Neutral Citation Number: [2019] EWHC 867 (Fam)

Case No: 2018/0206

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2019

Before :

SIR ANDREW McFARLANE
PRESIDENT OF THE FAMILY DIVISION

- -

Between :

RE: L (A CHILD)

- -
- -

MR NICHOLAS WILKINSON for the **Appellant**
MR STEVEN VEITCH for the **Respondent**
MS ANARKALI MUSGRAVE
(instructed by Duncan Lewis Solicitors) for the **Children's Guardian**

Hearing date: 28 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE PRESIDENT OF THE FAMILY DIVISION

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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.

THE PRESIDENT :

1. On 3 December 2018 HHJ Tolson QC made an order transferring the home of L, a boy aged 8 ½ years, from that of his mother and maternal grandmother in London to that of his father and the father's new partner in Northern Ireland. On 24 January 2019 Williams J granted the mother permission to appeal. The appeal concerns the approach to be taken in a case which, on the judge's finding, falls short of attracting the labels "intractable hostility" or "parental alienation".

Background

2. At the age of two years, following his parents' separation, L went to live with his mother and maternal grandmother and he has had his main home with them since that time. He has, however, been the subject of litigation in the Family Court since 2013 when the mother made the first application, namely an application for L to live with her (notwithstanding that was already the case). A final order was made by District Judge Gibson on 19 May 2016 confirming that L would live with his mother but providing for regular time with his father every third weekend in England and for substantial periods in Northern Ireland during the school holidays. It is of note that during the three years between the original application and the final order it seems that no fewer than 10 judges had heard the case, making a total of 12 orders. However, the final order was made by consent and none of the intervening hearings involved the court hearing any evidence or making any actual findings.

3. In October 2017 L gave an ABE interview to the local police in which he made assertions which, if true, indicated a lack of sufficient sexual boundaries in the father's home.

4. In a judgment given on 18 May 2018, HHJ Tolson dismissed the allegations upon which the mother relied and found "to a very high standard of proof that there has been no sexual or physical abuse by L's father of his son."

5. That finding was not, however, the end of the matter for by the time the case came before HHJ Tolson the father had applied for a change of residence. During the May 2018 hearing the judge had been exposed to both parents and to the maternal grandmother in the course of oral evidence. As a result of what he had observed during that process the judge considered that the father's central submission, namely that his relationship with his son was being undermined by the mother and grandmother, may be made out. Having dismissed the factual allegations, HHJ Tolson moved on in his judgment (at paragraph 30):

> "That is sufficient to dispose of the immediate fact-finding allegation. The question is, where is (father's) wider submission left? My findings clearly dispose of the mother's application to suspend contact in the case but they do not dispose, and I cannot dispose, of the father's application that L should, in future, live with him and not the mother. As advanced during his evidence, he presented it in some ways as a last resort. He feared that we had reached the position where in future the mother would be unable either to permit him a

> normal relationship with L or to promote his relationship with L in any way.
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> On the evidence I have heard, I am left with grave concerns in that respect but it would be wrong to reach any final conclusion on this evidence."

6. The judge therefore adjourned the father's application and directed that L should be made a party to the proceedings with a Children's Guardian appointed by CAFCASS acting for him.

7. Before parting from the case the judge made the following observation for the benefit of the mother and maternal grandmother:

> "Perhaps also inevitably, after a judgment of this kind, the question is, how will the mother and, in this case, the maternal grandmother, react to it? Is it possible from this point to move into what I shall describe as "a more broad and sunlit upland" in which L's time with his father in England and, more especially, in Northern Ireland passes peacefully and in L's best interests without any further allegations of this kind being made; or will the immediate future of this case see more of the same – more of the dreadful past history of litigation which we have had now for far too many years?"

The welfare judgment

8. HHJ Tolson heard oral evidence over the course of two days, with oral closing submissions on the third day. Judgment was reserved and handed-down on 3 December 2018. Both parents, the grandmother and L's Guardian gave evidence.

