Case No: KH17P10765

IN THE FAMILY COURT SITTING AT KINGSTON UPON HULL

IN THE MATTER OF THE CHILDREN ACT 1989

AND IN THE MATTER OF "A"

Date: 19 August 2021

B e f o r e :

HIS HONOUR JUDGE WHYBROW

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	FA	**Applicant**
	- and -	
	(1) MA	**First Respondent**
	(2) A (a child by their Children's Guardian of CAFCASS)	**Second Respondent**

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Hannah Whitehouse. (Direct Access barrister for the applicant)
MA (unrepresented)
Gemma Adams (solicitor for the Second Respondent)

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Judgment

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

1 This is an application made by FA for a child arrangements order and a prohibited steps order. A is the only child of the relationship between FA and MA. A is four years old.

2 The issues for the court are, first, what are the best arrangements for A to spend their time between their parents? Secondly should there be a prohibition on MA taking A out of the UK? Thirdly, should there be an order for MA to surrender her and A's passports?

3 FA's application was made in December 2017. There have been final hearings listed in each of the subsequent years, all of which were adjourned for further work and exploration of contact.

4 FA has been represented at this hearing by Hannah Whitehouse of counsel on a direct access basis. He has been represented at every hearing, usually by Giorgia Sessi of counsel, although he has been acting as a litigant in person since November 2020.

5 MA represents herself in this litigation although she did have legal representation for a short period in 2019. She has not attended this final hearing.

6 A has been represented by a Guardian appointed by Cafcass since December 2018. The original Guardian was replaced earlier this year. As usual, A's solicitor, Gemma Adams, has represented them in this hearing.

7 This hearing was listed to take place on 5 and 6 August 2021. For reasons which are not known MA failed to attend. As there appeared to be no good reason for her lack of attendance the hearing proceeded on 5 August, pursuant to rule 12.14(6) of the Family Procedure Rules 2010, as the court was satisfied that she has had reasonable notice of the hearing. On that day, I heard evidence from FA and the Guardian. Given the seriousness of the issues in the case and the need for the court to receive further information before making a final decision, I adjourned the proceedings until 13th August for a further one day hearing. Judgment is being handed down today, 19 August.

8 With the consent of FA and the approval of the court, the hearings on 5 August and today's hearing have been observed by a legal blogger, Lucy Reed, in accordance with the pilot scheme within Part 36J of the Family Procedure Rules 2010.

9 This judgment is ordered as follows, paragraph numbers in brackets:

Why is this court making orders for a Scottish child?

10 FA is English and MA is Scottish. A was born in England but has lived for most of their life in Scotland. One of the legal and practical difficulties in this case is that A is habitually resident in Scotland and has been so since 2018. MA has made a home for herself and A in Scotland and her evidence has always been that this is a permanent move.

11 When A was born in 2017 MA and FA were living in England. They share parental responsibility for A and they never married. There is no doubt that all were habitually resident in England and Wales at that time. When the parents separated in September 2017 MA spent time in Scotland but also returned to England, staying with family in both places. She took A on a trip outside Europe on 8 December 2017, ostensibly for a family holiday. Although he had initially agreed to this holiday, FA states that he did not consent to A leaving the jurisdiction because of the uncertainty about when A would return. Nevertheless, FA went with A and this caused FA to issue the current proceedings on 21 December 2017.

12 In March 2018 when she returned to the UK, MA stayed in England with A and facilitated contact in accordance with arrangements agreed at court. She then went to live in Scotland later in the Spring of that year.

13 To my knowledge, there has never been an application to the Scottish courts in relation to A. Also, there has never been an application for the proceedings in England and Wales to be stayed.

14 The court applied the jurisdictional rules in the Family Law Act 1986. The court assumed jurisdiction for A. My recollection is that at the time it was accepted by the court that A had been habitually resident in England and Wales and that they had not acquired habitual residence in Scotland before the proceedings began. The removal of A outside of Europe was seen as being a move which was without the agreement of FA, such that A's pre-existing habitual residence in England and Wales was treated as continuing, pursuant to section 41 of the 1986 Act.

15 At a time when I was not the case management judge in 2019 the question of jurisdiction was raised again. The court authorised an expert opinion to be commissioned from Alan Inglis of counsel on joint instruction, paid for under the child's legal aid certificate. This considered the question of jurisdiction.

16 The result of this process was agreement as to jurisdiction. At a time when MA was legally represented, it was conceded on the face of the order of 28 November 2019 that A was habitually resident in England and Wales at the time these proceedings began.

17 In summary, the jurisdiction of this court was established at the beginning of the proceedings and then confirmed on expert advice in 2019.

18 Agreements reached in relation to contact led to the proceedings being adjourned on many occasions. This court retained conduct of the proceedings for continuity, taking into account its increasing familiarity with the case. Aspects of

enforcement were always difficult due to the mother and child living in Scotland, it being recognised that orders of this court would need to be registered in Scotland under the 1986 Act to be enforceable there.

Why have the proceedings not been transferred to Scotland?

19 The usual approach taken is that Children Act proceedings are better conducted local to the child's residence. There are several reasons for this including the assistance which is given to the court through local knowledge of the services and facilities available. This advantage is usually combined with having a local social worker or Cafcass officer available who can spend time with child and is more able to gain an understanding of the child's perspective than someone who is based in a different area. It is also usually more practicable for the parent with care of the child to attend court if it is closer to their home. Enforcement measures may well be more effective when conducted locally.

20 It is likely that if A and their mother lived in a different area of England proceedings would have been transferred to their local court.

21 The position is more complicated because of the jurisdictional differences between England and Scotland. There is no power for this court to transfer proceedings to Scotland. The mechanism within the Family Law Act 1986 is one of an order to stay of these proceedings, registration of an English order in Scotland and for future proceedings to be taken in Scotland. That is likely to be the position in these proceedings once a final order is made.

What has been done about the breach of previous orders?

22 The history is littered with examples of orders under the Children Act 1989 being breached by MA.

23 It is always a dilemma as to whether enforcement through penal sanctions is likely to be in the best interests of the child. Perhaps in recognition of this, FA has not brought any proceedings for enforcement either in England or in Scotland, except that he made an application for enforcement order under section 11A of the Children Act, which application had to be withdrawn because of the

unavailability of the remedy sought (given that the remedy of an unpaid work order is only available against parents who live in England and Wales).

24 My recollection is that on each occasion when an order has been made, or when an order has been breached, the seriousness of this has been made clear to MA. She has herself said to the court and to the Guardian that she has felt pressured or "bullied" by orders made. There is no doubt that she has understood the orders and the potential consequences of breach.

25 Nevertheless, on each occasion when she has attended court it has been possible to reach constructive agreement to reinstate contact and to plan for its development. Those negotiations have avoided the need to confront breaches by way of punishment.

26 None of this is to say that breaches have been excused or ignored or not acted upon. Rather, the seriousness of the situation has been made clear to MA and the court has retained conduct of the proceedings with a view to ensuring that A's relationship with the father is established. Similarly, the seriousness of the situation has required the appointment of a guardian and instruction of an independent psychologist. To deal with breaches constructively and purposefully has been the strategy taken by the court.

27 It seems that in 2018 when contact orders were breached in the summer, and also in 2019 when a similar problem occurred, FA chose not to restore the proceedings to court and MA failed to apply to court for permission to suspend the existing contact order. In that sense both parents failed to deal with the breaches appropriately. The court addressed the problems it was faced with in the autumn of 2018 in the autumn of 2019 by fixing new final hearings and setting up interim contact. It is difficult to see what more could have been done given the applications before the court and the agreements reached subsequently at court.

Why has this case taken so long and why so many hearings?

28 I have been able to review the court file and a chronology of contact which has been agreed between the parents since the hearing in February 2021. I will set out the background here.

29 At the start of the proceedings A and their mother were on a trip outside of Europe. MA returned and attended court on 5 March 2018. On that occasion it was agreed that FA would see A in that month supervised by MA. Unsupervised contact would then take place for one week per month. Supervision was to build up the relationship between A and their father.

30 The ordered contact took place over four days for several hours supervised by MA 6th to 9 March 2018. A was with their father unsupervised for six hours on 10th March. A was with FA between 30th March and 2 April 2018 having met up in England.

31 On 24th April MA handed A over to FA in England and he had contact until 6 May 2018, although the chronology is unclear as to exactly how much contact he had during that period. Similarly, at the end of May there was contact in England but it is not clear for how long.

32 MA had gone back to Scotland and sought to change the contact arrangements and to promote contact in Scotland. However, subsequent orders were made in June and July 2018 to keep the previously ordered routine of contact for a period of days each month.

33 MA failed to comply with those orders and there was no face-to-face contact for several months. There was repeated breach but the court was not aware of this until a later hearing on 5 November 2018. On that occasion contact was ordered to restart and this included FA visiting A in Scotland in November, which did take place. MA failed to co-operate with the November order for contact in England in December. CAFCASS notified the court of this and recommended appointment of a Guardian for the child, which was ordered in that month. The final hearing was fixed for January 2019 with MA to bring A with her to court so that they could see their father around that time.

34 Blaming the exhausting journey, she failed to bring A on this occasion, leaving A in Scotland. On 23 January 2019 the court ordered that contact take place overnight in Scotland on two occasions to be followed by weekend contact in

England. Given the lack of progress in contact, the final hearing was not effective as such.

35 FA did look after A overnight around 22nd of February 2019 in Scotland but there was disagreement between the parents about where he stayed, with the mother being suspicious as to whether he was telling her the truth and finding the father to be covert.

36 The first handover in England was planned for 8 March 2019, which the mother describes as being very distressing, with A being upset as being separated from MA and going to their father. Despite this he did have A two nights at that time.

37 In summary, until this time (March 2019) the parents had been able to agree reasonable contact arrangements in March 2018 and these were implemented until June 2018. The arrangements broke down and contact was restarted in Scotland in November 2018 and again in February 2019 as a bridge to contact in England thereafter.

