

Neutral Citation Number: [2024] EWFC 313 (B)

Case No: CF24P70280

Cardiff Civil and Family Justice Centre

2 Park Street, Cardiff, CF10 1ET

Date: 22/10/24

**IN THE FAMILY COURT SITTING AT CARDIFF**

**Before :**

**HIS HONOUR JUDGE MUZAFFER**

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**Between :**

**Tom**

**(A Child, by his r.16.4 Children's Guardian Stephen Fitzpatrick)**

**Applicant**

**-and-**

**M**

**First Respondent**

**-and-**

**F**

**Second Respondent**

(Application by a Child for Leave to Apply)

**Mrs Sheila Radcliffe** (instructed by Miss Kristy Smith of Devonalds Solicitors) for the **Applicant**

**The First Respondent** appeared in person

**The Second Respondent** appeared in person

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**Hearing date: 23<sup>rd</sup> September 2024**

**Judgment handed down: 22<sup>nd</sup> October 2024**

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

### **Judgment for Tom**

**His Honour Judge Muzaffer:**

#### **What is this case about?**

1. This case is about Tom, a boy aged 13 years old. Tom would like to make an application to the court for an order that means he can live with his father and attend a different school. However, he needs the court's permission before he can do this because he is a child.
2. Tom's dad agrees that Tom should be able to make his application. However, Tom's mum does not. Tom also has a Children's Guardian, who is also of the view that Tom's application should not proceed.
3. Tom has been represented in this case by his solicitor, Miss Kristy Smith. Tom has also been represented at court hearings by a barrister, Mrs Sheila Radcliffe. I know they have worked closely with Tom and helped him understand the process and the issues that the court needs to think about.

#### **My Decision**

4. After a lot of careful thought, I have decided to not allow Tom to make his application. The arrangements that the court has put in place previously about the time that he spends with each of his parents and the school that he attends shall continue.
5. I have also decided that nobody should be allowed to make further applications to the court for orders about Tom until he turns 16 years old, unless the court has first given its permission.
6. I know that Tom will be extremely disappointed by this outcome, and will once again think that his voice has not been heard. I will now set out the reasons for my decision, and hope that Tom will understand that although it is not what he wanted, his case has been considered very carefully.

#### **What is the background to Tom's application?**

7. Tom's mum and dad separated when he was about a year old. Since then, they have both married, and so Tom has a step-mother and a step-father. Tom also has a half-sister, Anna (who is about to turn 6 years old) and two step-brothers.
8. Unfortunately, Tom's mum and dad have always found it very hard to agree about important decisions that need to be made for him, such as where he should live and when, and what schools he should attend. This is actually the sixth time that Tom has been the subject of a court case. Tom should know that this is a very high number, and not at all normal. It is also not his fault.
9. The first three cases in 2013, 2015, and 2016 concluded with Tom spending a roughly equal amount of time with each of his parents and an order that he attends W Primary School. I then dealt with a case in 2019 that again looked at these questions. Tom turned 10 during this case, and I was presented with evidence as to what Tom wanted to happen. I was told that Tom wanted to move to live with his dad and change schools closer to where his dad lived.
10. Although I heard and acknowledged what Tom was saying, my view was that he needed both his parents in his life, and that he should continue to live with them for a roughly equal amount of time. I was worried about what would happen to Tom's relationship with his mum and Anna should he move to live mostly with his dad, and that Tom appeared somewhat confused as to what he wanted and why. I also thought that it was not in Tom's interests to change schools, as the information I had was that he was happy and doing well at W Primary School.
11. The fifth case about Tom took place in 2022, when Tom's dad asked the court to decide where he should attend secondary school. Tom's mum wanted him to go to X Comprehensive, whilst his dad preferred Y Comprehensive. It was also reported that Tom wanted to move to live with his dad, and so the court considered this question as well.
12. This time the case was dealt with by a different judge, District Judge Andrews, but I have read through her decision. Judge Andrews also considered carefully what Tom was saying, but she too was worried about the impact on Tom's relationship with his mum and Anna if he moved to live with his dad. She concluded that it was best for Tom to move with most of his school friends to X Comprehensive. Once this decision was made, Tom's mum and dad agreed that Tom should continue living with each of them as he had done before.

### **What does everybody say about Tom's application?**

13. In a witness statement, Tom tells me that he is unhappy during the time that he spends with his mum, and is worried that this is affecting his education, emotional wellbeing, and ability to progress with his sporting competitions. I know that Tom is an extremely talented sportsman with high ambitions, and that sport is of great importance to him. Tom also told me that he did not feel that his wishes had been considered during the previous cases.
14. Tom's wish is to be able to move to live with his dad and to attend Y Comprehensive School. He says that he would want to continue spending time with his mum every other weekend and for a few hours during an evening each week.
15. Miss Smith tells me that she considers Tom to be a mature 13 year old who has demonstrated a clear understanding of his circumstances. She is of the view that he has a sufficient understanding of the concerns, risks, and consequences to be allowed to make his application.
16. Tom's mum agrees that he is an intelligent boy, but does not think he has shown that he truly understands the process and its consequences. She is concerned that Tom reasoning in support

of what he wants is unclear, and that he will suffer harm if directly involved in a legal battle between his parents. Tom's mum understood that he would be very disappointed if I refused his application and would need support to accept this. However, she believed that things would be OK with a little time. Tom's mum also thought that their relationship was currently better than it had been in a long time, and that they had all really enjoyed the time they spent together over the summer holidays.

17. Tom's dad asks me to consider that Tom has been clear in his views for many years, and that his voice should be heard. He believes that Tom will suffer greater harm if his application is refused, although agreed that he might also suffer harm if he was directly involved in a court battle. Tom's dad also agreed that things between Tom and his mother had been good recently.
18. Tom's Children's Guardian, Mr. Fitzpatrick, does not support Tom's application. Although he considered Tom to be intelligent, thoughtful and engaging, he was really worried about the harm that might be caused to Tom and his relationship with his mother if he were allowed to carry on with his case. Mr. Fitzpatrick believed that Tom was under a lot of pressure, and needed support through therapy, not a court battle.

#### **What are the issues that I must decide?**

19. I must look at all the information and decide whether Tom has sufficient understanding to be able to make the application. When deciding this, I think about a range of issues, including Tom's intelligence, his emotional maturity, his reasons for wanting to play a direct role, and his understanding of the process. I must also consider what risk of harm there is to Tom, whether that is by him being involved in a battle with his parents, or being excluded from the opportunity to have his voice heard in the most direct way.
20. If I think that Tom does have sufficient understanding, I will then consider whether he should be given permission in all the circumstances of the case. This would include the court thinking about what the chances are that he would get what he wants.
21. If I think Tom does not have sufficient understanding to make his application, then that is the end of the proceedings. If that is the case, I have then been asked to consider making an order that stops any further applications being made about Tom without the court first considering whether they should be allowed.

#### **What do I think the evidence tells me?**

22. I think that Tom is an intelligent and perceptive child. His school reports that he has an excellent attitude to learning and is progressing really well.
23. I do not believe that Tom is as mature as his lawyers and his dad say he is. The battle between his parents has left him in need of support for his emotional wellbeing. I am worried that he is unable to balance the issues about his mum, and that his stated unhappiness is not reflected in the time that he has enjoyed spending with her. I thought that Tom's proposals for the time that he wanted to spend with his mum showed that he does not understand the importance of his mum, Anna, and step-family to his life.
24. I also think that Tom's dad has had an influence over Tom's decision to make his application. I read Tom's NYAS records, which show that his dad was actively involved in the discussions about Tom making his own application at a time when he should have been supporting him to accept the outcome of the case in 2022. I believe that this influence, when

combined with Tom's other emotional needs, has affected his ability to understand the true nature of the issues.

25. Saying that, I make it clear that I hear what Tom says about his wishes and feelings, and I accept that these are extremely important to him. His strength of feeling is genuine, and this is the reason why he wants to play a direct role in the case.
26. I am not convinced of the extent of Tom's understanding about the reasons for the court's decisions previously. I also do not believe that Tom has put forward clear reasons for his desire to live with his dad and to switch schools. The information that I have received is that Tom does enjoy spending time with his mum, and that she does a pretty good job of making sure he makes his sporting commitments.
27. I am particularly concerned that Tom does not show any real understanding of the consequences of changing schools, and what a huge event this would be. I am worried that Tom is simply reflecting the views of his dad on this, as his dad has been trying to persuade the court to go with his choice of schooling since Tom was as young as three years old.
28. Linked to his obvious intelligence, I accept that Tom has a good understanding of the court process, although he is perhaps naïve as to how hard it would be to witness one of his parents being distressed in a court environment.
29. I was also very worried about the impact on Tom of being exposed to information that a child would not normally be exposed to about their parents. Although I have full faith in the ability of Tom's lawyers to help him understand things in an age appropriate way, I still think this would be harmful to Tom given the upset that he has already suffered over the years. I do not think Tom understands the long term effect of this.
30. Against this, I know that there is a risk that Tom will suffer further upset if he considers that he has been excluded from matters and that his voice is not being heard.

