Neutral Citation Number: [2024] EWHC 2578 (Fam)

Case No: FA-2024-000059

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/08/2024

Before :

MRS JUSTICE LIEVEN

- -

Between :

Father

Appellant

and

(1) Mother

(2) S
(By his Children's Guardian)

Respondents

- -

- -

Mr Jonathan Sampson KC and Ms Shazia Haider-Shah (instructed by **Woodfines Solicitors**) for the **Appellant**
Mr Will Tyler KC and Ms Andlib Mohsin (instructed by **Crane & Staples Solicitors**) for the **First Respondent**
Mr Rob Littlewood (instructed by **Hepburn Delaney Solicitors**) for the **Second Respondent**

Hearing date: **11 July 2024**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

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

Mrs Justice Lieven DBE :

1. This is an appeal brought by the Father ("F") against the decision of Recorder Patel ("the Judge") to refuse to make a Child Arrangements Order ("CAO") that the child ("S") should move from living with the Mother ("M") to the F. The decision was made after a three day hearing in February 2024. At the date of the judgment S was 9.5 years old. Permission to appeal was granted by the President of the Family Division, Sir Andrew McFarlane on 26 April 2024.

2. The F was represented by Jonathan Sampson KC and Shazia Haider-Shah, the M was represented by Will Tyler KC and Andlib Mohsin and the Children's Guardian was represented by Rob Littlewood.

The background

3. The parents began a relationship in 2003 and S was born in 2014. The relationship broke down in July 2015 and the F moved out in August 2015. The F applied for a CAO in December 2015. There has been litigation concerning S ever since, so for the large majority of his life. In May 2016 it was ordered that S live with the M but spend time with the F. In January 2017 the F applied again for S to live with him. This was concluded with an order that S continue to live with the M but spend alternate weekends with the F.

4. In January 2018 the F made a further application for enforcement which was dismissed by DJ Dodds. In May 2018 the F made a further application alleging that the M was obstructing contact and alleging that the M was coaching S to reject him.

5. In August 2018 DJ Dodds held a fact finding hearing. He set out a detailed judgment. DJ Dodds found against the F on a number of points. He made a s.91(14) order up to August 2020. The Judge summarised DJ Dodds' findings as follows at J9:

> *"That the mother did not hamper father's contact and [S] enjoyed a positive relationship with his father. That mother did not hamper [S] from seeing his paternal family. There was extensive contact as per the court orders. The mother was not emotionally harming [S] and that she was not encouraging him to reject his father. The mother was not excluding the father from important decisions in relation to [S's] education and health. The mother was not wrongly refusing to mediate. That the mother did not behave aggressively towards the father and that the father in fact placed intimidating messages in the communication book."*

6. I note that DJ Dodds also made a number of findings or conclusions about the F, including that he was at times, "dictatorial and obsessive" and that he had "obsession with compelling M to co-parent and to mediate".

7. In October 2020 the F made a further application for a CAO that S live with him. This was inter alia on the basis that the M had prevented all contact since February 2020. There had been a period between 2018 and early 2020 when S had been having contact with the F, Dr K and her daughter, and this contact appeared to have gone relatively smoothly and the evidence suggests that S had enjoyed it. The background

to the cessation of contact was that on 29 January 2020 M told the school that S had alleged physical abuse by the F. There was a safeguarding referral and the Local Authority ("LA") advised the M to suspend contact. Shortly thereafter the LA informed the M that there was no reason why contact should not resume subject to S's wishes and feelings. However, contact did not resume.

8. This is a case where undoubtedly the long delays in the Family Justice System have exacerbated the family's problems. There was a First Hearing Dispute Resolution Appointment ("FHDRA") in January 2021 adjourned to April 2021. The Magistrates determined that no fact finding hearing was necessary and ordered a s.7 report. Ms W was appointed as the Family Court Advisor.

9. S made various allegations to Ms W about his father, saying he had slapped him round the face, punched him and hit him.

10. Ms W spoke to both parents and S and concluded that there was continuing harmful conflict between the parents, which S was aware of. She raised concerns about "parental alienation" largely by the M but also some negative behaviour by the F. The Judge refers at paragraph 14-17 (J14-J17) to this report in some detail. Ms W recommended a psychological assessment of the family and that a Guardian be appointed. The Judge noted that in that report Ms W refers to the fact that a change of residence without work to support him would be "incredibly harmful" and "frightening" to S.

11. The matter first came before the Judge on 10 September 2021. He ordered the psychological assessment and appointed a Guardian. The M objected to Ms W being appointed as the Guardian, but the Judge did not accept her objection and said the identity of the Guardian was a matter for Cafcass.

