



Neutral Citation Number: [2025] EWCA Civ 55

Case No: CA-2024-001905

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
Her Honour Judge Robertson
ZC23P00032

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 January 2025

Before :

LORD JUSTICE BAKER
LORD JUSTICE NUGEE

and

LADY JUSTICE ELISABETH LAING

**RE A, B AND C (CHILD ARRANGEMENTS: FINAL ORDER AT DISPUTE
RESOLUTION APPOINTMENT)**

Dorian Day (instructed by **Direct Access**) for the **Appellant**
Deirdre Fottrell KC (instructed by **Farrer & Co LLP**) for the **Respondent**

Hearing date : 16 January 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 31 January 2025 by circulation to the parties or their representatives by e-mail.

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LORD JUSTICE BAKER :

1. The principal issue on this second appeal is whether a judge was wrong to make a final order in private children's proceedings at a Dispute Resolution Appointment ("DRA").

Background

2. The proceedings concern the parties' three daughters, whom I shall refer to as A, now aged 11, B, rising 9, and C, 7. The parents were married in Ireland, their home country, but later moved to England. In 2018, the parents' marriage broke down and, in January 2019, the father started divorce proceedings, whereupon the mother told him that she wanted to return to Ireland. The father then filed an application for a child arrangements order under which he would be the principal carer, and a prohibited steps order preventing the mother removing the children from the jurisdiction. The mother responded by filing an application for a specific issue order that she be permitted to relocate with the children to Ireland. Case management directions included a direction for a s.7 report by an independent social worker ("ISW"). In the course of her inquiries, the ISW spoke to A, then aged 5, but not the younger children. In her report, she recommended that the mother's application to remove the children permanently to Ireland be refused and that there should be a child arrangements order under which the children's time would be divided equally between the parents.
3. A contested final hearing took place before Deputy District Judge O'Leary in September 2019. At the hearing, the mother withdrew her relocation application. At the end of the hearing, the deputy district judge made a "shared care" order with each fortnight being divided under a 5:2:2:5 arrangement. The order of 24 September 2019 included a recital in these terms:

"If the father is unable to collect the children from school/nursery, he shall contact the mother offering that she collect the children instead and retain them thereafter until the father is able to collect them from her home. In the event that the mother is unable to collect and/or retain the children beyond 3.30pm, the father shall make his own childcare arrangements."
4. Nine months later, in June 2020, the mother filed a further application seeking a variation of the child arrangements order. The following month, the father filed an application also seeking a variation of the order. A further report from the ISW was ordered. Sadly, the ISW died in the course of these second proceedings and the report was prepared by a second ISW, Ms X. In the course of her investigation, the mother filed a second application to remove the children permanently to Ireland. The proceedings were delayed by the outbreak of the Covid-19 pandemic during which the children were homeschooled in the mother's home from Mondays to Thursdays and in the father's home on Fridays.
5. In her report, Ms X identified that the children were experiencing some problems. In particular, C, then aged 3, was said to display challenging behaviour and experience difficulties in social relationships. Ms X referred to counter allegations of abusive behaviour made by the parties. In the course of her report, she observed:

“A, B and C are in need of stability at this juncture in their young lives. Given the complexity of their parents’ conflict, characterised by their respective expression of anxiety about their futures with their children creating a sense of instability, changing their worlds by moving them from their current homes, schools and daily routines will be destabilising for them.”

She recommended that the mother’s second relocation application be refused and that the shared care be maintained in accordance with the existing schedule, with minor alterations.

6. In June 2021, a three day hearing took place before Recorder Trowell QC, (as he then was). At the end of the hearing, the recorder delivered a judgment dismissing the mother’s relocation application and maintaining the existing “5:2:2:5” child arrangements order, with minor variations.
7. In the course of his judgment, the recorder summarised the mother’s case as including that the children, in particular C, were not flourishing under the current arrangements, that young children should have one fixed home which in this case should be with her, that the father relied on nannies because of the demands of his work, and that this complicated matters for the children. The recorder made the following observations about the mother which are relevant to the issues arising on the present appeal:

“42. [Ms X] had no doubt that the mother was a capable parent. She did however think that the mother was an intense and an anxious parent. [Ms X] also raised in her oral evidence a concern that there was a risk that unconsciously the mother might act so as to diminish the father’s role with the children. She used the word ‘alienation’. [The mother’s counsel] says that word is misused by [Ms X], and it is clearly a heavily loaded word, so I shall not use it here but it is necessary for me to consider the risk that unconsciously the mother might diminish the father’s role.

43. I have absolutely no doubt but that the mother loves each of her children keenly. I have no doubt that she genuinely thinks that each of the children is loved by the father and that they love the father. Further I have no doubt that she does consciously acknowledge the importance of the father to the children. Where I think [Ms X]’s observation has force is that the mother does put problems in the children’s behaviour down to wrong day-to-day parenting by the father. I reach this conclusion having listened to her cross examination by Ms Fottrell on complaints and comments made by her of the father over the course of these proceedings. There may of course be occasions when the mother is right, but I do find that her general approach is to assume she is right, that he is wrong, and the problem would disappear if only the court would have (as she believes it should have done) entrusted her with the primary care of the children.”

8. Throughout the period of these two Children Act proceedings, the parties were also engaged in contested financial remedy proceedings which concluded in a final order in May 2022.
9. In February 2023, the mother filed an application to disclose parts of the order dated 24 September 2019 to the children's school, in particular the recital relating to collection of the children set out above. The following month, C was diagnosed as being on the autistic spectrum ('ASD'). In May 2023, the mother filed a further application for variation of the child arrangements order. In August 2023, the father filed an application for an order under s.91(14) preventing the mother making further applications without the court's leave. The DRA was initially listed before a circuit judge on 6 September, but on that day she transferred the case to Deputy District Judge O'Leary, who had made the original order in 2019 and was coincidentally sitting in the same court that day. She made directions for the filing of statements, including by the mother "setting out the events and changes in circumstances since June 2021 in support of her application for a variation of the current child arrangements orders", with a statement from the father in response. She also directed that Cafcass should file a safeguarding report pursuant to paragraph 13 of the Child Arrangements Programme in FPR PD12B and adjourned the case to 13 November "with a time estimate of 2 hours which is a DRA at which the Court will consider the parties' applications".
10. Both parties duly filed statements, with exhibits, which in the mother's case included copies of messages and other documents in which she had raised concerns about the father's care of the children. Prior to the adjourned DRA, two safeguarding letters were sent to the court by Cafcass. In the first, written at a time when safeguarding checks were incomplete, the family court adviser suggested that court obtain certain further information from the police, GP and the children's school. As to the need for a further s.7 report, she advised:

"I am mindful that the children's voices are missing from these proceedings and the Court may have a view on the need for these to be sought. I have considered this, on balance with the issues in question in these proceedings, and at this time do not advise that a further welfare assessment is proportionate to the need for further professional intervention in their lives."

