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Neutral citation number: [2024] EWFC 74 (B)
Case No:WD23P70135

IN THE FAMILY COURT SITTING AT WATFORD

Date: 3 APRIL 2024

Before :

HIS HONOUR JUDGE RICHARD CLARKE

Between :

**FATHER
- and -
MOTHER**

**Applicant
Respondent**

DECISION

His Honour Judge Richard Clarke :

INTRODUCTION

1. This is the decision of the Court following a final hearing in respect of applications brought by XXXXXX (referred to as "Father") issued on 15 February 2023 in respect of XXXXXXXXXXXXXXX, a boy born on XXXXXXXX 2014 (referred to as "the Child"). Father issued the following applications:
 - 1.1. A C79 enforcement application, seeking enforcement of a final Child Arrangements Order in case number WD15P00711 dated 14 June 2016;
 - 1.2. A C100 application, seeking:
 - 1.2.1. Variation of the previous Child Arrangements Order;
 - 1.2.2. A Specific Issue Order to change the Child's surname to add Father's surname, hyphenated with Mother's surname; and
 - 1.2.3. A Specific Issue Order to determine the storage of the Child's passport (with Father or in a neutral location).

2. The respondent is XXXXXX (referred to as "Mother"), who has also issued her own application on 11 May 2023 for:
 - 2.1. Variation of the Child Arrangements Order;
 - 2.2. A Prohibited Steps Order preventing Father from removing the Child from the jurisdiction without prior consent of the Court; and
 - 2.3. A Specific Issue Order for an Independent Social Worker to be appointed to investigate the harm caused to the Child by Father.
3. The trial of this matter has taken place over 2 days commencing on 5 March 2024. There was insufficient time available to deliver the Court's decision at the end of the hearing, hence this written decision.
4. Given the potential for wider distribution of this decision, the Court has anonymised the names of the children and family members. The Court has also decided to anonymise any reference to the professionals and experts who provided evidence for the benefit of the Court.

REPRESENTATION AND PARTIES

5. The Father was represented by Mr Dipré of counsel.
6. The Mother was represented by Ms Ecob of counsel.

BACKGROUND

7. The parties were in a relationship between 2000 and 2002. They reconciled in 2013, but were separated by the time of the Child's birth on 14 September 2014.
8. Mother registered the birth and only used her surname. Father was not included on the birth certificate, so did not have automatic parental responsibility. On 28 July 2015 Father issued proceedings under the Children Act 1989, seeking a Parental Responsibility Order and a Child Arrangements Order.
9. A Parental Responsibility Order was made on 2 February 2016. A Final Child Arrangements Order was made on 14 June 2016, providing for the Child to spend time with Father on an increasing basis. Other than holiday contact, the Order was made by consent. For the purposes of this decision it is sufficient to note that by the end of 2022 it had increased to:
 - 9.1. Alternate weekends from Friday at 6pm to Sunday at 5pm;
 - 9.2. Alternate Tuesdays from 6pm to 7:30pm;
 - 9.3. Summer holidays for 2 non-consecutive weeks; and
 - 9.4. Additional time on special days/occasions.
10. Both of the parents are in new relationships and have children by their new partners. Mother has married her partner, and Father is engaged.
11. The parents' concerns about the Child's behaviour went back to at least 2019. By the summer of 2022 Father says that he had concerns about

Mother shouting and hitting the Child. He decided to record a video of the allegations, which was done on 25 July 2023. There was also a second video of the Child complaining about the maternal grandmother vaping and blowing the smoke at him.

12. Around September 2022 the parties agreed that the Child should attend a coach due to behavioural issues. Father paid for a number of sessions between the coach and the Child, and the parents also spoke to the coach. During that work the existence of the videos became known.
13. Father sent the video to Mother at 15:40 on 24 October 2022. His covering email spoke about his concerns, but stated "I have not reported it to social services, but I have put it on file with my solicitor as that is the right thing to do..." Mother responded at 16:42 on 24 October 2022, stating "Firstly, yes I have and can raise my voice at our son when he is misbehaving and as for 'slapping him' yes I have on occasion lightly smacked him. There is a big difference between a light smack and what you are implying". Later the same day she sent another email speaking about the "lies and fabrication from our son..." and the fact it was a huge concern for her that "he can lie at that level about things that have absolutely never happened". The Child continued to spend time with Father.
14. The parents continued to engage with the coach, who gave recommendations on how to improve their communication.
15. Over the years Father had made various requests to be able to take the Child abroad. In 2019 Mother's refusal included Mother explaining that she was already taking the Child abroad for 10 days, so it would be a bit too much for him to go abroad again. Mother only agreed to Father taking the Child abroad on 2 occasions at most (Father says 1), one of which she insisted Father was accompanied by his sister. On Christmas Day 2022 the paternal grandparents attended to collect the Child. They asked Mother for the Child's passport, on the basis Father was intending to take the Child abroad, no notice having been given. The Mother refused.
16. From 1 January 2023 Mother has not complied with the 2016 Order. On 12 January 2023 Father received the following letter from Mother's solicitor, suspending contact:
Subject: My Client: (Mother); EXTREMELY URGENT
Importance: High
Dear (Father),
I have been consulted by (Mother) in respect of the child arrangements for (the Child) and I have been re-instructed for the purposes of addressing concerns that have arisen.
I appreciate there has been some challenges over the last few months, but I am going focus my concerns about the ongoing child arrangements on a video I have had sight of where you are quizzing (the Child) for some

12 minutes in what seems to be an attempt to extract negative information about (Mother) and her family.

