Neutral Citation Number: [2019] EWCA Civ 548

Case No: B4/2019/0241

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT NORTHAMPTON
HHJ Handley
NN139P00318

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 April 2019

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE COULSON

- -

Between :

G (Children: Intractable Dispute)

- -

Siân Smith (instructed by **Advocate** *pro bono*) for the **Appellant Father**
Cleo Perry and **Andrew Powell** (instructed by **Fullers Family Law**) for the **Respondent Mother**
Hannah Gomersall (instructed by **National Youth Advocacy Service**) for the **Respondent Children by their Guardian**

Hearing date: 21 March 2019

- -

Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. This appeal concerns two children, Gina (11) and Frances (8), as I will call them. They live with their mother, who separated from their father six years ago. Since then, they have seen very little of him, Gina's last contact being in 2014 and Frances's in 2016. For this state of affairs the father blames the mother and the court system. HHJ Handley, sitting in the Family Court at Northampton on 2 July 2018, did not agree. At the end of proceedings that had been running continuously since the parents' separation, he refused the father's application for orders that the children should live with him or have contact with him and prevented him from bringing further applications without permission for three years. He found that the father himself had become the leading author of what is on any view a great misfortune for these children and their parents. The father now appeals.

The background

2. The parents, now in their 40s, lived together for some years but separated in May 2013, when the mother left the family home with the children and went to her parents' home. Until then the children, aged just 5 and 2, had enjoyed a good relationship with their father. The mother had been prescribed anti-depressants from the time of Gina's birth, and she remains on a high dose.

3. In the month of the separation the mother applied for injunctions and for a residence order. She made allegations of domestic abuse against the father, consisting of sexually inappropriate conduct, controlling behaviour, verbal abuse, shouting and swearing at her in front of the children, throwing food at her, kicking the dog and shouting and swearing at the oldest child. The father made partial admissions but said other allegations were exaggerated. He nonetheless did not oppose a non-molestation order and agreed to move out of the home.

4. Since that time there has been uninterrupted litigation about the children and other matters, so much so that the papers before the Judge filled thirteen files. For the purpose of this appeal it is only necessary to chart the main features of the sad history. I shall do so in three stages: May 2013 to July 2015; July 2015 to April 2017; April 2017 to date.

(1) May 2013 to July 2015

5. By the end of May 2013, the father had seen each child once, but the mother was only willing to agree to further contact through the court proceedings. A section 7 report was prepared by the local authority. In November 2013, the court ordered weekly indirect contact for three months with weekly Skype contact to follow, and it set up a fact-finding hearing. Between January and May 2014, work was undertaken with Gina by the school nurse in which Gina was expressing her wish to see her father and saying that her mother was stopping it. Face-to-face contact then took place in March and

April 2014 in a local park with the mother nearby, but by June 2014, Gina was saying that she no longer wished to see her father. She has not done so since, except on occasions when he has attended her school against her wishes.

6. Meantime, in February 2014, the father himself applied for an order that the children live with him. Marking the exceptional difficulty of the situation, the children were made parties in March 2014.

7. In August 2014, a fact-finding hearing took place before HHJ Waine. He heard from both parents and formed a favourable view of the mother and an adverse view of the father. He also relied on two section 7 reports which had by then been undertaken and found that they contained relevant matters. He made adverse findings about the father and rejected his claim that the reporter had been in collusion with the mother. He made an order for supervised contact and directed an assessment of Gina, to be conducted by Dr Jo Stevenson, a clinical psychologist. Her report, produced in November 2014, recommended further assessment of the family.

8. The father then pursued two complaints against the author of the section 7 reports, which were upheld by the local authority after an independent review which found amongst other things that the reporter was biased, knowingly included untrue information, and accepted the truth of the mother's allegations before the fact-finding process had taken place. An injustice had been caused to the father for which financial compensation should be considered.

9. Supervised contact with Frances took place twice and with Gina once at the end of 2014 but failed on other occasions before funding ran out.

10. The father's appeal was heard by this court, but not until 29 July 2015. The appeal was allowed: *P-G (Children)* [2015] EWCA Civ 1025. Giving the main judgment, Ryder LJ said that the judge's reliance on the discredited section 7 reports created "a strong prima facie perception of unfairness". The findings were set aside and the court noted that even if the allegations had been upheld, they might well not have operated as a bar to contact. The matter was remitted to a different judge with the observation that a separate fact-finding process was unlikely to be necessary.

11. So the success of the father's appeal led to the setting aside of the findings of fact and the discouragement of a split hearing in a case of this kind. I do not believe that this court discouraged the making of any findings of fact at all about the mother's unresolved allegations, still less was it ruling on their truth or suggesting that they could lightly be dismissed; rather it was doubting whether any findings that might be made about them could be conclusive.

(2) July 2015 to April 2017

12. Following the appeal, the case was allocated to HHJ Handley, who has since then provided complete judicial continuity. He immediately made a number of case management and interim contact orders. However, the father refused to attend supervised contact on the basis that it was unnatural and he did not wish to expose himself to another professional who might "stab him in the back". This stance continued even when the Guardian told him that Frances wanted to see him. Eventually

some supervised contact with her took place (see below). Meanwhile, Skype contact which had been ordered in February 2016 took place for eight weeks only, but the underlying order was not discharged until the end of the following year.

