Neutral Citation Number: [2024] EWHC 1528 (Fam)

Case No: FA-2024-000041

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE FAMILY COURT AT WATFORD

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2024

Before:

MR JUSTICE POOLE

- -

AZ v BX (Child Arrangements Order: Appeal)

Between:

	AZ	**Appellant**
	- and -	
	BX	**Respondent**

- -
- -

Will Tyler KC (instructed by **Dawson Cornwell**) for the **Appellant**
The Respondent in person

- -

Hearing date: 13 June 2024

JUDGMENT

....

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 Poole:

1. This appeal raises issues about child arrangements orders which come before the Family Court on a daily basis: when to make a shared lives with order and to what extent an arrangements order should be defined.

2. By Children Act 1989 ("CA 1989") s8:

> "Child arrangements orders and other orders with respect to children.
>
> (1) In this Act "child arrangements order" means an order regulating arrangements relating to any of the following— (a) with whom a child is to live, spend time or otherwise have contact, and (b) when a child is to live, spend time or otherwise have contact with any person;"

The term "child arrangements order", and "lives with" and "spend time with" orders were introduced into CA 1989 s8 by the Children and Families Act 2014. The terms "shared care order", "shared lives with order" or "joint lives with order" do not appear in the Act but are commonly used by judges and practitioners.

3. Assuming that the parties to a child arrangements order application are the mother and father of the child, I take a shared lives with order to be one where the court orders that the child shall live with the mother and shall live with the father and then divides the children's time between living with each, whether that is equal time or otherwise. The Judge called such an order a shared care order but I shall adopt the terminology of the current wording of CA 1989 s8 and refer to a shared lives with order. The alternative, which the Judge elected to order, was a lives with order in favour of one parent and a spend time with order in favour of the other. For shorthand I shall refer to that as a "lives with/spend time with order". Of course there may be other kinds of child arrangements orders open to the court depending on the circumstances, for example a lives with order in favour of one parent with no time to be spent with the other parent, or a more complex order where the child's time is divided between more than two adults. CA 1989 s8 gives the court wide powers and is adaptable to the many and varied forms of family life which exist.

4. Whether an order is a shared lives with order or a lives with/spend time with order, each parent who already has parental responsibility, as in the present case, retains parental responsibility and neither parent with parental responsibility has priority over the other in terms of the exercise of parental responsibility by reason of the order. A parent who does not have parental responsibility shall have a parental responsibility order in their favour if a lives with order is made in their favour, but not if a spends time order is made in their favour. One material difference between a shared lives with order and a lives with/spend time with order that arises even if both parents have parental responsibility is created by CA 1989 s13 under which a parent with a lives with order may remove the child from the jurisdiction for up to a month without permission of the court or agreement of every person with parental responsibility. That is not the case for a parent without a lives with order in their favour. Nevertheless, if a child arrangements

order has been made it must be complied with and so CA 1989 s13 does not give the "lives with" parent free rein to take the child abroad for up to a month if by doing so the child would not spend time with the other parent as per the child arrangements order.

5. When making a child arrangements order, whether with a shared lives with order or a lives with/spend time with order, the court has to consider the division of a child's time between each parent. In doing so the court has a free hand to may make a tightly defined order for the division of time, to leave the arrangements undefined, or to make an order that lies somewhere between those two extremes, provided always that the court's primary consideration is the best interests of the child, that the court has regard to the matters set out at CA 1989 s1(3) (the welfare checklist), and that it applies the principles within CA 1989 s1 relating to delay (s1(2)), the involvement of each parent (s1(2A)), and only making an order if it is better for the child than making no order (s1(5)).

6. The appeal is against the judgment and order of HHJ Richard Clarke ("the Judge") in private family law proceedings. He handed down judgment on 5 January 2024 and required the parties' representatives to draw up an order to reflect his decision. The order was not perfected and approved until 29 January 2024. The Appellant's notice was filed on 19 February 2024 and referred to five grounds of appeal. On 16 April 2024 Henke J gave the Appellant permission to appeal out of time and for the appeal to proceed on grounds 2 and 4 of the grounds of appeal but refused permission to appeal on grounds 1, 3 and 5. The Appellant requested an oral hearing of a renewed application for permission to appeal on grounds 1 and 5 but not in respect of ground 3. Henke J directed that the renewal applications be listed together with the appeals on grounds 2 and 4. On 5 June 2024 Henke J gave permission to both parties to adduce further written evidence, which is now included in the appeal bundle, but refused permission for the independent social worker ("ISW)", to be called to give oral evidence at the appeal hearing.

7. The Appellant is AZ ("the Appellant") and the Respondent is BX ("the Respondent"). The parties were married for 13 years and have three children, a boy, R, now aged 13, and two girls, S and T, now aged 10 and 7. The Respondent began divorce proceedings in January 2022. In June 2022 the Appellant applied for child arrangement orders under Children Act 1989 ("CA 1989") s 8. The final hearing of that application took place before the Judge on 27 to 29 November 2023. At the hearing the Appellant was represented by leading counsel and solicitor, and the Respondent by experienced junior counsel on direct access. The Judge made the following child arrangement orders:

> "5. The children shall live with the respondent mother.
>
> 6. The respondent mother must make sure that the children spend time with the applicant father as follows:
>
> During school term time:
>
> a. The children shall spend one evening each per week with their father from after school, with father collecting the relevant child from school and returning them to mother's home as follows:
>
>   i) R on Tuesdays to 8pm

> ii) S on Wednesdays to 7 pm
>
> iii) T on Thursdays to 7pm
>
> b. The children shall spend alternate weekends together with their father … from 4.30 pm on Friday until 5pm on Sunday with the father collecting and returning them to the mother's home.
>
> During school holidays (including half terms):
>
> c. The children shall spend one half of the school holidays with their father on dates and times to be agreed in advance in writing."

8. The Judge further ordered that the children shall spend such further or other time with their father as the parties shall agree in advance in writing and he made orders about indirect contact.

