, nor their holiday to Queensland in 2017/2018. He could not recall the family doing things as a family. He confirmed that in their video calls with the family at Christmas there was no mention of the parties having separated. Likewise, in cross-examination, IDS confirmed that she was unaware of the families’ Queensland holiday in 2017/2018. She was aware of their trip to Florida, although the extent of that awareness was not explained. She too had access to the defender’s Facebook posts. IDS also confirmed that in her post 2017 communications with the defender there had been no reference to a separation or change of status in the parties’ relationship. In response to the proposition that, contrary to any indication that the pursuer sought to prioritise his relationship with the parties’ Australian based children, the pursuer had not, in fact, seen them for four years, IDS suggested that after the pandemic the pursuer “might have thought” the relationship too fractious. I found that an odd answer. Neither PDS nor IDS had suggested that they had witnessed anything to suggest such a fractious relationship. Indeed, the tone of their evidence was that from their own interactions, other than the single discussion with the pursuer, nothing further was said and things appeared “absolutely normal”. And as noted above, both appeared to be unaware to the extent of the parties’ family holidays. Whatever the pursuer might have told PDS and IDS at some point in 2018, any assessment of PDS and IDS’s evidence must be made against, or within the context of, all of the evidence in the case. Given the other evidence I heard regarding, for example, the parties’ family holidays or the parties’ personal communications, I find that I

am unable to place a significant degree of reliance on PDS and IDS's evidence insofar as it does cover relevant ground. Where their evidence is at odds with other evidence I do expressly accept, I am unprepared to rely on it.

[42] Simon was called in evidence by the pursuer. He adopted his affidavit. From the tenor of his affidavit and oral evidence, I formed the impression that Simon was a rather reluctant witness. I can readily understand that given the circumstances. Taking his affidavit and oral evidence together, it seems clear that the observations Simon made concerning his understanding of his parents' separation are based on the fact that after August 2016 they lived in different houses, in different countries. That is a misunderstanding by him. In relation to the parties' behaviour whilst on post 2016 holidays, again, I formed the strong impression that Simon did not want to be seen to come down on one side of a dispute he was clearly intelligent enough to understand the significance of. Again, his choice to resort to "I can't remember", particularly to questions regarding his parents' sleeping arrangement on holiday, left his evidence rather neutral on the matters he appears to have been called to give evidence about. Accordingly, his evidence adds nothing material to my overall assessment of the evidence.

[43] The pursuer called two friends and work colleagues in evidence. I will refer to them and SB and PC. PC adopted his affidavit. In summary PC stated that he met the pursuer in around 2010/2011 through work and established a personal friendship from 2017/2018. PC had not seen the pursuer from around 2020 but had begun to see him again "more recently", for which I infer 2023. Shortly after the pursuer's return to Scotland in January 2018, PC states that the pursuer told him that his marriage was over, and that the pursuer had told the defender so. PC appears to clarify that subsequently in his affidavit where he states that he did not remember his discussion with the pursuer other than what seemed like an

acceptance by the defender that the relationship was over. PC was aware that the pursuer had returned to Australia a few times with his focus on his children. There had been no reconciliation as far as PC was aware. PC stated that the pursuer had stopped wearing his wedding ring but that he was not sure when this stopped. PC stated that the pursuer had strong bonds with his children in Australia. In cross-examination, PC accepted that he did not know and had never met the defender. PC confirmed that the basis of the comment in his affidavit about an acceptance by the defender (as above) was from his discussions with the pursuer. PC was unaware that the pursuer had communicated with the defender on Valentine's Day, that the pursuer had sent the defender flowers on her birthday, that the pursuer had holidayed in Florida or Queensland with the family. In relation to PC's comment in his affidavit about the pursuer being very focused on his children, PC was asked whether it surprised him that the pursuer had not seen his two younger sons since 2020. PC answered that it did not surprise him. I found that an odd answer. It was PC who had chosen, through his affidavit, to emphasise the pursuer's "strong bond" with his children in Australia. To then be apparently unsurprised, without explanation, that in the face of such a "strong bond" there had been no personal contact for close to three years seemed to me to embody a contradiction that smacked of side stepping a question that gives rise to an unfavourable answer. Indeed, having seen and heard PC be cross-examined, I formed the impression that he was reluctant to be seen to say anything that might reflect unfavourably on the pursuer – perhaps for quite understandable reasons – but this, plus PC's acknowledged reliance on the pursuer as his source of information regarding the parties' relationship, materially undermines the reliability of PC's evidence and where PC's evidence is at odds with my objective assessment of more independent evidence, I consider that it would not be appropriate to rely on PC's evidence.

[44] SB also adopted his affidavit. SB had known the pursuer for 33 years. They spoke weekly and often caught up in person. The pursuer and SB were/are close friends. In Autumn 2017 the pursuer discussed texts the defender had sent and received to and from other men of a sexual nature. SB's former wife had previously had an affair and SB had confided in the pursuer at that time. SB states he advised the pursuer to speak to a lawyer and have nothing more to do with the defender. Following the pursuer's return from Australia in January 2018 the pursuer again confided in SB that the defender had continued with sending and receiving sexual text messages. SB states that the pursuer told him that that was the last straw, and that the pursuer had told the defender that their relationship was over. SB states that the pursuer was clear in that, and in later conversations, the relationship was over. SB states that on subsequent trips to Australia the pursuer did not share a bed with the defender and that the defender went to Australia over Christmas/New Year 2019/2020 to see the children and not the defender. SB's affidavit does not mention the family holidays to Florida or Queensland, or the family holiday in Edinburgh in July 2019. In cross-examination SB accepted that the information contained in his affidavit came from the pursuer. When asked about the reference in his affidavit to the pursuer being fortunate that his employer "pays" the pursuer's airfares, which "allows" (present tense, used twice) him to visit the three children who have remained in Australia, SB answered that there was a "problem with the tense". In his affidavit SB states that he is a "Vice President, Legal Compliance". For someone who holds such a position I would be surprised if they did not check carefully a document that they swore to be true, and which is to be lodged with a court. SB was asked if he was aware that the pursuer had not, in fact, seen the younger boys for two years. SB replied "that might well be right". Although that answer is not properly an answer to the question asked, it is suggestive of SB not being aware, which, given SB's

stated relationship with the pursuer, suggests that the pursuer might have been more selective with what he has discussed with SB than SB might be aware. Another example of this selectiveness might be the discussed move to Boston. Physically reuniting the whole family in Boston, as the parties discussed, would clearly be a significant step and one that, at least on one view, might not be consistent with having “nothing more to do with” the defender, yet it appears that either SB declined to mention this in his affidavit or that the pursuer appears not to have told SB of such a potentially significant step. A further example, discussed with SB in evidence was the sending of flowers and a card by the pursuer to the defender on Valentine’s Day. SB said in evidence that he was not surprised but he did not think the pursuer mentioned it and that it might be the pursuer trying to “keep things on an even keel”. Whilst I accept that actions – such as sending flowers to a person – must be interpreted in their own context, in the absence of any particular, alternative context, which SB clearly did not have, it seems to me that sending flowers and a card are more likely to be an expression of romance and love rather than an attempt to keep things on an even keel. I was, as with PC, left with the strong impression that SB was, again perhaps understandably, reluctant to be seen to say anything that might reflect unfavourably on the pursuer. Again, this and SB’s reliance on the pursuer as his source of information regarding the parties’ relationship, materially undermines the reliability of SB’s evidence and where SB’s evidence is at odds with my objective assessment of more independent evidence, I consider that it would not be appropriate to rely on SB’s evidence.