38 At this point I ceased being the case management judge as I left this court. It is clear from the events in the summer and winter of 2018 that MA repeatedly breached orders which she did not think were right for A, although she had previously agreed them. Her reasons were the impact of travel and A's distress at separation from herself. While the breach of orders was unacceptable, the practical and emotional problems which arose were real.

39 District Judge Lobb presided over a hearing on 3 May 2019 when MA had been concerned that A was too distressed to cope with handovers. MA could not take part in that hearing (remote hearings were not an established part of the court system at that time). She was ordered to bring A to England for handover here on 13th May. It appears that this did not happen. MA offered contact in Scotland but no contact took place.

40 MA's husband suffered a serious road traffic accident on 5 August 2019 such that his mobility was severely restricted and the immediate maternal family no longer had access to a vehicle

41 The case was not restored to court until the planned hearing before Deputy District Judge Glenday on 5 September 2019 when she ordered that a handover take place in England with the Guardian to observe this. This also did not take place. DDJ Glenday had ordered a psychological assessment by Darren Spooner and expert legal advice on jurisdiction from Alan Inglis on 5 September.

42 MA gave birth to A's half-sibling, "B", in October 2019 and she had ongoing caring responsibilities for her husband.

43 By the autumn of 2019 no contact was taking place or had taken place since March. MA had new caring responsibilities and considered A was unable to be handed over to their father because of A's distress.

44 In November I returned as the case management judge. On 28 November 2019 I made an order for contact by video calls and for contact in England in December 2019 which did take place and was described to be positive by both parents. The Guardian observed part of this contact. A saw the father at this time on two separate days.

45 There was a further contact in England on 18 January 2020 during one day (although two had been ordered). The November order also required A to be available for contact with their father overnight in Scotland in February 2020. FA reports that he and his mother travelled to Scotland and stayed overnight but that MA refused to hand A over. She questions whether he did travel and replies that she would not hand A over without proof of where he intended to stay with A.

46 The final hearing which I had listed on 4 March 2020 resulted in an agreement after the parents spoke at length with the Guardian. Video calls would continue twice a week. Face-to-face contact would resume at weekends and then increase to a couple of week-long periods, leading to a two-week period in August and September 2020. Handover would be in England. As these arrangements were untested it was agreed that would be an adjourned hearing in September 2020, if necessary.

47 The outbreak of the coronavirus meant that it was impossible to comply with the travel arrangements to meet for handover. The case was restored to court in May and it was agreed that the order of 4 March would be implemented as soon as possible, once the pandemic allowed.

48 The case then took a different turn in July 2020, before the March order could be implemented, with the mother having contacted a woman who was a partner of the father 2017-19, “FP”.

49 The women had shared messages on social media which were critical about the father’s conduct towards them. MA was concerned that FA was demonstrating a pattern of behaviour towards women which could put A at risk. Although FA denied these allegations, the court ordered investigation of these matters.

50 There were several case management hearings in July, October and November to review the evidence which had been filed and the Scott schedule of allegations. Video calls had been ordered in July 2020 to maintain the relationship with A but they had broken down in September 2020. MA considered that FA was not showing proper commitment to the calls and the quality of these calls was usually poor in her view.

51 Without informing FA, the Guardian or the court, the immediate maternal family travelled with A on a trip outside of Europe in September 2020. MA said that she intended to return in October but the booked return flight was cancelled due to the pandemic. She was able to take part in court hearings by telephone during this period and she was directed to file evidence in relation to her attempts to obtain a return flight, although she largely failed to do this. She eventually returned to the UK with A in February 2021, with the father having started to make an application under the Hague Convention on Child Abduction.

52 The final hearing had been listed in January 2021 but had to be delayed to February because M had not returned to the UK.

53 At the hearing on 11 and 12 February the Guardian applied for an adjournment for psychological advice on the issue of transfer of residence to FA and the court heard evidence on the issue of interim contact.

54 A separate judgement was made on that day under which there would be further re-introductory contact between A and their father in England, including unsupervised time when they were settled. This was to be reviewed in May 2021. In May 2021 the hearing was varied to a date in July as it clashed with planned contact. Contact took place successfully on two successive days in England. The Guardian restored the case on 1 June as the second period of contact in May failed to take place. MA had declined to attend on a subsequent weekend because of the cost and impact of travel, again in breach of the order. On 1 June the August final hearing was set up and it was ordered that in the interim there should be additional unsupervised time in England in June and then Scotland in July.

55 That contact also did not go entirely to plan. MA brought A to England in June (but to a different location than that ordered) so that A saw their father on consecutive days. MA supported this contact by being with A at the beginning and the parents worked to enable A to be alone with their father for several hours, including meeting the father's partner, now wife ("FW"), and her child , "C", step-sibling of A, and their own baby "D", half-sibling of A.

56 The ordered contact in Scotland in July did not take place. The father suggested some dates for him to travel to Scotland with his family but MA indicated that those dates were not convenient as she had other plans. Again, this was in breach of the prevailing order.

57 During the hearing on 1 June the mother's failure to cooperate with an order for surrender of passports (made in February) was also raised when MA was present. The importance of complying with the order was made clear to her again and on 1 June she was ordered to surrender those passports on a second occasion. It appeared that she understood this and would do so.

58 MA failed surrender passports again and the Guardian restored the case on 22nd July when the court made an order for registration of orders in Scotland and a port alert order. The mother failed to attend that hearing and failed to attend the final hearing. She has failed to communicate with the Guardian or A's solicitor since the hearing on 1 June.

59 In summary, since the comprehensive agreement reached in March 2020, there have been several unplanned and unforeseeable events which have hindered contact. First there has been a coronavirus. Secondly, MA unlawfully took A on a trip outside of Europe for over 4 months. Thirdly, F and FW have their baby who was born in spring, it being agreed that the re-introduction of contact would be delayed until D was born. Fourthly, MA has ceased cooperating with the Guardian and the court since early June. Fifthly, MA has continued to disobey in part orders for contact (and also now for surrender of passports).

What is the relevance of the allegations of domestic abuse?

60 MA has consistently made the court aware that she has been unhappy about aspects of FA's behaviour towards her and A. Early in the proceedings the parties filed printouts of media messages between them during their breakup. These included deeply critical messages and some verbally abusive messages, with both parents expressing themselves in regrettable ways.

61 MA's criticisms relating to A have been for FA's perceived lack of commitment, lack of child maintenance, lack of interest and lack of communication. She has not suggested that he has behaved in an abusive way towards A, although she has a more general concern that he can be temperamental and disrespectful. She is concerned that these characteristics may be demonstrated in front of A or towards A.

62 These concerns have led MA to request or require that contact with A is supervised and she has been reluctant to allow F to have overnight time or time in his own home with A.

63 The focus of the court has been on establishing a pattern of contact so that A's relationship with their father can grow. Throughout the proceedings on a number of occasions this has been instigated by periods of supervised contact leading to short periods of unsupervised time. This has been backed up by regular and frequent video calls. The purpose has been to re-establish the relationship

between father and child, allowing A to become familiar with and confident in their father and to assess their safety and welfare in his care. Particularly at first, FA has been accompanied by his mother, paternal grandmother, to support the contact and to give reassurance to MA. As A has got older and the relationship with A has developed, FA has had time alone. A's safety and F's ability to look after A has not been open to significant criticism by MA, particularly this year.

64 I identified in the hearing in February 2021, that from my point of view, the main purpose of supervision has been to enable A to settle in with their father before being left alone with him. To her credit MA has assisted in this process which otherwise would have been more difficult for A. From her point of view, and for the purpose of assessment, supervision has provided evidence of FA's capabilities.

65 Although they have been matters of concern for MA, the allegations of abusive behaviour towards MA were not argued by her as reasons to oppose the contact which has been ordered to date. In fact, neither MA nor Cafcass put forward these allegations as reasons to oppose unsupervised contact which has been ordered, such as in March 2020.

66 Matters took a different turn in the summer of 2020 when MA decided to contact FA's previous partner from 2017-2019, FP. FP had been with FA at times when A was in his care. In messages exhibited by MA, FP was disparaging about some of FA's behaviour towards herself, although she stated that she had no concerns about FA's care of A.

67 MA drew parallels with FA's conduct towards herself when they were in a relationship. The pattern of behaviour, as she saw it, posed a risk to A if they spent time at the father's home.

68 The allegations of FP and the links drawn by MA were investigated within these proceedings in 2020.

69 In accordance with Practice Direction 12J a Scott Schedule was drawn up and A's solicitor attempted to communicate with FP with a view to obtaining a witness statement. Although FP initially indicated she would cooperate, she later changed her mind so that nothing has been provided other than the messages to MA. FA denied the allegations within those messages and in the absence of any direct evidence from FP it was difficult to take these allegations any further.

70 The court decided not to proceed to a separate fact-finding hearing for the reasons set out in a recital to the order of November 2020. Those recitals were:

"Notwithstanding the allegations of domestic abuse, the court has decided that a fact-finding hearing is not
needed for the following reasons:
a. The allegations made by the Mother were known to the court and professionals throughout the
proceedings; the new allegations made by FP cannot be formally challenged given FP's
unwillingness to participate in the proceedings.
b. Despite the allegations made by the Mother, the court and the Guardian have deemed it appropriate for
direct contact to take place between A and the Father.
c. Despite her allegations, the Mother has previously agreed for direct contact to take place between A
and the Father, including after a long discussion with the Guardian on 4 March 2020.
d. The psychological report of Dr Spooner acknowledged the Mother's allegations and concluded that:
'these two allegations do not appear to form the basis on which MA's difficulties promoting the
relationship between A and their father are based. She has not used them as justification to bar contact
in the past' and also 'I argue that she [the mother] is partly justified in being concerned, but I do not think
that there is evidence of significant enough or unmanageable risk from FA to deny A's right to a
proper relationship with him'

e. The Father and the Guardian have expressed concerns about whether, regardless of any findings made
by the court in respect of the Mother's allegations, the Mother would comply with any order made by the
court."