9. The remaining grounds of appeal (keeping the original numbering for consistency) are:

> "1. The learned Judge erred in failing to set out any mechanism for how the parents should agree how holidays should be defined and agreed between them. Having determined that the parents are in conflict and do not agree with one [another] this poses a risk of harm to the children, it was incumbent upon the court to provide assistance in the management of the order to minimise this risk.
>
> 2. Further, the learned Judge erred in failing to define how the children should spend their birthdays and or religious festivals within the order and was wrong in his statement that the father had not set out his request for the court to address and manage the arrangements around special occasions and was wrong not to consider the need for these orders when reviewing the facts of the case and within the context of the welfare checklist.
>
> …
>
> 4. The learned Judge erred in his approach to the law and assessment of the legal principles, the facts and evidence of this case when determining whether to make a live with order to the Mother and to the Father or an order that the children live with their mother and spend time with their father.
>
> 5. The learned judge erred in his approach to the time the children spend/ live with the father at weekends in term time and was unclear as to the evidential basis for this and/ or his welfare assessment from which he reached his decision."

Background to the Decision under Appeal

10. Both parties are highly intelligent and educated individuals. The Applicant is a businessman and the Respondent a qualified legal professional. The Respondent petitioned for divorce whilst the parties were still living together with the children. After a while the Appellant arranged to move to a different property close to the family home but wished to move out only once child arrangements had been agreed. The parties agreed to mediation but that was unsuccessful. There were disagreements about the instruction of a child psychologist to assist the children. The Respondent raised safeguarding issues about the Appellant and stated that she wanted him to leave the family home. In early April 2022 the Appellant received a diagnosis of a very serious illness and required a course of debilitating medical treatment with a view to undergoing surgery after the conclusion of that treatment. He travelled abroad for the treatment and so was away from the children for a prolonged period in 2022. His prognosis was poor but he has so far responded very well to the treatment and surgery albeit with an as yet uncertain prognosis. His CA 1989 s8 application was stayed to allow for his treatment abroad to be completed.

11. The parties agreed jointly instruct an ISW who spent many hours with the family. She was later appointed formally at a First Hearing and Dispute Resolution Appointment once the Appellant's s8 application had been issued.

12. At the time of the final hearing the children were living predominantly with the Respondent but spending time with the Appellant. Interim orders provided that the children spent time with the Appellant as follows:

    i) In term times on each alternate weekend from 4.30 pm on Friday, being collected from the Respondent's home, until 5pm on Sunday evening.

    ii) In the school week each child to spend one evening (separately) with the Appellant from 4.15pm until 7.10 pm.

    iii) In addition, there was daily indirect contact via FaceTime at 7.10pm.

    The Appellant was not permitted to collect the children from school but could pick them up from after school clubs. During school holidays the children could spend no more than three consecutive nights with him.

13. There had been disputes between the parties as to the children spending time with the Appellant during school holidays. The Appellant complained of the Respondent's late cancellation of a planned holiday for the Appellant and the children to Spain in the summer of 2023. He did however enjoy school holiday time with the children in Easter and October 2023. These interim arrangements had been under strain – the Appellant seeking further time with the children by agreement, the Respondent not agreeing, and the Appellant making applications to court to ensure compliance with the interim contact orders.

14. At the time of the hearing before the Judge in November 2023 the Appellant's position was set out in his Leading Counsel's Position Statement. The Appellant sought a shared

lives with order (paragraph 14) as it is "important that the children are able to move away from conflict and proprietorship and know that they have two homes now… this order is not about securing equality but about the children knowing they are loved by both parents and that the court sees the value and worth in both relationships and both homes." He sought an order that "the weekend patterns should be alternated, changing to include weekdays" (paragraph 15) with Thursdays to Mondays in week one and Wednesdays to Fridays in week two. He sought "an order that holidays are shared equally" (paragraph 18). The position statement also referred to the Appellant's witness statement which set out further detailed proposals about the children spending time with each parent during holidays and on special occasions such as religious festivals as follows:

> "Half-terms – to be split such that the children live with each parent for an equal number of nights. For a one week half term, the parent with whom the children are living with on a Friday night will continue to do so until 12pm on Wednesday. For a two-week half term, the children will live with each parent for a block of eight nights with handover at 5pm on the middle Saturday.
>
> School holidays – Easter and Winter holidays to be shared equally with the children enjoying a continuous 7 night block with each parent. Summer holidays will be shared equally with at least one 2-week block with each parent. It is hoped that at least eight weeks prior to the commencement of holidays alternate agreement can be reached.
>
> Overseas travel is to be permitted. I have proposed alternative arrangements for this Winter that allows the children to enjoy an extended period with their family in the US, which I detail below.
>
> Bank Holiday arrangements
>
> For Bank Holidays that occur during school holidays, holiday arrangements will apply.
>
> Bank Holidays that occur during term-time (or other Monday school closure - e.g. staff inset days) will be spent with the parent who had the preceding weekend with the drop–off at school on Tuesday.
>
> Birthdays and Special Occasions
>
> Children's Birthdays and Parent's birthday – where a birthday falls in term-time the child will spend 60 minutes with the parent with whom they are not living with. Where a birthday falls on a weekend or in school holidays, the child will spend four hours with the parent they are not living with between 11am and 3pm.

> Birthday parties – the principal birthday parties held for school friends of S and T will be hosted alternately each year. The non-hosting parent may, of course, host a smaller more intimate party.
>
> Mother's Day and Father's Day – all three children are to spend four hours with the parent with whom they are not living with between 11am and 3pm where Father/Mother's day fall outside the lives with arrangements.
>
> Religious Festivals (Eid) – on the assumption that the children have a day off school, four hours to be spent with the parent whom they are not living with."

15. The Respondent made a number of allegations against the Appellant which she had set out in a Scott Schedule. She maintained in her opening position statement that the interim arrangements I have referred to should be made permanent. She proposed that during holidays the children should spend three nights (four full days) with the Appellant on alternate weekends, with some specific proposals about Christmas holidays.

The Judge's Decision

16. As part of his review of the procedural history, the Judge referred at paragraph [8] of his judgment to a safeguarding letter from 18 August 2022 that raised no safeguarding concerns in relation to either parent. Then at [20] he set out the 18 separate allegations the Respondent had made against the Appellant, including allegations of verbal, emotional and physical abuse of one or more of the children and coercive control of the Respondent. The Judge noted at [72] that the Respondent had withdrawn those allegations that concerned coercive control and manipulation of her including issues regarding finances. At [78] the Judge noted that the Respondent had accepted that there was no evidence that the Appellant had hit any of the children since R had been eight (some five years before the hearing). He noted at [107] that the Appellant accepted that he did used to hit R to "emphasise a point". The Judge criticised the Appellant for his conduct in that regard but clearly considered that there were no ongoing safeguarding concerns. He recorded at [96] that the Respondent had accepted that the Appellant did not denigrate R anymore. At [101] the Judge summarised the Respondent's position as to the remaining allegations as being that "anything she did not agree with … was presented as a demonstration of the father's abuse: that included agreeing the children should spend flexible time with father when he was diagnosed with a terminal illness, and then criticising father for the fact that the children were exposed to that illness." The Judge decided that it was not necessary to make any "further findings in relation to the mother's schedule of allegations other than those already set out. The court does not find that the allegations are relevant to the children's welfare and it is not the role of the court to engage in determining their disputes between them [the parents]" [138].

