



Neutral Citation Number: [2024] EWCA Civ 326

Case No: CA-2024-000071

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT IN TRURO
Recorder Ashby
TR22C50097

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 April 2024

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE COULSON
and
LORD JUSTICE NUGEE

H (A Child: Contact: Domestic Abuse)

Emma Favata (instructed by **G & I Chisholm Solicitors**) for the **Appellant Father**
Emma Pearce (instructed by **Cornwall Council**) for the **Respondent Local Authority**
Charlie Barrass-Evans (instructed by **Coodes Solicitors**) for the **Respondent Mother**
James Adams (instructed by **John Boyle Solicitors**) for the **Respondent Child**
by their Children’s Guardian

Hearing date: 19 March 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 10 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

1. This appeal concerns a child arrangements order under which a father is to have no face-to-face contact with his three-year-old son for an indefinite period. The child, who I will call James, lives with his mother.

Background

2. The parents' relationship started in 2016, when the mother was aged 18 and the father 43. It turned sour with violence on both sides, including in 2018 when in the course of a physical altercation the father pushed the mother over some railings and assaulted her when she was on the ground.
3. As the relationship was ending, the mother became pregnant and James was born in early 2021. The parents briefly cooperated, but by the time he was two months old, the position was again volatile. In September 2021, the mother stopped the father from having unsupervised contact after he had reported her to social services. In December 2021, James was made the subject of a Child Protection plan under the category of emotional abuse, and later that month the father brought proceedings seeking his removal from the mother's care. At around that time he had been shocked to discover that the mother's stepfather, who had been having contact with James, had convictions for serious sexual offences against a child in the 1990s and was subject to a Sexual Harm Prevention Order. By early 2022, both parents had obtained non-molestation orders against each other.
4. As if all this was not bad enough, James developed a rare and serious health condition. The mother missed a medical appointment and before another could be arranged, the condition had worsened to the point that he needed surgery, leaving him with a life-affecting condition, for which the father blamed the mother.
5. In September 2022, the Cafcass officer advised that a fact-finding hearing was necessary and recommended interim supervised contact. At the next hearing the court made an interim care order and in October 2022, the local authority issued care proceedings.
6. At a hearing in October 2022, the mother alleged that she had recently been raped by the father at a particular time and place. She was ordered to provide a statement setting out what had happened and there followed a sequence of events during which she retracted and then reinstated her allegation.
7. The court nevertheless approved the mother and James being placed in a parent and child foster placement. There were two such placements. The father began to have weekly supervised contact.
8. The fact-finding hearing, which lasted for five days, took place before Recorder Crosfill in April 2023. In a judgment of 19 May 2023, to which I pay tribute for its clarity and mastery of the complex web of evidence, he found that the parents' behaviour had been very poor indeed and that they had lost sight of the damage that attacking each other might do to James.

9. As regards the mother, the recorder found that she had a difficult childhood and was a vulnerable individual with mental health problems. Particularly when in drink, she could quickly lose her temper. She could resort to physical violence and had done so towards her mother, police officers and medical professionals. There had been spats and disagreements with other members of her family and her friends. In 2019 she had made a suicide attempt. She had been prepared to lie to obstruct contact, including by lying about being raped by the father in October 2022. Having seen her give evidence, the recorder formed the impression that she was worn down by the court process.
10. As to the father, the recorder found that he too had had a difficult childhood. He had had an earlier relationship that had featured allegations of domestic violence being made against him, and he had played no part in the lives of his three children from that relationship. He had made a suicide attempt in 2014, and in October 2021 he contacted the mother suggesting that he intended to kill himself, though the recorder found that this was largely said in an attempt to manipulate her. Later that year, the father had attempted to use his justified fears about the mother's stepfather as a bargaining chip to get contact. His subsequent blaming of the mother for James's health condition was unnecessary and cruel. He had engaged in coercive and controlling behaviour that principally included constantly criticising and belittling the mother for her obvious vulnerabilities, and on a number of occasions using physical violence. His 'I know best' attitude in the proceedings was a continuation of this behaviour.
11. The recorder found that both parents had used the police and social media to attack each other, describing it as a social media war.
12. In June 2023, after the fact-finding hearing and with positive assessments from the parent and child placement, the mother and James moved back into the community, where they remained at the time of the final hearing in November 2023.
13. In July 2023, the father's supervised contact was increased to twice a week. The contact was generally of good quality and was enjoyed by father and son.