Evidence led by defender

[45] The defender lodged two affidavits, the second on the morning of the proof. In the second affidavit the defender acknowledged that during the October to December 2017

period, she not only sent text messages, as referred to by the pursuer and as lodged in process, she also had sexual encounters with three men. The details of these encounters were not discussed by the parties during their confrontation on 30 December 2017.

Although the second affidavit makes reference to a few further matters, these are covered in the defender's first affidavit.

[46] The defender's first affidavit covers much of the factual ground that I have already set out when discussing the pursuer's affidavit. To the extent it merely repeats undisputed facts from the pursuer's affidavit, I will not repeat that. In her first affidavit the defender states, prior to the pursuer moving back to the UK in 2016, that he travelled regularly between the UK and Australia. In May 2017, the pursuer advised the defender that for tax purposes he would have to be paid from the UK side, at which point he opened a UK bank account. The only bank accounts operated by the defender were with First Direct and NAB, both of which were joint accounts, both of which gave the pursuer visibility to what the defender was earning and spending. It was common for people working for international companies and in the pursuer's position, including friends of the parties, to work away from home for extended periods and conduct long distance relationships. The pursuer would tend to come home to Australia at least four times a year. In October 2017 the parties discussed messages of a sexual nature the defender had sent and received from other men. Given what the defender now states in her second affidavit, it is clear that she was not truthful with the pursuer about the extent of her interactions with other men during that discussion. The pursuer and Simon came home to Australia over Christmas and New Year 2017/2018. There was a discussion on 30 December 2017 between the pursuer and defender about further messages sent and received by the defender to other men. Again, given what the defender now states in her second affidavit, it is clear that she was not

truthful with the pursuer about the extent of her interactions with other men during that discussion either. Whilst the pursuer was annoyed, after that discussion the parties did not speak any further about it. They did not discuss separating. Nothing in the pursuer's comments or actions suggested to the defender that their marriage was over. The following day the pursuer was "a bit off with" the defender but by no means did that symbolise the end of their marriage. During that time and in the following years there was no discussion about ending their marriage. The family attended a New Year's party and went out for dinner the following day, neither of which they would have done if the parties had separated.

[47] The defender made reference to the messages dated between April and July 2018 lodged at 7/10.1 and 7/10.2 of process, including the birthday card sent by the pursuer to the defender and the parties' plans for holidays. The message where the pursuer writes "Really really want to see you" was a reference to intimacy between them. The defender also made reference to the messages from May 2018 lodged at 7/11.1 of process regarding the pursuer stepping into the role of COO for his employer.

[48] The family holidayed in Florida in July 2018. The parties shared a bedroom and had sex a few times during the holiday. As far as the defender was aware the parties and the children were happy. There was nothing about the parties' arrangement that suggested to the defender that the parties were separated. Following their return from Florida the defender struggled financially. She felt like she always had to message the defender to remind him to send money, for example the messages at 7/10.3 of process. That was a cause of tension between them. In response, the pursuer proposed the move to Boston together (as discussed above)(see 7/10.3 of process). The defender stated that the pursuer would not have made that proposal if the parties were separated. The pursuer came home to Australia

in October 2018 as part of a business trip to Wellington. The pursuer and Simon came home to Australia for Christmas/New Year 2018/2019. The family spent every day together. They went out and enjoyed activities together. The parties exchanged gifts at Christmas. It was normal family life. The family went to Queensland. On the journey there the defender became unwell. The pursuer took the defender to the hospital. The pursuer was very concerned for the defender's welfare. He was loving and supportive. He put his arms around the defender when he took her into the hospital. The parties shared a bedroom on the holiday. They were not intimate as the defender felt unwell. The pursuer wanted to be intimate when in bed and put his arms around the defender. They did many things together as a family. These are referred to in the discussion of the pursuer's evidence. Before the pursuer and Simon went back to the UK they had a normal family time. The defender wished the pursuer a happy birthday. In January 2019 the defender messaged the pursuer about a new fridge she had got, about two kittens that needed re-homed and about the children's visit to the dentist. Reference was made to various productions at 7/45 of process. In February 2019 the pursuer came home to Australia for one of the children's birthdays. The pursuer and Simon came home to Australia in March 2019. The parties continued to operate as a married couple and the defender had no reason to think otherwise (see 7/46 of process). On 3 April 2019 the pursuer messaged the defender to wish her a happy birthday. He gave her a spa voucher and a Pandora charm, which he had planned with Andrea (see 7/47.1 of process). In May and June 2019, the parties corresponded, discussing holidays and a wedding invitation (again, see 7/47.1 of process). In July 2019 the defender and younger three children visited the pursuer and Simon in Edinburgh. The pursuer collected them from the airport. They stayed together at the flat rented by the pursuer. It was a bit tight for everyone. The defender slept with John in a bedroom. The pursuer slept with

James on a sofa bed in the living room. Simon and Andrea had their own bedrooms. The family undertook various activities together, for example visiting Edinburgh Castle and Xscape. They ate out with the pursuer's mother. The defender, her mother and Andrea went to Stobo Castle. The pursuer and the younger two children met the pursuer's mother. The parties corresponded whilst apart. Reference was made to correspondence at 7/34 and 7/48 of process. The pursuer dropped the defender and children off at the airport at the end of the holiday. Reference was made to further messages between the defender and pursuer and John and the pursuer at 7/48 of process. In September 2019 the pursuer completed a form "essentially as guarantor" for the finance in connection with a new car for the defender. Reference was made to productions at 7/49, 7/59 and 7/60 of process. The pursuer came home to Australia in November 2019 for Andrea's birthday. There were a lot of exchanges about money at this time. It placed considerable strain on the parties' relationship. During this trip "as far as [she] can remember" the parties shared a room. During that trip the pursuer told the defender he had lost his job. The pursuer said he got nine or twelve months pay. The defender asked the pursuer to get a job in Australia as she was keen for the family to live together again in one place. Reference was made to 7/12.1 of process, a news article dated 6 November 2019 confirming the pursuer was leaving his position. The article acknowledged that the pursuer had left his employer to move closer to his family in Australia. The pursuer and Simon came home to Australia for Christmas/New Year 2019/2020. The pursuer was acting a bit differently and he chose to sleep on the sofa bed in the hallway. Despite this, they continued to operate normally as a family. They bought matching pyjamas for Christmas Day. The parties exchanged gifts. The pursuer was upset during the holiday because the defender had booked a cruise for herself and the younger three children. She did so only because the children got upset when the pursuer

and Simon returned to the UK, and it would distract them. Following that trip Covid-19 occurred, and they could no longer travel. The pursuer and Simon have not been back to Australia since. On 14 July 2021 the pursuer messaged the defender to tell her he had spoken to a lawyer and made settlement proposals regarding their finances. The defender was shocked. That was the first time the pursuer had ever mentioned lawyers and the parties separating. The parties had never had a discussion about separating prior to then. The defender only became aware that the pursuer had received a payment of £800,000 during the course of this action, which she believed was for payment of some of his shares. Payment in respect of the defender's shares was made into the parties' joint First Direct account on 8 January 2019. Had the parties not been together at that time the defender would never have agreed for these funds to be paid into a joint account. The defender opened an account in her sole name on 4 February 2020. Reference was made to 7/54 of process.

