Neutral Citation Number: [2019] EWHC 634 (Fam)

Case No: 2019/0014

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2019

Before :

MR JUSTICE WILLIAMS

- -

Between :

CS	**Proposed Child Appellant**
- and -	
SBH	**1st Respondent**
- and -	
FS	**2nd Respondent**
- and -	
Andreea Juravle (Children's Guardian)	**3rd Respondent**

(Appeal FPR 16.5: Sufficiency of Child's Understanding)

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Barbara Hopkin instructed by the **Proposed Child Applicant**
The 1st Respondent was unrepresented
Mark Jarman (instructed by **Direct Access**) for the **2nd Respondent**
Richard Jones (instructed by Freemans Solicitors on behalf of Cafcass) for the **3rd Respondent**

Hearing dates: 27th February 2019

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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.

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MR JUSTICE WILLIAMS

Mr Justice Williams :

Introduction

1. I am concerned with an appeal in respect of an order made by His Honour Judge Meston QC on 6 November 2018. By that order he dismissed the mother's application for a variation of an earlier order made by HHJ Pearl in January 2017 by which she had ordered that the child should live with her father. The appeal has taken a most unusual route to the hearing I held on 27 February which has been to determine a preliminary issue which I identified in an order dated 8 February 2019 and which I confirmed in a directions hearing on 13 February 2019. The preliminary issue was recorded in the order as follows:

   'UPON the judge listing a hearing to make directions upon the preliminary issue as to Mr Burrows's locus to pursue this application for permission to appeal on behalf of the child having regard to whether the child may instruct a solicitor within this appeal pursuant to Family Procedure Rules 2010 [FPR 2010] r 16.6(3)(b) or r 16.6(5) ('the preliminary issue')'

2. The appellant's notice itself at paragraph 6 asserted that the appeal was against 'all parts of the order' which contains provisions setting out who the child should live with (her father); the time that the child would spend with the mother in term times and during holidays; who would have carriage of the child's passport; the discharge of earlier orders; requests by the child to see a solicitor; disclosure of papers to any legal representative acting or seeking to act on behalf of the child; and reservation of the case to HHJ Meston QC. I believe that the principal issue that the appellant's notice addressed was the refusal of HHJ Meston QC to vary the order so as to provide for the child to live with her mother.

3. The child concerned is CS (born 21 March 2006). Her father is FS who is represented by counsel Mark Jarman. Her mother is SBH who has not played a part in this appeal but was represented by leading counsel Mr Gupta QC during the proceedings at first instance. I hope the parties will forgive me if I refer to them throughout this judgment as the child, the mother and the father. I do so primarily to aid in ensuring their anonymity should this judgment be reported.

4. In the proceedings at first instance the child had a Children's Guardian appointed, Andreea Juravle. She had acted as the Children's Guardian ('the Guardian) during

proceedings which had taken place between 2015 and 2017. Shortly after the mother issued her application for a variation of the 'live with' order in April 2018, a dispute arose over which solicitor should be appointed by the Guardian. On 11 May 2018, the child was taken by her maternal grandparents to see Barbara Hopkin a well-known child law solicitor. The consultation was apparently funded by the maternal grandparents. Ms Hopkin assessed her as being competent to instruct a solicitor and wrote to the court asking that she be appointed as the child's solicitor albeit with a Guardian. The Guardian however appointed Ms Laura Coyle, another well-known child law solicitor, who the Guardian had instructed throughout the earlier proceedings. At a hearing on 3 July 2018 HHJ Meston QC refused Ms Hopkin's application for Ms Coyle's appointment to be revoked and for her to be instructed and confirmed the appointment of Ms Coyle. No appeal was lodged by Ms Hopkin on the child's behalf against this decision within the 21 (or perhaps 7 if it was a case management decision) days provided for and no appeal has been lodged subsequently. Ms Hopkin candidly accepts that she indicated to the child and to the maternal grandfather she thought that appealing against the decision was unnecessary [#9 of her statement]. Thus any application for an extension of time to appeal that order (had such an appeal been lodged) would probably have been doomed to fail having regard to the criteria applicable to relief from sanctions under FPR 4.6.

5. In the course of the hearing HHJ Meston QC had asked Ms Coyle what she would do if the child indicated that she wanted Ms Hopkin to represent her. In response Ms Coyle had confirmed that she would contact Ms Hopkin and explain the position. Following the hearing Ms Coyle says that the child did not indicate that she wished Ms Hopkin to represent her but rather that she was content with Ms Coyle and the Guardian. It was not until 30 January 2019 that Ms Coyle received an email purporting to come from the child stating that she did not want her as her solicitor anymore and would like David Burrows and Barbara Hopkin. In that email she says she has tried to tell her this before. That email is copied into the mother and I believe the maternal grandmother.

6. Thus since 3 July 2018 the child has been a party to the proceedings with a Guardian appointed for her pursuant to FPR 16.4 who has appointed a solicitor Ms Coyle. The child's wishes were to live with her mother. Ms Coyle met the child separately from the Guardian on 16 October 2018 specifically to assess her competency. At that point the Guardian had not concluded her enquiries or made a recommendation and thus in order to ensure that were a conflict between the child and the Guardian to arise, Ms Coyle was able to determine whether she should continue to act for the child directly pursuant to FPR 16.29 (2) she needed to be able to determine whether her understanding was such that she could accept instruction directly from the child. Ms Coyle concluded that the child was not competent to instruct her.

7. As matters transpired no conflict between the child and her Guardian arose. The Guardian filed a report for the final hearing which recommended that the child should live with her mother provided her mother was able to satisfy the court that the child relationship with her father would be maintained.

8. Prior to the final hearing the child wrote a letter to HHJ Meston QC which is dated 24 October 2018 and is appended to his judgment. Also appended to that judgment is a letter dated 28 November 2018 (or 2017) from the child to the father. They both make

distressing reading in respect of the very high level of criticism that the child makes in respect of the father. In the letter to the judge the child says:

"*...furthermore, another misconception is that people think that what I say is because of influence from my mum, which it is not*."

This does not sit easily with the previous judgments of District Judge Gibson and HHJ Pearl and in particular the conclusions of Dr Berelowitz, that the child's wishes were so enmeshed with those of her mother that they were not in effect independent of her mother.

9. At the hearing the mother was represented by Mr Teertha Gupta QC, the father by Mark Jarman and the child by Alison Moore counsel. HHJ Meston QC also met with the child. He records his impressions at paragraph 94 of his judgment saying that he found her to be '*...a pleasant polite and quiet child who I thought was (perhaps) a little young for her age...*' She was articulate and clear in what she wanted to say. At the conclusion of the hearing he delivered a very comprehensive judgment running to some 53 pages. He refused the mother's application for the child to come to live primarily with her. At paragraph 110 of his judgment he says:

[110] *so far as I can tell the mother has now managed to gain some emotional stability as compared with the descriptions of her in the earlier proceedings. However, I do not consider that the mother has yet shown sufficient evidence of change in her thinking about the father to enable the court to regard a change of [the child's] primary place of residence as in [the child's] interests. I consider that there remains a significant risk that the mother will consciously or otherwise influence [the child's] attitude and behaviour towards the father and thereby alienate [the child] from him, undermining what has now been achieved and leading to further proceedings and conflict which would clearly be harmful to [the child's] welfare*."

10. Following HHJ Meston QC having given his decision on 6 November but prior to the full judgment being completed, the child appears to have spoken to Ms Hopkin. It is at this point that an unusual train of events was set in motion in relation to the child's involvement with solicitors and the lodging of an appeal on her behalf. Ms Hopkin told me that she received a call from the child and informed her that she was about to go on sick leave and could not undertake any work for her. She told the child that she might write to the court. My understanding was that she provided the maternal grandparents (who had been paying her fees) or the child with a list of other solicitors who might be able to assist.

11. The child thereafter wrote to Sir Andrew McFarlane the President of the Family Division on 9 November 2018. In that handwritten letter the child says that *"I would like to appeal the decision made in court because when I was supposed to have been represented in court, Ms Laura Coyle said that I was not competent in making a decision, which is not what she would have said if she was representing me properly I have spoken to Ms Hopkin and she has given me her permission to appeal."*

I'm not sure what response the child had from the President.

12. In January 2019 the father made an application for a specific issue order and a prohibited steps order seeking an injunction against the mother not to disclose papers

to legal representatives seeking to act on behalf of the child, seeking permission to apply for a German passport for the child, and seeking permission to arrange psychotherapy for the child. This was listed on 9 January 2019 which had been (I think) also been listed for the finalisation of the order arising from the judgment of 6 November 2018.

13. The issue of the child seeing another solicitor was brought to the attention of HHJ Meston QC prior to the completion of his judgment. I am not entirely clear on the chronology of the finalisation of the judgment and order but at paragraph 114 of the judgment HHJ Meston QC explored this and declined to make such an order given the child's increasing competence. However he did make an order that no arrangement should be made for the child to consult a solicitor without prior notice being given to Ms Coyle. An order was also made preventing the disclosure of papers in the case to any other legal representative. The note of the hearing on 9 January 2019 records that by that stage David Burrows had attended on behalf of the child. It seems he had been contacted by the mother and put in funds by her. At some stage he had a 10 minute telephone conversation with the child. He informed the court that he intended to lodge an appeal against the order of November 2018 and also an application to appeal out of time in respect of the earlier decision as to the appointment of a solicitor for the child made in July 2018. He also said he intended to apply to the High Court under section 10 (8) of the Children Act 1989 on behalf of the child for leave to apply for a section 8 order and also indicated that he intended to make an application to replace the child's solicitor.