Professional assessments

14. At the end of the fact-finding hearing, the court approved the instruction of Dr Judith Freedman, consultant psychiatrist, to undertake a psychiatric and psychological assessment of the mother and of the father. Her report was dated 2 October 2023. In it she described two parents with complex historical and present mental health needs and a young child with special needs of his own, following his treatment.
15. Dr Freedman found that the mother's experiences had caused her to suffer from complex post-traumatic stress disorder (CPTSD). This could potentially cause problems for James as there might be times when she needed to close herself off from him to avoid triggering traumatic memories. However, Dr Freedman expressed more optimism about the ability of the mother, as opposed to the father, to mature and grow in her role as a parent to James and to continue to prioritise his needs. This was in keeping with her age-appropriate flexibility, which was an important factor in differentiating her prospects as a parent from the father's. Dr Freedman considered it important that, while both parents loved James and wanted to be part of his life, he

already had a strong and ongoing relationship with his mother and relied on her as the person who had seen him through the trauma of his treatment.

16. In relation to the father, Dr Freedman had a number of concerns. He had been diagnosed with depressive disorder and was likely suffering from an underlying disorder in his personality. The exact nature of this would only become apparent through psychotherapy, but it was likely that he had a mixture of narcissistic and borderline personality traits, which contributed to his need to engage in controlling and coercive behaviour. He did not accept his part in the acrimony, nor did he recognise the potential harm for James. He remained caught up in his complaints about the mother and with wanting to win the battle against her. He was preoccupied with the mother being sent to prison for her false rape allegation, without regard to the impact on James. His wish to monopolise might make him highly committed to James at present but, given that he had left his older children, Dr Freedman was concerned about his ability to maintain a strong relationship that would allow for the presence of a third person (the mother).
17. Passages in Dr Freedman's interviews gave vivid pictures of the profound impact that these events have had on the parents' lives. I refer to the father's account at [CB218] and the mother's account at [CB232], which make troubling reading.
18. Dr Freedman deferred a final view until she had seen the parenting assessments. She was asked a series of questions by the parties. As to contact, she replied that James should if possible benefit from having both parents in his life, but this was complicated by the likelihood of ongoing conflict if they had to negotiate with each other about contact arrangements. Contact would therefore require the ongoing involvement of the local authority. The aim would be for James to have a sense of his identity and maintain an adequate relationship with his non-resident parent. That would mean that contact would need to take place at a minimum of four times a year. Long-term professionally supervised contact was not ideal but it might be preferable to no contact at all.
19. Parenting assessments of the mother and the father by Valerie Cannon, independent social worker, were provided on 16 October 2023. She found that the mother was meeting James's needs to a good standard and she had no concerns about her parenting capacity. She expressed the view that James should remain in her care with some support. She expressed considerable concern about the father's attitude, which she feared could lead to ongoing harm to James and his mother. He continued to be unable to acknowledge or show any remorse for some of his behaviour, blaming others. He remained entirely without insight or motivation to change. He continued to harbour a strong sense of grievance and perceived injustice against the mother and he would want to impress his views upon James. His ongoing derogatory attitude to the mother and more widely, to women (especially mothers) as well as toward professionals who did not share his views presented a significant risk to James both directly and as a result of the effect exposure to this might have on the mother. Ms Cannon advised that the main thing that was likely to impact on the mother's mental and emotional well-being, and thus her capacity to care for James, would be contact with the father or experiencing the effects of his ongoing influence on her life. In particular, his discovering where she lived would be likely to have a detrimental impact on her feeling of safety and possibly re-trigger her CPTSD. Her response to continuing contact with the father was the single most significant thing that could affect her

capacity as a parent. Consequently, Ms Cannon recommended that contact should be limited to indirect contact unless and until the father became able to show evidence of change. She commented that it was rare for her to have to make such a recommendation.

