Neutral Citation Number: [2023] EWHC 345 (Fam)

Case No: FA-2022-00227

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2023

Before :

SIR ANDREW McFARLANE (PRESIDENT OF THE FAMILY DIVISION)

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Re C ('Parental Alienation'; Instruction of Expert)

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Ms Joy Brereton KC and Mr Christopher Barnes (instructed by **Beck Fitzgerald**) for the **Mother**
Charles Hale KC and Mr Frankie Shama (instructed by **Thomson Snell & Passmore)** for the **Father**
Mr Andrew Bagchi KC Ms Jessica Lee and Mr Luke Eaton (instructed by **TV Edwards LLP) for the Expert**
Ms Barbara Mills KC and Ms Charlotte Baker (instructed by **Dawson Cornwell LLP**) for the **ACP UK**
Mr Martin Kingerley KC and Mr Ben Mansfield (instructed by **Pepperells Solicitors**) for the **r16.4 Guardian**

Hearing date: 6th December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21st February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR ANDREW MCFARLANE P.

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.

Sir Andrew McFarlane P:

1. This is an appeal against an order, made by HH Judge Lindsay Davies on 15 June 2022, refusing an applicant mother permission, in the course of extended private law children proceedings, to reopen findings of fact that had been made in a judgment handed down on 24 June 2021. The appeal also challenges the judge's decisions, firstly, to impose a restriction on further applications under Children Act 1989, s 91(14) ['CA 1989'] and, secondly, to order the mother to pay costs.

2. Although the substance of the appeal relates to the fact finding undertaken in this particular case, the central issue raised is of more general importance and relates to the instruction of experts in proceedings where there is an allegation of parental alienation. The primary assertion being made in support of the appeal is that, if the case had been approached properly, the expert who was instructed in these proceedings should never have been instructed as they were unqualified to give expert evidence on the issues raised in their instructions.

3. In addition to the parties to the proceedings, the court has been assisted by written and oral submissions made by leading counsel on behalf of the instructed expert ['Ms A'], and also by leading counsel instructed on behalf of the Association of Clinical Psychologists- UK ['ACP']. The ACP is not a regulatory body. The relevant regulatory body is the Health and Care Professions Council ['HCPC']. The HCPC declined to intervene in this appeal.

The Background

4. Although it will be of central importance to the parties, the factual background has not been at the forefront of the appeal and it is not necessary to explain the lengthy course of this litigation in any great detail.

5. The proceedings relate to two children who are now aged 13 and 11 years old. Proceedings under CA 1989 were commenced almost immediately following parental separation in 2014. Final orders were made in 2015 authorising the children's mother to relocate within England and Wales on the basis that the children would live with her, but spend time with their father.

6. Contact between the children and their father broke down in late 2018 leading to cross applications to suspend contact and to enforce the earlier order. The court process was suspended for a time to allow for therapy and conciliation. The attempt at a consensual outcome was not successful and the proceedings were reactivated in December 2019. The children were joined as parties and a children's guardian was appointed.

7. In an order, dated 25 March 2020, making extensive provision for interim contact and case management, a recorder made the following provision for the instruction of an expert:

> '**Expert evidence**
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> 24. The father made an application pursuant to Part 25 Family Proceedings Rules 2010 for the instruction of a Child and Adolescent Psychiatrist or child psychologist.

> 25. The mother and the Guardian agreed that the instruction of an expert was necessary.
>
> 26. The Court considers that it is necessary to instruct an expert to consider the reasons and causes of [the older child's] unwillingness to see or speak to her father and [the younger child's] past unwillingness to do [so] and assess their emotional needs to inform the Court as to the appropriate child arrangements that should be put in place for each child. Without this expert evidence there will be a lacuna in the evidence which will prevent the Court from reaching decisions in the children's best interests.
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> 27. The discipline of the expert shall be either a child and adolescent psychiatrist or a psychologist. Permission to the expert to see both children.
>
> 28. Dr [A], psychologist, shall be jointly instructed on behalf of all parties to undertake an assessment of the family.'

This court has been told that the identity of the expert, Ms A, was only confirmed and agreed after the hearing and that paragraph 28, which mistakenly refers to Ms A as 'Dr A', was therefore added to reflect that development. It seems clear that the process adopted by the court at this time lacked necessary rigour. The order did not specify the required professional discipline of the expert as between psychology and psychiatry. It does not seem that Ms A's CV was ever submitted to the court and the court order, presumably agreed between the parties' legal advisers, erroneously described Ms A as 'Dr A'.

8. Ms A undertook her work in the summer of 2020. Her report, which was filed on 12 October 2020, was plainly influential. She concluded that the children had been alienated against their father by their mother. She considered that the eldest child showed signs of being a severely alienated child and that her younger sibling was on the same trajectory.

9. At a hearing on 16 October, HHJ Davies ordered the removal of the children from their mother's care and directed that there should be no contact between mother and children pending a fuller hearing on 29 and 30 October. On 30 October, having heard oral evidence from Ms A, the judge ordered that the eldest child should weekly-board at her school and have her home base with her aunt and the youngest child should live with the father. Limited contact was afforded to the mother pending the final hearing.

10. The final hearing in February 2021 had to be adjourned after two days due to the unfortunate illness of the children's guardian. It concluded in June 2021. In a full and closely reasoned judgment, delivered on 24 June, the judge, firstly, gave her own analysis of the extensive oral evidence given by the two parents. The judge concluded that the mother's evidence was neither reliable nor credible, in contrast to that of the father, and the judge made a number of significant adverse findings about the mother's behaviour in the context of potential alienation. Secondly, the judge weighed up, and ultimately accepted, Ms A's conclusion that both children had been influenced and encouraged by their mother to think very negatively of their father and that this had caused significant emotional damage to them. Thirdly, the judge accepted the children's guardian's own separate analysis (in part based on the CAFCASS Alienation Tool) and the guardian's conclusion that, without significant change in the children's negative

view of their father, it would become entrenched causing long-term emotional harm. It is of particular note that the judge stated that she had found the guardian's independent analysis 'compelling'. She, therefore, made orders for both children to live with their father and, after a period of suspension to allow for settling in, contact with their mother was to develop in a structured manner.

11. The mother applied for permission to appeal the fact-finding part of the judgment. Permission to appeal was refused by Peel J on 1 September on the basis that the application was 'totally without merit'. It is of note that one of the proposed grounds of appeal was:

> 'The judge was wrong in relying upon the report of [Ms A] whom holds herself out as a "psychologist" and gives diagnoses despite not being qualified to do so; the judge was wrong to give any weight to her report given that she does not meet the criteria in Part 25 FPR. In this regard the judge completely failed to deal with the criticisms made on the mother's behalf of [Ms A], and was wrong in the circumstances to accept the expertise and the recommendations of [Ms A].'

12. In his ruling Peel J said this of the proposed challenge to the instruction of Ms A:

> "The complaints made by the mother about the expert are not sustainable. She was jointly appointed in March 2020 and no appeal against her appointment was made. She produced reports and gave oral evidence, which was challenged. Her expertise was firmly placed in the arena by the mother. It was open to the judge to accept her evidence and to find that she was an impressive witness. Further, her evidence was only one part of the totality of the evidence which the judge considered."

13. A further hearing took place before HHJ Davies on 3 February 2022. In her judgment on that day, the judge varied a number of details within the arrangements for the children's care and welfare and she also flagged up the potential for the court, at a subsequent hearing, to impose a filter on further applications by making an order under CA 1989, s 91(14).

14. On 3 February 2022, whilst at court, the mother issued a fresh application to reopen the issues that had been determined in June 2021 in these terms:

> 'Application to re-open the finding of fact and welfare determination to review the safety of the findings made on parental alienation in light of concerns about the significance attached to Ms [A]'s opinion as set out in her assessment, reports and in oral evidence, and its consequences.'

15. On 20 April 2022, the mother issued an application under FPR 2010, Part 25 for permission to instruct an expert in support of her application for the June 2021 findings to be reopened. The sole focus of the expert's instruction was to advise upon the professional and/or clinical qualifications of Ms A to undertake the assessment of adults and/or children in the manner sought by Ms A's instructions. The expert to be instructed was Professor Wang, a clinical psychologist who is the chair of the ACP. The judge considered the application on paper, after receiving written submissions from all three parties. The judge had also seen an unsolicited email which Prof Wang had sent to the court in January 2022, in which he set out his view of the expertise of Ms A. In an order issued on 10 May, the judge concluded that it was not necessary to have Prof Wang's

expert opinion before the court when determining the application to reopen her findings. The Part 25 application was dismissed.