I have taken stock of and considered alongside that video various emails that have been sent to (Mother) and third parties, and I have also taken some instructions from (Mother) about (the Child) generally over the last few months in the context of circumstances where contact has been erratic in terms of you actually fulfilling the agreed arrangements, and also you actually being present during the times you are intended to spend with (the Child).

The video is of real concern to me, and my view is that (the Child) is at risk of ongoing emotional harm unless there is some serious intervention. No child should ever be put in front of a video and asked leading questions of the nature he was most of which were negative and designed to encourage (the Child) to denigrate his Mother, being his primary carer, and her family. That is what you have sent, and my concern is that the risk of harm runs deeper than just that video.

I have not taken the step to advise (Mother) of this lightly, given there is an Order, but I consider it in (the Child)'s best interests to suspend the contact arrangements and return the matter to court.

(the Child) will not therefore be available for contact on Friday 13th January 2023 or for the time being going forward.

Please ensure you contact me directly and not (Mother), and you should not encourage any third party to engage with (Mother) directly.

I advise you to take independent legal advice at this stage but I hope a resolution that gets to the bottom of why certain things have happened occurs so that (the Child) is protected going forward.

Kind regards...

17. Father applied to the Court on 15 February 2023. With his application he filed a C1A alleging emotional and psychological abuse of him, and physical, emotional and psychological abuse of the Child. Mother responded with her own C1A on 14 March 2023, alleging emotional and financial abuse of her, and emotional and psychological abuse of the Child. A description of what happened included allegations by Mother that she had been advised by the Child's school, counsellor and legal advice to temporarily suspend contact, given the extent of emotional harm and distress the Child was showing and the application (to the Court) and that there had "been a significant number of weekends (too frequent to particularise here) where the (Father) simply passed up the opportunity to have (the Child) himself and has asked the Paternal family to step in and assist".
18. Mother issued her own cross-application, dated 11 May 2023. It was accompanied by a schedule alleging, again, that "the Father himself has failed to make a number of recent ordered contacts and has left (the Child) with third parties. This has been a frequent occurrence, too frequent to ignore..." This apparently included an incident at Christmas 2022 when the Child stayed with the paternal grandparents because

Father was ill, but he then bumped into Father and his new family at the Winter Wonderland at Hyde Park. Mother sought to justify seeking a Prohibited Steps Order on the basis "Father has connections to Poland and there is a risk he will flee to the country with (the Child) and continue life there" and described Mother as continuing to "safeguard (the Child's) passport".

19. The first hearing took place before the Lay Justices on 2 June 2023. At that hearing the 14 June 2016 Order was suspended and an Independent Social Worker (referred to as "ISW") was Ordered to report, contrary to Father's wishes. The ISW was Ordered to send a s7 report to the Court and the parties by 4pm on 14 July 2023. Father remained critical of that decision, but no appeal was brought.
20. The Letter of Instruction to the ISW included a request that her report address whether the Mother had a reasonable excuse for breaching the existing Order. The ISW was also asked to advise on whether the existing Order should be varied.
21. The ISW report is dated 14 July 2023. While accepting this is only a selective summary, in it she:
 - 21.1. Noted the Child described Mother as strict sometimes, and elsewhere that she shouts a lot 'for stuff that (he) did not do'
 - 21.2. Stated the Child was unhappy with Mother for removing his games console
 - 21.3. Believed the Child was surprised when she raised possible change of surname, denying ever discussing this with or asking Father about this
 - 21.4. Confirmed that the Child had stated he missed his Father a lot and would like to see him, but he did not want to live with Father for half the time
 - 21.5. Reported the Child had said that it was Father who had asked him to say all the things that he had said in the video, and that what he had said was not true
 - 21.6. Felt the Child was burdened with divided loyalties
 - 21.7. Reported Father coming across as inconsistent, and at times misleading, in his interview. She felt satisfied the Child did not raise the issues with Father. She also questioned Father's reports of the Child being 'violent and lashing out' because he failed to alert anyone or provide any evidence of what the Child had done in order for him to reach that conclusion
 - 21.8. Thought the video would have taken some planning, although that was not what the Child had said, and spoke of Father reminding the Child of the 'script' and what the Child had to say in his questions. She caveated her view by saying if what the Child was saying was true it represented a serious and significant failure in Father's parenting and an attempt to cause serious damage to the relationship the Child shares with his mother

- 21.9. Reported that Mother felt Father would need to demonstrate over time that he is able to ensure the Child's safety at all times when the Child is in his care
 - 21.10. Expressed a view that Father was currently unable to prioritise the Child's welfare and safeguard him from Father's harmful behaviour
 - 21.11. Was of the opinion that the Child had suffered emotional harm by being encouraged by Father to make allegations of emotional and physical abuse against Mother (and the grandmother)
 - 21.12. Was unable to offer an opinion on whether the existing Order should be varied until further work was undertaken by the parents to help resolve their ongoing conflict
 - 21.13. Was of the view the Child had suffered emotional harm by Father ... and also that the Child may have suffered emotional harm by Mother, but to a lesser degree by being shouted at occasionally and by being 'tapped' by Mother's hand
22. As part of the preparation of the report, the ISW observed a contact session between the Child and Father on 6 July 2023. While the report covered discussions with Mother, Father and Child, it did not include a report on that contact. In the report the ISW sought to criticise Father's choice of toy to take to the contact which had taken place on 6 July 2023. Father had, apparently, been advised to bring only one small gift to the session. He took a toy figurine. It was stated by the ISW that it was part of a full set of toys, and she regarded Father as having purposely left the rest at his house to send an indirect message to the Child
23. The ISW report recommended interim contact between the Child and Father in the community, supported by a third party, to rebuild and repair his relationship with the Child, with a stepped approach to unsupervised contact. She also recommended co-parenting work for the parents to address the unresolved issues in their relationship which had, at times, prevented them from being able to co-parent effectively.
24. By the next hearing, on 24 July 2023, Father had issued a formal application for the ISW to attend that hearing to give oral evidence, dated 20 July 2023. Attached to the application was a letter to the ISW containing a list of 21 alleged factual inaccuracies in the report and 18 questions.
25. The District Judge hearing the case on 24 July 2023 ordered contact between the Child and Father, supported by a psychotherapist, for 2 hours each weekend on dates and times to be arranged. The recital noted Father was away from 29 July to 5 August and from 26 August to 2 September 2023. The ISW was to answer the questions raised of her and the final hearing was listed for 2 days on a date after 12 September 2023. The ISW was to attend the final hearing and the parties were to serve any further witness statements by 5 September 2023.