### **My Conclusions**

31. My decision that Tom lacks sufficient understanding to make his application comes as a result of balancing all these issues. The three things that I thought most important were:
  - a. My conclusion that Tom does not understand the long term impact of what he wants on the relationship that he has with both his mother and Anna.
  - b. My conclusion that Tom is unable to put forward clear reasons as to why there needs to be such a significant change to both the time he spends with his parents and his schooling.
  - c. My conclusion that Tom does not understand the extent of harm and upset that he might be caused through being in a court battle with his mum and dad.
32. In simple terms, I am not satisfied that Tom truly understands the nature of the issues and the consequences of his choices, despite his obvious intelligence and clear sense of what he wants. I hope Tom understands that I have paid very careful attention to what he has had to say, even if I have ultimately disagreed with him. I am confident that this is the right outcome in the long run.
33. It follows that Tom's applications shall be dismissed.

34. In deciding that nobody should be permitted to make further applications to the court for orders about Tom until he turns 16 years old (unless the court has first given its permission), I thought about the following:
- a. This is the sixth case about Tom, and when combined, he has been the subject of court proceedings for a total of three years.
  - b. For some time, it has been the recommendation of those working with Tom that he needs some carefully planned therapy and support to help him recover from the difficulties he has experienced because of the battle between his parents. Arranging this must be the priority now.
  - c. That support will have the best chance of success if Tom is settled and stable in both his living and educational arrangements.
  - d. With Tom starting his GSCE studies imminently, it is crucial that he is now allowed and supported to put the question of change behind him and is allowed to focus on the many positives that he has in life.
35. I know that Tom will find this hard to accept, but I am certain that it is in both his short and long term interests to be allowed the peace and calm of living with both of his parents and attending his current school. The focus must be on moving forward with the arrangements as they are, not on when it might be an appropriate time to ask the court to consider the case again.
36. I finish by saying thank you to Tom's legal representatives for the help that they have given him and the court in this case.
37. I also wish Tom every success for his future. That might seem like an unoriginal statement for a judge to make, but it is sincerely and genuinely meant.

His Honour Judge Adem Muzaffer

### **Full Judgment**

**His Honour Judge Muzaffer:**

#### **Introduction**

1. These proceedings concern Tom (for the avoidance of doubt, not his real name), a boy aged 13 years old. The application is brought by Tom himself. Tom does have the benefit of a Children's Guardian pursuant to r.16.4 of the Family Procedure Rules, Mr. Stephen Fitzpatrick. However, given the issues in the case, Tom has effectively proceeded to date being separately represented by Miss Kristy Smith of Devonalds Solicitors. I note that Tom was assisted in instructing Miss Smith by his National Youth Advocacy Service (hereafter "NYAS") support worker. The respondents to the application are Tom's mother and his father.
2. Tom seeks the court's permission to apply to vary two orders made by the Family Court in respect of him at earlier points in time. The first is a child arrangements order dated 28<sup>th</sup> January 2020 that stipulates he should live with each of his parents over a roughly equal split in time. The second is a specific issue order dated 4<sup>th</sup> July 2022 that determined he should attend X Comprehensive School. If Tom secures leave to pursue his applications, he seeks an order providing for him to live with his father and change school to one closer to his father's

home, Y Comprehensive School. The father supports Tom's applications, whereas the mother and Mr. Fitzpatrick do not.

3. This judgment follows a hearing on 23<sup>rd</sup> September 2024 at which the court received submissions from Mrs Sheila Radcliffe on behalf of Tom, and the mother and father as litigants in person. Mr. Fitzpatrick also provided representations to the court, it being the decision of Cafcass Cymru not to consider the question of alternative representation pending the decision on leave.
4. On the basis that the court was keen to ensure that Tom and his parents received the judgment at the same time, it was agreed that Tom's representatives should be sent a copy first to allow them to arrange a conference to talk him through the decision. The court then circulated a copy of the judgment to the parents and Mr. Fitzpatrick on the same day as that conference. Unfortunately, the formal handing down of the judgment could not be fixed until 22<sup>nd</sup> October 2024.

### **Essential Background**

5. The mother and the father commenced a relationship in 2007 and separated when Tom was a little over a year old in 2012. Both parties have re-married, and so Tom now also has both a step-mother and a step-father. Tom also has a maternal half-sibling of the relationship between his mother and step-father, Anna, who will shortly turn 6 years old, and two step-brothers.

#### *The 2013, 2015, and 2016 proceedings*

6. This is the sixth set of court proceedings in respect of Tom. The first in time was an application by the mother for a child arrangements order dated 11<sup>th</sup> October 2013. This concluded by way of a final order dated 14<sup>th</sup> July 2014 providing for a shared care arrangement. Although Tom was aged just 3 at the time, the question of his schooling was also litigated and settled with a specific issue order that he would attend W Primary School. This favoured the mother's position, with the father having argued that Tom should attend a Welsh language school nearer to where he lives.
7. The matter was next before the court a little over a year later, when the mother sought to vary the 2014 order by way of an application dated 28<sup>th</sup> August 2015. The arrangements that had been in place meant that Tom spent very little time with the mother over the course of a weekend, and a change in the arrangements to reflect this was agreed and recorded within a final order dated 18<sup>th</sup> November 2015. This provided for a somewhat convoluted cycle, with the upshot being that Tom started to live with his mother for one weekend in four. Otherwise, Tom continued to spend a broadly equal amount of time in the care of each of his parents over the course of a month.
8. A third application was issued by the father dated 9<sup>th</sup> June 2016. This application related to the father taking the child on holiday, and the father also sought an order that the child's passport be placed in his possession. This application was resolved by consent at a hearing on 16<sup>th</sup> June 2016.

#### *The 2019 proceedings*

9. The father then made a further application dated 15<sup>th</sup> May 2019, this time to vary the child arrangements order dated 18<sup>th</sup> November 2015 to provide for Tom, then aged 8, to live with

him and spend time with his mother on alternate weekends and for some midweek contact during the 'off' week. The father also sought a specific issue order that Tom change schools from W Primary School to Z Primary School, closer to where he lives. The mother utilised the proceedings to seek her own variation to the November 2015 order to provide for contact with Tom on alternate weekends.

10. I have the benefit of having case managed and heard the 2019 proceedings as a District Judge. The father's case was that he was simply trying to give effect to what Tom himself had expressed he wanted, namely, to move school and live with him. In support of his position, the father sought to rely on two reports prepared by NYAS, who had been engaged by the parents to support Tom in the period prior to the application being issued.

11. The court gave close scrutiny to Tom's ascertainable wishes and feelings at paragraphs 18 to 36 of its judgment dated 28<sup>th</sup> January 2020, a copy of which is contained within the hearing bundle. At paragraph 36, the court states as follows (with additions in brackets for context):

36. "I agree with the assessment of MR [NYAS worker] as recorded in Mr. Hall's [Cafcass Cymru Family Court Adviser] report. The evidence leads me to conclude that Tom, more likely than not, is a confused little boy. He is clearly acutely aware of the dispute between his parents, not least because he was physically involved in the incident on Mothering Sunday 2018, and it is no wonder, to my mind, that he has been guarded in his responses to questions posed by different people at different times. I consider that the actions of both parents, both directly and indirectly, have contributed to this and whether it be the mother's reaction to the initial NYAS letter or father stating subsequent to that letter that the mother had learnt some form of lesson. I must bear in mind that this is a little boy of just 9 years old, 8 years old at the time that all the wishes and feelings work was undertaken, and it strikes me that this is a case where Tom is trying desperately to say what he thinks will tread the fine line of keeping everybody happy. Whilst I do not ignore what he says, in the context of this dispute, his stated wishes and feelings cannot be described as reliable, even far less so determinative, and as such, I attach less weight to what he says than I might otherwise do in the case of a 9-year-old in different circumstances. Insofar as I can ascertain, the truth of the matter can be very simply put. Tom likes living with both of his parents."

12. In terms of Tom's future living arrangements, I concluded as follows:

52. "Turning to the question of Tom's living arrangements... the father's case for a change of residence is based on his assessment that a change of residence is necessary in order to allow Tom to thrive. I disagree strongly. The father must understand that Tom needs both of his parents to play an active and balanced role in his life in order to thrive. If the conflicts are put to one side, both are equally capable of meeting his needs. There is ample evidence within the s.7 report that Tom is happy and content in his mother's care. If anything, I am more concerned that a transfer of residence to the father runs the risk of an unacceptable and harmful undermining of the mother's role in Tom's life. I refer not just to actions such as his unilateral decision to take Tom to visit two schools, or indeed enrol him in out of school counselling without his mother's knowledge, but to [the evidence] that the father has been fostering in Tom an emotional dependency on him..."