In the second letter, after concluding safeguarding inquiries, she advised:

"The Court may wish to clarify how [the father's] behaviour has worsened towards [the mother] prior to considering its next directions. However, with the appropriate safeguards in place, it may be possible for the Court to resolve this matter without the need for a Section 7 report."

After receiving the two letters, the mother contacted the family court adviser in order, she said, to provide "clarifying" information.

The hearing before the deputy district judge

11. At the hearing on 13 November, the mother was represented by Dr Charlotte Proudman and the father by Ms Deirdre Fottrell KC. After hearing submissions on whether to

order a s.7 report, the deputy district judge indicated that she was not minded to order such a report but adjourned the matter for one week to 21 November with a view to giving judgment that day. In the event, she was unable to do so and instead heard further submissions on the father's application for an order under s.91(14). At the conclusion of that hearing, she made an order dismissing the mother's applications for an order under s.7, an order varying the child arrangements order and for disclosure of parts of that order to the school, and made an order under s.91(14) prohibiting the mother from making any applications for child arrangements orders or any other orders under s.8 of the Children Act or variation in the existing orders and any applications under s.13 of the Act without the leave of the court for three years, any such application to be reserved in the first instance to the deputy district judge, if available.

12. On 22 January 2024, the deputy district judge handed down a written judgment setting out the reasons for her decision. Having summarised the background, she summarised the mother's case in these terms:

“The mother's case was that there are new things known about the children and that their wishes and feelings have not been ascertained and this should be done. The mother also makes many complaints about the father and his parenting all of which, she says, could be solved if the children were in her care as the primary care giver. She complains, among other things, that he leaves too much of the parenting of the girls to nannies. She complains that he has not ensured that medication... is properly applied. B had a viral infection in her genital area and it is the mother's case that this was not treated properly with medication and appropriate medical creams and that it did not clear up as it should have done. She blames this on the father's neglectful parenting and that he delegated the application of medication to nannies who did not do so correctly.”

13. The deputy district judge referred to the two safeguarding letters sent by Cafcass. She continued:

“After receipt of each safeguarding letter, the mother chose to contact the author to mention more complaints or concerns about the father's deficient care of the children. This form of additional complaint is a feature of the way that this mother behaves. It is one of the reasons why the father seeks a s 91(14) order. There is a complaint about the father having thrown water over A one morning to wake her up. This complaint has been accepted to an extent by the father. He says it has been exaggerated and the water was not a cupful, but some drops. The mother's statement within these applications is a litany of complaints about the father and not each and every one has been covered in this judgment. The mother does not accept what she is told by professionals and seeks to add to complaints. This is similar to the mother not accepting the decisions of two different judges who heard evidence and both came to the same conclusion about the children benefiting from spending equal time with each parent.”

14. The deputy district judge then set out details of the girls' current circumstances. In respect of C, she noted that, as set out above at paragraph 9, she had been diagnosed with ASD. This was considered to be the explanation for her behavioural difficulties which had been evident at the time of the earlier proceedings. She recorded that the mother maintained that her behaviour was attributable to deficits in the father's parenting. She continued:

“It is noted that the mother, on receipt of the draft report on C from Dr A [the psychologist who had diagnosed C's condition], sent correspondence asking Dr A to include in the report a statement that C is suffering because she is away from the mother. Dr A did not adopt the mother's suggestion and emphasised the importance of staying neutral in these proceedings. Here is another example of this mother trying to assert and impose her view on professionals. It is a consistent trait.”

She described this as an example of the mother's style of parenting as observed by independent social workers in the earlier proceedings, where she had been described as “an intense and anxious parent”.

15. With regard to B, the deputy district judge noted that the health issues to which the mother referred were “also not new”, although again there was now a diagnosis, in her case of coeliac disease. B had also suffered from a genital infection. Although it was described by her GP as being common in children, the mother had “suggested very strongly that the father's application of the appropriate medication was deficient”. The deputy district judge also noted issues raised by the mother about B's health and behaviour at school, although adding that the school itself “does not appear overly concerned” and that she was doing well at school. She observed, however, that the mother presented B's behaviours as worrying and should require her to spend more time with the mother. A also has some health issues and nervous habits but was seen as doing very well at school where the issues raised by the mother were not seen as problematic.
16. The deputy district judge then turned to another element in the mother's case, namely the role played by nannies when the children were with the father. In particular, the mother complained that the father was in breach of the recital to the 2019 order. On this matter the judge said (paragraph 12):

“It is a theme of the mother's complaint and the mother's way of consistently blaming the father for any difficulties attaching to the children that the father is delegating too much care for the children to the nannies. This includes the father allowing a nanny to collect the children from school when she relies on a recital in the order from 2019 to the effect that if the father is unable to collect the children from school it should be the mother who undertakes this task and not a nanny. As this was the order which I approved after hearing evidence and giving a judgment in 2019 I am in a good position to say that the mother has been unrealistic about how it should be used. Disallowing the nannies to undertake collection duties from school when the children are

spending time with their father was not the intention of the recital. Nevertheless the mother roundly accuses the father of breaching the order by so doing. The second point of significant concern was that the mother contacted Ofsted about an issue she had with one of the nannies. This resulted in a letter from Ofsted to the nanny which can only have caused considerable concern for this nanny.”