[49] The defender supplemented her affidavit with oral evidence. The defender stated that she had not mentioned meeting men before her second affidavit because she did not want to discuss it openly/in public and that she had not discussed it with the pursuer. In relation to the argument on 30 December 2017 and its aftermath, the parties had a heated argument. The pursuer was angry. The defender was upset. The parties did not discuss the issue again. The defender did not recall the pursuer saying their marriage was at an end. The next day the pursuer did not talk to the defender. The pursuer had not spoken to the defender after arguments before. The family went to a Hogmanay party. The pursuer did not want to speak to the defender. The following day the family went for dinner together. The pursuer did not say they were separated. The parties never sat down as a couple and discussed their marriage, problems, separation or where they go from here. The defender

was not alerted to any change in the status of the parties' relationship after December 2017. The defender thought that 2018 was a better time together. It was more like their relationship had been. From 2015 the pursuer had been very work orientated. He did not come home, did not send flowers, they did not go out together. In 2018 there were messages every day, the pursuer bought her flowers, the pursuer made more of an effort. The parties had sex after December 2017. The defender was "100% certain" of that. The pursuer was not truthful when he said the parties had not shared a bed after December 2017. The flowers received by the defender shown in 7/68 of process were delivered to the reception at her work. The defender called the pursuer to thank him for them. She believed they were from the pursuer. If from the children, why not send them to their home so the children could give them to her? The children did not call her by her first name. As of November 2019 the defender had no sense of a change in their relationship as a cohabiting couple. 7/50 of process is a picture of the villa they rented in Queensland. The defender was "very sure" the parties shared a bedroom. In relation to the pursuer's evidence about his reason(s) for family holidays, staying at the family house and doing things together as a family, the defender stated that if the parties were separated the pursuer could have taken the children on holiday himself. The defender would never have denied the pursuer contact, especially the boys as they need a dad. They [the boys] felt abandoned. When the family visited Edinburgh in July 2019 the defender had no sense that the status of the parties' relationship had altered. The defender could have stayed with her mother. In relation to the payment of the funds from the sale of the defender's shares into the parties' joint account, the defender had no concerns in doing so as she trusted him. Had the defender thought the parties were separated she would not have done so. The pursuer did not say that the parties should separate things out after December 2017 (by which I understood the defender to mean

finances). The defender first thought about getting legal advice in February 2020 when she asked the pursuer to come back to Australia when going into lockdown. Under reference to the photographs lodged at 7/37 of process from Christmas 2019, the defender stated the atmosphere at home was normal, the pursuer cooked dinner, they made homemade crackers that had cinema tickets in, and they went to the cinema as a family. The photographs showed the pursuer wearing his wedding ring. It was both party's custom to wear their wedding rings. The defender could not recall the pursuer not wearing his wedding ring.

[50] The defender was cross-examined at some length. It was put to the defender that after moving to Australia, notwithstanding the pursuer working long hours, the parties found time to go out for dinner. The defender disagreed. She explained that the parties themselves "very rarely" went out. They did not leave the kids as they were young. They tended to go out for dinner with the kids (in this regard I note paragraph 5 of the pursuer's own affidavit where he states that "We did not go out often, given I was working most evenings."). The defender stated that friends would come over or they would go to friends. She made reference to German friends. The defender disagreed with the proposition that after December 2017 it was less common for friends to come round. Their German friends had gone back to Germany. The defender's friends continued to come over. The defender acknowledged that the pursuer required to return to the UK because of work and that he wanted the family to move back as well but that she did not want to leave Australia and that this placed a strain on subsequent communications. The defender confirmed in answer to questions put that she stopped messaging other men in January 2018 and did not see anyone after December 2017. The defender disagreed with the proposition that the pursuer's communications between October and December 2017 were attempts to rekindle intimacy, but she did acknowledge that the pursuer's communications in 2018 were such attempts.

The defender was asked about the argument between the parties on 30 December 2017. The defender accepted that the argument was short and heated, and that the pursuer was very angry. In relation to the proposition that the pursuer told the defender their marriage was over, the defender stated the pursuer said a lot, she could not recall everything, she did not recall those words being said, they could have been said but she thought if they had been said she would have remembered them. The defender rejected the proposition that the messages between her and the other men were confirmation that she was not committed to the parties' marriage. The defender stated she was committed to the marriage. The defender rejected the proposition that after the argument on 30 December 2017 the parties did not share a bed. The defender disagreed with the proposition that the pursuer always slept on the sofa bed. The defender accepted that on 31 December 2017 the pursuer did not talk to her. She thought that understandable. She was talking to him. They attended a party. The pursuer did not want to go. The parties discussed it and agreed to go. The defender knew the pursuer was angry. The defender reiterated that there were "often times" they would have an argument and not speak. The defender did not agree that the pursuer was "actively avoiding" her. In relation to the parties going out for dinner the following day, the defender disagreed with the express proposition that from leaving the home to the restaurant, at the restaurant and then on the way home the pursuer did not talk to her "at all". The defender explained the parties walked to the restaurant, which was 25 minutes each way, they would not have walked if either had not intended to have a drink. The restaurant was BYOB. The younger children were 7 and 10. The family went up north together the following day. That was booked at the last minute. The defender would be surprised if the parties did not have words together over something. Counsel for the pursuer put it to the defender that the messages between the parties from January 2018 to

January 2020 were about “normal things re family life” (I note here that this proposition is wider than the pursuer’s own assertion that the communications were “transactional” only, about the children and finances) and were not affectionate. The defender agreed that maybe the majority but not all were so, but the defender added that there was nothing like “I know we’re not together but let’s take kids on holiday”. The communication was as they had always done. The defender said that she could not recall telling anyone about the parties’ confrontation on 30 December 2017. If the parties were no longer together the defender would have told her good friends. In response to questions put, the defender was “100% confident” that she and the pursuer shared a bed whilst on holiday in Florida. The defender “vividly” remembered on the last night when she got into bed the pursuer was in bed. Counsel for the pursuer put to the defender that the pursuer said in evidence the parties did not have sexual intercourse since December 2017. The defender said that was not correct. She remembered vividly having sex with the pursuer. The defender emphasised the pursuer will remember. Counsel for the pursuer suggested to the defender that when on holiday in Florida, Simon could have looked after the other children and the parties could have gone out. The defender said that when on holiday the parties would not go out without kids. Counsel for the pursuer confirmed with the defender that the parties did not celebrate their 20th wedding anniversary whereas had celebrated before 2018. The defender stated that the parties had not celebrated their wedding anniversary for many years. She could not recall their 10th anniversary. Other than early on, it would only be a card. As a woman, if her husband did not acknowledge she would not reciprocate. Counsel for the pursuer next cross-examined about the Christmas/New Year 2018/2019 holiday. In response to propositions put by counsel for the pursuer, the defender gave evidence that during the period the parties were at home they did share a bed, they did spend time together after the

children went to bed but did not go out together, the pursuer did not avoid the defender, the pursuer and defender did exchange gifts, had the pursuer only given her token gifts she would have remembered that and, more generally, everything was exactly as it always was. In relation to the time spent in Queensland, the defender was clear that she and the pursuer shared a room. John might have been in their bed. Counsel for the pursuer put to the defender that when the pursuer took her to hospital, he was supportive only; not loving or affectionate. The defender disagreed. Under reference to the common position that the parties were not intimate during the trip to Queensland, the defender agreed with counsel for the pursuer's suggestion that, given the activities the defender did engage in, it was not health concerns that prevented intimacy, rather it was pursuer's decision not to be intimate. The defender disagreed saying that it was her decision not to be intimate. There was some discussion about the extent of the defender's knowledge of the pursuer receiving the money for his shares and the extent to which the pursuer might have financially assisted the three younger children, neither of which materially advanced matters either way. In relation to the family's holiday in Edinburgh in July 2019, counsel for the pursuer put it to the defender that after six months of being apart the parties could have shared a bed but did not. The defender explained that they had on occasions been in different rooms over the life of their children. The defender accepted that neither party attempted to have intimacy. There was some discussion between counsel for the pursuer and the defender regarding the extent of, if any, the pursuer's mother's knowledge about the parties' separation. The pursuer's position in evidence was that he had told his mother about a separation. Counsel for the pursuer asked the defender whether the pursuer's mother had "subsequently told you" she knew the parties had separated. The defender confirmed that no one from the pursuer's family, including the pursuer's mother, had discussed with her any question of the parties'