13. Having detailed some of the evidence giving rise to this concern, including reports from the school, the judgment continued:

56. “To my mind, it is clear evidence that the father’s behaviour... is the cause for Tom’s apparent reluctance and emotional trials during the course of the school day. The father must recognise, and very quickly, the impact that this type of behaviour is having on his son. My views is that Tom is shielded from the full extent of the negative aspects of the father’s behaviour as a result of the time that he spends with his mother.
57. Ultimately, as I have already indicated, the simple truth is that Tom likes living with both of his parents. A shared care arrangement of some sort must continue. I have no doubt whatsoever that this is in Tom’s best interests. Just to echo some of the advantages identified by Mr. Hall in his report, Tom is used to such an arrangement and there is no evidence that such a significant change in circumstances would be to his benefit. Tom has a half-sibling and it is of crucial importance that he is able to remain close as they grow together, and there is no reason to believe that Tom’s positive views and enjoyment of the time that he has with his father would diminish if that time remains broadly the same.”
14. Having evaluated all the options, the final order made provided for shared care based on a two-week cycle that allowed Tom to spend a full weekend in the care of each of his parents. With school travel arrangements in mind, Tom would spend eight nights with his mother and six nights with his father over the course of a fortnight in addition to an equal share of all school holidays.
15. The court also dismissed the father’s application to change Tom’s school. The father’s case was that Tom was unhappy at W Primary School because he had been the subject of bullying by two children. This assertion was not supported by any independent evidence before the court, including that provided by NYAS and the school. The court noted as follows:
47. “The bigger question for me is how the father has been responding to any statements that Tom has made about being bullied or unhappy at school, and why he pursues a change to this particular school with such vigour. The inescapable conclusion that I have drawn is that the father has seized on this issue as a means to further his ultimate goal of having Tom spend more time in his care and is seeking to revisit the point on schooling that he unsuccessfully litigated in 2014. I do not say that he has deliberately engineered it, but I am far from being satisfied that the father has sought to react to those statements made by Tom in a way that will allow him to move forward within his existing school and help him build resilience....
- ...
50. ... The father seems utterly devoted to driving down the positives of Tom’s life in his existing school, his friends and his achievements. He refused to accept that Tom would suffer any form of real loss if he was forced to change schools. I find, on the evidence before me, that he most certainly would.”

*The 2022 proceedings*

16. Unfortunately, whilst this may have finally settled the question of Tom’s primary school education, his transition to secondary school resulted in further disagreement. The father issued the fifth set of proceedings in respect of Tom on 13<sup>th</sup> March 2022, this time seeking a specific issue order that Tom attends a secondary school close to where he lives, Y Comprehensive. On the back of this, the father again sought a change in Tom’s living arrangements to provide for him to spend more time in his care. Once more, the father stated that his application accorded with Tom’s wishes and feelings. The mother opposed the

application, preferring Tom to attend X Comprehensive School, for which W Primary School was the natural feeder.

17. On the basis that I no longer sat in the relevant court centre, these proceedings were case managed and determined by District Judge Andrews. I have considered the transcript of her judgment dated 4<sup>th</sup> July 2022 and note the following points:
  - a. In the period since the previous set of proceedings, Tom had made several allegations in respect of his treatment by the mother and her husband. These had been investigated by the Local Authority and were considered unfounded.
  - b. The Local Authority, who had remained involved with Tom due to concerns about his emotional welfare, initially recommended that Tom should attend Y Comprehensive even though the allocated social worker, Miss S, was concerned that Tom had not considered all the consequences that would flow from this decision. Miss S's primary concern was that Tom's behaviour and the allegations against the maternal family would escalate should his wishes not be accepted.
  - c. In respect of Tom's living arrangements, Miss S considered that he required significant therapeutic work from CAMHS before a final decision could be made, although she also noted the difficulties in the mother being able to maintain the existing arrangements if Tom did attend Y Comprehensive given the additional travel involved.
  - d. During her oral evidence at the final hearing, Miss S accepted that there were some factors indicating alienating behaviours on the part of the father. Miss S then reversed her recommendation, stating that she believed there to be a greater risk of harm to Tom from attending Y Comprehensive than X Comprehensive.
  - e. The court proceeded to adjourn the final hearing part-heard and direct that Miss S prepares an addendum s.7 report. This concluded that further efforts should be made to maintain the shared care arrangement alongside the support of CAMHS. The Local Authority were also of the view that the father had provided them with misleading information as to the extent of Tom's friendship group that it was said would also be attending Y Comprehensive.
  - f. The Local Authority ultimately recommended that Tom should attend X Comprehensive and that the 2020 arrangements for his care remain in place.
18. The learned judge ultimately refused the father's application and ordered that Tom should attend X Comprehensive at the conclusion of his time at primary school. In explaining her decision, District Judge Andrews considered that the question was inextricably linked with that regarding Tom's care arrangements:
  45. "The section 7 report that is before the Court indicates that Tom has a positive relation with his half-sister, and if the application is allowed, Tom's living arrangements would have to change. My view is that he is at risk of harm in terms of that relationship, as he will have a drastic reduction in the amount of time he spends not only with maternal family, but also with his sister, and there is a risk that Tom will be alienated even further from his mother and maternal family, and that he would be alienated from the relationship he has with his step sister, which could cause emotional harm to him, and runs the risk of undermining the role the maternal family plays in Tom's life.
  46. There is a risk that there would be allegations against mum and stepfather and that the allegations Tom has previously made as outlined by Miss S would increase, but that in itself is not a good reason to allow the transfer application. Miss S has shared her view that all of the allegations he has made have been determined to be unfounded, and that all of the professionals involved in those allegations have concluded that he

makes these allegations whilst in mother's care in their view so that he spends more time in father's care.

19. I pause to note that in respect of paragraph 45, the father disputes any suggestion that he has engaged in alienating behaviours, and it does not appear to me that District Judge Andrews engaged in a fact-finding process in this regard. That fact does not undermine the Judge's conclusion that a change in Tom's living arrangements was likely to place further strain on his relationship with the maternal family.
20. District Judge Andrews went on to state as follows:
  49. "My view is that work from CAMHS is vital, and it needs to start as soon as possible. I take on board Tom's expressed views, but I have to determine what I feel is the right decision for his welfare and for him... I consider that Tom's educational, emotional and physical needs will be met by continuing with his peers who he has been in school with for a very long time onto X Comprehensive School...
  50. Moving him risks a disruption to the progress he has made in school and risks a disruption to his academic life at a time when he will be going through the upheaval of going to comprehensive school."
21. District Judge Andrews continued to identify two further issues that supported her decision not to interfere with Tom's living arrangement. First, it was understood that if Tom moved to live predominantly with his father, he would return to the back of the CAHMS waiting list and any therapeutic intervention would be delayed. Second, on the basis that a move to his father would be across local authority lines, Tom would lose the positive relationship that he enjoyed with Miss S.
22. Notwithstanding the Judge's concerns, I am told that the promised CAHMS appointment failed to materialise (although nobody was able to give me a clear reason why), and that Miss S had little further interaction with Tom after the conclusion of the proceedings. A referral was made via the Local Authority to a family therapy clinic. However, it appears only limited funding was made available for the service and it came to an end with little progress having been made. Otherwise, Tom was simply signposted to school-based counselling, but it seems the onus is put on Tom to access this as and when he wishes to discuss an issue. Given that concerns about Tom's emotional welfare had been consistently raised over several years by a range of professionals, it is difficult to understand how he was effectively abandoned without a plan of support at this time.

### *The present application*

23. Tom's application for leave to apply to vary the 2020 and 2022 orders was issued on his behalf by Miss Kristy Smith of Devonalds Solicitors on 30<sup>th</sup> April 2024. In a statement accompanying the application, Tom states that he is unhappy during the time that he spends in his mother's care and is concerned that the current situation is affecting his education, emotional wellbeing, and ability to progress in his sporting competitions. Tom did not feel that anyone had taken his wishes and feelings into account, hence his desire to make his own application.
24. The court's gatekeeping team appointed a r.16.4 Children's Guardian, directed a Children's Guardian report, and listed the question of leave to be heard on 5<sup>th</sup> July 2024. Further to a request from Tom, it was agreed by all that it would be of benefit to him to meet with me. As such, Tom attended court together with his solicitor, his NYAS Advocate, and Mr. Fitzpatrick

on 25<sup>th</sup> June 2024. He took time to familiarise himself with the courtroom, and we discussed the process and the questions that the court had to resolve in very general terms. A full note recording the visit is contained within the bundle. I hope that this was as helpful an experience for Tom as it appeared to be.

