

IN THE CENTRAL LONDON FAMILY COURT
IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF BOY A AND BOY B
BETWEEN:

CASE NO: ZC21P01703

BEFORE
RECORDER MCKENDRICK QC

Ms D

Applicant

-And-

Mr D

Respondent

Ms Maggie Jones (instructed by Lewis Nedas Law) for the Applicant

Miss Laura Bayley (instructed by Rix and Kay) for the Respondent

Hearing Dates 25-26 August 2022

APPROVED JUDGMENT
Handed Down 3 September 2022

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

RECORDER MCKENDRICK QC:

Introduction

1. I am concerned in these proceedings with the welfare of two brothers, A and B, aged 11 and 8 respectively. From what I have read in the papers they are two delightful boys. By way of an order dated 1 March 2018 HHJ Oliver made a Child Arrangements Order which provides for A and B to reside with their mother and father on alternate weeks and for shared time to be split between the school holidays.
2. By way of an application dated 1 December 2021 Mr D asks the court to make a Prohibited Steps Order pursuant to section 8 Children Act 1989 (hereafter the “1989 Act”) and he also seeks a Child Arrangements Order making provision for the boys to reside with him and spend time with Mrs D. By way of an application dated 26 November 2021 but not issued until January 2022 Ms D seeks a Child Arrangements Order and/or a Specific Issue Order which makes provision for the boys to relocate to reside with her in Somerset and to spend time with Mr D. These applications were conjoined and listed to be heard together with the mother as the applicant. Ms D has been represented by Ms Jones of counsel and Mr D has been represented by Miss Bayley of counsel. Both have provided considerable assistance to the court and I extend my gratitude to them for their constructive professionalism assisting the parties and the court in this difficult case.
3. At the conclusion of the hearing on 25 and 26 August 2022, I communicated to the parties my concern that A and B are promptly informed of my decision. If they were to move to Somerset they would need to change schools and the new school term begins on 5 September 2022. A and B are entitled to know my decision and to absorb and understand it before they begin their new school terms. It was suggested by the Cafcass officer that they might not move until the October 2022 half term, but if I had decided it was in their best interests to move to Somerset, that would have entailed A beginning a new secondary school in London for half a term and then leaving and beginning school in Somerset, weeks after the rest of his peers. This would not be in his best interests educationally or emotionally. There were also related challenges for B.
4. It has been necessary to consider all the options carefully, but at some speed, to ensure a decision could be made which would permit the boys to begin the new school term with their peers, whether that schools were to be located in London or Somerset. I am therefore providing an embargoed draft judgment to counsel and solicitors on 30 August 2022, but the substance of my decision can be communicated to Ms D, Mr D, A and B. Indeed, I ask that A and B receive the short letter I have written to them on Wednesday 31 August

2022 (attached as Appendix 1 to this judgment), when they are in their father's care on a short camping holiday. I shall formally hand down judgment on 2 September 2022 and deal with the terms of the order giving effect to this judgment with the assistance of counsel. Given public criticism of previous welfare decisions in respect of A and B (see below) I have considered it prudent to provide a written judgment and to give permission for it be published in anonymised form.

5. Having heard oral evidence and read written evidence at a final hearing sitting at the Central Family Court on 25 and 26 August 2022. My decision is as follows:
 - a. A and B shall continue to be the subject of a shared care arrangement, residing on alternate weeks with their father and mother;
 - b. Ms D's application for internal relocation to Somerset is refused;
 - c. A and B shall therefore attend schools in London;
 - d. A and B shall continue to share holidays but it is not in A's and B's best interests to spend two weekends each month at Ms D's home in Somerset and that frequency should be reduced to once per month and holidays.

Brief Background

6. As I have said A is 11 and B is 8. Their parents divorced in 2017. Private law proceedings were issued in 2017 and a District Judge made an interim decision that the boys should live alternate weeks with their mother and their father. After a final hearing in March 2018, HHJ Oliver made an order in very similar terms. Since then A and B have lived alternate weeks in the care of Ms D and Mr D at their separate homes in London. Mr D owns his home in London and Ms D rents a home. The boys attended the same primary school. I have seen their end of term reports, both are doing well educationally and socially. In January 2020 Ms D bought a home in Somerset. She continued with the rental in London and splits her time between these two homes.
7. I have been concerned to read in the papers about the repeated involvement of social services and the police in the lives of A and B. These visits and assessments are not neutral acts. They may very well be upsetting for A and B however careful and un-intrusive professionals try to be. I asked counsel to provide me a chronology of these involvements.

I have been provided with two chronologies as the parties were unable to agree each other's. The reality is that A and B do not appear to need the involvement of social services or the police. They have been the subject of a child in need plan but that was largely driven by problems with their parents' communication rather than any particular need for support on the part of A or B. The involvement of outside agencies has mostly been requested by one of the parents, seeking some form of tactical advantage or because of an over-reaction to issues with the 2018 Child Arrangements Order. I do however note both boys have had some therapeutic and mentoring support in school. Both Ms D and Mr D need to stand back and appreciate their boys are well cared for by both parents. From everything I have read, they are generally happy, healthy, well-educated and content boys. As I set out below, if they have frustrations it is with their parents and their poor relationship which at times is negatively visited on the boys' wellbeing, to their detriment.

8. Ms D alleges Mr D perpetrates domestic abuse. I was referred to there being abusive emails prior to 2018, but they were not in the bundle and this was denied by the father. HHJ Oliver had indicated that documentation in relation to events prior to the decision in March 2018 should not be included in the bundle. Ms D felt that a text message sent in December 2021 was abuse by Mr D. Mr D says this was text sent by fraudsters. Certainly the police took the matter no further. I was not asked to make any findings of domestic abuse by Ms Jones and no special measures were requested for the hearing. I considered this issue myself and also determined no additional measures were necessary.