13. After the appeal hearing, the father applied successfully for the replacement of the Cafcass Guardian. Then in November 2015 he applied for the discharge of the replacement Guardian, and this was granted on the basis that a position statement filed on her behalf had referred to a meeting with the father that had not taken place. There was by now a complete breakdown in the relationship between the father and Cafcass. A caseworker from NYAS was appointed to be Children's Guardian.

14. In February 2016, a section 37 report was ordered from the local authority following continued allegations by the father that the children were at risk of emotional harm in the mother's care. However, the father himself refused to engage with the local authority due to their previous involvement. The report concluded that the mother was committed to contact and criticised the father for not recognising the emotional harm to the children caused by his ignoring their wishes and feelings.

15. Also in February 2016, the father appealed from the Judge's refusal to recuse himself and for NYAS to be discharged. Permission to appeal was refused by Cobb J in June 2016.

16. In June 2016, the father attended the children's sports day. Gina was upset, but Frances enjoyed seeing her father. He then agreed to attend supervised contact and one successful occasion took place in August. This was followed by two unsuccessful occasions in September 2016, when Frances became very distressed. She has not had contact with her father since.

17. At the end of 2017, a refreshed criminal records search (which the father had opposed) showed that he had been convicted of harassment of another woman in the summer of 2015 and had been made the subject of a restraining order; that in May 2016 he had been fined for a breach of that order; that in October 2016 he was conditionally discharged for another breach; and that he had appealed that conviction and his sentence was increased to a three-month community order and an indefinite restraining order.

18. Judge Handley conducted a 'final' hearing in the family proceedings on 3-6 January and 23 February 2017, with judgment given on 24 April 2017. The main applications before the court were the original cross-applications from 2013 and 2014, and the father's application for a further psychological assessment by Dr Stevenson. That application was opposed by the Guardian, who supported the mother's application for a final order on the basis that the proceedings had been protracted and the children had suffered as a result.

19. The Judge preferred the father's case. In a reserved judgment, he reminded himself that the children have a right to a full relationship with both parents and any restriction on that requires good welfare-based reasons and the exhaustion of all other options. He also considered that the effect of the Court of Appeal decision was that the events complained of by the mother "did not happen and they do not form part of this case." He was critical of the Guardian for inaction in late 2016 when direct contact had broken down.

20. The Judge made these findings:

(1) Prior to the parties' separation the father enjoyed a good relationship with his daughters.

(2) The author of the section 37 report had accepted the mother's assurances at face value and his observations did not explain why as recently as September 2016 Frances had moved from a very successful contact to failed contact in very distressing circumstances.

(3) "If mother's evidence was considered in isolation she could easily be seen as a child focused individual who was supportive of contact and doing her best to promote contact in the difficult circumstances of this case with two children who are resistant to contact and with a father who brings his own complications and difficulties."

(4) "As I address the mother's evidence in the wider context of this case I am driven to ask myself why contact failed so quickly and why, with appropriate support and encouragement, contact including skype contact has failed over the last 4 years…"

(5) "Having considered mother's evidence and recognising that her own anxieties and concerns will have been transferred to the girls I find that she has allowed herself to be led by the girls rather than actively encouraging and promoting contact… She has concerns and anxieties about the prospect of the girls having a relationship with their father… She has allowed a situation to develop and continue which resulted in the failure of contact almost from the moment of separation… Her own anxieties and concerns have had a negative influence on the girls whether intentionally or otherwise… She allows herself to be led by the girls… She is not promoting and encouraging contact with the required drive or determination… She is too easily accepting of the girls' expressed reservations about contact… and… is not giving them the emotional permission to have that relationship."

(6) "I find that the father is an honest and reliable witness. I prefer his factual evidence when in conflict with the mother."

(7) "I accept that the children will have been affected by these proceedings and recognise the possible emotional harm if the case is allowed to continue but also remind myself that I must have regard to the longer term and not allow too much emphasis on any possible short term distress when the potential outcome could be no direct contact."

(8) "I share the father's concern that the Guardian failed to explore issues with the children in a timely fashion, for example when the skype failed and at the time of the disastrous September 2016 contact. I also express concern at the level of the Guardian's actual contact with the children and failure to meet with them at times when the father asked him to do so."

(9) "I recognise that the Guardian has reached his conclusion on the basis of his belief that the mother was actively promoting contact. With respect to the Guardian I have resolved this factual issue with a different finding."

(10) "Having considered the evidence in its totality and having noted all of my findings and comments I ask myself whether I am satisfied that I have explored all options before excluding direct contact whilst balancing the potential short term and longer term risks of emotional harm of both options and conclude that I am not so satisfied."

(11) "In my judgment and with respect to the Guardian I find that the recommendations of Dr Stevenson must be pursued in order to determine how contact could be reinstated before it would be appropriate to rule out direct contact."

(12) The Judge endorsed Dr Stevenson's observation that "continuing adversarial dynamics will not enable the family to move forward or for contact to be meaningful regarding either child."