12. The psychological report was eventually produced by Dr Arora on 21 October 2022. The Judge summarised Dr Arora's report at J22-J23:

> *"22. In as far as the assessment of the parents were concerned, there was no indication of any personality disorder or mental-health condition. Dr Arora considered that both parents had minimal insight into the concerns that had been identified. There was no ability between them to work collaboratively with each other because their interpersonal difficulties remained unresolved and that no steps had been taken, despite recommendations being made as far back as 2017, to address those concerns. It was also evident that both parents have a high degree of impression management. It was observed that they seek to be accepted to be doing the right thing.*
>
> *23. Dr Arora's assessment of [S] underscored his need to seek reassurance from his mother. That was also observed by Ms Fitzsimmons and Ms W. Dr Arora concluded in her clinical view a change of carer would not be in [S's] best interest, not would it be proportionate or necessary. She considered such a change in the absence of a robust specialist support would cause [S] emotional trauma. In an addendum report, dated 3rd February 2023, Dr Arora clarified that is therapeutic support or intervention was not followed*

> *through it would mean that the situation was unlikely to improve and therefore [S] would be unlikely to benefit from a relationship with his father. Dr Arora clarified there would be no alternative that could be recommended."*

13. Ms W, now the Children's Guardian, filed an addendum s.7 report on 17 March 2023. She recommended a referral to Early Help and a plan for work to commence with a review in 6 months. There was a hearing before the Judge on 22 March 2023 and all parties agreed the recommendations and the case was referred to CFP. The next hearing was on 25 September but there had been considerable further delay and any final decisions were further adjourned.

14. There was some contact with the F's partner Dr K, and her daughter H, with S. This initially seemed to go reasonably well. However, it seems to have broken down when S thought the F was going to join the contact sessions.

15. On 10 January 2024 the Guardian attended S's school but S refused to meet her. He gave no reason but did later tell school staff that he did not trust the Guardian. The Judge recorded:

> *"15. S later told school staff that he did not trust Ms W, despite having met her twice previously in what Ms W described as positive meetings. S told school staff that the Guardian had stated that people who grow up without a father are "weird" and that his mother had read one of the Guardian's reports to [S] and he felt the contents were not true. The Guardian reported that if [S] had been privy to her reports or any other court documentation, she was deeply troubled that M felt this was appropriate, given S's age."*

16. Ms W filed her final report on 31 January 2024. This report is central to much of Mr Sampson's criticism of the Judgment and I make extensive reference to it below. Her recommendation was that a change of residence "should happen as soon as possible" and there should be a break of any contact between S and his mother for 3-4 months, see paragraphs 48-49 of her report. Her report is a fairly lengthy one which sets out the pros and cons of different options, with full reasoning. I intend no disservice to that report by not quoting it further here. It is clear from the report as a whole and the section headed "[the M]" in particular, that Ms W took the view the M was effectively incapable of promoting contact, was engaging in false compliance and was negative and unhelpful in supporting contact between S and his father (see para 36).

17. The Judge heard the case on 5 February 2024 for three days, hearing evidence from M, F, Dr K (the F's partner), Dr Arora and Ms W. I will set out key parts of the Judgment below. He determined that it was not appropriate to transfer S's residence to the F.

18. The F appealed that decision and permission to appeal was granted by the President of the Family Division on 26 April 2024. I heard the appeal at a one day hearing on 11 July 2024.

The Judgment

19. The judgment is 155 paragraphs long and has an additional 11 paragraphs after "clarification" requests by the parties. Self-evidently the judgment must be considered as a whole and I will only set out a summary and extracts. This is important because in my view Mr Sampson makes many criticisms of the judgment which do not stand up to scrutiny if it is read fairly and as a whole.

20. This was principally a finding of fact hearing. The Judge's welfare decisions (particularly in relation to the transfer of residence application) necessarily followed his findings. Mr Sampson made some submissions about the nature of the hearing not being clear. But this was a case where the Judge considered the evidence, came to conclusions on the "facts" (in truth many of the findings were judgements of the parties rather than in any true sense facts), and then made decisions about S's best interests going forward.

21. In my view there are some key points which emerge from the judgment. Firstly, the Judge did not consider that the F had moved on very much from his presentation before DJ Dodds, see J58, J59 and J151. He continued to have a lack of insight into DJ Dodds' findings, J67. In the section dealing with the F's evidence the Judge said:

> *"60. I note the father has been deeply mistrustful of the mother in the past and that has continued. In my opinion it pervades his actions and response to any event. The first thought he has is to blame the mother, regardless of whether there is justification in that. The father stated that mother needed psychiatric assessment to the school. At times those actions in response would have caused anxiety and stress, quite likely transmitted to [S]."*

22. Secondly, the Judge had a nuanced view of the M, which encompassed both understanding the impact of having been in litigation for much of the previous 6 years but also the degree to which her anxiety about the F had transmitted to S, see for example J56 and J125; "*the mother's feelings about the father have been transmitted to S because it is impossible for her to hide them"*.

