Neutral Citation Number: [2019] EWHC 132 (Fam)

Case No: 2018/0134

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2019

Before :

MR JUSTICE WILLIAMS

- -

Between :

ME	**Applicant**
- and -	
MP	**1st Respondent**
- and -	
R	
(Through his Children's Guardian Samantha Ryall)	**2nd Respondent**

(Appeal: Termination of Contact)

- -
- -

Nasstassia Hylton (instructed as Direct Access Counsel **Pro Bono**) for the **Applicant**
Richard Egleton (instructed as Direct Access Counsel **Pro Bono**) for the **1st Respondent**
Katie Phillips (instructed by Harney & Wells) for the **2nd Respondent**

Hearing dates: 11 December 2018

- -

Approved Judgment

I direct that pursuant to FPR 27.9 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE WILLIAMS

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published. 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.

Mr Justice Williams :

1. I am concerned with R who was born on [a date in] 2006 and is now aged 12 years. His father is ME. His mother is MP.

2. On 27 July 2018 His Honour Judge Simon Thorp delivered a reserved judgment determining that R was to live with his mother and that he was only to have indirect contact with his father by means of the father sending letters cards or gifts but by post once per month (for six months) and thereafter fortnightly. The judge also made orders pursuant to section 91 (14) Children Act 1989 which meant the father required the leave of the court to make an application either for R to live with him or to spend time with R. The 'leave' requirement was to last until 27 August 2019 in respect of spending time with R and until 27 August 2020 in respect of whom R would live with.

3. His Honour Judge Thorp also made findings of fact in respect of both the father and the mother.

   The Father [#91-94]

   i) At times the father did indeed become angry with R and that he exhibited that anger and frustration by shouting at R when it was not necessary to do so and when the father should have had more empathy (or attunement) with R; on balance of probabilities the father's actions were not of a nature (or frequency) that R suffered harm. The father has not acted in a way which caused R emotional or physical harm.

   ii) The mother has not proved that the father took hold of R in the manner that she alleges. On this occasion, the father shouted at R (and that this showed a lack of understanding as to R), but there is no other finding. The finding is that this is not a father who has harmed his son.

   iii) Other than the findings above the findings sought by the mother are not proven on balance of probabilities.

   The Mother [#95 a-g]

   iv) The mother has been dishonest on many occasions and she has tried to bolster her firm belief by being untruthful about the extent of the abuse. She has encouraged R in his belief both directly (by discussing things with him) and indirectly (by him overhearing her, or by writing in his diary)

   v) In 2014 the mother primed R to make allegations against the father to the police which are not true,

vi) *The mother discussed with R what she said had happened to him in the past, and she encouraged him to tell the social worker. The mother did coach/primed R to make allegations against his father which were not true*

vii) *Beaver's diary - The mother wrote matters into the diary which were not in fact true. The mother has lied about the father more generally to bolster her case*

viii) *Ongoing since 2013 – the mother engaged in a course of conduct with the intention of preventing R from having any contact with the father and the paternal family.*

ix) *Ongoing since 2013, the mother has been implacably hostile towards the father having contact and/or a positive relationship with the father based upon her firm (but incorrect) belief that contact with the father would be unsafe.*

x) *From 2015 to present - the mother has alienated R from his father. As a result, R has suffered and/or remains at risk of suffering from significant long-term emotional harm as a result of his mother's manipulation; this is against the background of the mother's strong and firmly held (though incorrect) belief that the father presents a risk to R.*

xi) *From 2015 to the present the mother has repeatedly deliberately breached court orders (including consent orders) during the court proceedings that R has been the subject to since 2015.*

4. No appeal was made by either the father or the mother in respect of the findings made. It will be immediately apparent that the findings made in respect of the father were very limited in their nature and broadly within the ordinary parameters of parental behaviour. It will also be immediately apparent at the findings made in respect of the mother were of a very serious nature indeed to the extent that the finding at x) is couched in the language of the threshold criteria set out in section 31 of the Children Act 1989. It is implicit in the finding but is clear from the judgment that the harm the judge concluded that R had suffered and was at risk of suffering in the future was attributable to the care given to R by the mother. It's equally clear that that care was not what it would be reasonable to expect the mother to give to him. That highlights the potential public law dimension of the case.

5. In parallel with that order, His Honour Judge Thorp had also been seized of an application by X Local Authority for the extension of a supervision order which had been granted on 20 July 2016. On that application His Honour Judge Thorp granted permission to the local authority to withdraw its application for an extension of the supervision order which expired that day.

6. The net effect of the orders made was that R would continue living with his mother and would not see or have any relationship with his father or paternal family for the foreseeable future. The order for indirect contact recognised that there was a hope that contact might progress in the future but was underpinned by a conclusion that there was a real risk that R would have no contact with his father or the paternal family throughout his minority.

7. The father sought permission to appeal from His Honour Judge Thorp in respect of both the private law and the public law orders. Both applications were refused. The

father thereafter lodged an appellant's notice in the Family Division in respect of the child arrangements orders. He did not lodge an appeal in respect of the supervision order. This was because an appeal in respect of the supervision order would lie not to this court but to the Court of Appeal and given his principal complaint related to the child arrangements order, he focused his efforts (and his financial resources) on challenging the order which was of most direct relevance to him and to R and the mother. This appeal highlights a difficulty that both litigants and the court face where in complex private law cases there is an interface with public law which can be dealt with at the same level of the judiciary at first instance but where the paths part company for appellate purposes. However the local authority were identified as respondents to the appeal and on 8 October 2018 Mr Justice Baker (as he then was) directed that

'*...if the second respondent local authority wishes to be heard at the hearing of the appeal, they shall notify the family division appeals office within 14 days of service of this order. Upon receipt of such a notice the matter shall be referred to a judge of the family division for further directions.'*

8. No such notification was received and so the appeal has proceeded without the presence of the second respondent.

9. In his appellant's notice, the father sought permission to appeal in respect of:

   i) The child arrangements order for R to live with his mother (namely the refusal to transfer the living arrangements to the father)

   ii) Child arrangements order for R to spend time with his father by way of indirect contact (namely the refusal to order direct contact in the alternative)

   iii) The mother shall share each item of indirect contact with R and she shall encourage him to respond to his father

   iv) Section 91 (14) Children Act 1989 orders prohibiting applications regarding contact for one year; and prohibiting applications regarding live with orders for two years.

10. On 8 October 2018, Mr Justice Baker considered the application for permission to appeal. He refused permission to appeal against the order that R should live with the mother. He granted permission to appeal against the decision that R should have no direct contact with the father, the order as to indirect contact and the order under section 91(14).

11. Over the course of 11 December 2018, I heard the appeal. I had the benefit of written skeleton arguments from the father, the mother and on behalf of R. I also heard submissions from counsel over the course of the day. I was provided with an appeal bundle containing those documents which the parties had identified as being necessary for the determination of the appeal although it was of course only a selection of the five lever arch files of documents His Honour Judge Thorp was able to consider and contained only the transcript of the expert's evidence and not transcripts of all of the other evidence that His Honour Judge Thorp considered.

12. The father was represented by Ms Hylton, counsel who acted pro bono. The mother was represented by Mr Egleton, counsel who also acted pro bono. The mother is

profoundly deaf and was assisted throughout the hearing (as she was at first instance) by both a deaf intermediary and by two British Sign Language interpreters. The Guardian at the time of the hearing was Simon Scott. By the time the appeal was heard, he had retired and a new Cafcass Guardian Samantha Ryall was appointed. R was represented by Ms Phillips counsel. All counsel had appeared at first instance.

13. I would like to extend my thanks to counsel and to the team who assisted the mother at court. That counsel for the father and for the mother should appear pro bono in such a complex case as this is in the finest traditions of the legal profession. Up and down the country, counsel, solicitors and legal executives fill the gaping holes in the fabric of legal aid in private law cases because of their commitment to the delivery of justice. Without such public-spirited lawyers how would those such as the father and mother in this case navigate the process and present their cases? How judges manage to deliver justice to the parties and an appropriate judgment for the child without such assistance in cases like this begs the question. It is a blight on the current legal aid system that cases such as this do not attract public funding. So far removed from the stereotyped 'fat-cat,' the legal profession in cases such as this are more akin to Boxer in George Orwell's 'Animal Farm' always telling themselves "I will work harder."