The decision under appeal

16. The mother's application for the findings to be reopened was heard on 7 June 2022 and judgment was delivered on 15 June. The mother's application was opposed by the father and by the children's guardian (who had replaced the guardian previously in post, upon whom the judge had relied in her June 2021 judgment). In addition, the court considered whether an order limiting further applications should be made under CA 1989, s 91(14). The judge summarised the applicable legal context for an application to reopen, relying principally upon *Re E* [2019] EWCA Civ 1447; in particular she set out paragraph 50 in the judgment of Peter Jackson LJ:

> "A court faced with an application to reopen a previous finding of fact should approach matters in this way:
>
> > (1) It should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality of litigation on the one hand and soundly-based welfare decisions on the other.
> >
> > (2) It should weigh up all relevant matters. These will include: the need to put scarce resources to good use; the effect of delay on the child; the importance of establishing the truth; the nature and significance of the findings themselves; and the quality and relevance of the further evidence.
> >
> > (3) 'Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial.'
>
> There must be solid grounds for believing that the earlier findings require revisiting."

17. The judge summarised the findings that she had made and stressed that they had been based upon three separate limbs, namely the evidence of Ms A, the evidence of the guardian and, thirdly, the judge's own evaluation of the parents' evidence.

18. In reaching her decision, the judge considered that the arguments being presented were the same as those that were before her in June 2021 and before Peel J in September. She reminded herself of Part 25 and PD25A, she referred to guidance issued by me as President in October 2021 and to a short reference that I had made to the issue of experts in parental alienation cases in a speech in Jersey that month. She noted guidance that had been issued by the ACP in December 2021 and by the Family Justice Council ['FJC'] and British Psychological Society ['BPS'] in May 2022. She noted that Ms A's CV indicated extensive experience of reporting in cases of alleged parental alienation.

19. The judge observed that there was legitimate debate as to the meaning of the label 'psychologist' and that, even in the light of the more recent guidance, it was accepted that it remains open for a court to appoint a 'psychologist' who is not a Chartered Member of the BPS or otherwise registered. Applying the three-stage test described in *Re E*, the judge held:

> '32. … First of all, I have no hesitation in finding that the children and the parents have been in litigation for far too long. They need finality and this litigation must stop.
>
> 33. Secondly, considering the second limb of *Re E* I conclude as follows. The resources of the parties, who have been funding this litigation themselves, and the resources of the court have been taken up with this case for a significant number of years. The financial and emotional cost to the parties has been immense. Further time and cost cannot be justified. The children - who love both of their parents - will not be assisted if the case is once again reopened. The children are thriving in their schools and they now have the benefit of a relationship with both of their parents. To have another year of litigation will be damaging.
>
> 34. The findings I made a year ago are not accepted by the mother, but it appears that the decision I made has in fact benefited both of the children so that they can continue to grow up having a good relationship with both of their parents. The mother cannot accept any responsibility for the damage that has been done to the children over the years. The findings are, and remain, significant to the children. The findings I made have enabled the children the freedom to develop good relationships with all of their family (maternal and paternal). Any further evidence, that would be based on a new report by new expert, who would have to revisit all of the past, would not assist the children. This is not a case in which new evidence has come to light since I made my decision.
>
> 35. The third limb of *Re E* is this. There is no reason to think that a rehearing of the issue will result in any different finding from the decision I made a year ago. The issues were fully explored during the 2021 hearings and in the application for permission to appeal. There are no solid grounds for believing that the earlier findings require revisiting.
>
> 36. In these circumstances, I must refuse the mother's application to reopen the final hearing and therefore refuse to order a rehearing.'

20. The judge went on to make an order under CA 1989, s 91(14) imposing a filter on further applications until June 2025. In doing so she relied on her own appraisal and the recommendations of the guardian that the children needed a period of stability to settle to the arrangements that were in place.

21. Finally, following consideration on paper of an application for costs made by the father, on 15 July 2022 the judge directed that the mother must contribute £20,000 towards the father's costs of the application to reopen the findings.

The Appeal

22. The mother's appeal against the decision to dismiss the application to reopen the findings is based on grounds which, in summary, are:

    i) the judge was wrong to determine the application without expert evidence as to Ms A's qualifications to discharge her instructions;

ii) the judge was wrong to hold that there was 'no new evidence or information' where:

a) the court ignored the communication from Prof Wang;

b) the judge failed to commission a statement/report from the former guardian;

c) the judge failed to place any weight on recent guidance issued since the primary hearing;

iii) the judge failed to apply FPR 2010, PD25B properly:

a) by equating the Academy of Experts with bodies such as the BPS and the ACP;

b) by failing to have regard to the issue of public protection;

iv) the judge failed to have regard to specific criticisms of Ms A's work in the present case;

v) the judge failed to have regard to the children's proper interest in there being an investigation into the adequacy of the findings.

23. Permission to appeal was granted by Peel J on 15 July 2022, not because the proposed appeal had a real prospect of success, but 'for some other compelling reason', namely that it was in the public interest for the court to consider the instruction of unregulated psychologists as experts in the Family Court, in general, and Ms A's instruction and role in this case, in particular.

24. The appeal is opposed by the children's father and the guardian, but it is supported by the ACP. Indeed, as I will describe in due course, the prosecution of the appeal was in reality taken over by Ms Barbara Mills KC, leading counsel for the ACP. Mr Andrew Bagchi KC, leading counsel for Ms A, made submissions in support of Ms A's position.

25. At the oral hearing, the mother's appeal was presented by Ms Joy Brereton KC, leading Mr Chris Barnes. Ms Brereton accepted that the judge did not err in her description of the approach required by the law to an application to reopen, her error was in not engaging sufficiently in the process of evaluation.

26. Ms Brereton was critical of the process by which Ms A had been selected and appointed. It was not sufficiently 'rigorous' and Ms A's qualification to undertake the instructed work was not questioned until she was cross examined by leading counsel during the final hearing. By then damage had been done as Ms A's report had been sufficiently influential to cause the judge to direct the removal of the children from their mother at the first interim hearing following its receipt.

27. Ms Brereton submitted that there were clear and good reasons, as required by authority, to require the judge to direct a rehearing. In short, Ms A was 'not qualified to carry out the assessment' and, as a result, the fact finding determination was erroneous. For the sake of the children, therefore, the findings cannot stand and must be reopened.

28. In asserting that Ms A was not qualified to conduct her assessment, Ms Brereton expressly relied upon the submissions to be made by ACP.

29. In terms of the lack of a sufficiently rigorous process, Ms Brereton explained that the father had applied for the instruction of a psychiatrist or a psychologist. There is plainly a degree of difference between these two professional disciplines and, submitted Ms Brereton, a need for the court to be clear which is the appropriate one for the particular case. It is not, however, submitted that it was inappropriate for a psychologist to be instructed in the present case; indeed the ACP case is that the expert should have been a clinical psychologist. Ms A had been selected by the guardian and put forward, erroneously, as 'Dr' A. Ms Brereton told the court that a recommendation from a guardian is not often questioned. Ms A's CV is extensively set out. The CV is a diffuse and confusing narrative of attendance at courses and other activities. It would have been hard for the parties and the court to drill down to see what her underlying qualifications were. Ms Brereton urged this court to give guidance on how the process of information gathering before a choice of expert is made can be tightened up.

30. In support of ground (ii), Ms Brereton spelled out the 'new information' which, she submitted, cast doubt on Ms A's qualifications and her ability to report in this case. The new information consisted of:

    a) A memorandum from the President of the Family Division issued on 4 October 2021 on 'Experts in the Family Court' (see paragraph 31 below);

    b) A quotation from a speech that I gave in Jersey on 8 October 2021 (see paragraph 32);

    c) Guidance issued by the ACP in December 2021 (see paragraph 33);

    d) Guidance issued jointly by the Family Justice Council ['FJC'] and the BPS (see paragraph 34);

    e) A letter from Prof Wang (see paragraph 36); and

    f) The children's guardian had expressed some concern about the weight to be attached to Ms A's report at a hearing in February 2022.

31. Taking each of these sources of information in turn, on 4 October 2021 a *President's Memorandum: Experts in the Family Court* was issued. The main body of the Memorandum provided an explanation of basic principles, however the final paragraphs dealt with qualification and regulation:

> **'Duties to the Court and Professional Standards**
>
> FPR PD25B sets out the duties of the expert to the court. PD25B para 4.1(b) requires an expert to comply with the Standards set out in the Annex. These include requirements to have been active in the area of work; to have sufficient experience of the issues; to have familiarity with the breadth of current practice or opinion; and if their professional practice is regulated by a UK statutory body (see Table 1) that they are in possession of a current licence, are up to date with CPD and have

> received appropriate training on the role of an expert in the family courts. Psychologists are mainly regulated by the Health and Care Professions Council. The Family Justice Council has issued guidance jointly with the British Psychological Society on providing expert reports in the family courts [*reference to 2016 guidance now superseded*].
>
> Where the expert is not subject to statutory registration (i.e. child psychotherapists) para 6 of the Annex identifies alternative obligations to ensure compliance with appropriate professional standards.
>
> **Conclusion**
>
> The Family Court adopts a rigorous approach to the admission of expert evidence. As the references in this memorandum make plain, pseudo-science, which is not based on any established body of knowledge, will be inadmissible in the Family Court.'

