**IN THE HIGH COURT OF JUSTICE** **CASE No. CV06PO0007**
**FAMILY DIVISION**
**COVENTRY DISTRICT REGISTRY**

**BETWEEN:**

**TE**

**Applicant**

**and**

**SH**

**First Respondent**

**and**

**S**

**(by his guardian ad litem, the National Youth Advocacy Service)**

**Second Respondent**

## JUDGMENT

1. These proceedings concern, S. S is now 11¾ years old (born 5 March 1998). His mother is TE ('the mother'). His father is SH ('the father'). The father applies to the court for a residence order. I heard the application on 21st December. This is my judgment on the father's application.
2. The proceedings have been before the court continuously for the last four years. During that time I have delivered two substantial written judgments (on 13th December 2007 and 15th June 2009). The background history is set out in considerable detail in those two judgments. I do not propose to repeat it. This judgment should be read alongside my earlier judgments. Together they form a continuum.
3. The father last had direct contact with S in February 2006, almost four years ago. All parties agree that during the last four years the court has left no stone unturned in trying to re-start direct contact. The court's best endeavours have been unsuccessful. The last substantive order was made in July 2009. In that order I endeavoured to arrange some direct contact

between S and his two half-brothers, L and N. Those attempts failed. S refused to engage. I concluded that further attempts to make that order work were futile. I therefore suspended that order.

4. In addition to the two written judgments I have also given two short extempore judgments. The second of those extempore judgments was given on 25th September 2009. It was given in response to an application made on behalf of the father that I should list the matter for determination of a proposed application by him for a residence order, an application which I granted. In that judgment I assessed the current position in relation to contact. I said:

> 'In my judgment, there is today no rational or reasonable ground for believing that to persist with direct contact at this stage would be likely to lead to anything other than stubborn resistance and outward distress by S. So far as contact is concerned, if this case is to be disposed of today, then an order for indirect contact only would, I am satisfied, be the appropriate order. If I were to make such an order, then it is right to say that, for my part, in the light of my knowledge of this case, I have no real hope that such an order may in time lead on to direct contact. I have set out my detailed assessment of the mother in two judgments and in the light of that assessment I do not believe that once these proceedings are ended S's beliefs and attitudes are likely to change.'

5. It was against that background that this application came before me on 21st December 2009. Although it was agreed that the application should be heard on submissions it became clear during the course of that hearing that there was no evidence before the court of the father's proposals for caring for S. I therefore agreed to hear further evidence from the father on that very limited issue.
6. I begin my assessment of the father's application by reviewing some of the key findings made in my earlier judgments.

<u>Findings concerning the father</u>

7. The father issued his first application for a contact order in June 1999. Proceedings have been ongoing for the greater part of the last decade. In my first judgment I reviewed the history of the father's application. I noted positive comments made about his relationship with S made by some of the professionals who had been involved (see, for example, paragraphs 24 and 28). I also noted criticisms (see, for example, paragraphs 31 and 85) I summed up my own assessment of the father in these terms:

> '141. Having listened to the father as he gave his evidence, he impressed me as a devoted father who is committed to his son. At times during his evidence he was quite tearful. He is clearly devastated at the breakdown of his relationship with S. He said, movingly, that

this present situation isn't just S's tragedy or his tragedy but is a tragedy for S's siblings, his grandparents, his cousins, his aunts and uncles. He said that 'if ever we go out for a meal there is always an invisible guest there'.

'142. However, it is also clear that the father has great difficulty in foreseeing the consequences of his actions. For example, whilst I have no doubt that his decision to seek DNA tests was, as he says, intended to underline to the mother the fact that he is S's father, with all that that implies, I equally have no doubt that he gave no thought to whether that step might be perceived by the mother as a hostile step implying a slur on her character. In other words, he was unable to foresee that a step which he hoped would have positive consequences might in fact have very negative consequences. Similarly, his applications for permission to change S's name and for him to be educated in the independent sector, no doubt both worthy aspirations in his mind, were likely to have and did have a negative impact on his relationship with the mother. Given that contact was at last progressing reasonably well at the time he made those applications, it is unfortunate that the father did not have the foresight to contemplate the damage that might be caused by making those applications.

'143. The events of early January 2006 provide the most powerful testimony to the father's inability to foresee the consequences of his actions. Although the description of his conduct as being 'over-zealous' still rankles with him, I am satisfied that it is an apt description. The repercussions have been profound. Having over the years put so much effort into successfully establishing a meaningful relationship with his son, all of that good work was undermined by his over-zealous response to S's apparent disclosures.

'144. That said, it would not in my judgment be either fair or appropriate to conclude that in terms of the complete and utter breakdown in the contact arrangements the father is wholly responsible.'

8. My second written judgment was handed down in June 2009 and followed attempts to reintroduce some contact between the father and S. Those attempts had failed. Two particular events – a visit by the father and his wife to the place of worship and attending to watch S take part in a cross-country race at school – had not only required me to make findings of fact in respect of those events but had also provided an opportunity for me to review my assessment of each parent. So far as concerns the father, these are the findings I made:

'170. …So far as the father is concerned, I have already expressed the opinion that in terms of his ability to put himself in S's shoes, his ability to show empathy, he does not

appear to have moved on. I do not for a moment doubt the sincerity of the father's desire to re-establish contact between himself and S. His motives are entirely honourable. However, it appears to me that the father's single-minded pursuit of that end is blind both to the risk of failure and to the potentially adverse impact on S of continuing the fight. I noted earlier the difficulty judges encounter in coming to the conclusion that the end of the road has been reached. This father has not even begun to consider the possibility that the end of the road is in view.'

9. It is, of course, important to remember that all of those comments need to be seen in the context of the totality of the judgments in which they appear.

Findings concerning the mother

10. In reviewing the background history in the course of my first judgment in December 2007, I noted a consistent theme of concern about the mother's hostility towards the father's pursuit of contact with S (see, for example, paragraphs 12, 20, 26 and 67). I also noted some positive comments (see, for example, paragraphs 29 and 33). Although for a time there had appeared to be some improvement, at least in the sense that contact took place regularly and successfully, since the breakdown in contact in February 2006 the earlier concerns about the mother's attitude towards the father's contact with S have resurfaced.

11. In my first judgment in December 2007 I came to the following conclusions about the mother:

'146. In January 2002 Judge Deeley expressed some very strong views about the mother's attitude towards contact. After that hearing there was considerable improvement. Alternate weekend staying contact and holiday contact (including holidays abroad) took place. It is clear that the mother did, as she says, take to heart the criticisms made by Judge Deeley. As I noted earlier, in January 2004 Judge Fisher formed a much more positive impression of the mother. I have taken time to reflect on the evidence before arriving at my own assessment of the mother. I am not able to be as positive as Judge Fisher. In a number of respects the evidence before me, including my own observation of the mother giving evidence during this hearing, leaves me with some concerns.

'147. I have no doubt that the events of early January 2006 were traumatic for the mother. Not only the alleged disclosure but also the father's failure to return S to her care must have been very deeply upsetting. There had undoubtedly been some positive changes in the mother's underlying attitude to contact following the hearing in January 2002. I have no doubt that the events of early January 2006 put those changes into reverse.

‘148. Although the mother says that she is open to contact resuming when S is ready, I am not wholly convinced that she means what she says. In some respects, her conduct and her past comments tell a different story. The following issues, in particular, lead me to that conclusion:

(a) The fact that the mother has now arranged for S to have extra-curricular activities every day of the week, including weekends, means that there is now no space in his life for contact – and therefore no space for his father. Even if S were more open to the possibility of contact, the impact of a reintroduction of contact would be likely to have some negative side effects in S’s mind, given that he would have to reduce some of these activities.