14. At the conclusion of the hearing I gave the parties my decision to allow the appeal with short reasons and confirmed that I would provide a written judgment setting out more fully those reasons at a later date. That was necessary both because there was insufficient time to do justice to the reasons for my allowing the appeal but also because it would not have been fair on the mother or the team of interpreters assisting her to deliver a lengthy extempore judgment. I am conscious that the evidence highlights that the mother also has difficulties dealing with lengthy documents and so I will also summarise my reasons. They are these,

    i) One of the findings made by the judge was that R had suffered significant emotional harm as a result of the actions of the mother and was likely to suffer further significant emotional harm as a result of the actions of the mother. This particular finding, was contrary to the local authority's conclusion that the threshold for public law intervention was not met. Having made that finding prior to finally determining the private law applications and in particular the contact application the parties & the court should have reflected upon that finding and what further role the local authority might have been required to play in fulfilment of their statutory obligations to R.

    ii) The evidence of the clinical psychologist was that efforts to reinstate contact should be pursued. The effect of her evidence was that R would suffer significant harm if his relationship with his father was lost. She considered that the harm he would suffer in his mother's care could be ameliorated by undertaking therapeutic work to enable the mother better to meet R's emotional needs. She considered that if the mother did not make progress in her capacity to meet R's emotional needs the harm he may suffer in her care could outweigh the harm that would be caused by removing him from her care. The decision to terminate contact and to end the proceedings without further investigation carried with it the inevitable consequence that R would remain in the care of his mother and be exposed to the risk that Dr Duprey identified. The combined benefits of facilitating the re-establishment of contact and addressing the mother's capacity ought to have led to the conclusion that further enquiries were required to address those issues. The court placed

insufficient weight on the medium to long term harm that R might suffer as compared to the short-term harm that he would suffer by the continuation of the proceedings or further work on contact.

iii) Although no party had put before the court evidence of the therapeutic resources that could be deployed to address the risks identified by the psychologist it is clear that there was a gap in the enquiries made as a result of the parties not having been in a position to pursue to a conclusion the enquiries the psychologist recommended. In those circumstances the court should not have proceeded to a final determination that there should be no contact as there were still potential steps that could be taken to promote contact. The end of the road had not been reached.

The Grounds of Appeal

15. As a result of the refusal of permission to appeal in respect of whom R is to live with the remaining grounds of appeal are as follows:

i) Having made the wide-ranging findings that the father sought against the mother, the judge failed to place any or any sufficient weight upon the consequences of those findings within the subsequent welfare analysis. Accordingly, the judge reached the wrong welfare conclusion for R.

ii) In the alternative, in spite of the learned judge's own findings combined with the expert evidence of Dr Duprey, the judge prematurely abandoned the ongoing judicial duty to reconstitute the relationship between R and his father. Accordingly the refusal to order direct contact between R and his father was disproportionate in the circumstances.

iii) The learned judge placed insufficient weight on the long-term harm that R would suffer by not having a relationship with his father and the paternal family (as opposed to the short-term disruption of restarting contact).

iv) On the basis of the learned judge's findings and the evidence that was before the court, the judge was wrong to grant an order for indirect contact between R and his father with contact to be facilitated by the mother when in reality this order is unworkable.

v) The learned judge placed too much weight on the mother's reports of R's wishes and feelings and upon R's highly manipulated wishes and feelings; rather than on R's ascertainable wishes and feelings in the context of the wider evidence in the case.

vi) The judge failed to sufficiently consider (and he therefore prematurely dismissed) the option of a suspended transfer of residence order, in a final attempt to secure the mother's compliance with a child arrangements order for R to spend direct time with his father.

vii) The judge underestimated the ongoing long-term emotional harm that will be caused to R by him remaining in his mother's care in the context of (1) the serious findings of her emotional abuse of R (2) her denial to R of a

relationship with his father and the paternal family, and (3) Dr Duprey's concerns about the emotionally neglectful parenting that R will receive from his mother in future.

viii) The learned judge was wrong to grant a section 91 (14) order in these circumstances.

16. Grounds i), iii), and vii) thus focus essentially on the judge's evaluation of the risks of harm facing R and how he conducted that balancing exercise. Grounds ii) and vi) address the judge's decision not to make any further orders to attempt to progress contact. Ground v) deals with the judge's evaluation of R's wishes and feelings in his overall welfare assessment. Grounds iv) and viii) specifically address indirect contact and section 91(14).

17. It will be noted that the grounds of appeal do not aver that the judge was wrong in his summary of the relevant law. It is rather his evaluation of various matters in the context of the legal framework that is criticised.

18. It also emerges from the grounds of appeal and Ms Hylton's skeleton argument, but became very clear during submissions, that the grounds of appeal in relation to indirect contact and in relation to the section 91(14) order are inextricably linked with the success or failure of the direct contact grounds of appeal. This is because the central reason for providing for indirect contact via the mother was to avoid the harm that continuing involvement of social workers in R's life would cause and the central reason underpinning the section 91(14) order was to avoid R being exposed to ongoing proceedings and the harm that would cause. One of the principal reasons for ordering that there should be no direct contact was because of the harm that was being caused to R by continued involvement with social workers in relation to contact and continued exposure to the court proceedings and the tension and conflict arising therefrom. Thus unless the father succeeded on his arguments in relation to direct contact he would not succeed in relation to indirect contact and section 91 (14) and vice versa.

19. In their skeleton arguments and in their oral submissions, both Mr Egleton and Ms Phillips argued that the judge identified and applied the law correctly, he carefully considered the voluminous documentary and oral evidence both factual and expert and that his conclusions were well within the boundaries of the exercise of judicial discretion. I shall consider some of the essential arguments deployed both by the father and by the mother and the Guardian when I turn to consider the specific grounds of appeal.

The History of the Litigation

20. Much of what follows derives from the judgment of His Honour Judge Thorp itself. It seems to me necessary to set out the process by which the parties and R arrived at the orders made by His Honour Judge Thorp in order for me to appreciate how the parties' positions developed over time and how it was that the court came to carry out a combined fact-finding and welfare hearing in this case.

21. The parties married on [a date in] 2003 and R was born on [a date in] 2006. In 2013 when R was six or seven the mother made an allegation to the police that the father had physically abused R. This was referred to the local authority by the police and no action was taken by either. In the judgment this allegation was found to be untrue,

that the father had not harmed R and that the mother had primed R to make the allegation

22. In 2014 the mother and the maternal grandmother made further allegations of physical abuse against the father to the police. Again the outcome was no further action and the judge concluded the allegations were untrue.

23. The parties separated on or around 5 September 2014 when the mother left the family home with R. She attended at the police station and complained of abuse by the father towards R. The mother's solicitors confirmed that there would not be any contact and no contact took place between R and the father and so in December 2014 the father issued an application for a child arrangements order for R to live with him. In the course of those proceedings no findings of fact were made and the child arrangements order application proceeded through a first hearing dispute resolution appointment on 13 January 2015 and a further seven hearings. On 28 May 2015, a prohibited steps order was made preventing R from being removed from the jurisdiction of England and Wales. That remains in force.

24. The court ordered a section 7 report from the local authority and a social worker Janice Tipping provided report to the court. R began to spend time with his father and it progressed from supervised to supported to unsupervised and to overnight contact. The judgment records that regular contact took place during July to November 2015 albeit not without difficulty in particular towards the end of that period. It is the appellant's case that at that point the mother alleged that the father had threatened to kill R; which R had written in a notebook. The mother made an application to suspend child arrangements. It appears that this allegation was also not found to be true or was not pursued. I think it is implicit in the judgment that whether or not an express finding was made that this was not true it was made at a time when the judge concluded that the mother was priming R.

25. In November 2015 the mother made an application for an occupation order. That was opposed by the father who declined to move out of the family home to enable the mother and R to return. The judge was rightly critical of the father's lack of understanding of the mother's situation but more particularly how R might have felt. Although it may have been his case that he was seeking an order that R live with him and thus needed to remain in the family home, the reality on the ground for R was that he was not living in the family home which he had known for some period.