Father's Application to Adjourn

9. At the outset of the hearing on the 25 August 2022, Miss Bayley, on behalf of Mr D, sought an adjournment to the hearing. I was also asked to adjourn the hearing by the father's solicitor on Monday 22 August. This application was strongly opposed by the mother's solicitor. I made a short ruling on the papers informing the parties that I:

“Ha[d] considered the request for an adjournment and decline[d] to accede to the request. There is not likely to be an unfairness to any party because the CAFCASS officer is required to give evidence remotely on the afternoon of the first day. The hearing will be timetabled to ensure fairness between the parties. It is not unjust to proceed. Furthermore, there are pressing best interests reasons which should be

considered as part of the case management decision and they weigh against an adjournment, primarily the need for clarity over residence given the secondary school transfer.

10. The application to adjourn the hearing was renewed at the outset of the hearing. Miss Bayley's position is set out in her helpful position statement. In summary she said the 2 day time listing was too short to fairly determine the issues given the amount of paperwork and the lack of judicial reading time. She was concerned about the challenges of hearing the evidence from CAFCASS at 2pm on the first day of the hearing and queries whether this was fair and referred me to L (A child) 2019 EWHC 867. She invited me to adjourn the hearing and list it before HHJ Oliver with a time estimate of 3 days. Ms Jones on behalf of Ms D opposed the adjournment.

11. I agree with Miss Bayley's observations about the challenges of the hearing. I was presented with 2 bundles of papers for the hearing with 1, 332 pages. There were recent witness statements from both parties, with a copy of Mr D's being provided to the court on the day of the hearing although it was filed and served and read by the mother's representatives prior to the hearing. There was no witness template. The applicant's position statement arrived at 9 am on the day of the hearing. The 2 day hearing required hearing from four (reduced to three) witnesses with apparently no reading or judgment time. It is not a happy background to make such a major decision for A and B. However, having checked with listing at the Central Family Court the parties would wait until the spring of 2023 for a three day trial. As is well known there is a strong presumption against delay in 1989 Act proceedings. Child A will begin secondary school or move to middle school on 5 September 2022, depending on where he is living. I have already outlined above my concern that A and B know where they are to be residing and attending school as soon as possible. Having read the judgment of Sir Andrew McFarlane P in L (A child) 2019 EWHC 867 I was not persuaded it provided a proper basis for adjourning this hearing. The CAFCASS officer in these proceedings gave evidence remotely after Ms D's evidence. The father gave evidence after the CAFCASS officer on day 2. Ms Jones does not suggest there is unfairness to her client. In the end both parties gave full evidence and both parties were able to cross-examine the other party and the CAFCASS officer within the timescales. There was no unfairness and both parties' Article 6 ECHR rights have been at the forefront of my mind as I have been required to swiftly determine A's and B's arrangements.

The Evidence

12. I have heard evidence from Ms D, the CAFCASS officer and Mr D.
13. Ms D provided three witnesses statements, dated 26 November 2021, 31 March 2021 and 23 August 2022. She described A as an eleven year old humanitarian with interests in charitable causes and with a great awareness of environmental issues. She told me A likes rugby and martial arts such as karate. B is the comic, very sharp and funny. He is an affectionate boy. He also plays rugby and enjoys swimming. He likes building things, he wants to be a scientist first and then a policeman.
14. Mr and Ms D separated in 2017. Prior to that Ms D says she was the primary carer for the boys since birth. She says Mr D had a really good job, so she gave up her job and raised the boys from 2011 She went back to work in 2016. She had a global job until the pandemic when she was made redundant, and subsequently obtained employment working for the NHS in London. Although she works flexibly and often from home and from Somerset. Ms D told me: *“If I do relocate, I would continue my job, work flexibly, it depends on the outcome of the bearing.”* Later in her evidence she told me she would *“not leave her boys behind”* She told me she owns her home in Somerset with a small mortgage, but rents a small house in London near the boys’ schools. She was clear her preference is to be at home in Somerset and she told me she *“cannot afford to keep two properties”*.
15. In her evidence she told me that *“father’s involvement is really important. Mummy and daddy are equal, we have different qualities”*.
16. Her written evidence was focused on the life she has built in Somerset. She paints a warm picture of rural life, of a wide circle of family and friends. She describes the boys making friends, their involvement in local clubs, particularly the rugby club. She tells me about their summer holidays, fishing and on the beach. Her evidence is that the boys have their own bedrooms and have much more space than in London. She and the boys spent increasing amounts of time in Somerset during the pandemic. She considers the area where A’s secondary school is located to be unsafe. She refers to crime statistics. She said that the teacher gave a talk on the taster day which A attended which referenced crime in the area. Ms D has sourced a primary school for B in Somerset. He has attended for a taster

day and likes it. He would need to spend one year at the Somerset primary school before transferring to a middle school and thereafter moving to a secondary school. A would attend a middle school for 2 years before transferring to a secondary school. A has attended taster days at 2 middle schools in Somerset, as well as attending a summer camp at the school he would attend in London.

17. In cross examination Ms D said she accepted HHJ Oliver's decision, did not appeal it and tried to make it work. Ms D was referred to an exhibit to Mr D's second witness statement. The exhibit is a copy of two on-line petitions posted by Ms D following the hearing before HHJ Oliver. The second petition states *inter alia*:

“The family court are in crisis.

I did not get a fair trial....

He [Mr D] got 50/50 shared care. A blanket assumption by Judges and Social Workers.

Where physical emotional and psychological abuse has been involved shared care absolutely does not work. Abusers and perpetrators continue to abuse through the court system.

Social services are incompetent and out of their depth.

My children are suffering. They cry for me and there is nothing I can do.”

