Neutral Citation Number: [2019] EWHC 768 (Fam)

Case No: CM17P01903/CM17P51094

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2019

Before :

MR JUSTICE WILLIAMS

- -

Between :

PP	**Applicant**
- and -	
MS	**1st Respondent**
- and -	
MFS	**2nd Respondent**
- and -	
Essex County Council	**1st Interested Party**

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Re MFS (Appeal: Transfer of Primary Care)

Frank Feehan QC (instructed by **David Wilson Solicitors**) for the **Applicant**
The 1st Respondent appeared in person
Neil Bullock (instructed by **Cafcass**) for the **2nd Respondent**
Richard O'Sullivan instructed by the **1st Interested Party**

Hearing dates: 18th - 19th March 2019

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Approved Judgment

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

....

MR JUSTICE WILLIAMS

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

Mr Justice Williams:

1. On 28 September 2018 His Honour Judge North made an order in the Norwich family court which provided for a child, MFS, (born in September 2010) to live with his father MS. This represented a change in the child's living arrangements; previously he lived with the mother. The move was implemented that night. The order also provided for time that the child was to spend with the mother; that time was to be professionally supervised in the first instance. His mother, PP, seeks permission to appeal against that order. I hope the parties will forgive me if I refer to them in this judgment as the mother, the father, and the child. Before HHJ North the mother was represented by leading counsel, the father appeared in person, and the child was represented by counsel instructed by his Guardian Siobhan Duffy.

2. On 26 November 2018 an appellant's notice was filed on behalf of the mother seeking permission to appeal against the order of 28 September 2018. The mother seeks that the order be set aside. The appellant's notice was filed some 5 weeks out of time. In between the final hearing and the lodging of the appellant's notice she had parted company with the solicitors and counsel who represented her at the final hearing and had instructed new solicitors and leading counsel.

3. On 28 November 2018, Mrs Justice Knowles gave directions on paper listing the appeal for an expedited oral hearing of the application for permission to appeal, and for an extension of time with the appeal to follow immediately if permission was granted. For reasons which at the moment are unclear to me, that order is said not to have reached the parties until early January 2019. The order provided for the hearing to be listed in consultation with counsels' clerks and a hearing date of the 17 – 18 March 2019 was chosen. The Appeals Office records show the order being sent out on that date and the delay being caused by counsels' clerks not fixing the matter until 22 January 2019.

4. The effect of the delay in progressing the appeal means that the order has been implemented and the child has been living with his father, stepmother, half-brother and stepsiblings for a little under 6 months. That being so, even if the appeal were successful the order that might have been made on appeal would have been far from straightforward. The issue that might have been remitted to the family court might have been fundamentally different to that which was determined by HHJ North. Unless the appeal court not only set aside the family court order but also directed that in the interim the child was to return to live with his mother (with a probable change in school linked to that), in considering any remitted case the court would perhaps have been considering not whether the child should move from his primary carer

mother to his father but rather move back from his father to his former primary carer mother.

5. As it turned out having heard submissions from each of the parties, I was satisfied that the decision was neither wrong nor unjust by reason of procedural irregularity.

6. As far as I could tell from the bundle, no grounds of appeal were filed. The notice of appeal was accompanied by a skeleton argument drafted by Frank Feehan QC. Doing the best I could, it seemed that the grounds relied upon by the mother were that:

   i) The preparation and presentation of the reports of Dr Willemsen are in such breach of the protocols and guidance applicable that this together with the reliance to such a degree on his evidence gives rise to a serious procedural irregularity

   ii) The order providing for a change of primary carer was a disproportionate one in the context of the case.

7. However Mr Bullock was able to draw my attention to a document which was the grounds of appeal. They were

   i) *'The decision of the court was made on the basis of a serious procedural irregularity in that the influential report of Dr Willemsen was prepared and presented to the court despite a number of breaches of guidance and proper procedure as to the preparation and presentation of such reports'*

   ii) *'In all the circumstances the decision of the court immediately to remove the child from his single primary carer was disproportionate and wrong'*

8. The father, again acting in person, filed an argument in response. Mr Bullock on behalf of the Guardian filed a detailed skeleton argument. On the day of the hearing a position statement was filed on behalf of Essex County Council as an interested party. Counsel attended on their behalf but played no active role in the hearing.

9. On 11 March 2019, the appellant lodged an application for permission to rely on fresh evidence. At the outset of the hearing Mr Feehan QC submitted that the recent statement of the appellant mother dealt with her perspective of recent events relating to contact. The statement had been submitted in particular because in the father's response to the appeal he had included material which gave his account of how the child had settled into his care and how contact had been working. This was also accompanied by a letter from the child's new school, which was positive about how he had settled and his relationships at school and at home. Mr Feehan QC submitted that the statement might also illustrate that some of the judge's conclusions might be wrong. However given that an appeal is no place to determine contested issues of fact relating to contact he sensibly indicated that he would be content that I read it simply to ensure that the mother was reassured that I had both sides of the story. I have thus read her statement for that purpose. Included within that statement was a letter which the child appears to have written to his mother and which was amongst some material given to her on 11 November. It asks that I give his mum one more chance and that he should be allowed to go back to his old school. He says he misses his mummy and friends and says his mummy does everything for him. He says he wants to see his

mummy and that he misses her. The contents of the statement generally in terms of what the child says and what the mother says broadly represent a continuation of the sorts of behaviours demonstrated in the evidence prior to the final hearing. The mother also produces a letter from Dr Ahmed, the neurologist. It seems he has not had access to the reports of Dr Willemsen or Dr Blincow but he expresses the view that the type of illness he had diagnosed could not be imposed on a child. In the absence of access to the other reports this does not represent any real change from the position before HHJ North.

10. Given the nature of the challenge to the decision of HHJ North which involved a fairly detailed analysis of the report of Dr Willemsen together with an evaluation of the impact that report had on the other expert and professionals in the case alongside a consideration of the history of the family it was not appropriate to seek to determine permission to appeal as a preliminary issue but rather it could only sensibly be dealt with after I had delved deeper into the arguments. This was no doubt the reason why Knowles J listed the application in the way that she did.

11. Thus I heard full submissions from Mr Feehan QC over the course of half a day with responses from the father and the Guardian and a reply from Mr Feehan over the course of the following morning.

12. At the conclusion of those submissions I was able to reach a clear view that the appeal was without merit and not only that the appeal should be dismissed but that permission to appeal should be refused.

The Parties' Cases

13. I shall explore in more detail some of the arguments that were deployed in support of and in opposition to the appeal later. However the central arguments were as follows.

14. On behalf of the mother Mr Feehan QC identified two fundamental challenges to the judgment.

15. Firstly he argued that the report of Dr Willemsen was itself fundamentally flawed and that it had infected the other expert and professionals to such an extent that it amounted to a procedural irregularity. On further exploration Mr Feehan QC adopted an alternative formulation which was that the decision of HHJ North was wrong because it placed considerable reliance on Dr Willemsen's report and the conclusions of the other expert and professionals which relied so heavily on it.