(b) Ms J [S’s first guardian ad litem] noted that the mother has ‘significant influence and power’ in S’s life and thus expressed surprise that the mother ‘has not been able to persuade S to even look at a letter from his father’. S said his mother had given him the choice whether he read the letter or not. As Ms J said ‘Sometimes the “tough love” of a parent it not to give an 8 year old child a choice if we believe what we are doing is in their best interests.’ The same point could be made in respect of S’s failure to acknowledge presents received from members of the father’s family and his unwillingness even to send a postcard to his half-brothers when on holiday.

(c) Similar concerns arise in the report of the present guardian. There is a difference between a parent allowing contact to happen and a parent encouraging contact to happen. Mrs K records that in a joint discussion with both the mother and S, the mother had said to S ‘if you said you wanted to see him I’d have to go along with it’.

(d) The mother has engaged in therapy sessions and expresses a willingness to continue doing so. She engages in brief weekly telephone conversations with the father. Although at one level all of this is very positive, it could equally be construed less favourably as the mother accepting a level of inconvenience for herself as a price worth paying in order to maintain the present status quo of no contact. In this context it is appropriate to recall the note in the guardian’s report that when discussing S’s disclosure with the mother she had said that she would never have abused S in this way ‘because she loves her son more than she hates RG’.

(e) There is the curiosity of the referrals made by S’s GP firstly to Dr P and then to Dr N, apparently coinciding with the suggestion that they should be jointly instructed as expert witnesses in the case. As has been noted on behalf of the father, the effect of this was that Dr N was providing a report from the standpoint of a treating

consultant rather than that of an independent medical expert coming fresh to the case. In the event, Dr N was not formally instructed in a medico-legal capacity until after she had recommended that contact cease and at a time when she had not spoken to the father or appraised herself of the long and complex history. The concerns about what I have described as a 'curiosity' become more acute when one considers both the rapidity with which the mother made e-mail contact with Dr W once she knew he was being proposed as a possible expert witness in the case, and the lack of candour in the content of that e-mail.

(f) The mother's decision to tell the CSA that she no longer wished to receive child support from the father is a matter I find particularly surprising. The amount being paid was not an insignificant sum – around £450 per month. It was being paid regularly. This father is not one of those feckless fathers often referred to by way of justification for the existence of the Child Support Agency. I cannot recall ever before, whether in practice or on the Bench, having come across a mother suddenly turning her back on child support that was being paid regularly and without demur. I regard the mother's excuse for discontinuing child support as being specious. Even since contact stopped, this father has at all times been willing to provide financial support for his child and yet the mother has shunned his contribution.

'149. Whereas I have found that some of the father's actions have been carried out without any insight at all into the likely consequences, I am in no doubt that this mother does have insight into the likely consequences of some of her actions.

'150. In my judgment, when taken together, and in the context of the whole of the evidence before me, all of this strongly suggests that in truth this mother has no real wish to see contact restart.'

12. In my second written judgment, on 15th June 2009, I came to these conclusions about the mother:

'172. …there are a number of factors in the evidence that lead me to believe that the mother is still not as enthusiastic about reinstating contact as she would have me believe. I list just six of them:

(a) For three months after my earlier judgment, her continuing refusal to accept voluntary maintenance pending the making of a new CSA assessment.

(b) Her response to S's behaviour when Dr W visited her home.

(c) With respect to the planned encounter at the place of worship, her telephone call to Mrs K, rather than to the father, to discuss S's distress prior to this event; her

decision to invite the father to the place of worship notwithstanding her awareness of her own father's clear view that it was not the done thing for her and the father to be seen together at the place of worship.

(d) With respect to the planned encounter at the cross country event, her failure to tell S's Head Teacher that she had invited the father to attend the cross-country race; her delay in telling S about this event; her decision to invite the father to this event notwithstanding her understanding of the importance of that event both for S and for the school; her attempt to discuss S's adverse reaction with Mrs K on the morning of the event; her failure to discuss his reaction with the father.

(e) With respect to S's education, her rejection of the father's request that he should attend Parents Evening with her; her failure to consult the father about choice of secondary school; her general failure to recognise the significance of shared parental responsibility in matters relating to S's education.

(f) With respect to indirect contact, her failure adequately to reprimand S for his rudeness to the father during telephone conversations and for his failure to acknowledge gifts received from his paternal family.

'173. Having said all of that, I do accept that the mother has made some progress since the last hearing. I do accept that she has tried, though I am not wholly convinced that her intent has been to commit to making contact work. It is equally possible that her efforts have been intended to persuade the court that she has tried her best to make contact work.'

13. As with my findings concerning the father, it is appropriate to make the point that those findings concerning the mother need to be seen in the context of the totality of the judgments in which they appear.

Review of the NYAS caseworker's evidence

14. The NYAS caseworker is Mrs K. Mrs K was instructed by NYAS in June 2007. She has therefore been involved in this case for the last two and a half years. In that time she has prepared three written reports. She has also given oral evidence at two hearings. My evaluation of her evidence is to be found at paragraphs 113 to 124 of my judgment of 13th December 2007 and at paragraphs 118 to 129 of my judgment of 15th June 2009.

15. It is clear from my earlier analyses of Mrs K's evidence that on some issues I have not accepted her evidence and on one issue I have expressed concern about her approach.

16. Mrs K's position in her first report was that there should be a residence order in favour of the mother, a continuation of the therapy which had by then been taking place for some months, a cessation of the court proceedings and an order under s.91(14) for a period of

three years. I did not accept those recommendations. Instead, I gave permission for the case papers to be reviewed by Dr W, a Consultant Child and Adolescent Psychiatrist with a special interest in high conflict contact disputes. That order led to the preparation of three written reports by Dr W and to him giving evidence at two hearings. There are some key issues upon which Dr W and Mrs K disagree.

17. Mrs K was strongly of the opinion that the therapy provided for the parents and S by Mr L and Ms W had been beneficial for S and should continue. In contrast, Dr W's analysis was that the situation that has developed is properly to be characterised as one of alienation and that in those circumstances 'it is highly unlikely that any form of psychotherapy will lead to a change in [S's] response' and that 'no amount of therapy would be of any use unless it takes place alongside direct contact'. On that issue I accepted Dr W's evidence.
18. Mrs K has repeatedly expressed the opinion that there should be a cessation of the court proceedings, that continuation of the proceedings is harmful to S and that once the proceedings cease and he has the space to process his experiences it is more likely that he may then be willing to resume his relationship with the father. In contrast, Dr W said that he did not consider the proceedings to be harmful to S. He did not understand how a break in proceedings would help S. In his opinion a cessation of the court proceedings would be unlikely to lead to a softening of S's views. Again, I accepted Dr W's evidence.
19. As I noted in my judgment of 13th December 2007, Mrs K 'was of the clear view that S "has been harmed by the events of 05/06 and that he is likely to suffer ongoing harm if he is not helped to process these events and his family history in a safe therapeutic environment".' At that stage, in the light of the evidence then before me, I accepted that those events had indeed been deeply traumatic for S (see, for example, paragraphs 140 and 155). However, in Dr W's opinion those events had not been the cause of S's alienation from his father. He said that in his experience again and again he has found that alienation 'doesn't arise out of a particular event. It often arises just out of nothing. Out of, you know, years of having to tolerate the competition between the parents.' Once again I accepted Dr W's opinion.
20. I have also been concerned about Mrs K's approach to S's repeated indication to her that he does not want to have contact with his father. Both in his third report and in his oral evidence Dr W doubted that this was really the case. Dr W advised that it is important for the parents and for all of the professionals working with S to recognise that his expressed wishes and feelings are irrational and should form no part in the Court's decision making.
21. It is clear that Mrs K does not accept that advice. Indeed, it appeared to me that she had become so emotionally involved in her duties as S's guardian that she has lost some of that

sense of objectivity which is so vitally important in a case such as this. As I noted in my judgment of 13th December 2007

> '121. …It is clear that S's presentation during [Mrs K's] second meeting with him had had a very profound impact on her. She herself recounted the detail of that meeting with considerable emotion. Later in her evidence she said
>
> > "I feel pretty ferocious in protecting S. Never have I come across such a strong sense of fighting for a child."
>
> No-one who heard the guardian give her evidence could have been left in any doubt at all that she feels passionately about the welfare of this young boy.'