25. At the hearing on 5<sup>th</sup> July 2024, the court determined it appropriate to exercise its discretion to exclude Tom from the hearing pursuant to FPR r.12.14(3) and r.27.4(1). All parties agreed that this was the correct approach pending the determination of leave, with the question to be revisited if the application proceeds.
26. Tom was represented at this hearing, as he has been throughout, by Mrs Radcliffe of counsel. She drew the court's attention to the fact that Tom's legal team had not had sight of a range of important documents from the earlier proceedings, including welfare reports and District Judge Andrews' judgment of 4<sup>th</sup> July 2022. To quote from Mrs Radcliffe's position statement filed in advance of the hearing:

*"It has been ascertained through a conference with Tom that he has little knowledge of the basis of the decisions made about him to date by the court and this has not helped in any processing that he needs to complete to understand why, when he felt he was clear about his wishes and feelings, the court has failed to accept those views and made the orders which he now seeks to vary."*
27. Mrs Radcliffe considered, and the court agreed, that little could be achieved until this documentation was available and a further assessment could be made in respect of the central questions of Tom's understanding and the prospects of success of any application to vary.
28. The court timetabled the matter to a further hearing on 4<sup>th</sup> September 2024. Frustratingly, delays on the part of the transcription company meant that a copy of District Judge Andrews' judgment was still not available on this date. Mrs Radcliffe remained of the view that it was necessary to have this before she and Miss Smith could consider the extent of Tom's understanding, and the parents also agreed that a further adjournment was required. Although it was again the subject of some delay, the transcript was received in sufficient time to allow the re-listed hearing on 23<sup>rd</sup> September 2024 to be effective.

### *Allocation*

29. In preparing for the first hearing, the court observed commentary in *The Family Court Practice* indicating that an application brought by a child ought to be issued in the High Court. The commentary did not refer to a rule or practice direction as authority for the statement, and the private law allocation and gatekeeping guidance is silent on the question. However, the court later identified *Practice Direction (Applications by Children: Leave)* [1993] 1 WLR 313. This simply states that "*Such applications raise issues which are more appropriate for determination in the High Court and should be transferred there for hearing.*"
30. This practice direction does not appear to have been revisited in any other form in the 31 years since, but in any event, the solicitors for Tom did re-issue the application in the Family Division of the High Court on 11<sup>th</sup> July 2024. The Family Presiding Judge for Wales, Morgan J, subsequently released the matter to be heard with the existing proceedings.

### *Mediation*

31. An application made by a child is exempt from the obligations regarding attendance at a MIAM. In any event, it is recorded that the court urged the parents at the first hearing to

consider whether there was any form of mediation and/or family therapy that they could participate in with Tom to address his concerns without the need for litigation. The father subsequently proposed the assistance of Family Mediation Cymru. Having met with both parents, FMC did not consider that the case was suitable for mediation. Although the court has not seen a record in support of this, the mother informed the court that FMC had reflected on the history of the case and concluded that Tom's involvement in any mediation arrangement placed him at a risk of harm if he again felt his views were not being given primacy.

32. The father invited the court to direct further mediation at the hearing on 4<sup>th</sup> September 2024. This was not supported by any other party, and the court agreed that further delay in resolving the application was not in Tom's best interests. The court also accepted that there was a real chance that mediation would be counter-productive if Tom again perceived his mother as being to blame for not getting what he wanted.

### **Positions and Issues**

33. If Tom is successful in securing leave, his ultimate wish is to vary the existing orders to provide for him to live with his father and attend Y Comprehensive School. Although his position has been the subject of some movement, he would propose spending time with his mother (as well as his half-sister Anna, step-brothers, and step-father) one evening each week and on alternate weekends Friday to Sunday. Tom is content for the current arrangements regarding school holidays to continue, with him spending an equal amount of time in the care of each parent.
34. Tom is supported in his position by the father. He states that it has been evidenced that Tom has sufficient understanding and that his case is a merely a reflection of his long-held preferences and beliefs. The mother opposes the application, considering that Tom's understanding has been compromised by the influence of the father. She states that Tom's welfare is best served by concluding the proceedings at the earliest opportunity and continuing the existing arrangements for both care and education.
35. In that regard, I note that the time that Tom currently spends with each of his parents is not actually that set out by the 2020 order. This had been varied by agreement since the conclusion of the 2022 proceedings so that Tom currently spends an equal amount of time with each parent based on the following fortnightly cycle:
- a. Week 1: from Sunday afternoon until school on Tuesday with the father, and from after school on Tuesday until school on Friday with the mother.
  - b. Week 2: from Friday after school until school on Wednesday morning with the father, and after school on Wednesday until Sunday afternoon with the mother.
36. Mr. Fitzpatrick also opposes Tom's application, questioning the extent of his understanding in the context of the background to the case. He also considers that the risk of harm to Tom of litigating the case himself is greater than that which might be caused by the court concluding matters against his wishes. Mr. Fitzpatrick is of the view that Tom would instead benefit from the assistance of an experienced counsellor or therapist to help him make sense of the difficulties that he has experienced during his childhood.
37. At the first hearing, I raised whether it would be appropriate for the court to consider making an order restricting further applications in respect of Tom pursuant to s.91(14) Children Act 1989 if these proceedings are dismissed. The mother supported the same, as did Mr. Fitzpatrick. The father effectively adopted a neutral stance, stating that he had no intention of making a further application of his own if Tom's application failed. On behalf of Tom, it was

said that he appreciated why the court might think there should be an enforced break in any litigation. However, he was unable to agree to a s.91(14) order being in place for an extended period of time, as he would have to think about GCSE options next year and wanted to undertake these at Y Comprehensive. Although it was not expressed as such, I took this to mean that Tom already had it in mind that he would try and persuade the court again (and soon) if he was unsuccessful on this occasion.

## **Legal Framework**

### **Leave to apply**

38. Where the person applying for leave to make an application for a section 8 order is the child concerned, the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application: s.10(8) Children Act 1989.
39. However, the fact that the child has sufficient understanding does not mean that the court is bound to grant permission. The court retains a discretion, and the child's welfare is not paramount. The court will consider all the circumstances of the case, including the prospects of success if the proposed application is allowed to proceed.
40. I shall deal with the law relating to each part of the court's decision making process in turn.

### ***Sufficient Understanding***

41. I note the detailed attention given to the question of a child's understanding in the context of instructing separate representation. In *Mabon v Mabon* [2005] EWCA Civ 634, Thorpe LJ recognised the growing autonomy and consequential rights of children, and the need for judges to acknowledge this when they make a proportionate judgment of the sufficiency of a child's understanding. For the court to comply with its obligations pursuant to Article 12 of the United Nations Convention on the Rights of the Child 1989, the court must, "*in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare.*" The court also observed that (at paragraph 29):

"In testing the sufficiency of a child's understanding, I would not say that welfare has no place. If direct participation would pose an obvious risk of harm to the child, arising out of the nature of the continuing proceedings and, if the child is incapable of comprehending that risk, then the judge is entitled to find that sufficient understanding has not been demonstrated. But judges have to be equally alive to the risk of emotional harm that might arise from denying the child knowledge of and participation in the continuing proceedings."

42. In *Re W (A Child)* [2016] EWCA Civ 1051, Black LJ expressed the following views between paragraphs 32 and 35:

- a. The fact that the child's view coincides with a parent's views does not necessarily mean it is not their own view. Most people's views are influenced by others in one way or another and it is difficult to decide reliably whether someone is simply an agent for another person.
- b. The fact that the child's views are considered misguided in some way does not necessarily mean that the child does not have sufficient understanding to instruct their own solicitor. Even if there is a concern that the child lacks understanding because

they do not accept findings already made, the court should remember that adults with full understanding sometimes do not accept findings made.

- c. When assessing the question of understanding, there is a danger in the court becoming embroiled in satellite litigation about issues such as the degree of influence being exerted by a parent, when this may, in fact, be a significant part of the contentious subject matter in the substantive proceedings.
- d. Caution is also required when taking account of the risks to a child from direct participation, so that the judge does not stray into treating the question as a welfare assessment rather than an assessment of understanding.
- e. There will often be a risk of harm not only from participating in the litigation, but also from not participating. It is important to consider in practical terms the consequence of refusal of representation, including further disaffection generated by the fact that they will not have their own independent voice in the proceedings.

43. In addition, Black LJ includes the following general observations (at paragraph 36):

“Understanding can be affected by all sorts of things, including the age of the child, his or her intelligence, his or her emotional and/or psychological and/or psychiatric and/or physical state, language ability, influence etc. The child will obviously need to comprehend enough of what the case is about (without being expected to display too sophisticated an understanding) and must have the capacity to give his or her own coherent instructions, without being more than usually inconsistent.”