16. Mr Feehan QC identified some key principles which underpin expert evidence:

    i) An expert must not stray outside his area of expertise

    ii) It is not for the expert to resolve questions of disputed facts and he must identify those disputes and seek further instructions if necessary

    iii) The expert must take into account all material facts in giving his opinion

    iv) The expert must take account of primary evidence and not allow himself to pre-empt findings of the court by reference to hypotheses based on matters outside his expertise or inaccurately summarised or assumed facts

17. Mr Feehan QC identified several flaws that he said critically undermined the report and thus the evidence of Dr Willemsen.

    i) Firstly he diagnosed the child's mental health issues as arising solely from the mother's influence on his thinking. This he submits is inconsistent with the diagnosis of the child psychiatrist and outwith Dr Willemsen's expertise.

    ii) Dr Willemsen blames the mother's intense dislike of the father as the sole factor in the difficulties suffered by the child and bases this conclusion on disputed evidence. In effect he determines the factual dispute himself.

    iii) Dr Willemsen provided an inaccurate, partial, and improper summary of the sessions he spent with the mother and the mother and the child which call into question his objectivity to a significant degree.

    iv) Dr Willemsen's conclusion as to the reasons for the child's reluctance to see his father was unsupported by the totality of the evidence. The psychiatric diagnosis contemplated the stress of parental antagonism to each other. The conclusion that the mother was to blame and that she had not demonstrated any change so as to be able to promote an adequate relationship is an unprincipled leap from an unsustainable set of propositions. It ignored the fact that contact was ongoing and had progressed.

18. Mr Feehan submitted that all of the conclusions reached by Dr Willemsen were wholly inadequate and were not based in the evidence. He submitted that it showed he was not impartial, that he had made decisions on facts and he had made assumptions which were unjustified.

19. He submitted that the conclusions of the reports were 'a killer' and that they had played a critical role in the conclusions reached by the section 37 reporting officer, the Guardian and Dr Blincow. In relation to the section 37 report he identified sections of that at D85, 91 93, 95 and 97. In particular he submitted that the section at D 85 where the social worker dealt with the child's well-being in his mother's care referred only to the psychological assessment of Dr Willemsen. In this section she also refers to Dr Willemsen's concern about whether the diagnosis of OCD/Tourette's (based on the mother's reports and observations of the child in her care) were inaccurate. That conclusion was ultimately supported by Dr Blincow was assessment.

20. In respect of the Guardian's report, he said that it was driven by Dr Willemsen's report and referred to that section of her report at D146-147 and #54 where she referred to Dr Willemsen's addendum report and his conclusion in relation to the mother's lack of insight. These he said demonstrated that her report relied to a significant degree on Dr Willemsen's conclusions.

21. Secondly Mr Feehan argued that the change of primary carer was a disproportionate response to the situation. Given contact had been maintained for lengthy periods historically and by the time of the final hearing the child was seeing his father for staying contact every weekend there was no imperative for removing a settled but emotionally delicate child from a loving and cooperative mother and a settled domestic environment.

22. Mr Feehan rightly observed that it is not for this court to substitute its own proportionality evaluation but rather to review the evaluation undertaken by the lower court. In this case HHJ North did not specifically carry out a discrete proportionality evaluation but it is clear from the judgment that the issue of whether the child's welfare required a change of primary carer was at the forefront of his judgment. As the Court of Appeal (see Re C (Internal Relocation)) and this court have noted the role of a proportionality evaluation is in private law cases can sometimes be very difficult to separate out from the ultimate welfare conclusion.

23. The father's position was broadly as follows:

    i) The father took issue with Mr Feehan's submissions as to the evidential foundation for Dr Willemsen's opinions.

        a) He took issue with Mr Feehan's submission that Dr Willemsen had based his report on assumptions about the mother. He said the evidence from a variety of sources plainly demonstrated that the mother had been obstructive of contact for many years; coming up with a variety of excuses, changing her allegations and demonstrating both to professionals and through documents a willingness to denigrate the father and to dissuade the child from having positive contact. He noted that not only had the mother failed to attend appointments with Dr Willemsen when the child was supposed to be seeing his father, when he was to be seen with his mother by Dr Willemsen and that the mother had failed to produce the child on many other occasions when contact between the father and the child was to be observed.

        b) He submitted that the evidence from social workers, Cafcass officers, and experts was that his relationship with the child was very positive when they were seen together and the child and the mother's complaints about him were completely unsupported by the observations of their relationship.

        c) He identified that the mother's attitude to contact had long been a concern prior to Dr Willemsen's reporting.

        d) He said that the mother had a Queen's Counsel who challenged Dr Willemsen and his report in a variety of ways all of which were considered by the judge.

    ii) The welfare decision to change the child's residence to him was one which was not only supported by the totality of the expert and professional evidence but was one which had been in the background for several years as a result of the mother's obstruction of contact. He submitted that the mother's submission that contact had been relatively stable historically was very far removed from the truth and that the change of living arrangements was the only way of enabling the child to have a proper relationship with him and with his mother.

24. On behalf of the Guardian, Mr Bullock argued that there were no serious procedural irregularities or breaches of guidance or proper procedure in the preparation and presentation of Dr Willemsen's reports.

i) He submitted that the mother's leading counsel had taken all of the points that Mr Feehan now takes in respect of Dr Willemsen's report. Dr Willemsen was cross-examined on them and the judge dealt with his views on Dr Willemsen's reports in the judgment. Mr Bullock identified that it had not been suggested that there was any serious procedural irregularity in their preparation before HHJ North but I think that this is simply an appeal formulation rather than the difference in the substantive criticism that was levelled at Dr Willemsen

ii) He submitted that Dr Willemsen's report had not dominated the evidence in the way suggested. The other experts and professionals had plainly considered a very wide range of material in reaching their conclusions. Dr Willemsen's report was one part of the evidential picture but no more. He refuted the suggestion by Mr Feehan that Dr Willemsen's report had infected all of the other professionals or experts (who had refuted that suggestion in evidence) or that it had an undue influence on the judge's decision making.

iii) He submitted that Dr Willemsen's evidence was consistent with all of the other evidence that existed in the case whether drawn from the documents, or from statements or from other professionals or experts.

iv) He submitted that in seeking to show that Dr Willemsen had made unjustified assumptions and had failed to refer to relevant evidence, Mr Feehan had cherry-picked a few matters which supported the mother's case when there was a whole orchard of other fruit which supported the conclusion the judge reached and the conclusions the professionals and experts reached.

v) He submitted that the judgment was based on an evaluation of all of the evidence including the expert evidence, an evaluation of the credibility of the parties, an assessment of the social work, and other documented history and all that he had heard. Mr Bullock submitted that the majority of the evidence of all forms was consistent with the conclusion that the mother was alienating the child, was causing him emotional harm, and that the child's welfare could only be met by a move to live with his father.

25. Mr Bullock submitted that the decision to change the child's primary carer was based on overwhelming expert and professional evidence which was all in favour of an immediate change. The judge rejected the mother's submission that the experts and professionals had been manipulated by the father and that the Guardian had been hoodwinked by him. The judge considered the pros and cons of such a move. The decision was soundly based on a careful analysis of all of the evidence and was therefore neither disproportionate or wrong.

26. In paragraphs 21 – 57 of his skeleton, Mr Bullock expands upon these arguments.

The history of the case

27. HHJ North starts his judgment by endorsing a case summary and chronology prepared by the children's Guardian and the mother's solicitor. They were provided to me in the course of the hearing.

28. It is self-evident that litigation (or at least a dispute) has been ongoing in respect of the child since late 2012. The chronology included within the section 37 report provides far more detail as to the ups and downs over the years.

29. Having regard to the nature of the challenge to HHJ North's decision it is necessary for me to consider the process by which the evidence came into existence and what it said. I have therefore read all of the professional and expert reports as well as a number of other documents from the trial bundle.

30. The recent tranche of litigation commenced in May 2017 when the father issued applications for a change of residence. That was against a backdrop of the mother having suspended contact in March 2017, it previously having been taking place on alternate weekends and half the holidays. The suspension was accompanied by a letter from the mother to Her Honour Judge Murfitt. In that the mother said:

'...the school have clearly demonstrated their concerns for MFS's well-being and it has been heart-breaking to hear that MFS, who is now able to express himself, has been smacked hard, barged and abused by MS's partner QS, has suffered mental abuse and QS's children are constantly kicking MFS between the legs. This has had a dramatic effect of MFS and I ask the court to assist in helping me to safeguard my son.'