23. Thirdly, the Judge made findings of fact between J67 and J128. These are carefully reasoned and are all findings that were open to him on the evidence. The findings included the following:

> *"a. That F's historic mistrust of M has continued; that this pervades his actions and response to any event; that F's first thought is to blame the M, regardless of whether there is justification; that at times those actions … would have caused anxiety and stress, quite likely transmitted to [S] [J60];*
>
> *b. Ms M's report is reliable … the report demonstrates engagement and encouragement by the M, either directly with [S] or by her personal engagement at the time with Dr K and H [J66];*
>
> *c. The F demonstrates some insight into the finding of Judge Dodds, but in my assessment not significantly so [J67];*

d. DJ Dodds' assessments and conclusions are not undermined ... those repeated applications were an unacceptable strain on the M as [S's] primary carer [J71];

e. [S] has become institutionalised and is aware of professionals [J72];

f. The M has engaged in encouraging [S] during the ICFA programme [J73];

g. M feels the effects of being in these proceedings and view she holds of [S's] father is negative based on her own experiences ... they bleed out and [S] will have picked up on them. It will contribute to the view [S] now holds of his father [J77];

h. There has been parental conflict in the past and [S] has been exposed to it [J78];

i. Contact was withdrawn just prior to COVID ... during this period [S's] bond with his mother is likely to have been strengthened [J79];

j. [S's] own mind is that his father slapped him or was horrible to him, and that must equally play a part in his resistance [J80];

k. The M has exposed [S] to negative ideology of his father, but it has not been directly on every instance and I am not satisfied it is purposively or with intent for [S] to reject his father [J82];

l. [S] has been exposed to a negative ideology of his mother by his father ... he is impacted by it given the close bond he shares with his mother. It caused him to dislike his father [J85];

m. There has been parental conflict in this case. [S] is exposed to it and I am satisfied that has played a part in his views and choices now [J92];

n. If [S's] view was that F was harsher than M, again it is going to feed into his negative narrative, because he would consider himself unhappy about it [J94];

o. I am not satisfied that M has manipulated those professionals to her cause [J104];

p. In relation to [S's] narrative that his father slapped him and is horrible to him: I cannot be satisfied that it is a scripted narrative embedded by the M either. I am satisfied it is reinforced by her negative feelings and the experiences [S] has been exposed to by his mother [J109];

> *q. In relation to the change of surname: I am not satisfied on the balance of probabilities that the M permitted him to do it or with the intent to cut the F from [S's] life [J112];*
>
> *r. As to the allegation of disguised compliance: I am satisfied she followed the advice of professionals and the court [J118]; I have no doubt that the M has tried and intended to support [S] to see his father, despite her own negative view of him [J119];*
>
> *s. From those findings that I have made thus far I am satisfied that [S] has been exposed to parental conflict. That conflict has not abated. The M's feelings about the F have been transmitted to [S] because it is impossible for her to hide them. Thereafter, the M could have done more to support and encourage [S]. Although there is a significant amount attributable to the M in these scenarios, she is not solely responsible for the entrenched view that [S] holds. Some of that is attributable to the messages he has received from professionals directly and the behaviours of F that he has been exposed to, including the F's dislike of the M [J125];*
>
> *t. I am not satisfied that the precipitating event [S] complained of in February 2020 was manufactured by the M. [S] appears to genuinely hold those fears about his father and which his father does not dispute are genuine to [S] [J127];*
>
> *u. As to M's capacity for change: Dr Arora was clear about the therapeutic intervention beginning with the parents. I am satisfied that that would enable change in the M, particularly because she seeks to conform and follow the advice of professionals [J138];*
>
> *v. I am satisfied the M has not actively denigrated the paternal family [J145];*
>
> *w. [S] has threatened to harm himself and take his own life. That has not been discounted as a risk and I must consider it real [J141];*
>
> *x. I appreciate the guardian and others have formed a view that the F has moved on since DJ Dodds' findings. My own assessment is that is that it is not particularly far forward. [J151]."*

24. Fourthly the Judge was being asked by the F to make an order that Ms W herself had said would be "incredibly harmful" to S in the short-term. There were, to put it colloquially, pros and cons of making the order sought. The Judge weighed up those pros and cons in the Discussion section of the judgment and found that the harm to S in the short-term outweighed the potential but uncertain benefits in the longer term of restoring a relationship with his father. Subject to giving adequate reasons this was plainly a judgement that was open to him.

The law

25. The test for allowing an appeal in a Children Act 1989 case is set out in FPR30.12:

> **FPR 30.12.— Hearing of appeals**
>
> (…)
>
> (3) The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence.

26. The approach to the decision of the lower court being "wrong" is not entirely straightforward. Lord Justice Baker in *T (Fact-Finding: Second Appeal)* [2023] EWCA Civ 475 said at [56]:

> *"56. The most-frequently cited exposition of the proper approach of an appellate court to a decision of fact by a court of first instance is in the judgment of Lewison LJ in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 :*
>
> *"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360 ; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23, [2007] 1 WLR 1325 ; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477 . These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many.*
>
> *(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
>
> *(ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
>
> *(iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
>
> *(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*

> *(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *(vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.*
>
> *115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see Customs and Excise Commissioners v A [2022] EWCA Civ 1039 [2003] Fam 55 ; Bekoe v Broomes [2005] UKPC 39 ; Argos Ltd v Office of Fair Trading [2006] EWCA Civ 1318; [2006] UKCLR 1135 ."*

27. More recently, Lewison LJ summarised the principles again in *Volpi and another v Volpi* [2022] EWCA Civ 464 at [2]:

> *"i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.*
>
> *ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.*
>
> *iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.*
>
> *iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.*
>
> *v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.*