18. The on-line petition is accompanied by a clear picture of Ms D's face. The petition was sent to at least one professional working with one of the boys at their school, a Speech and Language therapist although Ms D gave the impression this was acceptable because she considered the therapist a friend. Mr D says it was also sent to parents at one of the boys' schools. The petition clearly indirectly identifies A and B and sets out some of the background to the private family law litigation they were the subject of. Mr D's second witness statement was provided in March 2022. Ms D did not remove the on-line petition. It appears to have been raised at a hearing before HHJ Oliver in June 2022 and yet it was still on-line on day one of the hearing before me on 25 August 2022. Ms D attempted to explain this, saying that she had closed the petition but had not realised that it could still be found on-line. I considered that her explanations were inadequate and at the conclusion of the hearing, I was informed she had requested for the petition with her picture to be removed but it remained on-line as her request was being processed. I made clear how

inappropriate it is for such a petition to be on-line which indirectly identifies A and B. After the hearing I was told it has now been removed.

19. In her evidence Ms D also accepted she made a formal complaint about the social worker who gave evidence before HHJ Oliver in March 2018. She was critical of this professional and her evidence. She also involved her MP. In cross-examination Miss Bayley explored with Ms D what took place at a financial remedies hearing in August 2018. Ms D was provided with £ 500, 000 to buy a family home. She told me in evidence that her position before the financial remedies court was that she was moving to Somerset and that was made clear to the court. However Miss Bayley then produced her witness statement for that hearing. The evidence was paused and Ms D was given time outside court to read her witness statement. In Ms D's witness statement for the financial remedies court she said:

“I believe that the children's' welfare would be best achieved by them having two stable homes, in reasonably close proximity to each other and to their school, which provide them with a reasonable and broadly equivalent standard of accommodation with each parent.

....

I invite the court to make an order for payment to me of a lump sum of £600,000, to be financed from the sale proceeds of the FMH and [A Address]. This sum will allow me to make inroads into my debts and supply a housing fund sufficient for me to purchase a modest property in the vicinity of the current FMH and the children's school”

20. When the evidence resumed and Ms D was asked questions about the contents of that statement Ms D said that by the time she received the financial settlement and paid off her debts she did not have the means to buy a suitable property in London. She bought a house in Somerset in January 2020. When shown her witness statement in cross-examination Ms D was not capable of recognising what she told me was untrue. She prevaricated and told me there must have been another witness statement that informed the judge in the financial remedies court she was moving to Somerset. This statement has not been produced.

21. Ms D told me she did not think it would be confusing for the boys that she bought her primary residence in Somerset in 2020, notwithstanding the prohibited steps order that she should not relocate with the boys to Somerset made by HHJ Oliver in 2018. She wants them to have a life in Somerset. I raised with her that the CAFCASS officer reported the boys found having three homes somewhat confusing and that they would like some stability. Ms D told me it is the first time she was aware of any such concern when reading what was said in the CAFCASS report. Ms D did not appear to think the current arrangements for the boys were confusing. They have two homes in London and their mother identifies a third home in Somerset as their home. She told me in evidence in respect of Somerset: "That's where our life is". Her evidence was full of examples of her registering A and B for Sea Scouts, of swimming classes and having them join and represent a local rugby club in Somerset. She considered A loved the rugby club in Somerset but disliked one in south east London his father had arranged. Observing her, she did not appear to be able to reflect on whether the extent of the integration she had arranged with the boys in Somerset was consistent with the spirit of the order made by HHJ Oliver, giving effect to the boys' best interests in 2018.
22. Ms D told me about Y. Y is A and B's half-brother who came to London some years ago and is educated at the secondary school Mr D proposes A will attend next month. Ms D considered that at 19, there was a significant age gap between Y and A and B. She told me she recognised the importance of Y in A and B's life, but she herself had only met him twice very briefly, most recently saying hello to him in the street, from her car when she passed with A and B. She said that she had had said that Y and his girlfriend would be welcome to come and stay in Somerset. An issue arose at the hearing as to whether Ms D had prevented A and B from playing an online game with Y, which I could not resolve.
23. Ms D accepted in cross-examination that she had Mr D removed from a WhatsApp parents group related to A's and B's activities. She accepted she has described Mr D to the police as a 'control freak' and agreed at that hearing that sometimes still considers that he is a control freak. She accepted that on or around 8 January 2022 she told the police that:

"I believe he [Mr D] is a narcissist and a psychopath. I'm his third wife, his first committed suicide."

24. When asked by Miss Bayley whether that remained her view, Ms D said that “he has high traits of those things. I did not lie to the police.” When asked by me why she told the police Mr D’s first wife committed suicide she told me: “I think Mr D might have had something to do with that. His first wife was very depressed and he was having an affair with Y’s mother.. That was very cruel.”
25. Miss Bayley questioned Ms D about allegations she made to the police in 2017 that Mr D had physically abused the boys. It is clear from a local authority record of strategy discussion that “Police took the view that the allegation was from mother and due to an acrimonious relationship between the parents that mother was making this false allegation”. Ms D accepted this was the police conclusion.
26. Lastly Ms D accepted that she had mentioned to A that there is a lot of crime in that area of his proposed secondary school. She said that the school also gave information about crime in the area.