26. Following the hearing the Father sought to ask a number of questions about the psychotherapist who was supposed to be supporting contact. Some of the questions were answered, and identified her as a friend of the maternal grandmother. Despite this information Father was still content for her to support the contact, which begs the question why he asked in the first place instead of focussing on making sure the contact took place. Father also raised similar questions about any relationship between the ISW, Mother and her solicitors.
27. The final hearing was listed for 11 December 2023, 'at risk'. However, no judge was available so, on 4 December 2023 the listing was vacated and re-listed for 5 and 6 March 2024. In response Father issued an application, dated 7 December 2023, for an urgent contact Order, on the basis no contact had taken place since the hearing on 24 July 2023, despite the Order, and seeking an earlier final hearing date.
28. Father's application was heard by a Circuit Judge on 21 December 2023. Interim contact was agreed to commence on 23 December 2023, supported by the same psychotherapist Father had previously challenged. The directions included the parties having a further opportunity to serve witness statements by 4pm on 13 February 2024. Strict directions were given for preparation of the case for the final hearing.
29. In advance of the final hearing there was a stand-off between the parents, neither of whom served their final witness statements in accordance with the Court directions. The statements were not served until the end of February 2024, with neither party bringing an application to rely on them out of time. An "unagreed" bundle was filed, which did not include Mother's final statement. It contained contact notes without permission, despite the requirement to seek the permission of the court under PD27A. The pagination of the hard copy bundle did not match the digital page numbering of the digital bundle. The bundle did not comply with the limit of 350 pages. The hard copy bundle was stuffed into a single lever arch file, which was overly heavy and in which the pages could not be turned properly as a result. A second bundle of "correspondence" was filed, again without permission. There was no hearing time estimate, and no reading list was provided to assist the judge. There was video evidence which the Court was asked to watch, but no arrangements had been made for this. There was also no transcript of the video evidence.
30. Mother attended the Court seeking screens in the hearing room, so she could not see Father and he could not see her. The Court was informed screens had been in place at every hearing, despite there being no record of this or any direction in the previous Orders. The Court queried what relevant findings of abuse had been made, and it was confirmed there were none. Mother had made allegations against Father in her witness statements. She accepted they were not relevant to welfare and were not

being pursued at the hearing. Father raising no objection, a screen was allowed.

31. The ISW and the Court had not had the benefit of the most recent documentation. The start was put back until just before 11:45am to allow the documentation to be considered. By that time Father had confirmed the only breach he was pursuing was the interruption of contact from 1 January 2023 onwards, Mother was not pursuing allegations of historic controlling behaviour and it was accepted that Mother's statement was inaccurate in respect of Father's criminal convictions and in describing the contact as supervised. A tight timetable was put forward, and the Court observed it left little time for any decision. It also failed to provide for the possibility that the Court may have some questions pursuant to its inquisitorial role.
32. The Court heard evidence from the ISW, the Father and the Mother. It also heard closing argument. Mother's advocate repeatedly failed to adhere to her time estimates and proceeded on the basis an amount of extra time would make little difference overall. As it was, the hearing was not able to conclude in the time allowed. What the Court did do is identify preliminary matters which would enable the situation to be improved pending receipt of the written decision.

THE ISSUES THE COURT HAS TO ADDRESS

33. Matters were narrowed, both during the course of evidence and in continuing discussions between the parties. The Court is grateful for the assistance of the legal representatives and the parties for their approach in this regard.
34. The parents' witness statements sought to vent a considerable amount of personal issues between them. It will achieve little to repeat them here. By the end of their oral evidence, both parents accepted that the problems stemmed from a dysfunctional relationship between them. They agreed they should undertake a co-parenting course, and the Court determined this should be the Talking Families course to be arranged through the Local Authority.
35. The parties have agreed there should be a shared care arrangement. Whilst Mother agreed time between the Child and Father should increase, there remained an issue about future division of time. Mother accepted the time should increase to 4 hours immediately, 6 hours while the course is being done and revert to the 2016 Order on satisfactory completion of the co-parenting course. She also agreed additional time at half-terms (+2 days), Easter (4 consecutive nights) and an alternating 23 December at 10am to 12:30 Christmas Day/12:30 Christmas Day to 10 am on 28 December pattern at Christmas plus 2 consecutive additional days. A system for retention of the passport and notification to the other parent of

any intended foreign holidays was agreed. The parents also agreed to use MyFamilyWizard to communicate in future.