17. The Judge noted at [38] that the ISW report:

> "sought to consider possible alienation by mother and accepted that the children may have picked up on mother's distress and the fact that she no longer trusted father. It noted that mother had taken control of how and when contact would take place between the children and father."

Later at [126] the Judge observed:

> "The independent social worker regarded it as a positive that mother sought to take control of how and when contact took place after the parties separated. The court questions how it is a positive, with a negative dynamic between the parents, that either of them should seek to control it."

18. The Judge was critical of the ISW's conduct and reports as he set out at paragraphs [120] to [131] of his judgment. For example, at [130] the Judge found that the ISW "appears to have decided that father lied on something. She then appears to have decided that as a result it undermined all of the information that father gave her… The difficult [sic.] is that may well then have contaminated her whole approach." And at [131], "The independent social worker's reports do not match her notes about the children's wishes and feelings." The Judge felt that the ISW had sided with the Respondent in an unbalanced way. The ISW was unable to give evidence due to serious illness. The Judge appears to have decided that he could not rely on her recommendations about child arrangements but did rely on information contained in her notes and reports (unless they were inconsistent) and did also appear to rely on some of her judgments – see for example [147] of the judgment where he said that he relied on the ISW reports to find that both parents were capable of meeting the needs of the children. On my reading of the judgment as a whole the Judge accepted that the mother had sought to control contact and that this was not positive. Ground 3 of the grounds of appeal concerned the Judge's approach to the ISW's evidence but it is no longer pursued.

19. The Judge was critical of the evidence of both parents. At [95] he said:

> "The parents were not great in the witness box. Both of them struggled to answer questions that were put. They sought to offer what they wanted to say in response to the questions instead of answering the questions. When presented with closed "Yes/No" questions, instead of giving "Yes/No" answers, they would give evasive answers, or would heavily caveat their responses. They came across as trying to control the narrative that was put before the court. The court had to tell the parties on a number of occasions that they needed to listen to and answer the questions, but they continued to act in that way and did not change how they presented. Father, in particular, would pick and qualify his answers to questions, leaving the court questioning whether he was seeking to avoid the truth. Unhelpfully, he would be

> presented with multi-part questions, meaning he could hop around the answers and avoid answering parts which he did not want to answer and trying to split hairs on the questions that were being put forward. To a similar degree mother would seek to deflect when answering questions."

20. The Judge referred to the Respondent's inconsistency and manipulation of the court at [134] and to the father's lack of insight into what was best for the children at [135]. The Judge observed at [92] that,

> "These are two highly intelligent parties. They have come across to the court as two highly opinionated parties. They attend the court seeking endorsement of their position. The reality that the court has to consider is that in those circumstances they are also unlikely to accept the decision of the court if it does not agree with them. However, it is important that the parties listen to the reasoning of the court."

> And at [94]:

> "What has been apparent to the court here is that these are parents who have not been able to put their disputes to one side for the children."

21. Summarising his conclusions about the parents and the impact on the children of their mutual hostility on the children, the Judge said at [139] to [141]:

> "139 The fundamental issue here, when looking at the children's welfare, appears to be the relationship between the parents. These are parents who, as a result of the end of their relationship, cannot work together. They are parents who need support regarding coming to terms with the breakdown of the relationship; however, that of itself is outside the remit of the court. But the court would observe, if it is not working it needs to change. Neither of them can change the other person or the other person's approach; all they can do is change their approach and work upon themselves and hope that it will lead to a more positive relationship post-separation.

> 140 Mother needs to give the children emotional permission to spend time with father. She needs to accept that they need a relationship with father which is safe. Father needs to accept that the children need space and time to have a relationship with mother, which cannot just be based around her undertaking the mundane but otherwise important aspects of their lives, such as preparing them for school, making sure they do their homework, feeding them and putting them to bed.

> 141 The children require quality time with both parents. Both parents need to appreciate the value of the other person in the lives of the children, appreciate how much better the children's lives will be if that occurs and respect the fact that they may not agree on everything and the fact that they do not agree does not mean that either of them is necessarily right, or, more importantly, that either of them is necessarily wrong. Until they can do so these children will continue to be negatively impacted by the separation of the parents."

22. The key elements of the Judge's findings and evaluation of the family were:

    i) There were no safeguarding issues.

    ii) The parents had been incapable of working together on child arrangements and other matters in the interests of the children.

    iii) The parents' inability to work together was not due to abuse of one by the other but due to their own perceptions of each other and their mutual distrust.

    iv) The parents each failed to appreciate the importance of the other in the lives of the children, which was to the detriment of the children.

    v) The Respondent had controlled contact. It was not "positive" given the "negative family dynamic" that either party should seek to control contact.

23. Turning to the child arrangements, the Judge had earlier reminded himself that the children's welfare was his paramount consideration and, in effect, he considered the elements of the CA 1989 s1(3) welfare checklist at [142] to [147]. By reference to the children's wishes and feelings the Judge found at [142] that "the children spending disparate dates with father separately during the week clearly works … it is clear to the court that should continue…" but he rejected as being against the children's best interests the father's proposal for each child to spend time overnight with him during term time weekdays as normal routine. He accepted that the parties might agree such overnight stays on an occasional basis. Likewise at [148] the Judge decided that the ongoing arrangements for alternate weekend stays with the Appellant during term time were beneficial and should not be changed.

24. As to time with the Appellant during school holidays the Judge considered whether to order Fridays to Mondays with the Appellant but held that "in general terms the court would say that the children should be spending approximately 50/50 holidays." Again, he allowed for the parents to agree other arrangements but said that the "starting point should be 50/50."

25. Then Judge noted that handovers could be problematic and that a neutral space was required so that the children would not witness the negative interaction of the parents but he did not direct any particular arrangements.