32. I made reference to this guidance in an address given in Jersey on 8 October 2021:

> "One specific problem which is said to arise in cases of domestic abuse is the not infrequent counter assertion that the person making allegations of abuse is themselves causing harm to the child by 'parental alienation'. This is a complex and sensitive issue, and in the short time available in this address I seek to make one and one point only about it. Where the issue of parental alienation is raised and it is suggested to the court that an expert should be instructed, the court must be careful only to authorise such instruction where the individual expert has relevant expertise.
>
> In this regard I draw attention to the fact that I am about to issue a General Memorandum on the topic of the instruction of experts. Within that I stress that an 'expert must demonstrate to the court that he or she has the relevant knowledge and experience to give either opinion evidence, or factual evidence which is not based exclusively on personal observation or sensation'. I also emphasise that an expert must be independent and impartial and that 'the court will refuse to authorise or admit the evidence of an expert whose methodology is not based on any established body of knowledge'. I conclude by saying:
>
> > 'The Family Court adopts a rigorous approach to the admission of expert evidence. As the references in this memorandum make plain, pseudo-science, which is not based on any established body of knowledge, will be inadmissible in the Family Court.'"

33. In December 2021, ACP issued guidance '*The Protection of the Public in the Family Courts*'. These extracts from the Executive Summary describe the central thrust of the document:

> 'In terms of Psychologists, only a practitioner psychologist (currently registered with HCPC ['Health and Care Professions Council']) such as a Clinical Psychologist can give a diagnosis or formulation or make recommendations about therapeutic interventions. Some, but not all practitioner psychologists, can make recommendations about capacity.

> ACP-UK is aware of several cases in which "psychological experts" who are not HCPC registered have suggested inappropriate diagnoses and made recommendations for children to be removed from their mothers based on these diagnoses.
>
> ACP-UK wishes to support those instructing experts for the courts to understand the importance of using HCPC registered practitioner psychologists and is available for consultation on such matters.
>
> More broadly, to protect the public from harm, the ACP-UK is campaigning for legislation to protect the term "psychologist" and restrict this to use by practitioner psychologists regulated by the HCPC.'

34. In May 2022, guidance was jointly re-issued by the FJC and BPS: *Psychologists as Expert Witnesses in the Family Courts in England and Wales: Standards, Competencies and Expectations*. It helpfully and succinctly described the current basis for registration and regulation of psychologists, together with an explanation of various categories of specialist and the importance of explicit job titles:

> '**3.1** Statutory regulation for psychology in the UK was introduced in 2009 and the Health and Care Professions Council (HCPC) is the regulator of practitioner, or registered, psychologists. Practitioner psychologists who have the qualifications necessary to meet the stringent criteria for statutory regulation with the HCPC, are registered with the HCPC with one (or more) 'protected' titles. The legislation protects seven titles: Clinical Psychologist, Health Psychologist, Counselling Psychologist, Educational Psychologist, Occupational Psychologist, Sport and Exercise Psychologist, and Forensic Psychologist. In addition, the two generic titles – Practitioner Psychologist and Registered Psychologist – are available to registrants who already hold one of the seven 'specialist' titles. See Appendix 1 for a detailed description of protected titles.
>
> **3.2** These titles are protected by law. Anyone who uses a protected title must be registered with the HCPC. Article 39(1) of the Health Professions Order 2001 makes it a criminal offence for a person, with intent to deceive, to state that they are on the HCPC Register; to use a designated title to which they are not entitled; or to say falsely that they have qualifications as a practitioner psychologist. An unregistered person may be committing an offence even if they do not use the designated title directly, such as describing the service they provide as 'clinical psychology' or 'forensic psychology'.'

The FJC/BPS 2021 guidance cannot strictly be described as 'new' material which has become available since the fact finding judgment as it is, in effect, a relatively modest revision of guidance issued in 2016.

35. The FJC/BPS guidance accepts that courts may appoint psychologists who are neither registered with the HCPC nor chartered members of the BPS as experts:

> '3.6 … Should a court appoint an individual who does not use an HCPC protected title, it should be aware that this would fall outside of the regulatory framework of the HCPC, e.g. to check qualifications and current fitness to practice. While a Chartered Psychologist and non-Chartered Psychologist would fall within the

> accountability of the BPS, if they are members of the BPS, e.g. code of ethics and conduct, they would not fall within the HCPC regulatory authority. Psychologists who are not HCPC registered should make it clear when accepting instruction, as should those who are not Chartered Members of the BPS.'
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> …
>
> '3.8 Courts should expect that all psychologists based in the UK providing evidence in family proceedings are regulated by the HCPC (if they are practitioners) and/or that academic psychologists have Chartered membership with the BPS.
>
> 3.9 It remains at the discretion of the court to appoint individuals who are not eligible for Chartered membership of the BPS or qualified for registration with the HCPC but that the court determines have relevant psychological knowledge or training. However, it should be made clear in orders and letters of instruction that these individuals are not being appointed as psychologist experts but under the auspices of other professional frameworks, e.g. Independent Social Workers with additional psychological qualifications or Psychotherapists. These individuals are also distinct from psychologists in relation to their remuneration rates paid by the Legal Aid Agency.'

36. The letter that is relied upon from Prof Wang, is undated, but was sent to the court in January 2022. It is confusingly headed with the name of an individual who is not a child, parent or otherwise involved in this case. It reads in full:

> 'I write to state that I have examined Ms [A]'s CV and confirm that she has no recognised substantive postgraduate qualifications, is unregulated, should not be calling herself a psychologist, should not be carrying out psychological assessments and making diagnoses; and while I acknowledge the appointment of expert witnesses is at the Court's discretion, in my opinion she should not be acting as an expert in court. She does not possess any doctoral qualification, is not a medical practitioner and therefore should not be referred to as "Dr" [A].'

37. Drawing these various sources together, Ms Brereton submitted that the most important was the letter from Prof Wang. More generally, the judge should have taken sufficient from the new material to be cautious about the role of Ms A and the need to reopen the case. In contrast, Ms Brereton submitted that the judge did not go into detail and adopted a superficial approach. There was, she argued, sufficient information before the court for the judge to open the gateway and direct a rehearing.

38. It is to be noted that neither in the Skeleton Argument, prepared by previously instructed leading counsel, nor in oral submissions, was the appellant's case particularised as to which findings were to be the subject of a rehearing. No submissions were made as to the separate findings of fact made by the judge as to the parents' past behaviour and presentation in court. Neither was there any reference to the free-standing analysis conducted by the, then, guardian. The case was put generally and on the basis that because, it is said, Ms A was not qualified to act as an expert the whole process was, thus, contaminated and must be reopened.

39. Further, in relation to the reopening issue, Ms Brereton, unusually, did not take the court to the judge's judgment under appeal and therefore did not make specific

submissions as to the approach of the judge which was that Ms A's contribution to the case was but one of three limbs upon which she had based her overall conclusions.

40. On behalf of the father, Mr Charles Hale KC, who had appeared at many of the hearings before the judge, submitted that the judgment under appeal is thorough and clear. There is, he said, no indication that the judge fell into error. The question of Ms A's qualification to act as an expert had been fully tested during the main hearing. Nothing new is now raised and the judge was justified in not ordering a re-hearing.

41. Mr Hale took the court through the history of the case. He stressed, in particular, that, at the interim hearing immediately following receipt of Ms A's report, the judge did not determine the long-term issue of permanent removal from the mother's care. She only had made interim arrangements, specifically to cover half-term. Removal pending determination of long-term arrangements at final hearing was only determined after the two day hearing two weeks later .. Ms A's report was not determinative, but simply a part of the significant jigsaw of evidence before the court.

42. On the appeal more generally, Mr Hale submitted that the 'new information' was (a) all properly considered by judge and covered in the judgment, (b) not capable of amounting to information which could undermine the original decision and (c) not information, even if relevant, which actually went to undermine the facts that were found by the judge.

43. Mr Hale supported the judge's decision to refuse the instruction of Prof Wang as an expert. The mother's application for Prof Wang to be a single joint expert was misconceived given the very strong opinion that he had already expressed as to Ms A's qualifications. In any event, the content and basis of Prof Wang's opinion were before the judge during the fact-finding hearing as they formed the substance of leading counsel's cross examination and submissions on the issue of expertise.

44. Mr Hale stressed the importance and value of the three pillared approach taken by the judge in reaching her overall determination. The judge's adverse findings against the mother stood separately from the analysis of Ms A, as did the separate evaluation made by the guardian. On the central point in the appeal, namely that Ms A was not qualified to act, Mr Hale submits that the case is fundamentally flawed due to the absence of any bright-line statement of law or regulation to that effect. The appropriateness of instructing a non-registered and/or non-regulated psychologist sits in a grey area about which there has been professional debate over recent years. The current guidance is no more than guidance; it is not the law. There was no legal prohibition preventing the instruction of Ms A and that, submitted Mr Hale, was fatal to the prospects of this appeal.

Submissions on behalf of ACP-UK: Should this court now determine the issue of Ms A's qualification to act as an expert psychologist in Family Proceedings?