26. Her Honour Judge Probyn listed all the outstanding applications for a combined fact-finding and final hearing before His Honour Judge Thorp. In December 2015 the matter came before His Honour Judge Thorp for the first time. It was listed for a final hearing at which the father was seeking a transfer of residence. The social worker Ms Tipping was in attendance. The mother was not represented but attended with a support worker from Deaf Hope. His Honour Judge Thorp concluded, in accordance with the concerns raised by the Deaf Hope representative that the mother needed a deaf intermediary and legal representation. It is not clear how proceedings had been underway for something like a year without those difficulties having been addressed, nor is it clear how it was that despite that being recognised and provided for it was not until the final hearing between March to July 2018 that the Guardian and the judge thought that the mother had come to fully understand the proceedings. Although the father wished the final hearing to proceed His Honour Judge Thorp concluded entirely correctly it seems to me that it would have been wholly unfair both to the mother and

to R. A psychologist report appears also to have been commissioned at that stage to look at the likely effect of removing R from his mother's care and whether his condition (autistic spectrum disorder) had any relevance to his making allegations. At that point the view of the social worker was that contact had been positive and that the mother was unreasonably preventing contact and this could cause significant harm to R. It is also asserted by the appellant father that the local authority concluded that the allegation that the father had threatened to kill R was unfounded and that R had himself been primed to make the disclosure by his mother; he himself telling them that. His Honour Judge Thorp directed a section 37 Children Act assessment. As a consequence, the local authority issued care proceedings in February 2016.

27. The psychologist, Dr Duprey reported on 15 June 2016, concluded that R was likely to reach the diagnostic criteria for ASD and at that point contact was going well. At that time she was clear that R very much values and enjoys the time he spent with the father; he spoke openly and spontaneously about the activities he enjoyed doing with his father and showed no hesitation in speaking to her about it. At that time she considered his attitude was very positive and perhaps indicated a greater level of stability likely due to the involvement of social care and the court. She raised concerns about the parenting capacity of each parent and the harm that R was exposed to. Given his clear autistic traits he had a particular need for stability consistency and clarity in his relationship with his parents. Her main concern related to the mother's capacity to allow R to developmentally separate, to have his own emotional experiences validated and to develop his own ideas and beliefs, especially in relation to his father. She concluded that R's welfare was best met living with his mother but having regular contact with his father with a high level of monitoring from children's services. She strongly recommended that initial conversations be had with both parents around the possibility of engaging with some family therapy intervention at some point in the future.

28. At an IRH on 20 July 2016, the father agreed that R should continue to live with his mother and the mother agreed that he should have regular contact with his father. All legal representatives agreed that it was not in R's best interests for the court to make findings of fact in relation to the allegations indicating that they were not likely to affect the outcome of the plan. His Honour Judge Thorp agreed. An agreed threshold was part of the order. It is expressed in terms of R having suffered emotional harm because of ongoing conflict between the parents in arranging contact. It records that the mother has made repeated allegations which have not been substantiated by the local authority and no findings have been made. It records that R has suffered emotional harm by being drawn into the conflict. It also records his suffered emotional harm in the mother's care due to her emotional influence, but this is attributed to R being able to detect from the mother's demeanour that she is frightened of the father. On the basis of that agreed threshold a supervision order was also made in conjunction with the child arrangements orders.

29. It is of course easy with the benefit of hindsight to criticise threshold being agreed on such a basis. The proceedings were now some 18 months old, serious allegations had been made by the mother against the father (including several to the police) and serious allegations of emotional abuse or alienation had been made by the father against the mother. On the other hand contact appeared to be moving forwards in a positive way with the support of the local authority and as Ms Phillips argued on behalf of the Guardian, it is hardly surprising that all parties thought it would be counter-productive to contact to embark on a highly contentious fact-finding at that

stage in the circumstances that presented themselves. I am inclined to agree. It is never easy to know when to embark on fact-finding and when to let sleeping dogs lie. Some dogs remain asleep for very lengthy periods and allegations fade into the background. Other dogs who have appeared to be soundly asleep can quickly awaken and deliver a nasty bite as the allegations re-emerge with full force. Differentiating between the two is never easy and there are no clear markers which point to one rather than the other. It is of course essential that the social work professionals, the lawyers and the judge expressly consider the issue and the respective benefits of or harm that fact-finding might result in or engender and that this is openly recorded. This approach would be consistent with the practice set out in PD12B and PD12J, paragraph 18 and would ensure that the issue is not overlooked.

30. The order provided for a progression of the time R spent with his father to include overnight in August 2016. There were then difficulties, although the social workers and support workers continued to put in substantial efforts to move it forwards. Contact continued to be positive when it happened but there were increasing difficulties in arranging it. In early 2017 shortly after there had been another overnight contact the mother stopped overnights and shortly thereafter stopped contact altogether.

31. In May 2017 the father issued an application to enforce the child arrangements order. At that stage he was not seeking a change of residence but rather the reinstatement of contact. At that stage he did not wish to have the mother penalised. On 14 September 2017 the local authority applied for an extension to the supervision order. Those applications came before His Honour Judge Thorp on 12 October 2017. I'm not sure why it took five months for the father's enforcement application to be listed for case management although it appears there may have been an earlier hearing in July at which some interim orders were made. I do not have a copy of that order. The mother was represented and opposed the resumption of contact and sought to suspend the order of 20 July 2016 (see paragraph 12 for of the order of 12 October 2017). The Guardian supported the resumption of contact with the assistance of the local authority. The court refused the mother's application to suspend contact and expressed the view that there should be contact between R and the father and the court expressed the view that the local authority should assist the parties in enabling contact to take place including by supervising. The mother was warned that if she did not comply with the court's orders this might affect her case in future. A further case management hearing was listed on 13 December 2017 to include consideration of whether there should be a fact-finding hearing. R was a party to both sets of proceedings.

32. At the hearing in December 2017 both the local authority and the children's Guardian submitted that in the light of the mother's position there should be findings of fact. Both parties were then unrepresented. The court ordered a fact-finding hearing which was listed for 10 days on the first open date after 9 March 2018. The order provided for an updated report from Dr Duprey the child psychologist.

33. On 21 March 2018 the case came on for hearing but the mother had parted company from her solicitor shortly before. The court was informed that the local authority were meeting to discuss whether care proceedings should now be commenced. She sought an adjournment. The Guardian opposed the adjournment on the basis of absence of legal representation but supported an adjournment on the basis that there was a need for an expert intermediary to assess the mother's ability to give evidence and to

inform a ground rules hearing. The father again opposed an adjournment on the basis of delay. I am not clear how it was that the issue of an intermediary only came up at this hearing. In any event the hearing was adjourned and relisted for case management on 27 March. Four days set aside for the start of the fact-finding were vacated (as I assume were the remaining five days of the 10 day listing).

34. Although I do not have a copy of the order of 27 March it seems to be agreed that at that hearing His Honour Judge Thorp directed that a composite hearing to consider fact-finding and outcome be listed for the next occasion. Part of the reasons underpinning this was that Dr Duprey had opined that further direct work with R would cause harm to him. It appears likely that by that stage the local authority had not only taken the decision that they would not issue care proceedings but in accordance with the care plan dated 9 May 2018, that they had decided not to seek an extension of the supervision order still less to seek a care order. The care plan records that they considered there were insufficient grounds to issue proceedings. The care plan records that they were of the view that no further work is needed or can be done with the family that will provide any meaningful change to the current situation and that further involvement from social services could have a detrimental effect on R [G248]. The father apparently opposed the proposal for a combined hearing and had proposed more specialist expert involvement if the court made a finding of parental alienation.

35. The final hearing took place over a number of weeks due to issues with the availability of individuals. Hearings took place on the 15 – 17 and 24 – 25 May, 1, 18, 20 June 2018 and 12, 13, 16, and 27 July 2018. His Honour Judge Thorp concluded that it was only during the final hearing that the mother fully understood the proceedings. During the final hearing, as set out at paragraph 17 of the judgment, His Honour Judge Thorp had available five ring binders (I suspect lever arch files) of evidence. The order records that he heard from 13 witnesses although I think this omits Dr Duprey who gave evidence on 24 May.

The judgment

36. His Honour Judge Thorp delivered a written judgment on 27 July 2018. It runs to 144 paragraphs over some 45 pages. His lengthy and comprehensive judgment addresses issues of the utmost seriousness in the private law arena. He ultimately concluded that R should live with his mother but have no direct contact with his father. The findings that are incorporated within the judgment make clear that he envisaged that R would thereafter have no relationship with his father or the paternal family. He identified a glimmer of hope in recent small changes in the mother's approach but I think it is fair to say that the balance of the judgment envisages the likelihood being that R would have no relationship with his father or paternal family for many years to come.

37. The structure of the judgment is as follows:

    i) The background

    ii) The law

    iii) The evidence

        a) The mother and the father

b) The professionals (social workers)

c) The psychological evidence

d) The children's Guardian and the local authority

iv) Factual findings

v) Welfare assessment of evidence

vi) Welfare analysis incorporating the welfare checklist factors

vii) Conclusions

a) Where should R live

b) Contact

c) Supervision order

d) Section 91(14)

viii) Orders

38. At paragraph 16 (a)-(g), the judge summarises the law in relation to fact-finding and termination of contact. No challenge is made to his summary of the law and, if I may say so, it is an admirably succinct and accurate summary.