Shelley Ingram

27. Ms Ingram is an experienced CAFCASS officer. She has produced a report dated 17 August 2022. She spoke to Mr D and Ms D on line. She met with A and B in person and spoke with them separately for 40 – 50 minutes each when they were brought to her office by their mother, having been in Somerset with her.
28. Importantly she set out A’s and B’s wishes and feelings in the report. She notes they were relaxed and happy when they met after a lunch at Nando’s with Ms D. A expressed a preference to go to school in Somerset “but told me his Mum had showed him things about the area [of his proposed London secondary School] that had put him off. When asked what he had seen he gave a vague answer about crime and the personal risks to him when travelling to and from the school.” A also said he wanted to move to Somerset “because he has friends and family there”. A also said that if he stayed in London he would like both his parents to listen to him and for his Dad not to have 3 hour conversations with him. He said that he could not be open with his Dad including about his wish to move to Somerset. He said “I wish my mum and dad would be back together and stop arguing and all of this crap that is going on”. Ms Ingram, observed in respect of A that:

“I had the impression he felt it was important to say bad things about his Dad during our meeting despite not being asked about this”

29. In respect of B, Ms Ingram noted, “Without prompting, [B] told me that [his proposed Somerset school] is a much better school” When asked to explain this he said that was because the teachers were kinder but he “was not able to tell me how he knew this from his short visit to the school”. He also said he liked his current London school and was happy because he would have the same teacher for the next 2022-2023 academic year. He was cross because Mr D had told him he would not see his older brother Y again if he moved to Somerset because he knew this was not true. Ms Ingram, noted: “Without prompting [B] told me “Dad lied to the Police when I was about 4 or 5, they came to Dad’s house, and I can remember he lied because Mum told me”. He said he is happiest on his iPad and his favourite activities include riding his bike and scooter in Somerset. B said if he could go back in time he would like to go back to when his parents were not separated and he and A did not have to travel.

30. Her core recommendation is set out at paragraph 34:

“On balance, and with some reluctance given the longstanding concerns and the complexities in this case which are well known to the Court through the previous reports prepared by ... Children’s Services, it is my assessment that the Court should grant Ms [D] permission to relocate. As has previously been stated, it is imperative that [A] and [B]’s relationships with their father, and with their brother [Y], are not only maintained but actively prioritised and promoted by Ms [D]. I note that the reports completed previously have recommended that should Ms [D] relocate, [A] and [B] should spend time with their father every other weekend and, to reduce travel, this should alternate between London and Somerset. I would agree with this recommendation and would suggest that Ms [D] makes a financial contribution to such arrangements as they would be in [A] and [B]’s best interests. On weekends when [A] and [B] are returning to London, if travel is by car, the parents should meet at an agreed halfway point. Mr [D] should spend time with the children for half of each school holiday.”

31. When questioned about A's and B's reported wishes and feelings Ms Ingram had concerns. She noted that A appeared to think he had things he felt he should say, for example she said that he told her: "Another thing I don't like about my dad". She found that a strange comment. She accepted that it was hard to say whether the wishes and feelings they expressed are their own. She told me: "there has definitely been influencing on some areas for example around the negative feelings about A's secondary school." Ms Ingram noted that A did not share anything about the school that he personally did not like, but rather he had the same views that Ms D had shared with Ms Ingram directly. She also noted that both boys had been influenced by the amount of time spent they had spent in Somerset and that their social activities with mum are very much centered on Somerset. However, she also noted that both boys did have some positives and negatives and could see this about the move. In cases where there has been significant influencing often children can only see one side of the argument, which was not the case with A and B.
32. Ms Ingram was concerned that A and B feel as if they have three homes. She described this as a highly unusual situation. Their London life really only takes place with Mr D and A and B are very aware of the difficulties. A was frustrated by "all this crap". Ms Ingram noted that whilst A and B could share positives factors about Mr D, she was concerned about their purported negative comments, raised out of context. A had said "...and another thing..." I was told this was a strange comment to make. She wondered if A felt he was supposed to say things that would make it appear he was unhappy with his father.
33. Ms Ingram told me both children were saying that they want to go to Somerset. Given this, she was concerned that A particularly, given his transition point, might blame Mr D if the relocation is not approved. She told me her recommendation is very finely balanced and was predicated on Ms D supporting and nourishing Mr D's role in A and B's lives. Ms D would need to take an active role to promote the boys relationship with the father and speak with the father. Ms D would need to accept she could not disrupt A's and B's time with their father in London and elsewhere. There would need to be an agreement on communication. I was told clearly that it would be difficult for her to recommend relocation to Somerset if the protective factors for the father's relationship were not in place. A move in this circumstances would be to A's and B's detriment.

34. Ms Ingram made clear her recommendation is predicated on Ms D maintaining, supporting and actively prioritising A and B's relationship with their father. I was told if the mother cannot do so, then CAFCASS would not make the relocation recommendation. Ms Ingram said that if Ms D is unable to separate her own views of Mr D from the boys' views of him then "*absolutely that raises concerns*". If Ms D is unable to separate her views from children's that will get in the way and if she is unable to actively prioritise the boys' relationship with Mr D "*then it would not make sense to recommend the relocation, it can only take place if the relationship with the father is maintained the quality of the relationship cannot be diminished. It is a key part of their emotional needs.*"

Mr D

35. Mr D has produced three witness statements: 6 December 2021, 27 March 2021 and 23 August 2022. One statement sets out lots of detail of the London school and the third statement sets out some detail as to why what Mr D considers to be the Cafcass recommendation is wrong. His third witness statements includes a WhatsApp message from A to a school friend that implies he is sad not to be on an induction course his London secondary school.

36. When cross-examined by Ms Jones, Mr D accepted he had cut and pasted a Children In Need report into his witness statement that failed to correctly set out the social worker's views on Ms D's mental health, which was that Ms D did not have mental health problems. He said that was for reasons of saving space and was not to mislead the court.

37. Mr D gave evidence that he does not believe the lengthy journeys to and from Somerset every fortnight are in the boys' best interests. He found them tired and said school had reported the same to him, although could not point to a written record of the school's concern. He gave evidence that the boys had told him at times the journey can take seven hours. He described Ms D's behaviour as "subversive sabotage of the order" of HHJ Oliver. He told me "The children are encouraged to speak out against me often." He also said A and B have been blocked from communicating with Y on their devices.