9. In a report dated 10 October 2018, circulated 10 working days before the hearing, the Guardian observed that a change of L's primary home would have a profound emotional impact upon him. He had been in his mother's care since birth and had a strong attachment with his maternal grandmother. The adjustment to living in a new city, a new home and a new school were bound to put pressure on an eight year old boy. The Guardian prioritised L's primary need as being that of feeling a sense of stability at that time. She expressed concern that both parents did not appear to be able to focus on L's well-being and the need to prioritise a positive view of co-parenting. Her conclusion was that a change of residence would be too damaging for him right now. She therefore recommended that L should remain living with his mother.

10. The closing paragraph of the Guardian's report however included the following statement:

> "…I have confirmed in this report that L is safe in the care of (father). (Mother and grandmother) must accept this. They must also accept that they have created a situation where L returns to their care and shares aspects of his spending time that are not necessarily true and they facilitate a manipulation of or

> put words into L's mouth. However, if (mother) cannot accept this at the next hearing then I would be inclined to consider more greatly that a change of residence is necessary."

11. Insofar as may be necessary, I shall refer to specific aspects of the evidence of the parties and Guardian when considering the specific points made on appeal.

12. In his judgment HHJ Tolson indicated that there were very similar themes in the reports written by various CAFCASS officers over the years during the proceedings. The first CAFCASS report identified the main issue in the case as arising from the parents' somewhat troubled relationship as co-parents and the importance of each of them protecting L from their adult issues during his childhood. Three years later the same CAFCASS officer referred to research on effects of "persistent entrenched parental conflict played out by way of the courts". The judge observed that the CAFCASS officer went further and suggested that L "could be developing a view that his mother is all good and his father is all bad".

13. Court activity in the second half of 2017 related to applications by the father to vary the child arrangements order, enforce it with respect to an imminent holiday and for a non-molestation order against the maternal grandmother with respect to conduct at contact handovers. Concern was expressed by one judge as to "the extent to which external agencies (police, social services and school) appear to be unnecessarily involved by the mother". L's ABE interview followed soon after and the matter was brought back to court on the mother's application to suspend contact.

14. Judge Tolson noted that a new CAFCASS officer wrote a letter to the court in July 2017 recording the following:

> "Significant concerns that L is caught up in a very acrimonious dispute between his parents and that inevitably he must be picking up on this. He must be absolutely torn apart that his loyalties are pulled one way and then the other by the very people who should be ensuring that he has a secure, loving and stable environment. I have no doubt that the emotional pressure on L can be nothing short of enormous and only by his parents achieving a full, lasting resolution can this little boy hope to enjoy a normal, happy childhood."

15. Six months later yet another CAFCASS officer records that matters had now worsened for L considerably so that:

> "L described his mother entirely positively and his father entirely negatively. L's responses to his father during supervised contact appear to show little concern for his feelings and he required no prompting to say that he wanted no contact with his father."

16. The observations of Ms Beer, a CAFCASS officer who is new to the case and who was appointed as L's Guardian for the final hearing before HHJ Tolson, are of interest. The judge summarised matters as follows:

> "Ms Beer's report draws a striking contrast between L's comments about his father when in the presence of the his mother – these are entirely negative – and the reality of L's relationship with his father. The contrast is between a child who is prepared openly and apparently without prompting to blame his father for abusing him; and this description:
>
> > "I observed L and his father to have a highly positive, close and fun relationship with one another. It was entirely obvious once L was able to relax and have fun that he feels comfortable in the presence of his father and he presented as a very happy, excited and joyous child. I found there to be no concerns with the quality of their relationship or with the care and attention the father provided L."

17. Ms Beer concluded that L was being emotionally harmed from the parental conflict and she went so far as to say that this now constituted "emotional abuse".

18. A key factor during the oral hearing was that, at the conclusion of the evidence of the parents and grandmother, L's Guardian announced that she had changed her recommendation to one that favoured L now moving to live with his father in Northern Ireland.

19. In his judgment HHJ Tolson made a number of conclusions with respect to disputed factual matters. It is important at all stages, in my view, to bear in mind that this was a part-heard hearing. The judge had already been exposed to each of the three key family members at length during the May hearing. In particular, during the first hearing the judge plainly formed an adverse view of the maternal grandmother. During his May judgment he said:

> "…(the father) had openly taken a video of (maternal grandmother) on an occasion when the father was due to collect L from the grandmother outside the school gates. It is true that the grandmother can be seen behaving entirely inappropriately and in a hostile manner towards the father during the course of this video. When the grandmother gave evidence before me she accepted that on this occasion she had behaved inappropriately. She also told me that she was someone who was hot-tempered. She also expressed the view that in her opinion she was dealing with an irresponsible father."