71 The court listed a composite final hearing during which domestic abuse allegations would be considered in so far as it was necessary as part of the court's welfare evaluation.

72 At the hearing in February 2021 for the reasons explained in the judgment I was able to go ahead to make a further interim order for contact, including unsupervised time, pending further assessment.

73 At this final hearing the court has to take into account the allegations of domestic abuse although its ability to do so has been hampered by the absence of evidence from MA.

74 The Scott Schedule describes a number of concerning incidents and allegations. These are as follows.

75 First, in 2007 FA received a caution for common assault and penalty notice for disorderly behaviour. The father was about 18.

76 Secondly, a year later he assaulted his girlfriend, punching her face, pushing her to the floor, kicking and punching her including kicking her in the head. He was convicted of battery.

77 Thirdly, between 2013 and 2017 while in a relationship with MA he was verbally abusive to her, calling her abusive names. She alleges he behaved in a controlling way toward her, isolating her and making threats such as to throw her out of their home.

78 In 2015, when 26, in temper, he punched a door next to her and shoved her into the door frame. In that year or the next year during a disagreement he was aggressive towards her pointing his finger in her face causing her to fall back.

79 Lastly in 2017, when she was pregnant, he grabbed and twisted her skin on her arm causing her pain.

80 It is then alleged that between 2017 and 2019 while in a relationship with FP he was verbally aggressive regularly and physically abusive including once pushing her against a wall in an argument. He was controlling toward her by throwing her belongings in the street after an argument.

81 The overall picture, compounded by the allegations from FP, are very concerning. They led to suspension of direct contact and an investigation last year. There is a pattern suggested of temperamental behaviour including emotional abuse and physical violence. Plainly the conviction from 2007, when he was 18, was very serious indeed. The overall picture is also suggestive of ongoing turbulence in his relationships with women between 2013 and 2019.

82 Within the final hearing, the absence of MA made it difficult for these matters to be pursued. I have provided my assessment of the evidence and my evaluation of its relevance below.

The Evidence

83 On 5 August, I heard from FA and the Guardian. FA confirmed that, although face-to-face contact was refused in July, he has continued to have video calls with A. He described that on 25th July A was happy to see him - it was a “normal call”. Usually the calls last 10 to 15 minutes, although A is often directed to hang up the phone, being told to “press the button”. He described that since face-to-face contact had restarted A appeared to be a lot happier to see him on video, it was “excellent” and A was engaging more. It is taking place twice a week.

84 As for the failed contact in July, he said that he had messaged MA to indicate that he had identified a place to stay in Scotland in the last week of July so that he could see A. He told her this on 10th July and she replied the following day, after being chased, saying that she had plans between 23rd and 26 July. It was queried whether he had given sufficient notice of the trip and he replied that he had told MA when she left England in June that he would look towards a visit at the end of July.

85 He described the failed visit to Scotland in February 2020. His evidence was that he and his mother did attend for contact. MA had wanted the booking confirmation sending, which could not be done, but he gave her the address and postcode of where they were staying so that she could check things out. He said that she declined to do so.

86 He was asked about the apology he had sent to MA after the February hearing and said that he had no reply. He had briefly apologised for the unfair way their relationship ended and that he could have conducted himself better. He described that he had "taken a look at himself" before he sent that message.

87 FA talked about his baby and how it seems that MA is reluctant to let A see that they are D's half-sibling . He said that he thinks "dad" is seen by A as his name "rather than what I am to [A]". When showing his baby to A on a video call, he said that MA had described D as "the baby".

88 The face-to-face meeting in England in June had been "excellent" with C and FW. A was a little shy to begin with but he said that "C is a lovely [child]" and C had brought toys for them to play together. It did not take long for A to come out of their shell and for a couple of hours they played tig in the park. It had been "a lovely afternoon".

89 He said that the contact in the contact centre in May had been a "massive success".

90 The contact in June was in a different location than that ordered – this was MA's choice as "she said she felt more comfortable there". He was asked about A being distressed at being left by their mother. He described that MA held A tight when they were upset and, although she did try to encourage A to go with their father, he described as a "flimsy attempt" and that she was more concerned to grip onto A to console them. Later on, when they met again, after A had had some time with their mother, they played together in the park and it worked really well. He had asked the Guardian for advice that afternoon The Guardian's advice had been very helpful.

91 If A came to live with him he would apply to enrol them in school. FA described the living arrangements in the home, and the bedroom A would have.

92 He was positive about promoting contact with MA saying that he would agree video calls three times a week. He did not think a weekend in Scotland would be practicable but he would be willing to meet halfway and would take A to Scotland to see their mother on occasions in holidays. He would be happy to share the school holidays equally. He agreed that the handover for change of residence should not be drawn out. He would be happy for MA to see A in England and said that he would "love" them to spend time together even outside of usual planned times.

93 I asked him about his personal development during these proceedings. He agreed that he has "grown" as a person, now having two children under his roof, a "completely different life". He intends to start university in September, and he may continue to work weekends although he is looking for a different job from his current one. He believes that they would cope financially. He said: "I'm completely settled now". I asked him how things have been turned round with A and he said that keeping up the video calls and some face-to-face contact has enabled this to happen.

94 He does not have concerns about MA's parenting of A except with regard to how she sees his baby and his role.

95 He thought that A would cope with settling in after a change of residence - he said that “I feel [A] wouldn’t take long”. A “got on like a house on fire” with C. He would be willing to access any services that were available. He would like A to be able to bring some of their possessions with them to make this easier.

96 He understood that it may be better for A not to be moved to live with him but he said he has no confidence in MA promoting contact. I asked him why he had not applied to enforce orders in Scotland and he said that that had been the advice he received until recently. He said that he did not think that to fine MA was likely in her financial situation and he would not want to see her go to prison.

97 Overall, FA was impressive in the warmth he showed about A and his lack of bitterness towards MA. I was concerned that he may be underestimating the effect on A of being uprooted as well as the potential longer term effects.

98 The Guardian also gave evidence. He said the transfer of residence is “a hard decision and a very difficult recommendation to make” but that he agreed with the psychologist’s advice that short-term impact was outweighed by the long-term benefits of having meaningful relationships. He had no confidence that MA would engage with the court proceedings and he thought that, if A remained with her, she would not adhere to orders, so that there will be no future relationship between father and A. He felt that MA did not take the proceedings seriously.

99 As to the short-term impact for A, he commended the use of photographs in a storyboard to familiarise FA’s family and home to A. He thought that FA should be the person to collect A and that he should seek the help of the local authority to support them. As Guardian in England all he could do was make referrals to the relevant authorities in Scotland, although the local authority in A’s locality did not see her circumstances as being a safeguarding matter.

100 He would recommend a 14-day period of no contact between A and the mother to facilitate them investing in a placement with their father, followed by frequent letters and cards. Regular and frequent video or telephone calls after 90 days. In future there could be such calls three times a week. Face-to-face contact

alternate weekends if possible. It would depend on how contact went for A, and how MA dealt with the contact before it would be clear how long contact would need to be supervised. He did not recommend a family assistance order to CAFCASS as he considered that the local authority should be able to assist with any further help for the family.

101 The Guardian was referred to the fact that he had not seen A and he agreed that he would have liked to have a couple of sessions with them to explore their feelings about their father and FA's family and the potential future with him. He had been unable to arrange this with MA due to her repeated lack of response.

102 The Guardian felt it would have been intrusive for him to talk to C about their experience of living with FA and he had not spoken independently to FW. He observed FA and FW with D on a home visit and he found FW to be an independent and strong-minded woman. He had not spoken to her on her own.

103 It was put to him that there was no help in place for the family, no support immediately lined up. He said that, in his experience, a family practitioner or a children centre worker could go out "pretty swiftly" to help with the transition for A, within days of being asked and that he would press for this, explaining the urgency.

104 He accepted that he had not previously had experience of transfer of residence for a child where there is a contact problem like A's and that he had been guided his recommendation by Dr Spooner.

105 In summary, he said that, considering the length of the court proceedings, there had been a lack of consistent compliance; the proceedings had had gone on long enough for her to show her commitment to contact but she had not done this, and he had no confidence that she would in the future. He himself had very little contact with MA and there was no evidence of a change in attitude from her.

106 I was concerned that I should have more evidence from the Guardian on the issue of A's wishes and feelings and also his assessment of what FW could offer

and an evaluation of her experiences with FA. The Guardian agreed to make further inquiries after 5 August before the hearing on 13 August, see below.

107 MA failed to attend the hearing but I have heard sworn evidence from her previously both in February 2021 and also January 2018. She has also made oral representations to me on many occasions, always expressing her views clearly and politely, with strength of mind. My judgment in February 2021 included observations about her evidence at that time and I will not repeat myself here.

108 One of the tasks I required after the February hearing was for the parties to communicate to agree a chronology of the contact which has taken place to date. That task was carried out and MA's views are well set out in that document. She has not filed written evidence for this hearing but it is helpful to look at some of her contributions to that document for a reflection of her position. Her notes show the positives and the negatives of the decisions she has made.

Excerpts from the Contact Chronology (emphasis added throughout)

"Dec 2019: I noticed immediately that FA's demeanour was completely different to how it had been during every previous handover. He knelt down to meet A at their level, with smiles and questions about their stuffed animal comfort since being a baby. He portrayed happiness, interest and genuinity**. Truly wonderful and disappointing in equal measures that he could act like this for a CAFCASS officer but not for A and their Mother**. As you'd imagine, the handover went really well and I was told that the visit itself did too, with the Guardian staying approx 45 minutes. FA sent me some pictures and updates of what A had been doing and **I honestly felt that we might be heading in the direction we should have started down two years ago**. A completely different experience than we'd seen previously. We went on to repeat a similar handover and drop off the following day. FA sent me updates and upon A's return, he explained what they had been up to during their time together. A also came back with a book that 'Santa' had given them. A was exhausted and fell asleep during the day. The following day, we made the journey back home."