17. She continued (paragraph 13):

“This mother has never accepted the decision that the children should spend equal time with both of their parents. This was the decision that I made in 2019. In 2021 Mr Recorder Trowell heard the application – including an application to relocate with the girls to Ireland. He maintained the child arrangements that they should spend equal time with each parent. Two ISWs have spent time considering this case and five days of court time have been used to consider the same issues. A total of three judgments have been contained in the bundle going over these issues as they presented in 2019 and 2021.”

18. Turning to the factors in the statutory welfare checklist, the deputy district judge first referred to the children’s wishes and feelings. The mother had argued that a s.7 report was necessary to gauge their current wishes about the arrangements for their care, some time having passed since previous inquiries. The deputy district judge observed:

“These children are aged between 5 and 10. They are currently spending equal time with each parent. Their wishes and feelings have been ascertained already within these proceedings on two occasions. In my judgment there is no further assessment to be carried out and to investigate matters again could be harmful for them. It is inconceivable that any social worker is going to try to find out if they would prefer a different division of time as this is an adult decision or, in lieu of parents agreeing, a decision of the court.”

She referred to the other factors in the checklist and concluded that none of them warranted a further s.7 report. In doing so, she observed that the children had not suffered any harm that warranted yet another investigation. There were no safeguarding issues and, in her judgment, no outstanding welfare issues. She added (paragraph 16):

“Two experienced ISWs have reported on these children in the last four years. Inevitably, such reporting is intrusive into the girls’ lives. In my judgment no further report is necessary and I am not going to order one.”

She referred to the overriding objective in FPR 1.1 and noted the court time which had already been used for consideration of these children’s welfare needs. She also recorded that the costs in the case were “breathtaking ... £1.6 million.” She concluded (paragraph 18):

“The issue before the court is the amount of time the children should spend with each parent. In my judgment the applications made by the mother have gone far enough. She is attempting to re-litigate matters that have been decided (*res judicata*) and not overturned on appeal. This is not an appropriate use of family funds and continuing such litigation is not a proportionate use of the court’s time.”

19. Turning to the father’s application for an order under s.91(14), the deputy district judge referred to the decisions of this Court in *Re P (A Minor) (Residence Order: Child’s Welfare)* [2000] Fam 15 and *Re A (A Child) (Supervised Contact) (s91(14) Children Act 1989 Orders)* [2021] EWCA Civ 1749. In the latter case, King LJ had stated, at paragraph 41:

“in many cases, but particularly in those cases where the judge forms the view that the type of behaviour indulged in by one of the parents amounts to ‘lawfare’, that is to say the use of the court proceedings as a weapon of conflict, the court may feel significantly less reluctance than has been the case hitherto, before stepping in to provide by the making of an order under s91(14), protection for a parent from what is in effect, a form of coercive control on their former partner’s part.”

20. After referring to the decided cases, the deputy district judge continued:

“unfortunately, the mother in this case has been carrying out such a campaign which can be seen by her statement prepared for this hearing as well as the highlighted attempts she has made to get professionals to add to their views that the children’s welfare would be better served if they spent more time with their mother. She sets out a catalogue of complaints about the father’s parenting and his use of nannies. Her tone creates the impression that her children are being harmed almost daily when that is not the position that can be seen from the children’s school reports. All of this is designed and aimed in order for her to argue that the children should spend the majority of their time with her and see their father for alternate weekends with one sleepover in the intervening week. Her complaints are clear examples of evidence gathering as was her effort to persuade Dr A to amend his report to suggest that the reason for C’s behaviour was all about the separation from her mother. This was not his / her view and Dr A was at pains to remain neutral.”

21. She described the mother as “engaging in evidence-gathering and is weaponizing the evidence she gathers”. She described the mother’s actions as “not child-focused” and added that “the volume and intensity of the complaints is out of the ordinary”. She concluded:

“I am entirely satisfied that this is one of those unusual cases where it would be right to impose a s 91(14) order in order to give the children a break from litigation.”

The first appeal

22. The mother filed a notice of appeal against the judge's order putting forward the following grounds:
 - (1) The judge was wrong summarily to dismiss the mother's application to vary the child arrangements order and refuse to order a s.7 report in the context of a material change in circumstances and serious concerns about the children's welfare and the current child arrangements not meeting the children's welfare needs.
 - (2) The judge was wrong to refuse a s.7 report, thus resulting in a gap in the evidence particularly in respect of the children's wishes and feelings.
 - (3) The judge was wrong to make findings against the mother without her being put on notice or having the opportunity to give evidence; furthermore, there was no evidential or factual basis upon which for the court to make such findings, which are unsafe.
 - (4) The judge was wrong to refuse to allow the mother to disclose recital C of the 2019 order.
 - (5) The judge was wrong to make a s.91(14) order against the mother for three years when the Cafcass safeguarding letter did not recommend this, where previous applications had been reasonable and also made by the father, and were genuine attempts to further the welfare of the children and where the section 91(14) prohibition is disproportionate to the harm it is seeking to avoid.
23. On 15 May 2024, permission to appeal was granted by HH Judge Harris. In a short judgment, she made some observations about the merits of the appeal on which the mother subsequently relied and which were considered in the appeal judgment as described below.
24. The appeal hearing took place before HH Judge Robertson on 19 July 2024. The parties were represented by the same counsel as before the deputy district judge. Judgment was reserved and handed down on 26 July.
25. Having briefly summarised the background, the judge set out the legal principles to be applied by an appellate court. She also cited case law concerning case management in family cases, including the observations of Sir James Munby P in *Re C (Children) (Residence Order: Application being dismissed at the Fact Finding Stage)* [2012] EWCA Civ 1489 (which I shall consider later in this judgment).
26. On the first ground of appeal, the judge recorded that Dr Proudman for the mother had taken her to all the evidence she relied on to show that there had been a change in circumstances since the previous proceedings. She concluded, however, that there was nothing in that evidence which led her to conclude that the deputy district judge's analysis was wrong. She recorded, in particular with regard to B, that she could see why HH Judge Harris, when granting permission to appeal, might have felt that there were new and troubling matters which should have been investigated, but concluded that there was more evidence which had been considered by the deputy district judge and that, on the balance of that evidence, it was not unreasonable or wrong for her to

conclude that B's difficulties were not so very different from how they had been in 2019 or 2021 and that they therefore did not need further investigation. There had been one development since the hearing before the deputy district judge on which the mother relied, namely that C had been excluded from school and had moved to another school. The judge noted that the mother had adduced no evidence about this, relying only on submissions, and the father had sought permission to file a report from the new school, which the judge refused. She concluded:

“The issue raised is merely another example of an issue where the mother claims there is a concern and the father produces a school report to refute it. DDJ O’Leary already had several such examples: another one would have been unlikely to change anything.”