20. The Guardian noted that contact was enjoyed by James and his father. She considered that the decision in relation to contact was a finely balanced one. Continuation of the current arrangements would be safe within the meetings themselves, but the most important need for James was stability of care by his primary caregiver and attachment figure. If the placement with mother was undermined, he faced the possibility of being placed in the care system. Neither parent could see a time when they would be able to come into contact with each other and both feared for their own safety and were apprehensive about further allegations. It was not appropriate to recommend supervised contact for the whole of James's childhood and there was a concern that as he grew and developed he would not be able to talk to his father about his school, his friends or his home. The father showed no insight and was not even pre-contemplative to change as he was very clear that he was not the issue or the risk. His static mindset showed no capacity to change and therefore he remained a physical and emotional risk to the mother and James. On balance, the safest plan was two-way letterbox contact as recommended by the local authority. If the father was able to reflect and move forward, direct contact might be reinstated.
21. When Dr Freedman came to give her oral evidence she was made aware of the position taken by Ms Cannon and the Guardian; she withdrew from her recommendation of quarterly contact and supported the proposal for indirect contact only.

The decision under appeal

22. The final hearing took place in November and December 2023 before Recorder Ashby. Over the course of four days, she heard evidence from Dr Freedman, Ms Cannon, the social worker, the father and the Guardian. The mother had filed statements but was not required to give oral evidence, and she attended the hearing by CVP from her solicitors' office.
23. On 8 December 2023, the recorder handed down a draft judgment and on 22 December she handed down her final judgment and made orders in these terms:
 - i. James should live with his mother.
 - ii. A supervision order was made for one year.
 - iii. The father's contact was to be limited to one 'goodbye for now' session, and thereafter to consist of sending and receiving letters, cards and photographs three times a year.
 - iv. The mother was permitted to withhold information from the father about James's home address, his nursery or school, and any other information identifying his whereabouts.
 - v. The father was prohibited from removing James from his mother's care and from taking deliberate steps to discover his whereabouts.

- vi. An order for three years under s. 91(14) Children Act 1989 was addressed to both parents.
 - vii. Non-molestation orders were made against both parents.
24. These orders were broadly in accordance with the proposals of the local authority, supported by the evidence of the professional witnesses and by the mother. The father's position was contained in a statement of 9 November 2023.

“2. James has gone through a lot in his life so far and he does need some stability and avoid further big changes. What is best for James right now is what is most important. It would not be right at the moment for him to come to live with me. What is right at the moment is to give us time to develop our relationship and to have contact which is face to face contact. I would like that to build up to include unsupervised and then staying contact.

3. That would mean that James would remain living with his mother. That would mean the least amount of change for James. That does not mean that I think it a completely safe place for James. I still have worries about it. Those come from the findings and admissions made by the mother during the fact finding hearing... and the whole history of this case in general...

39. I do fear that the recommendation that I should have no contact is just too big a step. That would be harmful to James and very upsetting to him.”

25. It is unnecessary to summarise large parts of the recorder's lengthy and careful judgment, to which I equally pay tribute. She directed herself carefully in relation to the law, including the court's approach to making contact orders against a background of domestic abuse. She reviewed the witness evidence in detail, noting that both Ms Cannon and the allocated social worker expressed surprise that the father had agreed that James should remain with his mother when he had until very recently been highly critical of her and insistent that he was better placed to be main carer.
26. In light of the grounds of appeal, I must refer to the recorder's treatment of Dr Freedman's evidence. It had been the subject of intense cross-examination by counsel then representing the father, as we see from the transcript. The recorder said this:

“107. Dr Freedman confirmed that she had now read the various documents she had not had sight of when preparing her letter of 25 October 2023. She had also read the updating documents that had been filed since that time. She confirmed that nothing she had read has given her cause to change her recommendations, save that she accepted the view of the Guardian and the Social Worker that ongoing low level direct contact between James and the father would be unwieldy. This was something she had left open as a possibility in her report, but she now accepted that it could not happen.

108. She was taken to task on this in cross examination by [counsel for the father], who put to her that it was her job simply to opine whether or not it is in James's interests to have face to face contact, whilst it was for someone else to talk about the practicalities or difficulties of that. Her evidence on this point was that she was not instructed to assess James. She holds strongly the professional view that if at all possible, children should know both parents, but she has also to listen carefully to the people who are instructed to consider James's life. She cannot separate herself entirely from what others have said. In this case the Guardian and the social workers have said they do not think face to face contact is viable and they have said that for a number of reasons, which Dr Freedman takes seriously and respects. She accepted that if the identified difficulties could be ironed out, then direct contact would be in James's interests, but this was not something she thought could happen overnight."