22. Although s.1(3)(a) Children Act 1989 (and Article 12 of the United Nations Convention on the Rights of the Child) do not permit me to accept Dr W's advice that the court should *pay no regard* to S's expressed wishes and feelings, I do accept that the substance of Dr W's advice is relevant in the context of the requirement of s.1(3)(a) that I should assess S's expressed wishes and feelings *'in the light of his age and understanding'*. Here, too, I find myself in disagreement with Mrs K.
23. It is also appropriate to note that in my judgment of 15th June 2009 I expressed concern about the fact that on one key issue Mrs K appears not to accept the findings I made in my judgment of 13th December 2007. At paragraphs 118 to 120 of my judgment of 15th June 2009 I said:

> '118. Mrs K has prepared three reports since the date of my last judgment. The first is dated 21st March 2008 and was prepared in readiness for the hearing at which I was to determine whether Dr W should be given permission to assess S. I find two particular aspects of that report to be striking.
>
> '119. Section 15 of that report is headed 'Guardian's reflections'. Mrs K says that she is 'mindful' of the judgment I handed down in December 2007. She then proceeds to highlight a number of passages from my judgment. It is noticeable that she refers to my comment that I had 'real concerns about both parents' and yet does not acknowledge [the] qualitative differences in the concerns I expressed about each parent. In contrast, Dr W acknowledged in his second report that 'The Findings make clear that the mother has long opposed and undermined contact between S and his father'. It was clear to me from her oral evidence that [Mrs K] did not really accept my assessment of the mother. She said that my findings have given a 'stronger judgment' on the mother's antipathy than she had referred to in her earlier report. However, it is also right to note that in answer to a question put to her by Miss Meyer, she said that 'one has to remain alert to

the risk that the mother is just paying lip-service so far as change of attitude is concerned'.

24. This was not the only matter upon which I expressed concern about Mrs K's approach to my earlier findings. I went on to observe that

    '120. Later in that same section, when contrasting the different approaches of Dr W, on the one hand, and the two therapists on the other, having noted Dr W's 'enormous wealth of experience' she went on to observe that 'Ms W and Mr L also have an enormous depth of experience'. She makes no reference to the fact that they had both accepted that they had no experience of dealing with a complex intractable contact cases (sic) such as this, a point to which I referred at paragraph 168 of my judgment.'

25. There are, therefore, several key issues upon which there has been a difference of opinion between Dr W and Mrs K. On all of those issues I have preferred the evidence of Dr W. When one adds to that my concern that Mrs K has not fully accepted my assessment of the mother and that she has lost some of her sense of objectivity in representing S's wishes and feelings to the court, it becomes clear that so far as the father's application for a residence order is concerned I should approach Mrs K's analysis and recommendation with a degree of caution.

<u>Dr W's evidence on change of residence</u>

26. The possibility of transferring residence from mother to father is an issue upon which Dr W was asked to advise. The following question was sent to him: 'Given your assessment of the mother and her family's stance, is this a case where there should be consideration of a Residence Order being made to the father in the interests of S, either on a temporary basis while S's relationship with his father is restored or on a long term basis?' In his final report, Dr W gave this answer:

    'I would support a change of Residence if there was evidence that S suffered emotional harm and/or abuse as a result of care given by the mother. I would not regard the presence of "alienation" in S as sufficient to conclude that the mother caused emotional harm and/or abuse. There would have to be other Findings of a type which would normally lead "to removal from or supervision of contact with residential parents. Such parents' factors include severe clinical pathology in the residential parent, Munchausen's by Proxy, parental neglect and/or abuse. It also includes making repeated and unsubstantiated allegations of abuse about the rejected parent, emotionally abusive attempts to inculcate negative beliefs in the child and child abduction…" That approach

seems compatible with the Court's approach in the UK though the quotation comes from the United States…'

27. Dr W was subsequently asked by letter to provide answers to a number of questions arising out of that paragraph. His response is very brief. In a letter dated 14th September 2009 he says

'I understand that the Court has not made Findings which could lead me to suggest that a change of Residence would, on balance, be in S's best interests. Therefore (questions (a) to (f) inclusive) I cannot recommend it as the way forward in this case.'

28. For the father, Miss Ball QC criticises the passage in Dr W's report (and by implication the further views expressed in his letter of 14th September) on the basis that he appears to be articulating the public law 'significant harm' test rather than the private law test of best interests. Miss Ball submits that in deciding whether to change residence from mother to father the court does not have to find some severe or serious failing on the part of the residential parent. For the mother, Miss Meyer QC complains that that point was not put to Dr W when he gave his oral evidence. She seeks to rely upon this passage from Dr W's written evidence in support of her submission that on the facts of this case a change of residence from mother to father is not justified.

29. On 13th December 2007, by consent, I made a residence order in favour of the mother. The father had indicated through his counsel on the first morning of that hearing that he would consent to that order. I said that I had 'no doubt it was right for the father to agree to a residence order in the mother's favour' (paragraph 145). However, it was clear that the father's consent to that order was, in one sense, tactical in that he hoped that by making it clear that he was not intending to disturb the residential status quo S and his mother would feel more secure and that S's approach to contact may soften. In her evidence the mother herself had said that the making of a residence order would 'go a huge way to help S to feel secure' (paragraph 112). Despite the making of the residence order in favour of the mother, S's approach to contact did not soften.

30. Against that background it was appropriate, for the sake of completeness, to invite Dr W to advise on change of residence even though there was then no such application before the court. Despite that question being put to him, when Dr W gave his oral evidence it was the issue of contact that was the focus of the father's application. It is perhaps unsurprising, therefore, that Miss Ball did not challenge Dr W on the passage to which I have referred. I accept that it is open to her to criticise that passage now, albeit that Dr W has not been recalled to give further evidence. I accept that in that passage Dr W appears to have applied

the wrong test. That enables me to consider discounting that part of his evidence. What it does not do is to enable me to make assumptions about what Dr W's advice might have been had he directed his mind to the correct test.