31. Ms Duffy was appointed to provide a section 7 report within the proceedings and did so on 24 August 2017. She considered that a section 37 report should be undertaken and that the child should have a guardian appointed. She also identified a concern that what the child was saying about contact was a result of influence. The mother sought a psychiatric evaluation of the father but His Honour Judge Middleton-Roy on 27 September 2017 directed a psychological assessment of the parents.

32. The report of Dr Willemsen was authorised by HHJ Middleton Roy on 27 September 2017. He is a clinical psychologist who specialises in child and family psychology as well as adult psychology. He has worked at the Tavistock Clinic and at the Great Ormond Street Hospital. The issues which he was asked to address were set out in 11 numbered paragraphs. He was provided with the entirety of the court bundle which was in existence prior to his instruction which included the parties' statements down the years, Cafcass reports dating back to 2015. He met with the mother and father and observed contact between the child and his father. The agreed letter of instruction is set out within the report and identifies the background issues. The report runs to some 36 pages. The executive summary which addresses the core issues is as follows:

    i) The father does not suffer from mental health problems

    ii) The mother has persistently portrayed the father negatively, as violent, as mentally unwell, and denigrated him as the father. The child identified with the negative and hateful feelings expressed by the mother towards the father, which in turn made the child make allegations against the paternal family and reject his father.

    iii) This case, in my view, is a case in which the mother alienates the father as a result of her collusion with her son against the father. This constitutes emotional abuse.

iv) The mother persistently sees her own distress in others: she sees psychiatric problems in the child and his father, while considering that she herself functions well and has no psychological problems. I'm concerned that she is preoccupied with the need to set the father aside, driven by her anxiety that she might lose the child, or that the child might prefer his father over her.

v) I have made the point that the mother did not make the child adequately available for this assessment.

33. An addendum to this report was ordered to look at the child's attachment to his parents and to consider how any change of living arrangements should be implemented and whether there was any evidence of change of the mother's ability to promote a relationship between the child and his father. The report identified a positive but undeveloped attachment with the father. It identified a possible insecure attachment of an anxious/ambivalent nature in respect of the child and the mother. He concluded that the child/father relationship was sufficiently positive to enable the child to make a direct transition to the father albeit he noted there would be distress. He noted that the mother had identified the need to make changes but noted that evidence of change was largely missing from her statement. A further addendum report seeking clarification of matters and whether they were within his area of expertise was also provided.

34. As a result in part of Dr Willemsen's observations as to the child's health the listed final hearing was adjourned in order to obtain an expert opinion from a child psychiatrist. Dr Blincow was instructed and provided a report on 28 June 2018. He concluded that the child was probably suffering from an emotional disorder of childhood linked to anxiety and stress rather than OCD or Tourette's. He considered the stress arose from the parental situation i.e. the conflict that he has been subject to and to having imbibed a very negative view of his father as well as his stepmother. He could not rule out that he had learnt the OCD/Tourette's conditions and being encouraged to elaborate and continue them. He considered that the doctors who had made the diagnosis needed to see the full picture. He identified that a change of residence would alleviate stress if the court concluded that the mother had encouraged the child to form an unnecessary and unrealistically negative view of the father.

35. The section 37 report was prepared by Ms Leahy. At paragraph 3 she sets out the nature of the enquiry that she undertook. It is clearly a very wide-ranging one drawing upon information from a very wide range of sources. It is of note that as long ago as September 2012 the mother did not want the father to have unsupervised contact with the child away from her home. The mother made further contact in December 2012 after the father had been granted contact with the child to be supervised by his family. The mother wanted social services to supervise the visit. In early 2013 the mother made allegations to Cafcass which appeared to be different in substance and seriousness to those she had reported to social services. The history set out by Ms Leahy he is drawn from the documentary records. A very clear picture emerges of the involvement of the police and social services relating largely to the mother's concerns about the father. No action was taken by social services; they plainly do not consider that the mothers concerns were made out. Contact between social services and the family continued down the years. In June 2016 they became involved because the child's school has expressed concern that the mother was preventing contact with his father. In March 2017 they were contacted by the child's then school who reported a

range of relatively low-level concerns expressed either by the child or the mother. The social worker conducted a number of meetings with the child. He could say nothing nice about his father and shared a range of complaints about his father and his father's partner. The social worker noted a positive relationship between the child and his mother and that the mother was encouraging the child in respect of contact.

36. The contact notes which are referred to in this report show that at the first session the child appeared to be relaxed, confident and happy in his father's company. He was described as chatting smiling and laughing with the father. The mother said that after the child came out of contact he was upset. Since then none of the sessions went ahead. Mr Feehan submitted that the records showed that the mother had been encouraging of contact. Whilst it is true that some of them do show that they also record the mother behaving in a way which was bound to be discouraging of contact; see for instance 3 September 2017. The references in the section 37 report to the psychological assessment by Dr Willemsen are limited. Whilst of course one cannot gauge the impact of that report merely by reference to how frequently it appears or how much of the report it takes up there is no sense from the report of that dominating the evaluation. The evaluation is clearly a broad-based one which draws together a wide range of evidential sources which is set out over some 33 pages. The professional judgment which is set out over the last 10 odd pages weaves together material from earlier section 7 report, from the child, from the parents, from the psychological assessment, from the school from the treating doctors. The social worker identifies evidence entirely independent of Dr Willemsen's report which suggests that the mother has undermined his contact with his father. She recognises the possibility that he has taken on his mother's negative feelings. She relies on research in relation to children who have been alienated from one parent and based on her own observations concludes that the child displays indications of alienation. Ultimately she concludes at paragraph 9.1, where she draws the sources of evidence together which lead to her conclusion that the child has been exposed to pure alienation by his mother. The phrase derives from a paper by Kay Woodall. She concludes that the child's behaviour and his views are consistent with those of an alienated child. This is entirely independent of Dr Willemsen.

37. In the Guardian's initial report when she was a Cafcass reporting officer in August 2017 she identified that the child was very negative about his father but was unable to give context to what he said. She noted that the school had reported that the child was unsettled following contact and that his behaviour and well-being had deteriorated. She noted that from the contact reports the first visit had gone well and that the child had been comfortable and relaxed. The feedback from the contact centre suggested that the mother was being obstructive over arranging visits [#41]. She observed that the child's anxiety was likely to relate to being very confused and unclear about where his loyalties should lie in regard to his parents. She noted that the contact records showed the child was comfortable with his father but that at the second session he said he didn't want to see his father and he was negative about him to the Guardian. At paragraph 50 of her report she identified her concern that the child had been influenced to feel negativity towards his father. She wondered whether the school's observation was due to his experiences with his father or him feeling disloyal to his mother on his return. It was on this basis that she recommended that Essex County Council be invited to undertake a section 37 report and that the court appoint a Guardian for the child. It is thus clear that long before Dr Willemsen came on the

scene and expressed concerns about alienation that Ms Duffy was concerned about the mother's negativity.