38. Mr D confirmed he has not spoken with Ms D in any meaningful way about A and B for "years".

Maternal Grandfather

39. Ms D's father provided a witness statement in which he says A told him his dad had told him that if he moved to Somerset he would never see him or his step brother Y again, and that he wanted to go to school in Somerset. That conversation took place on Christmas Day 2021. This was not challenged by Mr D. Ms D's father was present at court, but Mr D said that due to pressure of time, he would not require him to be cross-examined. Mr D accepted he did not know what A might have told his grandfather.

The Law

40. The law is relatively straight forward in the case of an internal relocation. Section 1 (3) of the 1989 Act is at the heart of how the court must approach the various applications.

41. Re C (Internal Relocation) [2015] EWCA 1305 is a leading case on this issue. Black LJ (as she then was) (in agreement with Vos LJ and Bodey J) held that:

“Once welfare has been identified as the governing principle in internal relocation cases, there is no reason to differentiate between those cases and external relocation cases. In my view, the approach set out in *K v K, Re F (Relocation)* [2012] and *Re F* [2015] should apply equally to internal relocation cases. Clearly, however, the outcome of that approach will depend entirely on the facts of the individual case. At one end of the spectrum, it is not to be expected, for instance, that the court will be likely to impose restrictions on a parent who wishes to move to the next village, or even the next town or some distance across the county, and a parent seeking such a restriction may well get short shrift. At the other end of the spectrum, cases in which a parent wishes to relocate across the world, for example returning to their original home and to their family in Australia or New Zealand, are some of the hardest cases which the courts have to try and require great sensitivity and the utmost care.

Before I leave the law, I want to venture a few words on the subject of proportionality. Ryder LJ raised this issue at paragraph 31 of *Re F* [2015] as follows:

"Finally, a step as significant as the relocation of a child to a foreign jurisdiction where the possibility of a fundamental interference with the

relationship between one parent and a child is envisaged requires that the parents' plans be scrutinised and evaluated by reference to the proportionality of the same. There was no question of that before this court, nor could there have been. It is a proposition that has already been decided that international relocation cases engage articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 [ECHR]. Whatever earlier *obiter* observations on and doubts about the applicability of the Convention to these cases that there had been were settled by the Strasbourg court's decision in *Glaser v United Kingdom (Case No 32346/96)*, [\[2001\] 1 FLR 153](#) at (57) to (65)"

Ryder LJ went on to say, at paragraph 32, that:

"it will not be every private law application that requires a proportionality evaluation. Many if not most private law children applications will be more than adequately protected by the domestic statutory regime and the jurisprudence of this court. International relocation applications under section 13 CA 1989 may require a proportionality evaluation because of the likelihood of the severance of the relationship between the child and one of her parents. That evaluation will inevitably focus on the welfare analysis of each of the realistic options and may amount to no more than an acknowledgement that one option is better than the other and that the preferred option represents a proportionate interference in the article 8 ECHR rights of those involved."

The present appeal has caused me to consider how a proportionality evaluation would actually work in the context of a relocation case. We are now entirely familiar with the role of proportionality in relation to public law children proceedings, see particularly *In the matter of Re B (Care Order: Proportionality: Criterion for Review)* [\[2013\] UKSC 33](#), [\[2013\] 2 FLR 1075](#). Its impact is upon whether the court sanctions an interference in family life by the state in the guise of the local authority. Interference will not be permitted if it would violate the rights of the child or parents to respect for their family life under Article 8 of the ECHR. Proportionality also has a well established role in contact disputes where, as can be seen notably in *Re A (Intractable Contact Dispute: Human Rights Violations)* [\[2013\] EWCA Civ](#)

[1104, \[2014\] 1 FLR 1185](#) the court can have an obligation to ensure that appropriate steps are taken to enable the family tie between parent and child to be maintained. It is not difficult to see how Article 8 influences the outcome in that situation – the court has to strive harder.

42. Vos LJ (as he then was) held:

I add a few words in an attempt to summarise the position that has now been reached. As counsel before us agreed, in cases concerning either external or internal relocation the only test that the court applies is the paramount principle as to the welfare of the child. The application of that test involves a holistic balancing exercise undertaken with the assistance, by analogy, of the welfare checklist, even where it is not statutorily applicable. The exercise is not a linear one. It involves balancing all the relevant factors, which may vary hugely from case to case, weighing one against the other, with the objective of determining which of the available options best meets the requirement to afford paramount consideration to the welfare of the child. It is no part of this exercise to regard a decision in favour or against any particular available option as exceptional.

43. I have also considered [K v K \(Relocation: Shared Care Arrangements\)](#) [2011] EWCA Civ 793 and particular what was said by Black LJ (as she then was) at paragraphs 141 to 145, although I note that at that time her Ladyship was considering relocation outside the jurisdiction (see paragraph 147) but her views evolved as set out above.

44. I was also referred to the decision of Sir Andrew McFarlane P in [to L \(A Child\)](#) 2019 EWHC 867 which is helpful background and the analysis of Baker J (as he then was) in [AH v DT](#) (2017) EWHC 36