39. It is a detailed and carefully considered judgment, and given the volume of evidence that he had considered both documentary and oral and the submissions he had heard, I recognise that surrounding the contents of the judgment is a significant 'penumbra' of other evidence that the judge had in mind, argument that he had considered and analysis or evaluation that was not or could not be reduced to writing. The judgment is therefore not to be interfered with lightly but only if the appellant can demonstrate that in some significant material respect the decision was wrong or that it was unjust by reason of procedural irregularity. The grounds of appeal do not assert any procedural irregularity and so the issue is whether the decision was wrong.

Appeals: the approach

40. FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for procedural irregularity.

41. In Re F (Children) [2016] EWCA Civ 546 Munby P summarised an approach to appeals,

22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not

the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."

23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):

> *"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case ... These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*

It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".

42. So far as concerns the appellate approach to matters of evaluation and fact: see Lord Hodge in *Royal Bank of Scotland v Carlyle* [2015] UKSC 13, 2015 SC (UKSC) 93, paras 21-22:

> *"21 But deciding the case as if at first instance is not the task assigned to this court or to the Inner House … Lord Reed summarised the relevant law in para 67 of his judgment in Henderson [Henderson v Foxworth Investments Ltd [2014] UKSC 41, [2014] 1 WLR 2600] in these terms:*
>
> *"It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."*

No Contact Orders

43. In the evaluation of welfare the Court of Appeal emphasised in *Re G (Residence: Same-Sex Partner)* [2006] EWCA Civ 372, [2006] 2 FLR 614

1. "26 'Welfare'... extends to and embraces everything that relates to the child's development as a human being and to the child's present and future life as a human being. The judge must consider the child's welfare now, throughout the remainder of the child's minority and into and through adulthood. The judge will bear in mind the observation of Sir Thomas Bingham MR in Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124 at 129, that:

2. '... the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems.'

3. [27] ... Evaluating a child's best interests involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations. Everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment, and the child's social, cultural, ethnic and religious community, is potentially relevant and has, where appropriate, to be taken into account. The judge must adopt a holistic approach ..."

44. In the matter of M (Children) [2017] EWCA Civ 2164 in the context of a no contact order case the Court of Appeal affirmed the summary given in *Re C (Direct Contact: Suspension)* [2011] EWCA Civ 521, [2011] 2 FLR 912, para 47 where the Court of Appeal summarised matters as follows:

"• Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.
• Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.
• There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.
• The court should take both a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems.
• The key question, which requires 'stricter scrutiny', is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.
• All that said, at the end of the day the welfare of the child is paramount; 'the child's interest must have precedence over any other consideration.'"

45. To that summary, which had been followed both in *Re W (Direct Contact)* [2012] EWCA Civ 999, [2013] 1 FLR 494, and *Re Q (Implacable Contact Dispute)* [2015] EWCA Civ 991, [2016] 2 FR 287, the Court add a reference to what Balcombe LJ said in *Re J (A Minor) (Contact)* [1994] 1 FLR 729, 736:

"... judges should be very reluctant to allow the implacable hostility of one parent (usually the parent who has a residence order in his or her favour), to deter them from making a contact order where they believe the child's welfare requires it. The danger of allowing the implacable hostility of the residential parent (usually the mother) to frustrate the court's decision is too obvious to require repetition on my part."

Analysis of the grounds of appeal and the judgment

Grounds i), iii) and vii)

46. These focus on the judge's evaluation of harm that R had suffered or was likely to suffer in the event of the court adopting the option of him living with his mother and having no direct contact with his father. That evaluation of course took place against a broader landscape of the other options which included living with his mother and having direct contact or steps being taken to resume direct contact or of moving to live with his father, either immediately or with a transition or the possibility of a suspended transfer of residence order.

47. The grounds of appeal are;

4. Having made the wide-ranging findings that the father sought against the mother, the judge failed to place any or any sufficient weight upon the consequences of those findings within the subsequent welfare analysis. Accordingly, the judge reached the wrong welfare conclusion for R.

i) The learned judge placed insufficient weight on the long-term harm that R would suffer by not having a relationship with his father and the paternal family (as opposed to the short-term disruption of restarting contact).

5. The judge underestimated the ongoing long-term emotional harm that will be caused to R by him remaining in his mother's care in the context of (1) the serious findings of her emotional abuse of R (two) her denial to R of a relationship with his father and the paternal family, and (three) Dr Duprey's concerns about the emotionally neglectful parenting that R will receive from his mother in future.

48. His Honour Judge Thorp's observations on the evidence and arguments and conclusions in respect of harm can be found in a number of sections of his judgment. These seem to me to be the most important.

i) Paragraph 96 he says *'although Dr Duprey stated in evidence that if the court made findings against the mother (as it has) then that would be a major concern regarding R's welfare, her view (and that of the children's Guardian) in the previous proceedings was that the truth of the findings sought by the mother and father would not make a difference to their recommendations...The professionals recommendations as to outcome were the same whatever findings the court made…I make it clear that whatever my findings on the factual matters had been, I agree with the professionals that the welfare of ME would lead to the same conclusion as to where he should live and as to the issue of contact. My decision would be the same.'*

ii) [46] *Dr Duprey agreed in evidence that R has suffered harm in the care of his mother, and is likely to continue to suffer from harm if he remains in her care. Contact with his father is important, and would be important as he grows older, and lack of contact is likely to harm him. That appears to be something which the mother is just not able to recognise.* [HHJ Thorp goes on to explain why Dr Duprey considered that separation from the mother would cause extreme distress and a placement elsewhere highly likely to break down. He set out a detailed account of why Dr Duprey thought that a move from the mother would be extremely harmful in paragraphs 47, 48 and 49].

iii) [51] *Dr Duprey shared the view of all professionals that this is not an easy case. Even more difficult, she said, was the issue of ongoing contact with the father. She recognised the problems which there had been over the last two years, but was still "reluctant" to recommend that there be no order for contact in this case, and stated that R deserved a relationship with this father. On the other hand, her firm view was that R should not be put under any further pressure and that he should not be seen by professionals to discuss this issue. She accepted in cross examination that the continuation of proceedings is in itself harmful to this child, and she was not able to identify a practical way for contact to be facilitated.*

iv) '*As with Dr Duprey, the children's Guardian found the issue of contact more difficult, and there was some divergences of use as between the professionals on this issue-though the differences were not so much as to the principle of contact but as to what could be practically achieved. The children's Guardian agreed with Dr Duprey that the contact should take place if this was possible and if it were not harmful to R. That has been his view throughout. His difficulty was with the issue of how this could be achieved in a practical way. The last two attempts at engaging with R have not only been wholly unsuccessful, but R has put himself at risk…His view was that to force contact now would be impractical and potentially harmful to R.'*

v) *His view was that it was only at this hearing and with the assistance of the experienced and skilled professionals, that she has fully understood the issues in the case. This has provided him with some hope she may be able to recognise R's needs and encourage contact in the future.*

vi) [114] '*I have made findings above. I do not find that the father has harmed R the harm which R has suffered to date has been due to the mother's wrong perception of the father, the fact that she has convinced herself that he is a danger, her continued reminding R of the danger presented by the father so that he too has become convinced of this, her exaggeration, and her not working with professionals. This has caused R to be involved in court proceedings over a long period of time, causing him distress and causing him to feel under pressure. More importantly it has led to him losing his important relationship with his father* [one has to import into this the earlier findings in particular the conclusion that R had suffered significant emotional harm and would continue to suffer significant emotional harm from his mother's alienation of him from the father].