20. In the October hearing the grandmother told the judge that she and the mother had learned from what the Guardian had said and, indeed, from the judge's earlier judgment and she accepted that she and her daughter needed to change their approach.

21. In his December conclusions the judge readily accepted the Guardian's description of L being unable to speak positively about his father when in the maternal home. Whilst it was not possible to identify precisely how and why this might be, the Judge indicated some parameters:

> "I am firstly concerned about the actions of the grandmother. She described herself as a hot-tempered woman when giving evidence before me on the last occasion. The video of her actions on one handover confirm her description. She believed the father to be irresponsible. She will have left L in no doubt about these views. I find she will have described him as a "bad man" on many occasions in the past, as the father contends. The grandmother presents very differently from mother. When giving evidence, the impression is that the mother is a relatively passive individual. The grandmother is not. There may well be a dynamic in play in the family home where to this point the grandmother has set the tone. L spends substantial amounts of time in the grandmother's care. I find that the grandmother's approach heavily influences L's present words and actions when in his mother's home."

22. The judge went on to hold that the mother contributed to the situation so that L was not allowed the emotional space to express positive feelings about his father and, in contrast, received emotional reward for expressing negative views.

23. After further description of the substantial emotional and psychological impact on a child who is being emotionally "torn apart" in this way the judge moved on:

> "The reality is, however, that it is the mother and grandmother who have created this situation. The father has not done so. He has, largely, not been in a position to influence L against his mother and there is no evidence that he has done so. He has not behaved ideally on occasions. The feel of the case is that the father fights his ground hard and does not give it up easily."

24. One aspect of the evidence before HHJ Tolson related to an incident at an airport when L was handed over by his mother to his father for holiday contact. Contrary to the normal arrangement, the mother had not included L's passport in the boy's luggage. After they had parted, and after he was "airside", the father checked the luggage and found the passport was missing. He summoned the police and, as a result of their intervention, the mother was located and produced the passport, which she had had with her at the airport, and it was transferred to the father once he had told the mother of his holiday plans.

25. The baseline agreement, recorded in a recital to the May 2016 child arrangements order, required the father to give the mother notice of his plans should he wish to take L abroad on holiday. The father had deliberately not done so because as the judge found, he feared that the mother would interfere by alerting the Northern Ireland police to his proposed exit from the country at a time when the NI police were still apparently investigating the original allegations of sexual impropriety.

26. The judge's conclusion in relation to this episode were as follows:

> "The whole incident demonstrates how easy it is for parents at war to damage a child. In context I can understand, but not condone, the father's actions. He believes he has to fight his

> corner hard. There is a considerable body of evidence to suggest that he is correct in this. The mother takes advantage of any chink in the father's armour or opportunity to be difficult (this is the feel for example of the "handover video" referred to in my previous judgment). I find that she knew L would be travelling abroad on holiday but took the opportunity not to handover the passport when she believed it would be required. This incident happened after my findings of fact and when the mother could have been under no illusion that I was looking for a more positive response from her. The actions of the mother and grandmother have a slightly harder "edge" to them because they are both health professionals and should know better."

27. The judge went on to find that the mother and grandmother's attitude and approach had not significantly changed since the time of his earlier judgment, save that there had been some movement following the Guardian's report some few days before the hearing.