14. HHJ Meston QC considered, given the plethora of applications which it appeared were intended to be made on the child's behalf in the High Court, that he ought to make as few orders as possible. He did confirm that until further order or discharge of the public funding certificate for the child she will remain represented by Ms Coyle and by her Guardian. The father objected to Mr Burrows contacting the child. Mr Burrows confirmed he would not pursue contact with the child until the matter was considered by the High Court. Mr Burrows made an application for permission to appeal the order of 6 November 2018 which was refused by HHJ Meston QC.

15. As I have referred to above an Appellant's notice was received in the Family Division Appeals Office on 15 January 2019. That notice identified the date of the decision as 1 November 2018 but I believe this is a typographical error and should have read 6 November 2018. The appellant's notice identified the child as the appellant and the appellant's notice was signed by David Burrows who identified himself as the appellant's solicitor. In the course of the hearing before me, Ms Hopkin stated that she had had some contact with Mr Burrows about him acting as her agent but had made clear to him that she was not contemplating any work being undertaken by her or by him prior to her return from sick leave in early February. Mr Burrows appears to have been put in funds by the mother and the issue fee in respect of the appeal according to the receipt of the court file appears to have been paid by the mother. In an unsigned statement which accompanied the appellant's notice, Mr Burrows said that he had had a 10 minute telephone conversation with the child and went on to say "*I would be naive if I suggested that enabled me to assess her understanding."* The document identified factors which *'suggest to me that this court should please enable me to see her.'* The statement refers to Ms Hopkin's assessment as being sound; I assume that this is a reference to Ms Hopkin's assessment of competence in May 2018 although at

paragraph 24 the statement refers to her assessment of the age and understanding of the child in relation to making an application for permission under section 10 (2) (b) and (8) [I think this must be a reference to the Children Act 1989]. As I referred to above the appellant's notice was not completed but was accompanied by a host of other documents which made it hard to discern what was actually being sought. Quite why an application pursuant to section 10 (8) of the Children Act 1989 for leave to make an application on behalf of a child for a section 8 order was referred to (or perhaps purportedly being made) within an appellant's notice I have not been able to fathom. As far as I am aware no application has been issued in the High Court using the part 18 procedure.

16. Following the lodging of the appeal, the papers were referred to me and on 23 January 2019 I gave directions on the appeal, requiring amongst other matters that the solicitors on behalf of the proposed appellant filed with the court a signed statement addressing the matters set out in FPR 16.6 (3) (i) and (ii) and identifying what application they were making to the appeal court in respect of the representation of the child. For reasons which I do not understand, rather than complying with that direction, Mr Burrows filed an appeal with the Court of Appeal against that order. On 5 February 2019 Lord Justice Baker dismissed the proposed appeal as being misconceived and totally without merit.

17. On 8 February 2019 I gave further directions on the appeal. Although I had considered striking it out for failure to comply with the order of 23 January it appeared to me to be more appropriate to list the appeal for directions in order to try to get to the bottom of the issue of whether Mr Burrows had any *locus* to pursue an appeal on behalf of the child. I identified the 2 possible routes by which a solicitor might have such status under FPR 16.6 (3) and FPR 16.6 (5 and 6)

18. On 13 February 2019 at a directions hearing Mr Burrows appeared on behalf of the proposed appellant child; it appeared that he was acting as agent for Ms Hopkin. Mr Jarman appeared on behalf of the father, the mother appeared in person and Ms Coyle appeared on behalf of the child and the Guardian. After hearing the parties and it appearing that all agreed that the only 2 routes by which Mr Burrows (and/or Ms Hopkin) might represent the child were those I had identified, I gave directions listing the preliminary issue for a one-day hearing. In the course of the hearing Mr Burrows indicated that Ms Hopkin would be resuming acting for the child, she having returned from sick leave. I made provision for statements to be filed specifically addressing the sufficiency of the child's understanding to instruct her own solicitor on the appeal and for the filing of skeleton arguments limited to the preliminary issue.

19. Both Ms Hopkin and Ms Coyle filed the statements as directed. Ms Hopkin's statement addresses the issue of the competence of the child as at May 2018 when she had seen her. It is implicit in her statement that her view has not altered but she does not address the issue of whether the child is competent to instruct her on the appeal as opposed to instruct her in respect of the issue of child arrangements. In submissions she told me that she had not seen the child recently and indeed has not spoken to her recently. She said her understanding of the order of HHJ Meston QC was such as to prevent her seeing the child or communicating with her without the consent of the father. This came as something of a surprise to me as the issue had been raised at the directions hearing on 13 February 2019 and I had made clear that my interpretation of the order made by HHJ Meston QC was not such as to prevent the child and her

solicitor meeting. I can only assume this view was not fed back to Ms Hopkin by Mr Burrows or that there was some other breakdown in communication. Ms Coyle filed a detailed statement setting out her involvement with the child and exhibiting various documents including email communications from the child and the guardians report. She made clear that she did not consider that the child was competent to instruct her own solicitor within the first instance proceedings. It is implicit she considers she is still not competent to pursue this appeal by instructing a solicitor directly. I believe the last meeting that Ms Coyle had with the child was on 17 December 2018 when they met to discuss the judgment of HHJ Meston QC. She was asked about the letter she had written to Sir Andrew McFarlane and Ms Coyle said she (the child) was uneasy about it and did not mention pursuing an appeal.

20. Each of the represented parties filed skeleton arguments for the hearing. Regrettably the skeleton argument filed on behalf of the child which appears to have been drafted by Mr Burrows was not focussed on the preliminary issues but rather identified some pre-preliminary issues and asserted that they require disposal prior to the determination of the preliminary issue. Much of the skeleton argument related back to the circumstances of the appointment of Ms Coyle in July 2018 and the law which governed that appointment. In the skeleton argument Mr Burrows argued that the original appointment of Ms Coyle was unlawful and should be declared to be unlawful pursuant to the Senior Courts Act 1981 section 30 (2) with the knock-on effect being that the order of HHJ Meston QC would fall to be set aside without further consideration. Given that there was no appeal in respect of that appointment and the July order and no reference had been made to the possibility of such an appeal in the directions hearing on 13 February 2019, I refused to permit Ms Hopkin to pursue that line of argument. If the appointment had been wrongly made the appointment pursuant to the court order would remain valid unless and until such time as the order was set aside on appeal. Although the skeleton contained some relevant and useful material, overall I felt as if I had been presented with a box of Lego pieces but no instructions to construct the model. It was only by a process of trial and error that one was able to ascertain which pieces were relevant to the model and which were for something else entirely.

21. Mr Jarman, on behalf of the father, and Mr Jones, on behalf of the Guardian, filed more traditional and focused skeletons.

22. Having spent some considerable part of the reading time which had been set aside for the appeal trying to understand the nature of the arguments deployed by Mr Burrows, further time in the course of the morning was also lost. Firstly, the appeal had been listed in open court but Ms Hopkin who had not instructed Mr Burrows or another advocate did not have higher rights of audience so I decided to hear the case in private. Secondly, and quite understandably, Ms Hopkin wished to explain the circumstances in which Mr Burrows had come to act. She explained that she was concerned about being funded by the mother and was thus acting pro bono on the appeal.

23. After all those preliminaries we were able to get onto the question of the preliminary issue. I had thought that some oral evidence from Ms Hopkin and Ms Coyle might be desired but in the event Ms Hopkin was appearing as the advocate and in any event no party wished to put questions to either Ms Coyle or Ms Hopkin and so the matter

proceeded on submissions. As arguments developed this appeared to boil down to two particular issues:

i) Firstly whether an appeal constituted new proceedings, such that the provisions of FPR 16.6 (3) applied, in which case Ms Hopkin's opinion on whether the child was able having regard to her understanding to give instructions in relation to the appeal appeared to be determinative.

ii) Secondly if the appeal was part of a continuation of proceedings whether pursuant to FPR 16.6 (5) and (6) the court considered that the child has sufficient understanding to conduct the appeal concerned without a children's Guardian. This involved consideration of both the law and the evidence.

24. As I shall return to later this apparently clear delineation between the role of Ms Hopkin and the role of the court turns out not to be so following a deeper dive into the authorities.

25. Ms Hopkin's position on behalf of the child was that the appeal constituted new proceedings. Mr Jarman and Mr Jones both argued that the appeal was part of a continuum of proceedings and thus the child could only conduct the proceedings without the Guardian if the court was satisfied she had sufficient understanding so to do. Ms Coyle and the Guardian were both of the opinion that the child did not have sufficient understanding to conduct proceedings. Mr Jarman and Mr Jones both submitted that the analysis of Ms Coyle and the Guardian was to be preferred to that of Ms Hopkin because it was reached after far greater and recent exposure to the child but also because it was an evaluation reached in full knowledge of all of the evidence in particular expert assessment and conclusions of judges. In contrast Ms Hopkins assessment was, they submitted, carried out in a vacuum; she not having had access to any of the evidence or the judgments.

26. The skeleton arguments filed did not really get to grips with the issue of whether an appeal constituted fresh proceedings so as to allow Ms Hopkin to rely on FPR 16.6 (3) or whether it was a continuation of the first instance proceedings so as to engage FPR 16.6 (5). I thus allowed the parties the opportunity to file further written submissions on the point.