This extract shows the child-centred approach of MA, concerned for the welfare of her child and pleased that A had a good experience with FA. The parents did not clash and they worked well together. There were no reservations expressed about FA's character except for the 'dig' about his previous shortcomings.

Then 18/1/20:

> "Myself and family travelled from Scotland to England to attend a party and for A to spend time with their Father. FA spent time with A on the day of the 18th January. A was reluctant to go at first but was intrigued by promises of a fun day out and found comfort in their bottle and stuffed animal. FA told me via Facebook message that he and his Mother were excited to give A a balance bike (presumably a Christmas gift) but unfortunately nothing more was said about it and A never came back to me with anything. I believe I had one written update about A that day, that they had eaten ice cream with sprinkles on it. A came back to me a little under the weather but excited about the party [we were going to]. Unfortunately A wasn't really themself and chose to sit on the sidelines of the party rather than join in their favourite thing- dancing! We left the party early and A had a good night's sleep. Sadly, A woke up seemingly poorly and wouldn't agree to simple tasks like getting dressed ready for another visit with Dad. I tried to encourage A but not seeing much success, I informed Dad that A wasn't feeling well and was unmotivated. **After eventually dressing A and encouraging them to go outside and see FA, A agreed but soon changed their mind once we were outside and I only felt it was fair to take them back inside and let them rest. A snoozed and cuddled all day before having a short nap at 3pm. I informed FA that A wouldn't be available for a visit this time. He was unhappy but understanding. (e**mphasis added)

This extract shows the child-centred approach again and that the parents communicated well to a degree. However, MA appears to have made a unilateral decision not to allow contact and not to comply with the court order. A was tired and "unmotivated" - given the distances involved it would have been better for FA to be able to take responsibility for A unless he agreed that it would be better for them to stay with their mother.

Then February 2020 in Scotland:

> "Shortly after returning to Scotland after our January visit to England, I began asking FA via Facebook message what his plans for visiting A in Scotland were. Referring to dates, times and day out plans. I asked him several times over two weeks but he was very vague in his answers, never really giving one. Eventually he informed me the night before his visit, that he planned to collect A at around 7pm on the evening of the 22nd February 2019. I responded by explaining that I thought 7pm was too late given that A's bedtime is 7pm. **I also informed him that due to his deception back in February 2018 about where he had stayed with A, I would only hand them over if I had confirmation of where he was staying**. He initially ignored my requests and messaged me on the morning of his planned visit, telling me he was about to leave his accommodation to collect A. I reminded him that I wasn't happy to hand A over without confirmation of where he was staying. After some time, FA sent me an address by Facebook message. Understandably, that wasn't enough to put my mind at ease so again, I asked for actual confirmation, in the form of a booking email for example. FA explained that his Mother (who had apparently travelled with him) had made the booking but did not have a smartphone to enable her to retrieve her booking email. FA suggested I could personally drop A off and in turn, see the accommodation with my own eyes. This wasn't an option as myself and "MH" [mother's husband] had no car or car seats (both were scrapped after MH's car accident). Public transport was our only option but again, was less than ideal for me to travel with two young children, one exclusively breastfeeding. FA and I messaged back and forth over a few hours, insisting that he simply show proof of where he was staying and him insisting that information 'was not court ordered' to be shared with me. **I refused to allow A to stay with their Father on the basis of not knowing where they would be**."

This refusal of contact occurred despite FA having travelled to Scotland. I commented in the February judgment that this decision was "cruel". MA could have made her requirement of proof of accommodation well known in court at previous hearings or even to FA in good time before the visit. It was simply not open to her to deny contact on this occasion – she disobeyed the order to meet her own needs ahead of the feelings of anyone else and ahead of the need of A to see their father. She went on to say:

> "I find it incredible that FA, and his Mother, collectively decided against spending time with A, after presumably spending hundreds of pounds and hours of their time travelling to see them, and for what reason? I can only presume to hold some sort of control over the situation. Since that date, FA has provided to the court, booking evidence of the accommodation that was apparently booked for those visitation dates. The exact paperwork I had asked for at the time but had not been provided. It makes no sense in my mind that he would rather not see A, than answer their Mother's simple requests. Despite the booking email, I still have reasons to believe that FA never actually made that journey. It's simply easy to receive a booking email/reference of accommodation but then promptly cancel it. FA had also posted photos on his social media account of him in England at midday on the day of his alleged travel back to his home. I don't believe the timing of travel would line up to enable this."

It is ironic that MA describes the father as 'trying to control the situation', which is exactly what she did without any lawful excuse.

After court hearing on 4/3/20 - when contact was agreed including overnight contact her description is: -

> "Myself, MH, A and B, yet again, made the journey from Scotland where we live, to England, to ensure FA maintains a relationship with the **child he cannot be bothered to visit. Our family travelled on public transport to enable FA's convenience**. FA collected A on the morning of 4th March, at the accommodation we had booked. A seemed untroubled and relatively excited about a promised trip to the shop to buy a film to watch at paternal Grandmother's home. FA seemed happy towards A but nervous and defensive towards MH, when MH took the opportunity to mention how happy he was to see A happy and willing to go and spend time with their Father. I provided A with everything they would need to spend the night including nappies, pyjamas, bottle and milk, stuffed animal, toothbrush and toothpaste. A returned to us with a toy they had picked up at the shop. **Allowing A to spend an unsupervised night with their Father was a challenging**

decision for me to make after some of the distressing and truly unpleasant and upsetting earlier handovers and overnight stays but my goal has always been to ensure A's well-being, happiness and enjoyment of these visitations, disallowing them if their needs aren't met, not simply disagreeing that they go ahead for no reason. We believed A had enjoyed their time with FA, although they were understandably happy to return to their parents and half-sibling, B.
There was a second attempted handover during one of those days. My parents offered to drop A with FA at paternal grandmother's home in but unfortunately when it was mentioned to A that they would be going there, they became quiet and upset. My parents (told me they) did what they could to encourage A to want to spend time with their Father but there was no convincing them and they became increasingly upset.
My Mother carried A to FA's front door where he greeted them in an unlit hallway. A cried and repeated to my Mum that they didn't want to stay, pleading 'Please don't leave me Grandma'. My Mother informed me that FA did little to encourage and reassure A and shortly after the attempted handover, after A had returned to the car with my Dad. FA explained to my Mum that "kids are dickheads" to which he insists my Mum (a mother of five and Grandmother to five) agreed with him, something my Mother obviously denies."

Despite the apparent watershed agreement of 4 March, this note shows the true feelings of MA towards FA. Contrary to her note, he had just been to Scotland to visit A and the contact is set up *for A* not for his "convenience". It also shows her continued willingness to breach an order if she 'believes A's needs are not being met'. The right lawful approach in that situation is for parents to try to resolve their differences by discussion and, failing that, for her to apply to court (as has been made clear to MA on many occasions).

After Covid prevented contact in Spring 2020 – MA commented:

"I contacted an ex-partner of FA's, FP, simply asking if FA had exhibited any concerning behaviours during her relationship with him. Sadly, she confirmed

my suspicions and explained that she too, had been emotionally abused by FA throughout their relationship. Please see my previous statements and Facebook messages between myself and FP. With this new information that confirmed my serious concerns that FA's abusive behaviours neither started or stopped with me (a criminal record for battery against an ex partner, five years before I began a relationship with him and FP's recollection of events after mine and FA's relationship ended).
Regardless of a global pandemic, **these new findings of consistent abusive and controlling behaviours exhibited by FA was enough reason for me to disallow my vulnerable and innocent child to spend unsupervised time with him. I still stand by my opinion that my child, A, is not safe in the sole, unsupervised care of their Father, FA and I will not allow unsupervised visitations between them until I am wholly satisfied that they are and will be safe and happy for the duration of their time with FA. If that means disobeying court orders, then so be it. I will not be pressured into jeopardising the safety of my child for any reason.**

FA has not seen A since March 2020, almost a full year. To my knowledge, FA has not travelled to Scotland where A lives, since February 2019. Since proceedings began in early 2018 (and before) FA's video calls with A have remained sporadic and inconsistent. FA has never once sent birthday or Christmas cards to A, despite having their home address. I've come to realise that the eyes of the law are somewhat rolled when I mention the lack of child maintenance but I believe it to be an incredibly important part of the picture painted of FA, who hasn't bothered to pay any money lawfully owed to A, since December 2019. **The lack of finances from FA leaves myself and MH A's only financial support and providers yet we are the ones left thousands of pounds out of pocket because we are over and over again, ordered and forced to travel across the country and book expensive accommodation to benefit FA's lack of interest and unwillingness to travel to see and create/maintain a relationship with his child.** (emphasis added) I have tried to recall these visitations to the best of my ability and believe that the facts stated in this witness statement are true."

It is not clear why MA sought to undermine the agreements reached on 4 March 2020. However, the words in bold state in uncompromising terms that MA continues to believe that A is not safe with their father and that she will disobey court orders if she considers them unsafe. Despite these words she did allow unsupervised time in 2021 when she visited England with A in June. Despite this she appears to be unable to accept unsupervised time again, given her lack of participation in these proceedings since June. Her approach seems to be one of defiance and self-righteousness.

Darren Spooner

109 The expert evidence in the case was provided by Darren Spooner, an expert funded by the public funding certificate of the child. He produced two reports in the case, having interviewed the parents on both occasions. No party sought to cross-examine or otherwise question his reports so that he was not called as a witness in the hearing. His report stands as an uncontested document. It is worth quoting from his report at some length given the seriousness of the recommendations made. The quotations are from his second report which built upon and was consistent with his first. Emphasis is added by me.