> *vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."*

28. Lord Justice Baker in *B (A Child) (Fact-Finding)* [2023] EWCA Civ 905 also said:

> *"47. I regret to say, however, that I have reached the conclusion that the judge's findings as to the perpetrator of B's injuries cannot stand. I find myself in the same position as in Re O (A Child) (Judgment: Adequacy of Reasons) [2021] EWCA Civ 149 (see in particular paragraph 44). The findings cannot stand, not because they are necessarily wrong, but because of the way the judge arrived at her conclusion. As in Re O, there are three overlapping problems with the judgment. First, the reasoning is, in a number of respects, insufficient and flawed. Secondly, in reaching her ultimate conclusion, the judge failed to take into account some material factors. Thirdly, she looked at the evidence in compartments and did not have regard to each piece of evidence in the context of the totality of the evidence before making her findings.*
>
> *48. In reaching this conclusion, I have not overlooked the clear case law as to the proper approach of an appellate court to an appeal against findings of fact as identified and repeated many times by courts at the highest level and summarised by Lewison LJ in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 at paragraphs 114-115 and in Volpi and another v Volpi [2022] EWCA Civ 464 at paragraph 2 . An appellate court must not interfere with findings of fact by trial judges, including the evaluation of those facts and to inferences to be drawn from them, unless compelled to do so. An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it. This approach is followed by this Court hearing family appeals just as it is in other appeals in civil cases. Those passages from Fage and Volpi have been cited and applied in this Court hearing appeals in family proceedings on many occasions, most recently in Re T (Fact-Finding: Second Appeal) [2023] EWCA Civ 475 when allowing a second appeal after the first appellate judge had failed to follow that approach when setting aside findings made by the trial judge."*

29. As per Dame Siobhan Keegan in *H-W (Children) (No 2)* [2022] UKSC 17:

> *"49. In a case where the judge has adopted the correct approach to the issue of necessity and proportionality, the appellate court's function is accordingly, as explained in In re B, to review his findings, and to intervene only if it takes the view that he was wrong. In conducting that review, an appellate court will have clearly in mind the advantages that the judge has over any subsequent court - see Lord Wilson in In re B at para 41 and the earlier decision of the House of Lords in Piglowska v*

> *Piglowski [1999] UKHL 27; [1999] 1 WLR 1360. 50. In In re B Lord Neuberger, at para 93, essayed a further dissection of the process of deciding whether a judge's decision was wrong. He cautiously prefaced his suggested breakdown of the possible states of mind of an appellate judge with the observation that there was danger in over-analysis. With hindsight, that was a prophetic observation, as this court held in the subsequent case of R (R) v Chief Constable of Greater Manchester Police [2018] UKSC 47; [2018] 1 WLR 4079. Lord Carnwath, giving the judgment of the court, said this at para 63:*
>
> *"With hindsight, and with great respect, I think Lord Neuberger's warning about the danger of over-analysis was well made. The passage risks adding an unnecessary layer of complication. Further, it seems to focus too much attention on the subjective view of the appellate judges and their degrees of certainty or doubt, rather than on an objective view of the nature and materiality of any perceived error in the reasoning of the trial judge."*
>
> *...*
>
> *51. On this appeal the real issue is not whether the appellate court is satisfied that the judge reached a conclusion which was wrong. The question is rather concerned with the adequacy of the judge's process of reasoning in reaching his conclusion. This appeal asks the question whether the judge did go through the rigorous process described at para 47 above or whether he proceeded too directly from his finding that the threshold criteria were met to the conclusion that it followed that a care order ought to be made. If, on appeal, it is found that a judge has unduly telescoped the process, and has not made the side-by-side analysis of the pros and cons of each alternative to a care order, then the likely conclusion is that his decision is, for that reason, flawed and ought to be set aside."*

30. In terms of the approach to a challenge to the reasons in a judgment, in <u>*Re F (Children)*</u> [2016] EWCA Civ 546, Sir James Munby P at [22]-[23] sounded this warning:

> *"Like any judgement, the judgement of the Deputy Judge has to be read as a whole and having regard to its content and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and provide sufficient detail and analysis to enable to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 229, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist". The task of this court is to decide the appeal*

> *applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360:*
>
> *"[…] An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself"*
>
> *It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffman's phrase, the court must be wary of becoming embroiled in "narrow textual analysis"."*

31. This relates to Munby LJ's earlier exposition on a similar theme in *Re A and L (Fact-Finding Ex Tempore Judgments)* [2011] EWCA Civ 1611:

> *"[35] The other principle, relating to the adequacy of a judge's expressed reasons, is that explained by Lord Phillips of Matravers MR in English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605, [2002] 1 WLR 2409, paras [17]-[21]. For present purposes it suffices to refer to how Thorpe LJ put it in Re B (Appeal: Lack of Reasons) [2003] ECA Civ 881, [2003] 2 FLR 1035, para [11]:*
>
> *'the essential test is: does the judgment sufficiently explain what the judge has found and what he has concluded as well as the process of reasoning by which he has arrived at his findings, and then his conclusions?'*
>
> *Thorpe LJ had previously observed that one should not ignore the 'seniority and experience' of the particular judge, the 'huge virtue in brevity of judgment', and that the 'more experienced the judge the more likely it is that he may display the virtue of brevity.' I should add that there is no obligation for a judge to go on and give, as it were, reasons for his reasons."*

32. There is no doubt that a Judge is entitled to depart from the view of an expert as long as adequate reasons for doing so are given, *Re B (Care Expert Witnesses)* [1996] 1 FLR 667 and the cases cited in the Red Book [2024] at para 3.483(8).