27. The judge’s conclusion on ground 1 was set out in paragraph 28 of her judgment:

“If there had been no balancing positive information before the court then it may well have been that the learned judge was over-robust in dismissing the application without seeking further investigation of the issues raised by the mother. But taken in the round, with the positive evidence considered alongside the mother’s concerns, it appears to me that there was both evidence and reason for the learned judge to believe that the situation was not as the mother presented it. The learned judge at first instance had read all of the evidence and was well aware of the father’s balancing evidence. In those circumstances, and bearing in mind her very wide case management powers (including her power under PFR 22(1) to control evidence) and her obligations under the overriding objective, I cannot say she was wrong to come to the view that there had not been a material change of circumstances, and I cannot say she was wrong to refuse a s7 report. I make it plain that in coming to that conclusion I have considered the individual assertions made by the mother, but also as a separate exercise I have considered whether, taken together, the totality of them make a significant change. They do not. The totality of the positive evidence counteracts [the] totality of the negative.”

28. Turning to ground 2, the judge noted that it is widely accepted that unnecessary professional intervention in a child’s life can be harmful. The question was whether in this particular case further investigation was necessary to close a gap in the evidence. She agreed that, “with the lapse of three years, the children’s wishes and feelings were somewhat out of date”. On the other hand, they were still “fairly young”. Furthermore,

“The question they would have been asked was a very narrow one, namely whether there should be a different division of time. The learned judge described that as an adult decision. HHJ Harris disagreed and said that was a misstatement of the law. I respectfully disagree with HHJ Harris about that. In my view it is established law that the parents, or in default, the court will made decisions about the time the children spend with each

parent. The children's wishes and feelings are part of that decision but they are only a part."

She noted that there were no safeguarding concerns, that according to the school reports the children were all doing well, and that there had already been two full hearings. She concluded that the deputy district judge was entitled to come to the view that she had enough information.

29. In respect of ground three – that the deputy district judge had been wrong to make findings against the mother – the judge (at paragraph 35) carefully went through the particular complaints raised by Dr Proudman. She cited the complaint that the judge had been wrong to say that the mother had contacted Cafcass after the safeguarding letters to make further complaints about the father and that she had in fact been seeking to clarify information. The judge described this as being "flatly contradicted by the Cafcass record" and referred to a collection of emails sent by the mother to the GP which were "either directly critical about the father or which exhibit passive aggression towards him". Having cited examples, she concluded that the deputy district judge

"had evidence, and was entitled to come to the view she did, that this form of behaviour is not a one-off, but is a feature of the way the mother behaves."

Of the mother's statement filed in these proceedings, Judge Robertson observed that:

"over 37 paragraphs, the majority of them focus on things she says the father has done wrong. It is entirely fair to say her evidence is a litany of complaints about the father."

She rejected the submission that the deputy district judge had been wrong to say that the mother does not accept what she is told by professionals. She continued (paragraph 36):

"There are other so-called "findings" which the mother seeks to challenge. I have considered them all, but will not in this judgment attempt to go through them all. There is, however, a procedural point which I must deal with, and that is the point made by the mother that these "findings" should never have been made at all in circumstances where the mother was not on notice of them, and had no opportunity to bring evidence against them and to cross-examine on the evidence which was relied on. I do not accept that argument from the mother. These observations made by DDJ O'Leary are not "findings" in the formal sense. It is the role, and indeed the duty, of the judge to come to a view about the character of a case and the character of a witness, and to express those views. Expressing those views does not amount to making formal "findings". I consider that the comments made by the learned judge about the mother amount to her observations and views on the mother's character and propensities. If every such observation had to be withheld until separate evidence was brought forward and cross examined upon, courts would grind to a halt. It would not be proportionate,

nor would it be in the interests of justice for judges to be unable to express their views until such a process was complete (always providing those judges' views are based on an acceptable level of evidence).”

30. The judge cited an observation by Recorder Trowell in the 2021 judgment that the mother's general approach was “to assume she is right, that he is wrong, and the problem would disappear if only the court would have (as she believes it should have done) entrusted her with the primary care of her children”. The judge continued (paragraph 38):

“This was the judicial view, unchallenged at the time, which formed the backdrop against which DDJ O'Leary made her own observations. DDJ O'Leary was entitled to rely on that. Having looked at the mother's individual complaints in relation to this appeal, three of which I have set out in detail above, I consider that there was evidence and information to support DDJ O'Leary's observations. I further consider that it would have been disproportionate and not in keeping with the overriding objective for further evidence to be called before the judge was permitted to express the views she did.”

31. She then considered a further point made on behalf of the mother, that the deputy district judge had been wrong to accept wholesale the father's narrative and reject the mother's. In this context she acknowledged that the judge had wrongly ascribed to the mother the complaint that the father had thrown water at A – a complaint which had in fact emanated from the school. She accepted that the deputy district judge may have accepted rather more of the father's narrative than the mother's. She continued:

“However, in my view she had cause to do this. She was not dealing with a blank canvas. She had dealt with the case fully in 2019 and she had read the full judgment from the case in 2021. She was aware of the findings about the mother which I have referred to in this judgment, and her propensity to seek to influence professionals. She knew that many complaints about the father had emanated from the mother, as I have set out above. She had also come to a view about the mother seeking to portray the children as being harmed when the school reports provided evidence that they were not being harmed. In my view the learned judge was entitled to come to these views on the basis of previous findings and the existing evidence. She may have been mistaken as to the mother making a particular complaint to the local authority but that does not undermine her general approach.”

32. On ground 4, the judge noted that the deputy district judge had not specifically referred to the mother's application to disclose the terms of the recital to the 2019 order to the school, but concluded that it was plain from the judgment that it was being refused. She found that this was the only sensible course for the judge in circumstances where the recital, which was a distillation of something agreed by the parties in 2019, was no longer agreed.