vii) *there are concerns arising from the enmeshed relationship between the mother and ME…I do accept that[evidence] of Dr Duprey that there are limitations in the mother's ability to fully meet R's needs in this area*

viii) [116] *'the risk of harm in staying with the mother is obvious. Whether or not the court makes an order for contact, direct contact will not occur in the short term and very probably over the longer term. Given R's present position, there is a high risk that the mother will not encourage him to have contact with his father, that she will not promote indirect contact, and there is a risk that she will continue to encourage R in his present view. While I accept that R is presently" content not to see his father a lack of relationship with him will cause significant harm in the future. He will also suffer harm if he cannot have contact with the paternal family... That having been said, I take into account the history of the proceedings. Many (though far from all) of the problems have arisen around attempts at overnight contact and, for periods, contact has worked. If R knows that he is being listened to, and if the mother knows that he is staying with her, I agree with the children's Guardian that there is at least some prospect that indirect contact will work. As I have indicated, there is also a risk arising out of the enmeshed relationship itself-that is that R will not fully develop his own personality and that in itself will cause him harm."*

ix) '*There is a further, and important, question arising if R stays with the mother-that is whether contact should be ordered to continue. I have already addressed the fact that if it does not, then that will be very harmful to R in the short and long term. There is also a risk of significant harm to R if an order for contact is made. Once again, I have dealt with this issue when addressing the evidence of Dr Duprey and the children's Guardian, and I accept their evidence. It is clear that even discussing the issue of contact causes ME considerable distress, and forcing R into contact at this time will also cause him significant harm. He is firmly set against seeing his father and is resistant to doing so. His behaviours in March and May of this year demonstrate that an order for contact may cause him not only emotional harm may cause him to put himself at risk. At present none of the parties have put forward a feasible solution to the difficulty-indeed the lack of such a feasible solution forms part of the father's main case on transfer of residence.'*

x) [120] [where should R live?] *I do attach weight to the fact that R has suffered harm due to his mother's actions, and that he will continue to suffer by not having a relationship with his father, and I take into account that there is unlikely to be a substantial reversal in the views of the mother and that there is a high risk that R will not have a direct relationship with his father. While I share the hope of the children's Guardian that the mother will now facilitate indirect contact as she says she will, there is clearly a risk that this will not be successful.'* The judge goes on to remind himself of the legal emphasis on maintaining the child parent relationship.

xi) [123-130] These paragraphs set out his analysis and conclusions in respect of the issue of direct contact. They need to be read in their entirety and I do not set them out in full in this judgment. At paragraph 129 the judge draws his analysis together and says '*I take account of all of these issues* [evidence of harm, evidence of lack of practical means of pursuing contact] *once again, I do not set them out in list form, but I refer to the matters set out above under*

the welfare checklist. With a great deal of reluctance, and sympathy for the father, I have come to the conclusion that the children's Guardian is correct on his analysis on this issue. It is clearly not possible for contact to take place without further intervention, and further intervention with R is likely to be damaging to him. He has been through many years of litigation and uncertainty, and needs some time to settle in his mother's care without the pressure upon him of seeing his father. In my judgment it is in his welfare interests for there not to be an order for direct contact. Neither is there any practical way for contact to resume. An order is likely only to result in further litigation for the child.

49. Mr Egleton, on behalf of the mother, emphasises the full extent of the judge's exposure to the evidence and argument over a period of 12 days. He points out that the judge reached a balanced and measured approach making stern findings against the mother but ultimately reaching a conclusion on contact which was child focused. He emphasises that throughout the hearing (and it was a developing process) he was loath to conclude that direct contact should be stopped and would only do so if the circumstances justified such a conclusion. It was only when he was satisfied after exposure to extensive evidence that all reasonable attempts to promote direct contact had been made and that to continue would not be of benefit but would be harmful that he reached that conclusion.

50. Mr Egleton said that in respect of the fact-finding hearing, the mother and the father had made common cause. Both of them felt a separate hearing was necessary but the local authority and Guardian urged His Honour Judge Thorp to undertake a conjoined hearing.

51. He accepted that it was agreed further work was needed but the evidence did not established who could do it and nor did the mother or the father have the money to do it. It did not appear to be available through the NHS or the local authority; however Ms Phillips said that the local authority had not conducted the enquiries Dr Duprey envisaged and so it could not be said that all possible options for the provision of that work had been explored. He pointed out that the local authority evidence was that they thought they had done all the work they could with R and couldn't help further with the mother because they said she was obstructive albeit there were also problems with interpreters.

52. In respect of indirect contact, he drew my attention to the fact that there was no other mechanism by which indirect contact could be facilitated save the mother. The school had been ruled out and the ongoing involvement of social workers was ruled out by the judge's conclusions on the impact that would have on R.

53. On behalf of the mother he emphasised that she had done her best in May to ensure contact took place and was genuine in saying it should take place. He said that the non-compliance with the order that she provide an update in photographs in August was due to a misunderstanding on her part. I'm afraid on the basis of her track record I find that extremely hard to accept. He also drew my attention to the documents in the bundle at section H which the father has sent to R in compliance with the indirect contact order. He said that the mother provided them to R and he has read them. So far he has not responded.

54. He invited me to reject the appeal and to allow the breathing space for R that the section 91(14) order provided for. He submitted that R's recent school report showed

outstanding good behaviour which was an indication of improvement following the termination of proceedings and that he would be able to freely express his own views when the leave filter fell away.

55. Ms Phillips on behalf of the Guardian submitted a detailed skeleton. She emphasised the lengthy history of the proceedings and the efforts that had been made over the course of them to progress contact and the limitations on the appellate court having regard to the limited documentation and transcript evidence that was available. I entirely accept that an appellate judge inevitably operates under that limitation where oral evidence and extensive documentary evidence has been deployed although the rules provide for the parties to put before the appellate court such evidence (or at least allow them to apply for leave) as they consider is necessary for the disposal of the appeal.

56. Ms Phillips also pointed out that the order granting permission to the local authority to withdraw the application to extend the supervision order had not been appealed and that I should be wary of trespassing into the public law issues or in any way determining matters which fell for properly within the supervision order proceedings. I am acutely conscious of the bifurcations of the appeal routes and that the issue of the supervision order withdrawal is not within my jurisdiction. It is of course the fact though that the evidence heard, findings reached, analyses undertaken were within the context of public and private law proceedings heard together. They are clearly so closely interwoven that they are almost impossible to separate.

57. She submitted that His Honour Judge Thorp approached this exceptional case with meticulous care and consideration and where he kept R's welfare as his paramount consideration. Ultimately he was faced with two equally unattractive options, neither of which was obvious and each of which saw R exposed to the risk of suffering further harm. Ms Phillips submits that if His Honour Judge Thorp was careful enough to have made a proper and correct assessment of the mother in making the findings how can it be said that his assessment of the parties and the welfare impact is fundamentally flawed? I have to say I do not read Ms Hylton's skeleton as suggesting that the judgment is somehow deficient or fundamentally wrong. Ms Hylton's argument is much more nuanced. Plainly a judge can get many things right in a judgment but none of us are infallible, and we may also get things wrong however many other things we got right. In matters of evaluation of facts and the exercise of pure discretion appellate courts have accepted that the grounds for intervention are narrow indeed. On matters of fact, the appellate court will only interfere where the conclusion is one that was not reasonably open to the judge on the evidence. On matters of pure discretion the appellate court will only intervene where the discretion has been exercised in a way that is outside the parameters within which reasonable disagreement is possible. However on matters of evaluation the appellate courts clearly can and do intervene if a matter has been given weight it cannot reasonably bear or where a matter has been given clearly insufficient weight or overlooked. Where such flaws are immaterial to the outcome no intervention will follow. However where such flaws are significant and clearly material to the outcome the appellate court may well conclude that the decision was wrong.

58. Ms Phillips accepted that the evidence of Dr Duprey was that she recommended that R should have contact with his father and did not feel that the stage had been reached at which no contact should be ordered. However Ms Phillips also pointed out that Dr Duprey had recognised that accessing the work that she recommended would not be

easy, that it would be a long-term process and that she was not overly optimistic about the chances of it succeeding. Ms Phillips accepted that Dr Duprey had not been asked or had not clearly elaborated upon the nature of the psychological harm that R would be likely to suffer as a result of the termination of contact or of remaining in the care of his mother without either her needs or his views being addressed. She submitted that the Guardian had supported the ideal of ongoing contact but the reality was that no viable plan to move matters forward had been constructed and thus he reluctantly concluded that no contact should be ordered as it was not in R's best interests to continue to try. Ms Phillips noted that the local authority had given evidence about how they could put Dr Duprey's recommendations into effect. She said their response was that they had undertaken the CFIS work with the mother and R. The inference was that there was nothing further they could do. Ms Phillips however accepted that the local authority had not made the sort of enquiries that Dr Duprey had spoken of and to that extent there was a gap in the evidence before the judge. Ms Phillips emphasised that the local authority had been heavily involved historically through section 37 Children Act directions and subsequently through the supervision order. They also had reached the conclusion that any further work with R would be harmful. They had also reached the conclusion that the mother would not cooperate with them in any further work and so did not see how they could conduct further work. The Guardian was clear that any ongoing proposal of work with R would be harmful.