The Legal Framework

27. Although the participation of children in appeals has been the subject of a number of reported decisions and some fairly recent and detailed guidance by the Supreme Court in Re LC (International Abduction: Child's Objections to Return) [2013] EWCA Civ 1058, [2014 1 FLR 1458 and by the Court of Appeal in Re M (Republic of Ireland) (Child's Objections)(Joinder of Children as Parties to Appeal) [2015] 2 FLR 1074 most of those cases have been in the context of the children either seeking to participate for the first time at appellate level or seeking to appeal against a refusal to join them at first instance. The cases consider the position at Court of Appeal level where the CPR not the FPR apply. The FPR apply to appeals from a circuit judge to the High Court.

28. Part 16 of the Family procedure rules 2010 is titled 'Representation of Children and Reports in Proceedings Involving Children.' FPR 16.1 'application of this part' states

that it sets out when the court will make a child a party in family proceedings and contains special provisions which apply in proceedings involving children. The rule draws a distinction between a child who is the subject of and a party to '*specified proceedings; or to which part 14 applies'* [adoption placement and related proceedings]' and other proceedings. Specified proceedings are defined in section 41(6) Children Act 1989 and include care proceedings and many linked public law proceedings under Part IV of the Children Act 1989. Although section 41(6)(i) and (6A) make provision for private law proceedings seeking a section 8 order to be specified by rules of court no such rules have been promulgated and thus section 8 proceedings do not attract the automatic party status afforded by FPR 12.3 and the automatic appointment of a children's Guardian afforded by FPR 16.3. Pursuant to FPR 16.2 (1) '*the court may make a child a party to proceedings if it considers it is in the best interests of the child to do so.*'

29. If the child is made a party to proceedings pursuant to FPR 16.2 the rules applicable to the child's party status and the appointment of a Children's Guardian are distinct from those which apply if the child becomes a party as a result of the proceedings being '*specified proceedings.'* The regime which applies is contained within FPR 16.4, 16.6, 16.22-28. In addition the duties of a solicitor acting for a child are contained in FPR 16.29. FPR PD 16A contains rules in Part 4 as to the appointment of a Guardian under rule 16.4 which at paragraph 7.7 specifies that the duties of a children's Guardian who is an officer of Cafcass includes the duties set out in part 3 of FPR PD 16 A; one of which is to appoint a solicitor for the child.

30. For the purposes of this preliminary issue it is the provisions of FPR 16.6 which are relevant. That rule provides

16.6 Circumstances in which a child does not need a children's guardian or litigation friend
(1) Subject to paragraph (2), a child may conduct proceedings without a children's guardian or litigation friend where the proceedings are proceedings –
(a) under the 1989 Act;
(b) to which Part 11 (applications under Part 4A of the Family Law Act 1996 or Part 1 of Schedule 2 to the Female Genital Mutilation Act 2003) or Part 14 (applications in adoption, placement and related proceedings) of these rules apply;
(c) relating to the exercise of the court's inherent jurisdiction with respect to children; or
(d) under section 55A of the 1986 Act,
and one of the conditions set out in paragraph (3) is satisfied.
(2) Paragraph (1) does not apply where the child is the subject of and a party to proceedings –
(a) which are specified proceedings; or
(b) to which Part 14 applies.

(3) The conditions referred to in paragraph (1) are that either –
(a) the child has obtained the court's permission; or
(b) a solicitor –
(i) considers that the child is able, having regard to the child's understanding, to give instructions in relation to the proceedings; and

(ii) has accepted instructions from that child to act for that child in the proceedings and, if the proceedings have begun, the solicitor is already acting.

(4) An application for permission under paragraph (3)(a) may be made by the child without notice.

(5) Where a child –
(a) has a litigation friend or children's guardian in proceedings to which this rule applies; and
(b) wishes to conduct the remaining stages of the proceedings without the litigation friend or children's guardian,
the child may apply to the court, on notice to the litigation friend or children's guardian, for permission for that purpose and for the removal of the litigation friend or children's guardian.
(6) The court will grant an application under paragraph (3)(a) or (5) if it considers that the child has sufficient understanding to conduct the proceedings concerned or proposed without a litigation friend or children's guardian.

(7) In exercising its powers under paragraph (6) the court may require the litigation friend or children's guardian to take such part in the proceedings as the court directs.
(8) The court may revoke any permission granted under paragraph (3)(a) where it considers that the child does not have sufficient understanding to participate as a party in the proceedings concerned without a litigation friend or children's guardian.
(9) Where a solicitor is acting for a child in proceedings without a litigation friend or children's guardian by virtue of paragraph (3)(b) and either of the conditions specified in paragraph (3)(b)(i) or (ii) cease to be fulfilled, the solicitor must inform the court immediately.
(10) Where –
(a) the court revokes any permission under paragraph (8); or
(b) either of the conditions specified in paragraph (3)(b)(i) or (ii) is no longer fulfilled,
the court may, if it considers it necessary in order to protect the interests of the child concerned, appoint a person to be that child's litigation friend or children's guardian.

31. Ms Hopkin argues that the appeal lodged by Mr Burrows on the child's behalf constitutes 'the proceedings' referred to in FPR 16.6 (3)(b)(i) and (ii) and that if she considers the child is able having regard to her understanding to give instructions in relation to the appeal and she is already acting then she has *'locus'* to represent the child on the appeal. She referred in submissions to the fact that a different regime for legal aid applies to appeals in comparison to 1st instance proceedings in support of her submission that the appeal was 'the proceedings' and that the appeal was distinct from the proceedings before HHJ Meston QC as indicated by the nature of the forms filed and the costs regimes. If Ms Hopkin were right in this analysis the provisions of FPR 16.6 (5) and (6) would not bite. In those circumstances she submitted that it would be Ms Hopkins opinion alone that would determine whether the child was able to conduct the appeal without a Guardian.

32. In contrast both the father and the Guardian argued that the appeal was a part of the proceedings that had originated in the Central Family Court and thus in order for the

child to pursue the appeal she would need to apply for permission under FPR 16.6(5) to conduct the appeal without a Guardian and for the removal of the Guardian. In order to succeed in that application, the child would have to satisfy me that she had sufficient understanding to conduct the appeal without a Guardian.

33. In addition Mr Jarman submits that Ms Hopkin cannot be '*already acting'* for the child within the meaning of FPR 16.6(3)(b)(ii) because Ms Coyle is and the court has not sanctioned Ms Hopkin acting. This submission is apt to address the position if the appeal is part of a continuum but does not really get to grips with the position if the appeal is new proceedings. If the appeal is new proceedings Ms Hopkin has accepted instructions from the child to act for her and is already in fact acting; albeit her doing so has not been sanctioned by the court and so would appear to meet the test. Ultimately the issue comes back to whether an appeal constitutes new proceedings or another stage of existing proceedings and what role the court plays in each situation in determining whether the child is competent to appear in the proceedings without a Guardian. Mr Jones makes a linked point. He submits if the appeal is fresh proceedings the provisions of FPR 16.2 and PD 16A would require the court to determine whether the child should be a party to the proceedings and that the issue of her representation could not arise unless and until the court had determined if she were to be a party. Thus as Ms Coyle remains acting for the child in accordance with the order of HHJ Meston QC, Mr Jones argues Ms Hopkin cannot be 'already acting' for her within FPR16.6(3)(b)(ii).

34. The rules do not specify how an application pursuant to FPR 16.6 (5) is to be made and thus the provisions of FPR 18.1 (2) (a) would appear to apply although the court can dispense with the requirement for an application notice. FPR PD 5A identifies form C2 as one of the forms that can be used to make a part 18 application. For an application made within an appeal I do not think it would be necessary to file a separate form but rather to complete part 10 of the appellant's notice (FP161). No application was filed with the appellant's notice nor was part 10 of the appellant's notice completed to make such an application but I am prepared for the purposes of this preliminary issue to treat the submissions that have been made as such an application notwithstanding the failure of Mr Burrows to comply with my original order to identify what application they were making. FPR 16.29 (7) also provides a mechanism where a child wishes an appointment of a solicitor to be terminated to apply to the court for such an order, although no such application has been made and nor was such an application advanced either at the directions hearing on 13 February or at the hearing on 26 February 2019. Such an application would leave in place the Guardian whose view is that the child is not competent to give instructions to pursue an appeal.

35. Although the drafting of FPR 16.6 (3)(b)(ii) in particular is not crystal-clear it seems clear that where FPR 16.6 (3)(b) is engaged it is the solicitor not the court which makes the initial decision as to the child's understanding to give instructions and that no application is required to endorse that solicitors conclusion. That seems to be clear from the fact that 16.6 (3)(a) refers to the court's permission being required '**or'** the terms of 16.6 (3)(b) being fulfilled and the fact that FPR 16.6 (6) refers to the court having a role in relation to 16.6 (3)(a) or (5) but not in relation to FPR 16.6 (3)(b). Thus where a solicitor considers the criteria set out in subparagraphs (i) and (ii) of

FPR 16.6(3)(b) are met the child may conduct proceedings without a children's Guardian and the court's endorsement of that is not required.