separation. Counsel for the pursuer cross-examined about the parties' financial decisions from 2019, suggesting that these were demonstrative of parties separating financial affairs, for example the purchase of the flat by the pursuer, the purchase of a new car by the defender and various text messages. The defender gave evidence that she was unaware of the pursuer's purchase of the flat until after January 2020, that she had discussed the need for a new car with the pursuer prior to sending him the relevant forms asking for his signature and that her communications were from a perspective where she was angry with the pursuer because she was paying for herself and three children yet the pursuer, who had a higher income, was using money from their joint account. The defender did not see the parties' discussions from the perspective of a separation or separation of finances. In relation to the cruise booked by the defender for herself and the three younger children to depart on 6 January 2020, the defender accepted that she did not ask the pursuer (or Simon) about the cruise because she was angry with the pursuer, assumed the pursuer would return to the UK after New Year and that Simon would go back to university. It is a matter of agreement that the defender and younger three children were taken to the port by the pursuer, boarded the cruise and have (other than Andrea who I understand travelled to the UK in 2023) not seen each other since.

[51] In terms of re-examination, beyond that recorded above, in relation to the Household Expense Verification Statement in connection with the defender's application for car finance – 6/15 of process – the defender confirmed that the address provided by the pursuer under the heading "Spouse/De facto", the pursuer had stated as his residential address the family house in Australia.

[52] The defender led in evidence Andrea. Andrea was born in late 2003, so was 14 to 16 years old during the material period. Andrea adopted her affidavit. Andrea remembered

their family holiday to Florida in 2018. The family stayed in a house together. The children had their own rooms and her parents shared a room. Everything was just the same and normal between her parents and they spent time together as a family. In relation to the holiday to Queensland, Andrea could not remember who she shared a room with or whether her parents shared a room. They possibly did. Everything was normal on the trip, as it had always been. In the summer of 2019, they visited Scotland and stayed with the pursuer. Andrea thought they all shared rooms as there were not enough bedrooms. Andrea thought she slept on a pull-out couch. Her mother, the defender, shared with John. It might not have been the same every night. At Christmas 2019 her mother bought matching pyjamas. Everything was just how it normally was. Andrea was never aware of her parents separating. They never said anything to them (which I presume means the children). Everything had been normal between them.

[53] Andrea was cross-examined. Beyond that which Andrea said she could not remember, in relation to the holiday in Florida, Andrea confirmed that she thought that her parents shared a bedroom, but she accepted that it was “possible” she could be mistaken. Andrea confirmed that she thought things were normal between her parents. In relation to the Queensland holiday, Andrea did not remember her father sleeping on the sofa. She thought things were fine between her parents. She did not notice, as was put to her, that her father did not talk to her mother. Nothing material arose in re-examination.

[54] James gave evidence. He was aged 10 to 12 during the material period. He adopted his affidavit. After his father and Simon moved back to Scotland he would see them a couple of times a year. They would stay with the family at home. It was just the same as when they had lived there. His father and Simon came over for Christmas 2018. His parents shared a room then. On the holiday to Florida in 2018 his parents shared a room. While

they were there, they were all together. It was just normal. When they visited Scotland in the summer of 2019 they did things together as a family. His father came to Australia on his own for Andrea's 16th or 17th birthday. His father slept in a bed downstairs in the house. At Christmas 2019 John thought his father might have slept downstairs but he could not remember. Everything was normal.

[55] James was cross-examined. Beyond that which James could not remember, in relation to the holiday in Florida, James said it "could be" that his mother and John shared a bedroom, and his father was on his own. In relation to the Queensland holiday, James could not recall, as was suggested to him, his father sleeping on a sofa. In relation to Andrea's birthday in November 2019, James did not remember his father sleeping on a bed on the landing. James was re-examined, James confirmed he thought his parents shared a bedroom on the Florida holiday. In relation to his father's visit in November 2019, James agreed with the suggestion that John still sought to share a bed with their mother at that time and that it was possible his father relocated to another bed. James said that it was "possible" that his parents shared a room at Christmas 2019.

[56] Two further witnesses were led by the defender, NS and LC. Both adopted their affidavits and were cross examined. I found their evidence to be of little material value. To the extent their evidence did bear upon material issues, which really related to NS only, much of what NS was able to say in evidence derived from the defender herself and so was rather limited in that regard. In these circumstances I do not propose to discuss their evidence, and I do not rely on it one way or the other.

Submissions

[57] Counsel for the pursuer provided a full written submission. She set out a full citation of the relevant law. I did not understand counsel to be at odds on the relevant law. Both appeared to agree that the relevant law is as stated above. Counsel for the pursuer submitted that, first, one must determine the nature of the parties' relationship during the period of admitted cohabitation. Thereafter a comparative exercise has to be carried out to determine when the parties' relationship changed. What is envisaged is a significant change in the nature of the relationship. Whilst the intention of a party may not be determinative, it can be a significant factor when it has been communicated by one party to the other. Counsel for the pursuer submitted that before August 2016 the parties had a fairly conventional marriage. Between August 2016 and December 2017, whilst the parties continued to live as husband and wife, albeit geographically distant, their marriage was in decline. Between September and December 2017, the pursuer found messages sent and received by the defender of a sexually explicit nature, which messages caused difficulties in the parties' marriage. In December 2017 the pursuer found further messages, and this was the "tipping point" in the parties' marriage. The pursuer decided to bring the marriage to an end on that date. There was no reconciliation after December 2017. The messages between the parties between 4 January 2018 and 11 March 2018 are not reflective of the parties' relationship before December 2017, nor are they indicative of a reconciliation. The parties have not shared a bed since December 2017. They have not engaged in sexual relations since December 2017. The pursuer continued to visit Australia and holiday with the defender and the children between 30 December 2017 and 6 January 2020 but did so not to continue living with the defender as husband and wife but as a separated parent engaging in family life. From 2017 onwards the parties were not sharing financial

information. The parties' communications and interactions from 30 December 2017 are not indicative of them continuing to live together as husband and wife. The action of the parties on Valentine's Day 2018 is not a significant factor in the determination of the relevant date. The court must approach the factual dispute objectively. The objective observer is not a stranger who happens to come upon the parties in public. The court, as the objective observer, furnished with the evidence, is to determine when something happened to change the nature of the parties' relationship from living together as husband and wife to something else. Whilst counsel for the pursuer submitted that the most significant factors, in the period after August 2016 were the argument on 30 December 2017, the pursuer's communicated intention and the absence of any reassurance by the pursuer, the other factors previously highlighted were relevant considerations. Counsel for the pursuer submitted that the correspondence, especially that in the period between January and March 2018, should be seen in its context. In particular, the pursuer's emotions following the abrupt end to a lengthy marriage, his distance from the children and need to keep lines of communication open and a number of health concerns relating to the defender and two of the children. After March 2018, the communication between the parties was "transactional". They simply evidence "co-parenting". The parties' children did not know of the argument on 30 December 2017. The parties

"managed to keep the deterioration of their marriage in 2016/2017, confrontations in October 2016 and December 2017, and the reasons for the marital breakdown away from the children."