26. Turning to the lives with order, at [154] the Judge referred to this as "the thorny issue of what is known as label litigation". He identified the issue as being "whether there should be a shared care order or a lives with order with mother and time with the other parent" [155]. He identified certain problems that either order could present, in particular that one parent might consider they have control under an order that the children should live with that parent, or that the children might feel that they lack a solid base if "there is not a complete definition of where their base is". Without explicit reference to specific authority, the Judge said that there is "conflicting case law about whether or not a shared care order is appropriate where parents cannot work together." It is not clear whether the case law to which he was referring and his concerns about shared care orders related only to cases of an equal division of time between two parents or to any shared order whatever the division of time. The Judge then concluded at [158] to [159]:

> "However, the court takes into account the various information in the reports from the independent social worker. In those circumstances, the reality of the lived experience of these children when looking at their welfare is that they continue to live with mother and spend time with father.
>
> In those circumstances, the court is satisfied that is what should be reflected in the order, but on that basis that the parties understand that if there is any suggestion that is being abused for whatever reason then it is something that the court can consider further."

27. The Judge emphasised at [160] that the lives with order in favour of the mother did not change the fact that both parents shared parental responsibility for the children. Finally, he exhorted the parties to consider how they were going to work through the remaining years of their children's childhoods so that they could work together as their children's welfare required.

28. I have a transcript of the exchanges between the Judge and Counsel following the handing down of the judgment on 5 January 2024. Ms Markham KC who had represented the Appellant at the hearing in November had been unable to attend the handing down of the judgment and different Leading Counsel, Mr Glaser KC, had attended in her place. Ms Gillman was Counsel for the mother at the hearing and at the handing down. The transcript begins:

> JUDGE CLARKE: Now, there is a lot that the court has addressed in that decision, and it is an extemporaneous decision as far as preparing it is concerned; I only finished preparing that this morning, and there may be things that parties want answers to or they may feel that there were minor discrepancies in relation to the facts. But are there are fundamental issues or questions that either of the parties have?
>
> MS GILLMAN: Your Honour, I am going to ask for a five or ten minute break, and then perhaps come back and address you.

> JUDGE CLARKE: Okay.
>
> MS GILLMAN: One of the queries I know that we will have is how we transition to shared holidays in a situation where the children have had a maximum of three nights with dad, how we get there. I can talk to my lady about that."

29. The Judge made some remarks about how that transition might be accomplished. The Judge made it clear that he expected the parties to agree arrangements for dividing the children's time equally between them during school holidays. He said, "that is a normal situation that you would expect between parents that are separated, and that is what we are trying to move these parents to." He discussed possibilities for the division of time during holidays which would depend on what the holiday plans were, for example visiting other family members abroad as commonly happened in this family. There then followed this exchange:

> "MR GLASER: And presumably – sorry – presumably your Honour is envisaging a, in the light of the present direction, a fairly simple order which does not have numerous recitals in it?
>
> JUDGE CLARKE: Let me explain my position in that regard.
>
> MR GLASER: Yes.
>
> JUDGE CLARKE: The longer the order the more parties come back to court arguing it and the more it underlines the ongoing problems between the parties.
>
> MR GLASER: Yes.
>
> JUDGE CLARKE: So I am not a fan of trying to cover every single eventuality and every single circumstance; I am also not a great fan of enormous recitals because along with everything else recitals turn into something to try and beat each other up about, so I am on final orders a fairly big fan of keeping it simple.
>
> MR GLASER: Yes, and it can include the usual provision, as was always the case: "Unless otherwise agreed between the parties".
>
> JUDGE CLARKE: Yes, absolutely, and I think with these parties there has got to be the consideration whether that should be in writing, and as far as writing is concerned, I regard that as being any form of communication which is set down in some form of typeface; so it can be a text, it can be an email----"

30. The case was then stood down for a short time. Upon resumption there was the following exchange:

> MS GILLMAN: Sorry, we were just having a discussion because I am not technically the applicant, but counsel has very kindly said I can raise any issues first.
>
> JUDGE CLARKE: Okay.
>
> MS GILLMAN: Your Honour, thank you for the time. Your order is actually quite clear; the position in the week is as it is but the holidays are to be shared, and the parents are to come to agreement with how that decision is reached. So, in fact, I do not have any queries about the order at all. Your honour there is an issue that may seem peripheral but there I no form H …"

Counsel then addressed the Judge on costs and some other issues which are no of relevance to this appeal.

31. Then transcript shows that at the end of the hearing the Judge said that ordinarily the order, to be drawn by the parties, should be returned by 4pm the next working day (Monday 8 January) but he was told that Ms Markham KC was out the jurisdiction and would need to review the order when she returned. He appears to have accepted that there would be some delay in the parties returning the order even if Counsel present on Friday 5 January 2024 could agree it by Monday 8 January. He was told by Mr Glaser KC that the order may not be sent to the Judge "for some time" and the Judge responded "Right. OK" but then warned the parties that if it were sent in after Monday 8 January 2024 it could fall "to the back of the queue."

32. After protracted communication, the parties were unable to agree the wording of the order. Counsel for the Respondent, Ms Gillman, wrote an email to the Judge dated 28 January 2024 seeking guidance as to the wording of the final order. In response to Ms Gillman's email, on 29 January 2024 Ms Markham KC sent a formal "Counsel's note post judgment and on settling of the order and request for clarification" to the Judge. She gave reasons for the delay in submitting the final order for the court's approval. She explained that the parties had been unable to agree the wording of the order in relation to child arrangements during the school holidays. She provided the Judge with the parties' competing proposals on the wording of that part of the order. They were, from the Respondent mother:

> "One month prior to the Easter holidays and six weeks prior to the summer holidays, mother shall send father a proposed holiday schedule, father shall send his amendments within 7 days and both parties shall use their best efforts to reach an agreed holiday schedule."

And from the Appellant father:

> "a. The father shall elect which dates of the summer holiday the children will be with him in even years and the mother in odd years, with agreement being in place by 30 March in any year.
>
> b. The mother shall elect which dates of the Easter holiday the children shall be with her in even years and the father in odd years with agreement being reached by November 30th in any year for the following Easter."

33. Ms Markham KC's note to the Judge continued by seeking clarification of the judgment. She set out case law on seeking clarification of a judgment. The clarification she sought was as follows:

> "The respondent father invites the court to clarify the following issues:
>
> • How the parents are to arrange time with the children on holidays and religious festivals.
>
> • Why there is no specificity to the orders made in particular around holiday agreements and arrangements."