36. However that does not appear to be the end of the matter. In *Re CT (A Minor) (Wardship: Representation)* [1993] 2 FLR 278, [1994] Fam 49, [1993] 3 WLR 602, CA Court of Appeal (Sir Thomas Bingham MR, Waite and Staughton LLJ) specifically considered the effect of the identically worded predecessor to FPR 16.6 (3) (b)(i) namely FPR 1991 9.2A (1) (b) (i). The Court of Appeal considered that taken together with FPR 1991 9.2A (10) that the court retained the ultimate right to decide whether a child required a Guardian or not. Lord Justice Waite said

'...if the rule is to be construed according to the whole tenor of the Act and its subsidiary legislation, it must in my view be taken to reserve to the court the ultimate right to decide whether a child who comes before it as a party without a next friend or guardian has the necessary ability, having regard to his understanding, to instruct his solicitor'

37. Although Mr Burrows referred to the Re CT decision in his skeleton argument in support of several points he made (and I note that he appeared in the case) the fact that the judgment also addressed the point of who was the ultimate arbiter of the child's understanding in FPR16.6(3)(b) cases was not referred to and was not picked up by anyone else during the course of the hearing. The Court of Appeal noted that the court might raise the question of its own motion.

38. FPR 16.6 (10) is save for minor variations reflecting the changes in numbering and terminology identical in its wording and effect to FPR1991 9.2A(10). That decision of the Court of Appeal, albeit perhaps *obiter* on the facts of the case, and albeit concerning the forerunner to the current rules I consider a powerful guide to the proper interpretation of the current rules. The arguments set out by the then Mr Holman for the Official Solicitor remain as compelling now as they were then. I consider that interpretation is fortified by the interpretive assistance provided by Article 3 of the United Nations Convention on the rights of the child requires that the best interests of a child be a primary consideration in any decision affecting a child: See Rayden and Jackson, Volume 2 'Children' Paragraph 30.58 and the cases cited there. It seems clear to me that it is in the best interests of a child that the court remain the ultimate arbiter of whether the child has understanding or sufficient understanding to act without a Guardian for the reasons identified by Mr Holman in Re CT as to the circumstances in which a solicitor's view might not be reliable. The court may raise the issue of its own motion and make the determination under FPR16.6(10).

39. Thus even if the appeal constitutes separate proceedings it is ultimately for me to decide whether the child has understanding or sufficient understanding to conduct the proceedings without a Guardian.

40. The wording of FPR 16.6(3)(b)(i) refers to a solicitor considering that '*the child is able having regard to the child's understanding to give instructions in relation to the proceedings.'* When applying FPR 16.6 (10)(b) the court would be considering whether that condition remained fulfilled. The wording of FPR 16.6(6) refers to the court *considering that the child has sufficient understanding to conduct the proceedings concerned without a Guardian*. There is on the face of it therefore a difference in what the court is considering; on the one hand 'able having regard to their understanding to give instructions' on the other 'sufficient understanding to conduct the proceedings'. Is there a material difference between the two? In Re S (A

Minor) (Independent Representation) - [1993] 2 FLR 437, the Court of Appeal appeared to consider that there was at least a technical difference because FPR 16.6(3)(b) contemplates a solicitor being instructed whereas 16.6(5) at least contemplates the child conducting the proceedings in person. However the expressions do tend to be used interchangeably. In Re W (representation of child) [2017] 2 FLR 199 the Court of Appeal refer to sufficient understanding interchangeably with understanding. It is also clear from the Court of Appeal's decision in re CT (above) where they refer to '*necessary ability having regard to his understanding*' that there is a parallel with 'sufficiency'. If one considers what lies at the core of the issue it is whether the child has the understanding to deal with the legal proceedings in question having regard to the subject matter of them and the nature of the proceedings. Having regard to what the House of Lords concluded in relation to Gillick competence it seems to me that whether the court is considering the question of able to give instructions having regard to their understanding or has sufficient understanding to conduct proceedings under FPR16.6(3)(b)(i) or (6) or (10) or 16.29(2)(b) or (8)(b) that the core evaluation is whether the child has sufficient understanding and intelligence to be able to give instructions or conduct the proceedings. Whilst I would not rule out the possibility of a case arising where the different formulations might result in a difference in outcome, in most cases the application of an objective assessment by the court whether under 16.6(6) or under 16.6(10) or 16.29(2) is likely to result in the same answer to the question of the child's competence.

41. The difference that ultimately might emerge in this case depending on whether the case falls within 16.6 (3) and (10) or whether it falls within 16.6 (5 and 6) would be whether the solicitor appointed was Ms Hopkin or Ms Coyle. If I conclude she has capacity she could, if the case is a 16.6(3)(i), instruct Ms Hopkin or if it is a 16.6 (5 and 6) one she could either continue with Ms Coyle or apply under 16.29(7) for Ms Coyle's appointment to be terminated and then go on to appoint Ms Hopkin under 16.6(3). If I conclude she does not have sufficient understanding to instruct but the appeal is fresh proceedings I would have to consider appointing a Guardian pursuant to FPR 16.6 (10). The rules are not entirely clear as to the position as between Ms Hopkin and the Guardian in such a situation but if I had concluded the child did not have sufficient understanding to instruct it seems self-evident that Ms Hopkin would have to take instructions from the Guardian. If I conclude she does not have sufficient understanding and the appeal is a continuation of proceedings then the Guardian remains appointed to represent the child and the solicitor would be obliged to accept instructions from the Guardian.

Appeal: Fresh proceedings or Continuing Proceedings

42. So does an appeal constitute a new set of proceedings in which the child and Ms Hopkin can rely on FPR 16.6 (3) (b) or is the appeal a stage of the proceedings which commenced in the court below which thus requires the court to make the decision as to whether the child has sufficient understanding to conduct the proceedings concerned without a Guardian. As a result of my conclusions arising out of the decision in Re CT (above) the distinction is of far less importance than originally it seemed. However having engaged with the issue I shall set out my conclusions.

43. FPR 30 sets out the procedural rules in relation to appeals. Mr Jarman places considerable reliance in his supplementary submissions on the interpretation of the

rules. He also points out that the definition of family proceedings provided by section 8 (3) and section 105 Children Act 1989 incorporates proceedings under part 2 of the Children Act 1989. He points out that no distinction is drawn between first instance and appellate proceedings and thus submits that an appeal is a continuation (or another stage) of family proceedings as defined.

44. The following matters suggest that an appeal is fresh proceedings:

i) The appeal is made in the High Court not in the family court and is allocated a specific number. It is made by an Appellants Notice not a C2 'Application in existing proceedings.'

ii) Legal Aid treats proceedings with a different case number as 'new proceedings' and an appeal after a final order is not covered by the same certificate.

iii) Cost are dealt with separately.

45. The following matters suggest that an appeal is part of a continuum of proceedings:

i) An application for permission to appeal may be made in either the lower court or the appeal court. This suggests the appeal process is linked as between the lower court and the appeal court.

ii) The appeal court has all the powers of the lower court (FPR 30.11)

iii) The appeal court's powers directly affect the order made by the first instance court, including the power to vary any order or judgment, refer any application or issue for determination by the lower court, order a new hearing (FPR30.11 (2) and stay the order of the first instance court. These all suggests a direct jurisdictional connection.

iv) The appeal court's function is identified at FPR 30.12 is reviewing the decision of the lower court unless it considers it to be in the interests of justice to hold a rehearing.

v) The appeal court powers include substituting its own decision or exercising its own discretion fresh rather than remitting the matter to the first instance court; Fallon v Fallon [2010] 1 FLR 910 CA. The court may also admit fresh evidence and may hear oral evidence.

vi) The respondents to the appeal are the other parties to the proceedings in the lower court (see FPR 30.1 (3)) and the appellant's notice must be served on any children's Guardian.

vii) Where a child is a party to the first instance proceedings they are automatically a party to the appeal proceedings the rules do not provide for the court to reconsider their party status or whether they will be represented by a Guardian and who will be appointed as the solicitor.

46. In Re M (BIIa Article 19: Court First Seised) [2018] EWCA Civ 1637 the Court of Appeal considered whether a decision of a Polish court declining jurisdiction which

was subsequently appealed lead to a break in the court being 'seised' of proceedings for the purposes of the rules under EC regulation 2201/2003. Albeit I recognise that the case is obviously distinguishable in the sense that the decision at issue related to jurisdiction itself the logic which underpins the decision that the court continued to be seized of proceedings pending an appeal or application to set aside is of some assistance. If a court continues to be seized of proceedings there is no break in the proceedings.

47. Notwithstanding the points which point towards an appeal being separate proceedings I conclude that the factors pointing in favour of an appeal being a continuation of proceedings are far more compelling. In particular the seamless continuation of party status and the powers of the appeal court all point to an appeal being another stage of proceedings; albeit different in nature. I don't consider that the use of an appellant's notice, rather than a C2, shed much light on the issue. Applications in existing proceedings can also be made by the use of other forms under the part 18 procedure. Seems to me the appellant's notice and the giving of a separate case number are administrative matters rather than affecting the substance of the proceedings. Nor do I consider the rules relating to the availability of legal aid shed much light on whether the proceedings are separate or part of a continuum. The rules applied by the Legal Aid Agency are a matter for that agency.

48. For all of the reasons identified above I conclude that an appeal is a continuation of the first instance proceedings. It is another step or stage in those proceedings and thus the provisions of FPR 16.6 (5) apply.

49. That being so it is for me to decide whether the child has sufficient understanding to conduct the appeal proceedings without a Guardian.

Sufficient Understanding, Understanding, Competence.