38. In her second report from March 2018 she identified concerns about the mother's capacity to promote contact. This was based on her own discussions with the mother about her proposals for contact. She also noted that the behaviour of the child in contact was indicative of an alienated child who was comfortable and relaxed when with his parent but may become rejecting of that parent within the proximity of the more favoured parent. She also observed the mother not encouraging contact but rather telling the child that she would get into trouble if he did not go to contact. The Guardian did not observe the child to be fearful of his father in contrast to the mother's case. When speaking to the child he was entirely positive about his mother and grandparents, and negative about his father. He was unable to give context or reasons for his views of his father and the Guardian thought that his expressed views were disproportionate to any of the reasons the child had previously given. She identified that her observations were similar to those noted by the local authority social worker and that he idealises one parent and devalues the other. Ms Duffy sets out a very short summary of Dr Willemsen's report. She also refers to the section 37 report. There is no greater reliance on Dr Willemsen's report than there is on the section 37 report. In her discussions with the mother and based on her written evidence the Guardian concluded that the mother had not taken any accountability or shown any insight into the concerns raised both by Dr Willemsen and the section 37 report. She refers back to the 2013 Cafcass report when the author stated that from his enquiries the mother has demonstrated that she is not able to promote ongoing contact between MFS and Mr S. Mr Feehan submitted that having to rely on a 2013 piece of evidence illustrated the weakness of the Guardian's analysis. On the contrary it suggests that the author of that report had identified an issue which had not ameliorated over the ensuing 5 years. The earlier report also identified that in 2013 when he was only 3 years old the child had been led into saying his father had hit him at the weekend and a video clip from 2013 demonstrated the maternal grandfather saying negative things to the child about his father. The Guardian expressed concern that the mother was asserting that the child had OCD and Tourette's when there was no medical basis for this and was relaying inaccurate information about the father. The Guardian herself identified the potential unreliability of the diagnoses obtained by the mother given that observations of the child's behaviour were not observed either by the Guardian, the social worker, the school or Dr Willemsen. In reaching her conclusion that supported a transfer of residence the Guardian relied on a host of matters. There is no sense that Dr Willemsen's evidence was given undue weight. In fact it appeared to coincide with much that the Guardian had herself observed for much that the social worker had observed.

The Judgment

39. It appears that the case was listed for 4 days although some time was lost as a result of other cases being listed before the judge. HHJ North adopts a case summary and chronology rather than setting out the background in full. He heard evidence from

    i) A local authority, social work manager

ii) Dr Willemsen, a clinical psychologist

iii) Dr Blincow, a child psychiatrist

iv) The father

v) The mother

vi) The Guardian

40. At paragraph 5 he sets out the main issues with identification of some subsidiary issues at paragraph 6 – 9 and the parties positions.

41. From paragraphs 12 – 112, the judge reviews the evidence and expresses his views on the reliability of the evidence, both expert and of the parents. He includes findings as to credibility of the parents and records reasons as to why he considered the expert opinions to be reliable.

42. From paragraph 113 onwards the judge sets out some specific factual findings including whether the child had Tourette's and OCD and concluded his problem is an emotional disorder of childhood being situationally based. He also accepted that the child had been subject to parental alienation by the mother. He concluded that the allegations made by the child were unfounded. He gave valid reasons for reaching those conclusions.

43. From paragraph 116 he evaluated what order would best promote the child's welfare and he considered the welfare checklist. He considered the argument that a change of residence was premature as the mother might now recognise the need to promote contact having heard the experts and the guardians evidence and the views of the court. The judge rejected the submission and concluded that the mother had not shown any willingness to take on board the unanimous recommendations of the professionals and experts, either in relation to the child's emotional disorder or the mother's view of the father's OCD or Tourette's but rather she had remained fixed in her views. He concluded that her stance was such that it gave him little confidence that anything he said would persuade her of the need to promote contact and concluded that the years of negativity may simply be too ingrained to expect such a reversal of mindset even if the sword of Damocles was hovering above her.

44. In reaching his conclusion the judge places weight on the following:

i) The contents of the section 37 report prepared by the local authority social worker and supplemented by the oral evidence of the social workers supervisor [para 22].

ii) Dr Willemsen's reports and oral evidence. He identifies the challenge that was made to Dr Willemsen's objectivity and independence and the challenge that was made to his interview with the mother. He concluded that there was no reason to suppose Dr Willemsen had any pre-existing belief that the mother had alienated the child from the father and that this conclusion was based upon his own robust assessment of the material available to him and his sessions

with the parties and the child. He considered he could place reliance on his independent expert assessment

iii) Dr Blincow's diagnosis that the child's underlying problems were not OCD or Tourette's but a stress-related condition. He considered that the diagnosis of the child's treating clinicians was not accurate and arose from the treating clinicians having an incomplete picture. He noted there were considerable indications that the child had been alienated from the father. He also recommended a change of residence because there is an absence of change in the mother. He had no significant area of disagreement with Dr Willemsen. He referred to Dr Kirk Weir's research which indicated that children in high parental conflict cases usually did well if moved to the estranged parent before the age of 11 to 12. The judge concluded that he was a very experienced expert who readily demonstrated that under cross-examination. He placed reliance on his assessment. He concluded that he had no pre-existing view that the child's anxiety or behaviours arose from the mother's antipathy to the father but concluded that based on his own assessment of the material available to him and his sessions with the parties.

iv) The unanimous views of the local authority, the Guardian, Dr Willemsen and Dr Blincow that the mother was unable to promote the child's relationship with the father and that inability was a cause of emotional harm to him.

v) He concluded from the evidence he heard from the father and what he had read about him that the father had a child focused approach which was based on a genuine belief that is better able to meet the child's needs. The judge was impressed by the father's evidence and he concluded that his evidence was consistent with the independent assessments that had been made of him by professional experts and the Guardian. He did not accept the mother's assertion that that the father was putting on an act whether in assessments by experts or during observations of contact in order to mislead them. He accepted that the father was able to listen to and accept professional guidance so that a move to his care would cause the child the minimum of distress.

vi) In respect of the mother he set out the positive and the negative. He concluded that he detected no real commitment on her part to the presence of a father in the child's life. He identified that his views, reached having heard her evidence, was consistent with the professionals and experts' views which was that the mother had a deep-seated inability to promote the father's contact with the child and her negative feelings towards him. He concluded that the mother was not a reliable historian and that he preferred the father's evidence on any factual disputes between them. He also noted that the mother seemed to be very single-minded in her beliefs and her view that the experts were wrong. Her view remains that the child did not enjoy contact with the father and that it needed to be reduced rather than progressed. He concluded that it was hard for the courts to have any confidence that the mother could change her position to promote contact in the light of her views. He noted that the treating doctors had reached diagnoses which the mother was likely to rely on but he identified that the opinions of the court-appointed experts were based on a fuller assessment and thus more reliable.

vii) He noted that contact between the father and the child when observed was noted to be positive. He referred back to observations as long ago as 2013.

viii) The Guardian had also reached her own independent assessment that the mother held the father in disdain and had been unable to put the child's need for a relationship with his father first. She considered that the mother had alienated the child from his father and continued to do so; the mother had a lack of reflective capacity. She considered that the child had suffered significant emotional harm in his mother's care and that although a move would be difficult for him it was in his best interests to move. She did not consider the mother to be honest and trustworthy and thought that the mother had attempted to manipulate her. She considered that if he remained with his mother there would be a continued failure to promote contact and that a suspended change of residence would not work. She thought the mother's negativity was so long-standing that she was unable to let the child have a loving relationship with his father. She has had opportunities to reflect on all the reports but her final statement still sought to reduce the father's contact and to seek treatment for conditions the experts did not consider the child had. The judge concluded that the Guardian was entirely independent and had made her own enquiries. She demonstrated that she had given detailed consideration to the issues and that she was impartial and had conducted a full and independent assessment.

ix) At paragraphs 113 – 115 he made some discrete factual findings. Firstly, he accepted that the child did not have the conditions Tourette's and OCD and that any tick was likely to arise from an emotional disorder of childhood which was situational. He accepted the assessment of the experts and professionals that the child had been subject to parental alienation by the mother and that he had no doubt that the child had been exposed to the mother's negativity about the father. He was unable to decide whether the mother had specifically coached the child but he did conclude that the allegations made by the child were unfounded. He accepted the father's evidence and accepted the reasons expounded by the experts as to why an alienated child might say such things.