Submissions

45. On behalf of Ms D, Ms Jones made the following pertinent points. She has been the primary carer or was the primary carer for the first years of their lives as she stopped work when A was born and did not return to work until 2016. Her roots are in Somerset and it is very familiar to the boys. Ms D has always wanted a move to Somerset and she is accepted as a local there. Indeed Ms D points out that she and Mr D jointly had an offer accepted on a property in Somerset before they separated.. The CAFCASS officer's view

was that where there is very difficult communication, shared care is not a very good idea. Ms D gave evidence that “she has done the best she can to make it work for the boys.” She has rented a property in the catchment area. Ms D had set up an account on a co-parenting app, Our Family Wizard, but Mr D had refused to use it. She had blocked Mr D’s email account in 2018. She said that Mr D sent abusive e emails (There are no abusive emails identified to me in the court bundle. I was told by Ms Jones that HHJ Oliver had said that the exhibits should post date the hearing in March 2018). Communication is done via Mr D writing to Ms D. She said that in future communication could take place between A and B and their father directly. Shared care will come to an end and the rotas produced by Mr D will not apply. Shared care requires much more communication because of lots of transitions. Ms D would prioritise the boys’ relationship with their father. She can separate out the fact she thinks the father is a narcissist and a psychopath from their need to have a relationship with their father. The co-parenting arrangement is fraught with difficulties. Mr D is not supportive of Somerset. The application to relocate is a genuine one and that is supported by Ms Ingram. Caution is needed in respect of Mr D’s evidence given he accepted that he had ‘cherry picked’ the evidence, including the evidence in respect of Ms D’s mental health. Ms D does not think that she will be able to continue to afford to rent and run a property in London.

46. Miss Bayley on behalf of Mr D refers me to [L v F \[2017\] EWCA Civ 2121](#) a case about the refusal of relocation, to make three points: i. paragraph 46 -task of court is to identify the available options that best meets the children’s welfare needs, avoiding a linear approach; ii. shared care at paragraph 70, - where parental relationship is bad, the historical approach to manage this is no longer good law; iii. paragraph 75 in respect of differing from professional recommendation. I note paragraph 70 states:

“When considering what arrangements are best for a child, the court’s powers are broad. There was a time when the orthodox view was that shared care should not be ordered where the parental relationship is bad. There will certainly be cases where that will be the conclusion on the facts, but the authorities show that there is no longer a principle to this effect: *A v A (Shared Residence)* [\[2004\] EWHC 142](#); *Re R (Shared Residence Order)* [\[2005\] EWCA Civ 542](#); *Re W (Shared Residence Order)* [\[2009\] EWCA Civ 370](#). HHJ Owens was referred by counsel for the father to the first of these cases, so she no doubt had them in mind when she made the

observation that *"there is clear authority that a failure to be able to communicate effectively is not a bar to shared care arrangements."*

47. Miss Bayley asks rhetorically is the current situation so toxic? She submits that HHJ Oliver's order survives and both boys have close and loving relationship with each parent. They are doing well educationally. They have busy social lives and friends in both places. They are thriving despite the poor communication. The intensity of the poor communication and the agenda which has fuelled much of the animosity, will reduce so the court can have confidence in there being an improvement. In summary 50:50 care had not yet reached the end of the road and there can be refinements to the order. Limited credibility can be given to Ms D's evidence that she can sustain and nurture the boys relationship with Mr D. The application made in 2018 was refused and a final order was made, she was in court and was represented and did not appeal. When asked about what she thought about it, she said she had "pick[ed] herself up get on with it and make the most of it". However, she did the opposite, she posted online petitions, identifying herself and the children, dragging the children's private lives into the public arena. They have been public from May 2018 until now, even although Mr D's witness statement was served in March. She submitted this was a serious issue that goes to the heart of the welfare checklist and that it was wholly inappropriate to air these matters publicly. Ms D complained about the social worker. She petitioned her MP Neil Coyle. She sought to undermine and criticise the social work and court process. She told the financial remedies hearing in August 2018 that she wanted to buy a house in London, she denied it and said her case was that she was moving to Somerset. Mr D then produced the witness statement that demonstrated she made no mention of Somerset. Her evidence is "utterly unreliable and this goes to the central issue of whether court can accept her evidence that she will promote Mr D's relationship with A and B." When she says in her evidence that she has no animosity to Mr D this is undermined by her evidence that she considers him a psychopath and a narcissist. In 2020 Ms D did not ensure that B came to London on his birthday, Ms D said he did not want to leave what he was doing in Somerset which was a breach of the Child Arrangements Order and which will be repeated in the future and will impact on the relationship. A and B's relationship with Y will be jeopardised. Mr D recently gave an iphone to A and Ms D posted the iphone back through the door and gave A a new iphone. The Court is only left with the mother's word, but she is not credible. She has influenced the children and shared crime statistics,. It was questioned how can it be in child's best

interests to make a child feel nervous or scared of their own environment? Ms D obtained a final order in 2018 and in 2020 bought a family house 170 miles away. She had undermined and sabotaged HHJ Oliver's order. She has set up a rival existence in Somerset which includes Sea Scouts, youth clubs and rugby clubs. This is contrary to A and B's best interests before court had made a decision about relocation. She has put her own interests at the forefront to move to Somerset and the children are collateral damage. CAFCASS recommend in their report that the children make the 170 mile round trip between London and Somerset only once per month. That is what Mr D agrees and proposes. It is onerous and tiring.

Analysis

48. There are in reality only two real options before the court. First, relocation to Somerset for A and B to live with Ms D and to spend alternate weekends, two half term holidays, a three week summer holiday and alternate Christmas and Easter holidays with Mr D. The alternative option is continued shared care between Mr D and Ms D, with A and B attending London schools with holidays divided between Ms D and Mr D. I must carefully analyse these two options against the welfare checklist. I have not been particularly helped by considering who was the primary carer prior to 2017. I accept Ms D's evidence she gave up her job and devoted considerable daily care to A and B but I also accept Mr D's evidence that he played a full and meaningful daily role with A and B each morning and afternoon when he returned from work. Care has been split since 2017. Both parents have much to offer A and B and have been heavily involved in their care for many years.
49. Mr D's written application sought a Child Arrangements Order providing for A and B to reside with him full time and to spend time with Ms D. I have not considered that as an option in this analysis because there was insufficient proper evidence in respect of it. CAFCASS did not provide their view on this proposal. There was no proper evidence of A's and B's wishes and feelings on this option. Having listened carefully to the evidence and observed Mr D in court, I do not think he was truly pushing for this option and it was in part a response to his fear that Ms D might give up her London home and thereby present the court with a *fait accompli*. I consider he is content with shared care, in the hope that after these proceedings come to end, communication between himself and Ms D might improve.