50. I now turn then to the meaning of '*sufficient understanding to conduct the proceedings.*' . As I have already noted the terms 'able, having regard to the child's understanding to give instructions' and 'sufficient understanding to conduct the proceedings' are subtly different, albeit as the Court of Appeal concluded in Re S (above) in practice in most cases will involve an application of the same test and will result in the same outcome. The shorthands of 'sufficient understanding' and 'understanding' have been used interchangeably in the jurisprudence and in practice professionals often refer to whether the child is 'competent' to instruct a solicitor without a Guardian or has 'capacity' so to do. All ultimately are referring to the same substantive issue. The sufficient understanding formula also applies for applications by a child for leave to bring an application under section 8 of the children act 1989: see section 10 (8).

51. Although the subject matter of the case was the child's ability to consent to medical treatment the decision of the House of Lords in Gillick v West Norfolk and Wisbech AHA [1985] UKHL 7 [1986] AC 112 remains the cornerstone of our current approach to questions relating to the capacity or competence of a child or young person to take decisions for themselves. Whilst the court retains the ability to, in effect, override a child's 'decision' where it considers that decision is not in the child's best interests that is a quite separate matter to the issue of whether the child is competent. Lord Scarman observed:

[186] The underlying principle of the law was exposed by Blackstone and can be seen to have been acknowledged in the case law. It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.
[188] ... The House must, in my view, be understood as having in that case accepted that, save where statute otherwise provides, ***a minor's capacity to make his or her own decision depends upon the minor having sufficient understanding and intelligence to make the decision*** *and is not to be determined by reference to any judicially fixed age limit…*
[189] ...I would hold that as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child ***achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed****. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law. Until the child achieves the capacity to consent, the parental right to make the decision continues save only in exceptional circumstances."*

The key expression which emerges from those passages but which are reflected in the judgment of Lord Fraser also are 'sufficient understanding and intelligence' to make the decision.

52. In Re S (A Minor) (Independent Representation) - [1993] 2 FLR 437 the Court of Appeal considered the House of Lords judgments in Gillick and specifically with reference to the expressions 'understanding' or 'sufficient understanding' under FPR 9.2A the 1991 rules said

(3) The tests in paras (1)(b)(i) and (6) are framed with reference to the child's understanding, not his age. In the ordinary way it is no doubt true (at least of children) that understanding increases with the passage of time. But the rule eschews any arbitrary line of demarcation based on age, and wisely so. Different children have differing levels of understanding at the same age. And ***understanding is not an absolute. It has to be assessed relatively to the issues in the proceedings.*** *Where any sound judgment on these issues calls for insight and imagination which only maturity and experience can bring, the child to the court and the solicitor will be slow to conclude that the child's understanding is sufficient.*

53. In Re CT (A Minor) (Wardship: Representation) [1993] 2 FLR 278, [1994] Fam 49, [1993] 3 WLR 602, CA Court of Appeal (Sir Thomas Bingham MR, Waite and Staughton LLJ) endorsed the approach of Sir Thomas Bingham MR in Re S (above) and thereafter referred to the child capability and understanding. The Court said:

'I would hope and expect that instances where a challenge is directed to a solicitor's view of his minor client's ability to instruct him will be rare, and that cases where the court felt bound to question such ability of its own motion would be rarer still. If and when such instances do arise, I would expect them to be resolved by a swift, pragmatic inquiry conducted in a manner which involved the minimum delay and the least possible distress to the child concerned. It would be very unsatisfactory if such issues themselves became the subject of detailed medical or other professional investigation. My own experience in this field of the law suggests that judges can be trusted to use their powers under rule 9.2A(10)[1] sensitively, recognising that in

border-line cases the solicitor's view should be entitled to the benefit of the doubt; and that solicitors, for their part, can be expected to appreciate that appraisal of a minor's capability to give instructions may often represent a difficult task in which objectivity and precision are not easily achieved, and to be ready to acknowledge, and even welcome, a second opinion.'

54. In Re N (Contact: Minor Seeking Leave to Defend and Removal of a Guardian) [2003] 1 FLR 652 Coleridge J at 656 quoted from an earlier judgment of The childoth J:

"The most helpful encapsulation of the case-law I find to be that of Booth J in the case of Re H (A Minor) (Guardian ad Litem: Requirement) *[1994] Fam 11, sub nom* Re H (A Minor) (Role of Official Solicitor) *[1993] 2 FLR 552 reading from 13 and 554H respectively. She said this:*

> *'The approach to be taken by a court to an application such as this was fully canvassed by the Court of Appeal in* Re S (A Minor) (Independent Representation) *[1993] 2 FLR 437, in which judgment was delivered on 26 February 1993. The test is clear. The court must be satisfied that H, in this instance, has sufficient understanding to participate as a party in the proceedings without a guardian ad litem.* ***Participating as a party, in my judgment, means much more than instructing a solicitor as to his own views. The child enters the arena amongst other adult parties. He may give evidence and he may be cross-examined. He will hear other parties, including in this case his parents, give evidence and be cross-examined. He must be able to give instructions on many different matters as the case goes through its stages and to make decisions as need arises.*** *Thus a child is exposed and not protected in these procedures. It has yet to be determined how far the court has power, if it has any power, in such circumstances to deny a child access to the hearing.* ***The child also will be bound to abide by the rules which govern other parties, including rules as to confidentiality.****'*

I find that a very succinct and useful statement of the law, relying as it does upon the very clear statement of the law set out by the Master of the Rolls in Re S (A Minor) (Independent Representation) [1993] Fam 263, [1993] 2 FLR 437, relying as he did upon a passage in an unreported case of Thorpe J called Re T (A Minor), 28 January 1993, where Thorpe J, as he then was, said in proceedings launched under r 9(2)A by a 13 year old without a guardian:
'I am bound to say that in an issue of this great complexity and with a child of only 13 years of age, I doubt whether on an application for leave I would have been persuaded that she had sufficient understanding to participate without the aid of a guardian. In a case of this sort, which was referred to the High Court with much complexity and delicacy, I would have certainly regarded the Official Solicitor as the appropriate guardian ad litem.'

I have been referred to a number of other cases. I do not think they take the matter, so far as the law is concerned, any further in relation to this particular issue. ***Each child and each case has to be looked at separately****."*

55. In Mabon v Mabon [2005] EWCA Civ 634 Thorpe LJ made the following observation at paragraphs 28-29:

"The guidance given by this court in Re: S cited above on the construction of rule 9.2A is now twelve years old. Much has happened in that time. Although the United Kingdom had ratified the UN Convention some fifteen months earlier, it did not have much impact initially and it is hardly surprising that it was not mentioned by this court on the 26th February 1993. Although the tandem model has many strengths and virtues, at its heart lies the conflict between advancing the welfare of the child and upholding the child's freedom of expression and participation. Unless we in this jurisdiction are to fall out of step with similar societies as they safeguard Article 12 rights, ***we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare.***

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

*[32] In conclusion, this case provides a timely opportunity to recognise the growing acknowledgement of the autonomy and consequential rights of children, both nationally and internationally. The FPR are sufficiently robustly drawn to accommodate that shift****. In individual cases, trial judges must equally acknowledge that shift when they make a proportionate judgment of the sufficiency of the child's understanding****.*

56. In Re W (A Child) (Care Proceedings: Child's Representation) Practice Note [2016] EWCA Civ 1051, [2017] 1 WLR 1027) the Court of Appeal was considering an appeal in relation to FPR 16.29 (2). In that case the child who had been subject to care proceedings had been separately represented by her solicitor because her position conflicted with the Guardian and her solicitor considered she was able having regard to her understanding to give instructions on her own behalf. In later proceedings a Guardian was appointed who appointed a solicitor. The child wished to instruct her own solicitor directly. There was a dispute between the view of the solicitor instructed by the child and the Guardian and the solicitor appointed by the Guardian as to whether the child was competent to instruct a solicitor directly. The first instance judge concluded that she did not have the capacity to instruct her own solicitor directly. The child appealed to the Court of Appeal against that conclusion.

57. The Court of Appeal considered the meaning of FPR 16.29(2) which provides that:

16.29 Solicitor for child
(1) Subject to paragraphs (2) and (4), a solicitor appointed—
(a) under section 41(3) of the 1989 Act; or
(b) by the children's guardian in accordance with the Practice Direction 16A,
must represent the child in accordance with instructions received from the children's guardian.

(2) If a solicitor appointed as mentioned in paragraph (1) considers, having taken into account the matters referred to in paragraph (3), that the child—
(a) wishes to give instructions which conflict with those of the children's guardian; and
(b) is able, having regard to the child's understanding, to give such instructions on the child's own behalf,
the solicitor must conduct the proceedings in accordance with instructions received from the child.

It will be apparent that the wording of 16.29 (2)(b) is worded almost identically to FPR 16.6(3)(b)(i).