Ms Markham KC's request for clarification ended with a request that the Judge confirm that "permission to appeal will run from the date on which the court confirms what orders it is making and why".

34. In his response by email later that same day, the Judge wrote that he had required a draft order to be submitted the day after handing down judgment and that the FPR required, in any event, submission of the order within 7 days (FPR r29.11(3)(a) applies when the court has required a party to draw an order). He wrote further:

> "3. Clarification should be sought in a timely manner. The communication indicates the parties were aware of a dispute over the draft order at an early stage, yet they chose not to revert to the court while matters were still fresh in the mind;
>
> 4. The court made it clear the parties needed to sort out the holiday arrangements. The court made the point that the greater the structure the more there is to argue over, if the dynamic between the parents is not addressed. The suggestion either party should be in charge of this, or that it alternates, ignores the problems with the parties' communications and their unhelpful dynamic. It would appear the parties are unable to heed the court's comments that they can only change their approach and not that of the other person. The court refuses to put either in charge. The court was clear that the order needed to be kept simple, and that is what is now approved;

> 5. I do not recall any submissions around religious festivals and note this did not appear until after draft 2. It does not appear in Miss Markham's position statement for the final hearing at all. The communications with [the ISW] show religious festivals were a problem between the parties and she did not recommend any previous change around this. Eid is a movable feast in any event, so no doubt the children will spend it with one or other parent as part of the alternating arrangements. No separate order is made."

The Legal Framework

Appeals

35. FPR 30.12(3) provides that an appeal may be allowed where either the decision was wrong or it was unjust for serious procedural or other irregularity. The court may conclude a decision is wrong because of an error of law, because a conclusion was reached on the facts which was not open to the judge on the evidence, because the judge clearly failed to give due weight to some significant matter or clearly gave undue weight to some other matter, or because the judge exercised a discretion which "exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong": *G v G (Minors: Custody Appeal)* [1985] FLR 894.

36. The appellate court must consider the judgment under appeal as a whole. In *Re F (Children)* [2016] EWCA Civ 546 Munby P summarised the approach as follows:

> "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 have 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…"

37. An appellate court must exercise caution in reversing a trial judge's evaluation of the facts, and of witnesses whom they have heard in person. In the case of *Piglowska v Piglowski* [1999] UKHL 27; [1999] 3 All ER 632; [1999] 1 WLR 1360; [1999] 2 FCR 481; [1999] 2 FLR 763; [1999] Fam Law 617 (24 June 1999), Lord Hoffman stated as follows:

> "In *G v G (Minors; Custody Appeal)* [1985] 1 WLR 647, 651-652, this House, in the speech of Lord Fraser of Tullybelton,

approved the following statement of principle by Asquith LJ in *Bellenden (formerly Satterthwaite)* [1948] 1 All ER 343, 345 [1947] 1 All ER 343, 345, which concerned an order for maintenance for a divorced wife.

'It is, of course, not enough for the wife to establish that the court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable…

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 primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications 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 second point follows from the first. The exigencies of the 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 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."

38. In family law cases an appellate court has to pay due regard not only to the trial judge's advantage in terms of assessing witnesses of fact but also in assessing what future arrangements should be made. In *Re A (Children)* [2015] EWCA Civ 1254, Lewison LJ held at [38] to [39]:

"An appeal court (such as this one) can only interfere with the decision of a lower court if it is wrong. It is not enough to show that different choices could have been made. Nor is it enough that the members of the appeal court would themselves have struck the balance differently. In a case such as this one the advantage that the trial judge has over the appeal court is enormous, as Lord Wilson explained in *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 at [42]:

> "The function of the family judge in a child case transcends the need to decide issues of fact; and so his (or her) advantage over the appellate court transcends the conventional advantage of the fact-finder who has seen and heard the witnesses of fact. In a child case the judge develops a face-to-face, bench-to-witness-box, acquaintanceship with each of the candidates for the care of the child. Throughout their evidence his function is to ask himself not just "is this true?" or "is this sincere?" but "what does this evidence tell me about any future parenting of the child by this witness?" and, in a public law case, when always hoping to be able to answer his question negatively, to ask "are the local authority's concerns about the future parenting of the child by this witness justified?" The function demands a high degree of wisdom on the part of the family judge; focussed training; and the allowance to him by the justice system of time to reflect and to choose the optimum expression of the reasons for his decision. But the corollary is the difficulty of mounting a successful appeal against a judge's decision about the future arrangements for a child."
>
> It seems to me that these considerations are all the more powerful in a borderline case. It is in precisely such a case that the legislature has entrusted the decision making to the first instance judge and this court should be very slow to interfere."

Re A was a public family law case but the same principle applies to a private family law appeal.

Child Arrangement Orders

39. I have already set out part of CA 1989 s8.

40. CA 1989 s1 provides so far as relevant:

> "Welfare of the child.
>
> (1)When a court determines any question with respect to—
>
> (a) the upbringing of a child …
>
> the child's welfare shall be the court's paramount consideration.
>
> (2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(2A) A court, in the circumstances mentioned in subsection (4)(a) … 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.

(2B) In subsection (2A) "involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time.

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question.

(4) The circumstances are that—

(a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings …

(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

(6) In subsection (2A) "parent" means parent of the child concerned; and, for the purposes of that subsection, a parent of the child concerned—

(a) is within this paragraph if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm; and

> (b) is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement."

Clarification of Judgment

41. Barely a week after Leading Counsel sought clarification of the judgment in this case, the Court of Appeal handed down judgment in *YM (Care Proceedings) (Clarification of Reasons)* [2024] EWCA Civ 71. In the opening ten paragraphs of his judgment, Baker LJ referred to case law to some of which Ms Markham KC had properly alerted the Judge. For the sake of economy I shall not quote the whole of those ten paragraphs but at [9] Baker LJ said:

> "The delivery of a judgment is not a transactional process. Its contents are not open to negotiation. Just as the trial is "not a dress rehearsal" but rather "the first and last night of the show" (per Lewison LJ in *Fage UK Ltd v Chobani UK Ltd*, supra, at paragraph 114), so the judgment is not a draft paper for discussion but the definitive recording of the judge's decisions and the reasons for reaching them. It is therefore inappropriate to use a request for clarifications to reiterate submissions or re-argue the case, or to cite a part of the evidence not mentioned in the judgment and on the basis of that evidence ask the judge to reconsider the findings. In my view it is also inappropriate to couple a request for clarifications with a warning that an application for permission to appeal will be made if the clarification is not provided. I regret to say that this case provides examples of all of these inappropriate requests."