45. The ACP-UK is a representative professional body for clinical psychologists, whose aim is to provide strategic and coherent professional leadership to all clinical psychologists in the UK. ACP has taken as part of its role the task of 'ensuring that the public are protected from those who claim to be "psychological experts" without requisite qualifications, expertise and regulation'.

46. ACP applied to intervene in this appeal on the following basis:

> 'The ACP-UK does not propose to make submissions on the disputed factual issues between the parties or merely to repeat the submissions of others, being mindful of the warnings given by Lord Hoffman in *E v The Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission intervening)* [2008] UKHL 66, [2009] 1 AC 536.
>
> Rather, the ACP-UK seeks to assist the Court by providing independent submissions on the issues that arise in the present case from the unique perspective of the representative body of psychologists who are qualified to report in cases such as these. It is able to offer an independent analysis and account as to the core qualifications, skills and expertise required in order to be able to undertake an expert assessment in private law proceedings.'

It was that on that basis (which was agreed by the parties) that I granted permission to intervene.

When granting permission to appeal, Peel J had identified the focus that was to be brought to bear on Ms A's qualification:

> "Second, by reference to the instant case, the court should consider whether it was appropriate to instruct [Ms A] and/or receive written and oral evidence from her and/or attach weight to her conclusions in circumstances where (1) she has no recognised substantial post-graduate qualifications, (2) she is not registered as a practitioner psychologist, (3) she is not subject to professional regulation, and (4) the opinion of the President of the Association of Clinical Psychologists UK is that she should not be acting as an expert in court proceedings."

47. The ACP skeleton argument, prepared by Ms Barbara Mills KC, leading Ms Charlotte Baker, for the appeal hearing put the ACP position unambiguously:

> '2. Having reviewed the papers with great care, the striking feature noted by the ACP-UK and what it is submitted must be this Court's first finding and starting point, is that this is **not** a case of an expert who has discharged their role poorly or gone beyond their remit, but is a stark and troubling example of an individual who holds herself out as an expert but has neither the qualifications nor the relevant skills to so hold. This is, therefore, an example of the real and serious consequences that follow when a person who is not an expert at all is brought in, by order of the Family Court, to assess and make recommendations about a family such as this one. The case for and importance of proper qualification and regulation is fortified by reference to what went wrong in this case.' [original emphasis]
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> …
>
> 7(b) It was not appropriate for Ms [A] to have been instructed to report in these proceedings, and no weight can or should be attached to her conclusions. She is not qualified (clinically or otherwise) to either assess the family in the way she has purported to assess them nor to answer the questions posed in the letter of instruction dated 13th May 2020.

> 7(c) The present case is a concerning example of the consequences of instructing an expert who is not, in fact, an expert at all, and then acting on their advice. It is a practice that must swiftly come to an end in the Family Court, or else the Court itself risks becoming an agent of harm.'

48. The ACP skeleton is plain in asserting that '[Ms A] should not be holding herself out as a psychologist of any description' … '[She] is neither qualified nor appropriately trained to make recommendations for therapeutic interventions for the children or adults [in this case], still less to deliver and/or guide the delivery of those interventions by others.'

49. Following these broad statements, the skeleton descends into a very detailed critique of the work undertaken by Ms A in the present case, supported by many specific quotations from the case papers. The document then moves on to explain that psychologists who practice in one or more of the protected fields must be registered with the HCPC, or otherwise be chartered members of the BPS.

50. The ACP urges this court to clarify the impact of paragraphs 3.8 and 3.9 of the May 2022 FJC/BPS guidance so that it is limited to individuals, who happen to have a psychological qualification, but who are unregistered, and who are to be instructed in another capacity – for example as independent social workers. Such individuals are not, it is asserted, 'psychologists' and are never to be instructed as such.

51. During Ms Mills' oral submissions at the first hearing I asked to be taken to some authoritative document, for example a statutory instrument or formal regulation, in support of the ACP's primary contention that Ms A is simply neither qualified nor trained to hold herself out as a psychologist or to advise on therapeutic intervention in a case such as this. Ms Mills was obliged to concede that there was no such authoritative source before the court at that hearing, but that these clear submissions were based upon her instructions. Ms Mills instructing clients were not in the court room, but were observing the proceedings remotely. She suggested, and I accepted, that the answer to that single question could be dealt with in a short document prepared for the second hearing. The point was therefore left on that basis.

52. To the court's surprise, ACP responded to the opportunity to submit a short further document by filing a second skeleton argument running to 30 pages. Paragraph 1 explained the purpose of this further document:

> 'This document has been prepared to focus on the qualifications required to answer the questions posed in the letter of instruction, dated 13th May 2020, and in particular (with reference to Peel J's order) whether Ms [A] has demonstrated she has those qualifications. That analysis is required if the Court is going to reach a conclusion as to whether it was *"appropriate to instruct Ms Al and / or receive written and oral evidence from her",* per Peel J's order of 13th September 2022.'

53. At paragraph 2, the skeleton acknowledged that there is no definition of 'expert' for the purposes of Family proceedings, and no definition of 'psychologist', beyond the seven 'labels' which have statutory protection. These concessions are followed by the following important concession: 'whether a person is capable of assisting the Court by providing expert evidence is therefore a question of fact, not law'.

54. The remainder of the document purports, by a most detailed analysis, to demonstrate that it was not appropriate to instruct Ms A. In the course of that analysis, extensive criticism is made of Ms A's contribution to the proceedings, both in writing and orally.

55. The ACP-UK second skeleton is of note for a number of reasons:

    i) The skeleton represented a significant departure, without the leave of the court, from the basis upon which (in its own words) the ACP-UK had sought, and were permitted with the consent of all parties, to intervene in this appeal, which was:

    > 'to offer an independent analysis and account as to the core qualifications, skills and expertise required in order to be able to undertake an expert assessment in private law proceedings.'

    In contrast, the document mounts a detailed critique of Ms A's CV and her work in the present case;

    ii) The document does not at any point address the issue for which permission to file a further submission was granted, namely the identification of any statutory instrument or formal regulation, in support of the ACP's primary contention that Ms A is simply neither qualified nor trained to hold herself out as a psychologist or to advise on therapeutic intervention in a case such as this;

    iii) By filing a 30-page, granular, negative critique of Ms A, the ACP succeeded in putting before the court, in another form, the evidence that would have been likely to have come from its chair, Prof Wang, if leave to file such evidence had not been refused by the judge;

    iv) 'The purpose of a skeleton argument is to assist the court by setting out concisely as practicable *the arguments* upon which a party intends to rely' [CPR, PD52A, para 5.1(1) – emphasis added]. Although formulated as a 'skeleton argument', the second ACP document is, in reality, opinion evidence based upon the professional knowledge of those who instruct Ms Mills.

56. The surprising manner in which ACP abused the permission that it was given to intervene in this appeal is deprecated. During the hearing it was necessary to determine how, if at all, the material submitted by ACP should be considered by the court. For Ms A, Mr Bagchi stressed that, had those acting for Ms A known of the approach that ACP intended to take in filing this document, they would have objected. He submitted that it was plainly wrong for detailed opinion evidence to be placed before the court by way of written submissions, with Ms A being expected to respond in the same way through her counsel.

57. Mr Bagchi invited the court to afford little weight to the material submitted by ACP. He cast ACP as a campaigning organisation with a membership, he said, of only 1,300 out of the total body of some 14,000 clinical psychologists in England and Wales. In the circumstances, Mr Bagchi did not attempt to respond to each issue that had been raised against Ms A in the ACP document. Instead, he confined his submissions to a number of key points.

58. During the hearing I concluded that it was simply neither possible nor fair to embark upon a detailed audit of Ms A's involvement in this case by measuring her work against the critical opinion advanced by ACP. In short the reasons supporting that conclusion were:

a) To do so would be to undertake an inherently unfair process based upon unsolicited opinion evidence that had been refused admission by HHJ Davies and for which no permission had been granted by this court;

b) The current court process is an appeal hearing during which it was not contemplated that the court would hear evidence and determine detailed issues of fact and opinion. In contrast, for the assertions raised in Ms Mills' skeleton to be determined, the court would have to engage in an extended process including:

i) Formal filing of evidence attributed to a named expert on behalf of ACP-UK (rather than having this material simply adduced in counsel's skeleton argument);

ii) Detailed evidence in response from and on behalf of Ms A;

iii) Oral evidence from the ACP witness and Ms A, followed, only then, by submissions based on that evidence;

iv) A judgment determining the relevant issues between ACP and Ms A.