44. Peter Jackson LJ undertook a review of the relevant authorities (including the above) in *In Re C (A Child) (Child Ability to Instruct Solicitor)* [2023] EWCA Civ 889 and observed as follows (at paragraph 58):

“Drawing matter together, this survey of the rules and the cases shows that, whether the answer falls to be given by the child’s solicitor or the court, the question will be: *Does this child have the ability to instruct a solicitor in the particular circumstances of the case, having regard to their understanding?* The assessment will be based on a broad consideration of all relevant factors and any opinions from solicitors and experts...

The assessment will be case-specific. It will not be driven by welfare factors or by a theoretical comparison between protection and autonomy, but by a practical assessment of the child’s understanding in the particular context of the case. There are no presumptions and care will be taken not to over-value any particular feature. The consequence of a sound assessment will be that the child’s rights and interests are respected and preserved.”

45. Finally, I note the useful framing of the above factors and their application by Williams J in *CS v SBH & Others* [2019] EWHC 634 (Fam) (at paragraph 65).

*All the circumstances in the case, including the prospects of success if permission is granted*

46. I have had regard to the three authorities identified in Mrs Radcliffe’s case summary dated 3<sup>rd</sup> July 2024, namely *Re C (A Minor) (Leave to seek Section 8 Orders)* [1994] 1 FLR 26, *Re SC (A Minor) (Leave to seek a Residence Order)* [1995] 1 FLR 927, and *Re H (Residence: Child’s Application for Leave)* [2000] 1 FLR 780.

47. I also note *Re M (Care: Contact: Grandmother’s Application for Leave)* [1995] 2 FLR 86, which provides guidance as to the appropriate test for the court to apply when assessing prospects of success at a leave stage (per Ward LJ at page 98):

“In my judgment the approach should be this:

- (1) If the application is frivolous or vexatious or otherwise an abuse of the process of the court, of course it will fail.
- (2) If the application for leave fails to disclose that there is any eventual real prospect of success, if those prospects of success are remote so that the application is obviously unsustainable, then it must also be dismissed...
- (3) The applicant must satisfy the court that there is a serious issue to try and must present a good arguable case... is there a real issue which the applicant may reasonably ask the court to try and has a case which is better than merely arguable yet not necessarily one which is shown to have a better-than-even chance, a fair chance of success?”

#### An order pursuant to s.91(14) Children Act 1989

48. On disposing of any application for an order under the Children Act 1989, the court may order that no application for any order under the Act may be made with respect to the child concerned by any person named in the order without leave of the court: s.91(14) Children Act 1989.
49. S.91A Children Act 1989 specifically identifies that the circumstances in which the court may make a s.91(14) order includes where the court is satisfied that a further application would put the child concerned at risk of harm.
50. In respect of further guidance on the use of s.91(14) orders, I have had regard to the well-known authority of *Re P (Section 91(14) (Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573 CA. I also note the treatment of this in the more recent matter of *Re A (Supervised Contact) (S.91(14))* [2021] EWCA Civ 1749, including the observations made by the court about the changing landscape of private law proceedings and the considerable scope for greater use of a 91(14) filter in the interests of children.

#### Evidence and Representations

51. I have considered the bundle of documents prepared for the leave hearing by the solicitor for Tom. This includes statements filed by Tom, Miss Smith, the parents, and an analysis completed by Mr. Fitzpatrick. In addition, I have had regard to two position statements prepared by Mrs Radcliffe.
52. No party suggested that I ought to consider the necessity of expert evidence, most obviously a psychological assessment of Tom. In the process of preparing this judgment, I have questioned whether this might have been something for the court to think about. In the circumstances of the case, a psychological assessment might have looked at issues such as Tom’s emotional state, his attachment profile, and his ability to hold independent views.
53. However, per *In Re C (A Child) (Child Ability to Instruct Solicitor)*, it is typically a matter for the solicitor whether a child has the ability to instruct, and expert evidence is not usually required. In addition, the court would have been mindful of the additional delay such an assessment would cause, as well as the risk that the court would be diverted into the type of satellite litigation that Black LJ warned against in *Re W (A Child)*. Whilst it may have been of some assistance to have a psychological assessment of Tom, this is not a case where the court is otherwise unable to reach a view on the evidence before it. There is undoubtedly a range of competing considerations for the court to assess and balance, but that is not unusual for a

dispute of this kind. Had an application been put, I am not satisfied that the high bar of necessity would have been made out.

54. The matter was determined on submissions only. Although I consider everything that I have read and heard, I shall only refer in this judgment to what is necessary to explain my decision.

Tom

55. Tom sets out his position in a witness statement filed with his application notice. He states how it has been a difficult few years for him, and that *“each time I try to approach the subject of where I live with my mother, my views are not considered”*. He goes on to state he finds it difficult to talk to his mother, and so tends not to engage in much conversation with her.
56. Tom states that *“my current situation is affecting not only my education and my ability to progress in my competitions, but also my emotional and psychological well-being... My views on my living situation have not changed in a number of years. I do not feel that my parents are able to talk and come to an arrangement that would benefit us all.”*
57. In terms of his decision to pursue his own application, Tom states *“I have discussed issues with my father, and he was willing to make another court application, but I felt that I wanted to do this myself. I want my voice to be heard. I want the court to know from me how this situation is making me feel.”* He concludes by stating *“I would like the court to vary the current Child Arrangements Order so that I can live with my father and spend time with my mother for a few hours during the weekend. I also want to be able to attend Y Comprehensive.”*
58. I note that Tom’s statement does not expand beyond this on the question of changing schools.
59. Tom exhibits to his witness statement notes made by his NYAS advocate in the period 2021 to January 2024. Given the role that it is said NYAS had in assisting Tom to identify a solicitor, it is unfortunate the notes were not up to date to the point that the application was issued. Extracts from the notes include the following:

26/06/23 Telephone call between NYAS advocate and the father.

*“I asked dad if he is planning to take the case back to court and he said he would like to but cannot afford the costs and he does not trust the system... Dad said he does not think Tom is thriving in school he is just doing OK. Dad has tried to find out if Tom can take the case to court himself but it seems he cannot get advice without paying money for it. I said I can ask this question to our legal team. Dad said he feels mum has been listened to more than anyone else in the case.”*

04/07/23 Telephone call between NYAS advocate and the father.

*“Dad said he is going to consider looking for a solicitor who will take on a legal aid case for Tom.... Dad asked how he can have all of Tom’s reports for if he goes to a solicitor and I said I would need Tom’s consent and this can be done over the phone...”*

04/07/23 Telephone call between NYAS advocate and Tom.

*“Tom called and said he has been speaking with his dad and wants me to email all of his reports from the beginning even the previous cases from lock down so that his dad has all the reports if they (my emphasis) choose to go to court.”*

12/12/23 Note [B89] – *“Discussed with Kristy from Devonalds and shared with dad and Tom also shared a list of solicitors. Dad and Tom to explore solicitors if decide to proceed.”*

08/01/24 Note [B90] – *Dad to contact Y Comprehensive to confirm there is a place for Tom.*

60. Tom also exhibits to his witness statement a letter that he wrote to both of his parents in January 2024. The NYAS advocate’s notes suggest that they assisted Tom with this. In the letter, Tom details his frustration at not having his views respected, and states as follows:

*“I would like you both to consider allowing me to transfer schools so I can attend Y Comprehensive and to live at dad’s house full time. I would still like to spend time with mum one evening a week after school for a few hours so we can maintain our relationship.*

*I would like if you could both work together to help me to achieve my wishes, so that I can be happy in both school and at home. If this is not going to be possible, then I am considering taking the case back to court myself with the support of a solicitor and asking them to change the court order. This is not the way I want it to be sorted out, I would much prefer it if we could deal with this as a family.”*

61. It will be noted that Tom’s proposals for ongoing contact with his mother are different here to those set out in his witness statement and his ultimate position to the court at the hearing of the application (per paragraph 32 above).