58. Lady Justice Black reviewed recent authorities addressing the understanding required of a child before she is considered able to give instructions from paragraphs 23 to 26. She identified the sea-change in attitudes over the years towards children's participation in proceedings and the autonomy and consequential rights of children and that process continued apace. Drawing the threads of her review together she said:

[27] The question of whether a child is able, having regard to his or her understanding, to instruct a solicitor must be approached having in mind this acknowledgement of the autonomy of children and of the fact that it can at times be in their interests to play some direct part in the litigation about them. ***What is sufficient understanding in any given case will depend upon all the facts.*** *In this particular case, in my judgment, the criticisms made by Ms Giz of Her Honour Judge Williams' approach, taken together, fatally undermine the decision that she took. The careful submissions on behalf of the local authority and the guardian in support of her determination failed to persuade me otherwise.*

[36] *Sometimes there will be a clear answer to the question whether the child is able, having regard to his or her understanding, to give their own instructions to a solicitor. In cases of more difficulty, the court will have to take a down to earth approach to determining the issue, avoiding too sophisticated an examination of the position and recognising that it is unlikely to be desirable (or even possible) to attempt to assemble definitive evidence about the matter at this stage of the proceedings.* ***All will depend upon the individual circumstances of the case and it is impossible to provide a route map to the solution.*** *However, it is worth noting particularly that, given the public funding problems, the judge will have to be sure to take whatever steps are possible to ensure that the child's point of view in relation to separate representation is sufficiently before the court. The judge will expect to be guided by the guardian and by those solicitors who have formed a view as to whether they could accept instructions from the child. Then it will be for the judge to form his or her own view on the material available at that stage in the proceedings, sometimes (but certainly not always) including expert opinion on the question of understanding (see* Re H (A Minor) (Care Proceedings: Child's Wishes) *[1993] 1 FLR 440, at 450).* ***Understanding can be affected by all sorts of things, including the age of the child, his or her intelligence, his or her emotional and/or psychological and/or psychiatric and/or physical state, language ability, influence etc. The child will obviously need to comprehend enough of what the case is about (without being expected to display too sophisticated an understanding) and must have the capacity to give his or her own coherent instructions, without being more than usually inconsistent.*** *If the judge requires an expert report to assist in determining the question of understanding,*

the child should be under no illusions about the importance of keeping the appointment with the expert concerned. It is an opportunity for the child to demonstrate that he or she does have the necessary understanding and there is always a risk that a failure to attend will be taken to show a failure to understand.

59. Lady Justice Black identified particular issues giving rise to difficulties in the evaluation of understanding as including:

i) The risk of placing too much weight in the evaluation of the child's understanding of allegations of influence or manipulation of the child by a parent,

ii) The fact that a child's views may be considered to be misguided does not necessarily mean the child does not have sufficient understanding to instruct a solicitor.

iii) The danger of the court becoming too embroiled in consideration of i) and ii) above such that it pre-judges what may be central issues in the substantive application.

iv) The need to balance the harm that might be caused by direct participation with the harm that might be caused by refusal of direct participation.

60. I was also referred to the decision of Mr Justice Peter Jackson (as he then was) in *S v S (Relocation)* [2017] EWHC 2345 (Fam), [2018] 1 FLR 825. The situation in which children are taken secretly by one parent (or grandparent) to see a solicitor either in advance of or in the course of an application or following an unsuccessful outcome is a matter which can cause profound concern. As HHJ Meston QC identified and as is emphasised by Ms Hopkin and Mr Burrows a competent child who wishes to instruct a solicitor has the same right to do so as any other individual. Orders directed at the child herself or a solicitor she wishes to instruct which have the effect of inhibiting or preventing that right raise very serious issues which do not call for determination in this case. Orders directed at the parents in the form of prohibited steps orders or specific issue orders and which are designed to inhibit or prevent them from assisting or encouraging a child to obtain legal advice are a different matter. In the course of the hearings on both 13 February 2019 and 26 February 2019 it was suggested that the order made by HHJ Meston QC on 6 November 2018 prohibited the child from seeing Ms Hopkin or Mr Burrows. Neither paragraph 11 nor paragraph 12 of the order had that effect and as is clear from paragraph 114 of HHJ Meston QC's judgment they were not intended to do so. As I have referred to above Ms Hopkin appeared pro bono because she was concerned at the potential conflict or appearance thereof that being funded by the mother might create. Again it is not an issue that I need to determine in this judgment but I acknowledge that there is some debate about the issue of one parent (perhaps with their own agenda) funding the obtaining of legal advice by a child who they believe is aligned with their position. The significance of the S-v-S decision lies in the further recognition of the importance of the autonomy of the child.

61. Interestingly neither Ms Hopkin or Ms Coyle were able to identify any guidance from either the Law Society or from Resolution which addressed how a solicitor approached by a child was to assess competence. Although both agreed that training

was given on the issue to solicitors joining the Children Panel neither were able to refer me to anything which shed more light on the issue.

62. I raised the question of whether the approach to capacity in the Mental Capacity Act 2005 which of course deals with capacity in adults was of any assistance. Given that lack of capacity for adults is linked to an inability to make decision in relation to a matter because of an impairment of or a disturbance in the functioning of the mind or brain it is hardly of direct relevance. However it is of note that in section 3 MCA 2005 factors such as inability to understand the information relevant to a decision, inability to retain that information, inability to use or weigh that information as part of the process of making the decision, or inability to communicate a decision are the components which determine whether an adult has capacity. I note also that unwise decisions do not denote of themselves an inability to make a decision. Some of those factors are plainly identified by the family courts, as being relevant to the evaluation of understanding.

63. Having regard to the jurisprudence I consider that Lady Justice Black's summary in paragraph 36 of her judgment in Re W (highlighted above) draws together much if not all of the earlier observations on the issue. What is clear is that there has been a shift away from a paternalistic approach in favour of an approach which gives significantly more weight to the autonomy of the child in the evaluation of whether they have sufficient understanding. Thus the earlier authorities need to be approached with a degree of caution in terms of the level at which they set the 'bar' of understanding. The autonomy issue sounds both in pure 'understanding' terms and in welfare terms.

    i) In assessing understanding the court is likely to attribute more weight to the child's views of the issues and the reasons they give for wishing to be involved amongst others. The expression of a wish for an objectively 'unwise' (or unsound) outcome might now not undermine the evaluation of sufficient understanding in the way it might have in 1993. It is perhaps also likely to hold the child to a somewhat lower expectation of understanding of the litigation process than emerges from Booth J's judgment cited in Re N (above) which appeared to contemplate an ability to negotiate complexities of litigation which many adults might struggle with.

    ii) In so far as the welfare of the child is a primary consideration in the decision-making process (Art 3 UNCRC and *Mabon* suggest it is) the welfare of the child sounds both in favour of their involvement (recognising the value they may add to the process and their rights as a person significantly affected by the decision) and against (where involvement may expose them to harmful emotional consequences).

64. Thus in determining whether the child has sufficient understanding to give instructions to pursue an appeal and to conduct the appeal I need to consider a range of factors including

    i) The level of intelligence of the child

    ii) The emotional maturity of the child.

iii) Factors which might undermine their understanding such as issues arising from their emotional, psychological, psychiatric or emotional state.

iv) Their reasons for wishing to instruct a solicitor directly or to act without a guardian and the strength of feeling accompanying the wish to play a direct role.

v) Their understanding of the issues in the case and their desired outcome any matter which sheds light on the extent to which those are authentically their own or are mere parroting of one parents position. Some degree of influence is a natural component of decision making but the closer to the 'parrotting' end of the spectrum one gets the lower the level of understanding there is likely to be. An unwise decision does not mean the child does not understand although it will no doubt depend on the extent to which the child's view diverges from an objectively reasonable or wise decision.

vi) Their understanding of the process of litigation including the function of their lawyer, the role of the judge, the role they might play and the law that is applied and some of the consequences of involvement in litigation. Care should be taken not to impose too high a level of understanding in this regard; many adults with capacity would not and we should not expect it from children. An ability to understand that their solicitor put their case but also has duties of honesty to the court, an ability to understand that the judge makes a decision based on an overall evaluation of the best interests of the child which balances many competing factors; the ability to understand that they might attend court, could give and evidence, could read documents; the ability to recognise the stress of exposure to the court process and the arguments between others. The presence of all of these would be powerful signs of a high level of understanding. Conversely the absence of them or evidence of a distorted understanding would be contra-indicators.

vii) The court's assessment of the risk of harm to the child of direct participation for the risk of harm arising from excluding the child from direct participation and the child's appreciation of the risks of harm.

65. Ideally the assessment would be swift and pragmatic without too deep a dive into the issues in the case and the competing analyses of the solicitors involved. In some cases, an expert assessment might be required in particular where the solicitors assessments are relatively evenly balanced or the court is otherwise unable to reach a clear view. No party suggested an expert was required in this case.

The evidence of this child's sufficiency of understanding

66. Ms Hopkin's statement and the other documents put before me show that on the 11 May 2018 the child attended Ms Hopkin's office. On 14 May 2018 Ms Hopkin wrote to HHJ Meston QC stating that she considered the child to be intelligent, articulate and competent. She confirmed that the child's view was that while she wished to continue to see her father she missed the more regular relationship with her mother and would be asking the court to reverse the arrangements so that she lived with her mother during the week and went to her father every other weekend, for one day in the week as well as the sum of the school holidays. She expressed the view on the

child's behalf that she ought to have direct representation so that she would feel heard and properly represented.

67. In her position statement put before HHJ Meston QC in July 2018 Ms Hopkin said the child had a very good understanding of the issues in the case and clearly wished to put her views forward to the court. At that stage Ms Hopkin did not have any of the papers from the previous proceedings or I think the mother's application for a variation of the live with order. In her position statement Ms Hopkin make clear that she assessed the child as being competent.