It would only be at the conclusion of such a process that the court might be able to hold that Ms A either was, or was not, qualified to carry out the instruction to provide a psychological report in this case.

c) Apart from being inherently unfair, the process urged upon the court by Ms Brereton and Ms Mills is fundamentally unsound and wrong. The central issue to be determined, rather than being litigated on appeal between the parties to the case, would be between Ms A and the ACP, who are merely interveners. For the ACP's position to be elevated to that of prosecutor in what would be, in effect, a lack of fitness to practice claim against Ms A, in the context of an appeal against a judge's decision not to reopen findings of fact in a private law children case, would stretch the boundaries of the appeal process to an untenable degree;

d) Were the court to accede to Ms Mills' submissions and hold that Ms A is, indeed, not qualified to act as an expert psychological witness in family proceedings, that finding would have a major impact upon Ms A's ability to continue to work as she currently does. Whilst in other fields of professional practice, via regulatory or disciplinary proceedings, such a finding might be made, that would only be the case after a full and fair hearing that had been properly constituted before an appropriate tribunal. The suggestion that this court, on the basis of submissions alone, and without affording any opportunity to Ms A to be heard directly, would make such a finding in the context of an appeal

against a refusal to reopen findings of fact, only has to be stated for it to be seen to be wholly untenable.

59. Approaching the issues in this way makes it necessary to focus on the question of whether HHJ Davies' original decision to refuse the instruction of Prof Wang at first instance is now open to challenge.

60. Ground 1 of the mother's grounds of appeal is that the judge fell into error in determining the rehearing issue in the absence of any expert evidence as to the sufficiency of Ms A's professional qualifications to provide a psychological report. That ground misstates the position by referring to 'any expert evidence', when the only application made to the judge was for the instruction of Prof Wang and the target of this ground must be the judge's decision of 10 May 2022 refusing that application.

61. In her judgment on this issue, following consideration of written submissions, the judge noted that Prof Wang was a highly qualified clinical psychologist with obvious expertise and experience as the Chair of ACP. She, correctly, noted that leave could only be granted if the instruction was 'necessary' to determine the application for a rehearing. The judge said that she was in no doubt about Prof Wang's opinion regarding Ms A's expertise as this had been expressed in the 'uninvited' email that he had sent to the court in January 2022. The judge concluded that it was not necessary for Prof Wang's expert view to be before the court. She considered that there was a danger of the case being de-railed with time taken up by discussion of the merits and de-merits of the competing views on the manner in which assessments are to be carried out. The judge noted that at the full hearing she would hear submissions based on recent authorities and guidance, the CV of Ms A and her cross-examination during the substantive hearing.

62. The current appeal is against the July 2022 refusal to order a rehearing. There is no direct appeal against the May refusal for leave to instruct Prof Wang. The mother's skeleton argument therefore argues that the judge was wrong not to order a rehearing in circumstances where she had refused the instruction of Prof Wang, rather than challenging the May decision full-square. In her oral submissions, Ms Brereton, understandably in those circumstances, did not challenge the refusal to instruct Prof Wang, but did criticise the judge's failure to refer to Prof Wang's email in the course of her judgment.

63. Notwithstanding the fact that the criticism in Ground 1 (that the rehearing issue was determined in the absence of expert evidence) has not been advanced prominently within this appeal, given the approach that I have taken by refusing to be drawn into consideration of the detailed critique of Ms A which is now presented by Ms Mills' skeleton arguments, the correctness of the judge's decision not to conduct a similar exercise at first instance by permitting the instruction of Prof Wang must be evaluated. The evaluation can, however, be short. In most Family proceedings, the purpose of instruction is to find out what the opinion of the instructed expert is on the relevant issue(s). Here, Prof Wang had, before the question of his being instructed as an expert had been raised, volunteered his opinion on Ms A's qualification in his January 2022 letter to the court in unequivocal terms [see para 36]. Whilst permitting him to be instructed as an expert would undoubtedly have provided chapter and verse for his shortly stated conclusion, the judge had already experienced Ms A being thoroughly cross-examined on this topic during the substantive hearing. She also had the

underlying detail set out in the FJC/BPS and ACP guidance. In the circumstances, and where the judge was going to measure that cross-examination alongside recent guidance and Ms A's CV, she was not in error in refusing leave to instruct Prof Wang.

'Qualification': the ACP-UK case

64. It is at the core of the mother's case on appeal, the ACP submissions and, indeed, Prof Wang's letter, that Ms A is 'unqualified' to call herself a 'psychologist', to conduct a psychological assessment, to act as an expert in the Family Court and, in particular, to discharge the specific instructions given to her in the present case.

65. These were the bold and firmly stated assertions that led the court to ask Ms Mills, at the first hearing, to be taken to some authoritative document (a statutory instrument or regulation) in support. From the ACP's second skeleton argument and Ms Mills' further oral submissions, it is now clear that no such authoritative document can be identified. Rather than relying upon a bright line categorisation of those who are, and those who are not, qualified to hold themselves out as a 'psychologist' and accept instruction in Family proceedings, the ACP's' case is built up through a patchwork of factors which, it is said, when taken together, exclude Ms A.

66. The principal element of the ACP's patchwork is that only practitioner psychologists who are registered with the HCPC, which is given statutory responsibility for the regulation of practitioner psychologists, may use the following 'protected titles':

- Clinical Psychologist
- Counselling Psychologist
- Educational Psychologist
- Forensic Psychologist
- Health Psychologist
- Occupational Psychologist
- Sport and Exercise Psychologist
- Registered Psychologist
- Practitioner Psychologist.

67. Separately (or in addition), a psychologist may be a 'chartered psychologist', which is a grade of membership of the BPS only open to those with certain post-graduate qualifications and who have been vetted by the BPS.

68. Thus, an individual who is not registered with the HCPC may not use one of the protected titles and, if not chartered by the BPS, may not call themselves a 'chartered psychologist'. This is very solid ground and provides a clear and reliable indication of the expertise of a psychologist who comes within these two schemes. Difficulty arises, however, from the fact that the title 'psychologist' is not, of itself, regulated or protected. The situation is described in the current FJC/BPS guidance:

> 'Under the current legislation, the HCPC is not authorised to protect the basic title 'psychologist'. Therefore, both fully qualified and experienced psychologists and people who are not qualified in psychology at all can legitimately refer to themselves as any kind of psychologist. For example, the following titles are in use:
>
> • Assessment Psychologist
>
> • Child Psychologist
>
> • Criminal Psychologist
>
> • Expert Psychologist
>
> • Developmental Psychologist
>
> • Consultant Psychologist and
>
> • Graduate Psychologist.
>
> …
>
> When unqualified people refer to themselves as 'psychologists' this may create confusion for the public, other professions and the legal system. But unless such people cross other boundaries, such as laws concerning misrepresentation of qualifications, deception and fraud, this is currently not illegal.'

69. The cohort of individuals who call themselves psychologists, but who are neither regulated nor chartered, has been referred to in these proceedings as 'non-regulated psychologists'. The ACP accepts that such individuals, who may only have a basic qualification in psychology, may nevertheless refer to themselves as 'psychologists'. The ACP, however, submits that a non-regulated psychologist is not qualified to undertake psychological assessments in Family Court proceedings. The submission is based upon the fact that a psychological assessment will normally include the administration of one or more psychological assessment tools. Whilst some such tools are available to any user, most are controlled by their publishers and only supplied to psychologists who have the requisite qualifications to use them. The group of assessment tools which are controlled in this way is itself sub-divided into two groups, with the second, more exclusive category, only supplied to those with a specific qualification (for example registration with the HCPC). The ACP describes the three categories as generally being:

i) The first tier containing tests capable of being purchased by anyone.

ii) The second tier requiring the purchaser to demonstrate and evidence their competency at a relatively high level.

iii) The third tier requiring (for some publishers) registration with the HCPC as a practitioner psychologist or a psychologist chartered with the BPS, and for others: a doctorate, or certification to practice in a related field to purchase, or certification/full active membership in a professional

organisation requiring training and experience in the relevant area of assessment.

70. The ACP's argument is that a person whose ability to purchase assessment tools is restricted to the first tier will be limited to those tests and, therefore, unable to evaluate psychological factors which could only be measured by the second and third tier tests. When the specific instructions given to, and accepted by, Ms A in the present case are considered, the ACP's submissions focus on Question 1:

> '1. Please undertake an assessment of the children focusing on their global functioning, intellectual, emotional, social and behavioural development and comment on any matters of concern.'

71. Ms Mills makes a number of specific points about Question 1:

a) It requires:

i) a *cognitive assessment*;

ii) an assessment of the children's *adaptive functioning* (said to be crucial to identify a learning difficulty, a specific learning difficulty, a neurodevelopmental condition, developmental delay or making decisions about capacity);

iii) an assessment of emotional, social and behavioural *development*;

b) Standardised tools are normally required to assess intellectual functioning. The most widely used for *cognitive assessment* are the Wechsler Intelligence Scale for Children and the NEPSY-II. Both of those tests are only available for purchase by those in tier 3.

c) Appraisal of *adaptive functioning* requires evaluation of structured information on a validated measure such as the Vineland Adaptive Behaviour Scales, which can only be purchased by those in tier 2 or 3.

d) Assessment of *development* typically requires a clinical interview measured against self-report psychometric tools such as the Beck Youth Inventories, or for adolescents, the Symptom Checklist-90-Revised, both of which are restricted to tier 2 or 3.