E54: “Since I was last involved in this case it has evolved in such a way that A has been placed in an increasingly precarious position, in my opinion. The Guardian is right to be concerned about this and **I fear that unless there is a dramatic and rapid sea change in A’s family landscape and lived experiences they will ultimately suffer significant emotional harm**. If nothing changes I think the most likely outcome is that A will ultimately reject their father in the future and the whole paternal side of the family because (a) they will be unable to tolerate the stress associated with the parental conflict and contest about them (which they will understand more and more as they grow up), (b) conflicted loyalty, (c) the failure of their parents to work together to promote their relationship with their father and (d) the psychological crossings between parents will

cause them distress because they will learn over time how their parents feel about one another.

E55 ….."**I concluded in my report of 31 January 2020 that while some of MA's concerns about FA were justified, they were not of sufficient scope or gravity to prevent A having a normal relationship with their father and neither were these seen as justification on her part to withhold contact previously**. Further, in the Guardian's analysis (28/2/20; D39:7), the week before the aborted final hearing, MA told her that she did not see any current risk factors from FA. She couldn't recall saying this to the Guardian when I asked her about it. The final hearing was to go ahead in March 2020 with her knowing that neither **I nor the Guardian had any significant concerns about FA presenting a risk to A and that there was no reason A should not have a relationship with their father**. His Honour Judge Whybrow made an order for significant contact at that hearing on 4 March 2020. No direct contact has taken place since March 2020

….This means that the option of a transfer of residence to father has to be on the Judicial table for consideration, because **A's welfare demands that they have to be protected from harm by being placed with the parent who is the most capable of meeting their welfare needs**. This case to me appears to be one of Judicial/professional over-patience, because Court orders are not discretionary and so far MA has chosen to pay scant attention to what has been ordered of her. The longer this continues the greater the risk to this child. **If MA is unable or unwilling to sort this out immediately and permanently then removal of A from her care will continue to ascend in priority up the list of welfare options that are available in my opinion.** My experience is that a transfer of residence to a non-resident parent has been ordered by many Courts in cases such as this, and this has occurred with at least 40 children in cases that I have been professionally involved with."

Para 11: "I think **both parents are presenting a risk of emotional harm to A by creating a family landscape that is toxic and dysfunctional. More specifically, their relationship with one another is so pathological that they are unable to co-parent. As A's awareness, perception and insight improves alongside their psychosocial development they will become increasingly aware of these pathological dynamics in their parents' relationship and they will therefore come to learn exactly how their parents feel about one another. This will affect A and (a) it will make**

psychological crossings between their parents increasingly fraught and (b) increase the likelihood that they will experience significant emotional discomfiture as a result of conflicted loyalty."

22 "I have been involved in cases where 40+ children have had their residence changed to a non-resident or alienated parent and not on a single occasion have I heard that the child did not tolerate the change in the longer term and indeed thrive. This includes 6 children (3 separate families) who could not be moved straight to the other parent and went into Local Authority bridging placements before being moved. My colleagues have experienced similar outcomes, locally and internationally. This is with children of all ages, including A's age."

25 "It makes sense to assume that the children might experience significant distress and emotional harm from a change of residence in cases such as this. However, the science and my own experience does not support that assumption in the longer term. My experience is that, actually, children who have their residence changed from an alienating parent to an alienated parent (a) are resigned to making the most of it and (b) tolerate it and thrive. In fact, most appear relieved to be separated from the harmful influence of the alienating parent."

27 "In terms of which option will cause A more harm, well **I suspect they will experience considerable distress in the short term if their residence is changed to their father. In the long term I think A will be at risk of significant emotional harm and rejecting their father if they remain in the care of their mother and continues to have their relationship with their father undermined.**"

29 "**If MA can sort this out then she needs to adhere rigidly to any order that is made and to the spirit of that order and, like the Guardian, my clear opinion is that (a) supervision of contact is not required and (b) contact needs to include significant staying contact in the near future. If MA can enable this to happen and maintain it for the rest of A's minority then I would lean on the side of A remaining in her care."**

35 “If a protective separation is required then resumption of direct contact between A and their mother (and maternal family) will be dependent on MA being able to demonstrate (a) that she will not undermine A’s residence with their father and (b) convincingly demonstrate a good insight into the inappropriateness of their past parenting and the consequences of this for A.

36. If protective separation is required and/or there are ongoing professional/Judicial concerns that MA continues to present a risk to A by attempting to interfere with their relationship with their father then **their contact will need to be supervised until she can convincingly desist from doing so**.”

This opinion remains unchallenged at the final hearing. The guardian agrees with Darren Spooner except that he recommends that the period of no contact between A and their mother should be much less than the 90 days recommended by the psychologist.

110 I accept the advice of the psychologist except that I agree with the Guardian that a shorter period of no contact is likely to be better for A if they move to their father (although this would need to be carefully monitored). I also now find that FA has developed his insight and his conduct so that he is likely to be more able to co-parent A than he was and is more able to promote contact with MA than might otherwise be thought.

The Law

111 In making my decision in this case I have considered a number of other reported decisions which have considered transfer of residence. These include:

V vs V [2004] EWHC 1215

Re A [2007] EWCA Civ 899

Re S [2010] EWHC 192 (Fam) [2010] EWCA Civ 325

Re D [2010] EWCA Civ 496

TB v DB [2013] EWHC 2275 (Fam) T

Re M [2012] EWHC 1948

112 Transfer of residence has been ordered in such cases. Although every case is fact specific, as a general point I note that transfer has been ordered where the child is suffering harm due to false allegations being maintained by the residential parent and that these

cases have generally involved children older than A. In some cases there had been total denial of contact, others where contact has been taking place.

113 More recent cases have set out clearly the appropriate legal principles. I will quote from two of those decisions.

In Re S (Parental Alienation: Cult) [2020] EWCA Civ 568, Peter Jackson LJ giving the court's judgment said as follows:

> "The law concerning parental alienation
>
> 7. At the outset, it must be acknowledged that, whether a family is united or divided, it is not uncommon for there to be difficulties in a parent-child relationship that cannot fairly be laid at the door of the other parent. Children have their own feelings and needs and where their parents are polarised they are bound to feel the effects. Situations of this kind, where the concerned parent is being no more than properly supportive, must obviously be distinguished from those where an emotionally abusive process is taking place. For that reason, the value of early fact-finding has repeatedly been emphasised.
>
> 8. As to alienation, we do not intend to add to the debate about labels. We agree with Sir Andrew McFarlane (see [2018] Fam Law 988) that where behaviour is abusive, protective action must be considered whether or not the behaviour arises from a syndrome or diagnosed condition. It is nevertheless necessary to identify in broad terms what we are speaking about. For working purposes, the CAFCASS definition of alienation is sufficient:
>
> "When a child's resistance/hostility towards one parent is not justified and is the result of psychological manipulation by the other parent."
>
> To that may be added that the manipulation of the child by the other parent need not be malicious or even deliberate. It is the process that matters, not the motive.
>
> 9. Where a child's relationship with one parent is not working for no apparent good reason, signs of alienation may be found on the part of the other parent. These may include portraying the other parent in an unduly negative light to the child, suggesting that the other parent does not love the child, providing unnecessary reassurance to the child about time with the other parent, contacting the child excessively when with

the other parent, and making unfounded allegations or insinuations, particularly of sexual abuse.

10. Where a process of alienation is found to exist, there is a spectrum of severity and the remedy will depend upon an assessment of all aspects of the child's welfare, and not merely those that concern the relationship that may be under threat. The court's first inclination will be to reason with parents and seek to persuade them to take the right course for their child's sake, and it will only make orders when it is better than not to do so. Once orders are required, the court's powers include those provided by sections 11A to 11O of the Children Act 1989, and extend to consideration of a more fundamental revision of the arrangements for the child. We agree that whilst a change in the child's main home is a highly significant alteration in that child's circumstances, such a change is not regarded as "a last resort": Re L (A Child) [2019] EWHC 867 (Fam) at [53] to [59] per Sir Andrew McFarlane P. The judge must consider all the circumstances and choose the best welfare solution.

11. Cases at the upper end of the spectrum of alienation place exceptional demands on the court. It will recognise that the more distant the relationship with the unfavoured parent becomes, the more limited its powers become. It must take a medium to long term view and not accord excessive weight to short-term problems: Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124 per Sir Thomas Bingham MR at 129. It must, in short, take action when and where it can do so to the child's advantage. As McFarlane LJ said in Re A (Intractable Contact Dispute: Human Rights Violations) [2013] EWCA Civ 1104; [2014] 1 FLR 1185 at 53:

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

12. Unhappily, reported decisions in this area tend to take the form of a post mortem examination of a lost parental relationship. Re A (above): 12 years of proceedings, 82 court orders, 7 judges, 10 CAFCASS officers, no contact. Re D (Intractable

Contact Dispute: Publicity) [2004] EWHC 727 (Fam); [2004] 1 FLR 1226 (Munby J): 5 years of proceedings, 43 hearings, 16 judges, no contact. Re A (Children) (Parental Alienation) [2019] EWFC B56 (HHJ Wildblood QC): 8 years of proceedings, 36 hearings, 10 professionals, no contact despite an attempted change of residence. In some cases (e.g. Re A) a formal finding of a breach of the state's procedural obligation under Article 8 was made. Another recent example is Pisica v Moldova (Application No 23641/17) 29 October 2019, where a mother was deprived of contact despite five years of proceedings during which she had obtained orders for the children to live with her. Finding a breach of Article 8, the ECtHR stated:

"63. The Court reiterates that although the primary object of Article 8 is to protect the individual against arbitrary action by public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life (see, amongst other authorities, Glaser v. the United Kingdom, *no. 32346/96, § 63)…*
…

66. In cases concerning a person's relationship with his or her child, there is a duty to exercise exceptional diligence, in view of the risk that the passage of time may result in a de facto determination of the matter (see, for example, Ignaccolo-Zenide*, cited above, § 102;* Süß v. Germany, *no. 40324/98, § 100, 10 November 2005;* Strömblad v. Sweden*, no. 3684/07, § 80, 5 April 2012; and Ribi?, cited above, § 92).*
…

73. It is against this background of increasing alienation of the two children from the applicant that from July 2013 she asked the court to decide the custody case in a swift manner. Despite this request and her many complaints about P.'s actions, the first-instance court took a year and a half to decide (see paragraphs 12 and 31 above). This added to the overall period during which the applicant did not have meaningful contacts with her two children, while P. continued to be able to alienate the children from her (see paragraphs 12, 13, 18, 21, 23, 24, 26, 33 and 34 above). This delay in deciding the case is contrary to the principle of exceptional diligence referred to in paragraph 66 above.
…

80. In the light of the above considerations, the Court finds that, in the present case, the domestic authorities did not act with the exceptional diligence required of them (see paragraphs 66 and 73) or discharge their positive obligations under Article 8 of

the Convention. There has therefore been a violation of Article 8 of the Convention in the present case."