28. The judge expressed his conclusions as follows:

> "It is in that light that I must view the evidence given by the mother and the grandmother. I am afraid that I do not accept that the grandmother has performed what in the light of her evidence to me at the fact-finding hearing would be a U-turn. She remains a woman with a short temper who has a very poor view of the father. She will have called him a "bad man" (in Cantonese) in L's presence on many occasions as the father alleges. Her attitude will, in my judgment, continue to be evident to L. He will continue to spend much time in the care of the grandmother. It is more difficult to guage the mother's approach in future. She was reflective when giving evidence. On the other hand she seems a passive individual. I do not believe she really wants to change L's view of his father. Moreover, I do not think she will have the strength of character to do so. If I look to the future, I am afraid I see more of the past.
>
> I add that it would now I believe take a real effort to change L's approach to his father when in the care of the mother and grandmother. I do not believe they are up to this. Importantly, it is not just a question of L's attitude to his father. At present, I do not believe that L is wedded to the idea that he is an abused child: I have accepted the father's evidence that L told him he had been put up to say things to the police. There is, however, a danger that L's repetition of allegations to his maternal family might become a belief system. In this case, I would not put the danger at the extreme end of the scale, but it exists."

29. The judge went on to express himself satisfied at the circumstances in the father's home. The judge had encountered the father's partner who gave evidence during the fact-finding hearing. She, too, is a health professional, and a person whom the judge found to be "impressive". Whilst the judge sought more clarity around L's schooling, he accepted that the father would find a perfectly appropriate state school for L. L currently attends private school in England. Most importantly, the judge concluded that by living with his father L would have sufficient "emotional space" to maintain a relationship with both parents.

30. The judge then conducted an analysis tethered to the Children Act 1989 s 1 welfare check list. In particular the judge held that maintaining the placement with his mother and grandmother would not meet L's emotional needs and "will cause him emotional harm in the future". He concluded that the inevitable emotional harm that would follow a move to Northern Ireland was "harm which is worth incurring" given the absence of substantial change by the mother and grandmother. He therefore concluded that the balance of advantage lay in a move to Northern Ireland.

31. The mother promptly indicated an intention to appeal and the judge's order has been stayed since that time.

The appeal

32. The Grounds of Appeal were not drafted by Mr Nicholas Wilkinson. Further to those Grounds of Appeal, Mr Wilkinson, counsel for the mother in front of the judge in the welfare hearing and on appeal presented a wide-ranging case in line with the Grounds of Appeal in which very many detailed points were made in criticism of the process in the lower court and the judge's judgment. The appeal process has been significantly assisted by Mr Justice Williams who, when granting permission to appeal, identified three broad themes in the mother's case as follows:

    a) There is arguably a procedural irregularity in respect of the failure to ascertain L's wishes and feelings in respect of who he was to live with and in which country;

    b) Arguably the decision to transfer residence was premature;

    c) The judge's conclusions in respect of the balance of harm are arguably wrong on insufficiently evidenced.

    I am grateful to counsel who have focussed their submissions within the structure established by Williams J.

(a) Wishes and feelings

33. In preparation for her report the Guardian had interviewed L and his mother separately at the CAFCASS offices and, on another day, she observed L and his father together. I have already summarised the Guardian's observation as to L's stated response about his father, which is wholly negative when with his mother, and, in contrast, his behaviour, which was entirely positive when father and son were seen together. The Guardian did not directly ask L about the proposal that he should move to live with his father in Northern Ireland. In oral evidence, in response to a question

from the judge, the Guardian explained that, although she had begun to investigate wishes and feelings using worksheets with L, she had not directly asked him about a move to Northern Ireland because she considered that it would be harmful to do so. Questions were put to the Guardian in support of the Mother's case that there should be a second report and an application for an adjournment for L's wishes and feelings to be directly sought until one was made in closing submissions.

34. Relying upon the House of Lords decision in *Re: D(a child)* [2006] UKHL 51 and the Supreme Court decision in *Re: D(a child)* [2016] UKSC 34, Mr Wilkinson submits that there is a procedural requirement for the court, in every case, to hear what a child has to say and for the child to participate appropriately in the process. Mr Wilkinson submits that the Guardian's failure to seek L's wishes and feelings on the central issue represents a fundamental failure in the decision-making process and renders the judge's order unsafe. Although the judge observed that, had the question been asked, L's reply would have been "obvious", it is submitted that the judge was wrong not to assess why L would say that and why he would be so adamant that he did not wish to live with his father in Northern Ireland.

35. Separately Mr Wilkinson is critical of the Guardian's failure to observe any contact between L and the mother. This failure, in his submission, compromised the Guardian's ability to make any observation, and the Judge's ability to draw proper conclusions, as to L's presentation when with each of his parents and there being a tense environment in the maternal home.