#### *Tom’s Legal Representatives*

62. Miss Smith is a member of the Law Society’s Children’s Panel. In a position statement lodged with Tom’s application, she states as follows:

*“Devonalds are of the view that Tom meets the criteria to satisfy the Gillick Competence Test. Devonalds has considered that, following extensive discussions, Tom is a mature, 13 year old who has demonstrated a clear understanding of his circumstances. Consideration has and continues to be given to the emotional impact upon Tom of providing instructions on this issue, which is clearly very emotive for him. Consideration has also been given to the reasons why Tom seeks leave to bring this application, the remedies that may achieve the outcome that Tom seeks, and the balance of the risk of emotional harm to Tom. Devonalds are satisfied that Tom has an appropriate level of understanding of the concerns, risks and consequences.”*

63. In a further position statement addressing the question of Tom’s wish to meet with me, Miss Smith adds:

*“Mstr [redacted] is a 13 year old young man. He has been clear and concise in his instructions and shows a level of maturity and understanding of his situation. Mstr [redacted]*

*has, as confirmed in his statement, advised that he has felt that his voice has not been heard previously, and that his wishes and feelings have not been taken into account.”*

64. In preparing for this judgment, the court identified that the Family Justice Council has published guidance in April 2022 entitled *Guidance on Assessing Childs Competence to Instruct a Solicitor*. With regret, I confess that I was not aware of the existence of this guidance at the point that the application was heard, for it is plainly an extremely important and helpful document. As its title suggests, the guidance is intended to assist solicitors in reaching a conclusion on whether a child has sufficient understanding and intelligence to be assessed as competent to instruct their solicitor directly without a guardian. Paragraph 14 sets out some fundamental principles, and paragraph 15 details a list of issues to bear in mind when making the assessment. At the conclusion of the document, there is a checklist of considerations, including prompts such as *“Have you considered whether there are any external influences?”*, and *“Have you assessed the child has understanding of the issues in dispute?”*.
65. The guidance recommends that the decision to accept direct instructions from a child is recorded in writing and the assessment set out in some detail. I am unaware as to whether Miss Smith committed her assessment of Tom to writing in the way suggested. With the benefit of hindsight, the court ought to have flagged this for consideration at the outset of proceedings. In any event, I am bound to query how Miss Smith was able to properly address core aspects of the checklist, such as those highlighted above, with the limited information that she had available to her at the point that she accepted the instruction. I remind myself that those instructed by Tom only obtained a copy of 2020 judgment shortly prior to the hearing on 5<sup>th</sup> July, and the 2022 judgment later still.
66. I accept that it is inevitable that a representative in the position that Miss Smith found herself might not have access to every relevant document when deciding whether to accept instruction from a child. However, there are obvious risks to undertaking an assessment of a child’s understanding with the intention of issuing proceedings in circumstances where little more is known than that the child wants something, and has done so for a long time. Not only may the initial assessment be flawed, but the information gathered subsequently might be harder to analyse objectively and stand to be coloured by the previous determination.
67. In addition to Miss Smith, Tom has had the benefit of representation from experienced counsel at each of the hearings to date, namely Mrs Radcliffe. It is worth emphasising that whilst she advises and acts on instruction, it remains Miss Smith’s assessment as the solicitor accepting the case that underpins Tom’s application. That said, Mrs Radcliffe has done her utmost to assist the court by conveying her own impression of Tom, and has been instrumental in assisting him with the evidence and information that has been received as the case has progressed.
68. In her first position statement to the court dated 3<sup>rd</sup> July 2024, Mrs Radcliffe describes Tom as possessing an impressive capacity to *“understand the variants of decisions that the court could make, and recognises that even though he makes this application, he may still not get what he says he wants, and could remain under the current regime of shared care which would be awkward for him with his mother at home.”* Mrs Radcliffe goes on to affirm that it is the view of those who are instructed by Tom that he has sufficient understanding to make the application.
69. Mrs Radcliffe filed a further position statement following receipt of the 2022 judgment shortly prior to the hearing on 23<sup>rd</sup> September. She sets out as follows:

*“The judgment from DJ Andrews showed the process of decision making was based on a number of factors which were balanced against each other. Tom was not aware of some of*

*these features and was asked to accept that the court was making its decision on evidence that was before it at the time... What was clear from the meeting was that Tom felt reassured that although the court did not agree with his father's application, the matters raised by him were fully reviewed and that Tom's wishes and feelings had been expressed to the court..."*

70. Mrs Radcliffe went on to state that Tom had expressed concerns that two of the factors identified in support of the court's decision in 2022 had not in fact materialised, namely a proposed appointment with CAHMS and an ongoing relationship with his then social worker. In light of this, and having reviewed *"the basis of the decisions of the court and knowing that mediation will not work between his parents, Tom is still of the view that today is the time that his views should be heard, front and centre, and he wishes to pursue his application for leave and for a change of schools and perhaps more importantly a change to reside with his father as his primary carer."*

#### *The Mother*

71. The mother seeks to rely on the 2020 and 2022 proceedings to *"question the validity and authenticity"* of the current application. She acknowledges that Tom is an intelligent boy who is doing well at school, but believes that he has not demonstrated a true understanding of the process and its consequences. The mother argues that Tom is unable to explain a rationale for his decision making, having previously stated that he does not know why he feels the way that he does. Understandably, she is concerned about the emotional and psychological impact of Tom advancing his own application, and agrees with Mr. Fitzpatrick that Tom requires therapeutic intervention to support his emotional needs. She also shares Mr. Fitzpatrick's concerns that her relationship with Tom will be significantly undermined should Tom be successful in his ultimate application to transfer residence.
72. In her oral submissions to the court, the mother accepts that Tom would be very disappointed if the court refused his application, and would require support to process the decision. However, she believed that if Tom were left alone to settle, things would be OK. She pointed out that Tom had been very happy in her care of the summer holidays. In her view, notwithstanding the strain of navigating the application, their relationship was better now than it ever had been.

#### *The Father*

73. In his written evidence to the court, the father denies having influenced or promoted an application by Tom to change his living arrangements, stating that he only became aware of Tom's wish for change following the family therapy work in 2023. The father goes on to specifically state that he was *"unaware of Tom's intentions until I was contacted initially by NYAS in late 2023 to consider Tom's wish to arrange a conciliation meeting between himself, his mother, and myself."* On the face of it, these assertions are directly contradicted by the NYAS file notes dated 26<sup>th</sup> June 2023 and 4<sup>th</sup> July 2023 set out above.
74. The father states that he supports Tom's application, as his wishes and feelings *"have been clear and settled in the matter of the arrangements for his care for some years."* The father states that he has confidence in Tom's maturity, and hopes that the court will grant permission for his voice to be heard. In terms of the balance of harm, the father considers that Tom is likely to experience greater emotional harm if his application is refused. However, the father was able to acknowledge at the hearing on 23<sup>rd</sup> September that Tom would find it upsetting to be exposed to further conflict, and that he might find the situation difficult whether leave is granted or refused.

75. To his credit, the father was also willing to accept that Tom and the mother's relationship was "pretty good at the moment" and that they had enjoyed the time spent together over the summer holidays. The father maintained that Tom was unhappy with the situation as it currently is, but acknowledged that it has "fluctuated massively over a number of years".

*The Children's Guardian, Mr. Stephen Fitzpatrick*

76. Mr. Fitzpatrick's report to the court is dated 14<sup>th</sup> June 2024. The focus of the report is on the question of permission, although Mr. Fitzpatrick does offer some preliminary views regarding Tom's application more generally.
77. Mr. Fitzpatrick describes meeting with Tom, who he considered an "intelligent, thoughtful, and engaging young man." Mr. Fitzpatrick considered Tom confident and able to engage in discussion with him. He did not detect any unusual adult language, or phrases that might have been indicative of him having been prepared or coached in advance of the meeting.
78. As well as being clear as to where he would prefer to live, Mr. Fitzpatrick states that Tom was candid in telling him that he would prefer for there to be no order in respect of the time that he spends with his mother. However, Tom "felt that he needed to offer weekends, as otherwise he felt the Court would not agree. I asked him, if given the choice, how much time he would spend in his mother's care and he said 'probably not much'." Mr. Fitzpatrick concluded that Tom has made his own application because he feels that an application made by him will result in his views carrying more weight in court.
79. I note that Mr. Fitzpatrick spoke with the head of pastoral support at X Comprehensive. They discussed Tom's use of a system which allows pupils to log how they are doing with reference to green, amber, or red indicators. Mr. Fitzpatrick was told that Tom would often prompt a staff check-in by giving a red, but when located "appears to be happy, and he is then unable or unwilling to expand on why he had given a red." The teacher remarked that she wondered whether Tom might be using the system not because of emotional difficulty, but because he wants to build an evidence base in order to move home and schools.
80. Further to a considered and balanced analysis of all the circumstances, Mr. Fitzpatrick considered himself unable to support Tom's application for leave. Whilst acknowledging the risks that arise from Tom believing that his views have not been respected, Mr. Fitzpatrick considered the emotional harm that might be caused by permitting the application and pitting him against his mother was greater. It was his assessment that:
- "Essentially, Tom is at an age where he is far more able to assert himself and act with more independence, but he is not yet an adult and he is incapable of thinking like one, particularly in respect of longer-term consequential thinking."*
81. Mr. Fitzpatrick's ultimate view, in keeping with the other professionals involved with Tom over the years, was that was under a lot of pressure and required therapy, not litigation. I found the following paragraph of Mr. Fitzpatrick's report to be particularly striking:

*"Without seeking to apportion responsibility, as that is not my role, I cannot overemphasise the impact that the inter parental conflict has had, and will continue to have, on Tom. I have no doubt that his parents love him dearly, and generally want the best for him, and I cannot help but wonder if they are fully aware of the impact they are having on their son. I am sure that when they found out they were to be parents and thought about the sort of childhood they hoped to give him, they did not envisage that it would be dominated by litigation centred around their conflict. It will undoubtedly be Tom's enduring primary memory of childhood."*

## Analysis

82. I remind myself that I am required to undertake a practical assessment of Tom's understanding in the context of this case. The views of Miss Smith and the father on one side and Mr. Fitzpatrick and the mother on the other are diametrically opposed. In making my own evaluation as to whether Tom is of sufficient understanding to pursue his application, I find it helpful to adopt the list of some of the factors that the court must weigh in the balance as identified by Williams J in CS v SBH & Others.