13. In summary, in a situation of parental alienation the obligation on the court is to respond with exceptional diligence and take whatever effective measures are available. The situation calls for judicial resolve because the line of least resistance is likely to be less stressful for the child and for the court in the short term. But it does not represent a solution to the problem. Inaction will probably reinforce the position of the stronger party at the expense of the weaker party and the bar will be raised for the next attempt at intervention. Above all, the obligation on the court is to keep the child's medium to long term welfare at the forefront of its mind and wherever possible to uphold the child and parent's right to respect for family life before it is breached. In making its overall welfare decision the court must therefore be alert to early signs of alienation. What will amount to effective action will be a matter of judgement, but it is emphatically not necessary to wait for serious, worse still irreparable, harm to be done before appropriate action is taken. It is easier to conclude that decisive action was needed after it has become too late to take it. “

Re L (A CHILD) [2019] EWHC 867 (Fam), McFarlane P on appeal from HHJ Tolson QC said as follows:

“53 I have already set out the key passage in the judgment of Coleridge J in Re: A (Residence Order) [2009] EWCA Civ 1141. Similar wording was used by Thorpe LJ in his judgment in the same case at paragraph 18:
"The transfer of residence from the obdurate primary carer to the parent frustrated in pursuit of contact is a judicial weapon of last resort. There was hardly a need for a psychologist to establish the risks of moving these girls from mother to father, not only after her long years of care but also in the light of the negative picture that they had been given of a father who they had not effectively seen for 17 months. The risks of gamesmanship from the mother in the future, confirmed in residence but nailed down with a clear detailed contact order, were plainly less, and from that essential risk balance the judge was diverted. In a sense it could be said that the order she made was premature and in its draconian content too risky for these children."

54 Whilst having the greatest respect for the two judges who gave judgments in Re: A, I would wish to distance myself from the language used insofar as it refers to a

decision to change the residence of a child as being "a weapon" or "a tool". Whilst such language may be apt in discussion between one lawyer and another in the context of consideration of the forensic options available to a judge who is seeking to move a case on, such language, in my view, risks moving the focus of the decision-making away from the welfare of the child which must be the court's paramount consideration.

56 In Re: C (Residence) [2007] EWHC 2312 (Fam), Sumner J, a father applied for a change of residence on the basis that he believed that he was being side-lined by the mother and replaced by her new husband who was to be called "dad" by the seven year old child. Expert opinion stated that the case was finely balanced. The mother, however, proposed a joint residence order with an increase in contact. Sumner J refused the father's application, but ordered that case to come back under review to monitor, in particular, the mother's progress in undertaking therapy. At paragraph 183 of his judgment, Sumner J summarised his approach to the central issue:

"[183] C has spent all his 7 years under his mother's care, with whom he has a strong and beneficial bond. No court would alter that situation without clear evidence that he had suffered harm which would continue or was at serious risk of that. In April he was suffering harm because of the mother's attitude to his relationship with his father. Re-reading Dr B's first report shows how the tension and the attitudes were affecting C.

[184] It was not done to cause him harm. It was part of the mother's negative feelings towards the father being allowed a far too free a rein. It was to C's detriment. It is, sadly, a not uncommon result of a breakdown in a relationship. It is not often that it is so graphically pointed out as in this case. Courts are slow to change residence in such circumstances without giving the resident parent a chance to understand what has gone wrong and to remedy it, provided that such a course is compatible with a child's best interest. The changes in the mother's attitude justify such a course in C's best interests.

[185] I consider the mother has shown an understanding of what has gone wrong. She has apparently listened and responded. I am less clear about whether she has the will to sustain the implementation of the changes needed. There has been too little time, though progress has been made. It is therefore best if the court retains a close supervision of the progress."

Sumner J has correctly identified the approach to be taken.

57 More recently, in Re: M (Contact) [2012] EWHC 1948 (Fam), Peter Jackson J (as he then was) considered a case with some similarities to the present proceedings. The children involved were aged 8 and 10 and their primary home was with their mother, her partner and two younger half-siblings. There had been substantial difficulties in the children maintaining contact with the father and, the judge found that the mother was coaching the children into disliking their father. Whilst Peter Jackson J held that it was contrary to the children's welfare to be deprived of family relationships which were essential for their development, his findings fell short of holding that they were currently suffering emotional harm or were likely to do so in the future. Nevertheless he held that the father's application for a residence order should succeed, subject to offering the mother one final chance. He therefore made a conditional residence order in the father's favour, provided that a move to live with the father would not take place if the mother complied with two further ten day periods of staying contact.

58 Again, the authority of Re: M sits comfortably alongside the approach taken by HHJ Tolson in the present case. **It is to be noted that Jackson J actually made a residence order in favour of the father, notwithstanding a lack of finding of direct emotional harm to the children.** (emphasis added) In the present case, the finding of emotional harm made by HHJ Tolson is more than sufficient to justify the modest distinction in outcome between his decision and that of Peter Jackson J in Re: D (must be typo for Re M).

59 Having considered the authorities to which I have referred, and others, there is, in my view, a danger in placing too much emphasis on the phrase "last resort" used by Thorpe LJ and Coleridge J in Re: A. **It is well established that the court cannot put a gloss on to the paramountcy principle in CA 1989, s 1**.(emphasis added) I do not read the judgments in Re: A as purporting to do that. The test is, and must always be, based on a comprehensive analysis of the child's welfare and a determination of where the welfare balance points in terms of outcome. It is important to note that the welfare provisions in CA 1989, s 1 are precisely the same provisions as those applying in public law children cases where a local authority may seek the court's authorisation to remove a child from parental care either to place them with another relative or in alternative care arrangements. **Where, in private law proceedings, the choice, as here, is between care by one parent and care by another parent against whom there are no significant findings, one might**

anticipate that the threshold triggering a change of residence would, if anything, be lower than that justifying the permanent removal of a child from a family into foster care. Use of phrases such as "last resort" or "draconian" cannot and should not indicate a different or enhanced welfare test. What is required is for the judge to consider all the circumstances in the case that are relevant to the issue of welfare, consider those elements in the s 1(3) welfare check list which apply on the facts of the case and then, taking all those matters into account, determine which of the various options best meets the child's welfare needs. (emphasis added)

Welfare Checklist

114 The court must make the decision which is best for A and should not make an order unless it is better for them than not making it. The welfare checklist in section 1(3) of the Children Act must be applied. This lists six factors which will be of different relevance in different cases.

The Wishes and Feelings of the Child

115 One of the unusual features of this case is that the Guardian and solicitor have had little interaction with A. This is one of the gaps in the evidence which I identified on 5 August, the Guardian having been unable to communicate with MA for the preparation of his final report. He has been unable to have any communication with A to date.

116 As his position statement of 12 August makes clear, he was unable to speak to MA after the hearing on 5 August, despite numerous attempts. The previous Guardian had limited opportunity to see A. She observed handover of contact in late 2019 and observed some video contact.

117 I said in my judgment in February 2021 as follows: “the Children's Guardian would usually report on (wishes and feelings) but she has had limited ability to interact with A because of the history of the case as outlined. It is not in dispute that A has had good interaction with the father by video contact and, if asked, they would likely say that they would like to have continuation of their living situation with their mother and have contact with their

father. MA says at times A has been reluctant to go to contact and they have returned somewhat disturbed by it, taking a couple of days to settle back into their routine, with diarrhoea, and the overall the picture has been that they had been quite a stressed child when they have returned from contact with F.

It is often that a court may hear this, A is trying to settle into different arrangements. Advice from Dr Spooner about the pressure on A is such that it may well be, without making a particular finding, they struggle to make the journey or swap from mother's to father's care. A may be experiencing 'a virtual cliff'. Dr Spooner talks about an experiment which indicated that children pick up on non-verbal cues and whilst I can accept that MA has said nothing adverse about FA and tried to portray a positive, amicable relationship, that does not mean that A does not pick up on non-verbal cues such as atmosphere, facial expressions and approach, and A may have picked up on these causing them some difficulty. It may well be that they have a similar experience when they are with the father, there may be non-verbal or verbal cues picked up in respect of A. These are influences that both parents need to work hard to avoid."

118 I remain concerned that no social worker or Cafcass officer has spent time with A in recent times to be able to assess their wishes and feelings. The Guardian has not recommended that the proceedings be adjourned for further attempts at this given the non-compliance of A. However, this underlines the need for caution in implementing any order for A.

<u>The needs of A including her emotional, psychological and physical needs.</u>

119 I said in my judgment in February 2021 that A is thriving, their development is excellent and they appear to be very well cared for. A has a developing knowledge of their father and it is very important that this carries on without interruption and that they can develop a strong and profound relationship. A needs to be safe from emotional and physical harm. A must not be exposed to any domestic abuse. There is no room for this around A, wherever A stays. A's needs are considered further within the other factors below.