59. Ms Phillips points out that Dr Duprey had not required a finding of fact to be undertaken before she felt able to report. She also notes that the father did not at the final hearing seek an adjournment and has now elevated the significance of the findings of fact beyond that which they can fairly bear, because he was largely successful. Ms Phillips submits that the findings of fact clearly were not determinative in the father's favour and cannot be viewed in isolation of the judge's other conclusions in respect of the mother which included that there had been difficulties with communication and her understanding because of her deafness and that he rejected the father's case that the mother had hatched a plan to end his relationship with R. I entirely agree with Ms Phillips that the findings of fact cannot be viewed in isolation nor are they determinative in a way which operates against the mother. However that does not lead to the conclusion that they were not relevant to the welfare outcome; either in how the welfare outcome was to be reached or in its actual determination.

60. Ms Phillips points out that Dr Duprey's evidence was given before the further attempt at contact in May 2018 when R put himself at risk and made further allegations against the father. She submits that His Honour Judge Thorp was entitled to reach the view on Dr Duprey's evidence that he did. He was entitled to conclude that no one had been able to advise as to how Dr Duprey's recommendations for therapeutic work could be put into practice and that likewise he was well aware that the mother would likely not promote contact. His lengthy evaluation and analysis shows that he was entitled to reach the conclusions that he did. It is ultimately in relation to these arguments that the appeal revolves and I turn to discuss them now.

Discussion and Conclusions

61. His Honour Judge Thorp said he found Dr Duprey to be a particularly impressive witness. She was the expert who was instructed to provide a psychological assessment of R and his parents. She is a chartered clinical psychologist. Given her qualifications clearly her evidence on the issues of psychological harm (or emotional harm) were

likely to be of particular importance; whether harm which had been sustained or harm which was likely to be sustained. Her opinion on the need for therapeutic intervention in order to ameliorate the risk of future psychological harm was also likely to be particularly important. The core of Dr Duprey's conclusion was that R should have contact with his father and that work be carried out with both parents to enable contact to move forwards. She considered that the therapy that had been carried out to date had been wrongly focused on R and that it should have been focused on the parents in particular the mother. She said she thought there was the possibility for some shift with more intensive work and more long term work with the mother. She thought it might take place over a period of six months, albeit said it would probably more given the mother's additional needs. She thought it needed a specialist in the field of parental alienation and she was concerned about the local authority not playing any role in the family's future and thought they may be best placed to identify local agencies or experts who can help. She was clear that she thought the local authority should remain involved with the family albeit the focus should not be on R. In her evidence she confirmed that even if that work could not be done, she did not think that contact should not take place. She clearly thought that responsibility for the adverse shift in R's position was linked to the mother's having become more fixed in her position.

62. It is not clear why Dr Duprey did not express an opinion on whether the making or not making of findings against the father or mother would make a difference to her opinion in May 2018. In her 2016 report, she had opined that R and the mother were somewhat enmeshed and there was a risk that R would struggle to develop his own separate identity to his mother and was likely to develop a pattern of prioritising the needs of others above his own. She said her main concern related to the mother's capacity to allow R to developmentally separate and to have his own emotional experiences validated and to develop his own ideas and beliefs especially in relation to his father. At that point contact was taking place and she recommended continued regular contact with the father. She recommended that more intensive reflective work was undertaken with both parents but especially with the mother. She went on to say that if the mother continues to show very little capacity to develop her understanding of R's emotional world, despite additional focused intervention, it may be that the concerns around her parenting capacity outweigh the potential effect of separation on R. She said she was not optimistic about the capacity for much perspective shift from either parent particularly the mother. Given the conclusions that His Honour Judge Thorp reached in relation to the mother's attitude to the father and the likelihood of R continuing to suffer significant harm whilst in her care it is almost impossible to reconcile that finding with the statement that Dr Duprey in 2016 had thought there would be no difference to her recommendations whatever the fact-finding process delivered. In her oral evidence she said [G4] it was an incredibly difficult situation to make any clear recommendations about. She recommended R remain with his mother because of the worry about the impact of separation on him. That concern led her on balance at the moment to recommend that he should stay with his mum. In her evidence she talks about her concerns about the impact on R of ongoing proceedings and conflict being harmful. She also is clear in her recommendation that R should be having contact with his father, that he was positive about it and that he benefited from it. The majority of her evidence focused on the issue of the impact on R of being moved from his mother's care, his exposure to parental conflict and the reasons for him expressing the views he was (both as to the allegations and his antipathy to contact). During questioning by Ms Hylton, she expressed the view that if the mother had primed for alienating R that it would be very concerning and the nature of the

allegations put it at the extreme end of the spectrum of influencing children. She said that aspect of the priming would be very serious emotional abuse of R. Her evidence was that if R remained in the care of his mother he would continue to suffer significant emotional harm on the basis both of what had happened and what was likely to happen in the future [G45] she thought that without intervention with the mother that the emotionally harmful behaviour would continue. When she was asked about the harm arising from no contact, she said that the absence of conflict and the stress would be a benefit. She agreed that growing up without knowing his father was a negative and said she felt terminating contact was too extreme and she did not recommend it. What she did not do though and she does not appear to have been asked by anybody in either her report or her oral evidence was to articulate precisely in psychological and developmental terms the possible or likely consequences for R of:

i) Firstly, growing up and reaching adult hood without having any relationship with his father or paternal family,

ii) Secondly, continuing to hold a set of beliefs about his father that were at best inaccurate at worst fundamentally wrong,

iii) Thirdly, growing up and reaching adult hood being parented solely by his mother who had been identified not only as having caused emotional harm to him through her alienation of him from his father but also and as significantly whose parenting was identified as creating an enmeshed relationship where R was unable to developmentally separate, to develop his own identity separate to that of his mother.

63. The judge's observations on the uniformity of approach of the Guardian and Dr Duprey thus seems to me to understate the distinction. Dr Duprey was very clear in her evidence that R should have contact with his father and that further work should be undertaken to progress that with the mother in particular. Although she had not specifically identified resources she was clear in her evidence that this should be undertaken and thought the local authority would be best placed to do that. I do not think that the failed contact in May 2018 and the fact that it took place after Dr Duprey gave evidence undermines the overall either the specific conclusions she reached or the overall thrust of her advice.

64. Both the Guardian and His Honour Judge Thorp considered that there had perhaps been a shift in the mother's understanding and thinking. Neither saw that as a window of opportunity for therapy though. This must arise from the fact that the Guardian in particular had concluded that there was no further possible therapeutic way ahead identified. Of course if there was a therapeutic way ahead, or the possibility that such a way ahead existed but had not been identified, if there was thought to be a change, even if subtle in the mother's capacity to recognise R's needs, surely this was the time to move with the therapy identified by Dr Duprey. Such insight as the mother had gained through the process surely needed nurturing with careful ongoing work rather than being left untended. Given her previous position it was far more probable, and implicitly recognised by the judge, that the mother would continue to behave in the way her historical record suggested she would than for the hope to blossom into realisation and action. At paragraph 107, the judge agreed that the position is a little more positive and said that one hopes she will realise the importance of R developing

a relationship with his father but '*there is a significant risk that she will be unable to do so.'*

65. Whilst the judge acknowledges and indeed characterises the lack of contact as being very harmful in the short and long-term he compares this to the significant harm that would be caused by discussing or forcing R to have contact. Whilst I do not underestimate at all the powerful evidence of R's response to attempts at contact this is clearly a short-term issue that might be capable of being addressed; indeed Dr Duprey considered that it could be and even if it could not be, thought that contact should still be pursued (albeit I accept this was before the May 2018 attempt). Although the evidence as to the medium to long term harm was not articulated as clearly as it might have been the overall effect of the evidence was of very considerable medium to long-term harm arising from a number of sources. This was not simply a case of harm arising from a lack of contact. To that had to be added the harm being done to R himself as a result of the false narrative he had absorbed about his father and thus his genetic heritage. In addition to this was the harm that had been identified arising from the enmeshed relationship. The clear conclusion of Dr Duprey was that if there was not a change in the mother's capacity to meet R's needs the harm that he would suffer was so great that it might outweigh the very considerable distress and harm that everybody agreed would result from his being separated from his mother. That the child psychology expert had characterised the ongoing harm as potentially outweighing the harm of separation seems to me to be a very powerful indication of the extent of the potential harm she foresaw. In particular given that the court was not contemplating any means by which the mother's capacity might be improved by taking up the recommendation of Dr Duprey, that the mother in particular undergo intensive therapy, the inevitable conclusion was that because the mother would not change without therapy therefore R was likely to be exposed to emotional harm of sufficient magnitude that might require his removal from his mother's care. The harm that His Honour Judge Thorp refers to is not identified as being of this magnitude. It must of course be recognised that His Honour Judge Thorp was faced with a question to which he had not been provided with a clear answer.