36. The parties did not agree on change of name, or whether there should be a finding of breach without reasonable excuse. Mother also argued that for the first 3 months of the 2016 Order weekends should be limited to 1 overnight stay as part of a gradual reintroduction.
37. Father continued to seek adoption of a hyphenated surname, including both his and Mother's surname. It was accepted, on his behalf, that videoing a child was frowned on by the Court, but he asked the Court to find it was not done with malice or that Father told the Child what to say. The Court was asked to find that Mother had breached the 2016 Order without reasonable excuse, but the Father did not seek any form of punishment of Mother as a result. In terms of division of time, Father sought a long-term goal of equal time with each parent and requested full 2 overnight weekend stays on reintroduction of the 2016 Order.
38. Mother maintained that the Child's surname should not be changed, because it was what he was used to. She opposed moving to equal division. She also opposed the Court making any findings on breach, on the basis there was no need if Father was not seeking a consequence. There was a suggestion that if it became an issue again in future the issue could be re-litigated.
39. Both parents reported the Child had expressed different views to them about whether the Child wanted the name change. They were open to the fact he may have said different things to each parent.
40. Father's increase to equal care was proposed over an extended period of time. He had produced a proposed schedule showing how this would work which would mean the Child would not have a single uninterrupted weekend with Mother for an 8-month period. He said that if the Child did not want the time to progress as ordered then he would be entitled to express this and it would be respected. Father did not have an answer for what would happen if the Child said different things to each parent. He said he was not wedded to his proposed plan, but would accept anything that would move matters towards equal care.
41. During the evidence it was put that the case should not conclude at this hearing, and should be listed for a review hearing following completion of the co-parenting course. The Court expressed that the benefits of a co-parenting course were likely to be seen over time, rather than being a quick fix, and that such a request would appear to be contrary to the Child Arrangements Programme. Neither party pursued a review hearing in closing submissions, with Father indicating the move to equal time would be, roughly, over a 2-year period.

THE LAW

42. The governing principles in proceedings of this kind are, of course,
- 42.1. the welfare principle (s1(1) of the Children Act 1989 – child’s welfare is the paramount consideration),
 - 42.2. the 'effect of delay' presumption (s1(2) – delay is likely to prejudice the welfare of the child),
 - 42.3. the parental involvement presumption (s1(2A) – unless the contrary is shown the involvement of a parent in the life of the child concerned will further the child’s welfare; qualified by s1(6) – the presumption does not apply if involvement would put the child at risk of suffering harm),
 - 42.4. the overriding objective (part 1 of the Family Procedure Rules 2010 – dealing with a case justly having regard to any welfare issues involved including expedition and fairness), and
 - 42.5. the parties' rights under Articles 6 (fair trial) and 8 (respect for private and family life) of the European Convention on Human Rights.
43. The Court reminds itself of the following summary on this¹:
- 43.1. The welfare of the child is paramount.
 - 43.2. 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.
 - 43.3. 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.
 - 43.4. Excessive weight should not be accorded to short term problems and the court should take a medium and long-term view.
 - 43.5. 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.
44. The law is well known in this field, uncontroversial and need not be recited at length but the Court needs to remind itself of it both personally and so the parties are aware of the context of the decision it makes. It can be summarised as follows:
- 44.1. Where there are disputed allegations of fact there is only one standard of proof in these proceedings, namely the simple balance of probabilities.² The seriousness of the consequences of a finding of fact do not affect the standard to which it must be proved. The burden of proof is on the party who makes the allegation(s), it is not reversible and it is not for the other party to establish that the allegation(s) are not made out.

¹ Black LJ in J-M (A child) [2014] EWCA Civ 434

² Re B [2008] UKHL 35

- 44.2. If a legal rule requires a fact to be proved (the court) 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 (court) is left in doubt, that 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 (that party) does discharge it, a value of 1 is returned and the fact is treated as having happened.³
- 44.3. The inherent probability or improbability of an event remains a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. "Common sense, not law, requires that in deciding whether the fact in issue is more probable than not regard should be had to whatever extent appropriate to inherent probabilities⁴" The fact an event is common or frequent does not lower the standard of probability to which it must be proved, nor does the fact it is very uncommon or infrequent raise the standard of proof.
- 44.4. Where the evidence, stands only as hearsay, the court weighing up that evidence has to take into account the fact that it was not subject to cross examination.⁵
- 44.5. If the Court finds that any witness who has given evidence has lied on collateral matters then in the assessment of their core credibility it must:
- 44.5.1. decide whether a witness did in fact deliberately tell lies. If not sure that he or she did, then it should ignore the matter.
- 44.5.2. ask, if sure a witness has lied, why have they done so?
A lie told by a person can only strengthen or support evidence against that person if the Court is satisfied that (a) the lie was deliberate; (b) it relates to a material issue; and (c) there is no innocent explanation for it.⁶ Lies, however deplorable, are significant only to the extent that they affect the welfare of the child, and in particular to the extent that they undermine systems of protection designed to keep the child safe.⁷ A witness may lie for many reasons , such as shame, misplaced loyalty, panic, fear, distress, and the fact that a witness has lied about some matters does not mean he or she has lied about everything.⁸ Where witnesses have made mistakes or told lies in their evidence there must be an evaluation by the court.
- 44.6. The Court must must take into account all the evidence and, furthermore, consider each piece of evidence in the context of all the other evidence.

³ Lord Hoffman in Re B (Children) [2008] UKHL 35

⁴ Lord Hoffmann in Re B at para 15

⁵ Re W [2010] UKSC 12

⁶ R v Lucas [1981] 1 QB 720

⁷ Re: F (A Child) (Placement Order: Proportionality) [2018] EWCA Civ 2761 para. 25.