The father's proposals

31. As I noted earlier, I have heard oral evidence from the father concerning his proposals for caring for S were I to make a residence order in his favour. The father lives in the South East with his wife, LH, their two sons L and N, and the father's parents who are both retired professionals. LH does not work. She is the children's primary carer. She is responsible for undertaking the school run each day. The children are privately educated. Both attend the Z School. The Z School is a co-educational day preparatory school for children aged from 2 to 13. In the event that S should join the household the father proposes that he, too, should be privately educated. He proposes that S attend the Z School until the end of the academic year 2010/11. The father says that a place is available at the Z School, subject to S undergoing an interview with the Head Teacher. Term starts on 7th January.
32. The father proposes that at the age of 13 S should move to the X School. The X School takes students (both boarders and day students) from the ages of 13 to 18. The father is willing to consider alternatives to the X School. Although there are State schools in the area it was clear that the father had not seriously considered any of them as a possible school for S.
33. The family home is one with which S was familiar in the days when staying contact was taking place. He has his own bedroom there. Although the father has plans to build an extension, which may mean a temporary relocation to a rented property nearby, he has no present intention of moving house.
34. The father continues to work in the City. He has a journey by train of around an hour to get to and from his place of work. He is not required to travel abroad as part of his work. His employers have confirmed that, as a result of changed responsibilities, from 4th January the father will be able to leave for home by 4.00/4.30pm each day. The normal school day ends at 4.15pm. If S were attending an after-school club then the father may be able to collect him from school. More often than not it is likely to be LH who would collect him from school. In the short term, whilst S settles in, the father would be able to work from home. The father has an option to leave his present employers in May. His employers are keen to retain his services. The father believes that his employer's desire to retain his services will enable him to negotiate terms compatible with the demands on him as S's father. As he put it, family comes first.

35. The father is mindful of the fact that if S were to move to live with him then that would impact on the friendships S already has in the area where he now lives. He would encourage S to keep in contact with his friends not only electronically (by Skype, for example) but also by having them visit him at his new home.
36. Miss Meyer suggested to the father that if S moved to live with him then it is likely that the greatest burden would fall upon his wife. The father did not accept that. He said that he and his wife share the care of L and N, his wife undertaking the greater share of responsibility during the week and he at weekends. That would continue to be so if S lived with them.
37. In the event that there were to be a change of residence the father would promote ongoing contact between S and his mother and maternal family. On behalf of the father Miss Ball has prepared a detailed draft order setting out his proposals for S's future care. In essence, the father proposes that S be allowed a month to settle in and that from the end of January he should spend alternate weekends with his mother, from Friday until Sunday, that he should spend around half of school holidays with his mother and that he should have contact with his mother by telephone or Skype not less than twice a week.

Submissions

38. On behalf of the father, Miss Ball has gone through my earlier judgments with care and on the basis of that analysis she submits that the court has already reached a number of significant conclusions. She sets out seventeen in total. They may be summarised, briefly, as follows: that the mother is more culpable than the father for the breakdown in contact and the failure to restore it; that whereas the father has lacked insight the mother has been well aware of the likely consequences of her actions and has behaved wilfully; that the mother's behaviour has created antipathy and coloured S's thinking about his father; that although in recent months there have been some signs that the mother may have been attempting to change course, the reality is, as she herself admitted in evidence, that she has now lost control of S; that the consequence of all of this has been that S has become alienated from his father; that S has been emotionally affected by being at the centre of parental conflict and is at risk of future harm if he is unable to enjoy a meaningful relationship with his paternal family; that the court is pessimistic about the mother's ability to change.
39. I accept that that is a fair summary of my earlier findings. Miss Ball submits that these findings are concerning both as to harm suffered and as to risk of future harm. She refers to Dr W's evidence as to the harm which alienation can cause to a child's welfare. That risk of harm is so important that the father (and the court) cannot simply sit back and do nothing. If the residential parent is unable to help to restore the relationship between father and son,

and plainly this mother cannot, then that should lead the court to consider whether the risk of future harm may now be most effectively avoided by a change of carer.

40. Miss Ball submits that if S were to live with his father then the father can be relied upon to meet all of S's needs including the need for him to have a positive image of and meaningful relationship with his mother and other members of his maternal family. In contrast, she submits that it is plain from the court's findings that the mother is very unlikely to enable S to have a relationship with his father during the remainder of his childhood. Miss Ball referred to S's reference to his father as a 'monster' and submits that that suggests S is already suffering emotional harm. The consequence of the mother's continuing failure to enable S to have a relationship with his paternal family will be that he will continue to suffer emotional harm; that he will be deprived of a relationship with his brothers; and that he will continue to live in an environment where part of his identity is the subject of disrespect and hatred.
41. Miss Ball acknowledged that S is saying that he wants to have nothing to do with his father. However, she submits that Mrs K, has over-emphasised S's expressed wishes and feelings and has accorded them too much weight. Although the court must listen to S it must also determine what weight to attach to his wishes and feelings and that, in turn, requires the court to make an assessment of his level of understanding and maturity.
42. In short, Miss Ball submits that the court must now grasp the nettle. The court has a responsibility to look to the longer term and that means taking effective steps to minimise the clear risk of harm to S. As she put it, if this is not a suitable case for transfer of residence it is difficult to imagine one that is.
43. On behalf of the mother, Miss Meyer, reminds me that in 2007 the father consented to the making of a residence order in favour of the mother. He conceded that in terms of her day to day care of S, the mother was doing a good job. The court has found that the mother is meeting S's needs 'to a high standard'. He is doing well at home. He is also doing well at school where reports suggest that he is a high achiever.
44. Miss Meyer notes that the court has previously expressed concerns about the ability of both parents to meet S's emotional needs. So far as the father is concerned, the court has expressed concern about his lack of insight and empathy – his apparent inability to put himself into S's shoes.
45. Like Miss Ball, Miss Meyer has gone through my earlier judgments and has highlighted some of the findings I have made. I accept her analysis. Miss Meyer also very properly emphasises

that in addition to considering the court's past findings, the court must be alive to what she refers to as 'non-findings'. She says that

(a) What is equally important is the findings that the Court has not made as these must be considered when balancing all factors of the welfare checklist by way of example. (sic)

(b) The court has not found that the mother is responsible (or solely responsible) for the alienation of S from his father.

(c) The court has not found that S suffers any disadvantage in any other areas of his life.

(d) The court has not found any exposure of S to distorted belief systems or false allegations from the mother.

(e) The court did not make its order for sibling contact based on any assertion by the mother, or assumption by the court, that this would lead on to contact between S and his father.

46. Miss Meyer undertakes a detailed review of Dr W's evidence and concludes that there is nothing in his evidence that supports a change of residence. Notwithstanding the findings made by the court in its earlier judgments, Dr W was unable to indicate that the benefits of a change of residence would outweigh the negatives which would flow from such a move. Furthermore, there is no reason to believe that a change of residence would solve the underlying problems – the prolonged conflict between the parents, their poor communication, or the lack of trust between them, all of which have contributed to the current impasse. In her submission, it is too simplistic to suggest that a change of residence would lead to these problems going away.

47. Miss Meyer also refers to the evidence of Mrs K and notes that Mrs K reports that S has remained distressed and adamant about not wanting to see his father despite the conversations she and his solicitor has had with him.

48. Miss Meyer points to the likely distress that would be caused by moving S from the care of the parent who has been his primary carer for the whole of his life and with whom he has a strong bond. Such a move would mean not only change of carer but also change of home, change of school, loss of friends and loss of the social and sporting life he enjoys at present. He will have to build a new life living with a father whom the court has found lacks insight and empathy. She submits that such destabilisation and disruption of S would come at a heavy emotional and psychological cost. It would involve the court taking a substantial (and, it is implied, unreasonable and inappropriate) risk.