50. I have also formed the view that Ms D will not “leave her children behind,” as she told me and however difficult it is financially for her to maintain a home in London and Somerset, she will manage. It would not have been very appropriate of her to have attempted to force the court’s hand and refused to continue to rent her London home. She has not done so.
51. Standing back, having carefully considered the evidence and observed Ms D and Mr D in court it is clear A and B have a number of strong emotional needs. First of all they need each other. There was rightly no suggestion A and B should live otherwise than with each other. I agree. I have considered their needs separately but given it is manifestly in their best interests to be together, the competing matters in the welfare checklist can be approached in largely the same way. Secondly, they need their mother. She loves her children very much and movingly describes them in her third witness statement as “the beat of my heart, the pulse in my veins, the energy of my soul”. There is no doubting her commitment to her children and they need her. Thirdly, A and B need their father. He forms a hugely important part of every aspect of their lives and meets a very significant range of all their needs but particularly their emotional needs. Fourthly, A and B also need, indeed, require, their parents to stand back and stop the conflict between them. The parents know this. Professional after professional has commented on it. Ms D and Mr D have put their needs ahead of A’s and B’s and this must now stop.
52. The challenge in these proceedings is to seek to balance the frustration caused to A and B of continuing to be exposed to the parental tension and conflict as their parents seek to co-parent and manage the shared week around arrangements against the risk of significant emotional harm to A and B, of their important relationship with their father being marginalised and diminished should they live in Somerset. Having listened to the evidence I consider A and B are at risk of emotional harm if their relationship with their father did not continue in a full and meaningful manner, promoted by Ms D if she were to reside in Somerset. There are also risks in respect of their relationship with Y. The frustration to A and B of the current arrangements is already present. A is entirely correct to describe it as “crap”. It has become worse in the last twelve months as both parents have sought to navigate advantages to improve the chances of a positive outcome in respect of this hearing. In my judgement, it has also been made significantly more difficult as Ms D has been determined to fashion a life in Somerset to assist her in demonstrating to this court that A and B should be permitted to relocate. I agree with the Cafcass officer that Ms D’s

wish to reside in Somerset with A and B is a genuine one. That is where she is from and plainly she wants for herself and her boys a rural, “organic” life, as she describes it. However, the fortnightly trips to Somerset and the long periods during the COVID pandemic when the boys were remotely educated from Somerset have added real and significant strains on the relationship between Mr D and Ms D. I do not go as far as Mr D in describing Ms D’s attempts to create an alternative home for A and B in Somerset as “sabotage” of the order of HHJ Oliver prohibiting relocation to Somerset, but it is plain it is fraying the edges of that order and Ms D is deliberately creating a parallel home (to London) for A and B which is fuelling the communication problems and tension between the parents. That needs to stop.

53. I observed the mother’s reaction to listening to Mr D’s evidence and his counsel’s closing submissions. She was consumed with anxiety and at times anger. She found it difficult to listen to the other side of this difficult family fissure. It is clear she found the shared care order difficult to accept in 2018. Her online petition, complaints about social workers and involvement of her MP demonstrate her inability to accept the court’s welfare analysis in 2018. I also consider her evidence before me has been less than honest and she was not truthful in respect of what she told me she had told the court in August 2018. As a result, I do have difficulty accepting her evidence that she is capable of prioritising Mr D’s relationship with A and B. I consider she does believe that Mr D is a control freak, a narcissist and a psychopath. She finds it very difficult to follow the court order made by HHJ Oliver and if A and B were to reside in Somerset, she may grudgingly provide Mr D with the contact the court ordered, but she would not embrace his involvement. She does not embrace what Mr D brings to enrich A and B’s life. She found that very hard to even listen to it in court. In my judgement, if A and B were to reside with her in Somerset she would not be capable of carrying out the steps that Ms Ingram said were necessary for her to advise the court that A and B should relocate. There is therefore a likelihood that Mr D will be frozen out of A and B’s lives in any meaningful way and that they are at risk of suffering emotional harm were there to be a relocation to Somerset. An important one half of their lives would become diminished. The emotional benefits from the relationship would become anaemic and under-nourished. It is contrary to their welfare for their relationship with their father to be damaged in this way. Given their ages they would likely suffer harm in the immediate short term future, but also be at risk of further harm growing up without the strong relationship they currently need and enjoy.

54. It is against this background that I must consider the welfare checklist for both options. I am required to consider:

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under this Act in the proceedings in question.

55. I do not doubt that A and B have expressed the view that they want to move to Somerset. I consider, however, that they have been subject to quite significant influencing both from what their mother has told them and also by her actions. There has also been some influencing from Mr D. For some time, Ms D has created a pleasant rural life on the weekends and holidays that she has been able to. Naturally the boys have found this seductive. But in reality, given HHJ Oliver refused relocation to Somerset, A and B ought not to have been exposed to the level of integration in Somerset that they have been by Ms D. At this stage, until a court has properly considered relocation afresh, four years after HHJ Oliver, a responsible parent would not have sought to influence their children with a lifestyle which the court has not yet considered and approved. It also clear Ms D has undermined A's confidence in his personal safety in London by being unfairly negative about his London secondary school and its location. Therefore, I approach the expressed wishes and feelings of A and B in the CAFCASS report with some caution, as Ms Ingram suggested I should. They are not their true ascertainable wishes and feelings. I place some weight on their wish to move to Somerset, but it is limited as A and B have not appreciated how marginalised their important emotional relationship with their father would become.