68. In her statement of 20 February 2019 Ms Hopkin provided a precis of her involvement with the child and her assessment of competence. She said she had not descended into a detailed account of all that she had discussed with the child; she considered that this was unnecessary and potentially a breach of client confidence or privilege. She made the following points which are relevant:

a) She is solicitor of 30 years' experience and is an assessor for the Law Society children's panel and has contributed to the law society guide for solicitors representing children in court proceedings.

b) She has represented numerous children both through guardians and instructed directly by the children themselves.

c) Over the years she has made countless decisions as to whether a child is competent to instruct a solicitor directly or not. She approaches the assessment of each child as an individual and applies common-sense to looking at how well they understand the issues and whether they are able to properly instruct her in putting their case to the court in a meaningful way.

d) She acknowledges that in such assessments she may profoundly disagree with the argument they wish her to put to the court and she is aware of the issue of not over involving children in family disputes but giving them the right to be involved if they are capable of understanding and wish to be involved.

e) Her summary of the meeting on the 11 May 2018 is as follows:

'...at that meeting I found that [the child] was an intelligent and thoughtful child and she set out her views, wishes and feelings clearly and articulately. When I questioned her about her views and made points about what the court was interested in ascertaining in such proceedings, she clearly responded to my interventions and understood the significance of what I was saying by the content of her answers.'

f) She was provided with letters that the child had written to her grandparents and to her father setting out her unhappiness with the arrangements and in the letters to her grandparents asking to see a solicitor. Ms Hopkin thought the letters showed a thoughtful and intelligent approach to a complex matter of how her time should be spent between her parents.

g) The child said she had had a solicitor during previous proceedings but had not met her. Ms Hopkin expressed the view in her statement that there did not appear to be any reason on the face of the information she had to justify her solicitor not visiting her. After the July hearing Ms Hopkin reassured the child that an appeal was unnecessary as she had a solicitor who was coming to see her and was duty-bound to put her case to the court and would if that case departed from that being presented by the Guardian represent her separately from the Guardian.

h) She observes that she does not consider it proper for Ms Coyle to overturn Ms Hopkins assessment of the child's competence without an expert report.

i) The child has subsequently spoken to her on the telephone and she regards her as still competent to instruct her directly.

69. In her submissions Ms Hopkin emphasised that the child's position was that she wished to amend the time she spent with her father and mother. She described the position as a relatively straightforward position for a child to adopt. She did not consider the emotions that were engaged or demonstrated by the child were out of the ordinary or were relevant terms of assessing her understanding. She said she did not consider that the child was merely parroting her mother's position but she was able to explain why she wished to reverse the arrangements. Nor did she think that the child trivialised issues which would have been a contra indicator to sufficient understanding. She accepted that the child did not understand the reasons why the court had made the decision that she should live with her father which initially caused me some concern. However on further exploration it emerged that the reasons were to be explained to the child in therapy and as a result of the mother's refusal to engage in the therapeutic process that explanation had not yet been given to the child. She said from her discussions she had assessed whether the child could understand an argument and understood what would happen in a court room and she had concluded she could. She emphasised that her understanding from the communications she had had with the child and those Mr Burrows had had with the child were that it was her clear desire to appeal the order. Although she had not spoken directly with the child since July 2018 she saw nothing that gave her any reason to alter her assessment of the child's sufficiency of understanding.

70. Ms Hopkin acknowledged that she had not seen all the papers. Indeed it emerged in submissions that she had not got a copy of the judgment of HHJ Meston QC against which the appeal has been lodged; although in her statement she says she has read it. This had been provided to Mr Burrows but appeared not to have made its way onward to Ms Hopkin. She acknowledged that her initial evaluation of the child's competence was something which might have to be re-evaluated in the light of other evidence. She said that she had not found the decision on the child's sufficiency of understanding to be difficult in this case.

71. Ms Coyle provided a statement. This went into a significant level of detail in her analysis of why she had reached the conclusion that the child was not competent. The level of detail is not surprising given her longer involvement with the child. Some of the salient points are as follows:

i) She sets out her experience which is plainly of shorter duration than that of Ms Hopkin. She has been a member of the children panel since 2012 and has regularly represented children through guardians and directly instructing including in a number of reported cases.

ii) She has acted as the child's solicitor since October 2015. Prior to 30 January 2019 the child had not said to her that she wanted a new solicitor. On that day her email coincided with emails sent by Mr Burrows to Ms Coyle's firm and by the mother to HHJ Meston QC and his response.

iii) In December 2017 the maternal grandparents had also sought to engage a solicitor for the child which the father had cancelled upon advice from the Anna Freud centre, who were working with the family.

iv) She notes that in July 2018 Ms Hopkin did not advance an application for the child to instruct her directly but rather sought her appointment as the solicitor for the child alongside a Guardian.

v) She met the child on 16 October 2018 on her own specifically to assess her competency. She also saw her on 30 October 2018 when the child met the judge and in December.

vi) Ms Coyle characterised her task as being assessing the child's ability to understand the proceedings, to be able to provide her with instructions in respect of decisions which impact upon her and to understand the process of what instructing a solicitor in tales.

vii) She identified the following factors which fed into her assessment:

a) She is academically able for her age. She is a warm and engaging child who is polite, friendly and chatty.

b) The matter is extremely emotional for her

c) Whilst she gave instructions on the headline issue of who she wanted to live with she was unable to provide instructions on any other matter or to consider other scenarios whereby she could spend more time with her mother.

d) She did not appear to fully understand the role of a solicitor appearing to believe that simply telling a solicitor what she wishes to happen means that it will happen. She appeared to have endowed '*having a solicitor'* with a disproportionate importance despite having had the functions explained to her.

e) She did not appear to understand how an adversarial court process works. While she understood that it is a judge who makes the final decision she was not satisfied that she understood how a judge reaches that decision, the sort of information he considers and that he is entitled to disagree with her views.

f) She struggles to make an informed choice about her wishes; struggling to separate what her mother wants to happen with her own enjoyment of her current circumstances and close relationship she has with her father. This conflict is evident from expert reports (including that of Dr Berelowitz), school reports and observations of both Ms Coyle and the Guardian. She has very simplistic views. She does not understand the reasons for the previous court decisions.

g) She is very emotionally aligned to her mother which is a view accepted by professionals and experts. She appears to carry a great responsibility on her 12-year-old shoulders for the mother's failed applications. She was relieved when the mother indicated in July 2018 that the mother was withdrawing her application to change the living arrangements. This indicates her expressed wishes and her apparent desire to change the arrangements through court action were not necessarily her own. Some of the letters Ms Coyle has received from the child do not appear to be written in her own words but echo emails sent by the mother.

h) The child does not actively pursue communications with Ms Coyle in contrast to other children who Ms Coyle has acted for. Indeed she does not volunteer to discuss the court case when they meet. She is usually reluctant to discuss it with either the Guardian or Ms Coyle.

i) Given the history there are welfare implications of the child accessing information in the proceedings. She is supposed to be having therapy.

j) After HHJ Meston QC gave his decision and circulated his judgment the child did not mention appealing the decision. When asked about the letter she wrote to the President of the Family Division she became visibly uneasy and could not explain why or when it had been written. Although she indicated that she would like to still have a solicitor this was not in connection with any appeal and she was not able to explain why she still wanted one. She appeared to understand the Guardian's explanation for the judge's decision that her mother was not yet ready and needed more therapy. At no stage did the child indicate unhappiness with the Guardian, Ms Coyle or the position that had been put before the court. She was able to speak to the judge.

viii) As a result of her own assessment of the child's lack of competence and the Guardian's conclusion that the child should be able to live with her mother if her mother demonstrated sufficient change no question of separate representation by Ms Coyle arose.

ix) She points out that she did not see the child during the previous proceedings. Refuting Ms Hopkin's suggestion that this represented some failure to comply with her professional duties she pointed out that it was a carefully considered decision reached by herself and the Guardian having regard to the number of professionals that the child had seen.

x) In determining whether to allow Ms Hopkin to represent the child the court should bear in mind that she has been funded by the maternal grandparents and Mr Burrows has apparently acted for the mother in some capacity.

xi) The Guardian agrees with Ms Coyle's assessment of the child's capacity.

xii) The Guardian also believes that the child continues to require a Guardian to act as a protective buffer in the case. The mother has filed further applications which will require consideration of the appointment of a Guardian.

72. The Guardian's own analysis of the child is that she is intelligent, sociable and is making good academic progress at her school. She was not proactive in pressing her wish to live with her mother. Emails from the child to her solicitor about the case mostly were written when she was with her mother. She interacts easily with adults and professionals. She appeared clear in her desire to live with her mother. She blamed her father for not being able to live with her mother saying 'he is the cause of this' and despite having had explanations and having gone through therapy and having experienced a positive relationship with her father she still is negative about her father in a way which the mother is also. The Guardian noted that the child had said she would not mind if her mother withdrew her application. She also expressed concerns about her being taken to a solicitor and the additional pressure this places on her. Although the Guardian did recommend that the child should live with her mother if the mother could demonstrate that she would be able to give the child an overall positive view of her father, the tenor of the report overall is that the mother's approach had changed little. Thus the probability of her demonstrating such change was limited.

73. I have seen some of the communications from the child to Ms Coyle, her father, HHJ Meston QC, and to the President of the Family Division. They present a mixed picture; sometimes expressed in mature or adult language, more often somewhat immature. She says Ms Hopkin has given her permission to appeal. She expresses some fairly extreme feelings about her father describing him as abusive, him being the cause of her suffering and cruel. She speaks of him wanting to ruin her life. It does not paint a picture of an individual with anything like a mature, reasoned or emotionally insightful approach to her position or how to resolve it.