33. I would extract the following principles from the case law in respect of this type of appeal:

    a. The test is whether the decision was "wrong", see FPR 30.12 or there was a "serious" procedural or other irregularity;

    b. Appeal judges should not interfere either with findings of fact or evaluations or inferences from those facts, unless "compelled to do so", see *Fage* at [114];

    c. The trial judge will be in a significantly better position to assess the evidence than an appeal judge, see *Fage*, and many other cases

including *Piglowska v Piglowski* [1999] 1 WLR 1360; *Re H-W (Children)* at [49];

d. The judgment must be read as a whole and not be subjected to a narrow textual analysis, see *Volpi* at [2];

e. An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied s/he was "plainly wrong" and "What matters is whether the decision under appeal is one that no reasonable judge could have reached", see *Volpi* at [2], as agreed with in the Family Court context by Baker LJ in *Re T* at [57];

f. In terms of the standard of reasons the Judge must

i. reach conclusions and give reasons to support his view, but does not have to spell out every matter, see *Fage* at [115];

ii. consider the evidence in a holistic way, weighing up the pros and cons.

34. There is extensive caselaw on the approach the Court should take where there are allegations of "alienating" behaviour. Ultimately the question whether one parent has acted, whether deliberately or otherwise, to influence a child against the other parent is a matter of fact which turns entirely on the individual case. I am not convinced that reference to multiple other cases in which the facts will necessarily be different, and the conclusions turn on those facts, is particularly useful. However, the judgment in *Re C* of the President of the Family Division Sir Andrew McFarlane sets out some very helpful dicta, which are binding on me.

> *"Before leaving this part of the appeal, one particular paragraph in the ACP skeleton argument deserves to be widely understood and, I would strongly urge, accepted:*
>
> *'Much like an allegation of domestic abuse; the decision about whether or not a parent has alienated a child is a question of fact for the Court to resolve and not a diagnosis that can or should be offered by a psychologist.*
>
> *For these purposes, the ACP-UK wishes to emphasise that "parental alienation" is not a syndrome capable of being diagnosed, but a process of manipulation of children perpetrated by one parent against the other through, what are termed as, "alienating behaviours". It is, fundamentally, a question of fact.'*
>
> *It is not the purpose of this judgment to go further into the topic of alienation. Most Family judges have, for some time, regarded the label of 'parental alienation', and the suggestion that there may be a diagnosable syndrome of that name, as being unhelpful. What is important, as with domestic abuse, is the particular behaviour that is*

> *found to have taken place within the individual family before the court, and the impact that that behaviour may have had on the relationship of a child with either or both of his/her parents.*
>
> *In this regard, the identification of 'alienating behaviour' should be the court's focus, rather than any quest to determine whether the label 'parental alienation' can be applied."*

35. Parental alienation is a highly contentious phrase or concept. Some reliance has been placed, by all parties in this case, on the draft Family Justice Council Guidance on Parental Alienation. I note that this is a Consultation Draft, where although the consultation has been completed, no further document has yet been produced. I remind myself that firstly, it is a guidance document and not law, and secondly it is only in draft form at the consultation stage. As such it necessarily carries limited weight.

36. There are some passages which give some helpful guidance on how a court may approach allegations of "parental alienation":

> *"a. the important checklist at page 3, which highlights the subtleties of the process and, in particular, the fact that there can be reasons other than alienating behaviours for a child's reluctance or refusal to see a parent;*
>
> *b. the narrative setting out this same theme:*
>
> *'Evidence of alienating behaviours*
>
> *Where alienating behaviours are alleged, the court should require those making the allegation to identify the evidence upon which they rely.*
>
> *Alienation involves an act or acts by a parent, that must be evidenced, resulting in the psychological manipulation of the child and the child's unjustified rejection of the other parent. Such behaviours must be evidenced just as other acts of abuse are evidenced.*
>
> *The behaviour of a child is not evidence of the behaviour of an adult, so the behaviour of a child should not be used to evidence adult behaviours.*
>
> *All potential risk factors, such as domestic abuse, must be adequately and safely considered when looking at the nexus between the behaviour of a parent and a child.*
>
> *The fact that a child is resistant to spending time with a parent, does not automatically mean that the child has been exposed to alienating behaviours from the other parent. The court should remain mindful that a child might withdraw from a relationship with a parent for a variety of reasons e.g.: a new adult relationship; parental separation; loyalty to the other parent; rigid parenting; abusive parenting; or differing parenting styles.*

> *A child might align themselves with another child or adult or demonstrate attachment behaviour to protect the relationship with their resident parent. Alignment and attachment issues can result in resistance, reluctance and refusal without any alienating behaviours perpetrated by an adult.'*
>
> *c. the proper place of the expert in the staged process:*
>
> *'Next steps*
>
> *Where the court has made findings of any form of abuse, including, but not limited to, domestic abuse, sexual violence or alienating behaviours, the court will need to consider whether further or other evidence is needed for the court to conduct a proper welfare evaluation."*