56. A's and B's physical and educational needs are capable of being met either by relocation to Somerset or continuing with alternate weeks with mum and dad in London. Looking at

the rival school options for A and B in London and Somerset, the London option appears objectively better, particularly for B who would face only one transition in London rather than three if he moved from his current primary to a primary in Somerset then middle school and secondary school.

57. I acknowledge that sharing homes in London and spending alternate weeks with their parents may not be ideal. This may involve disruption. I have taken this into account.
58. I gain little further material insight into the decision I must take by considering A's and B's age, sex and background.
59. As highlighted above, the welfare checklist matters that are pertinent here are: "the likely effect on him of any change in his circumstances"; "any harm which he has suffered or is at risk of suffering"; "how capable each of his parents...is of meeting his needs" and ultimately the boys' emotional needs. Overall, the relocation to Somerset is not in A and B's best interests because they are at real risk of emotional harm because Ms D will not be capable of prioritising their need to have their relationship with Mr D nurtured and strengthened. The physical distance of 170 miles between A and B and their dad is likely to create a damaging emotional distance. I have considered very carefully, the poor parental relationship, and I am aware that I am proposing the continuation of alternate weeks of co-parenting, in the context of the poor communication. I am aware I am possibly requiring A and B to be subjected to frustration and upset by being co-parented by Mr and Ms D in circumstances where their parents seem incapable of speaking to each other. Having considered all the evidence, this is a less bad outcome for A and B than the emotional risks of relocation to Somerset. I reach this conclusion given that I believe the mother's push to relocate by stealth before a court order, will now come to an end and the relationship between Mr and Mrs D may improve now it is clear Somerset is a place for holidays and the focus of the boys' life is their homes and schools in London. I also express the hope that the hearing and this judgment will assist Mr and Ms D to stand back and improve their communication to reduce A and B's frustration with "the crap".
60. Therefore, having carefully considered the two options for A and B and having carefully applied the welfare checklist, I am clear that their best interests are met by continuing the shared care, alternate weeks in the care of their mother and father in London, attending London schools as opposed to relocating to Somerset. The risk of emotional harm to A

and to B of the relocation is too great and is not in their best interests. In reaching this decision, I find myself in agreement with the advice of CAFCASS and ultimately I agree with Ms Ingram's evidence that relocation to Somerset cannot take place in circumstance where it is very clear that Ms D cannot protect A and B from her own views of their father; cannot separate out and protect their relationship with their father, from her own strongly held views of Mr D. It would be quite wrong to expose A and B to the risk of emotional harm by permitting their much needed relationship with their father to be damaged by relocation to Somerset.

61. I have considered Ms D's Article 8 ECHR rights both to a family life and a private and home life, given she wishes to be in Somerset. I have weighed these rights carefully in my analysis, but the paramountcy of A and B's needs lead me to the conclusion, through the welfare checklist, that continued alternate weeks between Mr and Mrs D are necessary for A and B and the order I make is proportionate and necessary in respect of Ms D's rights.
62. The holiday arrangements which Ms D and Mr D should continue as before in A's and B's best interests. However, I consider now it is re-established, again, that A and B will be co-parented spending time by way of alternate weeks with their parents in London, that the fortnightly tiring trips to Somerset should cease. It is not in the boys' best interests to be confused by thinking they lead a life across three homes. It is also tiring for them and A in particular will need his energies for the demands of the secondary curriculum and, soon enough, public examinations. Managing their lives in two different homes is sufficient challenge for them. Their fun time in Somerset should be appropriately preserved to Christmas, Easter, some half-term and summer holidays. A handful of weekend trips should also feature.
63. I end by urging Mr D and Ms D to work together for A and B to improve their communication with each other to accept this decision made for A and B to ensure the co-parenting the boys needs is a success for them. A and B are fortunate to have parents with so much to offer each of them.
64. I ask counsel to draft an order to give effect to this decision refusing the application for relocation and to set out the child arrangements orders and ancillary matters.

Appendix One

RECORDER JOHN MCKENDRICK QC

CENTRAL FAMILY COURT

LONDON

30 August 2022

Dear [A] and [B],

My name is John and I am a judge. I met your Mum and Dad at court in London last week. Your mum and dad have asked me to make decisions for you both about where you should live.

Your Mum asked me to decide that you should both come and live with her in Somerset and see your Dad only every second weekend and at holidays. Mum wants you to go to schools in Somerset.

Your Dad asked me to decide that things should stay as they are. That you spend one week with him and the other week with your Mum in London. Dad wants you to go to schools in London.

I think you met a lady called Shelley in July and you told her what you wanted. She told me you both liked the idea of living with your Mum in Somerset. Shelley spoke to me as well last week.

I hope you both understand that I have made the decision and not your Mum or your Dad. Judges sometimes have to make decisions when parents cannot agree.

I have decided you should both continue to live in London with one week in the care of your Dad and then one week in the care of your mum. This means you will both go to school in London from next week. I have decided you should have nice holidays in Somerset and I will speak with your Mum and Dad again to sort that out.

I have made this decision after considering who you both are, what you both need and things like your education, happiness and your welfare. I have decided you need each other – I think you are good brothers to each other. I also think you need to spend time with your Mum and with your Dad. They both need to play an important role in caring for you. I was worried your Dad might not have a full and proper role in your lives if you lived in Somerset. Looking at all these things in the round I felt this was the best decision for your both, although of course I considered what you both wanted.

I have also asked your Mum and Dad to behave a bit better. I know you both find the arguing that happens between them difficult. Although it is a naughty word, [A], you are right to describe it to Shelley as “crap”. I have told your parents to stop “the crap”.

I hope you can both settle down with the new school term with week about with Mum and Dad in your London homes. I hope you will enjoy nice holidays in Somerset. I wish you both good luck.

Judge John