⁸ A County Council v K, D and L [2005] 1 FLR 851 (para 28)

- 44.7. The evidence of the parents and other carers is of the utmost importance. It is essential that the Court forms a clear assessment of their credibility and reliability. However, any judge appraising witnesses in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment solely by virtue of their behaviour in the witness box and to expressly indicate that they have done so.⁹
- 44.8. The assessment of credibility generally involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he or she now believes it to be. With every day that passes the memory becomes fainter and the imagination becomes more active. The human capacity for honestly believing something which bears no relation to what actually happened is unlimited. Therefore, contemporary documents are always of the utmost importance.¹⁰
- 44.9. Whilst of course appropriate attention must be paid to expert evidence, it is important to remember:
- i) that the roles of the court and expert are distinct; and
 - ii) that it is the court that is in the position to weigh the expert evidence against the findings of the other evidence
- the judge must always remember that he or she is the person who makes the final decision.¹¹ The evidence of an expert is not held in any special position and there is no presumption of belief in an expert no matter how distinguished they may be. However, a judge cannot substitute their own view for the views of the experts without some evidence to support what they conclude and must give reasons for disagreeing with an expert's conclusions or recommendations.
- 44.10. Change of name is essentially a welfare decision. The leading case is that of *Re W*¹², which set out the following factors which should be considered in this case:
- 44.10.1. on any application the welfare of the child is paramount, and the judge must have regard to the section 1(3) criteria;
 - 44.10.2. among the factors to which the court should have regard is the registered surname of the child and the reasons for the registration, for instance recognition of the biological link with the child's father. Registration is always a relevant and an important consideration, but it is not in itself decisive;
 - 44.10.3. the relevant considerations should include factors which may arise in the future as well as the present situation;
 - 44.10.4. reasons given for changing or seeking to change a child's name based on the fact that the child's name is or is not the same

⁹ *Re M (Children)* [2013] EWCA Civ 1147 (paras 11 and 12)

¹⁰ *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403, per Lord Pearce; *A County Council v M and F* [2011] EWHC 1804 (Fam) [2012] 2 FLR 939 (paras 29 and 30): see Mostyn J in *Lancashire CC v R* [2013] EWHC 3064 (Fam) (paras 8 and 51).

¹¹ *Charles J in A County Council v KD and L* [2005] 1 FLR 851 para 39 to 44

¹² *Re W, Re A, Re B (Change of Name)* [1999] 2 FLR 930, following *Dawson v Wearmouth* [1999] 1 FLR 1167

as the parent making the application do not generally carry much weight;

- 44.10.5. the reasons for an earlier unilateral decision to change a child's name may be relevant;
- 44.10.6. any changes of circumstances of the child since the original registration may be relevant;
- 44.10.7. where the child's parents were not married to each other, the mother has control over registration. Consequently, on an application to change the surname of the child, the degree of commitment of the father to the child, the quality of contact, if it occurs, between father and child, the existence or absence of parental responsibility

45. The child's welfare is the paramount consideration for the Court and when considering this it must apply the welfare checklist in section 1(3) of the Children Act 1989, namely:

- 45.1. the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- 45.2. their physical, emotional and educational needs;
- 45.3. the likely effect on them of any change in their circumstances;
- 45.4. their age, sex, background and any characteristics of them which the court considers relevant;
- 45.5. any harm which they have suffered or is at risk of suffering;
- 45.6. how capable each of the parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting their needs; and
- 45.7. the range of powers available to the court under this Act in the proceedings in question.

46. **All parties have been given the opportunity to be represented** within these proceedings and have been able to put their case and Article 6 of the European Convention of Human rights has been fully engaged. No party has sought to argue their rights have not been respected.

THE EVIDENCE AND WITNESSES

47. The Court has read and heard a considerable amount of evidence. The fact it does not mention something in this decision does not mean it has not fully considered it but it is impossible to set out in this decision everything that has been heard and read. The basic principle is that the parties need to understand why the Court makes the findings and Orders it does on the issues that require determination.

48. The analysis of the evidence and findings are on the basis of hearing and reading the entire evidence and analysing the evidence in totality.

49. The Court has had the benefit of hearing evidence from the following witnesses:

- 49.1. The ISW;

49.2. Father; and

49.3. Mother.

50. The parties witness statements did not focus on the welfare of the child. It would appear they had each become dissatisfied with the 2016 Order over the years. They allowed this dissatisfaction to fester until it bubbled over at the start of 2023. Despite this, both parents seemed to come a long way in their oral evidence and the Court does not wish to undermine that progress in the content of this decision. The Court respects the compromises made by the parents and accepts the agreed aspects of the proposed Order. The Court is also mindful of the fact it should not become involved in the party's petty disputes. The Court also has to give a reasoned decision. This decision is therefore limited to the matters the Court regards as fundamental to the overall decision it makes on the disputed issues.
51. The ISW gave evidence first. She did not support a change of name. She was clear both parents needed to undertake co-parenting work, but had not expressed this clearly in her report because Mother was on maternity leave at the time and so she had felt it was not reasonable to expect Mother to do it. She had clearly formed a view on the facts. She struggled to answer questions asked of her. When asked about the Child's view she would respond with her own. When asked about Mother's motivation she would provide her own explanation, rather than referring to any explanation Mother had given. When asked about inconsistency in the information Mother was providing she characterised it as possible oversight.
52. She spoke about a lack of empathy for the Child from Father in the video. She felt the video was good enough reason on its own for Mother to suspend contact. She maintained it was wrong for Father to bring the figurine to the contact in July 2023, but could not say what the toy was. She was also unable to say why Father would want to upset the Child. She confirmed she had not spoken to Father about it, but said she felt Father had sufficient time to go to somewhere like Toys'R'Us to find a toy to excite the Child and his actions were deliberate. Her view was linked to Father being misleading over describing the Child as violent and lashing out. She sought to draw a distinction between this and Mother's reports the Child was prone to outbursts and reacted disproportionately.
53. Irrespective of any findings of the Court, the ISW felt Father needed to complete parenting work to help repair things. When asked whether, if the allegations were true, Father would have been justified in retaining the Child on the allegation Mother had hit the Child she accepted that if Father had reasonable concerns about the Child's safety she would expect a parent to take action to prevent further harm.