37. I also note the reliance placed, at least by Cafcass, on their internal Tools which the Judge was referred to.

38. In my view "parental alienation" is not a helpful categorisation. There may be multiple reasons why a child is suspicious of, or hostile to, one parent. There is a spectrum between a child's wholly justified concerns and the parent who deliberately seeks to turn a child against the other parent out of hostility, which is not objectively justified, to that other parent. One parent may play a role in the child's view of the other parent, indeed if the child lives with one parent that is highly likely to be the case. There may be some objective reason for the lived with parent's view, as was the case here in the light of DJ Dodds' judgment. That the child picks up and responds to the lived with parent's views, worries, suspicions and concerns, is very likely. There will then be a spectrum of both the lived with parent's worries and the degree to which the child reflects them or magnifies them. Some parents may be very good at hiding those worries, some much less so. But to be labelling this "parental alienation" seems to me to be unhelpful.

39. A child may become worried and perhaps scared of an absent parent for all sorts of reasons. That fear may not be objectively justified, but being scared of something or someone is often not an objectively justified response, whether by an adult or a child. The lack of objective justification for one's fears makes them no less real. There appears to be in the case something of an assumption by the F and the Guardian that if the child is scared of the F that must be because he has been "alienated" and that his fear is somehow illegitimate and can be largely ignored, with the justification of creating a relationship with his father. In my view this is both illogical and does not follow the basic human psychology. S's fear of his father may be wholly real and impactful upon him, even if it has no rational basis. Given that the Court has a statutory duty to pursue the child's welfare, forcing him to live with a parent he is afraid of, whether objectively justified or not, is something that would need considerable justification.

40. The Judge plainly felt that the harm through forcing S to live with his father, or at least removing him from his mother and placing him with his father's new family, was disproportionate to any benefit that might be gained. That is a balance of harm and benefit which was plainly open to the Judge, subject to him giving adequate reasons.

Ground One

41. On Ground One, Mr Sampson submits that the Judge was wrong not to follow the recommendation of the Guardian and the single joint expert, Dr Arora and therefore to transfer S's residence from the M to the F, and that he gave insufficient reasons for departing from their professional opinions.

42. Mr Sampson points to the Guardian's final report where she said in her conclusions:

> *"42. I have been involved with this family now for over three years now and I am saddened and disappointed that we have got to this point. Everything I have recommended in the past was to avoid a recommendation of a 'change of residence' due to the harm this option will undoubtedly have on [S] in the short and potentially longer term if ordered. Ideally, I would have liked to be in a position to recommend that [S] remains living with this mother but spends time with his father, however after several attempts to reestablish [S's] relationship with his father, whilst still in his mother's care, this has disappointingly been unsuccessful.*
>
> *43. I have had to consider both the short term and long-term impact to [S] in firstly, believing that he has suffered significant harm from his father, and secondly, not having a relationship with his father or the paternal side of his family. I have concluded that the long-term impact on [S] is more harmful than the harm he would suffer from a change of residence. In formulating this opinion I take into account that there are some children who manage a change of residence well and there are some who do not. It is not possible to predict the future but in my opinion [S] will undoubtedly struggle initially however there have been glimmers of hope in [S's] response to his paternal family members which show that when [S] is away from scrutiny and parental influence, he is able to settle and even be positive within these relationships.*
>
> *...*
>
> *49. If the Court agrees with my recommendation, how distressing the move will be for [S] is in many ways dependent on the parents' behaviour, for example I would want to avoid police involvement if at all possible. Whilst I understand that if the Court orders a change of residence this will be incredibly upsetting for [the M], it is important that she can support [S] in making the move as easy as possible. This could include packing a bag with some clothing, school uniform and equipment and some of his favourite items which may help him to settle, although it would be important that she does not do this whilst [S] is present.*
>
> *50. I have also had to consider contact between [S] and [the M] if a change of residence is ordered. The research suggests that there should be a break in contact between children and the parent who displays influencing behaviours for around 3-4 months. This time allows for reparative work to begin and the child's narrative to change away from*

> *any potential influence. Whilst I recommend a 'live with' order can be made in respect of [S] residing with his father, I am not yet able to recommend a final 'spend time with' order in respect of the time [S] should spend with [the M]."*

43. She referred earlier in her report to where she felt that the M was not supportive of contact and was not giving S the reassurance that he needed:

> *"20. [The M] took [S] to the GP on the 30/11/23 where it is reported that [S] was feeling stressed about seeing his father. This subsequently led to the GP making a referral to Children's Services. I reflect on Dr Arora's report where she states "[S's] score on the anxiety scale is mildly elevated. This suggests that he is likely to have psychological vulnerabilities associated with anxiety. Thus, he may benefit from a clinical intervention to address anxiety related concerns." Dr Arora goes on to state felt that [S's] anxiety was likely to be a result of the lifetime parental conflict he has experienced. I was deeply troubled to read the school log dated the 19/10/23 where [the M] reportedly stated that [S] is scared in respect of contact, however that he has to go because she doesn't want him to be removed from her care, having to move school and stop going to basketball due to living with his father so is doing 'what she is told'. [The M] has previously told me that she has told [S] that he has to go. In my experience of discussing contact with [the M] she presents as anxious and unsupportive, so this combined with a narrative that he 'has to' go to contact, in my opinion does not give [S] the emotional permission or reassurance that she believes this is what is best for him and that the relationship with his father is important. Dr Arora highlighted that when she met [S] and [the M], she observed him to look at [the M] for reassurance, so in my view [S] would have needed both verbal and nonverbal reassurance from [the M], which do not think she has been able to give."*

44. She set out her view that the F had acted "respectfully" and that he supported the M's relationship with S, see para 26. She also recorded that the F had said he would pay for therapeutic support for S, but felt it would be a waste of money to do so if S remained with his mother.