### *The level of intelligence of the child*

83. Everybody agrees that Tom is an intelligent and perceptive child. X Comprehensive reports that his attitude to learning is excellent in all subjects, and he is developing proficiency which is inline or exceeding his peers. In the January 2024 letter to his parents, Tom himself identifies as trying hard at school and knowing that his "*work is very good.*"

### *The emotional maturity of the child*

84. Whilst I note that it is the assessment of Tom's representatives and the father that Tom is a mature 13 year old, I do not consider that the wider evidence supports this conclusion. On the contrary, my assessment is that his maturity has been significantly undermined by the years of conflict and unmet emotional needs. The position that he has taken against his mother lacks balance and a sense of reality. His stated unhappiness is not reflected in his day to day experience of shared care, with it being agreed by all that the summer holiday period *in the middle of these proceedings* was particularly positive.

85. Tom's lack of emotional maturity is perhaps best reflected in his approach to what contact arrangements should be put in place if the court were to agree that he should move to live with his father. His proposals have changed significantly through the course of the year, starting with the suggestion that he spends just one evening a week with his mother after school 'for a few hours', but progressing to alternate weekends and an additional teatime visit every week at the hearing on 23<sup>rd</sup> September (via yet another proposal in his witness statement).

86. When I sought to better understand how and why Tom's position on contact had changed, Mrs Radcliffe told me that it was because of the time Tom had enjoyed with his mother over the summer months. I was told that Tom had reflected and appreciated that it would be a loss to only see his mother and Anna infrequently and for such short periods of time. Mrs Radcliffe suggested that this was evidence that his understanding and maturity was becoming ever more enhanced. However, I bear in mind the fact that I expressly flagged Tom's proposals on contact as being an issue of concern at the first two hearings in the proceedings, and that Tom himself had identified to Mr. Fitzpatrick that he had needed to offer weekends to stand a better chance of securing the court's permission.

87. I consider that Tom's statement that he would actually prefer no order for contact and "*not much*" time in his mother's care is a more accurate indicator of his mindset. This suggests a complete lack of awareness and understanding of the importance of his mother in his life, both in the past and in the future. It is knee-jerk, conflict driven, and manipulative.

88. Tom's position also reveals a concerning lack of regard for his relationship with his half-sister Anna. I note that in her s.7 report dated 16<sup>th</sup> May 2022, Miss S had commented on their relationship as follows:

*“Tom appears to have a positive relationship with Anna, and has been observed to show lots of emotional warmth towards her... During discussions with Tom’s step-father, he advised that Anna adores Tom and they have both been excited at the prospect of going to the same school together. Tom also shared this view with me.”*

89. Nobody suggests that Tom’s relationship with Anna has diminished in quality over the last two years. That he is now so dismissive of her, to the point that he is seemingly unable to refer to her by name in his witness statement, suggests an inability to comprehend the lifelong nature and importance of a sibling relationship.

*Factors which might undermine the child’s understanding such as issues arising from their emotional, psychological, or psychiatric state*

90. Multiple professionals have concluded that Tom’s emotional well-being and mental health has been negatively affected by the parental acrimony and litigation that he has been exposed to over many years. His vulnerability has been left unaddressed, and the harm he has suffered has likely become embedded in his sense of being.
91. Although the question of the father engaging in alienating behaviours loomed large in the 2022 proceedings, the father is right to point out that the court did not actually undertake a fact finding process addressing this issue. It would plainly be inappropriate for the court to try and draw its own conclusions on an application for leave. However, the court can and should have regard to the evidence that is before the court as to the father’s apparent influence over Tom’s decision making.
92. That the father has sought to foster in Tom an emotional dependency on him is something that the court first highlighted as a cause for concern in 2020, with the father being expressly warned about the harmful impact of such behaviour continuing. It remained a feature in 2022, and Mr. Fitzpatrick picks up the thread once more in his report in these proceedings. It is inescapable that Tom’s stance now on the issues of care and schooling is the same as those argued for by the father in the previous sets of proceedings. It is also clear that contrary to his assertions, the father was actively involved in initiating the discussions surrounding Tom making his own application to the court as far back as June 2023, just 11 months after the end of the 2022 proceedings. I note the mother’s point that this was notwithstanding the fact that the father had signed up to a Local Authority plan to support Tom to accept the decisions made by the court.
93. I acknowledge that the fact a child’s view coincides with a parent’s view does not necessarily mean it is not their own view, and that most people’s views are influenced by others in one way or another. However, I conclude that the extent of the emotional dependency evidenced here, including the length of time over which it has been embedded and its consequential harm, is likely to have undermined Tom’s ability to understand the true nature of the issues that he puts before the court.

*The child’s reasons for wishing to instruct a solicitor directly or to act without a guardian and the strength of feeling accompanying the wish to play a direct role*

94. I fully accept that Tom feels strongly about wanting to play a direct role in the proceedings, and that his reason for this is that he believes the court has previously attached insufficient weight to his wishes and feelings. However, although Tom considers that his voice has not been heard, the reality is that the court gave anxious contemplation to his views in both the 2020 and 2022 proceedings. Now that he has had the opportunity to have the court’s judgments explained to him, it seems that he accepts that this is the case.

95. Whilst I accept Mr. Fitzpatrick's assessment that Tom has made this application as he believes his views will carry more weight in court, the contents of the NYAS notes lead me to conclude that it is likely that the decision to instruct a solicitor was either directly or indirectly influenced by the father. The notes record that it was the father who raised the prospect of an application first in time, with Tom only mentioning it when it became necessary for him to provide his consent for the release of his documentation.

*The child's understanding of the issues in the case and their desired outcome, any matter which sheds light on the extent to which those are authentically the child's own views or are mere parroting of one parent's position*

96. I do not propose to rehearse that which I have already observed in respect of Tom's insight into the issues and bigger picture, or the extent to which his position may have been influenced by his father. However, it strikes me that there are two further points to make under this heading.
97. The first relates to Tom's understanding of the issues at the outset of the proceedings. In her position statement dated 3<sup>rd</sup> July 2024, Mrs Radcliffe accepts that Tom had little knowledge of the basis of the decisions made about him at the point that they first met in conference. This is not intended as a criticism – it was an inevitability, as the court's judgments had not been made available to Tom's representatives before this time. However, what the court must look for in these circumstances is evidence that the child has then been able to take on board the new information and respond in a reasoned manner. I am not satisfied that there is evidence before me to suggest that Tom has been able to do this. For example, on consideration of the 2022 judgment, Tom's focus was on the failings of CAHMS and the Local Authority to see through the proposed support, rather than the raft of other issues that drove District Judge Andrews' decision.
98. The second point to note is the absence of any cogent explanation for Tom's desire to live with his father and switch schools, over and above the bold statement that this is what he needs to make him happy.
99. It is difficult to identify any specific criticisms of the mother or her care of Tom from the evidence that he has submitted. The only issue detailed to any real extent relates to the mother's support for Tom's sport, but even then, it is not disputed that the mother manages to get Tom to most of sporting commitments, notwithstanding the competing demands that she has with Anna. I also understand that a plan had long since been agreed to enable Tom to attend the gala in August, which he did successfully.
100. I note that Tom also expresses upset at having to share a bedroom with his step-brothers. However, I recall it being said that his step-brothers only stay over on alternate weekends, and so a desire to change residence as a result would appear to be an entirely disproportionate response.
101. More fundamentally, Tom's rationale for wishing to change schools is not addressed at all in his evidence. Bearing in mind the importance to Tom of his education, I find this extremely surprising. It appears that the motivation is simply one of convenience, Y Comprehensive being closer to the father's home. However, given that the father successfully supports Tom attending at X Comprehensive on the days that he is in care, it would plainly be open to a court to conclude that residence and schooling are not inextricably linked.
102. In the absence of any evidence to the contrary, I am drawn to conclude that Tom has no real understanding of the significant consequences that would arise from a switch in

schools. On any case, it would be a huge event. He is acknowledged by all as doing well at X Comprehensive, receives a good level of pastoral support, and is in a peer group with many individuals that he has known since primary school. A move at this point would be steeped in risk, and the court would inevitably require a good reason. I have formed the view that Tom's desire to move schools without offering any real justification is a clear example of him simply parroting the views of his father, who has litigated to have Tom educated on his terms since he was as young as three years old.