x) From paragraph 116 – 131 he set out his analysis of the welfare checklist. That is an appropriate, indeed thorough, analysis of the competing arguments and issues.

xi) At paragraph 131 – 136 he focused particularly on the range of powers available to the court. It is at this point he deals with the submission made on behalf of the mother that a change of primary carer was a Draconian order which was not required in the circumstances and that, for instance, a suspended order would be more appropriate. HHJ North rejected the submission that the mother might now recognise the need to promote contact having heard all of the evidence and the judge's view. The judge rejected that submission on the basis that during her evidence she had not shown any willingness to take on board the combined and effectively unanimous recommendations of the professionals and experts. She remained of the view that the father and his partner had assaulted the child and that the father had manipulated the experts and professionals. He thought her stance was such as to give little confidence that anything he might say would persuade the mother

of the need to promote contact and that the years of negativity may be simply too ingrained even with the sword of Damocles hovering over her. He thought her submission that contact should now be reduced was indicative of her ongoing antipathy to contact. He also noted that contact had been taking place between the father and the child's since the adjourned first final hearing and he considered that the observations he had made then might have had some effect but ultimately and despite Dr Blincow's report the mother still sought a reduction in contact to remove overnights. He was not persuaded that there was any basis for rejecting the evidence of the experts and professionals all of which supported a change of primary carer.

xii) At paragraphs 136 – 137 he drew the threads together concluding that leaving the child with the mother would continue to expose him to significant emotional harm whereas a move would not only have the positive advantage of ceasing his exposure to significant emotional harm but also that he would enjoy a positive relationship with both parents.

45. It is in that context that the criticisms of the judgment and the report of Dr Willemsen have to be gauged.

Extension of Time

46. The following points are made on behalf of the mother. A statement from a solicitor Robert Berg has been filed:

i) The mother initially sought advice from her previous lawyers but lost confidence in them and instructed a new firm.

ii) She instructed new solicitors on 10 October 2018. Medical and psychiatric reports and the child and family assessment were received on 18 October. On 19 October an unapproved copy of the judgment was received.

iii) A consultation with Queen's Counsel could only be booked for 5 November with a further telephone conference taking place on 20 November. The grounds of appeal were received on 25 November. The mother wished to instruct leading counsel who was of greater seniority and appellate experience than her first silk. That was reasonable.

iv) The court had delayed sending out the directions between 28 November and 7 January 2019. Hence the listing of a hearing was delayed by some 6 weeks.

v) The underlying merits of the appeal were strong and it would be unjust to refuse an extension of time.

47. FPR 30.7 deals with variations of time. It is worded in the same way as CPR 52.15. FPR 4.1(3)(a) likewise is worded as CPR3.1(2)(a). It would therefore appear that extensions of time are to be dealt with in the same way that the court approaches them under CPR 52.15 and CPR 3.1(2)(a) and CPR3.9. As the White Book makes clear where an application is made to extend time and is itself made out of time the court

should approach it on the basis that it is an application for relief from sanctions. At this point the CPR an FPR part company as FPR 4.6 provides a list of factors to be taken into account when considering relief from sanctions.

"4.6 Relief from sanctions
(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –
(a) the interests of the administration of justice;
(b) whether the application for relief has been made promptly;
(c) whether the failure to comply was intentional;
(d) whether there is a good explanation for the failure;
(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre –action protocol;
(f) whether the failure to comply was caused by the party or the party's legal representative;
(g) whether the hearing date or the likely hearing date can still be met if relief is granted;
(h) the effect which the failure to comply had on each party; and
(i) the effect which the granting of relief would have on each party or a child whose interest the court considers relevant."

48. In Denton and others -v- TH White limited [2014] 1 WLR 3926 the Court of Appeal identified a 3 stage approach to applications for relief from sanctions in the context of the Civil Procedure Rules. That 3 stage approach was to,

    i) Identify and assess the seriousness or significance of the failure to comply

    ii) Consider the reason for the failure or default

    iii) Consider all the circumstances of the case so as to enable the court to deal justly with the application

49. Some of the principles can be surmised from the case law:

    (a) 'a person who finds himself unable to comply timeously with his obligations under an order should apply for an extension of time before the time for compliance has expired' (per Munby P *Re W (Adoption Order: Leave to Oppose); Re H (Adoption Order: Application for Permission for Leave to Oppose)* [2014] 1 FLR 1266);

    (b) being unrepresented is not in itself a good reason for non-compliance (*Re D (Appeal: Procedure: Evidence)* [2016] 1 FLR 249, CA);

    (c) no distinction should be drawn between the lay party and his advisers when considering delay (*Daryananii v Kumar and Gerr*y (2000) (unreported) 12 December, CA);

    (d) issues relating to public funding and/or pressure of work are unlikely to be regarded as good reason,

(e) particular regard should be paid to the proportionality of strike-out as a sanction (*London Borough of Southwark v Onayamoke* [2007] EWCA Civ 1426);

(f) the underlying merits of a case are a potential consideration (*Re H (Children) (Application to Extend Time: Merits of Proposed Appeal)* [2015] EWCA Civ 583 [2016] 1 FLR 952).

50. Mr Bullock, on behalf of the child, opposed the grant of an extension of time. He submitted that in the circumstances of a case such as this, where radical changes in the living arrangements for a child were being made, that time was of the very essence. He submitted that an application for a stay ought to have been immediately made to the trial judge and if refused to the appeal judge. Failing that the lodging of an appellant's notice within a shorter timeframe than the 21 days should have been done to enable the court to consider whether the order ought to be stayed (or reversed) pending the full hearing of the appeal. He submitted that it was simply unacceptable for the mother to await the availability of her chosen leading counsel when others would no doubt have been available. As a result of the mother's dilatoriness, the child has now settled into a new status quo having changed home and school.

51. I consider that:

i) The failure to comply with the time limits for appealing is serious. It means that the child has completed the move to his father and has begun to settle into his new existence. That has now been for 6 months. Given the child had moved on the day the decision was taken the need for expedition was particularly acute. The consequences of the late appeal have had a direct impact on the child's welfare in that it is now effectively not possible to recreate the previous arrangements without causing further upset to the child. In cases where a transfer of primary care is the outcome and an appeal is proposed the ideal would be for an application for permission and a stay to be applied for prior to the implementation of the transfer; even if this means an urgent application to the appeal court.

ii) Whilst I appreciate that the mother wished to instruct another silk this did not mean either that an appeal could not have been lodged at an earlier stage, nor did it mean she had to wait for the availability of her first choice silk. This was a paradigm case for urgent action.

iii) Having regard to all the circumstances if I had considered that the appeal itself had merits I might have been persuaded to granted an extension of time given the seriousness of the issue in play, although the passage of time is such that it would have been of far less weight in the overall evaluation having regard to the downside of granting an extension given the inevitable unsettling effect of an ongoing appeal and more importantly the real issue over whether a successful appeal would ultimately have any effect on the ground given the change in the status quo.

52. Having regard to my conclusion on the merits of the appeal, the stage I and stage II considerations lead me to conclude that an extension of time should be refused. Given that the appeal has been fully argued I appreciate that this is of little practical

consequence on the facts of this case. However if there is any lesson to be learned from this case it is the critical importance of making timeous applications either for a stay, or for an extension of time.

Appeals: the approach

53. FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for procedural irregularity.

54. The test for granting permission [FPR 30.3(7)] is:

i) There is a real (realistic as opposed to fanciful) prospect of success
ii) There is some other compelling reason to hear the appeal

55. In Re F (Children) [2016] EWCA Civ 546 Munby P summarised an approach to appeals,

22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they hpave won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."