66. Although in paragraph 115 His Honour Judge Thorp returns to the issue of harm when looking at the capability of the parents of meeting his needs and refers to there being concerns about the enmeshed relationship between the mother and R the principal concern is identified as the mother's ability to meet R's need to have a relationship with his father. In her 2016 report [G108-110] Dr Duprey's concerns about the mother's ability to allow R to developmentally separate were much wider. In her 2018 report her recommendations as to the mother's need for therapy were not limited to her views as to the father but were more broad-based in terms of the mother's capacity to reflect on R's emotional needs. Her conclusions at para 4.16 [G183] deal with the mother's capacity to develop her understanding of R's emotional world and if that did not develop the concerns about her parenting capacity would outweigh the potential effect of separation. It does not seem to me that these concerns from the expert in child psychology are reflected in the conclusions as to the harm that R had suffered and the harm he was at risk of suffering. To the extent that they are referred to [para 116] they do not appear to have been given the weight it seems to me that they deserved. This may be because (as I have set out above) Dr Duprey had not been asked or had not of her own volition fully articulated the psychological consequences for R of the continuation of the enmeshed relationship, the holding of false views about his father, and the lack of any relationship with his father or his

paternal family. Given the mother's relative isolation in terms of her social and family circle this assumed even more significance.

67. In addition whilst in many cases in carrying out an evaluation of the harm the court will be required to consider what harm the child may be exposed to during contact with the other parent in this case the court had concluded that the father did not pose any risk to R. Thus in terms of the contact itself there was only benefit to be had. The risk to R arose from the mother's opposition to contact and the conflict that engendered.

68. There is of course a crossover with the appeal on ground ii) and iii) and the obligation on the court only to order no contact as a last resort and where the court had taken all necessary steps to consider all available options to promote the child parent relationship. As Ms Phillips and Mr Egleton emphasised and as is clear from the judgment, there was no formulated proposal before the court to take the matter forward. They rightly emphasise that the opinion of Dr Duprey and the views of the Guardian and others was that R was suffering emotional harm from involvement with social workers and attempts at contact. His Honour Judge Thorp rightly laid considerable emphasis on this in paragraph 116 of the judgment. I was told in submissions by Ms Phillips that the Guardian had made enquiries through Cafcass of whether a child contact intervention programme in particular the high conflict intervention might be available. I was told that due to both a lack of space and an indication that it was considered the parties were too far apart meant this was not available. Ms Phillips though, frankly accepted that the local authority had not pursued enquiries into possible resources. This it seems was as a result of a crisis within the local authority but also no doubt due to the fact that the local authority had moved from considering the issue of care proceedings all the way through to the threshold not being met and there being no ongoing role for them. It does not appear that Dr Duprey's recommendation that R and the parents needed a high level of local authority support and that they may be able to identify and access (or at least identify) resources which would be able to deliver the sort of therapy that Dr Duprey had identified as necessary in contrast to the work that had been done by the local authority which Dr Duprey considered was wrongly focused both in respect of the work done with the mother and with R. That is not a criticism of the local authority because in her first report Dr Duprey had not fully set out her recommendations and it does not appear she had been asked to clarify the precise nature of the programme of therapy that she thought was required. Nor had the father identified a therapist who might be able to do the work Dr Duprey recommended. The reason for this seems to be a combination of the fact that it was only during her evidence in May that Dr Duprey clarified the sort of work that she was talking about and that the conjoined fact-finding and outcome hearing had led to the father nailing his colours to the mast of a transfer of residence. Had a fact-finding taken place separately and had the parties been able to reflect upon the conclusions in particular the conclusion that R had suffered and was likely to continue to suffer significant emotional harm from the mother's parenting of him it seems inconceivable that the court would not have had before it before finally determining matters proposals from at least the father but also almost inevitably from the local authority of a quite different sort to that which the judge was faced with.

69. The overall emphasis in his analysis from paragraphs 123 to 130 is on the absence of any identified means by which contact could be progressed. The judge reminded himself of the importance of contact. He notes at paragraph 124 that the professionals

are of the view '*...it has harmed R not to have had the opportunity to have a relationship with his father and that it will cause him significant harm if he does not have a relationship with his father in the future...'* At paragraph 125 His Honour Judge Thorp identified the issue as being one of practicality in the view of the Guardian and Dr Duprey. The judge approached the matter on the basis that any further work would involve R in it. That does not appear to me to be a full reflection of what Dr Duprey was saying. Her evidence was clear that the emphasis needed to be on work primarily with the mother but also with the father. This would clearly be a precursor to work with R. It seems implicit in her evidence that if the mother made progress, R himself would not then be exposed to such a degree of hostility and would not then himself be likely to be so opposed or upset by the idea of contact. This is noted in paragraph 126 where His Honour Judge Thorp said that Dr Duprey's evidence was that the resources for such work do not appear to be available. On my reading of the evidence, her view was that they had not been identified rather than that they were not available. He also notes that work with the mother would take some time.

70. Whilst the judge in paragraph 129 clearly refers explicitly to the harm that would be caused by continuing the process of seeking to establish contact and whilst he does refer back to his earlier conclusions on the risk of harm to R of there being no contact and him remaining in the sole care of his mother the central (albeit not only) factor in the welfare checklist was the risk of harm. This requires the balancing of the harm (short and perhaps longer term) to R of seeking to progress contact as against medium to long-term harm arising from the various sources which would come into play in the event of no contact; inextricably linked with no further therapy for the mother. For a combination of reasons, I do not consider that this balancing exercise took place in the way it ought to have. This was to some extent due to the fact that no one had elicited from Dr Duprey the sort of explicit assessment of the likely nature of the harm and its consequences for R; it was also in part attributable to the fact that the parties and the court had not, because of the conjoined hearing, focused so clearly on the consequences of the fact-finding and the imperative need for identification of resources to provide the therapy Dr Duprey had identified was necessary both to further contact but also to reduce the risk of emotional harm arising from the mothers inability to identify R's emotional needs. As I have referred to before given Dr Duprey had indicated that this harm was so significant it would potentially outweigh the harm of separating R from his mother the absence of this from the evaluation of the balance of harm as an explicit component and the absence from the evaluation of the balance of harm of the full extent of the other aspects of harm lead me to the conclusion that ultimately the evaluation the judge undertook failed to give due weight to (a) the consequences of the findings as articulated in ground one; (b) the long-term harm that R would suffer by not having a relationship with his father and the paternal family as opposed to the short-term disruption of restarting contact) (c) did not give due weight to the ongoing long-term emotional harm that would be caused to R by him remaining in the mother's care in the context of the serious findings of her emotional abuse of R, her denial to R of a relationship with his father and the paternal family, and Dr Duprey's concerns about the emotionally neglectful parenting that R will receive from his mother in the future.

<u>Grounds ii) and vi)</u>

71. These are:

i) In the alternative, in spite of the learned judges own findings combined with the expert evidence of Dr Duprey, the judge prematurely abandoned the ongoing judicial duty to reconstitute the relationship between R and his father. Accordingly, the refusal to order direct contact between R and his father was disproportionate in the circumstances.

6. The judge failed to sufficiently consider (and he therefore prematurely dismissed) the option of a suspended transfer of residence order, in a final attempt to secure the mother's compliance with a child arrangements order for R to spend direct time with his father.

72. At paragraph 130 of the judgment His Honour Judge Thorp said:

7. '*The court has a duty to look at all realistic possibilities. In assessing whether there are further steps the court could take to enable contact, I have considered whether a further adjournment would be of assistance (even though no party asks the court to do so. I have reached the conclusion that this would not be in R's welfare interests. The same point apply. Any intervention with R is likely to be harmful to him. Intervention with the mother (even if resources were available) is likely to take some significant time. I also bear in mind that further delay is unlikely to be in R's welfare interests given the duration of proceedings and that he has become distressed by the proceedings and intervention.'*

73. On behalf of the father Ms Hylton has argued that given the other conclusions that he had reached in particular in relation to harm it was necessary for the judge to consider further intervention and adjournment. Although she frankly concedes that the father did not seek an adjournment, he having opposed a conjoined hearing and for financial reasons being anxious for a final decision to transfer residence being made, she justifiably made the point that this was not a situation that the father wished to be in but rather had been forced on him by the adjournment of the fact-finding on 21 March and the subsequent decision to undertake a conjoined hearing. Ms Hylton had earlier referred and His Honour Judge Thorp refers to it in the judgment to the possible need for a more specialist expert to be instructed had findings of alienation been made against the mother at the conclusion of a fact-finding. Thus the absence of an application to adjourn further consideration was not a live issue during the hearing because the court had listed a conjoined hearing. A proposal from the father was not available because of the way in which the evidence had emerged and the way the hearing was progressing. Since the conclusion of the hearing the father has identified resources which would potentially be able to carry out the sort of work that Dr Duprey had referred to.