54. While the parents generally gave helpful evidence, each parent sought to minimise matters that painted them in a bad light when giving their oral evidence. When forced to accept they may have made an error they did so only reluctantly. While the screen was in Court at Mother's request, the net effect was that the parents could not see each other's response to the evidence. This was very telling when the Court was discussing their dysfunctional relationship and neither parent could see that the other was in tears.
55. Father had described himself as an upstanding member of society and criticised Mother for hitting the Child, asking what message it sent to the Child. He has a criminal conviction for battery. He sought to minimise this by describing himself as being caught up in a bar fight he had not started. When challenged on this he accepted he had been convicted for kicking another person in the head whilst in police custody.
56. Father had previously told Mother he was legally entitled to take the Child out of the country for a week without her agreement. This was not an accurate statement of the law. He also told her he had lodged the video evidence with his solicitor, which was not accurate either. However, he struggled to accept he had lied.
57. Father accepted it was inappropriate to send his mother to ask for the passport at Christmas without any previous discussion. This admission came at the end of his oral evidence, over a year after the event. If an apology was likely to have any significant impact it should have been issued at the time.
58. Mother sought to characterise the hitting of the Child as a light tap. She reluctantly accepted that was still hitting, and that she had described it as light smacking in her email. She described herself as having a loud voice and said she would raise her voice to the Child if his behaviour needed to be tamed, which he might see as shouting. She also accepted it was a long-standing concern of Father's that she would shout at the Child.
59. In the video the Child complained of Mother hitting him and shouting at him. The basic allegations were accepted by Mother in her email in response, although not to the degree alleged. The Court is dealing with possible exaggeration, not complete fabrication.
60. Mother was asked why she waited to suspend contact after she had seen the video. She said she had needed to think about what had happened. She also talked about contact breaking down, with the request for the passport at Christmas making her think enough was enough and seeking legal advice. She was unable to explain why her solicitor's letter of 12 January 2023 stated the solicitor had "taken some instructions from (Mother) about (the Child) generally over the last few months..."

61. The reasons given by Mother for suspending contact in the letter of 12 January 2023 were the video, erratic contact and Father not being present at contact. There was no evidence of erratic contact before the Court.
62. The only incident presented to the court of contact being erratic/possibly breaking down was the Winter Wonderland incident, despite Mother having asserted the incidents were too frequent to ignore. Mother accepted she had been informed Father was ill, but complained she was only informed at the end of the weekend. Father explained that because there was illness in his family he did not wish to expose the Child to it, so the Child had stayed with the paternal grandparents. The Father had already bought tickets for all the family, including the Child, to the Winter Wonderland and did not want him to miss this. He therefore arranged for his sister to bring the Child to Hyde Park to meet up, thinking this was safer as it was an outside venue. When this was put to Mother she accepted that it was a case of miscommunication, not a fabrication.
63. The Father has accepted all along that he recorded the Child. He says it was justified in the circumstances. It was asked of the ISW, by his counsel, whether someone who videoed a child and then realised it was not appropriate and would never do it again would still need to do a co-parenting programme. However, Father never gave evidence that he accepted it was wrong to video the Child.
64. The video is problematic. It should not have been recorded. There is a contradiction in Father's position. If the matter was so serious Father felt compelled to record it he should have done something with it, not sit on it for 3 months.
65. It is emotionally harmful to a child to require them to sit in front of a camera and criticise a parent. On Father's behalf, the Court was asked what else Father could have done. If Father had a genuine concern then he should have raised it with Social Services or the police.
66. When a child raises a complaint it is important the person it is raised with takes account of any context when deciding what to do. It is accepted that the Child never presented with any unexplained injuries. Instead of reporting the matter Father chose to ask the Child a series of leading questions, encouraging the Child to make complaint about Mother. If there was a genuine issue then he undermined any investigative process. Father failed to express any regret for his actions. He had no appreciation of what he had done wrong. That said, neither Mother nor her solicitors sought to address the issue with Father to make sure it did not happen again. The eventual response was to terminate contact without discussion.
67. Over the last 30 or so years there has been increased understanding and acknowledgement of the wide range of internal and external influences that can distort and undermine the reliability of child complainants. It is a

fact that children's accurate memories can be wholly usurped by a wide range of external and internal factors, such as suggestive questioning or confirmatory bias. They are not alone in this. The same applies to adults. This includes evidence children may embellish or overlay a general theme with apparently convincing detail that can be very difficult to detect, even by the most expert assessor.