27. The recorder remarked that she did not find it strange that Dr Freedman's opinion in respect of direct contact had evolved in light of the views of the social care professionals: indeed, she would have been concerned if an expert witness was not able to reflect upon and weigh in the balance the views of others. She found Dr Freedman's evidence in this regard to be well reasoned.
28. The recorder also analysed in considerable detail the criticisms made by the father of Dr Freedman's approach. These largely consisted of complaints that the doctor had not been even-handed as between the parents. The recorder was not troubled by the majority of these arguments, but she did pick out three as warranting consideration. The first was that Dr Freedman recorded Recorder Crosfill as saying that the father was narcissistic, when the word he had used was 'arrogant'. The second was that the doctor had accepted that the mother had 'largely' accepted the findings of fact, when the mother's statement makes clear that she had not done so in relation to the October 2022 rape allegation in particular. The third was that the doctor appeared to have treated unproven allegations by the mother as if they had been accepted by the court. Having looked into these matters, the recorder considered that, in some respects Dr Freedman might have been more careful in her written report:

"135. However, on balance I do not find the flaws in her written report to be fatal to her overall conclusions. The most important conclusion that Dr Freedman draws, aside from illustrating to the court the nature of each parent's difficulties and the therapeutic input required to address those, is the conclusion she makes that the mother is making efforts to move away from her past self and past relationship. The mother has a degree of insight and self-awareness, and a motivation to change, which Dr Freedman found to be entirely absent in the father. That conclusion is not, in my judgment, marred by her treatment of what the mother told her in interview. Dr Freedman has identified in the mother a candidate for whom therapeutic intervention could be very successful, and an individual whose "door is open" to making the changes required, and she has reached the opposite

[conclusion] about the father. This of course is well within her area of considerable expertise and furthermore, as shall become clear below, is not contradicted by any of the other evidence before me, and so I accept those conclusions.”

29. The recorder said more about the suggested deficits in Dr Freedman’s approach in response to the now seemingly inevitable request for clarification, but it is not necessary to say more about that. Nor do I need to rehearse her treatment of the evidence of Ms Cannon or the allocated social worker.
30. In the course of her assessment of the father’s evidence, the recorder remarked on his pride in James and pleasure in contact, and his denial that the mother was truly afraid of him. She did not believe that he genuinely accepted that the mother was a good enough parent to care for James and she considered that a lot of his evidence appeared to be aimed at undermining her. She found that the father remained worryingly fixated on the mother’s wrongdoing and was unable to see his own role in things for what it really was. In summary:

“240. I found the father to be sincere in his love for his son, and I understand the frustration and anxiety he must feel at the present situation. I do not doubt that he feels victimised; it is clear from the fact finding outcomes (both the parents’ admissions and the judge’s findings) that both parents have behaved terribly in the past, and neither of them has always been focused on James’s welfare. But the father’s oral evidence lent weight to the views of Dr Freedman and the social work professionals that whereas the mother has recognised her part in things and is working hard to improve the situation, the father appears stuck. He returned repeatedly to his narrative of blaming the mother for everything and justifying his behaviour as being a result of hers, and as I have said, his evidence was egocentric; he remains at the centre of his thought processes. Much of his evidence appeared to me to be more about undermining the mother than about giving me any reassurances about his own conduct.

241. Whilst he has assured me that he would not intentionally do anything to undermine James’s placement with the mother, I did not entirely believe him. Indeed, I consider on balance that it is likely he will find that he cannot help himself, such is the extent of his entrenched views of the mother, and I think it safe to say that the father continues to have an agenda where it comes to the mother that is not just about James’s welfare.”

31. In relation to the Guardian, the recorder concluded:

“265. I found the guardian to be a very thoughtful witness. She has clearly given considerable thought to the local authority’s care plan, the mother’s requests for various orders and the way in which the orders sought all combine. She had conducted a meticulous and difficult balancing exercise, and I believe her

entirely when she says it was not at all an easy decision to endorse the local authority's plan for the cessation of direct contact between James and the father."