<u>The Effect of a Change of Circumstances</u>

120 If an order is made for contact between A and their father, and it is complied with, it is likely that contact will develop positively, building upon the contact which has taken place so far. Such contact is very important for A's knowledge of their identity, their self-esteem and their emotional development.

121 If only video or postal contact takes place, this will give A limited insight into their identity and background. A would know that their father loves them and is interested in them. While this is better than nothing, it falls far short of developing a strong relationship and attachment. It would make it extremely difficult to develop any sibling relationship. It would not meet their need to have a substantial relationship with both sides of their family.

122 If an order is made for A to move to live with their father, this is likely to cause them immediate distress and confusion. A's world would be turned upside down given that they have lived throughout their life with their mother as their primary carer. A has spent virtually every day of their life with their mother and now also with their stepfather and their half-sibling, B.

123 If they lived with their father, it is likely that their father would do his best to promote A's relationship with their maternal family. However, contact with their mother might be difficult depending on how their mother presented herself and what risks she posed. There may be risks, for example, in relation to MA taking A back into her care or out of the jurisdiction or in undermining the placement with their father. How the mother would react to transfer of residence and to what extent she would be able to put her child's feelings first, is not known. Initially the mother's contact would need to be supervised closely to ensure that it is safe and not undermining. It is not clear who would carry out supervision, without further assessment. Initially it may well be necessary for a professional to do this. It could not simply be done at a contact centre because such centres do not usually provide such supervision.

124 In the medium to long term it is likely that if A lived with their father this would provide the best opportunity to have a meaningful relationship with both sides of the family. How they would cope with missing their mother and their home in Scotland is not known. It may be profoundly difficult for them. The depth of A's distress cannot be known at this time. A is not thought to show any additional psychological or emotional disturbance. However, the effect of the move may be to cause these symptoms. The Guardian does not have sufficient knowledge of A to advise on this matter. The psychologist thought that he did not need to see A in this case to make his recommendations.

125 I am aware that for some children the sort of move contemplated in this case can cause long-term scarring, a sense of fear and loss which they cannot come to terms with. In some children the reaction is so strong that the change in residence has had to be reviewed and changed.

126 Against this, A is young, knows their father and is not thought to think bad of him. It is suggested by the psychologist and the Guardian that transfer of residence is a necessary step to take.

The Risk of Harm

127 There is an obvious risk of emotional harm if the move is implemented. Indeed, the move itself is likely to be traumatic

128 If no move is allowed it is likely that A will continue to suffer emotional harm through the impairment of a relationship with their paternal family. Although at times MA has talked in positive terms about the need for this relationship, and at times she has done well to promote this, she has also acted decisively in the opposite direction by refusing contact and disobeying orders on numerous occasions. Even since the hearing in February 2021 her compliance with the order for contact has been less than half of what was expected of her. She is not in court to explain her reasons for denying contact in Scotland in July. Based on the evidence of FA, it would appear that she had no good reason to refuse to accommodate contact on the dates which he proposed.

129 As for the risk of harm through domestically abusive behaviour it would be naïve to say that there is no risk of this based upon the past experiences described by MA and the messages of FP. In the absence of the participation of MA in this hearing it is not possible to gain a fuller understanding of the context of her allegations. In any event, even if she had sought to pursue the allegations at this hearing, I do not consider that it is necessary or relevant to make findings in relation to the allegations given the gap of time and the events which have taken place since then including the positive promotion of contact by MA at times. Any findings on these allegations are unlikely to affect the contact arrangements in any way.

130 Based upon the evidence within text messages referred above (in 2017) and the presentation of FA, whom I have been able to observe in many hearings since 2017, it seems to me to be more likely than not to be true that he is *capable* of being verbally intimidating and abusive. The previous conviction from 2008 showed a serious failure of self-control. He has misused recreational drugs which are likely to have a detrimental impact on his self-control and sense of responsibility (although a drug test in these proceedings was clear and there is no evidence of ongoing drug use during these proceedings). At times he has failed to interact warmly with A on video calls, although I accept that these calls will not always have been easy.

131 FA has expressed remorse for his conduct towards MA at times, although he does not admit most of the specific allegations she makes against him. In the absence of her

being here to be questioned about those allegations I am not prepared to find them to be true. From a legal point of view therefore they are treated as not having happened. He has expressed appropriate remorse for the previous battery conviction. He has expressed apology to MA as agreed at the hearing in February 2021 although it appears she has ignored his words.

132 There is no evidence of domestically abusive behaviour or drug use or criminality in his current relationship. He was open and convincing in this expression of how much he has changed during these proceedings. He is obviously a more mature and happy person than he was when the proceedings began. He appears to be rising to his responsibilities in his relationship with FW. I accept that these are relatively recent changes and that he is full of good intention. He talked about having made "massive" changes in himself. It is too early to say if these changes will endure but there are good reasons to be optimistic for this. There is no evidence of any immediate risk to A in his care within the current relationship

The Capacity of the Parents to meet A's needs

133 It is thought that MA has copious ability to meet the best interests of A except with regard to the promotion contact, where her conduct and her intentions have been mixed. She has overt reluctance to promote contact due to her own feelings against FA, mistrust of him and her dislike of him, fuelled by the opinions of FP. She appears to be stuck in her opinion about him. She has made it very clear that she will not "go against her maternal instincts" and this means that she has been impervious at times to advice from professionals and the orders of the court. This is an element of self-righteousness and stubbornness in her behaviour. Having said that, she is capable of appearing reasonable and flexible. She has made agreements at court which appear to be sensible but, away from court, she has withdrawn.

134 Many of her concerns about contact have a reasonable basis. A's distress at the handovers in Newcastle, which in part reflected their age at the time, are understandable. FA missing some contact and not engaging while on video contact and failing to provide for A financially cause her concern. Not all of the breaches of the court orders and agreements are caused by her, such as the disruption caused by the coronavirus and difficulty of settling A at times. The logistics of making the long-distance journey and the cost of it are real barriers, not all created by her although she was the one to move away and she must have a part to play in making face-to-face contact happen.

135 There is no evidence to find that MA is actively alienating A or that she is utterly opposed to contact. She has agreed to contact in the past and has promoted it and it appears that, despite the lengthy history of problems, A has a positive relationship with their father.

136 However, there are numerous instances where I have concerns about MA's behaviour, many examples where she appears to be unwilling to put her own feelings about FA on one side to make things easier for A.

Examples include:

(1) not attempting to build bridges - when encouraged by the court in February to make contact with FA's partner FW to discuss A and to get to know A's putative step-mother, it is described that MA used the opportunity to warn her of FA's behaviour and refer her to Claire's Law. As the psychologist commented, this is not in the spirit envisaged by the court and was "divisive and unhelpful".

(2) similarly, it is reported by FA that, although he apologised to MA as invited by the court in February, she did not meet him halfway (or even take a step). She had been urged by the court to apologise in return and to try to build bridges but it appears that she did not respond to him at all.

(3) there appear to be no good reason for her failing to engage with FA to arrange contact in Scotland in July.

(4) in May 2020 MA decided to contact FP having previously agreed to extensive contact arrangements. This led to FA being referred to the police and to a suspension of contact for several months. It is likely that contacting FP was motivated by an intention to scupper contact for A.

(5) MA has continued to make unilateral decisions without reference to anyone else including the court. This includes taking A on a trip to Europe in September 2020 and staying there longer than was necessary, without justifying and evidencing the need for them stay. This was bound to cause anxiety and fear for FA that A would not return.

(6) in February 2020 it appears that FA and his mother attended Scotland to have contact with A but she refused to produce A for contact without proof of where they were staying so that no visit took place.

(7) it appears that she continues to build up her husband MH as a father figure for A and she referred FA's baby as "the baby" rather than A's half-sibling.

(8) on FA's evidence video contact can be prematurely terminated frequently by MA.

(9) MA appears to be convinced that FA will hurt A where there is no evidence of him acting aggressively or abusively with a child.

(10) at the handover in England in June 2021 A was described as uncertain about whether to go with their mother; rather than encouraging A to go to FA, he reports that MA said that she could see A was worried that 'she was worried too' and that her attempts were "flimsy".

(11) when she took A on a trip outside of Europe in September 2020 she appeared to be carefree about the delayed return, did not demonstrate empathy for the position of FA and failed to provide the ordered evidence of her attempts to return earlier.

(12) she continues to fail to surrender her and A's passports, fuelling FA's (the Guardian and the court's) fears of potential abduction.

(13) she failed to engage with the Guardian or the court for this final hearing. Her conduct appears to be unclear in motive but gives the impression that she considers herself above and beyond the law and therefore unlikely to obey future orders for contact.

137 FA has lived stably and safely in a household with children since early 2020, now with both his baby and his stepchild, C. It is thought that those children are looked after to a good standard. He is loving and committed to contact with A. He does not evince hostility to MA. He is positive, saying that he would "love" to be able to arrange for A to have contact their mother.

138 In relation to domestic abuse it would appear to be clear that at times FA has behaved in a temperamental and aggressive way, a way which would be harmful for a child to witness, such as use of angry language. At times he has misused substances and has been unfaithful in relationships.

139 I have considered Practice Direction 12J, paragraphs 33 and 34, as to whether there is any need for expert assessment including a risk assessment, whether any treatment should be sought as a precondition to his time with A, such as course related to domestic abuse.