33. In respect of ground 5 – relating to the order under s.91(14) – the judge noted that the deputy district judge had referred herself to the correct case law, the effect of which was that orders under the subsection “are no longer to be seen as a weapon of last resort, and that the test to be applied is the welfare of the child”. Having upheld the deputy district judge’s decision that the mother’s evidence was “a litany of complaints”, she further upheld her description of those activities as “lawfare”. She noted that she had been considering, for the third time, the same arguments about spending time arrangements for the girls. She concluded:

“In my view the learned judge stayed on the right side of the line in this case, by applying the overriding objective, considering issues of proportionality, controlling the evidence as she saw fit, and making the decision that she did in a case which she considered, rightly, to be res judicata.”

The second appeal

34. On 28 August 2024, the mother filed a notice of appeal to this Court, acting in person. On 26 September, a skeleton argument was filed in support, drafted by Dr Proudman. On 8 November, I granted permission to appeal.
35. Five grounds of appeal were advanced, in similar but slightly different terms from those put forward at the first appeal. They were as follows:
- (1) The judge erred in concluding that there was no error in summarily dismissing the mother’s application for a child arrangements order and a s.7 report when there was evidence of a material change in the children’s circumstances; the consequence was a draconian decision which, even allowing for a wide ambit of discretion, was outside the parameters of fair decision-making.
 - (2) The judge was wrong to place limited or no weight on the need to ascertain the child’s wishes and feelings, pursuant to s.1(3) of the Children Act 1989, and instead, relying on outdated wishes and feelings.
 - (3) The judge’s approach in summarily dismissing mother’s application deprived her of the proper opportunity to answer the case against her and deprived the court of evidence that was necessary to enable it to make reliable and sound findings of fact.
 - (4) The judge was wrong in refusing to allow disclosure of the relevant extracts to the school from both the 2019 and 2021 orders, which was for the benefit of the children’s welfare and further to a request made by the school.
 - (5) The judge erred in the application of s.91(14) in making findings about the mother’s conduct whilst depriving her of the right to respond, thus the findings made were on a procedurally improper basis, and the child’s welfare did not require such an order.
36. In the event, the mother was represented at the appeal hearing before us by Mr Dorian Day who relied and expanded on the submissions in Dr Proudman’s skeleton argument. He identified the cornerstone of the mother’s case as being a challenge to the summary determination of issues at an early stage of proceedings with limited evidence. That

moved, he said, into the wider issues of proceeding without any updated welfare evidence in the form of a s.7 report and of the court's ability to make decisions under the welfare checklist absent evidence about the children's current wishes and feelings.

37. As in the lower court hearings, the mother's fundamental case was that the children's circumstances required the court to change the arrangements for their care. Two of the children have special needs and all three are seeing a therapist. Although some of the children's difficulties were known to the parties and the courts in the earlier proceedings, the extent of their problems had only become evident since 2021. In particular, there have now been clear diagnoses of coeliac disease in B and ASD in C. C has also been excluded from school. Extensive submissions as to the children's complex needs were made to the deputy district judge and reiterated to Judge Robertson. Both judges had failed to recognise that these complexities required a fresh assessment by the court. In reaching that conclusion, they erred in attaching excessive weight to positive comments in the children's school reports. They had failed to attach weight to the strong evidence that the children were unsettled by the repeated transitions from one parent to the other and the uncertainty that arose as to who would be taking and collecting them from school.
38. The deputy district judge had wrongly concluded that there was no justification in making fresh inquiries as to the children's wishes and feelings. At the time of the earlier proceedings, the children were of an age and level of understanding where little weight would be attached to their wishes and they had not been asked about their views as to the arrangements for their care. They were now at an age at which greater weight should be attributed to their expressed views.
39. It was submitted on behalf of the mother that the deputy district judge had been wrong to make findings against the mother at the DRA. She had reached conclusions on disputed, polarised allegations at a dispute resolution hearing without allowing the mother a fair opportunity to respond. It was unfair to find that the mother was "weaponising" issues and had engaged in "lawfare" without conducting a full hearing on evidence. She had wrongly proceeded on the basis that it was the mother who had always raised concerns when in fact in some instances it had been the schools. It was submitted that Judge Harris had been correct when granting permission to appeal to conclude (as she said in the short judgment delivered on granting permission) that the deputy district judge "went too far in a hearing dealt with on submissions, by effectively accepting all of the father's characterisation of the situation and rejecting all of the mother's". In accepting the father's case, the deputy district judge had clearly made findings and Judge Robertson had been wrong to describe them as merely observations.
40. Mr Day submitted that the deputy district judge had been wrong to make a s.91(14) order against the mother. The earlier proceedings had been concluded with no adverse criticism of her conduct of the litigation. The current application was made because the mother was genuinely concerned that the current arrangements were having an adverse impact on the children. Furthermore, the "findings" on which the deputy district judge relied when making the order were unfair and contrary to the assessment carried out by the same judge four years earlier. There had been no balance in the deputy district judge's analysis on this application. She overlooked the fact that the father had made applications which he had withdrawn.

41. These arguments were countered by persuasive submissions from Ms Fottrell. By the hearing in November 2023, there had been, in the previous four years, two sets of proceedings with fully contested hearings conducted by two judges who had each concluded that the broadly equal division of time was the right arrangement for the children. For that reason, the starting point for the deputy district judge was whether there had been a change of circumstances relating to the children’s welfare that justified re-opening the child arrangements order. To that end, when giving case management directions on 6 September 2023, she had ordered the mother to file a statement “setting out the events and changes in circumstances since June 2021 in support of her application for a variation of the current child arrangements orders”. In response, the mother filed a statement, with extensive exhibits, in which she sought to make a good case about B’s health, C’s ASD diagnosis, the issues about the use of nannies, and complaints against the father. Having considered that evidence, together with the evidence in response from the father and extensive submissions from both parties, the deputy district judge concluded that no further court investigation was required and there was no requirement to make inquiries as to the children’s wishes and feelings.
42. Ms Fottrell emphasised that this was a second appeal following a first appeal at which the judge had conducted a clear, detailed, thorough and robust review of the deputy district judge’s decision, in the course of which she read all the evidence and the transcripts of the hearings. Judge Robertson’s characterisation of the deputy district judge’s comments about the mother as “observations” rather than formal findings was correct. She had been right to endorse the decision to make a s.91(14) order, partly on the basis of those observations but also because the children plainly needed a break in the litigation.