72. The ACP's case with respect to Question 1 is that Ms A is not qualified to purchase the tools that they assert are necessary to assess each of the various elements of this question, she does not purport to have used those tools and, indeed, it is claimed that she does not appear to have answered Question 1 with respect to (i) cognitive ability or (ii) adaptive functioning.

73. It is of note that with respect to the other nine questions in Ms A's instructions the ACP does not assert, in contrast to Question 1, that any instructed psychological expert would need to deploy specific, restricted, assessment tools (save insofar as the answer to those questions relates back to the factors assessed under Question 1). With respect to Question 8, which invites advice on therapeutic or other input for the children or parents, the ACP submit that it is not unreasonable to expect that an expert would share

the same or substantially similar qualifications as those employed in the NHS who advise on therapy. It is submitted that Ms A's CV does not indicate that she is so qualified.

74. The ACP skeleton then moves on to consider the assessment tools that Ms A did use in this case, and to analyse her CV in the context of qualification and/or experience to undertake those tests. For the reasons that I have given, I determined that it was not appropriate for those matters to be litigated by the two interveners within the scope of this appeal.

75. For the reasons already given, it is not possible for the court to determine, within the confines of this appeal, whether the ACP's patchwork of points amounts to a total embargo upon an individual such as Ms A so as to prevent them from being able to provide expert opinion in response to instructions given in this or other similar cases. I have, nevertheless, set the ACP submissions out in some detail because they are of value in flagging up the potential for the qualifications of a candidate for instruction to fall short of what is required. As I will describe in more detail, I propose to refer these matters to the FJC for investigation and, if appropriate, the issue of revised guidance.

The Mother's Appeal on Reopening: Conclusion

76. At the conclusion of the oral hearing, I announced my decision, which was to dismiss the substantive appeal against the judge's refusal to re-open the fact finding process. I will now set out my reasons for that conclusion.

77. The single issue upon which the appeal is based is that relating to Ms A's qualification to undertake the role of expert assigned to her in this case. It is correct that, since June 2021, when the fact finding judgment was given, there have been developments in terms of guidance which focus upon the need for caution when instructing experts in Family proceedings. Reference has been made to the ACP guidance, and the FJC/BPS guidance, and to the President's Memorandum, to which reference was made in a speech in Jersey. This new material is important and should be read and understood by professionals and judiciary in the Family Court, but it is no more than guidance or advice. It is neither black-letter law nor regulation, and it does not, of itself, render unlawful that which was previously accepted, or, more particularly, render 'unqualified' an individual who was previously thought to be qualified to act as an expert.

78. Ms Brereton impliedly accepted this position by not placing great weight on the new guidance and indicating that the main development was the letter to the court from Prof Wang and, now, the intervention of the ACP. I have already held that the judge was correct not to admit Prof Wang's letter as evidence and was right not to permit his instruction as an expert. In her judgment refusing permission to instruct Prof Wang, the judge had not identified his letter as one of the factors to be taken into account when hearing the substantive application to reopen the factual conclusions, and it can be seen that she did not do so. The judge was plainly correct in taking that course. The unsolicited letter from Prof Wang was not evidence and the court had refused permission for him to be instructed as an expert. Indeed, in those circumstances, if the judge had placed reliance upon the letter as part of her decision it would have been vulnerable to a charge of abuse of process.

79. Ms Brereton submitted that the fact that Prof Wang's letter was not admitted into evidence, and permission to instruct him as an expert had been refused, did not mean that the judge was entitled to ignore it. In support Ms Brereton relies upon the well known distillation of the approach to reopening previously determined facts described by Hale J (as she then was) in *Re B (Children Act Proceedings) (Issue Estoppel)* [1997] 1 FLR 285. It is not necessary to quote the passage in full, but at its conclusion Hale J described the approach to be taken:

> 'The court will want to know:
>
> (a) whether the previous findings were the result of a full hearing in which the person concerned took part and the evidence was tested in the usual way;
>
> (b) if so, whether there is any ground upon which the accuracy of the previous finding could have been attacked at the time, and why therefore there was no appeal at the time; and
>
> (c) whether there is any new evidence or *information* casting doubt upon the accuracy of the original findings.' [emphasis added]

Ms Brereton focusses on the acceptance that new 'information', as opposed to 'evidence', may be relied upon as casting doubt on the accuracy of the original findings. Hale J's phrase, including reference to 'information', has been taken up and followed in subsequent authorities. Ms Brereton submits that, even if leave to adduce evidence from Prof Wang had been refused, the fact that the Chair of the ACP had written to the court in these terms should have been taken into account by the judge.

80. Although the wording of Hale J's formulation in *Re B* properly allows Ms Brereton to make that submission, it does not, in my view, take matters any further. Without being prescriptive, the primary focus of the word 'information' in the context of an application to reopen a factual determination must relate to factual information that, whilst not, at that stage, formal 'evidence', casts doubt upon the previously found facts, for example a police log or a mobile phone record. A letter restating an assertion that had been four-square before the court at the original hearing, namely that Ms A was not qualified, no matter how apparently authoritative the source may be, is not of the same quality as fresh factual information. It is an opinion. In addition, Hale J's formulation is descriptive as opposed to prescriptive; a court is not obliged to take account of every piece of new 'information', but may do so. In the circumstances, reference to 'information' in *Re B* does not take the Appellant's case any further.

81. Moving on to the submissions made on appeal, and for the reasons that I have now given, at some length, it would be wholly wrong for this court to embark upon a contest on the issue of Ms A's qualifications played out solely through counsel's submissions between two parties who are both interveners in the appeal process. In the absence of some bright-line provision which, without debate and unambiguously, establishes that Ms A was not qualified to undertake instruction as the psychological expert in these proceedings, this appeal process is simply inapt to determine the issue. It would be neither possible nor, indeed, fair, for the court effectively to determine Ms A's fitness to practice as she has been doing for some years by trial by submission alone.

82. Once these core elements of the mother's appeal are set aside, all that remains is the suggestion that a previous guardian had expressed some concern at a preliminary hearing over Ms A's qualification. This point was, rightly, not pursued in detail. By the time of the hearing before the judge, which is the focus of the appeal, the guardian's position was plainly against re-opening. In this court the guardian opposes the appeal. Any indication of earlier, shortly stated, concern must therefore be of little weight and cannot save the appellant's case.

83. I was, however, so clear that the appeal should be dismissed not solely because of the negative conclusion that I had formed about the proposed assault on Ms A's qualification. In any appeal of this nature, it is necessary for the court not only to keep in focus the specific criticisms that are being made of the judge below, but also to maintain the whole of the original fact-finding judgment in view at all times. The primary focus is on the decision whether or not to reopen the fact finding decision, consideration of Ms A's qualifications is but one part of the overall determination. From that perspective, the appellant, even if the case against Ms A had proceeded further, would have had an uphill task. The June 2021 judgment was a full and thorough judgment from a most experienced Family judge, who had been immersed in the case over a number of hearings and, at the trial, over a number of days. An appellate court will always, rightly and necessarily, afford significant respect to findings of fact made by a judge who has been exposed to the key lay parties, and to the totality of the evidence, in the cockpit of a fully contested hearing. That judge has a perspective and insight into a case which is of a wholly different order to that of the appellate court. HHJ Davies made clear and firm adverse findings as to the mother's credibility and her detailed evidence. These findings were the judge's own findings, based on the written and oral evidence of the parties. They were free-standing findings and not based upon the analysis and conclusions of either Ms A or the guardian. Separately, the guardian had come to her own conclusions as to the welfare outcome for the children. Whilst there would plainly be potential for the guardian's conclusion to be influenced by the evidence of an expert, the judge was satisfied that this, too, was a free-standing evaluation. Ms A's evidence was a third element in the judicial decision making; it was compatible with the first two, but not more influential than that.

84. The soundness of the judge's findings is evidenced by Peel J's first decision to refuse permission to appeal on the basis that the application was 'totally without merit'. On the internal merits of the case, that decision and categorisation were justified. This appeal has come to the court to allow the wider issues to be considered, by reference to Ms A's role in this case. Once that aspect of the appeal has fallen away, the judge's decision remains as unopen to challenge as it was before Peel J on the first permission application, when he described the judgment in these terms:

> 'The judge carefully considered all the evidence both separately and holistically, weighing it against the welfare criteria. Her judgment is clear, logical, reasoned and internally consistent. Ultimately, there is no basis for interfering with the careful conclusions on both facts and welfare. There is no real prospect of success on the appeal, and permission to appeal is refused.'

Peel J's description is, in my view, correct in every particular.

85. There being no challenge to the judge's approach as to the applicable law, in the circumstances the appeal against the refusal of leave to reopen the fact finding decision failed and was dismissed.