23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):

> *"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case ... These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*

It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord

> *Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".*

56. Lord Hoffmann also said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372:

> "*If I may quote what I said in Biogen Inc v Medeva Plc [1997] RPC 1, 45:*
>
> *'... [S]pecific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'*
>
> *First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc v Medeva plc [1997] RPC 1:*
>
> > *'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'*
>
> *"The exigencies of daily courtroom life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account.... An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*

57. So far as concerns the appellate approach to matters of evaluation and fact: see Lord Hodge in *Royal Bank of Scotland v Carlyle* [2015] UKSC 13, 2015 SC (UKSC) 93, paras 21-22:

> *"21 But deciding the case as if at first instance is not the task assigned to this court or to the Inner House ... Lord Reed summarised the relevant law in para 67 of his judgment in Henderson [Henderson v Foxworth Investments Ltd [2014] UKSC 41, [2014] 1 WLR 2600] in these terms:*

"It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

58. Whilst Mr Feehan originally framed his ground one as a procedural irregularity, it seems to me that in the light of the acceptance that all of the criticisms of the report were aired before HHJ North that it is more properly characterised as an assertion that the judgment was wrong in that the reliance on the conclusions derived from Dr Willemsen and the other experts and professionals was not sustainable if I accepted the criticisms of Dr Willemsen's report. Put another way, it might be said that the judge placed undue reliance on that material.

59. Although ground two was framed specifically in terms of the proportionality of the decision that HHJ North reached, it was a discretionary decision of paramount welfare reached after weighing all the relevant circumstances and in particular the welfare checklist. In Re J (Child Returned Abroad: Convention Rights) [2005] 2 FLR 802 Baroness Hale of Richmond at [12] stated:

"If there is indeed a discretion in which various factors are relevant, the evaluation and balancing of those factors is also a matter for the trial judge. Only if his decision is so plainly wrong that he must have given far too much weight to a particular factor is the appellate court entitled to interfere: see G v G [1985] 1 WLR 647, [1985] FLR 894."

60. In Re B (Care Proceedings: Appeal) [2013] 2 FLR 1075, Lord Neuberger stated at [93]:

"There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's views is in category (i) – (iv) and allowed if it is in category (vi) or (vii)."

The Substantive Arguments on Appeal

Ground 1

The decision of the court was made on the basis of a serious procedural irregularity in that the influential report of Dr Willemsen was prepared and presented to the court despite a number of breaches of guidance and proper procedure as to the preparation and presentation of such reports

61. Whether it is a procedural irregularity or whether it renders the decision wrong is perhaps neither here nor there. Ultimately the question is whether the mother can demonstrate that Dr Willemsen's report is so seriously inaccurate/unreliable/biased that it could not properly be relied upon by the judge and/or if it was so unreliable did it infect all those reports which came after to an extent which renders them unreliable in their conclusions and thus makes any decision by HHJ North based on them wrong.

62. Returning then to Mr Feehan's central key principles and central points.

An expert must not stray outside his area of expertise

63. Mr Feehan was not able to identify any document from any professional body or otherwise which supported his submissions that Dr Willemsen had strayed beyond his area of expertise. It appeared clear from the minutes of the experts meeting that OCD was identified as principally a mental health issue and thus within the expertise of a psychiatrist but that Tourette's syndrome was a neurodevelopmental issue which was within the competence of a psychologist. Inevitably in respect of a number of conditions the boundary between psychology and psychiatry may not be entirely clear and there are many cases where either a psychologist or a psychiatrist might validly opine on a matter. Clearly there are others where the issue would fall squarely and exclusively within the expertise of a psychiatrist or a psychologist. I do not accept that any offering of an opinion by Dr Willemsen in his first report as to the child's presentation was outwith his expertise. He observed that there was no evidence of OCD or Tourette's disorder. His conclusion that the child's allegations against the father and paternal family were caused by the negativity of the mother was a causal link that he was entitled to make on the basis of his assessment of the parents and the child. He was specifically asked to comment on the ability of the parents to support and promote the relationship with the other and if they cannot do so what is the impact upon the child. In order to answer this question Dr Willemsen was well within his remit in expressing the views he did.

It is not for the expert to resolve questions of disputed facts and he must identify those disputes and seek further instructions if necessary

64. No one could argue with the general proposition which Mr Feehan asserts. However of course within any case there will be a range of facts and a range of disputes over them. Whilst it is of course not for an expert to determine a core fact (i.e. whether the father had hit the child) this does not prevent an expert basing his assessment on the penumbra of facts which accompany such cases. Thus Dr Willemsen was perfectly entitled to take into account all of the material which shed light upon the mother's attitude to the child's relationship with his father. Whether this was contained within Cafcass reports, the fathers or mothers written statements, his interviews with them, his direct experience of booking appointments with them, videos he was shown, his observations of the mother and child, his observations of the child and the father these were all matters he was entitled to take into account. In the same way as a penumbra may surround a judgment so a penumbra will surround an experts report. It would be impossible (particularly with limits now imposed upon the length of experts reports) for them to make reference to every particular piece of information or evidence that they have relied upon. Of course, if their analysis and conclusions are plainly inconsistent with the weight of the evidence that may call into question the reliability of their conclusion. In this case Dr Willemsen's conclusions are consistent with the

weight of all of the other evidence in the case. Had he concluded that the evidence demonstrated that the mother was supportive of the child's relationship with the father that would have called into question his judgment. Mr Feehan submitted that Dr Willemsen had taken against the mother and his criticism of the mother in relation to missed appointments was an example of this when she had valid reasons for missing them. I do not accept this. He was able to judge whether the mother's explanations for not bringing the child to appointments were valid or not. The fact that there is a symmetry with other examples down the years of the mother giving excuses for failed contacts tends to support the validity of his interpretation rather than to undermine it.

The expert must take into account all material facts in giving his opinion

65. Again the general proposition cannot be disputed. That does not mean that the expert has to **refer** to all material facts in giving his opinion. Again it would simply be impossible for him so to do within the confines of a user-friendly and page limit compliant report. Mr Feehan's principal complaint is that Dr Willemsen did not refer to the material which shows that the mother was supportive of the child's relationship with the father and encouraged him to go to contact. With the greatest respect to Mr Feehan those references which he took me to were so limited in number but also in substance against the very considerable body of other material which illustrated the mother's obstructiveness or lack of support for contact down the years that they could not possibly have made any difference to Dr Willemsen's conclusions. It is self-evident that he did not set out all of the material which pointed towards the mother's obstructiveness but rather made some discrete selections to illustrate the point. The material from the section 37 report compellingly illustrates the mother's negative attitude towards the father over the period 2013 to 2017. The judgment of HHJ Murfitt concluded in respect of one occasion that an enforcement order would not be appropriate for technical reasons although she found the underlying facts were established which demonstrated the mother being obstructive; one she found both were to blame, and one she found the mother had a reasonable excuse and another she found to the criminal standard that the mother failed to comply and had no reasonable excuse. The notes from the supervised contact sessions did record the mother encouraging the child to have contact but also showed the mother putting the child off going to contact.