45. It is clear from the section of her report relating to the M, paras 32-41, that the Guardian felt that she was not supportive of contact, was unjustifiably critical of the F and engaged in false compliance.

46. Mr Sampson points to a number of elements in the Guardian's and Dr Arora's evidence, and says that the Judge summarised Dr Arora's evidence in very short terms at J50-J53, although he accepts that there is further analysis at J129-J152. He then sets out a number of very detailed criticisms of the Judge's reasoning. This includes that the Judge found at J138 that he was satisfied that that the M would change, where he says the expert evidence did not support that conclusion. That paragraph is a good illustration of the need not to take a sentence out of context, and understand the overall thrust of the Judge's reasoning. The Judge said:

> *"Dr Arora's assessment, which was shared by the guardian, is that mother's capacity for change is low. Again, I factor in the history and extent of these proceedings and the fixed mindset that the mother has. Dr Arora was clear about the therapeutic intervention beginning with the parents. I am satisfied that that would enable change in the mother, particularly because she seeks to conform and follow the advice of professionals. At times it is evident the mother does not act on her own. She needs prompting. It was commented on by the guardian."*

47. Mr Sampson submits that the judgment does not accurately reflect the professional evidence.

48. Ground Two is a reasons challenge, that the Judge did not undertake a full and reasoned welfare analysis in relation to the short and long term harm to S if there was no change of residence; and that he did not properly consider the caselaw and guidance on approach to "parental alienation".

49. Mr Sampson submits that the Judge wrongly dealt with the impact of change on S and did not properly consider the categories of harm. Again he sets out a number of detailed complaints about the judgment including:

    a. The Judge failed to consider the causal links between the M's anxiety and S's rejection of the F;

    b. Failed to consider the impact of delay on S, with the prospect of his becoming more entrenched in his rejection of the F;

    c. Gave little or no weight to the F's ability to meet S's needs;

    d. Failed to rehearse the Guardian's evidence of the M's inability to meet S's medium to long term emotional, psychological and identity needs;

    e. Failed to consider the M's ability to engage with therapeutic work;

    f. Placed disproportionate weight on short-term impacts.

50. Ground Two (b) is that the Judge did not refer to the caselaw on parental alienation.

51. Ground Two (c) is that the Judge took into account matters that were not determinative and placed too much weight upon them, such as the F not providing costs and timescales for therapeutic work. Mr Sampson is also critical of the Judge for expressing concern about the lack of certainty about the impact of transferring S's residence.

52. Ground Three is that the Judge was wrong to approach the F's case on the basis that he was suggesting DJ Dodds' judgment was wrong. Ground Four is closely related and Mr Sampson submits that the Judge was wrong to place significant weight on that judgment given it was five years old.

53. Mr Tyler submits that the critical point is that the Judge did not agree with Dr Arora or the Guardian's views on the contested facts, namely on the alleged "alienation".

The Judge considered the underlying parental behaviour but reached different views on it from Dr Arora and the Guardian. It was entirely open to him to do so, and to reject the professional opinions which were being advanced.

54. Further the Judge reached different conclusions on the level of harm to S from removing him from his mother's care and placing him in the F's household.

Conclusions

55. In my view this is a classic example of an appeal which is in truth a challenge to the merits of the decision and to the weight the Judge gave to particular evidence. It is also an example of trying to pick and choose parts of a judgment and not reading it as a whole; and seeking to impose an obligation on a judge to give reasons for every factual element and disagreement, which is disproportionate to the task. It is important that Family Court judges can exercise their functions without feeling that judgments have to be overly long and detailed because of their fear of being successfully appealed.

56. The ultimate decision, not to remove S from his M's care and place him with the F, was one that was self-evidently open to the Judge. It went directly to S's welfare best interests, and involved a balance between various factors as explained in considerable detail in the judgment. It could not possibly be said that the Judge's decision was one "that no reasonable judge could have reached", see *Fage* at [2ii].

57. The thrust of Ground One is that the Judge disagreed with the Guardian and Dr Arora about whether residence should be transferred. The starting point is that the determination of factual issues, and what is in the child's best interests under s.1 of the Children Act 1989 is for the Judge, not the Guardian and not an expert.

58. The Ground is framed as a reasons challenge, but there is in my view a danger of the court allowing what is said to be a reasons challenge to become in reality a merits challenge. What lies behind the criticism of the Judge's reasons, is actually a disagreement with the reasons that were given and the conclusions the Judge reached on the evidence.