[58] Counsel for the defender also provided a full written submission. The relevant law was identified and, again, there appeared to me to be no material difference between the parties on the law. Counsel made reference to certain parts of the evidence. It was significant that, save for the exchange between the parties on 30 December 2017, where the

pursuer maintains he told the defender their marriage was over – a statement the defender does not recall the pursuer making – the pursuer at no time thereafter either in private discussion or text or email exchange with the defender discussed their separation prior to 6 January 2020. The defender did not seek legal advice during that period. There was no intimation to the children that the marriage had ended. There was no expression of anxiety on the part of the defender regarding the loss of financial support from the pursuer. The messages between the parties following the pursuer's departure in January 2018, were such that the defender was entitled to receive them as gestures of love and affection from her husband and carried no suggestion of separation. Likewise, the communication between the parties before and after the pursuer's visit in February 2018 carried signs of affection from the pursuer and carried no signs separation. The pursuer sent flowers and a card to the defender, addressed to her by her first name, at her place of work, on her birthday on 3 April 2018, along with sending an electronic birthday card depicting hearts. The pursuer conceded in cross-examination that the flowers and card had come from himself, that the communications and actions were strong gestures of love and affection from the pursuer to the defender on her birthday and that the defender was entitled to receive them as such. There was no indication of separation within the communications. In relation to the planning for and holiday in Florida in July 2018, the communications indicated an excitement for the family to be together. The family spent the entire holiday together. The parties shared a bedroom and had sex. Andrea and James corroborated that the parties shared a bedroom. Both children said in evidence that everything was normal. The photograph of the family at 7/2.1 of process shows the family together, the pursuer with his arm around the defender and both parties wearing their wedding rings. The correspondence showed that the holiday arrangements were last minute, which undermined

the pursuer's evidence that his reason for going on the holiday was that he had promised the children he would do so. The correspondence and actions of the parties gave no indication of separation and were entirely consistent with normal family life and engagement with continuing cohabitation. The correspondence from the pursuer to the defender in August and October 2018 regarding the possible relocation of the parties and the children to Boston, including the pursuer's invitation for the defender to be financially reliant on him, is entirely consistent with the parties' continued cohabitation and the parties planning their future together. It was in abject conflict with any sense of separation. The pursuer communicated with the defender regarding his visit "home" in October 2018, expressing the view that "he was looking forward to it", the language of which was consistent with normal marital relations. In relation to the family holiday over to Queensland over New Year 2018/19, the parties had discussions regarding the holiday, during which the pursuer expressed excitement about the holiday. The defender recalled sharing a bed with the pursuer but declining to have sex. The evidence of Andrea and James was that relations were "normal" and neither child could remember the pursuer sleeping on a sofa, as asserted by the pursuer. The photographs lodged of family activities, the defender's Facebook post and that both parties could be seen to wear their wedding rings were all entirely consistent with continued cohabitation. The evidence before the court regarding the pursuer's visit to Australia in March 2019 was characteristic of normal family life. The pursuer acknowledged the defender's birthday in April 2019 and the associated productions suggest an enthusiasm on the part of the pursuer about the arrangement of a gift for the defender. The productions contained communications regarding the parties' plans for holidays for the summer and Christmas of 2019. These communications make it plain the parties were continuing to plan for the future together and are wholly suggestive

of a united family unit, entirely consistent with continued cohabitation. Communications between the parties about the invitation to the wedding of a work colleague of the pursuer, a public event focused on the celebration of marriage was highly eloquent of continued cohabitation. If the parties were in fact no longer cohabiting it was improbable that the pursuer would extend the invitation to attend such an event. In relation to the family holiday in Scotland in July 2019, the family stayed together in the pursuer's flat. The flat was small. There was never a suggestion that the defender stay elsewhere. The defender could have stayed with her mother. The family undertook activities together. When the defender and Andrea stayed at Stobo Castle, the pursuer and defender exchanged communications and photographs about their respective trips. These exchanges were light-hearted and entirely consistent with cordial relations between a married couple. The pursuer visited the family home in November 2019. The pursuer shared with the defender that he had lost his job. The evidence of Andrea and James was that relations between the parties were normal. An article produced regarding the pursuer's departure from his employment described the pursuer's departure to enable him to move closer to his family. In relation to the pursuer's visit to Australia over Christmas and New Year 2019/20, the defender gave evidence that for the first time the pursuer was distant. The parties engaged in family activities. The whole family wore matching pyjamas on Christmas Day. The photographs lodged taken over Christmas depict a normal, happy, cordial Christmas. There was nothing to suggest anything other than a united family unit. Both parties wore their wedding rings. More specifically, in relation to the parties wearing their wedding rings, whilst the pursuer gave evidence that he did not consistently wear his wedding ring, it was notable that he did in front of both the defender and children. At the point of raising proceedings (6 April 2022) the pursuer was unaware that the pursuer had received, in

December 2018, a substantial sum for his shares in his previous employer. In September 2023 the defender learned through the pursuer's adjustments that the value was approximately £800,000. The pursuer was mis-describing the history of his marriage for financial advantage. By contrast, the defender averred the relevant date of 6 January 2020 in her defences lodged in March 2023. Finally, there was no cogent basis to support the pursuer's evidence regarding the separation of the parties' finances. The pursuer encouraged, and the defender in reliance on that encouragement, placed the money she received for her shares in the parties' joint bank account. The defender did not open a bank account in her sole name until February 2020. The pursuer signed finance documents in relation to the purchase of a new car by the defender in late September 2019. He did so as "partner/spouse" and gave his home address as that of the family home in Australia. Viewed objectively, the evidence in the case did not support a relevant date of 30 December 2017. Rather, the evidence supported a relevant date of 6 January 2020.

Decision and reasons

[59] Before turning to my reasons, I will address the issue of credibility and reliability of the witnesses. I do not reject any of the witnesses as wholly incredible or unreliable. In relation to the parties' children, on some matters the children gave evidence that they could not remember. On some occasions I concluded that their answers were driven by a desire not to be seen as taking a side on a question they knew was important and partial. On other occasions I concluded they genuinely could not remember the detail they were being asked to provide. Where they did give positive answers, I accept those answers were genuinely given and I accept that they are largely accurate. The one exception to this is Simon's evidence in his affidavit about his understanding of the date of his parents' separation,

namely 2016 after he and the pursuer moved back to Scotland and his parents were no longer living together. I do accept that Simon's evidence on this point reflected his genuinely held understanding. I simply think that it was an innocent misunderstanding. I will come back to this part of Simon's evidence. In relation to the witnesses IDS, PDS, SB, PC, NS and LS I have commented on the evidence of these witnesses above and I will not repeat what I said. In relation to the defender's evidence, I accept that the defender was initially untruthful about the extent of her relationships with other men, not only to the pursuer but also to her lawyers and to the court. That is a factor that I take into consideration when I assess her evidence. I also accept that when the defender knew that she was going to give evidence in court she acknowledged her untruthfulness. I am prepared to accept that the defender did not want to admit she had been unfaithful to the pursuer. In the end, however, having seen and heard the defender give evidence, I am not prepared to reject her evidence on this basis. Where, on balance, I accept that the defender's evidence is consistent with my objective assessment of other evidence in the case, I am prepared to accept it. In relation to the pursuer's evidence, I have been left more cautious regarding his evidence. On several occasions he asserted propositions in his affidavit and oral evidence regarding the status of the parties' relationship that seemed to me to be at odds with an objective assessment of the relevant evidence and only once matters were put to him in cross-examination did he accept that the objective assessment was correct, for example various messages he sent to the defender, the sending of flowers to the defender at her place of work and the Valentine's card/message he sent her, all of which, when pressed, he conceded were, or could legitimately be received by the defender, as signs of love and affection. Another inconsistency that caused me to hesitate in accepting the pursuer's evidence was in relation to his evidence (paragraph 78 of his affidavit under the heading "Returning to UK following