68. Father did not automatically proceed on the basis the allegations made by the Child were true. He sought to question these, and also raised this with Mother. Unhelpfully, he was not as questioning with Mother as he was with the Child. She was expected to explain why the Child said what he did.
69. Father countered Mother's arguments about him by alleging she had breached the Order without due cause on numerous occasions. Other than terminating contact, none were identified or pursued. Both parties alleged controlling behaviour by the other, but neither sought any findings.
70. Mother did not produce any evidence from the school or counsellor stating she had been advised to suspend contact, despite her previous assertion. When Mother suspended contact she told the Child that Father was busy with work and contact would resume whenever Father sorted out his problems or issues. She did not want to accept she had lied, but accepted what she had said was not true. She also did not want to accept that it may have been harmful to let the Child think Father was putting work ahead of contact with the Child.
71. Father's partner is Polish. It was the only connection Father had with Poland that Mother was able to put forward. It was the only fact, other than Father asking for the passport, that she was able to rely on over the issue of the passport.
72. Mother argued that Father had made no effort to see the Child after August 2023. That ignored the Father's subsequent application to the Court. It also ignored correspondence sent by Father's solicitors chasing the matter up, and that her own solicitors said they would provide a substantive response and did not.
73. Mother complained that Father failed to send the Child a birthday present in 2023. Father referred to her solicitors' correspondence saying he was not to contact Mother, either directly or through a third party. When Mother was asked how not sending a present compared to the emotional impact of terminating contact without notice she was dismissive of any impact of stopping contact, focussing on the impact of the lack of birthday present. However, it was also her complaint that the Child had behavioural issues and was too materialistic.

74. Father complained that he could not do right for doing wrong. There were aspects of this that were clearly true. The best example was the criticism of him for not taking his concerns to the police or Social Services. That was a valid concern, however in Mother's witness evidence she also complained about the fact there was a Social Services investigation when Cafcass made a referral.
75. The parties went to war in both correspondence and their witness statements. Children Act proceedings should be conducted with the aim of improving the child's welfare. The Court struggled to find any focus on the Child, despite both claiming they were focussing on this. Both parents were critical of how the other had proceeded in trying to arrange contact after 24 July 2023. However, neither disagreed with the Court's observation that with 2 willing parents it would have taken place.
76. It may have assisted the parties if their legal representatives had tried to reduce the tension between them. However, the legal correspondence was highly confrontational and even descended to the personal. Mother's solicitor accepted the letter of 12 January 2023 should have been couched in terms of Mother's position and that their personal views were not relevant.
77. There are emotional benefits to a child having an ongoing relationship with both their parents, and, similarly, emotional harm in not doing so. A child is the product of 2 people. It needs to be remembered that when one parent criticises the other parent in front of a child they are criticising part of that child. A child needs their parents to work together. Here, it was accepted the parents were pulling in opposite directions and the Child was caught in the middle.
78. These are parents who will continue to parent the child following this final hearing and will have to continue to work together. This is despite the fact that have gone to war within the proceedings. They both accept they need help to repair their parenting relationship.
79. There may be an "App for everything", but using an App to communicate will not repair the relationship between the parents on its own.
80. There are problems with using an independent social worker, over and above the direct expense to the parties. Where they recommend further work they are generally unable to directly refer to courses run by the Local Authority or Cafcass.
81. It is a trite observation that an ISW cannot produce a s7 report. S7 of the Children Act 1989 limits such reports to Local Authorities and Cafcass officers. The report of the ISW was a welfare report. That does not minimise the fact that the Court should explain its reasons if it departs from the recommendations.

82. The ISW was supposed to be independent. She was entitled to provide an either way recommendation (i.e. if the Court finds A then this, but if the Court finds B then this) but she did not do so. In coming to a view on the allegations she presented herself as partial. Father had already asked inappropriate questions about her association with Mother's solicitors after she had been appointed. A welfare report in a case like this should be an opportunity to progress matters. Here, nothing happened to progress her recommendations. Father's paranoia may have prevented progress anyway, but it was not a good look.
83. There are limitations on the impact of the evidence of the ISW. She gave evidence first. She was not to know about any change in the parties' position, because they gave evidence afterwards. She was not to know Mother would agree reinstatement of the previous Order following the co-parenting work. Unfortunately, she was unable to identify the toy figurine for the Court to draw a view on her conclusions about the inappropriateness of this. What was consistent in her approach was a recommendation of a staged approach, rather than immediate reinstatement of the 2016 Order.
84. At the end of the hearing the Court issued a summary decision on which course should be attended to prevent any further delay. The delay in progressing a co-parenting course before the final hearing was disappointing. Talking Families was identified as suitable through the Local Authority and could commence mid-April 2024. A similar course was also available through Cafcass, but there had been no referral and there was no information when it could start. The parties proposed they book on the Local Authority course to cover the eventuality that the Cafcass course was not available for some time. The Court indicated the Local Authority course should be attended instead.
85. There are potential problems with booking courses which are not needed, because this takes away a limited resource from other families. At the same time, there has previously been significant drift in this case and the Court wanted the parties to leave knowing exactly what was required and when. The Talking Families course was the only course that met this criteria.
86. The Court does not need to give a full decision on matters that are agreed between the parents. The only reservation the Court has on what is agreed is that changing the label to shared care, where the Child lives with both parents, will not fix their relationship. It requires more than that.
87. Shared care does not require equal care. The Court therefore needs to determine the enforcement application and conduct a welfare analysis regarding the change of name and increase in time with Father, including whether it should be to 50:50.