Discussion and conclusion

43. It is well recognised that litigation about children following the breakdown of their parents’ relationship often exacerbates the harm they have suffered as a result of that breakdown. Strenuous efforts are devoted to encouraging parents to resolve such disputes without resorting to the court. These efforts continue after proceedings have started. A crucial stage is the DRA. The purpose of a DRA is to try to resolve the issues without a contested final hearing. Within the Family Procedure Rules, Practice Direction 12B, paragraph 19(3) requires the court at the DRA to “identify the key issues (if any) to be determined and the extent to which those issues can be resolved or narrowed at the DRA” and to “consider whether the DRA can be used as a final hearing”.
44. Even where the parties are unable to reach an agreement, the court has the power to bring the proceedings to an end if satisfied that such a course is consistent with the welfare of the children, which under s.1 of the 1989 Act is the paramount consideration whenever the court is determining any question about the children’s upbringing. In *Re C (Children) (Residence Order: Application being dismissed at the Fact Finding Stage)* [2012] EWCA Civ 1489, this Court dismissed an appeal against a judge’s decision reached after an abbreviated hearing of the evidence. In that case, a father was seeking to overturn a residence order in respect of his three children on the basis of allegations about the mother’s day-to-day care of the children. After the father’s evidence in chief, however, the judge halted the evidence and after submissions delivered judgment dismissing the application. In giving the lead judgment dismissing the appeal, Sir James Munby made the following observations about case management in family cases:

“14. It has long been recognised -- and authority need not be quoted for this proposition -- that for this reason a judge exercising the family jurisdiction has a much broader discretion than he would in the civil jurisdiction to determine the way in which an application of the kind being made by the father should be pursued. In an appropriate case he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter. He may determine that the matter is one to be dealt with on the basis of written evidence and oral submissions without the need for oral evidence. He may, as Judge Cliffe did in the present case, decide to hear the evidence of the applicant and then take stock of where the matter stands at the end of the evidence.

15. The judge in such a situation will always be concerned to ask himself: is there some solid reason in the interests of the children why I should embark upon, or, having embarked upon, why I should continue exploring the matters which one or other of the parents seeks to raise. If there is or may be solid advantage in the children in doing so, then the inquiry will proceed, albeit it may be on the basis of submissions rather than oral evidence. But if the judge is satisfied that no advantage to the children is going to be obtained by continuing the investigation further, then it is perfectly within his case management powers and the proper exercises of his discretion so to decide and to determine that the proceedings should go no further.

...

18. It is pre-eminently a matter for the trial judge in a case of this sort to determine the form of procedure which will best meet the welfare needs of the children. A judge is not obliged, merely because one parent or the other wishes him to do so, to listen to evidence if it has become apparent to him that the process is not going to be of any advantage to the children. That was the view Judge Cliffe took. It was a robust view, but it is quite impossible, in my judgment, to assert that the judge, in taking that view and adopting that approach, exceeded the generous ambit of discretion which the law conferred upon him as the trial judge.”

45. It follows that a court is not obliged to hold a fact-finding hearing just because one party is asking for one. Indeed, the court should only hold a fact-finding hearing where findings are necessary before making decisions about the children’s future. In *K v K* [2022] EWCA Civ 468, this Court gave guidance on the proper approach to fact-finding hearings in private family proceedings following its earlier decision in *Re H-N* [2021] EWCA Civ 44 (paragraph 65):

“A fact-finding hearing is not free-standing litigation. It always takes place within proceedings to protect a child from abuse or regarding the child’s future welfare. It is not to be allowed to

become an opportunity for the parties to air their grievances. Nor is it a chance for parents to seek the court’s validation of their perception of what went wrong in their relationship. If fact-finding is to be justified in the first place or continued thereafter, the court must be able to identify how any alleged abusive behaviour is, or may be, relevant to the determination of the issues between the parties as to the future arrangements for the children.”

That guidance was given in a case involving allegations of domestic abuse. But it applies to all occasions when a court is considering whether to hold a fact-finding hearing in a private children’s case. A fact-finding hearing should only be held where the findings are, or may be, relevant to the determination of the issues about the future child arrangements.

46. That approach continues throughout the proceedings and after they have come to an end. Not infrequently in private children’s proceedings, a party who is dissatisfied with the outcome of a hearing tries to get it changed at a later date by bringing another application. In *DP v PC* [2017] EWHC 2387 (Fam), I said (at paragraph 36):

“where there has been a contested hearing relatively recently at which the issues have been properly and fully ventilated ... if a parent then returns to court and seeks to reopen the issue, then it is likely that a court will take the view that there should be no further extensive investigation, unless there has been a significant or material change in circumstances.”

As it happened, in that case I concluded that the judge had been wrong to dismiss the second application summarily because the earlier application had been withdrawn without a full hearing. But in cases such as the one we are dealing with on this appeal, when there have been previous proceedings relatively recently – in this case two sets of proceedings – in which judges have made orders after delivering judgments following contested hearings, it is likely that the court will decide that there should be no further investigation unless there has been a significant or material change in circumstances.

47. I accept the submission made by Ms Fottrell that, where parties have been in proceedings for several years, it is incumbent on any judge to look carefully at the necessity of permitting a party to reopen matters which have been extensively litigated, particularly where the court is concerned about the detrimental effect of the litigation on the children. Such an approach is entirely consistent with the case management responsibility of the first instance judge.
48. In the present case, there had been two contested hearings in the previous four years. In her ISW report for the second proceedings in 2021, Ms X had found that the children “were in need of stability in their young lives” and that “moving them from their daily routines would be destabilising for them”. The recorder had accepted her recommendation that there should be no substantial change in the child arrangements order. Both Deputy District Judge O’Leary and Judge Robertson concluded that there had not been a change of circumstances sufficient to justify a further full investigation by the court. In oral submissions, Mr Day suggested that, whether or not there had been

a significant change of circumstances, the girls' circumstances now were sufficiently troubling to require a further investigation. In my view, where there has been no material change in circumstances since the previous fully-contested hearing, it is difficult to envisage (in the words of Sir James Munby P in *Re C*) any "solid reason in the interests of the children" for embarking on an exploration of the matters which one or other of the parents seeks to raise, in particular where that would involve exposing the children to the disruption of a further s.7 investigation. Although there had plainly been some developments in the girls' lives, in particular B and C, I am not persuaded that the deputy district judge was wrong to hold that they did not amount to a change of circumstances sufficient to demand further investigation by the court.