32. Taking stock of the professional assessments as a whole, the recorder considered it acceptable for the other professional witnesses to have drawn upon Dr Freedman's conclusions in conducting their own analyses, despite the areas of difficulty in her report. She also rejected the suggestion that Ms Cannon had relied on Dr Freedman blindly or that the local authority had blindly relied on Ms Cannon. She noted that all involved were experienced professionals and she was satisfied that they had each analysed the evidence and considered carefully what recommendations they should make. The guardian had articulated this particularly well. In summary:

"280. I am satisfied therefore that it is not the case that the local authority's case about the cessation of contact should simply fall away because of issues in Dr Freedman's report. It is a position shared between all of the professionals and based upon a holistic evaluation of the evidence. Where there is consensus between all the professionals in the proceedings and I am satisfied that their evidence is adequate and has not been undermined, it is quite right to say that I must take that particularly seriously and that I would need to have clear and cogent reasons... to go behind those recommendations."

33. The recorder then addressed the welfare checklist in a passage that included these paragraphs:

"289. The primary change in James's circumstances that is being proposed by the LA is that he will cease having direct contact with the father. Over the course of these proceedings, James has been enjoying regular contact with the father and has developed a weekly routine of which this contact is an important part. His relationship with the father has blossomed and it is clear that the father is an important person to James..."

295. The likely effect on James of a change in circumstances must, in this case, be balanced against the likely effects on him of direct contact continuing, and I consider this below under the next subheading.

Harm suffered or that he is likely to suffer

296. The harm James has suffered in the past is well documented and well-rehearsed throughout the written evidence in these proceedings. It is reflected in the findings that have been made and the final threshold document. I do not think it necessary to repeat it here.

297. Of more importance at this stage in the proceedings, is the harm that James is likely to suffer, going forwards. In the event that direct contact with the father is ceased, then James will

suffer the harm that is outlined in the previous paragraphs in consideration of changes in circumstances. If direct contact is continued however, then in this case James faces a raft of other risks of harm.

298. Most importantly, there is a risk that James's placement with the mother will destabilise either through the father actually taking steps to achieve this or, more likely, through the mother's fear or perception that he may do (or is doing) so. The mother has a diagnosis of CPTSD and it has been identified that fear of further interference by the father in her life (justified or otherwise) has the potential of triggering her symptoms. When triggered, she is likely to be unable to provide James with the parenting care that he needs.

299. This means that, even if one takes at face value the father's assertion that he has no intention of ever doing anything that would disrupt the placement, the risk nonetheless remains until such time as the mother has successfully completed treatment for her CPTSD. This treatment is likely to take two years to complete.

300. Having heard from the father at length I have formed the view that despite his stated intentions, there is a strong likelihood that at some stage he will be unable to help himself in doing something that could, or does, undermine the placement. His view of the mother is so negative and so entrenched that I think it only a matter of time before something occurs that causes him to react. In my judgment therefore, the risk of destabilisation of James's placement should be viewed not only in terms of the mother's perception of potential risk but also as an actual risk, still posed by the father.

301. If James's placement with his mother is destabilised such that she cannot offer him good enough care, the family will find itself back in the court arena. James will endure another set of professionals becoming involved in his life and the uncertainty of further proceedings. He may not, ultimately, be able to remain living within his birth family.

302. Other than the risk of destabilisation of the placement, I heard from the professionals that there is risk of emotional harm to James from either parent if he should hear or perceive that parent being negative about the other. Exposed to that kind of behaviour, he could grow up to resent either one of his parents. Ms Cannon warned me that as it is the mother who will be imposing boundaries and dealing with the day to day, there was a risk that James would end up resenting her rather than the father.

303. Because it has broadly been agreed that it is better, especially for the mother because of her CPTSD but in reality, for both parents, if the father does not know where the mother and James are living, there is also risk to James arising from the pressure he will come under as he grows older, to ensure that he does not say anything during contact that might give away confidential information. The guardian explained how difficult, and how wrong, it would be to ask James to withhold information from the father.