Whilst he accepted that is was neither necessary nor appropriate to ask every child in every case, given L's age and circumstances, it was necessary in this case. Not to have engaged L directly on the central point has resulted in the child being "completely overlooked". The mother's case is that the failure to directly engage L in expressing wishes and feelings on the central point in the case, is fundamental and that, on this ground alone, the appeal should be allowed and the case remitted for a second report to be obtained which does adequately meet the child's right to participation in the process.

36. The appeal is opposed by the father and the Children's Guardian.

37. On behalf of the father, Mr Steven Veitch, who also appeared below, stressed that the welfare check-list required the court to have regard to the "ascertainable" wishes of a child not his "expressed" wishes. The Guardian had undertaken some work with L and, as a result of her assessment, she held back from asking him the central question because she considered that to do so might cause him harm.

38. On behalf of the Children's Guardian, Ms Musgrave submitted that the mother's assertion that L could express wishes and feelings in a clear and meaningful way was, unfortunately, not justified in the present case. The Guardian was justified in her professional opinion not to risk harm to the child by asking a question in the present circumstances. Equally, the judge was entitled to rely upon the Guardian in that regard.

(b) The decision to transfer residence was premature.

39. In submitting that the judge's decision to change residence was premature, Mr Wilkinson relied upon a line of cases including the well-known decision of *Re: A (Residence Order)* [2010] 1FLR 1083: where, at paragraph 21, Coleridge J stated:

> "The remedy of transferring residence from one parent to the non-resident parent is an essential weapon or tool in these cases as a weapon or tool of resort. It may indeed be a case of putting a gun to a parent's head to force her or him to rethink, as counsel described it, but that, it seems to me, is a legitimate approach and remedy. However, whereas here there has been an apparent volte-face by the mother and a concession that now contact should happen, combined with an acceptance by all that the mother's care was in all other respects adequate, the remedy of last resort needs to be deployed with great care and any apparent change of heart, seems to me, fully tested."

40. The other cases relied upon by Mr Wilkinson are:

Re: C (Residence) [2007] EWHC 192 (Fam)

Re: V (a child) [2013] EWCA Civ 1649

Re: R (A Child: Appeal: Termination of Contact) [2019] EWHC 132 (Fam)

41. Mr Wilkinson makes a number of short, but nevertheless strong, submissions in this regard:

i) The case, and in particular the Guardian's report, turned on whether the mother could make sufficient change. Given that the Guardian's report was only received 10 clear working days before the hearing, any assessment of change following that report was premature;

ii) In contrast to the "last resort" cases, this is not a case of deliberate manipulation;

iii) Similarly, there was no finding of intractable hostility to contact.

In short, the mother's case is that it was certainly premature to hold that the welfare balance had tipped in favour of the father at the November hearing.

42. As part of the appeal in relation to prematurity, Mr Wilkinson listed no fewer than 11 steps that the court might have taken short of making an immediate order for transfer of residence, for example by adjourning the case, or making a suspended transfer order to allow the mother further time to demonstrate the capacity to change.

43. On behalf of the father, Mr Veitch mounted a head-on challenge to Mr Wilkinson's reliance upon the "last resort" line of cases on the basis that those authorities relied upon or focussed on a failure to provide contact whereas, in the present case, the judge concluded that the child was being harmed and would be harmed in the maternal home. Consequently, Mr Veitch submits that the judge was correct in applying an ordinary welfare test and, in particular, balancing the harm that would be

experienced in the mother's home with the harm arising from a move to Northern Ireland.

44. For the Guardian, Ms Musgrave pointed to the judge's earlier findings, the clear message in his May judgment and the finding that the mother had made no change at all, at least prior to the publication of the Guardian's report. In this the judge was entitled to rely upon the airport incident in support of that finding.

45. In relation to the mother's case on prematurity, and the suggestion that the court should have adjourned the matter, commissioned further reports or made a suspended order, Ms Musgrave submits that:

> "After six years of litigation it can fairly be said that if the Appellant was minded to change herself through the process of litigation then that would have taken place before the final hearing. There were, in practice, no realistic options left to the court."