49. The mechanics of achieving a transfer of residence are also problematic. As Miss Meyer puts it, in view of the inability of Mrs K, Dr W, the mother and the maternal uncle to achieve a direct meeting between S and his father 'it is inevitable that any attempt to transfer the residence of S would also require the use of an unacceptable degree of force by either a professional or a family member'.
50. Miss Meyer also makes the important point that whilst experts do not decide cases, the court should be wary of adopting a course of action that is not supported by either professional in the case.
51. Miss Meyer assures me that the mother does hope that at some stage in the future S will feel able to develop a relationship with his father and paternal family, though she is unable to say with any confidence that that will happen. Until then, all reasonable steps have been taken to try to re-establish contact. All have failed. It is time for the court to withdraw. The mother therefore seeks dismissal of the father's application for a residence order, dismissal of his application for direct contact, a continuation of the agreements between the parents recorded in the order of 7th July 2009 and an order under s.91(14) Children Act 1989 prohibiting the father from applying for contact or residence for a period of one year.
52. On behalf of NYAS, Miss Kaur adopts the submissions made on behalf of the mother. In her written submissions Miss Kaur says of the father's application that Mrs K 'is dismayed by this turn of events and is very anxious about the impact such an application could have upon S'.
53. Mrs K remains of the view that S's expressed wishes and feelings are genuine and should be listened to. She does not agree with Dr W that S's position is irrational.
54. Like Miss Meyer, Miss Kaur points to the practical difficulties in effecting a transfer of residence given S's likely distress and resistance. She asks, rhetorically, who could force him into such a move. Mrs K would not envisage taking part in the transfer arrangements. Even if the transfer could be achieved, Miss Kaur queries what force might then be required to ensure that S remains in his father's home. Miss Kaur points to the fact that even when sibling contact was attempted in the summer, S ran off.
55. Miss Kaur submits that before ordering a transfer of residence the court would need to be satisfied that the harm likely to be caused by S remaining in the care of his mother outweighed the harm likely to be caused as a result of transferring residence to the father. Like Miss Meyer, she makes the point that neither Mrs K nor Dr W is recommending that such a dramatic upheaval is in S's best interests. Mrs K's view is that it would be nothing

more than an experiment, and an experiment which could have a devastating effect on S emotionally and educationally,

56. NYAS seek dismissal of the father's application for residence, an order for indirect contact and an order under s.91(14) for a period of one year.

The law

57. I am grateful to counsel for their very helpful submissions on the law. There is, in truth, little between the parties so far as the law is concerned. There was a great deal of overlap in the authorities to which they referred. I bear all of that learning in mind as I approach this case. As ever in these high conflict cases, the difficulty comes not in stating the law but in applying the law to the facts, in balancing established principles in a way that achieves an outcome which is in the best interests of S's welfare.

58. I set out an overview of the relevant law in my earlier judgments. I do not propose to restate what has been set out previously. However, now that the focus is on the issue of residence rather than contact it is appropriate that I should add a little to what has previously been said.

59. I begin with the case of In re B (A Child) (2009) (FC). In giving the judgment of the Court, Lord Kerr gave a reminder of the approach to be adopted by the court when dealing with private law disputes. He began by referring to observations made by Baroness Hale in In re G (Children) (Residence: Same-sex Partner) UKHL 43 at paragraph 30, where she had said that

> '…The statutory position is plain: the welfare of the child is the paramount consideration. As Lord MacDermott explained in J v C [1970] AC 668, 711, this means that it "rules upon or determines the course to be followed". There is no question of a parental right.'

Lord Kerr then goes on to say that

> '37. This passage captures the central point of the In re G case and of this case. It is a message which should not require reaffirmation but, if and so far as it does, we would wish to provide it in this judgment. All consideration of the importance of parenthood in private law disputes about residence must be firmly rooted in an examination of what is in the child's best interests. This is the paramount consideration.'

60. Thus it is that in the case with which I am concerned, all of the other principles and guidance articulated in the cases referred to by counsel are secondary to that central principle, that any decision about S's residence must be firmly rooted in an examination of what is in his best interests. References in the case law to, for example, the fact that the children of separated

parents are entitled to know and have the love and society of both their parents or to the fact that the mutual enjoyment by parents and child of each other's company constitutes a fundamental element of family life, may assist the court in its determination of what is in a child's best interests but nonetheless remain secondary to that overriding principle.

61. On behalf of the father, much has been made of a case which has recently received a lot of publicity in the national Press. A headline in the Daily Telegraph on 21st November announced 'Judge orders boy to live with father against his wishes'. The reference to the case is In the Matter of R (A Child) [2009] EWCA Civ 1316. That case bears some striking similarities to the case with which I am concerned. For example, at the time of the order for transfer child R was of almost the same age as S; there had been a long period in which the father had had no contact with child R, that period (six years) being even longer than the gap in contact between the father and S; child R was thriving in his mother's care and appeared to be doing well at school, just as in this case; child R was hostile to the prospect of moving to live with his father, again, just as in this case. There are also two significant differences between that case and the case with which I am concerned. Firstly, although there had been a six year gap in contact, during the period of eighteen months leading up to the order transferring residence to the father, the father had been having contact with child R even though the circumstances of that contact were far from ideal. Secondly, the order made by the judge transferring residence from mother to father was an order recommended by both child R's guardian ad litem and by the psychiatric expert, Dr M.
62. It is important to keep firmly in mind two points concerning the case of Re R. The first is that Re R does not propound any new principles to assist the court in determining high conflict private law disputes. Re R simply provides an illustration of how established principles were applied in determining what was in the best interests of the welfare of that particular child. The second point leads directly from the first, and that is that every case is fact-specific. In the case before me I am concerned with the question of what is in S's best interests. In determining that issue I must have regard to all of the findings I have made about these parents and about this child in the course of these very lengthy proceedings. Notwithstanding the similarities, S's family history and circumstances are different from those of child R.
63. In refusing permission to appeal against the decision of the trial judge in Re R, Lord Justice Wall made the point that 'orders transferring children from one parent to another are very rare and usually only taken as a last resort'. In more than fourteen years on the Bench, that is my experience too. The step of transferring residence from one parent to the other in a high

conflict contact case is, as Lord Justice Ward observed in Re C (Residence Order) [2008] 1 FLR 211, a step more often threatened than carried out. Whether that step is the appropriate step for me to take in this case is the question I now turn to consider.

Welfare checklist analysis

64. As in my earlier judgments, I begin my analysis by reference to the welfare checklist in s.1(3) of the Act.

65. Section 1(3)(a) requires me to take account of S's wishes and feelings, considered in the light of his age and understanding.

66. The analysis of S's wishes and feelings set out at paragraphs 155 to 163 of my judgment of 15th June, though undertaken in the context of the father's application for contact, holds good in respect of the father's present application for a residence order. Throughout the time that I have had conduct of these proceedings I have been acutely aware of S's very clearly expressed view that he does not wish to have contact with his father. He has said this both to his first guardian ad litem, Ms J, and to his NYAS caseworker, Mrs K. He has been saying this very clearly indeed for the last four years.

67. Although this is what S has said, in my judgment of 15th June 2009 I noted some signs of a contrary view. In Mrs K's second report she notes that S does have some positive memories of time spent with his father (see paragraphs 121 and 123 of my judgment of 15th June 2009). Dr W regarded this as a 'small sign of hope' (see paragraph 109 of that judgment).

68. More importantly, in that same judgment, when outlining the evidence relating to the father's encounter with S at the place of worship, I noted that

> '50. The father's account of this encounter is in one key respect rather different from the mother's account. The father says that whilst they were in the hall, 'when not observed by his maternal family, S smiled at me, appeared at one stage to try to wave at me (until his cousin turned around) he kept on exhibiting curiosity and glancing in my direction and then later he smiled and greeted my wife LH.' He says that S's face 'really lit up' when he saw him. He says that when they queued for tea S was immediately in front of him in the queue and yet showed no sign of anxiety or distress. There were no signs that S was trying to avoid him. LH confirmed the father's account.'

I accepted the father's account.