21. The Judge therefore granted the father's application for a further assessment by Dr Stevenson. This was in due course extended to an assessment of the whole family at the Guardian's request. The father gave an assurance that he would participate.

(3) April 2017 to date

22. Since the April 2017 judgment a different NYAS caseworker has acted as Guardian. The father has made numerous unsuccessful applications for his removal and has threatened to report him to the police for harassment or to sue him if he makes any contact with him. The relationship between the father and NYAS has completely broken down, as did his relationship with Cafcass, to the point (unprecedented in my experience) that HMCTS has had to act as a middle man for the transfer of documents between the father and the Guardian.

23. The relationship between the parents themselves improved briefly after the April 2017 judgment but by April 2018 the mother was applying for a s.91(14) order preventing further application by the father without the leave of the court.

24. It was in this context that Dr Stevenson was re-instructed. Her assessment, complicated by difficulties in the father's approach, was completed in March 2018. Her conclusions were as follows:

(1) The mother and father both have an IQ in the average range but some deficits in processing speed and working memory.

(2) It was difficult to evaluate the father's mental health and psychological profile due to his high level of defensiveness and oppositional behaviour. He stated that he considered that, like other professionals, Dr Stevenson's aim was to "dig for dirt". He required the interviews to be carried out in a court building. His presentation was at times loud and intimidating and she felt it necessary to ask for security to patrol the corridor outside.

(3) A number of the father's traits are indicative of social (pragmatic) communication disorder (previously known as Asperger's). Further assessment outside proceedings is recommended.

(4) Gina has an IQ in the average range with an uneven cognitive profile. She has a secure attachment to her mother but some dependency traits. She has angry and dismissive feelings regarding her father, who she does not consider to be part of her family.

(5) Frances has an IQ in the average range of functioning but cognitive deficits regarding verbal comprehension. She has a secure attachment to her mother and sister with some idealised traits. She is curious regarding her father and ambivalent regarding him and her relationship with him.

(6) A package of further assessment and therapeutic intervention for the father is recommended with further contact development only taking place once they are completed. At that point an attempt should be made to arrange contact in a therapeutic setting, starting with Frances.

25. The matter came before HHJ Handley for final hearing on 23-27 April 2018, with judgment being handed down and orders made on 2 July 2018. All parties were represented by counsel. Evidence was heard from Dr Stevenson, the parents, the deputy head of the children's school, and the Guardian.

26. The Judge gave a careful judgment. He introduced the background, and particularly the events since the April 2017 hearing. He summarised the parties' positions. He once again outlined the law. He considered the delay that had occurred and the reasons for it, but he said that was not assessing the case as at 2013, or at any other date than 2018. He rejected the father's complaint that his rights under Articles 6 and 8 had been breached. He placed full responsibility for the father's difficulties with the current Guardian upon the father.

27. The Judge thoroughly summarised Dr Stevenson's evidence. Although the assessment had been directed at his own request, he found that the father was "at best, a reluctant volunteer when it came to the issue of his own assessment" and that he had "sadly… not been able to prioritise the needs and the welfare of the children in the context of the family-wide assessment." He noted that the father "maintains that all the blame and responsibility rests with mother and that when this case is viewed in its totality, there is no need for him to change because he has done nothing wrong, a position which, in my judgment, demonstrates little if any insight into the concerns of the professionals." The Judge found Dr Stevenson to be an impressive witness who gave measured and child-focused evidence.

28. Having heard the mother, the Judge accepted that, whilst she had struggled to accept the findings made in 2017, she now accepted them. He further accepted her evidence that she will support the children to have contact that accords with their wishes and feelings and which meets their welfare needs.

29. As to the father, the Judge accepted that, like the mother "he loves his children dearly". The Judge acknowledged that events earlier in the proceedings had contributed to the father's sense of injustice and continuing mistrust of professionals. Having said that, he reflected on the father's evidence and made the following observations:

    (1) The father's "open hostility is abundantly clear. It is both sad and concerning to hear that he confirmed that he hates the children's mother and has done so since their separation in 2013."

    (2) Dr Stevenson's observations in 2014 had been prophetic: "Sadly, the adversarial dynamics and conflict continues with father being the main if not principal source of conflict and, in consequence, the children still have no relationship with him despite the further passage of time."

    (3) He was troubled by the father's lack of full engagement with Dr Stevenson's assessment. "I find that he placed his own hostility to his own assessment above the needs of the children to have the best available evidence before the court." Likewise, the father's approach to the Guardian "cannot be reconciled with the need to prioritise the welfare interests of the children".

    (4) The father's minimisation of his convictions "demonstrates a continuing lack of insight into the concerns raised by Dr Stevenson… It is also of concern that these convictions were not made known to the parties or to the court at the time of the January 2017 final hearing even though the convictions were very recent at that time."

    (5) Attendance at the children's school functions "demonstrates father's inability to prioritise their welfare above his own wishes. His visits are plainly for his benefit and not for that of his children."

    (6) "A further and compelling example of father's inability to demonstrate insight into the children's welfare is his insistence that the children would be better in care than with the mother and his confirmed intention to pursue committal proceedings for her failure to secure skype contact sessions if the children remain in her care."