103. On a related point, I note that Mr. Fitzpatrick's report queries why it is that the father did not bring this application himself. This was put to the father by the court, but he did not provide a clear response. The NYAS notes record the father as saying that he would like to take the matter back to court, "*but cannot afford the costs, and he does not trust the system.*" I consider it likely that the father ultimately considered that an application by Tom would have better prospects than one fronted by himself, bearing in mind his lack of success and the concerns raised about his conduct in the previous sets of proceedings.

*The child's understanding of the process of litigation including the function of their lawyer, the role of the judge, the role they might play and the law that is applied and some of the consequences of involvement in litigation*

104. I am told that Tom has expressed a good understanding of the court process and the types of issue that the court must consider. This is unsurprising, as he is both a clever young man and the concept of litigation is one that he has grown up with. He has also had the benefit of having matters explained to him by Miss Smith, Mrs Radcliffe, Mr. Fitzpatrick, and to a lesser extent, during his meeting with me.

105. I note that Mr. Fitzpatrick explored with Tom how he might feel if he were in court and saw one of his parents becoming distressed. This was a pertinent question, as the father has at times found the process to be emotionally demanding. Tom's response to Mr. Fitzpatrick was that he would find it hard, but that he would be willing to do it. This might be indicative of Tom's determination to see the matter through, but it is equally representative of his emotional naivety. In any event, no party has suggested that Tom should be present in court at any of the hearings to date, and I would anticipate that similar considerations would apply should the substantive application be permitted to proceed. The question of Tom giving evidence would be a bridge crossed if reached.

*The court's assessment of the risk of harm to the child of direct participation and the risk of harm arising from excluding the child from direct participation, and the child's appreciation of the risk of harm*

106. Although Tom's involvement in any court hearing might be restricted or limited, it is inevitable that he would be exposed to information that he would otherwise not be by virtue of being the applicant in the case and the need to provide instructions to his legal representatives on all relevant matters. Even if steps were taken to mitigate the risks, such as a clear focus on explaining matters in a sensitive manner, it is difficult to see how this would not be harmful to Tom given that which he has already suffered because of the parental dispute. I am not clear the extent to which Tom truly understands this and its long term implications for his emotional welfare and family relationships. If Tom does feel a need to promote what is ultimately his father's position, this is likely to add to the burden that he carries. Mr. Fitzpatrick's evidence on the question of harm was particularly forceful.

107. Against this, I balance the argument that Tom will also suffer emotional harm if he considers that he has been excluded from matters and that his voice is not being heard. There

is every chance that this will generate further dissatisfaction, which may well then be visited upon the mother and risk jeopardising their current positive relationship. Tom has been set in his mind for many years, and his strength of feeling will not subside overnight. However, I note that Tom has previously had periods when he has been able to come to terms with the court's orders, and if supported properly, will hopefully do so once more.

### **Conclusions – the application pursuant to s.10(8) Children Act 1989**

108. This is a finely balanced case and one that has been difficult to decide. The court has before it an intelligent 13 year old who has consistently expressed the same views for many years in respect of his care and schooling. This is not a case in which there are past findings of alienating behaviours on the part of the father, or in which there is reason to believe that Tom does not genuinely believe in the proposals he is putting forward. His desire that his voice is heard is perfectly understandable given the importance of the issues at stake, and if he feels excluded, this will likely cause him harm. I also note that Tom's case is supported by the professional assessment of Miss Smith, although I do not consider that I can attach as much weight to this as I ordinarily might considering the issues identified at paragraphs 65 to 66.
109. Set against this are serious questions surrounding the true extent of Tom's emotional maturity, which I accept has likely been undermined following years of exposure to conflict. There is also evidence that Tom's decision making has been influenced and led by the father to such an extent that it has diminished his ability to understand the true nature of the issues. Tom's insight into the consequences of his proposals appears at best superficial, and there is an obvious risk of harm to him being drawn into litigation in the most direct way imaginable.
110. I am acutely aware of the importance of an articulate teenager's personal autonomy, and the need for a court to guard against paternalistic judgments of welfare. However, on balance I am not satisfied that Tom has sufficient understanding to bring his own application to vary the 2020 and 2022 orders. In addition to the various considerations that I have identified above, I consider three factors to be particularly determinative:
- a. Tom's lack of insight and appreciation of the long term implications of his proposals on the relationship that he has with both his mother and half-sister (not ignoring the fact that his relationships with his step-father and step-brothers are also important);
  - b. The absence of cogent reasons put forward by Tom to explain the need for such a radical overhaul in both his living and education arrangements; and
  - c. The fact that Tom does not appear able to truly comprehend the extent of the risk of harm that might be caused through direct participation in the proceedings.
111. My assessment of Tom's understanding is in the context of a case that has 11 years of litigation behind it, and includes consideration of the evidence and judgments flowing from past proceedings. The overall conclusion that I have reached is that whilst Tom has a level of understanding enhanced by his obvious intelligence and sense of conviction, this has proved to be superficial in nature when scrutinised and rigorously assessed. At its simplest, I am not satisfied that he truly understands the nature of the issues and the consequences of his choices. I acknowledge the practical repercussions of my decision, in particular the risk that it will itself cause Tom a degree of further emotional harm. However, I am quite clear that this risk is substantially outweighed by the risk to his welfare of allowing the litigation to proceed.
112. Given that I have concluded that Tom does not have sufficient understanding to pursue his application, it is unnecessary for me to consider questions such as Tom's prospects of success if the proposed application was permitted. The application falls at the first hurdle, and shall stand dismissed.

## **Conclusions – the imposition of an order pursuant to s.91(14) Children Act 1989**

113. This is the sixth set of Family Court proceedings in respect of Tom. On a rough totting up, Tom has been the subject of court proceedings for a combined total of 3 out of the last 11 years. The longest break that Tom and his parents have had from litigation is approximately three years between June 2016 and May 2019. The period of respite following both the 2020 and 2022 proceedings was less than two years.
114. This is plainly unsustainable. The emotional cost to the parents has been huge, and the harm caused to Tom significant. Tom stands little chance of recovering from the difficulties that he has experienced whilst his parents continue to be embroiled in this cycle of litigation. He desperately needs them to focus on supporting him and his needs, rather than the conflict that they have with one another.
115. The cry for Tom to access meaningful therapeutic support has grown louder with each passing set of proceedings. I agree with Mr. Fitzpatrick that a holistic therapeutic approach with a suitably trained and experienced therapist must be the priority now. I note that family therapy is also recommended in the summary letter received from the Local Authority. I urge the parties to move this forward as a matter of urgency, and to share in whatever costs there may be. I give permission for a copy of this judgment to be disclosed to any therapeutic provider to assist in their task.
116. Any therapy will inevitably need to proceed on the basis that Tom's current care and education arrangements are going to remain constant for the foreseeable future. Stability is key in laying the foundations for recovery, and therapists are often reluctant to become involved if the child is undergoing significant life upheaval. Save for one minor amendment, Tom's living arrangements have now been settled for over four years, and he is now well established at X Comprehensive. If his parents, and more specifically the father, actively support him in the decisions that have been made, then the stability that Tom craves is there for the taking.
117. Tom has now started year 9 and will be choosing his options for GCSEs imminently. I agree with the mother when she states that this is a crucial time for Tom to settle, heal, and focus on the positives that he has in life. This may well be the last real chance for Tom to progress and recover, but that chance will be quickly lost if either Tom or the father have it in mind that there need only be a temporary pause before asking for the issue to be reconsidered once more. Everybody now needs to invest in the outcome of these proceedings and the court's previous determinations. The court has nothing left to offer.
118. I appreciate that Tom will find it hard to accept, but I consider it unquestionably in his welfare interests for a s.91(14) order to be imposed until 7<sup>th</sup> January 2027, his 16<sup>th</sup> birthday. The order will cover any applications made by the mother, the father, and Tom, save for an application for an enforcement order. This level of restriction is entirely proportionate to the harm that the order is intended to avoid.
119. Plainly, it remains open to a party to persuade the court that there is a need for renewed judicial investigation at any time. However, the court will be required to consider whether there has been a material change in circumstances since the order was made. I shall direct that any application for leave should not be served until the court has made an initial determination of the merits of the application, which the court may do so without an oral hearing if it sees fit.

## **Next Steps**

120. This judgment will be formally handed down at a hearing fixed for 10.00am on 22<sup>nd</sup> October 2024. A separate judgment prepared for Tom's benefit has also been circulated, it being considered that Tom would prefer this approach to the decision being communicated in the form of a letter.

His Honour Judge Muzaffer

22<sup>nd</sup> October 2024