69. S's wishes and feelings must be assessed in accordance with his age and understanding. It is here that the assessment becomes more difficult. I have found that S has become alienated from his father. S has said that his father is a 'monster' and that he 'hates' him. It is clear from Dr W's evidence that such behaviour fits within the pattern of behaviour of children

who have become alienated from their non-resident parent. In his report of 18th July 2008 Dr W was very clear. He said that

> 'It is also important for both parents and for all professionals working with the child to recognise that the child's expressed wishes and feelings are irrational and should form no part in the Court's decision making.'

70. The law requires that the court should take account of S's wishes and feelings. It would be wrong, therefore, for me to pay no regard at all to the views which S has so clearly and consistently expressed. The Act, the UNCRC and case law all emphasise the importance of listening to and respecting the wishes of the child. As a general proposition I accept that the older the child the greater the respect that should be accorded to his or her wishes and feelings. As Butler Sloss LJ said in re S (Minors)(Access: Religious upbringing) [1992] 313 at page 321, a case involving two children aged 13 and 11,

> 'Nobody should dictate to children of this age, because one is dealing with their emotions, their lives and they are not packages to be moved around. They are people entitled to be treated with respect.'

I cannot and do not ignore S's expressed wishes and feelings. However, in the light of Dr W's evidence, it would be equally inappropriate for me to proceed on the basis that those expressed wishes and feelings should necessarily be taken at face value. They need to be assessed in the light of S's age and understanding. The impact of alienation upon the reliability of those wishes and feelings and the signs (albeit modest) that they may not in fact reflect his true feelings, are matters to be taken into account when assessing the weight to be attached to them.

71. Section 1(3)(b) requires me to have regard to S's physical, emotional and educational needs.
72. S has the same physical and educational needs as any other child of his age. That cannot be said of his emotional needs. In my earlier judgments I concluded that S has suffered emotional harm as a result of being caught up in this protracted dispute between his parents – a dispute that has been ongoing, in one form or another, for most of his life.
73. Dr W has referred in his reports to research evidence which suggests that 'children whose parents separate experience rates of psychosocial problems (behavioural and emotional disturbance, academic under-achievement, relationship difficulties) that are two to three times higher than those children whose parents remain together'. Dr W goes on to note that 'the evidence suggests that when conflict continues following separation the outcome is even worse than that for children exposed to chronic conflict (of a similar nature) between partners who remain together'. That is the kind of advice I hear repeatedly from Child and

Adolescent Psychiatrists giving evidence in these high conflict cases. As I noted in my judgment of 15th June 2009, S's emotional needs

> '165. …include the need to be freed from this parental conflict and to be enabled to process and overcome his negative feelings towards his father. He also needs to be helped to come to terms with the fact that his father's DNA is in every cell of his body and of what that implies for his own self-identity'.

74. Section 1(3)(c) requires me to take account of the likely effect on S of any change in his circumstances.

75. In the context of these proceedings, S has at times displayed some quite disturbing behaviour. His behaviour when Dr W visited his home (see paragraph 16 of my judgment of 15th June 2009) was grossly abnormal. His behaviour when told that his father would be attending the cross-country race and his subsequent behaviour on arrival at school (see paragraphs 54 to 69 of my judgment of 15th June 2009) was equally concerning. During one of the attempts to engage S in meetings with his half-brothers in the summer of 2009 – an event that can only be regarded as completely non-threatening – he ran off. I mention this abnormal and disproportionate behaviour since it is likely to be an indicator of his response to the change in his circumstances now proposed by the father. On behalf of the mother, Miss Meyer asks how the court could ensure that a handover took place given the kind of extreme reaction one might reasonably expect from S. Indeed, she goes further than that and suggests that even if the physical transfer of care could be achieved there is a strong likelihood that the problem of dealing with a distressed and unco-operative child would be likely to recur every time there is a move from the care of the mother to the care of the father at the end of contact visits.

76. So far as the initial transfer is concerned, Miss Meyer makes a valid point. However, in my judgment it does not necessarily follow that because the initial transfer of care from mother to father may be difficult to manage that there would be similar difficulties at the conclusion of contact visits. I also do not accept that it necessarily follows that the distress that could be anticipated at the time of the initial transfer of care from mother to father would be either long-lasting or damaging. I remind myself of the views expressed by Dr W in his report of 2nd October 2008. In that report Dr W responds to a number of specific questions put to him, one of which was an invitation to express an opinion on 'the impact of a permanent move on S and what support could be put in place to manage such a move'. Dr W advised that

'It is likely that S would be temporarily distressed if removed from his mother's care. That distress would be greatly reduced if his mother was able to co-operate with the procedure and help in the transfer from one home to another. It would be reduced if there were reasonable arrangements for subsequent contact and if the mother was able to behave in a way which supported the change. She is an intelligent professional woman working in the area of human psychology. She should know what she has to do to help S, but I have no doubt she would benefit from support in dealing with her own feelings, and possibly to a lesser extent in knowing how to help S.

'There is an enormous research literature and plenty of professional experience concerning children removed or separated from one or both parents. The children affected usually adjust reasonably well, the more so if they are well adjusted, intelligent, not exposed to previous traumatic separations, are over 5 or 6 years of age, and have some familiarity with their new carers. If there were genuine parenting failures (such as emotional abuse) causing the need to move then the children usually develop far better than if they were not moved.

'In this case there is the very considerable advantage that S would move to a family with whom he has existing loving relationships…and a home with which he is familiar. In S's case the risk of ongoing distress or disturbance is very low.'

77. Section 1(3)(d) requires me to take account of S's age, sex, background and any characteristics of his which the court considers relevant.

78. S is a young boy of rising 12 years of age. He has been the subject of ongoing dispute between his parents for almost the whole of his life. Although in the early years observations of his contact with his father suggested that he was fairly resilient to this parental disharmony, during the course of the last four years that has plainly not been the case. He is a boy who now appears to function well at school and at home but significantly less well in the context of the ongoing parental dispute.

79. Section 1(3)(e) requires me to take account of any harm S has suffered or is at risk of suffering.

80. Following the receipt of Dr W's written reports, on 13th November 2008 I was invited by Miss Ball, on behalf of the father, to direct the trial of a preliminary hearing to determine the issue of whether S had suffered emotional abuse by either of his parents. Although I declined to give that direction, I did take the opportunity to clarify the findings I had made in my judgment of 13th December 2007. This is what I said:

'11. In my judgment, it is clear that when I dealt with this case a year ago I found that S has been emotionally harmed. In my judgment, harm is normally the result of trauma and it is clear that I found that S had been subjected to trauma, the trauma arising from exposure to the mistrust and tension between his parents. I also found that both parents bear responsibility for that mistrust and tension. I found, too, that whereas in the Father's case that was the result of lack of insight and empathy…that in the Mother's case it was more wilful. As for which of these has played the greater part in causing the emotional harm identified, it is not, in my judgment, possible for me to say…'

81. I am satisfied that S has suffered emotional harm. I am also satisfied that if he remains alienated from his father he is at significant risk of suffering the kind of psychosocial harm (behavioural and emotional disturbance, academic under-achievement, relationship difficulties) described Dr W in his evidence and to which I referred earlier in this judgment.

82. In my judgment of 15th June I made a finding that although there have been times when S has been distressed (as, for instance, when Dr W went to visit him at home) that that distress has not caused S harm. I went on to say (paragraph 169) that 'I accept that there remains a risk that future distress could lead to harm, though in the light of Dr W's evidence I am not inclined to assess that risk as being a significant risk.' Since that judgment the evidence suggests that the attempts to arrange contact between S and his half-brothers may have caused him distress. There is no evidence to suggest that that distress has caused him harm. More problematic is the risk that he may suffer emotional harm as a result of transferring residence to his father. Although it is right to note that risk it is equally right to keep in mind Dr W's advice on that issue, to which I referred earlier.