42. At [90] of his judgment in *YM*, Baker LJ summarised the key principles that apply to requests for clarification:

> "90. Finally I return to the vexed issue of requests for clarification. It may be, as Ms Fottrell suggested during the appeal hearing, that it takes time for the messages from reported cases in this Court to get through. But, if I may adopt the words of Sir Nicholas Wall P quoted above, it is high time they did. This case illustrates that the procedure is still being misused. I would therefore draw the following lessons to be learned from this case, in the context of other cases which have involved similar examples of the practice being misused:
>
> (1) A judgment does not need to address every point that has arisen in the case. The court should only be asked to address any omission, ambiguity or deficiency in the reasoning in the

> judgment if it is material to the decisions that have to be taken in the proceedings. In care proceedings, the decisions are whether the threshold criteria for making orders under s.31(2) are satisfied and, if so, what orders should be made to meet the child's welfare needs.
>
> (2) When making a request for clarification of any perceived omission, ambiguity or deficiency in the reasoning in the judgment, counsel should therefore identify why the clarification is material to the decisions that have to be taken in the proceedings.
>
> (3) Counsel should never use a request for clarification as an opportunity to re-argue the case, reiterate submissions, or invite the judge to reconsider the findings.
>
> (4) Requests for clarification should not be sent in separately by the parties but rather in a single document compiled by one of the advocates. If necessary, there should be an advocates' meeting to compile the document. Save in exceptional circumstances, there should never be repeated requests for clarification.
>
> (5) Judges should only respond to requests for clarification that are material to the decisions that have to be taken in the proceedings.
>
> 91 The purpose of the process of clarifications is to head off unnecessary appeals. In a number of recent cases, the misuse of the process has had the opposite effect. I hope that hereafter counsel will confine requests to matters which are material to the proceedings and that judges will deal robustly with requests that exceed what is permissible."

43. A further lesson that arises from earlier case law, including *Re T (A Child)* [2002] EWCA Civ 1736 (see Arden LJ at [50]) is that an advocate "ought immediately as a matter of courtesy at least, to draw the judge's attention to any material omission of which he is then aware of then believes exists." Of course, often advocates will need some time to consider their notes of an ex tempore judgment, or a written draft judgment, before they can properly decide whether a request for clarification is necessary and if so how to formulate the request, but it is important to make any such requests promptly. In cases where the parties are required to draw the order after judgment has been handed down, FPR r29.11(3)(a) requires the order to be filed "no later than 7 days after the date on which the court ordered or gave permission for the order to be drawn up so that it can be sealed by the court." That gives an indication of the short timescale within which requests for clarification should be made.

Submissions

44. Mr Tyler KC appeared for the Appellant but he had not appeared in the court below. He sought to persuade the court to give permission to appeal in respect of grounds 1 and 5, and to allow the appeal on those grounds as well as grounds 2 and 4. There was no appeal against the equal division of time during school holidays nor the Judge's decision not to extend each child's individual time with the Appellant during term time weekdays to overnight. He submitted that if the appeal were allowed, the court should substitute orders as follows:

    i) A shared lives with order.

    ii) Adoption of the Appellant's proposals in November 2023 as to arrangements for school holidays and special days.

    iii) Extension of alternate weekend time during term times to include Sunday nights so that the Appellant could take the children to school every other Monday morning.

45. Mr Tyler KC did not take any issue with the Judge's evaluation of the parties as set out in the judgment. He made a general observation that the judgment was replete with aphorisms but did not contain clear, consistent reasoning in support of the key decisions now under appeal. He submitted that certain decisions made did not follow from the findings and evaluation of the evidence:

    i) The Judge found that the parties could not put their disputes aside and were unable to communicate or work together for the benefit of the children but he made an order for an equal division of time during school holidays to be agreed by the parties without any default position nor any defined mechanism for making such arrangements. This part of the order was set up to fail because, as the Judge had found, the parents had been unable to reach agreements.

    ii) The Judge noted evidence that the Respondent had "taken control of how and when contact would take place" [paragraph 38 of the judgment] and questioned how it could be positive "with a negative dynamic between the parents, that either of them should seek to control it" [para.126]. The Judge then noted that "an order that the children should live with one parent and spend time with the other parent can often be presented as that parent having control" but nevertheless made such an order.

    iii) The Judge said in response to the request for clarification that, in relation to any order regarding time spent with the Appellant during holidays, "the greater the structure the more there is to argue about" whereas the reverse was true: as the Judge's own evaluation demonstrated, these parents would be likely to argue about the arrangements unless there was a court-imposed structure in place.

46. Mr Tyler KC urged the court to consider the operation of the Judge's orders when combined:

    i) By operation of CA 1989 s13, the lives with order in favour of the Respondent gave her the right to remove the children from the jurisdiction for up to one

month without the Appellant's consent. This was of importance given the children's wider family connections in the US where they enjoyed visiting during the summer school holidays. The Appellant had no such right and required the Respondent's agreement to take the children abroad on holiday. The Respondent could veto the father taking the children abroad.

ii) The absence of default or defined arrangements for the school holidays meant that the Respondent's ability to "veto" the Appellant taking the children abroad was particularly powerful and problematic.

iii) The fact that a lives with order was made in favour of one parent only underlined a clear message that she was in the driving seat so far as "time with" arrangements were concerned. The opening words of the "time with" part of the order, taken from the Standard Family Orders template, reads, "The respondent mother must make sure that the children spend time with the applicant father as follows". Again, in combination with there being no direction or compulsion in relation to school holiday arrangements or special day arrangements, the Respondent would be emboldened to regard herself as the parent with control over the arrangements.

iv) The lives with order in favour of the Respondent, with only time to be spent with the Appellant also indicated to the children that one parent, the Respondent, was the main or predominant parent in their lives which was not conducive to their best interests in all the circumstances of this case.

47. Ground 1 refers to the Judge's failure to "set out any mechanism for how the parents should agree how holidays should be defined" but I understood the Appellant's position to be that the mechanism that was required was a defined default set of arrangements which should apply in the event of there being no parental agreement, rather than, say, the provision of a timetable for reaching agreement. The latter would still rely on parental agreement when the inability of the parents to reach agreement was a central problem in the case.