(c) Balance of harm

46. The mother's overall case is that the evidence was simply insufficient to support the Judge's finding as to the balance of harm and, insofar as harm was identified the finding was based on speculation and general experience, rather than upon an assessment of the child in this case.

47. Further, given the finding that L was able to express positive feelings to the father when they were together, and had a good and close relationship with him, it is questionable that the serious harm identified by the Judge was not made out on the evidence.

48. Looking at the balance the other way, it is submitted that evidence of negativity and harm in the maternal home amounted to speculation, particularly as the Guardian had not seen L in his home environment.

49. Mr Wilkinson further challenges the judge's findings which place the major part of the blame for the family conflict upon the mother and grandmother, rather than taking a more rounded view given the criticisms that can be made as to the father's personality and his responsibility for the parental conflict.

50. In response, although they did not put the submission in precisely these terms, Mr Veitch and Ms Musgrave's case is that the mother's appeal on the question of balance significantly over-complicates the reality of the case by raising all manner of factors when it is clear that the whole case turned on the emotional harm issue and the judge's conclusion that if things stayed as they were then L would suffer emotional harm which, over time would become entrenched. That was, they submit, the deciding issue, indeed the only issue of importance, in the case and on that the judge was entitled to hold that the balance tipped in favour of a move to the father.

(d) (Process)

51. In addition to the major themes identified by Williams J, Mr Wilkinson raised a number of alleged procedural deficiencies in the course of his submissions. The principal deficiency relied upon was the manner in which the Guardian's change of recommendation at the conclusion of the other oral evidence was dealt with. Prior to that point, submits Mr Wilkinson, the mother's case had been conducted upon the basis that the Guardian was in her favour. He did not therefore cross-examine the father in detail about the planned move to Northern Ireland (for example around schooling). All the oral evidence, he told me, was adduced on the basis that L was going to be remaining with the mother as recommended by the Guardian. In any event, when the change of view was made known to the parties, Mr Wilkinson submits that there was insufficient time for the mother to re-focus her case to meet the changed situation.

52. In this regard, however, Mr Wilkinson accepts that his application for an adjournment was made after the Guardian's evidence, in his closing submission and, as the transcript shows, the Judge considered that he had afforded counsel additional time to cross-examine the Guardian given the change of advice, although it was not possible to ascertain from the transcripts how much time had been provided in addition to the luncheon adjournment. Mr Wilkinson told me, and I readily accept, that in closing submissions he did apply for a fresh report as to L's wishes and feelings, to which the judge responded that he was not minded to adjourn and that a choice had to be made between the two options.

Discussion

Change of residence: only as a last resort?

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.

55. The second observation to make with regard to *Re: A* is to refer to the context of that case. The sole issue before the court related to the "obdurate" character of the mother who had consistently demonstrated opposition to any contact taking place. The decision of the Court of Appeal demonstrates that the risks to the child of changing residence, were not, at that stage, seen to outweigh the detriment to the child's welfare arising from the mother's difficulty in complying with contact arrangements. In contrast to the present case, there was no finding that the child was suffering emotional harm in the maternal household.

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. Mr Wilkinson submits that the mother in this appeal is in a similar position to the mother in *Re: C*. The mother and, importantly, the maternal grandmother in the present case were given the chance that Sumner J gave to the mother in *Re: C* by HHJ Tolson in his judgment of May. On the judge's findings, the situation in the maternal home did not, however, materially change. The judge found, in contrast to *Re: C*, not only that harm had happened in the past, but that it was continuing to be experienced by the child and would continue in the future. I therefore do not regard the approach adopted by HHJ Tolson as being in any way at odds with that described by Sumner J in *Re: C*.

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. 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*.

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. 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.

Wishes and feelings

60. CA 1989 s 1(4)(a) requires the court to have regard to "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)".

61. Whilst it is a fundamental principle, applicable to every case, that the child who is the subject of the proceedings shall be heard, the manner and the degree to which the child is heard will vary from case to case. Further, it is important to bear in mind that each element in the welfare checklist is subject to the overarching requirement in CA 1989, s 1(1) that the welfare of the child must be the court's paramount consideration.