Un-regulated psychologists as experts in the Family Court: Guidance

86. Before leaving these issues, and turning, shortly, to the remaining two elements of the appeal, this in some ways unsatisfactory hearing does provide the court with the opportunity to draw the recent guidance together and to flag up the key points in clear terms. What follows is not intended to change or to amend what is said in the FJC/BPS guidance or in the President's Memorandum. It draws, where appropriate, on the ACP guidance and on Ms Mills' submissions, but in doing so the court is conscious that this material is generated by a single campaigning association, and is not material emanating from a regulatory body or an office holder/official body within the Family Justice system.

87. I start with basic concepts and labels. There is no definition of an 'expert' in Family proceedings, save for the circular procedural definition at FPR 2010, r 23.2(c): "'expert' means a person who provides expert evidence for use in proceedings".

88. Certain statutory exceptions to the term are set out in Children and Families Act 2014, s 13(8):

> '(8) References in this section to providing expert evidence, or to putting expert evidence before a court, do not include references to—
>
> (a) the provision or giving of evidence—
>
> (i) by a person who is a member of the staff of a local authority or of an authorised applicant,
>
> (ii) in proceedings to which the authority or authorised applicant is a party, and
>
> (iii) in the course of the person's work for the authority or authorised applicant,
>
> (b) the provision or giving of evidence—
>
> (i) by a person within a description prescribed for the purposes of subsection (1) of section 94 of the Adoption and Children Act 2002 (suitability for adoption etc.), and
>
> (ii) about the matters mentioned in that subsection,
>
> (c) the provision or giving of evidence by an officer of the Children and Family Court Advisory and Support Service when acting in that capacity, or
>
> (d) the provision or giving of evidence by a Welsh family proceedings officer (as defined by section 35(4) of the Children Act 2004) when acting in that capacity.'

89. Expert evidence will only be permitted in children proceedings 'if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly' [C+FA 2014, s 13(6)].

90. An expert witness may give factual evidence on a matter that he is not qualified to give expert evidence upon, but his opinion will only be admissible 'on any relevant matter on which he is qualified to give expert evidence' [Civil Evidence Act 1972, s 3]. There is no definition of 'qualified' in CEA 1972.

91. Save for those individuals who are excluded from giving expert evidence by C+FA 2014, s 13(8), the question of whether an expert is 'qualified to give expert evidence' [CEA 1972, s 3] is a matter for the court in each individual case.

92. The instruction and role of experts in the Family Court is already the subject of extensive coverage within FPR 2010, Part 25 and PD25A-D. In particular:

    a) The duties of an expert are set out at FPR 2010, r 4.1;

    b) The 'standards for expert witnesses in children proceedings in the Family Court' are set out in the Annex within PD25B;

    c) There is a list in Appendix 1 to the PD25B standards the statutory regulators applicable to the various UK health and social care professions. It includes the list of 'protected titles' regulated by the HCPC;

    d) Appendix 2 to the PD25B standards has a list of examples of professional bodies/associations relating to non-statutorily regulated work, this list includes:

        - Association of Child Psychotherapists
        - The UK Council of Psychotherapy
        - The British Association of Counselling and Psychotherapy;
        - The British Association of Behavioural and Cognitive Psychotherapies;
        - The British Psychoanalytic Council.

93. Certain categories of psychologist, for example 'clinical psychologist,', have a 'protected title', which may only be used by those who are validly registered under the regulations [see paragraph 66]. The generic label 'psychologist' is not protected and may be used by any individual, whether registered or not. A report by an unregistered person calling themselves a psychologist may be called a 'psychological report'.

94. From the perspective of the court, and it may be from a wider public perspective, the open-house nature of the term 'psychologist' is unhelpful and potentially confusing. In other fields, particularly medicine, the court is used to a stricter regulatory scheme in which an individual can only call themselves by a professional title, for example paediatrician, or pathologist, if recognition of their expert status is confirmed and

monitored through formal regulation and registration. It is, however, a matter for the psychological profession and, ultimately, Parliament, whether a tighter regime should be imposed.

95. In its letter to the court declining the invitation to intervene the HCPC, having described the registration scheme and the HCPC's role in setting standards of proficiency for practitioner psychologist. The letter continues:

> 'The broad use of the term 'psychologist' is not a protected title. Beyond the HCPC's protected titles, any person may call themselves a psychologist. Because the functions of practitioner psychologists are not protected, they may practice as such without the need for registration. … [W]ith no restriction on the use of the title 'psychologist' itself, there is nothing the HCPC can do about individuals undertaking the same work as registrants but who simply avoid using a protected title. On 1 July 2022 we wrote to the Director of Workforce at the Department of Health and Social Care to highlight the risks presented by unregulated psychologists including in relation to the provision by them of expert evidence in court proceedings. As noted above, it is ultimately a matter for the Government to determine which roles should be subject to statutory regulation.'

96. The court must, therefore, work with the current, potentially confusing, scheme, but must do so with its eyes wide open to the need for clarity over the expertise of those who present as a psychologist, but who are neither registered nor chartered.

97. Courts faced with a potential expert who presents a voluble, unstructured CV should at all times bear in mind that there is clear and solid ground to be found in the registration scheme. A lesson plainly to be drawn from the present case is the need for clarity as to an expert's qualification and/or experience. The more diffuse and unstructured a CV, the less effective it is likely to be in transmitting information crisply and clearly. In this regard, lawyers, magistrates and judges are lay readers. They need to be able to see with clarity, and in short form, the underlying basis for an individual's expertise. HCPC registration, or chartered status in the BPS, provide a reliable, one-stop, method of authentication. Where a potential expert is registered with the HCPC as entitled to hold themselves out as an expert under one of the protected titles, this can be taken as sufficient qualification to offer an opinion within that field of practice. Further detail in the CV may assist with the choice of one particular expert over another, but it is the kitemark of HCPC registration which should resolve the question of qualification without more. A psychologist's CV should, therefore, prominently highlight whether they are HCPC registered or not. It is incumbent on an un-registered psychologist to assist the court by providing a short and clear statement of their expertise.

98. It is not, however, for this court to prohibit the instruction of any unregulated psychologist. The current rules and guidance are clear and contain an element of flexibility. The question of whether a proposed expert is entitled to be regarded as an expert remains one for the individual court, applying, as it must, the principles reiterated by the Supreme Court in *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6 (adopting the approach in *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579) that

> "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an

> expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

This is not, however, an open house and there is a need for caution. In every case the court should identify whether a proposed expert is HCPC registered. A sensible practice, where the expert is un-registered, is for the court to indicate in a short judgment why it is, nevertheless, appropriate to instruct them.

99. A further, potentially important, factor is the restrictive scheme that ACP has described as being applied by the publishers of psychological assessment tools which require a bespoke, or advanced, level of understanding from the user [see paragraph 69]. The description of the three-tier structure in counsel's submissions was necessarily summarised and requires further evaluation and explanation before it may be taken further by courts, but, if it is correct that publishers do restrict access to a range of valuable tools to those with HCPC registration, this can only enhance the need for the court to understand whether a potential expert is, or is not, registered. I am going to invite the FJC to investigate this issue and consider revising its guidance to include reference to this factor if that is justified.

100. Ms Brereton correctly submitted that there was a need for rigour during the process of identifying and approving an expert for instruction in Family proceedings. Given the potentially confusing use of the title 'psychologist', the need for due rigour is underscored.

101. In the present case evidence of a lack of rigour arises from the court indicating in its initial order that either 'a psychiatrist or a psychologist' was to be instructed. It is not necessary to do more than state that plainly there is a significant difference between the two. A psychiatrist is a doctor who is a specialist in the diagnosis and treatment of mental illness, whereas a psychologist's skill is in assessing personality, intellectual functioning and behaviour. Whilst there may be a crossover between the two, their focus, skill and training are different.

102. The difficulties that have arisen in these proceedings, where much time has been taken up at first instance and on appeal in attempting to evaluate Ms A's qualifications to discharge her instructions, indicate that work should be done to assist parties and the court at the initial stage of choosing an expert by establishing a template into which the basic qualifications of any 'psychologist' should be entered. The aim of the template will be for readers to see at a glance whether an individual is currently registered with the HCPC (and if so in what category), or a Chartered Psychologist, or not. Further information, displayed shortly and clearly, should identify any formal qualifications, posts held and published work. If, on investigation by the FJC, the three-tier structure controlled by the publishers of assessment tools is seen as a valid indicator, that too should be included. Such a template might include some easily understood 'traffic-light' indication of expertise. A template of this nature would, I believe, greatly assist courts in divining the basic level of expertise of a potential expert witness. It would remain open to the court to instruct any person who it considers is capable of discharging the expert role in each case, but, particularly where a proposed psychological expert is un-registered, the court should be on notice to the need to look more carefully at the underlying evidence of appropriate expertise.

Parental Alienation

103. Before leaving this part of the appeal, one particular paragraph in the ACP skeleton argument deserves to be widely understood and, I would strongly urge, accepted:

> 'Much like an allegation of domestic abuse; the decision about whether or not a parent has alienated a child is a question of fact for the Court to resolve and not a diagnosis that can or should be offered by a psychologist. For these purposes, the ACP-UK wishes to emphasise that "parental alienation" is not a syndrome capable of being diagnosed, but a process of manipulation of children perpetrated by one parent against the other through, what are termed as, "alienating behaviours". It is, fundamentally, a question of fact.'