59. On a fair and objective reading of this judgment it is quite clear why the Judge disagreed with the Guardian, and Dr Arora's more caveated, recommendation. I summarise those reasons for the benefit of clarity:

    a. He took into account and gave weight to S's wishes and feelings, see J130-J131. In my view this was wholly appropriate. The child's wishes and feelings are a material consideration under s. 1(3)(a) of the Children Act 1989. They are also relevant under Article 12 of the United Nations Convention on the Rights of the Child ("UNCRC"). Although S was not *Gillick* competent, his wishes and feelings required respect. The voice of the child should always be an important, although not determinative, consideration in decisions that are about that child's life.

    b. He took into account the fact that S was fearful of his father and held that belief strongly, see J130. In my view, and much more

importantly that of the Judge, this was an important consideration. As have said above, whether or not that fear was "justified", it was real for S.

c. He gave weight to S's emotional and psychological need for stability, see J132.

d. He took into account the Guardian and Dr Arora's views and the future risks to S, see J134.

e. He took a more positive view of the M's ability to promote the relationship than did the professionals, see J136-J138. This was par excellence a judgement for him having heard the oral evidence. Fundamentally the F and the Guardian disagree, but that is not a matter for an appeal court.

f. He placed very considerable weight on the impact on S from being moved, including on his schooling, his friendships and his relationships, and on the risk of self-harm and behavioural problems see J140-J143. Again this is a matter of weight for the Judge. Mr Sampson has tried to elevate some of the dicta in the cases on parental alienation to somehow being binding propositions of law. That cannot be right for the reasons given by the President of the Family Division in *Re C*, the court needs to focus on the particular behaviour of the parents and the particular impact on the child. There may be cases where a "robust" intervention has a good prospect of restoring relationships and the harm to the child can be seen to be "short-term". There may be other cases where such an intervention is not proportionate, given the harm involved. Where on that spectrum or balance a case lies depends on the individual facts, and subject to the *Volpi* test of it being one that no reasonable judge could have reached, is for the trial judge.

g. He considered the benefits to S of rebuilding the relationship with his father, but in my view entirely rightly said there was no guarantee of success, see J145. He was plainly worried about the lack of confidence in the strategy, see J147-J150. I asked in the hearing whether there was any peer reviewed research as to whether the kind of intervention proposed here was likely to be successful. I note that neither I nor the Judge were pointed to any such research. The weight that the Judge attached to the risk of the proposed move of residence being unsuccessful in terms of restoring the relationship, but causing S very considerable and unquantifiable harm, was again a matter for the Judge. It is worth noting at this point that Dr Arora was sufficiently concerned about S and potential for self-harm, that she said in oral evidence if residence was transferred he would have to be supervised at all times. This is merely a small indication of the level of risk that the Judge was being asked to take.

60. The Judge's view at J151 are worth recording in full:

> *"I have to express a degree of scepticism. I appreciate that the guardian and others have formed a view that the father has moved on since District Judge Dodds' findings. My own assessment is that it is not particularly far forward. The father has not made contact with [S's] school, as reported by the guardian and when he did it resulted in a negative commentary towards the mother. There has been repeated applications, demonstrating a fixed approach in achieving an outcome the father has sought since the beginning. I do temper that with the evidence that was given before me, which seems to demonstrate some further movement forward."*

61. I agree with Mr Tyler that it is clear that the Judge took a different view of the F from that of the Guardian, and to some degree Dr Arora. He did not think that the F had moved on very far from the findings of DJ Dodds. That was a matter for him.

62. For all these reasons I consider that the Judge was entitled to disagree with the Guardian and Dr Arora, and gave wholly adequate reasons for doing so. I therefore dismiss Ground One.

63. Ground Two focuses on the welfare analysis. The Judge took into account all the material evidence, weighed it up and reached a rational conclusion open to him. This Ground is in my view simply a challenge to the weight the Judge gave to different factors. Subject to rationality, weight is a matter for the Judge. The Judge gave more weight to the harm to S of removing him from his mother than to the potential benefits of the move in terms of restoring a relationship with the F. It might be said that the Judge gave more weight to short-term harm than possible medium and long-term benefit, but that was a matter for him. The F strongly disagrees with that balance, but there is nothing "wrong" or irrational about it.

64. For the reasons set out above, particularly the analysis in his conclusions, I consider the Judge's reasons for his welfare analysis are again more than adequate.

65. There was no need for the Judge to refer to the various caselaw and guidance. Each of these cases necessarily turns on its own facts. The Judge took into account the potential long term benefits. Authority cannot bind a judge to take a particular approach on what is an intensely case specific balancing exercise.

66. Grounds Three and Four related to the Judge's approach to DJ Dodds' judgment. This was a highly material consideration for the Judge, given that it formed an important part of the history and DJ Dodds had set out clear views on the parties. The Judge was entitled not just to take it into account, but also to assess how far he felt that the F had changed since he gave evidence in 2018. The Judge's assessment was self-evidently open to him, given that he heard the oral evidence. Again the Judge disagreed with the Guardian, but that was a matter for him. His reasons are again perfectly clear.

67. For all these reasons I reject this appeal on all Grounds.