ENFORCEMENT

88. The comments attributed to Lady Justice Black in J-M (A Child) were a repetition of a summary of the case law on refusing parental contact, including that 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. The comments do not just apply to the approach of the judiciary. They are comments of general application.
89. Court Orders are to be followed. Where an exceptional circumstance arises where contact has to be terminated, as a last resort, then a party is taking the decision not to comply. Terminating contact is emotionally harmful to a child. The decision must be a balancing act between the harm caused by terminating contact and the harm caused by allowing it to continue. Having taken that decision, the party terminating the contact should then bring the matter back to Court promptly, preferably before the Order has even been breached. What they should not do is terminate contact then sit back and wait to see what the other person is going to do about it.
90. Father does not seek an enforcement Order whereby Mother is required to undertake (for example) unpaid work in the community. However, he does seek a finding of breach. It is not a petty dispute. It is fundamental to why this case came back to Court.
91. Mother accepts she breached the Order. The question is whether she had "reasonable excuse for failing to comply with the (Order)".
92. Father's behaviour in the second half of 2022 was unfortunate, both with regard to the video and how he dealt with it and also regarding the request for the passport.
93. Mother failed to discuss her substantive issues with Father before terminating contact. There was no attempt made to obtain his agreement not to video the Child again. There was no effort to mediate. There was no "shot across the bows" from Mother through her solicitors, setting out future expectation. If contact had been breaking down it was in the Child's interest that efforts should have been made to fix it, not stop it. There were alternatives available to Mother which would have been less harmful to the Child. None of them were proposed or pursued by her.
94. The Court takes account of the fact the Court suspended the Order when the case finally came before it in June 2023, but by then the damage had already been done. The Court also notes the view of the ISW that Mother had reasonable cause. However, the Court has sight of all of the evidence in this matter and the benefit of hearing both parents in evidence, which the ISW did not have. Reasonableness has an objective element. The

Court does not accept it was reasonable for Mother to suspend contact when she did.

WELFARE ASSESSMENT

95. Wishes and feelings – Both parents report that the Child has told them different things about his name. Father says the Child wants the surname change, while the Mother says he does not. Father does not say the Child has told him he wants equal time with both parents, yet Father still pursues this as a long-term goal. The independent evidence before the Court is that the Child does not wish to have his name changed, or for there to be an increase in time with Father towards equal shared care. For a child caught between the parents an Order which gives the child the veto or power of determination, as suggested by Father, potentially places the child in a much worse position than before. There is also the problem of the parents then accepting that the child is genuinely stating what they want, if they feel able to do so despite wanting to make either or both parents happy.
96. Their physical, emotional and educational needs – the issues here are the physical and emotional needs of the Child. They have not been prioritised in the past, with failings by both parents. However, there is no such thing as a perfect parent. The issue is whether the parents have been able to appreciate how their behaviour has to change, before the Child suffers irreparable harm.
97. The likely effect on them of any change in their circumstances – an increase in the amount of time spent with Father would have a consequent reduction in the amount of time with Mother. The Child is on the first steps to reinstatement of the relationship with Father. It is important that is not taken too far too fast. Should he then be told to spend up to half of his time living with Father this may have a de-stabilising effect on him, as he may not have a clear picture of where he lives and is based. A change of surname is something that could also have a de-stabilising effect on him. He has spent the first 9 years of his life becoming accustomed to using his current name. Any change is unlikely to match those of his half-siblings, due to his unique parentage.
98. Their age, sex, background and any characteristics of them which the court considers relevant – the Child is now 9 years of age. He has 2 half-siblings, as well as 2 extended families, and it is important he is able to have positive relationships with both.
99. Any harm which they have suffered or is at risk of suffering – the main risk is of further emotional harm in the future. He needs his parents to be able to work together and to be able to prioritise his welfare. Where they disagree on something he needs them to be able to respectfully disagree.

100. How capable each of the parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting their needs – when taken in isolation each parent appears capable of meeting his needs. The difficulty is that they both share parental responsibility and need to be able to work together. It is something the parties are to seek to improve. However, when considering the issue of name change the Court notes this is a Father who has shown commitment to the Child, has had good quality contact, in the main, and who shares parental responsibility with Mother.
101. The range of powers available to the court under this Act in the proceedings in question – on increase in time, the Court can either make a tight Order which is to be strictly complied with or a loose Order with principles to be applied. Arrangements need to be flexible in future, because they will need to change with time. This is because, as the Child grows up, there will be more demands on his time and what may be suitable for a 9 year-old may not be suitable for a 14 year-old. If the parents are unable to work together and to be flexible, prioritising the Child's welfare in their decisions the Child will be caught in a straitjacket and the parents will keep returning to court.

CONCLUSION ON DISPUTED MATTERS

102. Change of name – the ideal time for this to have been dealt with was in 2016. The Child has now spent 9 years using the same name and the Court accepts he does not wish it to be changed. Changing the surname against the Child's wishes whilst re-introducing the Father into the Child's life risks undermining the reinstatement of that relationship. The Court is satisfied the Child's wishes and feelings should be respected on this issue. The application to change the child's surname is refused.
103. Current progression of time – the parties are agreed time with Father shall increase to 4 hours a week up to the start of their course, then increase to 6 hours a week if the supporter is able to accommodate this until the course is completed. The issue is whether the 2016 Order (now 2016+) should recommence in full with 2 overnights every alternate weekend or just 1 for the first 3 months. There is a necessary corollary that the extended time in holidays would not be able to take place until this period had ended.
104. It is impossible to predict how the Child will respond to reintroduction of overnights. The Court is dealing with a re-introduction after a break of 14 months. The evidence of the ISW was that a staged approach should be adopted and the Court accepts this evidence. For the first 3 months following re-introduction of overnight the Court is satisfied it should be limited to one night a weekend, unless otherwise agreed by the parents.
105. Future progression of time – the Court does not regard the medium and long-term issues in the case as revolving around whether time moves

towards 50:50. Those issues revolve around the relationship between the parents. There is a reason why shared care does not automatically equate to an equal division of time, because it is not always appropriate. There is also acknowledged research supporting the emphasis on quality over quantity. The Court is not satisfied it is in the Child's welfare interests to set out a progression plan which could be implemented in a years' time to move towards 50:50. On current evidence 50:50 is Father's aspiration and nothing more.