It is not the purpose of this judgment to go further into the topic of alienation. Most Family judges have, for some time, regarded the label of 'parental alienation', and the suggestion that there may be a diagnosable syndrome of that name, as being unhelpful. What is important, as with domestic abuse, is the particular *behaviour* that is found to have taken place within the individual family before the court, and the *impact* that that behaviour may have had *on the relationship* of a child with either or both of his/her parents. In this regard, the identification of 'alienating behaviour' should be the court's focus, rather than any quest to determine whether the label 'parental alienation' can be applied.

Appeal against CA 1989, s 91(14) order

104. In the event that the appeal on the issue of reopening was dismissed, Ms Brereton maintained the mother's challenge to the s 91(14) order imposed by the judge.

105. HHJ Davies dealt with the s 91(14) order as follows:

> '38. Under sections 91(14) and [91A] the court has power to make an order under its own initiative. This is not a case where there have been a series of hopeless applications. The law is now clear that these orders should not only be made in exceptional circumstances. Although the duration of the litigation in this case perhaps does put it to towards the top end of anything that could be regarded as a normal dispute, I take into account, as I must, the impact on these children of the continual litigation in this case. They have been in litigation, in one way or another, for about eight years of their lives. I accept the recommendation of the guardian that the children now need an extended period where they understand that their living arrangements are stable and fixed and they need to know that their parents are no longer fighting over them.
>
> 39. The mother fears that this section 91(14) order will be seen as an interference with their Article 8 rights (in other words an interference in their private and family life).
>
> 40. A section 91(14) order is not a total bar of any further application but it adds an additional step which is required before an application could be made to ensure that such an application is appropriate. I have to make sure that any order is necessary, proportionate and is the least interventionalist order in any Article 8 rights.

41. I am satisfied that this is a case in which a section 91(14) order is necessary. I weigh the potential damage that will be caused to the children if there is further litigation. They need to settle into the routine that I put in place a year ago. The children need to continue to have good contact with their mother and to spend good time with their father. They need to enjoy their life at school and to continue to get involved in all of their out-of-school activities with their friends. The children do not need social workers, guardians, therapists or counsellors. They do not need the spectre of court cases hanging over them.

42. I have come to the conclusion that I should make a section 91(14) order and that this order will last until the eldest child has completed the GCSE exams (in June 2025). That will enable the children to know that there will be no major changes in their lives for a sensible period of time. That, then, is my order in respect of section 9(14).'

106. CA 1989, s 91A states:

'**S 91A Section 91(14) orders: further provision**

(1) This section makes further provision about orders under section 91(14) (referred to in this section as "section 91(14) orders").

(2) The circumstances in which the court may make a section 91(14) order include, among others, where the court is satisfied that the making of an application for an order under this Act of a specified kind by any person who is to be named in the section 91(14) order would put—

(a) the child concerned, or

(b) another individual ("the relevant individual"),

at risk of harm.

(3) In the case of a child or other individual who has reached the age of eighteen, the reference in subsection (2) to "harm" is to be read as a reference to ill-treatment or the impairment of physical or mental health.

(4) Where a person who is named in a section 91(14) order applies for leave to make an application of a specified kind, the court must, in determining whether to grant leave, consider whether there has been a material change of circumstances since the order was made.

(5) A section 91(14) order may be made by the court—

(a) on an application made—

(i) by the relevant individual;

(ii) by or on behalf of the child concerned;

(iii) by any other person who is a party to the application being disposed of by the court;

(b) of its own motion.

(6) In this section, "the child concerned" means the child referred to in section 91(14).'

107. The mother's appeal against the s 91(14) order asserts that it lacks proportionality were there was no history of unmeritorious applications. Secondly, it is submitted that the extension of the law by s 91A has no application in circumstances where the judge did not find that there was a risk of harm to the children or to another individual.

108. Ms Brereton submitted that, looked at in the round, this was not a case where the s 91(14) filter should have been deployed. Although only made for 3 years, such an order is, it is argued, disproportionate in a case such as this.

109. In opposing this aspect of the appeal, Mr Hale drew the court's attention to the fact that, in February 2022, the judge had advised the mother to consider very carefully whether she should apply to have the facts reopened. The mother nevertheless pursued her application. It was an application made against evidence that the children have thrived in the current arrangements and are now sustained in a relationship with both of their parents.

110. In relation to the new provision in s 91A, it is correct that the judge did not make specific findings of 'risk of harm' to the children or the father, but the judge did weigh the 'potential damage that will be caused to [the children] by further litigation'. This is purely a semantic distinction and it is clear, having expressly referred to s 91A, that the judge was applying the new provision. In any event, the general power under s 91(14) is now to be deployed without the need to establish exceptional circumstances [*Re A (A Child: Supervised Contact) (s 91(14) Children Act 1989 Orders)* [2021] EWCA 1749] where there is a need to protect a child from endless unproductive applications.

111. It is not correct to say that the appellant mother has no history of unmeritorious applications. The first attempt to appeal was cast as 'totally without merit' by Peel J. The subsequent application to reopen the facts was dismissed and this appeal, which was permitted for reasons other than the merits themselves, has now been dismissed.

112. The judge's judgment demonstrates that she properly considered all of the relevant factors. She had given the mother fair warning about the consequences of an application to reopen if that were to subsequently fail. In all the circumstances this aspect of the appeal has no arguable basis and must also fail.

Costs Appeal

113. After correctly setting out the legal context and the case for each party on costs, the judge gave the following reasons for her decision:

'1. The mother's application to reopen the hearing had no prospect of success. It was a repetition of the argument put before Peel J when the application for permission to appeal was dismissed as being totally without merit.

2. The arguments had previously been raised in the same manner during the original hearing in 2021.

3. The "new" matters which the mother attempted to raise were not new and were not relevant to the decision I made which was based on the whole of the evidence in the case.

4. The mother brought this application knowing that costs were an issue the father having raise this at the previous hearing in February 2022 and in subsequent correspondence.

5. The mother's determination to have what might be described as "another bite of the cherry" was not a reasonable stance to take in all the circumstances of this case.

6. I therefore find that this is a case in which the mother's unreasonable approach to the litigation allows me to consider making a costs order.

7. I take into account that any order made against the mother will cause her to become even more disillusioned with the justice system and may have an adverse impact on her however I do not consider a costs order will impact adversely on the children who are now settled living with the Father.

8. I take into account that an order for costs may make cooperation between these parents even more difficult to achieve however I also take into account that they have been litigating for about 8 years and there has been not so much as a glimmer of hope that they will start to cooperate. Sadly I conclude that a costs order will have no impact on their already rock bottom relationship.'

114. The costs appeal is maintained even if, as it has, the substantive appeal failed. The appellant's skeleton submits that:

a) There was no finding in the main that the mother's conduct in seeking to reopen the case was unreasonable or reprehensible;

b) It was not sustainable to go further than the substantive judgment and holding that the application had no prospect of success;

c) Even if unreasonable conduct is found, a costs order should not automatically follow;

d) The combined effect of the judge's substantive findings, the s 91(14) order and costs order is likely to have a chilling effect on the mother's ability to act to promote the children's best interests in the future.

115. Ms Brereton submitted that there was no basis for the judge to hold that the mother had acted unreasonably or reprehensibly in promoting her application for the findings to be reopened. In particular, at the time of the February hearing, the children's guardian was supporting the application and it is therefore difficult to say that the mother was unreasonable at that time. In addition, during the spring and summer of 2022 there were other issues regarding the children and the case was likely to be back before the court in any event.

116. In opposing the appeal on costs, Mr Hale described the judge's judgment as being a model ruling. After 8 years of litigation, this was the first occasion that the father had made a costs application. His overall costs bill has been in the region of £250,000.

117. It is of note that there is no criticism of the judge's approach in law to the question of costs. In the circumstances, on appeal, the court has regard to her finding that it was not reasonable for her to pursue the reopening application and then the exercise of judicial discretion.

118. Having reviewed this case in detail, it is not possible to fault the judge's approach on the question of costs. In circumstances where the first appeal had failed on the basis that it was 'totally without merit', and a second attempt to overturn the findings of fact based largely upon subsequent guidance, rather than anything of more substance, had failed, the judge was fully entitled to hold that the mother's conduct was not reasonable. Whether those words were used in the substantive judgment or not, the reality is that the application to reopen did not enjoy any prospect of success. In terms of proportionality, it is relevant that this was the first occasion on which the father had sought costs. Whilst the cumulative impact of the judge's findings and orders will have been a substantial blow to the mother, by failing, without good reason (as Peel J, HHJ Davies and I have now held), to accept those findings but instead seek to overturn them, she had brought the making of those orders upon herself.

119. As with the appeal against the s 91(14) order, the costs appeal is unarguable and can only be dismissed.