48. Mr Tyler KC submitted that when responding to the request for clarification, the Judge had been incorrect to say that submissions about religious festivals did not appear in Ms Markham KC's position statement for the final hearing. The Respondent accepted that they did so as is clear on the face of the position statement which expressly referred to the detailed proposals set out in the Appellant's statement. In any event, submitted Mr Tyler KC, the Judge did not then adequately address the request to clarify his decision in this regard. The Judge noted that communications with the ISW had shown that religious festivals were a problem for the parents but concluded, without any or any sufficient reasoning, that no order should be made.

49. Henke J gave permission to the parties to adduce new evidence into the appeal including post judgment correspondence between the parties regarding school holiday child arrangements. I hesitate to place too much reliance on this new evidence particularly since it post-dates the judgment and order under appeal and since the Respondent sought to persuade the court of an interpretation of the correspondence that was very different from the Appellant's interpretation. Mr Tyler KC submitted that the correspondence demonstrated that (i) the Respondent did indeed regard herself as in the driving seat so far as the school holiday child arrangements were concerned, and (ii)

the parties continued to be unable to work constructively together. Mr Tyler KC told the court that after the order under appeal had been made, the Appellant had had to abandon a plan to take the children on holiday abroad because the Respondent had failed to agree to it.

50. As to ground 5, Mr Tyler KC submitted that the Judge simply did not explain why he decided not to allow the children to stay overnight with the Appellant every other Sunday during term times. The Judge had urged the parents to share everyday childcare, not just holidays and enjoyable activities with the children, but the arrangements did not include any staying contact that would allow the Appellant to get the children ready for school and to take them there.

51. The Respondent was unrepresented but she provided the court with written arguments that were cogent and well presented and she articulated her points very clearly in her oral submissions. The Respondent slightly misunderstood the process of drawing up the order after judgment. The Respondent suggested that because Mr Glaser KC drew up a proposed order which simply recorded that the children should spend equal time with each parent during school holidays with dates to be agreed between the parents, it was not open to Ms Markham later to seek clarification or for the Appellant now to challenge that order. As I tried to explain during the hearing, Counsel's obligation was to draw up an order that reflected the Judge's determinations, not to take the judgment as a starting point for further submissions or negotiations. Furthermore, compliance with the obligation to draw the order does not deprive a party of the right to appeal.

52. The Respondent relied heavily on the case law governing appeals which I have set out earlier in this judgment. I do not need to repeat those principles here.

53. The Respondent submitted that the Appellant was cherry-picking – he did not want to disturb those parts with which he was content, only the parts that did not suit him. She submitted that the problems that have arisen in relation to child arrangements have not been due to mutual hostility but due to the Appellant's determination to exercise control. She warned that the Appellant has an incentive to paint a picture of the order being unworkable because he wants more control. She said that in seeking agreement as to arrangements after the judgment she has indeed sent time schedules to the Appellant, but that is only so that the arrangements can be arrived at in an orderly manner, allowing time to consult the children. The Appellant, she complained, changes his mind and disrupts the planning of arrangements.

54. The Respondent submitted that the Appellant's proposal for each parent to dictate the holiday arrangements in alternate years, was "peculiar" and did not focus on the best interests of the children. The Appellant had unreasonably rejected her own proposal to provide for a timetable for the reaching of agreement. She said that she does not have control over the arrangements because she has to abide by the order for a 50/50 division of time in school holidays.

55. The Respondent told me that it would be "chaos" if the Appellant had a lives with order in his favour.

56. The Respondent said that if the appeal were allowed she would wish this court to impose substitute orders rather than to remit the case for further hearing in the Family Court.

Analysis and Conclusions

57. The Appellant has been granted permission to appeal in relation to grounds 2 and 4 of the Grounds of Appeal and seeks to renew his application for permission to appeal in relation to grounds 1 and 5. Mr Tyler KC submitted that grounds 1 and 2 are inextricably linked and further, that the combination of the orders appealed under grounds 1, 2, and 4, produce an outcome that was contrary to the Judge's own evaluation of what was required. I indicated to the parties at the outset of the appeal hearing that I would hear submissions on all grounds and determine permission and, if necessary, the substantive appeal, rather conducting the hearing in two stages.

58. I should first address the failure of the parties to agree the wording of the order and the request for clarification. The Court of Appeal's decision in *YM* was handed down very shortly after the Appellant's request for clarification but the principles set out in *YM* were already well established. In my judgment the actual request for clarification was appropriately short but it was made late. I accept that in this case the communications with the Judge about when time to appeal would run were not designed as implied warnings about appeal in the absence of clarification, something Baker LJ in *YM* warned should not be done. I do not regard the request for clarification of the judgment as to school holidays to have been appropriately made. As Baker LJ so clearly set out in YM, a judgment is not a transactional process. The transcript of exchanges after the judgment was handed down show that the Judge was very clear that he did not think it appropriate to define the division of the children's time during school holidays beyond ordering an equal division. He also made stated that he wanted a simple order in relation to holiday time because, in his view, the longer the order "the more the parties come back to court arguing it and the more it underlines the ongoing problems between the parties." After a short break in the hearing after handing down, Counsel returned to court and Ms Gillman told the judge that the order was quite clear in relation to holiday time, namely that the parents are to come to agreement. Mr Glaser KC did not demur and Counsel moved on to address other matters with the Judge.

59. Although the Judge perhaps gave more explanation in those post judgment exchanges than in his judgment as to the reasons why he would not make further orders about holiday time than a simple order providing for an equal division of time, he did make his decision clear and he did give brief reasons. He had clearly decided not to dictate any arrangements beyond the equal division of time. The Judge was perfectly entitled therefore to refuse to give clarification of his judgment when asked "how the parents are to arrange time with the children on holidays" and "why there is no specificity to the orders made in particular around holiday agreements and arrangements."

However, the Judge had not addressed the issue of arrangements for time with the children during religious festivals (or indeed other special days) in his judgment. It would have been reasonable for Counsel to have asked for clarification as to what his determination was as to "time with" the Appellant on religious festivals, birthdays, bank holidays, and other special days, and the reasons for that determination. In fact, the request made was not exactly to that effect, asking only how the parents were to arrange time with the children on holidays and religious festivals. The Judge responded by saying he was making no order in relation to religious festivals but his response does not particularly assist the parties' or this court's understanding of the reason why he made no order in relation to those special days beyond his expectation that the parents would themselves work it out.