49. It is important to note that the mother's application was of a relatively limited scope. She was seeking a variation of the child arrangements order so that the time the father spent with the children was reduced from seven days a fortnight to four with an equivalent change in the division of school holidays. She was also seeking an order for the disclosure of the recital to the 2019 order to the school. Taken together or separately, these issues did not themselves inevitably require the court to seek a s.7 report. Nor did they inevitably require a full hearing with oral evidence. They were issues which on which a judge exercising her case management powers might fairly conclude could be sensibly and proportionately determined on submissions.
50. It is also important to note that the order under appeal here was not a summary dismissal of the mother's application without consideration of the evidence. Although there was no oral evidence, there was extensive written evidence. The deputy district judge had directed the mother to file a statement setting out the changes in circumstances since June 2021 in support of her case for a variation of the current child arrangements. In consequence, the court was supplied with a statement, including extensive exhibits, and detailed submissions on behalf of the mother seeking to identify developments in the children's lives which required further investigation by the court. Having read that material, plus the father's statement in reply and exhibits, and the two safeguarding letters from Cafcass, and considered comprehensive oral submissions, all in the context of the two earlier judgments, the deputy district judge concluded that no further investigation was required and indeed might be harmful to the children.
51. The mother has not identified any factor which would justify this Court interfering with the deputy district judge's decision. That conclusion was plainly within her discretion, and one which she was in a strong position to reach having conducted the first contested hearing in 2019. This is an appellate court and, as Ms Fottrell reminded us, we must keep in our lane. As Sir James said in *Re C*, this was "pre-eminently a matter for the trial judge ... to determine the form of procedure which will best meet the welfare needs of the children". As in that case, it is "quite impossible" to assert that the deputy district judge, in taking that view and adopting that approach, exceeded the generous ambit of discretion which the law conferred upon her.
52. In those circumstances, there is no merit in the ground of appeal concerning the children's wishes and feelings. As the deputy district judge was entitled to conclude that there had been no material change after two previous investigations in the preceding four years, and thus no solid ground for embarking on a further investigation, there was no welfare issue on which their wishes needed to be canvassed. In any event, I agree with the approach of both judges to the issue of the children's wishes and feelings. As Judge Robertson observed, the issue in the case was "a very narrow one,

namely whether there should be a different division of time”. That was “an adult decision” in which the children’s wishes and feelings are “only a part”. Furthermore, as the deputy district judge observed, investigations under s.7 are intrusive into children’s lives. They are not to be ordered unless necessary to resolve an issue about a child’s welfare. As Ms Fottrell reminded us, s.7 is a permissive provision. No report should be ordered under s.7 unless it is necessary to resolve the issues. There had already been two detailed ISW reports in the preceding four years. In this case, there was no recommendation for a s.7 investigation in the Cafcass safeguarding letters. In those circumstances, having considered the relevant factors in the statutory welfare checklist in s.1 of the 1989 Act, the deputy district judge was fully entitled to conclude the proceedings without ordering a report.

53. In considering the challenge in ground 3 to the criticisms of the mother which form the basis of the third ground of appeal, it must be recalled that the deputy district judge was not dealing with a blank canvas. She had conducted the first hearing in 2019. She had read the recorder’s judgment from 2021 in which he had found that the mother attributed problems in the children’s behaviour to the father’s day-to-day parenting, that her general approach was to assume that she was right and he was wrong and that she thought that “the problem would disappear if only the court would have (as she believes it should have done) entrusted her with the primary care of the children”. In his judgment, the recorder had tempered these criticisms of the mother by acknowledging that she recognised that the father loved the children and they loved him and that he was important to them. But the deputy district judge was entitled to take account of the criticisms when considering the mother’s renewed application for a variation of the child arrangements order.
54. Where a judge at a DRA concludes that the evidence and arguments put forward by the mother indicated that she was continuing to make allegations against the father with the aim of achieving a change in the child arrangements order in the manner criticised by the recorder in an earlier judgment only two years earlier, and that there is nothing to warrant further investigation sought by the mother, the judge is entitled to record her conclusion that the mother has continued to conduct herself in the same way. It would be wholly disproportionate, and contrary to the children’s welfare, for the judge to be precluded from taking that course without a full hearing.
55. At a DRA, when deciding whether or not there should be a further investigation and full hearing, a judge has to assess the information put before her. Pragmatically, that cannot be confined to agreed evidence. When deciding whether it is in the interests of the child to authorise a full court investigation or to conclude the proceedings at the DRA, the court is not obliged to disregard any piece of contested evidence and only take into account matters that are agreed between the parties. That would undermine the court’s powers to control and conduct proceedings in accordance with the paramountcy of the child’s welfare. The judge has to consider the information put before her, recognise that it is not necessarily the complete picture and in some respects contested, and come to a view as to whether a full court investigation is necessary and proportionate. Where the judge concludes that such an investigation is neither necessary nor proportionate, she will often proceed on a basis that in some respects is not accepted by all the parties and has not been the subject of findings.
56. Of course, there is a limit to the circumstances in which a court can properly and fairly proceed in that way. It will turn on the details of the contested issues and the proposed

outcome. At one extreme, for example, where a party is alleging that the other parent has sexually abused the child and that as a result all contact should be supervised, it will be difficult if not impossible for the court to make a final order without making formal findings about the allegations. But where the proposal is for a less radical adjustment of the child arrangements order, it will often be open to the court to reach a conclusion without a fully contested hearing. This is a decision which can largely be left to the skill and experience of the family judge without appellate interference.