    (7) The Judge also noted as concerning features the father's attempts to avoid questions in evidence, his fixed belief that professionals were out to 'dig dirt' on him, and his pursuit of individuals and professionals with complaints including eight outstanding civil actions and seven police complaints. The Judge described the father as holding the Guardian "in complete contempt".

    (8) Overall, "It is abundantly clear that father has completely lost sight of the welfare of the children, a fact supported by the lack of any coherent planning for their sought-after return to his care, beyond the observation that his father would provide funds for a rented property."

30. Finally, the Judge summarised the Guardian's opinion that there was no evidence to support the father's allegations of parental alienation but clear evidence that he had a preoccupation with ongoing litigation. The Judge found the Guardian's evidence to be

balanced and measured and his recommendations to have been carefully considered, well-reasoned and supported by the evidence.

31. Turning to his conclusions, the Judge firstly noted that all parties were in agreement that indirect contact was not working in this case; indeed in Dr Stevenson's view it was not only unsuccessful but had fuelled conflict. He then summarised his findings:

    (1) The mother has reflected on and accepted the findings made against her in 2017. She accepts that some of her previous conduct may have had a negative impact, albeit unintentional on her part, but this needs to be considered in the context of the father's own behaviour and his approach to this litigation. She is driven by the children's welfare needs and no finding of parental alienation is made.

    (2) The father lacks insight into the children's welfare needs. He is unable to prioritise the children's welfare above his own wishes and goals. He harbours a deep-rooted sense of hostility to the mother to the extent that his behaviour is harmful to her emotional and psychological welfare and in consequence is likely and almost certainly going to impact upon her parenting and hence be damaging to the children.

    (3) The children do not want to live with the father or spend time with him and would suffer emotional harm if placed with him or required to have direct contact with him against their wishes.

32. In consequence of these findings, the judge granted the original application made by the mother and dismissed that made by the father.

33. The Judge then considered the mother's application, supported by the Guardian, for a s.91(14) order, first directing himself as to the legal principles. He reviewed the "exceptional" history and noted that the children "have been involved in acrimonious proceedings for some five years, have had no less than four guardians or case workers, and have been seen by professionals on countless occasions." Whilst he accepted that not all of the delay could be laid at the father's door, he noted that there had been no fewer than twenty-seven interlocutory hearings since the Court of Appeal decision and that a number of the father's applications demonstrated that his "almost immediate response to any grievance or concern is to issue a C2 application… [and] unless restrained, father will maintain that approach with application after application." In conclusion, he found the order sought by the mother and the Guardian necessary though draconian and concluded that three years was a proportionate duration. He also dismissed three further applications issued by the father since the April 2018 hearing.

34. The resulting order contained:

    (1) A child arrangements order for the children to live with their mother;

    (2) The dismissal of the father's application for the children to live with and/or to spend time with him.

    (3) An order that the father should have no direct contact with the children.

(4) An indirect contact order for the mother to send the father monthly updates about the children by email, and for the father to send cards at birthdays and Christmas.

(5) An order under s.91(14) Children Act 1989 preventing the father from making any application about the children for a period of three years without the permission of the court.

(6) Recordings in these terms:

a. AND UPON the court making an order for no contact between the children and the father unless and until the father completes the therapeutic work recommended by Dr Stevenson (it being understood by the court and the parties that upon the completion of the following steps the father may seek to resume contact and may make an application for that purpose).

b. AND UPON the court indicating that it is expected that [the father] will undertake the further assessments and access the therapy as detailed within Dr Stevenson's report dated 12 March 2018 as detailed below and any further therapy as recommended by any of the recommended assessments to assist with and inform the planning and management of any future contact…

The order then referred to four forms of assessment and therapy: communication disorder, neuropsychology, cognitive behavioural therapy and mental health oversight by a GP.

35. The father's application for permission to appeal was considered by Williams J at an oral hearing on 14 December 2018. By his subsequent order of 22 January 2019, he granted permission to appeal and transferred the matter to the Court of Appeal pursuant to Family Procedure Rules 2010 r.30.13, which provides for the transfer to this court of an appeal for which permission has been given by a county court or the High Court on the ground that the appeal raises an important point of principle or that there is some compelling reason for the Court of Appeal to hear it.

36. Since the order, the father has issued six applications for permission to make an application. Five have been dismissed by Judge Handley and one, concerning schooling, has been allowed.

37. This abbreviated summary of the history is sufficient for the purposes of the appeal, but it comes nowhere near to conveying the incessant level of attrition that has characterised this case. Since the appeal in July 2015, the father has issued some fifty-six applications and Judge Handley has made approximately fifty orders. For example, since NYAS was appointed in November 2015, the father has made eleven applications to discharge the Guardian or to remove NYAS and four applications for Judge Handley to recuse himself. There have been about thirty hearings across forty days. The strain of such bitter and incessant proceedings on the parents and children has been huge.