140 Paragraph 35 requires the court to ensure that any contact will not expose the child to an unmanageable risk of harm and paragraph 36 requires the court to consider the effect on the other parent, MA, and the risk of future harm

141 In considering these matters, the assessments of the psychologist and the Guardian are such that neither considered the allegations to be so serious as to require supervision of contact. MA has attended and supported contact on a voluntary basis since 2018 (and indeed in 2017 before these proceedings), she has carried out handovers on many occasions without there being incidents of domestic abuse or incidents which caused harm to A (their distress being about separation from the mother is a different matter). FA's current relationship and his presentation of stability are positive factors. There would appear to be no evidence of risk at this time to MA or to A from contact taking place. There does not appear to be a need for further work to be done by FA as a precondition to being with A.

142 I understand that to allow unsupervised contact is likely to cause a high level of worry to MA. This relates to the effect on A being separated from their mother as well as worries about FA's behaviour in a domestic setting and her doubts about his ability to provide good childcare. The antidote to this is for FA to build up a history of successful contact over time.

143 A is old enough to talk to adults about how they feel, if something worries them. It appears to me that FA has insight into the criticisms made of him and is motivated to do the best he can for A, rather than to punish or harass MA and that is likely his future conduct in contact will be good. There are huge benefits for A in having more extensive contact with their father in these circumstances. The allegations of domestic abuse and violent behaviour do not arise in the context of time spent with A or in the current relationship.

144 I have considered the case law to which I have been referred by Ms Whitehouse. While every case is different in terms of its own facts, there are similarities between the current case and Re L. This case concerned an eight-year-old child who had been brought up in London by her mother and maternal grandmother. Her father lived in Northern Ireland. The court made an order for the child to go to live with the father and the mother's appeal was dismissed. Like A, this child had lived with her mother since birth and her parents separated when she was young. The court did not make any findings on the mother's allegations of inappropriate behaviour by the father. There was lengthy litigation, entrenched parental conflict. The Guardian did not initially recommend change of residence but made that recommendation during the hearing. The child been very negative about seeing the father but when observed with the father contact was happy with him. The child had spent substantial time with the father in the past and the judge felt that the harm of the move was a harm "worth incurring". He found the child to be have suffered emotional harm in the mother's household, the maternal grandmother referring to the father as "a bad man" in the child's presence of many occasions.

145 I also considered the case of Re A (Children) (Parental Alienation) [2019] EWFC B56 which again concerned an older child than A. There had been 36 hearings with 10 different professionals involved and care proceedings had been brought. The father had been "demonised" by the mother in her household. The judge had ordered a change of residence but this failed and the judge identified that this was due to a lack of collaborative working amongst the professionals, the pre-planning was inadequate and some of the professionals disagreed about the proposed transfer. The children had run away from the father, refused to eat and exhibited extreme distress, returning to the mother within a month after the hearing. It had been "deeply traumatic". The proceedings had been going on for eight years.

146 The original Guardian reported in February 2020 that she had had little involvement with A but that it appeared the mother provided a high standard of care. She had observed A at a contact handover. A later report in February 2021 referred to there being "a real air of hope" in March 2020. She said that she would not recommend changing residence at this time but there should be psychological advice about this. She recommended stepped increases in contact. She said changing residence could be seen as 'punishing' MA rather than being in the best interests of A. She would be "very reluctant" to recommend this move, the "trauma" of the move would be exacerbated by the distance involved.

147 The new Guardian followed the advice of Darren Spooner. He recommended a quick transition for A with FA providing a storyboard which could be used to work with them plus daily video calls. He suggested that the father should go to Scotland to pick up A, returning with them after a couple of days of intensive contact.

148 He said that there should be no contact with MA for at least 14 days. After that contact would be indirect by post/photographs for a further period. In the long run contact on alternate weekends if possible (alternating between England and Scotland) but, if the journey is too arduous, contact could be at a mutually agreed place between FA's home in England and MA's home in Scotland. He recommended holidays are shared with A visiting their mother in Scotland, with their mother to collect them in England and their father to collect them after contact.

149 On 5 August I asked the Guardian to make further inquiries of FW and to interview her alone. On 12 August he produced a position statement to set out the positive results of that meeting, both as to her willingness to support FA's care of A and as to her experience of living with FA.

150 I also gave MA the further opportunity to co-operate with staying contact in Scotland, in the week in between the 5 August and now but she failed to engage with FA or the child's representatives.

Conclusion

151 The court must apply section 1 of the Children Act 1989, doing what is best for A. In summary from the welfare checklist, the key points are as follows. I accept that FA is capable of having unsupervised time with A at his home. There is no evidence to require assessment in relation to domestic abuse or further fact-finding in relation to those allegations. MA has continued to exhibit reluctance and disinclination to arrange contact and to cooperate with FA, the Guardian and the court. She has taken that reluctance to new lengths by ignoring the final hearing completely and making no proposals for the future. The assessment of A's relationship with their father, and the beginnings of their relationship with FW, C and D, are all positive, albeit that they are based on fractured contact arrangements to date.

152 I consider the range of options are as follows:

1 to make an order simply for video and postal contact;

2 to make an order for staying contact with their father which would primarily be in holiday times given that A is now in school;

3 to make an order for A to live with their father and have contact with their mother;

4 to order that A should be removed from the mother's care and be placed into foster care for a period before they be prepared to move to their father;

5 to make an order for staying contact backed with a suspended order for transfer of residence, in the event that she continued to fail to comply.

153 It should be clear from what I have said above that I do not consider that option 1 is sufficient for A or is justified in the circumstances of this case. Ongoing video contact is likely to be important for A whoever they live with but it is not enough to foster their relationships with their parents.

154 I have considered whether option 4 would be in the best interests of A. Placing them in a local foster home in Scotland would give control of contact with their father and mother and they could be prepared for any move to their father's care. Such a placement would enable A to have more time with their father, stepmother and their children so that the option of a move to England could be more thoroughly explored.

155 However, the disadvantages of placement with strangers would concern me. It is not known how they would cope with such a move and it is far from clear that such a holding position is necessary given that there appear to be no immediate risk A if placed with their father.

156 Additionally, the legal process for making an interim care order which would be applicable in Scotland and/or transfer of any interim care order to Scotland is not straightforward. There would be an issue about whether this court could make an interim care order given than A is living in Scotland (a care order is made to a local authority in England/Wales). Even if an order could be made in favour of an English local authority, the consent of the Scottish local authority is required before an order in that jurisdiction, called a compulsory supervision order, can be made to replace the interim care order. It is far from clear that the local authority in Scotland would be willing to take on such responsibility and arrange foster care. To date the local authority has been unwilling to see any need for their involvement. It is likely that this route would cause delay and uncertainty for A. The court would want to hear from the Scottish local authority before making such an order, to consider its plans for A. It is likely that such a removal to foster care would better conducted within the Scottish legal system rather than as an adjunct to these proceedings. Indeed, that may well be the only route to achieve this.

157 Given these difficulties and the obvious disadvantages of such a move for A, I do not consider that this is a realistic option or necessary option for A at this time.

158 I made it clear in my judgement in February 2021 that it is likely that the best order for A is option 2 which would enable them to stay living with their mother but have regular substantial time with their father. The problem with this option is that the court has no confidence that this will be adhered to in a reliable way given the mother's deep-seated reservations and her willingness to break previous agreements and orders. It is likely that the mother's adherence to any such an order for contact would be enhanced by the father registering the order in Scotland, something which he has not previously done. It would not be easy for him to take proceedings in Scotland for enforcement but, from A's point of view this would have the advantage of not disrupting their residence. Putting A first, as I must do, this is a less interventionist approach and a less disruptive option than transfer of residence.

159 I am satisfied that an order to transfer of residence, option 3, would better enable A to maintain a relationship with both sides of the family. The more difficult question is whether it is justified in the best interests of A given the likely risks of emotional harm.

160 If there is no realistic opportunity for A to have staying contact with their father, it seems to me that an order for transfer of residence for them is better than leaving them with

nothing but virtual contact or exposing them to another protracted period of partially successful face-to-face contact within these proceedings. I am satisfied that sufficient opportunity has been given to MA to promote face-to-face contact and she has repeatedly failed to deliver. Her lack of participation now emphasises the depth of the problem.

161 Therefore in the absence of any substantial proposals for staying contact, proposals which stand a realistic prospect of implementation, it seems to me that the court has to grasp the nettle and accept that there should be plans for transfer of A's residence to their father. In the absence of cooperation from MA this order would need to be registered in Scotland for enforcement. This is a case in which the immediate harm caused to A by uprooting them from their mother's care is necessary to bring them the long term benefits of a substantial relationship with both parents.

162 I have considered whether there should be a delay to enable A to be prepared for a move to their father's care, to enable work to be done by way of preparation of her. That would be the ideal but I have no confidence that MA would cooperate with this work given her disengagement from the proceedings.

163 If MA had made realistic and generous proposals for staying contact, including over the half term in October, there would have been merit in testing this out, particularly if backed by a suspended order the transfer of residence, option 5. However, in the absence of any such proposals it seems to me that such an order is likely to be delaying the inevitable and is likely to expose A to a protracted period of uncertainty and pressure given that mother profoundly disagrees with the order for staying contact, let alone transfer of residence which she described in the February hearing as "preposterous".

164 Reluctantly, I accept the application made by FA for A to live with him is the best way forward for A. I agree with the Guardian that this decision needs to be implemented as soon as possible both to avoid A suffering undue emotional pressure but also because of the risk of them being abducted. I will hear from the parties about the dates for handover. I consider that the proposals for contact made by the Guardian are reasonable ones and that there will need to be flexibility to adapt to the way in which A and their mother accept the court's decision. I consider that a family assistance order for 6 months should be made to CAFCASS to support the transfer of A and the future contact arrangements. FA agrees to be named in that order and A should also be made subject to that order. If the Local Authority become closely involved with the family, it may be that this order could be varied or discharged.

165 In the meantime I will maintain the prohibited steps order so that A cannot be taken out of the United Kingdom by MA and I renew the order to surrender of passports. I give permission for the orders made today to be registered in Scotland.

HHJ WHYBROW

19/8/21