66. Mr Feehan also relied heavily on the letter from the school in March 2017 which showed that MFS and the mother had both said that the father and stepmother were behaving abusively. Mr Feehan submitted that it was clear from this letter that the mother had been advised by the local authority to suspend contact and yet this had been held against her. Whilst it is clear that the letter referred to the obligation on the mother to protect the child and the need to suspend contact if that was necessary, of course the local authority are advising based on the mother's and the school's report. Insofar as one can say that when a local authority tell a parent that if they consider their child is at risk of harm they should take steps to protect them it could be said that the mother had acted on the advice of the local authority. However they of course did not know what the situation on the ground was. If the mother was behaving in such a way as to generate anxiety in the child and the child was thus demonstrating anxiety upon his return from contact both the school and social workers would act accordingly and advise accordingly. However it would be on the basis of a false premise. Ultimately HHJ North concluded that what the child had said about his

father or his father's partner hitting him or being unkind was not true and that the reality of the child's relationship with his father was a positive one. This was based primarily on his conclusion that the father was a credible witness and observations of their relationship. Thus it was the mother's anxiety and her negativity which generated the anxiety and complaints from the child. She thus bears ultimate responsibility for creating a situation which enabled her to suspend contact.

67. True it was that the mother who then wrote to HHJ Murfitt. True it was that 3 months later after the father had issued an application the mother offered supervised contact. The offering of supervised contact in June 2017 in substitution for alternate weekend and half the holidays was hardly a fulsome demonstration of her supporting contact. The evidence from many other sources pointed entirely the opposite direction. The mother's interviews with Dr Willemsen illustrated her negativity. Ultimately her evidence to the court was that she wanted to reduce contact from overnights and given the judge's finding on her credibility (based on her acceptance that she would say anything to keep her child) it is unsustainable to assert that the failure by Dr Willemsen to explicitly refer to a small number of evidential points which could be deployed to argue that the mother was supportive of contact, in any way undermines the general tendency of the evidence or the reliability of his conclusions.

68. The other point relied upon by Mr Feehan in particular was that in his conclusions Dr Willemsen emphasised the mother's negativity about the father but not the father's negativity about the mother. Mr Feehan QC is right in noting that the father did say many negative things about the mother to Dr Willemsen. However critically there was no evidence that the father had been negative about the mother to the child. In fact supervised contact sessions suggested that the father was positive about the mother. Mr Feehan's submission that the mother's account to Dr Willemsen of the father was not negative in the same way simply does not bear analysis. Her meeting with Dr Willemsen was dominated by the issue of the father having OCD or Tourette's, his unpredictability, his aggressiveness, the risk he posed to the child, the risk his partner posed, his intrusive thoughts, his sick thoughts. Given what the child had said to various professionals and the disconnect between his relationship with his father when it was observed and his reported complaints it was hardly an unsupportable leap for Dr Willemsen to find a causal connection. Thus the mother's negativity about the father was being transmitted to the child and thus became of central importance in a way that the father's negativity about the mother did not. The difference is therefore explicable and in no way undermines the reliability or objectivity of his report.

69. Taking all of the above into consideration I do not consider that Mr Feehan QCs fourth proposition that the expert must take account of primary evidence and not allow himself to pre-empt the findings of the court by reference to hypotheses based on matters outside his expertise or inaccurately summarised or assumed facts needs further elaboration.

70. Turning then to the 4 key points identified in relation to Dr Willemsen's report as critically undermining the report and thus the evidence of Dr Willemsen.

<u>He diagnosed the child's mental health issues as arising solely from the mother's influence on his thinking. This he submits is inconsistent with the diagnosis of the child psychiatrist and out with Dr Willemsen's expertise.</u>

Dr Willemsen blames the mother's intense dislike of the father as the sole factor in the difficulties suffered by the child and reaches this conclusion on disputed evidence. In effect he determines the factual dispute himself.

71. Mr Feehan QC in particular identifies paragraph 70 of Dr Willemsen's report as being devastating. He says *'the negativity is portrayed by the mother and her father through his comments at MFS's school, are in my view, the reason for MFS's allegations against his father and the paternal family. The mother makes every effort to ensure that MFS must suppress his loving feelings for his father so that MFS only loves her. The evidence of this split, of separating his loving and hateful feelings between his parents, is clear on page E22 of the court bundle where MFS places or negative feelings with his father and all positive feelings with his mother.'* This is a reference to what is now D25 of my bundle. This is the Guardian's report (which self-evidently predates Dr Willemsen's report and thus cannot be susceptible to infection) and refers to how the child completed some worksheets with Ms Duffy which does illustrate the splitting referred to by Dr Willemsen. There are many other examples within the bundle of the mother expressing negative thoughts about the father or indeed the grandfather being videoed saying to the child that his father is a horrible man. Dr Blincow concluded that the child was not suffering from Tourette's or OCD as diagnosed by the neurologist and child psychiatrist the mother had taken him to but rather was affected by an emotional disorder of childhood. This is attributed to the parental situation. This was not as characterised by Mr Feehan merely the parental conflict but rather was specifically identified at paragraph 4.2.4 '*...as the conflict that he has been subject to amidst having imbibed a very negative view of his father as well as his stepmother*.' Mr Feehan's suggestion that there was no evidence of the mother's distress being projected onto the child (as referred to in paragraph 76 of Dr Willemsen's report) was also a conclusion he was entitled to reach. There is much evidence of the mother's inability to contain her negative feelings and there are examples of her distress being evident to others; in particular the Cafcass safeguarding officer. It is clear from the Cafcass safeguarding letter that the mother was distressed on the telephone and terminated the call. It is inconceivable that the Cafcass officer could have mistaken extreme distress for a bad line. Dr Willemsen plainly was not only relying on this. He specifically refers in his report to her demonstrating such behaviour in the course of the interview. It seems to me this opinion is plainly within his expertise and is plainly derived from material from which that conclusion could be drawn. The fact that Dr Blincow also considered that the child did not have Tourette's or OCD but rather that in particular in the mothers company he demonstrated symptoms of them and the mother reported them in ways not noted by the school, the father or other experts and professionals all were capable of coalescing into the conclusion that Dr Willemsen reached.

72. The conclusions Dr Willemsen reached as to the cause of the child's negativity are well supported by other evidence from a multiplicity of sources as to the mother's negativity about the father, which taken together with the absence of any observable fear in the child when with his father (indeed a positive relationship between the child and the father) provide a sound basis for the conclusion reached by Dr Willemsen. Given what the mother said to him and which was repeated to others including the Guardian and the court it was quite clear that the mother had not changed her attitude to the father. She having said to Dr Willemsen that she needed to change, several months later it was clear she had been unable to achieve any change, as was apparent

to the judge. Thus Dr Willemsen's conclusion that the child's negativity was a product of the mother's negativity and that she had not demonstrated a change was neither unprincipled or unsustainable.

Resolving Disputed Evidence

73. I have addressed this point above.

Dr Willemsen provided an inaccurate, partial and improper summary of the sessions he spent with the mother and the mother and the child which call into question his objectivity to a significant degree

74. The judge admitted the transcript of the tape recording that the mother took of her meeting with Dr Willemsen. He saw another psychiatrist's opinion on that. He dealt with this at paragraph 39 of his judgment. There is nothing in anything that Mr Feehan has said which undermines the conclusion of the judge as to Dr Willemsen's objectivity or his basing his conclusions in the material he had available to him and his sessions with the parties and the child.

75. I therefore do not accept that the criticisms made of Dr Willemsen's report are made out to any material extent. In so far as one might say it would have been better for him to have acknowledged that there was some evidence which indicated the mother supporting contact or that he might have noted that the father's negativity about the mother did not impact upon the child, that is a counsel of perfection and has no bearing on the reliability, objectivity, professionalism of the report or his evidence.

76. The conclusions that HHJ North reached as to Dr Willemsen's expertise and the reliability of his opinion were conclusions that not only were plainly open to him having heard from Dr Willemsen and all of the other witnesses but were probably the only proper conclusions he could have reached on the totality of the evidence.