The appeal

38. We have had the benefit of submissions from Ms Siân Smith for the father, Ms Cleo Perry and Mr Andrew Powell for the mother, and Ms Hannah Gomersall for the children. We thank them all, and particularly Ms Smith, who has represented the father *pro bono* at the 2015 appeal and at all main hearings since. Her commitment, in all involving no less than sixteen days in court plus a telephone hearing and an advocates' meeting, is in our view quite exceptional.

39. In her skeleton argument, Ms Smith has grouped the grounds of appeal drafted by the father into four strands, which I paraphrase:

(1) Procedural issues of unfairness and delay:

a. The lower court failed to implement the directions of the appeal court, though nothing had changed and there was no bar to contact.

b. The Judge case-managed ineffectively, failed to list early hearings, allowed delays to blight the situation, did not enforce indirect contact when it stopped and failed to resolve the intractable dispute.

c. The Judge accepted false evidence and continued the systematic failure to uphold the father's Art. 6 and 8 rights.

d. Unfair presumptions of misconduct were made against the father, who was denied the opportunity to rebut them. The failure to distinguish between matters that were or were not disputed has undermined the burden of proof.

(2) Compartmentalisation and inconsistency:

a. Without any good reason, the Judge's decision in 2018 did not follow through on his findings in 2017.

b. He instead focused on two highly partisan reports and treated them as effectively determinative.

(3) Not pursuing all reasonable routes to maintaining contact:

a. The Judge failed to recognise the fundamental need for a relationship between the father and the children. He did not act in the interests of children whose father is (as he himself puts it) "free of findings, risks or concerns throughout."

b. He shied away from his 2017 findings and wrongly failed to make a finding of parental alienation.

c. He failed to take all avenues to restore a normal parent-child relationship but instead followed the Guardian's advice in ordering indirect contact which had repeatedly failed, without investigating why that was so.

d. He did not effectively enforce orders for indirect contact when they were broken.

(4) A s.91(14) order was disproportionate:

a. It is not consistent with a final order made with the ambition of a therapeutically-supported resumption of the children's relationship with their father.

The parties' submissions

40. Ms Smith argues that the orders should be set aside and the matter remitted for rehearing by a High Court judge, with all options for the children remaining open. Taking each strand of the grounds of appeal in turn, she submits that:

(1) The proceedings were procedurally unfair and infringed the children and father's Article 8 rights. This court should make a "high-level, macro, appraisal" of the human rights violations in this case, as undertaken by McFarlane LJ in *Re A* (see below) at [50]. She analyses the key events in each of the three periods since the separation and identifies delays and missed opportunities at each stage. The court focused on the mother's allegations of domestic abuse throughout and not on the father's allegations of negative influence. There ought to have been an early welfare hearing (see Hedley J in *Re E (A Child)* [2011] EWHC 3521 (Fam) at [11]) to allow the court to understand and change the mother's attitude to contact at an earlier stage.

(2) The factual matrix was established by the 2017 judgment but the factual basis on which Dr Stevenson conducted her assessment of the children and parents is not at all clear. She refers at length to the mother's allegations to the extent that it is not possible to say that she conducted the assessment as required, i.e. on the basis that they had not occurred. The report contains a strong theme of domestic abuse which is reflected in the conclusions. It also fails to take into account the negative findings made against the mother in 2017. The same points can be made in respect of the Guardian, who simply failed to adequately consider the history of the case. While the Judge identified these criticisms, he failed to analyse them and identify how in the circumstances he could place weight on those opinions. He should also have been more cautious in accepting the mother's capacity to meet the children's needs, given his findings in 2017.

(3) On the question of whether all reasonable routes to maintaining a relationship had been pursued, the judge failed to address the reasons for the children's wishes and feelings and he did not balance the harm from contact with the harm from the lack of a relationship, instead taking a linear approach. In particular, following *Re E* (above) at [31], the Judge did not ask "Why?" the children felt this way. He was also wrong to say that the children did not want to see their father, when Frances's position as recorded by Dr Stevenson and the Guardian was more ambivalent about seeing him. Moreover, even on the Judge's own analysis, therapy for the father could have taken place within existing

proceedings; or he could have asked for further expert advice, though no one suggested he should do so.

(4) Finally, Ms Smith criticises the s.91(14) order. The judge, having directed himself correctly in law, placed considerable reliance on the length of proceedings and number of hearings but failed to recognise that such hearings were simply those required to progress the litigation. These are exceptional proceedings and the path taken by the judge was disproportionate. Furthermore, the length of the order was arbitrary.

41. For the mother, Ms Perry and Mr Powell submit that:

(1) Over a period of three years, the Judge worked to promote the children's contact with their father. The delays were due to a range of factors, including the father's resistance to orders, the number of applications made, the 2015 appeal, delays in legal aid funding for Dr Stevenson, and the availability of participants for key hearings.

(2) The Judge did not rely at any point on the assertion of a history of domestic abuse. Dr Stevenson's conclusions were firmly grounded in rigorous clinical assessment and most particularly her meetings with the father himself. There is no evidence that they were based on findings of fact that had been set aside. Her letter of instruction made clear that she should proceed on the basis that no findings had been made, her report repeatedly refers to behaviours as "alleged", and when cross-examined on the issue she said she had recorded cross-allegations by both parties.