62. In the present case, L is represented by a professional CAFCASS guardian, a solicitor and experienced counsel. To that extent the voice of those acting on L's behalf is certainly "heard" within the proceedings.

63. The duties of the Children's Guardian, appointed under Family Procedure Rules 2010, r 16.4, are set out in PD 16A paragraphs 7.6 and 7.7:

> "7.6 It is the duty of a Children's Guardian fairly and competently to conduct proceedings on behalf of the child. The Children's Guardian must have no interest in the proceedings adverse to that of the child and all steps and decisions the Children's Guardian takes in the proceedings must be taken for the benefit of the child.
>
> 7.7 The Children's Guardian who is an officer of the service or a Welsh Family Proceedings Officer has, in addition, the duties set out in Part 3 of this Practice Direction and must exercise those duties as set out in that Part."

64. The reference to duties under Part 3 of PD 16A refers to the duties of a Children's Guardian appointed under r 16.13, namely one appointed in specified "public law" proceedings or adoption proceedings. By PD 12A, para. 6.6(b) the Children's Guardian must advise the court on "the wishes of the child in respect of any matter relevant to the proceedings…".

65. There is, therefore, an express duty placed upon a guardian in a case such as this to report on the child's wishes. However, in my view, that duty must be tempered by the overarching requirement to afford paramount consideration to the child's welfare. In the present case, the Guardian began direct work with L which would normally lead to explicit discussion of the central issue before the court. However, during the course of that work she saw first-hand that which her predecessors had also apprehended, namely that this young boy was exquisitely torn between a wholly negative presentation of his father in the maternal home which was in total contradiction to the reality of his relationship with his father when they were seen together. The Guardian considered that any expression of wishes in the current circumstances would be bound to favour the mother. More importantly, she considered that to ask the question and to put this eight year old boy on the spot of

expressing a choice would itself be emotionally harmful. She therefore made the positive decision not to ask him the question. Her decision was, certainly by implication, supported by the solicitors and counsel instructed on L's behalf, who now defend that decision before this court, and her decision was accepted by the very experienced family judge. In those circumstances, it is difficult, indeed it is not possible, for the mother to argue on appeal that the exercise conducted by the Guardian was fatally flawed and that, as a result, the process before the judge should be set aside and a fresh exercise undertaken to canvass L's wishes and feelings.

66. Further, I accept the submission of Mr Veitch and Ms Musgrave which focusses on the word "ascertainable". In the professional opinion of the Guardian, it was not possible to ascertain L's wishes and feelings on the central issue without causing him emotional harm. It was also the view of the Guardian that L's position was such that any expression of wishes would be unlikely to represent his true wishes and feelings, and, to that extent it would not be possible to ascertain the child's genuine view.

67. In any event, by the close of submissions, Mr Wilkinson had trimmed back the mother's case by accepting that the CAFCASS officer was not required to put the direct question to L: "Where do you want to live?". There was, he argued, however, a need for a more subtle process to identify how the child felt about a move to Northern Ireland.

68. For the reasons that I have given, I do not consider that there was an error, whether fundamental or not, in the approach of the Guardian and the court to the issue of L's wishes and feelings. Actions speak louder than words. In that regard the Guardian's observation of this heavily conflicted young boy, who has a good relationship with both of his parents, yet can only speak negatively of his father when in the care of his mother and maternal grandmother, speaks volumes and, as the judgment demonstrates, his voice, in that regard, was heard loud and clear by the Judge.

Balance and prematurity of the decision

69. The central submission in the mother's appeal is based upon the twin assertions firstly, that the judge was in error in conducting the welfare balance and, secondly, that he acted prematurely in directing a move to Northern Ireland at this stage. In presenting the mother's appeal, Mr Wilkinson was careful to limit and focus his submissions so that contemplation of the need for change in the maternal home was limited:

    a) to the present application;

    b) to the period of 10 working days following receipt of the CAFCASS report; and

    c) to the mother alone.

    If consideration of the issues in the case is limited in that way, then Mr Wilkinson's submissions would hold weight. The mother will have had only a limited time to change. Oral evidence demonstrated her acceptance that she had previously been in error and was willing to take advice and, indeed, that she had engaged on a parenting course. If the parameters of the case were as tightly confined as Mr Wilkinson's

submission, then the judge's decision would, indeed, be seen as premature. But, as the judge's judgment plainly demonstrates, there was much more to the case then the narrow, constricted perspective that the mother seeks to present in arguing the present appeal.