83. Section 1(3)(f) requires me to consider how capable each of these parents is of meeting S's needs.

84. I have expressed concerns about both of these parents. If I were to transfer residence to the father, his lack of insight and empathy could undermine the placement. He would need not simply to listen to S but to be in tune with what S has to say. I am concerned about the father's ability to do that. Failure to address that issue effectively could have adverse consequences for S emotionally and psychologically. Against that, I have found the father to be a caring and compassionate man and it may be that I have to trust him to take positive steps to overcome this difficulty. He would have the support of his wife and his parents, each of whom would need to read the judgments I have given in order to understand the concerns that I have. At the hearing in May 2009 I heard evidence from LH and formed a

favourable impression of her. I have confidence in her ability to give both the father and S the support they would need.

85. Leaving aside my concerns about the father's lack of insight and empathy, I am in no doubt that he and his family would be able to meet S's physical and educational needs. They already enjoy a high standard of living. I have seen parts of their home in videos and photographs. It is clearly a comfortable property. L and N are being privately educated. Although there is no evidence before me as to their progress at school, no-one has suggested that there are any concerns for the welfare of these two younger children either within school or within their home.

86. My concerns about the mother are more profound than my concerns about the father. My greatest concern about the mother is to do with her ability to meet S's emotional needs. In my judgment of 15th June I said

> '173. I do accept that the mother has made some progress since the last hearing. I do accept that she has tried, though I am not wholly convinced that her intent has been to commit to making contact work. It is equally possible that her efforts have been intended to persuade the court that she has tried her best to make contact work.'

87. I also noted in my earlier judgments one of the reasons why the mother has failed to achieve any improvement in the position concerning contact. I said that

> '80. In the same way that attempts at telephone contact have been wholly unsuccessful, so too has been any attempt to communicate by exchange of presents and cards. S will not even send a thank-you note to acknowledge any gift received. The mother has been completely unable to persuade S to engage. It was put to her by Miss Ball that she had lost control of S. She agreed that she had.'

88. In so far as it is important to S's emotional well-being and sense of identity that he should have a meaningful relationship with and respect for his father, his half-brothers and other members of his paternal family, I am satisfied that the mother lacks the capacity to ensure that that need is met. The evidence before me does not suggest that there is any prospect of that situation changing in the foreseeable future. Indeed, given the mother's acceptance that she has lost control of S, I assess the prospects for change as being negligible.

89. Leaving those concerns aside, I accept that the mother has demonstrated an ability to meet S's physical needs to a high standard. If S remains in her care I am satisfied that that will continue. For the most part, the mother has also been able to meet S's educational needs, though I have been critical of her for her failure to involve the father in decisions relating to S's education.

Discussion

90. S's welfare is the court's paramount consideration. An assessment of what is in the best interests of his welfare inevitably involves the balancing of a number of factors. In any particular case the question of what weight should be given to individual factors is largely a matter for the trial judge, so long always as the judge is mindful of the ultimate objective which is the need to establish what is in the child's best interests.

91. The reference to 'balancing a number of factors' is a reminder that there are two sides to the scales. On the one side must be placed those factors which should be counted in favour of maintaining the status quo. On the other side must be placed those factors which should be counted in favour of changing the status quo. Only when the relevant factors have been assigned to their appropriate place in the scales can the court come to a judgment as to where the ultimate balance lies. I therefore begin this part of my judgment by considering what factors should be weighed in the balance and on what side of the scales. In a case with a history as long and complex as this case I accept that there is scope for difference of judicial opinion as to which factors should be placed in the scales and on which side. In the next two paragraphs I set out the factors which appear to me to be the most important though I make it plain that in isolating those factors in this way I do not lose sight of the totality of the evidence before me. I do not rank them in any kind of order.

92. On the side of the scales representing the status quo, I place eight factors:

    (1) The parents had separated before S was born. The mother has at all times been S's primary carer. Even during those years when contact worked well, the longest period of time that S has spent in his father's care is 15 days.

    (2) The evidence demonstrates that S is doing well in every respect both at home and at school. I have found that the mother's physical care of S is of the highest order. Although there is no evidence from S's present school, to which he moved in September, the evidence from his Junior School was that he was doing very well both academically and in sport. Save for her relationship difficulties with the father, which have led her to be (to a greater or lesser extent from time to time) hostile to S enjoying a meaningful relationship with his father, the mother is otherwise bringing up a son who is flourishing.

    (3) S continues to express a strongly held view that he wishes to remain in the care of his mother. That has been his position consistently since direct contact stopped in February 2006. No stone has been left unturned in trying to encourage a change in

S's position. Those efforts have been unsuccessful. He is now rising 12 years of age. His wishes and feelings are entitled to respect.

(4) Direct contact last occurred in February 2006. S has not been to his father's home for almost four years. The closest he has come to having direct contact with his father, at the cross country race in March 2009 (see paragraphs 54 to 69 of my judgment of 15th June 2009), was a complete failure.

(5) Given that there has been no direct contact for almost four years and given, too, the distress which S has shown at some of the steps that have been taken to try to break the contact deadlock, it can reasonably be anticipated that a change of residence would be likely to cause S significant distress. Dr W's opinion is that such distress is likely to be short-lived. However, I accept that it is likely that that distress would lead to management difficulties in effecting the transfer. Those difficulties could conceivably require the use of some degree of force in order to achieve the transfer. It is likely that the distress would continue in the early days following transfer.

(6) A move to live with the father would involve not only a change of primary carer but a significant reduction in the level of contact that S has with members of his maternal family and in all probability the loss of school friends. It would also involve the disruption of a change of school after just one term at his present school.

(7) The father works more than an hour's journey away from his home. It is clear that on weekdays substantial responsibility for caring for S would be delegated to his stepmother and to his paternal grandparents.

(8) I have expressed concerns about the father's lack of insight and empathy. Unless the father is able to make real changes in this area it is likely that this could undermine S's placement with him.

93. On the other side of the scales I place the following seven factors:

(1) I have found that S has already suffered emotional harm. I have accepted evidence from Dr W that S has become alienated from his father. I have also accepted Dr W's evidence that there is a risk that the long-term consequences of alienation and estrangement from his father could be damaging to S's welfare. That damage could include the kind of psychosocial harm (behavioural and emotional disturbance, academic under-achievement, relationship difficulties) described by Dr W in his evidence and to which I referred earlier in this judgment.

(2) Although S has very clearly stated that he does not wish to see his father (and has called him 'a monster' and has said that he 'hates' him) I have accepted evidence

from Dr W that as a result of the alienation not only are those views irrational they are also unreliable. In my judgment of 15th June 2009 I found that video footage clearly showed S to have been relaxed, happy and at times quite animated during his stay with his father in January 2006. I have noted some recent signs that S's expressed wishes and feelings may not genuinely reflect his true wishes and feelings.

(3) I am satisfied that the father is being sincere in the assurances he gives concerning the maintenance of S's relationship with his mother and maternal family in the event that S were to live with him. Given all that the father has faced over the last ten years, one might have expected him to be angry. In fact, as Dr W noted, he is, quite simply, very sad. I have detected no sense of malice or ill-will towards the mother. The father has pursued these proceedings as determinedly as he has because he cares deeply about the welfare of his son. In my judgment the father would be in a better position to maintain the mother's relationship with S than vice versa. I am confident that the father would prioritise the need for S to continue to enjoy a close and loving relationship with his mother.