(3) The Judge acted in accordance with the positive duty to promote contact as summarised in *Re A (Children) (Contact: Ultra Orthodox Judaism: Transgender Parent)* [2017] EWCA Civ 2164 at [61]. His orders do not terminate contact, but rather provide a therapeutic way of re-establishing it. He used all the tools available to him to remove barriers to contact but met with obstacles from the father at every stage. As a result, several opportunities to progress contact were lost. The father has now become fixated by litigation and has lost all objectivity. In the end the Judge had no alternative. He took into account the views of both children. This court should respect the scrupulous exercise of his discretion.

(4) The s91(14) order was rightly made. *Re P* (see below) requires the court to weigh all circumstances in the balance. The father sought to conceal convictions for harassment and breach of a restraining order. He bombards professionals and the mother with emails and issues repeated applications. Behaviour of this kind is now recognised as harassment and coercive control and should be a basis for an order limiting applications. The six applications issued since the order was made show that it is needed.

42. For the Guardian, Ms Gomersall accepts that the father suffered unfairness in 2014, but that this was remedied by the 2015 decision of this court. Since then, the Judge prioritised the case and case-managed it in a fair and timely way. Most of the delay has arisen from attempts to explore all avenues to contact and as a result of the way in which

the father has conducted the litigation. The changes of Guardian are an unusual feature but each was made to assist the father, who has not responded.

Analysis

43. Before stating my conclusions about this appeal, I record that (like the Judge) this court well understands the distress felt by any parent who is unable to enjoy a relationship with his or her children. In this particular case, we are also fully aware that the father has legitimate grounds for dissatisfaction for the events that led to the discharging of the first two Guardians, and perhaps the third. We are also very conscious of the stress that these proceedings have caused to *both* parents *and* to the children. This is exactly the sort of history that repeated initiatives, before and since the advent of the Family Court, have aimed to avoid.

The governing principles

44. The governing principles in proceedings of this kind are, of course, the welfare principle, the 'effect of delay' presumption, the parental involvement presumption, the overriding objective, and the parties' rights under ECHR Articles 6 and 8. In the present context, they have on many occasions been gathered together in authority of long standing, as for example by Black LJ in *J-M (A child)* [2014] EWCA Civ 434 at [25]:

    (1) The welfare of the child is paramount.

    (2) It is almost always in the interests of a child whose parents are separated that he or she should have contact with the parent with whom he or she is not living.

    (3) There is a positive obligation on the State and therefore on the judge to take measures to promote contact, grappling with all available alternatives and taking all necessary steps that can reasonably be demanded, before abandoning hope of achieving contact.

    (4) Excessive weight should not be accorded to short term problems and the court should take a medium and long term view.

    (5) Contact should be terminated only in exceptional circumstances where there are cogent reasons for doing so, as a last resort, when there is no alternative, and only if contact will be detrimental to the child's welfare.

45. This clear guidance is echoed in the presumption in s.1(2A) Children Act 1989, introduced in October 2014, that unless the contrary is shown the involvement of a parent in the life of the child concerned will further the child's welfare. But by s.1(6) the presumption does not apply if involvement would put the child at risk of suffering harm.

46. So the presumption of parental involvement is very strong, but it is not absolute. As in all matters relating to the upbringing of a children, welfare prevails.

47. Next, the substantive link between delay and welfare is so clearly recognised that the presumption at s.1(2) that delay is likely to prejudice the child's welfare is preceded

only by the welfare principle itself. Procedurally, the overriding objective at FPR r.1.1 to deal with cases justly requires the court to deal with them expeditiously and fairly. Our domestic laws therefore reflect the Article 6 right to a fair hearing within a reasonable time and are consonant with the procedural requirements of Article 8, which require the court as a public body to *deal diligently* with proceedings of this kind: *Kopf v Austria* (App. No 1598/06) [2012] 1 FLR 1199.

48. A thorough analysis of the Convention requirements that are engaged in these cases can be found in *Re D* [2004] EWHC 727 (Fam) at [26]-[35]. That was a case where a "wholly deserving" father had been denied contact for five years, a situation for which the mother was "wholly responsible". Munby J reviewed a number of decisions of the ECtHR, but for present purposes it is enough to recall what was said in *Glaser v United Kingdom* (2000) 33 EHRR 1 at [66]:

> "The key consideration is whether [the national] authorities have taken all necessary steps to facilitate contact as can reasonably be demanded in the special circumstances of each case. Other important factors in proceedings concerning children are that time takes on a particular significance as there is always a danger that any procedural delay will result in the de facto determination of the issue before the court, and that the decision-making procedure provides requisite protection of parental interests."

49. Where delay has a direct and adverse impact on a party's position, a breach of the procedural aspects of Article 8 may be found. That is what happened in *Re A (Contact: Human Rights Violations)* [2013] EWCA 1104, [2014] 1 FLR 1185, where McFarlane LJ said this at [53]:

> "The conduct of human relationships, particularly following the breakdown in the relationship between the parents of a child, are not readily conducive to organisation and dictat by court order; nor are they the responsibility of the courts or the judges. But, courts and judges do have a responsibility to utilise such substantive and procedural resources as are available to them to determine issues relating to children in a manner which affords paramount consideration to the welfare of those children and to do so in a manner, within the limits of the court's powers, which is likely to be effective as opposed to ineffective."