70. Firstly, concern about the impact on L of being a child at the centre of parental conflict was identified as long ago as 2013. It has been the theme of the CAFCASS reports in the case at every stage over the years. This is not a new concern generated for the first time in the father's recent application for a change of residence. Ms Musgrave was right to point to the fact that this case has been going on for six years. Further, the May hearing before HHJ Tolson was the first part of a part-heard process. The judge could not have been more explicit in delivering a wake-up call to the mother and the grandmother in his May judgment. Any reading of that judgment makes clear that the judge was so concerned at L's position as to give active consideration to the father's change of residence application. Further, whilst it is correct that any parental conflict requires more than one participant, the judge's findings make plain that he regarded the actions of the mother, and more particularly the grandmother, to be the principal source of conflict and the principal cause of harm to the L.

71. The manner in which Mr Wilkinson sought to close down the parameters of the case in presenting the mother's appeal was most striking with regard to the maternal grandmother. If she was mentioned in his submissions, it was only in passing. For the judge, however, the personality and role of the maternal grandmother in L's life was, if anything, more significant in terms of emotional harm to the boy than that of the mother. As the extracts from the judgment to which I have made reference demonstrate, the judge identified the grandmother's behaviour as harmful. He also concluded that, despite the earlier judgment, the grandmother had been unable to undertake a U-turn or, indeed, demonstrate any real change at all. These were crucial findings. The role of the maternal grandmother in the maternal home, and in L's experience of relationships in the family, was central to the judge's analysis. It is, therefore, wholly artificial to challenge the welfare balance undertaken by the judge in a manner that excludes consideration of the grandmother's role.

72. Thirdly, although the role of the CAFCASS Guardian was important, and the judge agreed with her final recommendation, both the May and November judgments demonstrate that the analysis leading to the conclusion that L must move to Northern Ireland was the judge's and the judge's alone. Having formed a preliminary view that raised the real prospect of a move to Northern Ireland in May, the judge made it plain to the mother and grandmother that he expected to see a change in the following months. In this regard, the airport incident was of importance. The judge's finding as to what took place, and, in particular, the motivation of the mother and the grandmother in acting as they did, is not directly challenged on appeal, nor could it be. The judge was entitled to rely upon that incident in support of the wider finding that, in reality, nothing had or would change in emotional terms for L if he were to remain living in the maternal household.

73. In terms of the welfare balance, in circumstances where the two households on offer were broadly similar, with each meeting L's needs, the case turned on one issue, namely that of emotional harm. The judge concluded that the level of emotional harm and the potential for future harm were such that, in the absence of any clear indicator

of change, a move of home was justified. The key finding of emotional harm is not challenged in the appeal. Indeed, the mother told the Judge "I got it wrong – I need advice". It may be that the decision to move L was finely balanced, but, as is well known, finely balanced welfare decisions are not susceptible to a successful appeal. It is, in my view, not possible to say that the Judge was "wrong" in fixing the balance as he did in this case.

74. Finally, the mother's complaints about process are insufficient to amount to a finding that the process was so flawed as to establish a breach of the right to a fair trial. The change in the Guardian's recommendation at the close of the lay parties' oral evidence undoubtedly placed the mother's team in an unwelcome and difficult professional position. Given the decision to run mother's case on the basis that L was likely to remain living with her, in the light of the Guardian's report, the forensic difficulties were enhanced. No application was made to recall the father. Although it is unclear as to how much time was given, further time was stated to have been given by the judge for the mother's cross-examination of the Guardian. Difficult though the circumstances were, there is no real ground for criticising the trial process, or for challenging the judge's decision to refuse the adjournment application that was made at the end of the hearing.

Conclusion

75. Despite understanding the magnitude of this decision for L, and for the mother, for the reasons that I have now given none of the challenges made on the mother's behalf to the trial process and to the judge's judgment have been sustained. In consequence, this appeal must be dismissed and arrangements must now be made for L to move to Northern Ireland.