(4) I am satisfied that the father, together with his wife and parents, would be able to meet S's physical and educational needs to the same standard as that provided hitherto by the mother.

(5) Although in my judgment of 15th June 2009 I accepted that the mother had made some progress since the previous hearing in November 2007, I was not wholly convinced that her intent had been to make contact work. I expressed the opinion that it was equally possible that her efforts had been intended to persuade the court that she had tried to make contact work. I said that my concerns about the mother had 'lessened only slightly since December 2007'. That remains my position.

(6) Previous orders of the court have not been effective in re-establishing direct contact. I do not share Mrs K's optimism that indirect contact may in due course lead to a resumption of direct contact. If the status quo remains and the court proceedings come to an end I consider the prospects for re-establishing any form of contact between S and his father to be remote. In my judgment the overwhelming probability is that S will have no further contact with his paternal family unless, in later adult life, he himself seeks it out.

(7) Following on from that last point, the mother has accepted that she has lost control of S. I am confident that even if the mother were motivated to provide real encouragement to S to see his father it is unlikely at this late stage that that

encouragement would bear fruit. In any event, I am not confident that the mother is genuinely motivated to provide that encouragement.

94. Mrs K is firmly of the view that a transfer of residence to the father would not be in S's best interests. Miss Meyer has very properly reminded me that I should be slow to depart from the recommendation of S's guardian ad litem and should only do so if there are good and sufficient reasons to justify departure. Earlier in this judgment (see paragraphs 14 to 25 above) I reviewed Mrs K's evidence. I noted that on a number of issues I had accepted the evidence of Dr W in preference to Mrs K's evidence. I also expressed concern about the fact that Mrs K appeared to have continued to approach the case on the basis of her own assessment of the mother even though it was plain to her that her assessment was at odds with the assessment set out in my judgment of 13th December 2007. In the light of those criticisms I am in no doubt that it is open to me to depart from Mrs K's recommendation provided I am satisfied on the totality of the evidence before me that it is in S's best interests for me to do so.

95. I referred earlier to Dr W's evidence on the question of transferring residence from mother to father (see paragraphs 26 to 30 above). I have accepted that in advising against transfer of residence Dr W misdirected himself on the test to be applied. I concluded that that error of approach entitled me to discount that part of his evidence. I am satisfied that it is appropriate that I should discount that part of his evidence. I do not presume to speculate on the advice Dr W would have given on this issue had he applied the correct test. However, as will have become clear from this judgment, in several respects Dr W's evidence would seem to provide support to the father's application.

96. As I have stated repeatedly throughout the course of this judgment, the ultimate outcome must be one that is in S's best interests. So I ask myself, would a change of residence be in S's best interests? Would it be a proportionate response to the problems and concerns I have described? Would it best promote S's right to family life? Can it properly be said that that is where the balance falls? In answering those questions I remind myself that there is no professional evidence expressly in favour of transfer and that Mrs K is firmly opposed to it?

97. In my judgment of 25th September I said 'I do not for a moment doubt the very steep hill which this father would need to climb in order to persuade the Court to transfer residence from mother to him'. I confess that as I have re-read my earlier judgments, considered the authorities and read and listened to the submissions of counsel I have come to regard that hill as being much less steep than I had first thought.

98. I am in no doubt that when taken together the combination of S's expressed wishes and the fact that there has been such a long gap since direct contact last took place provide a strong argument against transfer of residence to the father. However, I have found that S has already suffered emotional harm and ultimately it seems to me that the decision comes down to a balancing of the risk of future harm since S is entitled to expect that those responsible for his care (including the court) will seek to protect him from the risk of harm. There is a risk, though not a certainty, of S suffering psychosocial harm by remaining in his mother's care where it is likely that he will continue to harbour distorted views of his father and paternal family with all the consequences that will have for his self-identity and self-esteem. There is also a risk, though not a certainty, of S suffering emotional harm by being removed from the only home he has known, from the care of a mother to whom he is strongly attached and from his maternal family and friends.

99. For me, one of the remarkable features of this case has been the fact that despite her profession and her ability to understand the evidence as to risk of harm, this mother has appeared to be quite insensible to that risk. Although I have been critical of the father for his lack of insight and empathy, the reality is that the mother has been equally guilty of a lack of insight when it comes to the risk of harm to her son as a result of his alienation from his father. If S remains in her care and that risk of harm materialises, I would be concerned that this mother may find it difficult to acknowledge the problem and take appropriate steps to address it. To acknowledge the problem would require her to face up to the truth that she bears some responsibility. I have no doubt that she would find that immensely difficult.

100. On the other hand, if a move to live with his father were to cause S emotional harm there would be concern about the father's lack of insight and empathy and, in consequence, about his ability to help or to recognise the need for help to enable S to overcome the problem.

101. So far as this last part of the balancing act is concerned, it seems to me that in the final analysis it comes down to my assessment of each parent's ability to change. I have already doubted the mother's capacity to change. In my judgment of 15th June 2009 I said that my concerns about the mother had 'lessened only slightly since December 2007'. That remains my position. In contrast, notwithstanding the concerns I have expressed about the father, I have been more positive about his ability to change (see paragraph 84 above) particularly given the support of his wife. Whilst I am in no doubt that both of these parents want what is best for S, in my judgment, holistically, the father is more likely to be able to meet the full range of S's needs than is the mother.

Conclusions

102. The decision for the court is a profoundly anxious and, as I now accept, finely balanced decision. Some may regard a decision to move S as being too bold and inappropriately risky. Mrs K has referred to it as 'an experiment'. Others may regard a decision not to move him as failing to grasp a nettle that has cried out to be grasped for far too long. I have taken time over Christmas and New Year to reflect on my decision. Having reflected I have come to the conclusion that, traumatic though it may be in the short term, it is in the best interests of S's long-term welfare for him now to live with his father. I so order.

103. I will hear further submissions on the arrangements for transfer of S's care. Subject to those submissions, I approve in principle the draft order submitted by Miss Ball though minor changes will be required to reflect the fact that this judgment is being handed down on 4th January 2010 and not, as presupposed in that draft, on 21st December 2009.

His Honour Judge Clifford Bellamy
Designated Family Judge for Warwickshire and Coventry
4th January 2010

30A I formally handed this judgment down earlier today. At the invitation of Miss Meyer, for the mother, I add this word of clarification to that section of my judgment which deals with Dr W's evidence in respect of transfer of residence (paragraphs 26 to 30). In her submissions on 21st December Miss Meyer urged me to approach with caution Miss Ball's criticisms of Dr W's evidence on this issue since those criticisms had not been put to him in cross-examination. Miss Meyer invited me to consider recalling Dr W. I declined to do so. In arriving at the decision not to adjourn to enable Dr W to be recalled I had in mind a number of factors. In particular, I have received a substantial amount of evidence from Dr W, both written and oral, upon which I was satisfied that S has suffered harm and is at risk of future harm (as discussed, for example, at paragraphs 80 and 81 of this judgment). I was satisfied that Dr W's evidence also enabled me to come to a conclusion about the distress that S would be likely to suffer if I ordered that residence be transferred to the father and as to whether that distress was likely to be of a magnitude that would cause him harm (see paragraphs 76 and 82 of this judgment). In deciding whether to adjourn to enable Dr W to

be recalled a balance has to be struck between, on the one hand, my assessment of the need to hear further evidence from him and, on the other, the further delay to this very long-running case that would inevitably have been caused in arranging for that further hearing to take place. I came to the conclusion that the balance came down against the proposed adjournment.