separation”) where he states “I told [Simon] shortly after separation, possibly at the airport going home.” It seems to me that the purpose of this statement is to demonstrate a contemporaneous, outward expression of separation by him. However, as noted above, Simon stated in his affidavit that he believed his parents had separated in 2016 when he and the pursuer returned to Scotland. If the pursuer was correct about telling Simon in early January 2018, Simon would not be left with the understanding he expressed in his evidence. Given that the separation of one’s parents is likely to be a significant event in a young person’s life, I consider it likely that Simon would have remembered any such conversation. The concern I am left with is that the pursuer has mistakenly or unthoughtfully given evidence that, at best, is inconsistent with an objective assessment of independent evidence, raising questions about the reliability of the pursuer’s evidence, or, at worst, has deliberately given such evidence, thereby raising concerns about the credibility of the pursuer’s evidence. There are parts of the pursuer’s evidence I do accept. I accept that on finding out about the defender’s actions he was deeply upset and angry. In these circumstances, where the pursuer and defender’s evidence are at odds in relation to a material issue, and there is no independent evidence supportive of either, I am inclined to accept the evidence of the defender.

[60] The parties, as a family, moved to Australia in 2013, a move facilitated by the pursuer’s employer. Between 2013 and August 2016 the pursuer travelled extensively with his employment, often returning to the UK. Latterly in that period, the pursuer’s work became more UK focused and the pursuer’s employer requested that the pursuer return to the UK. The pursuer returned to the UK in August 2016, along with Simon. Between August 2016 and December 2017 the pursuer would travel to Australia to see the defender and his three younger children and the family would holiday together, either in Australia or

elsewhere. There is no suggestion that the change in the family's living arrangements or the parties' cohabitation between 2013 and August 2016 or from August 2016 to December 2017 constituted a separation within the context of the Family Law (Scotland) Act 1985. It is against the nature of the parties' cohabitation during this period, and particularly the period from August 2016 to December 2017, that both counsel submit any sufficient change in the nature of the parties' cohabitation should be assessed.

[61] Adopting that approach, which I accept is supported by the authorities cited, on the basis of the evidence presented to me, in my judgment, the nature of the parties' cohabitation changed such that they no longer cohabited as husband and wife at the time when the defender departed with the younger children on the cruise in January 2020 and the pursuer left to return to the UK with Simon in the days after. 6 January 2020 is the first of these events and is, in my judgment, the date on which the parties' ceased to cohabit as man and wife and is the Relevant Date. I have reached that decision for a number of reasons. These fall broadly into two areas. The first relates to an analysis of the parties' relationship viewed from a chronological perspective; an approach adopted by both counsel. The second relates to more general considerations.

[62] Considering the chronological approach, firstly, the nature and tone of the communications between the parties is, objectively, indicative of continuing cohabitation as man and wife, albeit I accept that the nature and tone of the communications does change, most relevantly during the latter part of 2019. In that correspondence, at different times, the pursuer expresses a strong desire to see the defender, some of his messages contain kisses at the end, some are suggestive, and the subject matters go beyond the asserted limit of merely transactional and entirely child focussed issues. The pursuer himself accepted in cross-examination on a significant number of occasions that the defender would be entitled to

receive such communications as gestures of affection from a husband. The nature and tone of these communications, post 30 December 2017, embody no sense of, or support for, separation of the parties.

[63] Secondly, the pursuer sent to the defender, received by the defender at 7.11am on 14 February 2018, a text message constituted by a single red heart. As the pursuer accepted in cross-examination, given the time difference between the UK and Australia, the pursuer would have sent the message on the 13th, UK time. The defender replies "... thanks happy v day". Objectively, to choose to, and plan in, engaging in a tradition that symbolises romance and love is to act entirely consistently with a continuing relationship of husband and wife and the antithesis of the cessation of that relationship.

[64] Thirdly, the defender sent the pursuer a bouquet of flowers, including roses, to her place of work on her birthday in April 2018. The bouquet was accompanied by a card addressed to the defender by her first name. Objectively, to send a person who is your spouse a bouquet of flowers, which includes roses, to their place of work is, as counsel for the defender put it in submission, a public declaration of affection and unity. It is not the act of a separated husband who communicates only regarding practical matters relating to their children. The matter does not stop there. The pursuer also sent to the defender an electronic birthday card depicting a large heart with smiling face accompanied by a message with two emoji hearts. Again, the pursuer accepted in cross-examination that his actions and communications were a strong gesture of love and affection from him to the defender. In examination-in-chief the pursuer sought to explain that the flowers and accompanying card, whilst arranged by him, were, in fact, from the children. That, as he conceded, was inconsistent with the fact that he had addressed the card to his wife's first name. It also fails

to explain the sending of the separate text message. Again, these actions contain no sense of or support for separation of the parties.

[65] Fourthly, the evidence of the parties' children. I have set out the evidence above and made comment on the extent to which I accept its credibility and reliability. I accept the evidence of the children on matters where they thought able to give evidence. I consider that the children were well placed to comment on the "normality" of their parent's relationship and the various sleeping arrangements at various time, which is in turn relevant to my conclusions regarding the parties' holidays in Florida and Queensland and when at home in Australia or at the pursuer's flat in Scotland in July 2019.

[66] Fifthly, the evidence relating to the planning for and holiday in Florida in July 2018 is, objectively, demonstrative of the parties continuing to cohabit as man and wife. In the lead up to the holiday the pursuer messages the defender "Really, really want to see you". The pursuer sought to explain that wording by suggesting it was a reference to the family. On balance, I do not accept that. On balance, I conclude that the pursuer is referring to the defender. Had he been referring to the family he would more likely have said "you all". Irrespective, and particularly considered against a backdrop of the pursuer's assertion that his communications with the defender were transactional and about the children only, a reference to the family includes the defender. I accept the defender's evidence that the parties shared a bedroom. That evidence is supported by the evidence of Andrea and, with a little less confidence, James. The defender's evidence was that the parties had sex. Having concluded they shared a bedroom, I accept, on balance, as the defender gave evidence, they had sex. The photograph lodged of the parties and younger three children, in which the pursuer has his arm around the defender, is a telling picture of a united family. Both the

pursuer and defender are wearing their wedding rings. Again, the evidence is entirely consistent with ongoing relations as husband and wife and inconsistent with separation.

[67] Sixthly, the messages from the pursuer to the defender concerning a possible relocation of the family to Boston are, objectively, clear indications of ongoing commitment by the pursuer to the defender of their relationship together as husband and wife in the context of a family. "We would all be together" and "No need to work at all" are clear indications of this. On an objective reading of these messages the pursuer's explanations that "we" "might mean [Simon]" and that the messages might be an attempt by him to "pacify [the defender] about money" are frankly incredible.