57. In this case, the deputy district judge decided to proceed to a final order on the basis of the information put before her at the DRA. In giving her reasons, she expressed views about that information, including views that were critical of the mother. As Judge Robertson remarked, the “observations” made by the deputy district judge were not “findings” in the formal sense. They were based on the earlier findings made by the recorder and the extensive new evidence put before the deputy district judge by both parties. I agree with Judge Robertson that it would have been disproportionate and not in keeping with the overriding objective for further evidence to be called before the judge was permitted to express the views she did. Judge Robertson was right to point out that the deputy district judge may have been in error in at least one respect in ascribing to the mother a complaint that had emanated from the school. Like Judge Robertson, however, I do not consider this invalidates the deputy district judge’s approach or decision. Any such error was immaterial. Given her own experience of the case in 2019, and the criticisms of the mother made by the recorder in 2021 – expressed in measured but clear terms – and her reading of the evidence put before her, she was entitled to make the observations she did about the mother.
58. There is no merit in the fourth ground of appeal. As Having made the original order, the deputy district judge was in a good position to construe its meaning. She observed that “disallowing the nannies to undertake collection duties from school [during the periods] when the children are spending time with their father was not the intention of the recital.” Thus the application to disclose the recital to the school with a view to the mother undertaking collection duties during those periods was misconceived.
59. Finally, there is the order under s.91(14). This order does not impose a complete bar on applications. It requires the party to obtain the court’s leave before any application is made. As Ms Fottrell pointed out, guidance as to the circumstances in which such an order is appropriate is set out in the Family Procedure Rules at Practice Direction 12B, paragraph 13A:

“[The subsection] leaves a discretion to the court to determine the circumstances in which an order should be made. These circumstances may be many and varied. They include circumstances where an application would put the child concerned, or another individual, at risk of harm ... such as psychological or emotional harm. The welfare of the child is paramount.”

The Practice Direction makes it clear that the circumstances can also include “where one party has made repeated and unreasonable applications” and “where a period of respite is needed following litigation”.

60. The decision to make an order under s.91(14) in this case falls squarely within the guidance in the Practice Direction and the case law cited in the judgments, in particular *Re A*, supra. It was manifestly within the discretion of the deputy district judge to conclude that the order was justified by reason of the mother's conduct and the need to give the children a break from litigation.
61. Three further points arise. First, a further argument not identified in the grounds of appeal was tentatively advanced by Mr Day in oral submissions. He pointed out that, when launching this latest application, the mother had filed a form C1A. This is the form which has to be filed alongside the originating application, and/or the acknowledgement filed by the respondent, when a party asserts that there are allegations that the children may have suffered or be at risk of suffering abuse. In the form, the mother had made some allegations about the father's behaviour and its impact on the children. Mr Day sought to argue that the approach and judgments of the courts below were deficient because neither judge had considered the form C1A. As I understood his point, he was submitting that there had been a failure to comply with the court's obligations under Practice Direction 12J. When it was pointed out to him that this alleged omission was not mentioned in the notice of appeal to this Court, he agreed to "move on". Following the hearing, the mother herself sent an email to the Civil Appeals Office (copied to the father's representatives) enclosing a copy of the position statement filed for the hearing before the deputy district judge which included reference to the C1A form and the allegations therein. I have therefore re-read the transcripts of the hearings before the deputy district judge and the judge to check whether there was any omission of the sort suggested. Some of the specific matters mentioned in the form C1A were referred to in the hearings – for example, the father's alleged failures to obtain treatment for some of the children's conditions, and the complaint that the father threw water over A to encourage her to get out of bed. But so far as I can see, neither judge was invited to treat these matters as abuse. Indeed, at one point during the first appeal before Judge Robertson (transcript, page 34), Dr Proudman submitted that the issues which may warrant investigation were whether the current arrangement is suiting the children "because of their particular needs, not because of any deficiency in parenting on the part of the father". In the circumstances, it is unsurprising that the complaint raised by Mr Day at the hearing about the failure to address the allegations of harm in form C1A did not feature in the grounds of appeal to Judge Robertson or to this Court.
62. Secondly, a number of submissions made on behalf of the mother, in particular in the skeleton argument, were based on observations made by HH Judge Harris in her short judgment granting permission to appeal from the deputy district judge. In my view, it is rarely if ever appropriate for an appellate court to attach weight to observations made when granting permission to appeal. A judge considering an application for permission to appeal is engaged on a different exercise from the court hearing the full appeal, namely assessing whether there is a real prospect that the appeal will succeed or some other compelling reason for the appeal to be heard. He or she may point out potential flaws in the trial judge's decisions and reasons but should avoid making any definitive comments on them. A judge considering an application for permission to appeal will rarely have access to all of the material available to the appellate court. All judges sitting at an appellate level regularly find that an appeal which seemed strong when granting permission looks completely different after hearing arguments canvassed at the appeal hearing. In this case, the fact that Judge Harris expressed criticisms of the deputy district judge's judgment carried no weight before Judge Robertson and the fact that Judge

Robertson departed from Judge Harris' assessment adds no weight to the appeal before this Court.

63. Finally, whilst reaching the clear conclusion that the decisions at first instance and on the first appeal should be upheld, I would respectfully not endorse the judges' characterisation of the matters which the mother was seeking to raise as "res judicata". As Hale J observed nearly 30 years ago in *Re B (Children Act Proceedings) (Issue Estoppel)* [1997] 1 FLR 285 (at p295D):

"the weight of Court of Appeal authority is against the existence of any strict rule of issue estoppel which is binding upon any of the parties in children's cases."

She continued, however:

"At the same time, the court undoubtedly has a discretion as to how the inquiry before it is to be conducted. This means it may on occasion decline to allow a full hearing of the evidence on certain matters even if the strict rules of issue estoppel would not cover them."

This illustrates that there is nothing new in the idea that judges have a discretion as to how to exercise their case management powers in children's cases, although the obligations on judges when exercising that discretion to be rigorous in case management are now in sharper focus.

64. For the reasons set out above, I would dismiss this appeal.

LORD JUSTICE NUGEE

65. I agree.

LADY JUSTICE ELISABETH LAING

66. I also agree.