304. Not only would a child of James's age find that extremely difficult to do (and I consider it extremely likely that it is only a matter of time before James says something at contact which does give away the mother's location or that of his nursery), but it would set a precedent for him whereby he could become unclear about what he can say to whom. In the event of, for example, problems in his home life with the mother, this represents a significant safeguarding concern as James will not feel that he is able to turn to trusted adults for help. The concept of having to keep secrets is not a good one to instil in a young child.

305. The ramifications of having to withhold information, and of any accidental leak of confidential information on his part, may not be something that James himself feels particularly in the next couple of years, unless it leads to destabilisation of his placement, but the wider emotional impact on him as he progresses through childhood and adolescence could be significant.

306. Whilst much of this analysis is phrased in the context of a future risk of harm, I do not consider it to be speculative. The evidence in this case demonstrates that there is a real prospect, a likelihood on the balance of probabilities, of these risks becoming reality."

34. The recorder then arrived at her conclusion about contact. She agreed with the guardian that the decision was finally balanced and extremely difficult. She had no doubt that the cessation of direct contact, even if it was only for a period of two to three years, would cause real loss to James. She balanced that very carefully against the risks of harm from a continuation of direct contact and considered that the most important piece of James's "jigsaw" at the moment was the stability of his placement with his mother. It was vital that this was secured and underpinned to ensure that he did not experience further harm, extending potentially as far as the loss of both of his parents. The direct risk was to the mother, with the secondary risk being to James because his welfare could not be safeguarded if hers was not. The link was not tenuous: harm occurring *to* the mother would place James at risk of significant harm *from* his mother. It was true that matters had improved during the course of the proceedings, but it would be incorrect to draw a parallel between this and the future. The parents had been under scrutiny, and James was still young.

35. Weighing up the risks and benefits of contact continuing or ceasing, the recorder drew the same conclusions as the professionals. The risk of harm to James from continuing direct contact was greater than the harm he would experience by it ceasing. The guardian had done her best to “think outside the box”, but nobody had come up with a satisfactory alternative solution to this very unique set of circumstances. It was a case in which the court had to search for the least harmful scenario. The only consolation for the father and for James was that the cessation of direct contact was intended to be a temporary measure of hopefully no more than three years. If both parents were able to engage fully in therapy and self-improvement, it should be possible for direct contact to resume. If this were to happen, given the quality of the contact to date, it should go well and be of great benefit to them both. She described indirect contact as being of utmost importance as a means of allowing the father to continue to have some involvement in James’s life and ordered the parents to share the costs of the contact service.
36. The ‘goodbye for now’ visit took place in January 2024.

The appeal

37. The father sought permission to appeal from the refusal of direct contact and from the length of the s. 91(14) order. On 14 February 2024, King LJ granted permission to appeal in relation to the issue of contact only.
38. The grounds of appeal are that:
1. In deciding that direct contact should cease, the recorder erred in allowing undue weight to the evidence of Dr Freedman.
 2. The recorder erred in ruling that direct contact should cease.
39. The real question that arises on this appeal falls under Ground 2, and I will dispose of Ground 1 briefly.
40. On Ground 1, Ms Favata argues that the final order was based in large part on the evidence of Dr Freedman, but that this was fatally undermined by the basis upon which her diagnoses of the parents were made. Those flaws were such that her report was unreliable and should have been approached with considerable caution. Ms Favata elaborated on the instances in which Dr Freedman’s approach was objectionable, a number of which have been referred to above, saying that they had crept into the assessment and thence into the evidence as a whole.
41. Having been taken through the detail of the argument under this ground by Ms Favata, I would reject this ground of appeal. The recorder rightly found that the core of Dr Freedman’s evidence lay in her assessment of the parents’ personalities and that this was not significantly affected by controversies about her loyalty to the findings of fact. Moreover, the final order was not on my reading unduly based on Dr Freedman’s views. She was one of four professional witnesses, who all saw broadly the same picture from their respective points of view. In fact, Dr Freedman was the last of the four to conclude that direct contact could not be recommended. The submission that her evidence confounded the court’s assessment is therefore unconvincing,

particularly where the father's complaints were scrutinised so closely by the recorder. We are being addressed with arguments that she was entitled to reject.