77. However it is also clear that HHJ North's judgment was not based solely on Dr Willemsen's evidence. It was one component in a much larger construction. If Mr Feehan had been able to demonstrate that it was the cornerstone upon which all the other parts of the construction rested and if he had demonstrated that cornerstone was defective it might of course have undermined the whole construction. However Dr Willemsen's report was not of such significance either in the evidence of the other professionals or expert nor in the judgment itself.

78. Having reached the conclusion that Dr Willemsen's report is not open to criticism in the way submitted it is perhaps not necessary for me to go on to deal in detail with the issue of whether his conclusions were a virus which infected the other professionals who reported, the other expert and the judgment.

79. However having read the reports of the Guardian, the section 37 report, Dr Blincow, and of course the judgment and having regard to the criticism that is made of the authors of those I feel I ought to address the issue at least briefly.

80. It is clear from the section 37 report that it was a detailed and extensive piece of work which drew on a multiplicity of sources. Whilst of course reference is made to Dr Willemsen's report there is no sense that Ms Leahy has relied on it unduly or

abdicated her responsibility in favour of simple reliance on that report. Clearly it informs her assessment, however it is because it finds a symmetry with so many other pieces of the jigsaw that it is important. I have little doubt that were Dr Willemsen's report to have appeared to be inconsistent with the generality of the evidence that this would have been noted. Thus I do not consider that there is any basis for the suggestion that undue reliance was placed by Ms Leahy on this report.

81. The same is true of the Guardian's analysis. There is no sense from this of Dr Willemsen's report dominating the landscape. The Guardian had identified a concern about influence by August 2017. This concern gained further traction both from Dr Willemsen but also from the section 37 report and the evidence contained therein but also from Dr Blincow's report, and the mother's interaction with the Guardian. Again there is simply no detectable basis for the contention that the guardians analysis was corrupted by Dr Willemsen's evidence. HHJ North considered the criticisms made by the mother's counsel of the Guardian and rejected them. There is no basis for challenging that conclusion.

82. The same is also true of Dr Blincow. The minutes of the experts meeting powerfully demonstrate the to be expected dynamic between two experts of different but connected disciplines who have regard to and give weight to the views of the other but are perfectly capable of holding their own. There is no evidence to suggest that Dr Blincow was views were subjugated to those of Dr Willemsen.

83. As I have set out above the judgment itself draws on a wide array of evidence. The pieces of evidence are put together in a way which creates a complete picture. In jigsaw puzzle terms all the pieces are there. This is not a case of a 50 piece jigsaw where 49 pieces belong to one picture and one belongs to another and where that one piece is then allowed to dominate the picture so as to completely alter it. Dr Willemsen's report was one piece of a jigsaw which fitted with all of the other pieces to complete the picture which the judge discerned.

Ground 2

In all the circumstances the decision of the court immediately to remove the child from his single primary carer was disproportionate and wrong

84. In support of this, Mr Feehan referred me to paragraph 44 of the decision of the House of Lords in In Re G (children) (residence: same-sex partner) [2006] UKHL 43 [2006] one WLR 2305 where Baroness Hale said:

'First the fact that CG is the natural mother of these children in every sense of that term, while raising no presumption in her favour, is undoubtedly an important and significant factor in determining what will be best for them now and in the future. Yet nowhere is that factor explored in the judgment below. Secondly, while it may well be in the best interests of children to change their living arrangements if one of their parents is frustrating their relationship with the other parent who is able to offer them a good and loving home, this is unlikely to be in their best interests while that relationship is in fact being maintained in accordance with the court order.'

85. Mr Feehan's central submission was that the evidence before the judge demonstrated that the mother was supporting contact and had done so since the separation of the

parties. He submitted that the difficulties with contact were no more than those typically encountered between separated parents and that the judgment of HHJ Murfitt of June 2016 demonstrated that the mother had not been found to have frustrated contact. On further exploration Mr Feehan acknowledged that the judgment was adverse to a limited degree. He submitted that the reason contact had been suspended by the mother in March 2017 was as a result of the local authority recommending that it be suspended and that when the father brought the matter to court the mother immediately offered supervised contact. He submitted that thereafter the records of supervised contact demonstrated that the mother had been encouraging to the child about having contact with his father and that difficulties with the child engaging in contact could not be laid at her door.

86. Furthermore, within the proceedings themselves when contact had resumed it had taken place in accordance with the court order and thus he submitted there was no real basis for concluding that contact would not continue to take place had the child remained in the primary care of the mother.

87. The father's response together with that of Mr Bullock was in effect that this submission was a mixture of cherry picking and spin. I do not intend to repeat what I have set out above. The remainder of the evidence available to HHJ North convincingly demonstrated a very long history of problematic contact which had deteriorated significantly after March 2017 and where the mother's negativity which was evident then had endured through to the final hearing with no evidence of amelioration.

88. Thus the assertion that this was a case where appropriate contact was being maintained was simply unsustainable. HHJ North recognised that since March 2018 a degree of stability of contact had been achieved. However he was perfectly entitled to reach the view that this was within the context of ongoing court proceedings. The view of all concerned was that once the spotlight shifted away from the mother as a result of the termination of court proceedings the problems were likely to re-emerge given the absence of any change in attitude by the mother. In her statement of 6 February 2018, the mother acknowledged that there needed to be a fundamental change in her perception in respect of [the child's] father in order for the child to feel that he is permitted to have a relationship with his father. HHJ North's conclusions about the mother's evidence make quite clear that the mother had made little if any progress in changing her perception of the father.

89. The Guardian's analysis of what outcome was in the child's best interests is full and thorough, weighing the potential effect on the child of leaving his mother's care and moving to father's and the risks of him being further alienated from his father if he remained in his mother's care. The Guardian relied upon a constellation of matters in reaching that conclusion.

90. The social work assessment identifies [D133, #30] the pattern that has been observed of contact being adhered to for a period of time after court hearings but then breaking down. She refers to Dr Willemsen's conclusion that until the mother can evidence insight into the manner in which she had affected the child's view of his father she was not in a position to promote contact over the long term. This conclusion is hardly surprising and is consistent with what the mother said in evidence to the judge.

91. The evidence of Dr Willemsen and Dr Blincow both supported the need for a change. Both identified emotional harm being suffered by the child. Both identified the likely continuation of that harm given the track record and the absence of any evidence of insight or change by the mother. Dr Blincow identified the window in which a transfer of primary carer stood a good chance of success.

92. The overwhelming weight of the evidence supported a change of primary carer. Even the mother's own evidence supported this; both in terms of her position at the final hearing that contact should in fact be reduced and her continued negativity towards the father and inability to take on board the views of the experts or professionals.

93. Thus in terms of HHJ North's decision insofar as it was a discretionary decision based on his evaluation of the evidence it was a decision well within the parameters within which reasonable disagreement is possible. Indeed on the evidence before him almost every judge would have reached the same conclusion. A decision to leave the child with his mother would have been a most unusual outcome on that evidence and would have called for a very clear explanation support. Thus the decision was not wrong from an appellate perspective. Rather it was right. In proportionality terms this was a decision which I conclude falls within either category (i) or perhaps (ii) in Re B terms. In other words it was either the only possible view or a view which I consider was right. The change of primary carer was plainly the decision that was in this child's best interests and it was plainly a proportionate rather than a disproportionate order on the evidence.

Conclusion

94. Having conducted what I consider to have been a very detailed review of the evidence before HHJ North and his judgment with the benefit of powerful written and oral advocacy in support of the parties cases I have reached the clear conclusion that the appeal is without merit. Whilst it was only possible to reach this clear view after that detailed consideration it is clear that neither of the grounds of appeal had any realistic prospect of success when road tested against the evidence that the judge had available to him. I therefore:

    i) Refuse permission to appeal

    ii) Refuse an extension of time to appeal

    iii) Dismiss the appeal.