[68] Seventhly, the evidence relating to the planning for and holiday in Queensland over New Year 2018/2019 is, objectively, demonstrative of the parties continuing to cohabit as man and wife. There is discussion between the parties about the possibility of the family going on a cruise. In the end the family went to Queensland. The defender gave evidence that the parties shared a bedroom. The pursuer gave evidence that he slept on a sofa. Andrea and James gave evidence that they could not recall the pursuer sleeping on the sofa and that they thought everything was normal. The photographs lodged appear to show a family together enjoying each other's company. Both parties wore their wedding rings. The defender's Facebook post seems to me to be a clear message by the defender to her social circle of family unity. The evidence before me gives no sense of disunity or separation. There was a dispute between the parties about the extent to which the pursuer supported the defender on a trip to the hospital. The defender giving evidence that the pursuer was wholly loving and supportive. The pursuer giving evidence that, whilst he did assist the defender by taking her to hospital, it was not done in a loving way as would be expected between husband and wife. Irrespective of the extent and nature of the support provided by

the pursuer to the defender, it seems to me quite understandable that the pursuer would have assisted to some extent, regardless of the status of their relationship. The parties were away from home and the defender appeared, potentially at least, significantly unwell. I have come to the conclusion that this evidence concerning the extent of any support given when attending hospital is not material to my decision.

[69] Eighthly, the pursuer acknowledges the defender's birthday on 3 April 2019. Again, the arrival of the message at 08:13, Australian time, suggests planning on the part of the pursuer so the defender receives the message soon after she wakes up. The defender thanks the pursuer for a gift. The pursuer gave evidence that the gifts were from Andrea and that he merely facilitated as Andrea had no money. I do not accept that explanation for two reasons. Firstly, the pursuer's response to the defender thanking him is not consistent with such a position. Secondly, if the pursuer did not want to be involved with the giving of a present, he could have simply given Andrea money to allow her to purchase a gift of her choosing, rather than having "many texts about it!".

[70] Ninthly, in May 2019 the parties discuss holidays for the UK summer and Christmas/New Year periods. The discussions are of a family holiday. They are consistent with parties planning as a family and are suggestive of continuing cohabitation within that family. In July 2019, the defender and younger children travel to Scotland where they stayed with the pursuer and Simon in the pursuer's flat. The flat was small and accommodation was relatively cramped. I accept the defender's evidence that she could have stayed with her mother. The family engaged in activities together. When the defender and Andrea spent time at Stobo Castle with the defender's mother, the pursuer, James and John spent time with the pursuer's mother and the parties' exchanges messages about their respective activities. The parties wore their wedding rings. The evidence led before me

about the parties' time in Scotland in July 2019 is consistent with ongoing family life with the parties as husband and wife. There is nothing in the evidence to suggest that the parties had separated. Prior to the defender and younger children coming to Scotland, the pursuer raises with the defender the possibility of attending a wedding of a work colleague they have been invited to. The possibility of Andrea also attending is raised and the defender asks whether they should bring dresses with them. The pursuer sought to explain in cross-examination that the reason the work colleague had invited the pursuer and defender was because the work colleague did not know that the parties had separated. That raises two concerns. Firstly, in response to the invitation the pursuer does not appear to have responded to his work colleague that the parties had separated (on the pursuer's evidence, some 18 months before). Secondly, irrespective, if the parties were truly separated, as was accepted by the pursuer, he could simply have attended the wedding alone. He need not mention it to the defender at all. I agree with the submission of counsel for the defender that if the parties had, in fact, separated, it is improbable that the pursuer would extend, to the defender, the invitation, from a work colleague, to attend a wedding, a public event focused on the celebration of marriage.

[71] Tenthly, in November 2019 the pursuer stayed with the family in Australia for Andrea's birthday. The defender gave evidence that the parties' shared a bed. She recalled that the parties were on their bed when the pursuer told her he had lost his job in the summer of 2019. As previously stated, the pursuer's position was that the parties had not shared a bed since 30 December 2017 and, as above, I have rejected that singular assertion on the basis of the evidence before me. Andrea and James both gave evidence about this time in their respective affidavits and oral evidence. In her affidavit, in the paragraph between references to Summer 2019 and Christmas 2019, Andrea refers to "a time" when the pursuer

stayed at the family home without Simon. Andrea states in this paragraph, which, given the known chronology, is likely to refer to the pursuer's November 2019 trip, that she thought her parents slept in the same room. Counsel for the pursuer put to Andrea that the pursuer slept in a bed on the landing to which Andrea replied that she did not know. James, in his affidavit, thought that the pursuer slept in a room downstairs. It was also put to James in cross-examination that the pursuer slept in a bed on the landing. James disagreed and stated he "thought" the pursuer slept in a bedroom downstairs. In re-examination James gave evidence that it was "possible" that the pursuer might have shared a room with the defender but relocated to another bed if/when John sought to share a bed with the defender. Both Andrea and James gave evidence that everything was normal between their parents. Thus, both children rejected the pursuer's assertion. Andrea appears to support the defender's position and James appears unsure. On balance, I accept that the parties shared a bedroom and a bed in November 2019.

[72] Eleventh, the pursuer and Simon stayed with the family in Australia over Christmas and New Year 2019/2020. The defender gave evidence that the pursuer acted differently on the trip and chose to sleep on a sofa bed in the hallway. The family wore matching pyjamas on Christmas day and shared a Christmas meal together. The parties wore their wedding rings. On the face of them, the photographs lodged of the family depict a normal family Christmas scene. However, I would acknowledge some of the photographs might show the pursuer appearing a little distant. Previously, in early December 2019 there is communication between the parties regarding Andrea's passport. The defender had arranged a cruise for herself and the younger children to begin on 6 January. In the communication the pursuer is clearly surprised that there has been no prior reference to the cruise. There is a difference in the evidence between the parties regarding when the pursuer

was due to return to Scotland. The pursuer's position being that he had arranged to stay for his birthday. The defender's position was that the cruise was arranged to distract the children from the return of the pursuer to Scotland. The communications appear to me to support a degree of surprise on the part of the pursuer but also appear to support the defender's stated intentions. That said, the communications appear to me to be somewhat fractious and are not consistent with two people seeking consensus following a possible misunderstanding. As set out above, on 6 January 2020 the defender and younger children leave on the cruise without the pursuer and Simon, who soon thereafter return to Scotland.

[73] In terms of more general matters, a number of other points arose in the evidence that I consider material, albeit they do not fall neatly into the chronological assessment above. As I have set out above, the parties continued to wear their wedding rings throughout the period in dispute. That said, as stated by the pursuer in cross-examination, he took off his wedding ring on occasions when he went out with friends, albeit the pursuer did not date when these occasions were. What I consider material about this evidence is that having taken off his wedding ring, the pursuer made the conscious decision to put it back on again and appears to have done so on a number of occasions. I agree with the proposition put by counsel for the defender to the pursuer that wearing a wedding ring is an outward symbol of a commitment to marriage. To remove a wedding ring on occasions and then consciously choose to put it back on again, it seems to me, is to make the conscious choice to associate oneself with that outward symbol of a commitment to marriage. Such a situation is different to, for example, wearing a ring out of habit until an event causes one to remove it permanently. In my judgment, the pursuer made a choice to wear his wedding ring throughout the disputed period and that choice is, objectively, entirely inconsistent with an argument that he considered himself to be separated from the defender.

[74] Whilst a fact that cannot give any insight into the intentions of the pursuer, and noting that the legal test for determining the Relevant Date is predominantly objective, it is of note that the defender continued, throughout the disputed period, to use a photograph of herself and the pursuer, with arms around each other, for her messages with the pursuer. If the defender was separated from the pursuer, and knew it, it seems to me unlikely, if not inconceivable, that she would continue to use such a photograph.