74. In the course of submissions on the Guardian's behalf Mr Jones emphasised that both the Guardian and Ms Coyle after careful and detailed consideration had concluded the child was not competent. They were particularly concerned that the child felt under pressure and considered that she would not be aggrieved were the court to find against this application or against the appeal. The Guardian considered that she would simply get on with her life which in reality she was content with and doing well in.

75. In his judgment HHJ Meston QC identifies from the judgment of HHJ Pearl that '*the child's wishes are so enmeshed with those of her mother that they are, in effect not independent of her mother. As a child of only 10 years of age, [the child] even though she has maturity and intelligence is too young to see the bigger picture*.' From what he saw of the child and from her letters HHJ Meston QC considered she was a little young for her age albeit articulate and clear in what she wanted to say. He found it difficult to understand her reluctance to accept the proposition that her father loved her. He considered that she understood the choice that had to be made but:

"*...however, she does not fully understand the reasons why she has come to live with the father nor what the court wanted her mother to undertake and achieve before resuming care of [the child] and she does not understand the risks that remain. Her feelings about her father as expressed in her letters to the court and the father are quite simply not a reflection of her real experience of her current life with him."*

76. He considered that she appeared to understand and accept the possibility that she remain living with her father notwithstanding that he identified that she had a sense of not being listened to [#101 (e)].

Discussion

77. Each case must be approached on its own facts. The stage at which I am assessing the issue of sufficiency of understanding comes relatively late in these proceedings where an experienced family court circuit judge has already determined the substantive issue and made findings which are relevant to my evaluation of the sufficiency of the child's understanding.

78. The views of Ms Hopkin on the one side and Ms Coyle on the other are diametrically opposed. There is however an immediate and obvious difference between them. That is not the age and experience of the solicitor conducting the evaluation but rather the extent to which the evaluation is an informed evaluation. Ms Hopkin's evaluation is based primarily on her meeting with the child supported by what she can glean from communications that she has had with the child or which she has been sent by the child and some other modest exposure to information. Although her evaluation has not taken place in a vacuum it is very much in a low pressure vessel in terms of the material that has been available to her to assist in the evaluation. Ms Coyle's evaluation has been taken with exposure to the full atmosphere of information which bears upon the issue. As Ms Hopkin accepted in submissions, an initial evaluation of a child may very well have to be reassessed the light of further information that becomes available. This is far from a simple case given the history of it. Thus initial impressions almost certainly would have to be reassessed.

79. Turning thus to some of the factors which I need to weigh in the balance in making my own evaluation of whether this child is of sufficient understanding to conduct the appeal without a children's Guardian my conclusions are set out below and draw upon all that I have set out in this judgment as well as what I have read and heard.

    i) *The level of intelligence of the child*: she has the intelligence of or slightly above her chronological age.

    ii) *The emotional maturity of the child*: she lacks emotional maturity, this being evidence by an inability in particular to hold a balanced view of her father or an understanding of her position.

    iii) *Factors which might undermine their understanding such as issues arising from their emotional, psychological, psychiatric or emotional state*: the extent of her enmeshment with her mother and the emotional harm that she had suffered from that is likely to diminish her ability to understand the true nature of the issues.

iv) *Their reasons for wishing to instruct a solicitor directly or to act without a guardian and the strength of feeling accompanying the wish to play a direct role*: I accept that the child has felt her voice has not been listened to or heard but that actually does not reflect the reality given that she has had a Guardian and solicitor both in the original proceedings and recently. Whilst inevitably her reasons for wanting to have a solicitor and appeal will be mixed, arising at least in part from the fact that her solicitor and Guardian did not achieve the outcome she desired I consider that it is also likely that her position has been influenced by her mother and maternal family either directly or indirectly. Although every child is of course different the fact that this child has not been in direct contact with Mr Burrows or Ms Hopkin pushing for information, seeking answers or otherwise proactively pressing her case indicates to me that her desire to have her own solicitor in Ms Hopkin and to pursue the appeal is not particularly strong. Her acceptance of the possible withdrawal of proceedings in summer 2018 is further evidence of this.

v) *Their understanding of the issues in the case and their desired outcome any matter which sheds light on the extent to which those are authentically their own or are mere parroting of one parents position*: the child's lack of a full appreciation of the reasons for living with her father in part at least arises from the fact that the issue has not been addressed in therapy although I note that the Guardian understood that the child had knowledge of the reasons but had not processed it. The child's wish to live with her mother was accepted by the Guardian and HHJ Meston QC as a genuine one. Inevitably it is in part a product of influence (whether direct or indirect and see HHJ Pearl's conclusion) but all our views are in part a product of influence of others views. The child's wishes in this case are closer to the authentic end of the spectrum than the parroting end although they probably fall closer to the middle.

vi) *Their understanding of the process of litigation including the function of their lawyer, the role of the judge, the role they might play and the law that is applied and some of the consequences of involvement in litigation*: Ms Coyle's analysis but also the contents of some of the child's expressed views whether in letters or to the Guardian do not indicate much of an understanding of the court process, the functions of a solicitor, the role and function of a judge or the consequences of having a solicitor acting directly. They emerge as very simplistic and unrealistic. Although neither Ms Hopkin or Ms Coyle specifically addressed the question of the child's understanding of the appeal process, the nature of an appeal is in many ways harder to understand than the first instance process given it is a review of the judge's decision rather than a rehearing of the application.

vii) *The court's assessment of the risk of harm to the child of direct participation for the risk of harm arising from excluding the child from direct participation and the child's appreciation of the risks of harm*: both the Guardian and HHJ Meston QC considered that the child would accept an outcome that was contrary to her expressed wishes. It is clear from the Guardian's report that continued litigation is contrary to the child's welfare. In particular the burden that it is considered that she carries to promote the mother's position is harmful. Further involvement in litigation in this appeal or otherwise will

likely be contrary to her welfare interests. Exposure to sensitive information to a child of this age and with this history will be harmful. Although her actual involvement in this appeal might be limited the process of challenging the judgment would inevitably involve detailed discussions with the child about the evidence. On the other hand, she has expressed a desire to have Ms Hopkin act for her and to appeal. This has endured since HHJ Meston QC's adverse judgment. However it is not pressed proactively and the Guardian and Ms Coyle did not detect any real desire to appeal in any event. Thus preventing the child from engaging directly in this litigation with the effect that it would very probably bring the appeal to a juddering halt is not likely in my view to be perceived by the child as a significant insult to her autonomy as an individual.

80. Giving all due weight to the child's personal autonomy and having regard to the welfare implications of her not being able to instruct a solicitor to pursue her appeal overall and taking account of all of those matters which weigh in favour of the conclusion that she does have sufficiency of understanding I am quite clear that the factors which support the conclusion that the child does not have sufficient understanding substantially outweigh those pointing the other way. Inevitably the evaluation is more an art than a science and the weight to be given to each component cannot be arithmetically totted up. The overall impression that clearly emerges is one of a child who does not have sufficient understanding to conduct the appeal without a children's Guardian. That is not to say that Ms Hopkin's initial evaluation was wrong; it has to be looked at in the light of the totality of the material available. The test in FPR 16.6 (6) is not met. My conclusion would be the same as if I were considering the test under 16.6 (3) as to whether the child is able having regard to her understanding to give instructions in relation to the appeal.

81. The judgment of HHJ Meston QC is a long and detailed one. The decision ultimately revolves around his assessment that the mother has demonstrated insufficient change to tilt the welfare balance in favour of a change in the living arrangements. The grounds of appeal against HHJ Meston QC's decision assert:

i) The judge sought to override the rights of the child to her own confidentiality and alongside that to her entitlement to a fair trial

ii) The judge failed properly to ensure the child's views were heard by the court and represented in his decision-making

iii) Procedurally it was not open for the judge to refuse leave to the child to make her own children act 1989 section 8 application.

iv) The judge failed to make any attempt properly, or fairly to the child to assess her understanding in the legal contexts in which the term arises

v) Domestic abuse: the judge failed to take any account of the child's allegations to him of domestic abuse as required by law

Whilst I have not been considering the application for permission to appeal I would observe that none of those grounds immediately strike me as having a realistic prospect of success. I accept of course that they might improve in elaboration but there is nothing obviously wrong with the decision reached by HHJ Meston QC;

indeed reading it as a whole it appears to right. Thus in terms of cross checking any decision I make as to the sufficiency of the child's understanding and the consequent impact that may have on the appeal I am reassured that the termination of the appeal through an adverse decision on the sufficiency of the child's understanding may only be bringing forward the termination of the appeal.

Conclusion

82. The effect of my decision is that the child cannot pursue this appeal without a children's Guardian. The Guardian remains appointed for the child. Given my conclusions, Ms Coyle is not obliged to conduct the proceedings in accordance with instructions received from the child (FPR 16.29(2)) but rather in accordance with instructions received from the Guardian (FPR 16.291)). Although I have not heard submissions from the parties on the precise impact it appears to me that means either that the Guardian would seek permission to withdraw the appeal or that the appeal would be struck out. If the parties are unable to agree the form of order arising from this judgment the parties may lodge their competing versions and I will determine the issue on paper. Mr Jarman intimated a costs application might be made were I to determine the preliminary issue in this way. If that is pursued he will need, as I trailed during the hearing, to consider against whom such an order would be sought and the basis for it and to make any necessary applications. I would hope that further hearings could be avoided but if necessary we will re-convene to finalise matters.