42. Turning to Ground 2, the father argues that the circumstances simply did not satisfy the conditions for cessation of contact. There had been good quality contact since November 2022, the father had not sought to find the mother during this time, and her own mental health had improved. A range of preventative orders had not been breached by the father. Thus, the risk identified by the recorder did not reflect the reality on the ground. Moreover, the other parties and the recorder did not give due consideration to the possibility that 12 months of support and supervision by the local authority might materially reduce the perceived risk of harm. Yet the father can only renew his application in three years' time, with no indication of what might happen then.

Analysis and conclusion

43. This was a genuinely difficult decision and the recorder gave it diligent attention. Her judgment shows a thorough grasp of the issues. In the circumstances, the appeal threshold is high. At the same time, any decision to bring apparently successful contact to an indefinite end requires strong justification.
44. The general approach to contact in cases where domestic abuse is a feature is summarised by MacDonald J in *D v E (Termination of Parental Responsibility)* [2021] EWFC 37:

“Child Arrangements Order – Termination of Contact

24. Applications for a child arrangements order under s.8 of the Children Act 1989 require the court to apply the principles set out in s.1 of the 1989 Act. In this case, the order sought is that there be no contact between G and her father. Within this context, I in particular note and bear in mind that s.1(2A) of the Children Act 1989 provides as follows:

“(2A) A court, in circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.”

25. With respect to assessing whether the contrary is shown for the purposes of s.1(2A) of the Children Act 1989, I further bear in mind that the courts have, historically, held that it is almost always in the interest of a child whose parents are separated that he or she should have contact with the parent with whom he or she is not living. This principle, and the following further applicable principles can be drawn from the decisions of the Court of Appeal in *Re C (Direct Contact: Suspension)* [2011] 2 FLR 912 at [47], *Re W (Direct Contact)* [2013] 1 FLR 494 and *Re J-M (A Child)* [2014] EWCA Civ 434 at [25]:

i) The welfare of the child is paramount and the child's best interests must take precedence over any other consideration.

ii) There is a positive obligation on the State and therefore on the judge to take measures to promote contact, grappling with all available alternatives and taking all necessary steps that can reasonably be demanded, before abandoning hope of achieving contact.

iii) However, the positive obligation on the State, and therefore on the court, is not absolute. Whilst authorities must do their utmost to facilitate the co-operation and understanding of all concerned, any obligation to apply coercion in this area must be limited since the interests, as well as the rights and freedoms of all concerned must be taken into account and, more particularly, so must the best interests of the child.

iv) Excessive weight should not be accorded to short term problems and the court should take a medium and long term view.

v) Contact should be terminated only in exceptional circumstances where there are cogent reasons for doing so, as a last resort, when there is no alternative, and only if contact will be detrimental to the child's welfare.

vi) The key question, and the question requiring stricter scrutiny, is whether the court has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.

26. These principles must be read in light of FPR 2010 PD12J, entitled Child Arrangements and Contact Orders: Domestic Abuse and Harm, which provides as follows at paragraph [7]:

“In proceedings relating to a child arrangements order, the court presumes that the involvement of a parent in a child's life will further the child's welfare, unless there is evidence to the contrary. The Court must in every case consider carefully whether the statutory presumption applies, having particular regard to any allegation or admission of harm by domestic abuse to the child or parent or any evidence indicating such harm or risk of harm.”

27. The foregoing principles set out in PD12J are expressed by reference to domestic abuse. However, it is plain that this approach will apply, in proceedings relating to a child arrangements order, to all allegations or admissions of harm to the child or parent relevant to the question of contact or evidence indicating such harm or risk of harm. Within this context, I note that paragraphs 35 to 37 of PD12J enjoin the court, inter alia, to

take the following factors into account when considering child arrangements in cases where the court is satisfied that such harm has occurred:

i) The court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.

ii) The court should apply the individual matters in the welfare checklist set out in s.1(3) of the Children Act 1989 with reference to the harm that has occurred and any expert risk assessment obtained.

iii) In particular, the court should consider any harm which the child, and the parent with whom the child is living, is at risk of suffering if a child arrangements order is made.

iv) The court should make an order for contact only if it is satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before, during and after contact.

v) The court should consider, inter alia, whether the parent is motivated by a desire to promote the best interests of the child or is using the process to continue a form of abuse against the other parent and the capacity of the parents to appreciate the effect of past abuse and the potential for future abuse.”