50. In that case an "unimpeachable" and "irreproachable" father was not given "a timely and effective process in circumstances where there was no overt justification for refusing contact other than the intractable and unjustified hostility of the mother." The failure was of such a degree that it amounted to an unjustified violation of the Art. 8 rights of the father and child. [65]

51. The judgment in *Re A* contains important guidance at [60] about the need in a potentially intractable case for judicial continuity, effective case management and

timetabling, a judicially set strategy, consistency of approach and a predetermined willingness to enforce orders.

52. So the procedural question on this appeal is whether the history of these proceedings shows an unjustified failure by the court to deal diligently with the proceedings in a timely and effective way to such a degree as to amount to a breach of the rights of the father and children. The substantive question is whether the Judge took all reasonable measures to promote contact before abandoning hope of achieving it at this stage.

The factual framework

53. Judicial decisions rest on a framework of facts that the court has found proved to the relevant standard. There is an obvious and important distinction between an allegation and a proven fact. It is the court's task to decide what issues are sufficiently relevant to require investigation, and once it has selected an issue, it will either make a finding of fact about it, or it will leave it out of account when making its decision. What it will not do is to build its decision upon unproven disputed allegations, for that would create the "tottering edifice" described in the *Darlington* case [2015] EWFC 11 at [11].

54. Taking matters to the next stage, once facts have been found, they will form the basis not only for the judicial decision, but the approach of those who have to carry it out. So, a finding that a parent has or has not injured a child will be brought forward into the welfare assessments carried out by social workers. If those assessments take place before fact-finding has taken place, they may have to be premised on alternative outcomes. But either way they cannot treat unproven facts as if they were proven facts, and still less can they proceed on a factual premise that is inconsistent with the facts that have been found.

55. In *Re B (Children)* [2008] UKHL 35 at [2], Lord Hoffman memorably described the burden and standard of proof in this way:

> "If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

56. This then is the conceptual framework under which the law operates in order to make the decisions that must be made. It requires the court to treat events as having happened or as not having happened. In most areas of life we do not operate in this binary way, but the law does so to achieve effectiveness, fairness and consistency.

57. In the present case, the court has made no finding either way about the mother's allegations of domestic abuse. They had not been rejected or disproved but to the extent that the father disputed them they were not matters upon which the Judge was entitled

to rely. The question is whether he did so, either directly or indirectly through the professional reports.

Pursuit of the realistic options

58. In every private law case, no less than every care case, the court must identify what the realistic options are. In accordance with the governing principles, it will do so with a marked preference for some options over others. In the present case, the theoretical options included one or more of the following (leaving aside the father's suggestion that the children be placed in foster care):

a. A complete bar on contact
b. The option taken by the Judge
c. An order for significant indirect contact
d. An order for direct contact
e. Transfer of the children's home to the father
f. Adjournment for further investigations

59. The question here is whether the Judge sufficiently evaluated the advantages and disadvantages of such options as he regarded as realistic, and in particular whether he gave proper weight to the harm caused by loss of the parental relationship and to the evidence about Frances's wishes and feelings.

Section 91(14)

60. Section 91(14) states:-

> "On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court."

61. Guidance was given by this court on the proper approach to the exercise of this power in *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573 CA at [41]:

> "Guidelines
>
> 1). Section 91(14) should be read in conjunction with section 1(1) which makes the welfare of the child the paramount consideration.
>
> 2). The power to restrict applications to the court is discretionary and in the exercise of its´ discretion the court must weigh in the balance all the relevant circumstances.
>
> 3). An important consideration is that to impose a restriction is a statutory intrusion into the right of a party to bring proceedings

> before the court and to be heard in matters affecting his/her child.
>
> 4). The power is therefore to be used with great care and sparingly, the exception and not the rule.
>
> 5). It is generally to be seen as an useful weapon of last resort in cases of repeated and unreasonable applications.
>
> 6). In suitable circumstances (and on clear evidence), a court may, impose the leave restriction in cases where the welfare of the child requires it, although there is no past history of making unreasonable applications.
>
> 7). In cases under paragraph 6 above, the court will need to be satisfied first that the facts go beyond the commonly encountered need for a time to settle to a regime ordered by the Court and the all too common situation where there is animosity between the adults in dispute or between the local authority and the family and secondly that there is a serious risk that, without the imposition of the restriction, the child or the primary carers will be subject to unacceptable strain.
>
> 8). A court may impose the restriction on making applications in the absence of a request from any of the parties, subject, of course, to the rules of natural justice such as an opportunity for the parties to be heard on the point.
>
> 9). A restriction may be imposed with or without limitation of time.
>
> 10). The degree of restriction should be proportionate to the harm it is intended to avoid. Therefore the court imposing the restriction should carefully consider the extent of the restriction to be imposed and specify, where appropriate, the type of application to be restrained and the duration of the order.
>
> 11). It would be undesirable in other than the most exceptional cases to make the order ex parte."