[75] Another factor that I consider relevant, albeit in itself not highly significant, is what I consider to be an inconsistency in the pursuer's evidence regarding him not taking action to bring his marriage to an end after 30 December 2017 on the basis of legal advice obtained. In his evidence the pursuer stated that he received legal advice between September and December 2017 and was told that waiting for a period of two years post separation would make obtaining divorce more straightforward. For those familiar with divorce proceedings that advice makes sense. However, the pursuer's position in evidence was clear and unequivocal, he separated on 30 December 2017. The marriage was over as at that date. He made that clear to the defender. Yet it was not until 6 April 2022 that the case was initiated by service of the summons on the defender via Andrea. That is over four years from 30 December 2017 and a little over two years from 6 January 2020. The pursuer's initiation of divorce proceedings, particularly in light of his evidence about the advice he received, is more consistent with a separation at the beginning of 2020 than the end of 2017.

[76] Also relevant to my consideration of Relevant Date is the evidence of the parties concerning their financial decision making. The first point concerns the pursuer setting up a TSB bank account following his return to the UK in August 2016. The pursuer gave evidence that following his return to the UK he was changed to, and paid under, a UK contract and that his reason for setting up the bank account was to begin to separate the

parties' finances. He denied telling the pursuer that this was for tax purposes. At the outset of her cross-examination of the pursuer counsel for the defender was careful to confirm with the pursuer that notwithstanding the changes in the families' living arrangements the parties remained together as man and wife until 30 December 2017. It seems to me, standing that confirmation by the pursuer, it is unlikely that the pursuer made the prospective decision to separate the parties' finances due to relationship issues. It seems to me to be more likely and more consistent with the evidence before me that the pursuer is seeking to retrospectively place an interpretation on his setting up of the TSB bank account to support his asserted Relevant Date. Also inconsistent with the assertion of a separation of finances is the evidence in relation to the lodging of the defender's payment received in connection with her shares, on the advice of the pursuer, into the parties' joint bank account in the UK in December 2018, which funds the pursuer subsequently drew on. The above facts, in my judgment, make more sense and are more consistent with the parties continuing to operate their finances jointly. The defender first opened a bank account in her sole name in February 2020. That fact might give rise to an inference that the defender thought that her relationship with the pursuer had changed at that point such that it would be appropriate for her to operate her own independent bank account, which is consistent with the parties' separation at a point shortly before this. Two other financial decisions are relevant. The first relates to the defender seeking finance for a car and asking the pursuer to sign finance documents. Something was made of the fact that the pursuer had signed the documents as spouse/partner and given his home address as the family home in Australia. Review of the forms makes it clear that the form proceeds on the basis that it is being signed by a spouse/partner. Further, the defender had told the pursuer that she needed a new car and, on the basis of the evidence before me, presumably required the pursuer's consent/statement

of income to afford the car. It seems to me that the pursuer, in signing the forms, may have been doing no more than facilitating that need. I do not conclude from his actions that the pursuer was, in fact, confirming the status of the parties' relationship. The final financial decision that I consider relevant is the one that causes me the most concern. In 2019 the pursuer purchased a house. He made an offer to purchase in April 2019, concluded missives in May 2019, finalised his contract on 17 July 2019, the day after the defender and younger children left Scotland to return to Australia after holidaying with the pursuer, and had entry to the property in August 2019. All of this remained unknown to the defender. It seems to me that to keep such a major decision, and about a house, away from the defender, the pursuer must have been, objectively, making arrangements for permanent living arrangements in Scotland, in circumstances where there appears to be no discussions with the defender about doing so. The pursuer had fairly recently before received a substantial sum of money and investing some in a property might be considered prudent. In the end, the circumstances of the pursuer's purchase of the flat might be considered to weigh against the defender's asserted date of separation. It does not, however, necessarily support the pursuer's asserted date. Considered against all of the evidence in the case, I do not consider it decisive.

[77] Counsel for the defender also made reference to the non-disclosure by the pursuer to the defender of his substantial pay out for his shares obtained in the same circumstances as the defender's receipt of a share purchase. Counsel for the defender, perhaps understandably, argues that the pursuer's selection of 30 December 2017 as the date upon which the parties separated is made simply and solely for the purpose of selecting a date before receipt of his share funds in a cynical attempt to defeat the defender's claim for financial provision on divorce. That might be true. However, merely because the

subsequently asserted date of separation precedes the receipt of funds for his shares, it does not necessarily follow that the asserted date is a cynical attempt to defeat the defender's claim for financial provision. In the circumstances, I think it would be fallacy on my part to conclude that the circumstances surrounding the pursuer's disclosure of his receipt of the share sale proceeds should be interpreted as reliably undermining the pursuer's asserted date of separation. Lest there be any doubt, I consider there to be more than sufficient evidence before me to provide that undermining.

[78] The essence of pursuer's position is, and was throughout his evidence, that he told defender that their marriage was over during the argument on 30 December 2017 and he could not see that the defender could understand differently. Any further interaction between them was transactional and entirely driven by his desire to see his children. He was concerned that should he not maintain relations with the defender she would prevent him from seeing his children. The defender was, to use the word used by the pursuer in his evidence, a "conduit" to his children. On the basis of the evidence presented to me, I do not accept there is anything material in the evidence to positively support that assertion and much to refute it. The defender was clear in her evidence-in-chief, she would not have denied the pursuer access to their children. The defender acknowledged "especially the boys, they need a dad." As the pursuer himself acknowledged in cross-examination there was nothing to stop him visiting Australia and holidaying with the children alone.

Although the pursuer stated that in the past the defender had prevented him from seeing the children, when pressed, the examples he gave did not support the assertion. One example related to when Simon was very young and no context beyond the parties having an argument and the defender leaving with Simon is provided. One example relates to when the pursuer left with the children to go on holiday to the Gold Coast as she was not

prepared to wait until the following day to leave. The pursuer apparently flew up the following day after his business meeting. The third example relates to the defender taking the children to Legoland on her own but, again, no context is given. When expressly asked in cross-examination whether she accepted the pursuer might feel she might take children away again, the defender replied “not really ... don’t understand why [the pursuer is] not seeing the children”.

[79] In drawing the above threads together, in her evidence the defender said that she thought the parties’ relationship was “not so good” during 2015, 2016 and 2017 whereas 2018 was one of their better times before getting worse again in 2019. Although I am not able, in the absence of relevant evidence, to comment in any detail on the period 2015 to 2016 and through to September 2017, what I am able to conclude is that the parties themselves agree that notwithstanding the pursuer’s return to the UK in August 2016, there was no sense of separation and the parties remained as husband and wife until 30 December 2017, at which point the pursuer asserts the parties separated. On the basis of the evidence before me, I accept the defender’s evidence that she thought the parties’ relationship was better during 2018. I say that under reference to all of the evidence discussed above for that period. I have also concluded that in 2019, and more particularly later in 2019, there are signs of cracks in the parties’ relationship. The nature and tone of the messages between them has changed from 2018. Significant decisions do appear to be being made in the absence of consultation with the other. The pursuer acknowledges in his evidence that he has begun to see other women, although these appear casual rather than forming a new relationship. At Christmas in 2019 the pursuer does not share a bed with the defender. The communications regarding the cruise in January 2020 has an element of bitterness to it. But, in my judgment, when the defender and younger children get on the cruise ship without the

pursuer and Simon and the pursuer and Simon return to Scotland for the last time, the parties appear to me to have consciously let go of their relationship and, at that point, objectively, they separate and are no longer cohabiting as man and wife. Accordingly, in my judgment, applying the relevant law as set out above, the Relevant Date is 6 January 2020.