45. This approach is consistent with the rights analysis under Article 8 ECHR, neatly summarised by the recorder in the present case:

“Right to family life

98. I must have regard to the respective rights to respect for their family life of the child and their parents under Art.8 ECHR; while having in mind that where any balancing of rights between parent and child is necessary the interests of the child must prevail (*Yousuf v Netherlands* [2003] 1 FLR 210). Such intervention or intrusion as the Court decides upon into that family life must be necessary and proportionate to the harm that would otherwise be likely to be experienced by the child.

99. The approach to be drawn from domestic authorities is clearly accepted within European jurisprudence: where the maintenance of family ties would harm the child’s health and development, a parent is not entitled under Article 8 to insist that such ties be maintained (see *Neulinger and Shuruk v. Switzerland* [GC], no.41615/07, 6 July 2010; S 136; *R. and H. v. the United Kingdom*, no. 35348/06, 31 May 2011 S 73).”

46. As these overviews clearly show, the court must approach the fundamental welfare assessment that underlies every decision with full alertness both to the inherent value of the parent-child relationship and to the significance of any harm that a contact order may entail for the child or for the parent with care. Where these considerations conflict, the court must identify the best solution for the child or, where there is no good solution, the least worst one.
47. That is what the recorder did here. There was no easy answer. James was born to parents who Recorder Crosfill described as loathing each other, and each of them bore the scars of their disastrous personal relationship. At a superficial level, the fact that contact was going reasonably well might have appeared encouraging, but the deeper assessment undertaken by the court showed that the situation was unstable. Although the father had conceded that James should live with his mother, in his heart he believed that he would be the better carer, and he certainly wanted contact to develop to unsupervised contact and staying contact. This was regarded, by Dr Freedman for one, as impossible because of the high level of mistrust between the parents. Relevantly under PD12J, the father's motivation for seeking contact was also mixed and his capacity to appreciate the effect of past abuse was considerably lacking.
48. I would readily accept that, for the reasons given by the professional witnesses, the recorder was entitled to consider that the current level of contact was unsustainable for the future and that the removal of supervision could not be contemplated. Her findings of fact, which are not challenged, were that there was both a real and a perceived risk of harm to the mother arising from the father's attitude, and that this translated into a real risk of a placement breakdown for James. The evidence also supported her finding that it was objectionable in principle and unsustainable in practice for James to be called upon to keep his whereabouts secret from his father.
49. On a reading of the papers, it was less clear to me whether the recorder had focused sufficiently on the possibility of the less drastic solution of contact taking place infrequently, perhaps quarterly as Dr Freedman had briefly proposed in her answers to the parties' written questions. During the course of submissions, it was clarified that hardly any attention had been paid to this at the hearing, with the father seeking to maintain at least his current contact and the other parties arguing for no direct contact. At one stage, I wondered whether this might represent a missing element in the assessment, and it would indeed have been preferable if the issue had been expressly considered. However, having heard submissions, in particular from Mr Adams on behalf of the guardian, I am satisfied that this cannot invalidate the recorder's conclusion. The risks that she found compelling in relation to regular contact would also apply to a significant degree to infrequent contact, and the fact that no party identified this as a solution may reflect that.
50. Another matter that deserves consideration is the father's argument that the court has not provided a strategy for the reintroduction of contact in two or three years' time. Again, the recorder might have said more about this, and she might have drawn attention to the fact that the supervision order could be extended for a further two years on the application of the local authority. But in reality the ball will be in the father's court. If he is able to let go of what the recorder described as his "negative obsession" with the mother, he will have done something to repair the damage of the years, and can expect the court to look again at the possibility of restoration of face-

to-face contact. If not, the prospects will be gloomy, whatever intervention he might ask the court to make.

51. I accept that it seems unfair that, where both parents are responsible for the situation they have created around their child, the relationship between the child and one parent has to suffer. That is the unfortunate consequence of extreme family situations of this kind, which sometimes demand that priority is given to the relationship between the child and the other parent in an attempt to prevent even worse outcomes.
52. I would dismiss the appeal.

Lord Justice Coulson:

53. I agree.

Lord Justice Nugee:

54. I also agree.
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