62. In *Re B (Section 91(14) Order: Duration)* [2004] 1 FLR 871 Thorpe LJ considered an indefinite order of this kind in a case where there was no objective justification for deprivation of contact:

> "It is very important where a child is effectively denied or inhibited from an ordinary relationship with her father by the determination of her mother to excise the father from her life that the court should never abandon endeavours to right the wrongs within the family dynamics.… In my judgment, the order… simply gives the wrong message.… This is not a case in

> which the father has in any way abused the family justice system to disturb or undermine the mother's primary care. The judge has specifically found that he has acted responsibly in pursuing his desire for an ordinary relationship with his daughter by contact applications… The prohibition needs, above all, to be compatible with the primary drive and objective of the court to restore the relationship."

The outcome was that a two-year order was substituted for an indefinite one.

63. The question is therefore whether the order made by the Judge was justified at all, and if so whether it was for an appropriate length of time.

Conclusions

64. Having set out the facts, the arguments and the applicable principles at some length, I can address the questions that arise on the appeal quite shortly.

65. In the first place, making all allowance for the father's legitimate complaints about matters that led to the first appeal, I conclude that there has been no breach of the Article 6 or 8 rights of the father or the children by virtue either of the absence of contact or the length of the proceedings. In reaching that conclusion, I consider the detailed chronology and then stand back to survey the whole course of the proceedings. Although their length is of itself a matter of concern, that does not of itself amount to a rights infringement. What is more relevant is that since 2015 the Judge has diligently and sympathetically attempted to revive the father's relationship with his children but has been forestalled by the mother's earlier lack of support for contact and by the father's increasingly extreme attitude. The father's self-description as "free of findings, risks or concerns throughout" confirms that he currently has little if any insight into his own difficulties. As time has gone on, his self-defeating stance has become the main obstacle to progress. To be clear, Art. 8 rights are not reserved for irreproachable parents, but a parent who is only willing to participate in the delicate work of family reconstruction on his own uncompromising terms cannot hold others responsible when the work does not succeed.

66. Nor do I accept the submission that the Judge's decision was influenced by findings of fact that had been set aside. Given the unfortunate history, the Judge was alert to this issue and in both judgments he firmly stated that he treated the events as not having happened. The reports of Dr Stevenson and the Guardian do no more than record accounts of the history that the parents were fully entitled to give. Nowhere do the reporters assume the truth of these unresolved allegations or base their opinions upon them. The Judge was entitled to make no findings about them and, having done that, right to leave them out of his calculations.

67. As to whether the Judge pursued all reasonable routes available to him, it is important to understand what the real choices were. Most of the theoretical options listed above can be discarded. There was no gap in the evidence and no one argued for further assessment or further adjournment, which would have been a truly bad option in a case that had already been adjourned in 2017. Indirect contact had by common consent

failed. Supervised contact had been tried and failed and the father was unwilling to try again. An order permanently terminating contact was not advocated by anyone, nor was it necessary if a therapeutic approach had any chance of success. The obvious goal of unsupervised contact, if the children's resistance could be overcome, was prevented by the father's conviction that it could never work while they lived with their mother. This left only two options: the orders made by the Judge or the order sought by the father for the children to live with him, notwithstanding what the Judge described as the lack of any coherent planning for matters such as accommodation. Of these options, only one was realistic in the absence of a finding of severe parental alienation and the Judge's choice was all but inevitable.

68. The complaint that the Judge did not take relevant matters into account is not made out either. He repeatedly reminded himself of the importance of contact and he accurately summarised the children's wishes as described by Dr Stevenson (see paragraphs 24(4) and (5) above). There is nothing inconsistent between his two judgments in their assessment of the parents in circumstances where the mother had reflected on her approach in the interval but the father had not. In particular, the Judge was fully entitled to accept professional advice that this was not a case of parental alienation. On his findings, the situation here can clearly be distinguished from cases such as *Re D* and *Re A* (above), where one parent was blocking contact and the other was blameless.

69. In the end, the Judge's fundamental findings

(a) that the children would suffer emotional harm if they were placed with the father or required to have direct contact with him against their wishes, and

(b) that the father has completely lost sight of their welfare

effectively determine the outcome of the trial and of this appeal. They were conclusions securely based upon professional advice and upon the Judge's own very extensive knowledge of this family. They have certainly not been shown to have been wrong and nor has there been any serious procedural irregularity.

70. Finally, this was an obvious case for a s.91(14) order in the light of the Judge's findings and the terrible litigation history. The mother and children are entitled to some protection from incessant litigation and the length of the order is not inconsistent with the possibility of a therapeutic approach to the restoration of contact. Events since the order was made show that it is working fairly.

71. For these reasons, I would dismiss this appeal. In doing so, I express the hope that it may even now be possible for these children to re-establish their relationship with their father and to come to know him, not as someone who hates their mother but as someone who loves them and is prepared, even at this late stage, to show it by seeking the support that might lead to a better outcome.

Lord Justice Coulson:

72. I agree.

Lord Justice Longmore:

73. I also agree.