74. Mr Egleton and Ms Phillips both emphasised that over the period May through till early July consideration had been given to the issue of resources. The Guardian had made enquiries of a child contact intervention which as I have referred to earlier had been ruled out. The local authority as Ms Phillips frankly acknowledged had not undertaken the sorts of enquiries of the resources available in their area will stop again as I have averted to earlier this seems to have been a consequence of the change in tack to seeking no order and no further local authority involvement together with changes in social work staff. Given the findings of fact made by His Honour Judge Thorp that R had suffered significant emotional harm in the care of his mother and was likely to continue to suffer significant emotional harm in the care of his mother taken together with Dr Duprey's evidence that if the mother did not through therapy

improve her capacity to meet R's emotional needs that the ongoing harm R might suffer would outweigh the harm of separating him from his mother the local authorities position as articulated in the care plan could not it seems to me have been maintained. Because the findings emerged in a conjoined judgment of course it was not possible for the local authority to respond to the findings by an amended care plan or an alternative proposal whether to issue care proceedings or to seek a continuation of the supervision order with a fleshed-out proposal for the work that would need to be undertaken with the mother father and perhaps with R to address the risks.

75. The conjoined hearing inevitably led on the facts as the judge concluded them to be to a lack of opportunity to the parties to respond in a considered way to the consequences of those findings. No doubt the judge was influenced by his understanding of the position of Dr Duprey but most particularly the Guardian that his decision on findings would not influence the welfare outcome. However standing back it is impossible to reconcile the finding of fact the judge made which was that in terms the threshold criteria for public law intervention had been met with the conclusion that findings of fact would have made no difference. Taken together with the evidence of Dr Duprey that absent therapeutic intervention with the mother the risks of emotional harm to R of remaining with his mother might outweigh the risks of emotional harm of separating him from his mother I cannot reconcile the conclusion that the fact-finding outcome would have no impact on the welfare outcome.

76. I entirely accept that the benefit of the perspective that is now available to an appellate judge than was available to the trial judge and the parties caught up in the thick of an extended 10 day final hearing taking place over some two months means that no criticism can properly be made of the judge or the parties for the positions they adopted at the time. However that does not mean that the decision in this respect was not with the benefit of that perspective wrong.

77. For those reasons I conclude that the decision to make a final order in respect of direct contact was wrong because the combination of the consequences of the findings of fact that had been made and the lack of full exploration of the options available (in particular in relation to therapy for the mother) meant that the end of the road had not been reached. Whether it is characterised as His Honour Judge Thorp having not given due weight to the possibilities of obtaining further information, or not giving due weight to the consequences of his findings of fact in particular how they sounded in terms of the local authority's position or whether it is characterised as a disproportionate decision on the facts as they stood does not matter.

78. It follows that if the decision to terminate efforts to promote contact was wrong that the decision to rule out a suspended transfer of residence was also wrong as all options would need to be available to the court to progress contact. Had His Honour Judge Thorp continued the process of considering contact, notwithstanding his clear and plainly correct decision on residence, he would no doubt have wished to keep that particular issue undetermined. In particular having regard to Dr Duprey's evidence about the potential change in the balance of harm were the mother not to engage in or benefit from therapeutic intervention to assist her in meeting R's emotional needs I'm quite satisfied that this order should fall away in conjunction with the discharge of the no direct contact decision.

Ground v)

79. This ground focuses on the weight that was given to R's wishes and feelings.

i) The learned judge placed too much weight on the mother's reports of R's wishes and feelings and upon Rs highly manipulated wishes and feelings; rather than on R's ascertainable wishes and feelings in the context of the wider evidence in the case.

80. At paragraph 112 of his judgment His Honour Judge Thorp addresses R's wishes and feelings. He deals with who he wants to live with initially but also considers his views on contact. He concluded that R has at times been positive as to contact and had enjoyed it when it took place. However he noted he had been highly resistant to it and the evidence established that his current feelings were clear and strongly held. His Honour Judge Thorp noted that the views of a 12-year-old child would in many cases be given a very high degree of recognition. He noted that by reason of R's ASD his understanding is not the same as it would be for another child of his age. He also explicitly noted that his views have been affected by the hostility of his mother towards his father and by him being provided with information which is not true. Notwithstanding those caveats His Honour Judge Thorp accepted the evidence that demonstrated the high levels of distress caused by trying to encourage him to have contact with his father.

81. Ms Hylton on behalf of the father argues that this approach failed to take into account that if one [excised] the mother's negative influence there was a wealth of evidence that R's true wishes and feelings were to see his father. The evidence suggests that this is true.

82. However as Ms Phillips submits those wishes and feelings were R's genuine wishes and feelings even if they were tinged with influence. She points out that it is clear from His Honour Judge Thorp's overall analysis that R's wishes and feelings did not weigh more heavily in the balance than other considerations.

83. I agree with Ms Phillips analysis in this respect and do not consider that His Honour Judge Thorp gave either the mother's reports of R's wishes and feelings or his highly manipulated wishes and feelings undue weight. There is nothing in the judgment in particular in the final evaluations in respect of contact that R's wishes and feelings, per se, were given undue weight. The real impact of his views was in terms of the harm that was caused to him by attempts to raise contact with him or to reintroduce contact.

84. Whilst I therefore do not agree that His Honour Judge Thorp was wrong I do not think this is the whole answer. The consequence of the finding that R had been primed with information about his father that was not true and had been alienated from his father meant that unless steps were taken to address this in some way that erroneous belief would endure, perhaps for life. The evidence was that the mother was not likely to change without therapeutic input. Even with therapeutic input the prognosis was not good.

85. It seems to me that this finding is also inconsistent with the conclusion that the findings would not affect the welfare outcome. Whilst I entirely accept that the overwhelming evidence at that point was that immediate work with R was not something anybody wished to contemplate because of the harm that it would cause that is only part of the picture. Work with the mother was a prerequisite to redressing the false picture. If that work failed to yield results the court would need to grapple

with the issue of how the harm that had been done and was being done was otherwise to be addressed. That it appears to me adds further weight to the conclusion that further consideration needed, and needs, to be given to the way ahead for R, the mother and the father.

Indirect Contact and S.91(14)

86. Given my conclusions in relation to the issue of direct contact the issue of indirect contact does not need to be determined. Indirect contact will continue pending further consideration of the issue of direct contact. The court will of course have to address this issue if eventually a no contact order is made. However that will need to be assessed on the evidence as it stands at the time. I would merely observe that the rationale underpinning the indirect contact facilitated by the mother would be hard to argue with if the eventual conclusion was that R should have no ongoing contact with social workers. In the absence of any other mechanism for facilitating indirect contact it is difficult to envisage any other outcome.

87. The section 91(14) order in respect of spending time with the father falls to be discharged on the basis of my findings in relation to the direct contact issue. The section 91(14) order in respect of the live with order does not need to be determined in the context of this appeal. The live with order was not appealed because permission was not granted and the question of a transfer of residence is not currently live. In the event that a transfer of residence became live because R's then welfare required it to be considered the section 91(14) order would not in practice constitute any obstacle to the court considering that. Section 91(14) imposes a leave requirement on the father not on the court or anybody else. Its existence may be some reassurance to the mother and may contribute to R's welfare at the current stage and so I do not consider it appropriate or proportionate to determine that application

Conclusion

88. For all of those reasons I have allowed the father's appeal in part. I would emphasise that my conclusions do not involve any criticism of the parties' lawyers or the judge in how they approached the case. It was clearly an exceptionally difficult case on its facts. The procedure which the court had in essence been forced to adopt to determine the fact-finding and welfare imposed a further difficulty on all concerned. With the benefit of hindsight and a different perspective it seems clear that the findings of fact that the judge made inevitably required further consideration to be given to the way ahead; particularly from the local authority and the father's perspective. The judgment itself is plainly carefully crafted and considered. However even the best of judges (who also happen to be fallible human beings) in comprehensive and careful judgments can occasionally get things wrong.