60. Having regard to the child arrangements order as a whole, and the grounds of appeal, I have decided that I should reach a conclusion on grounds 1, 2, and 4 only once I have considered all of those three grounds. They are inter-related. Ground 5 seems to me to relate to a discrete issue and can be addressed separately.

Grounds 1 and 2

61. I agree with Mr Tyler KC that grounds 1 and 2 raise similar issues because in relation to both school holidays and special days the Judge decided not to make any defined order beyond the 50/50 division of school holiday time. However, it does not follow that I am bound to reach the same decision on each ground.

62. As noted, the Judge did not address the issue of religious festivals, birthdays and other special days in his judgment. In the request for clarification and his response only the question of religious festivals was raised and he dealt with it very shortly. However, the outcome was that he made no separate order regarding religious festivals or any other special days. The Judge wrongly stated in his response to clarification that the issue had not been raised at the final hearing - it had been expressly referred to in the position statement on behalf of the Appellant by reference to detailed proposals in the Appellant's witness statement – but that error does not by itself render the decision not to make a separate order wrong.

63. The Judge took considerable care to evaluate the parents' evidence and their approaches to their communications, their relationship, and their parenting. As is very clear, he concluded that they had been incapable of working together in the interests of the children and he urged them to make changes to their own views and behaviour in order to find a way of working together. Some of the Judge's comments made after the handing down of his judgment and in his written response to the request for clarification, suggest that he had a general dislike of defined "spend time with" orders and was refusing to make any further orders in relation to school holidays on that basis rather than applying his mind to what kind of order was suitable in this particular case. However, looking at the judgment overall, as well as his post judgment observations and clarification, I am satisfied that the Judge did apply his mind to the particular circumstances of this case and decided that it was not in the best interests of the children in this case to make any further order in relation to school holidays beyond the simple order that he made for an equal division of time on terms to be agreed. It is more difficult to reach that conclusion with reference to his decision to make no order in relation to religious festivals and other special days (all of which, for shorthand, I shall refer to as "special days"). However, taking his judgment and post judgment clarification as a whole, it seems to me that his evaluation of the parental dynamics led him to decide that it was better to make no order in relation to special days than to make any order.

64. The question for me is whether the school holidays order and the decision to make no order regarding special days were wrong.

65. CA 1989 s8 provides the court with flexibility to make child arrangements to suit the best interests of the child in each case depending on the particular circumstances of that case. In some cases the court might consider that the best interests of the child are served by a tightly drawn, detailed order setting out defined arrangements, day by day,

sometimes hour by hour. Such orders may dictate where the parents hand over the children, who should be present at handovers, who should take the children to school or pick them up, where a child will spend their birthday, or their parents' birthdays, and so on. In other cases, a much looser order might be suitable. When making a child arrangements order that is intended to be in place for several years ahead, a degree of flexibility might be preferable and a detailed, precisely defined order less suitable. Children grow up. Parents change. Circumstances change.

66. Whatever form of order is made, it is generally in the best interests of a child to make an order designed to avoid further or repeat court applications. It is generally not in the best interests of children for the family to be engaged in protracted or repeated litigation.

67. Mr Tyler KC submits that the poverty of parental relations in this case, and the controlling approach of the Respondent, which the Judge had recognised, meant that it was manifestly wrong and contrary to children's best interests for the Judge to refuse to impose "default arrangements" which would allow both parents properly to plan holidays and special days for the benefit of the children in the event of the almost inevitable breakdown in attempts to reach agreement.

68. Of course, it is precisely because separated parents cannot agree child arrangements that the vast majority of private law cases come before the court. If parents are capable of reaching agreement then, unless there is some other reason to do so, the court will not be asked to impose child arrangements. It does not follow that the court must always make a defined child arrangements order when the parents cannot agree arrangements for themselves. In each case the form of order has to be tailored to meet the best interests of the children depending on all the circumstances. No order will be made unless making an order will be better for the children. What is not acceptable is for the court to dismiss the option of making a defined or detailed child arrangements order in principle, or as a general rule, without considering the impact on the children's welfare. Attempts to define child arrangements sometimes result in labyrinthine formulations. Understandably, this is exactly what the Judge wanted to avoid. There is merit in simplicity and the court cannot, and should not try to, address every minute of the children's lives or every practical arrangement. However, a defined order does not have to fall into that trap. The court can formulate orders that provide sufficient certainty and clarity without necessarily covering every possible eventuality. Some courts may be concerned that the less detail is included in a child arrangements order, the more opportunity there is for disagreement, uncertainty for the subject children, and further court applications. On the other hand, some courts might fear that the greater the detail within the order, the more there is for the parents to argue about and to challenge. That is the concern that the Judge expressed. In a case where the court assesses that one parent is pragmatic and reasonable and the other dogmatic and controlling about arrangements, then a different approach might be taken from a case in which reasonable parents disagree about a particular aspect of child arrangements but are capable of working together on other aspects in the interests of their children. The balance has to be struck in each case according to the court's evaluation of the family dynamics and circumstances, always seeking to promote the best interests of the children.

69. CA 1989 s1(5) applies such that when the court is considering a child arrangements order, it shall not make an order unless it consider that doing so would be better for the child than making no order at all. The Judge made an order for holiday arrangements

specifying the extent of the division of time but relying otherwise on the parents to agree the arrangements. He made no order as to arrangements for special days. The Judge will have been well aware of the s1(5) provision and would have rightly considered that he should only add to the orders that he made if it would be better for the children. It seems clear that the Judge did not think that making additional orders would be better for the children. CA 1989 gives the court considerable flexibility in determining the terms of child arrangements orders. An appellate court should be wary of interfering with a trial judge's assessment of what form of order is suitable. I must certainly not interfere with the Judge's order on the basis only that I would have made a different order.

70. In the present case the provision of a default, defined arrangement in the event that the parties failed to agree arrangements for an equal division of time in the school holidays would have been possible without making the order overly complex or lengthy. For example, adopting the approach that the Appellant had proposed at the final hearing, the Judge could have ordered that during school holidays the children shall together spend equal time with each parent on such dates and times as agreed by the parents in writing no later than six weeks before the commencement of the respective school holiday, and that in default of agreement by that time, the children shall spend alternate weeks during Winter and Easter holidays with each parent, and alternate fortnights during the Summer holidays. It is true that such an order would not meet every eventuality or issue that might arising during school holidays but the best interests of the children do not necessarily require an order to descend into minute detail. The family would have to come to agreements as to these additional details and issues as they arose. But they would know the essential arrangements in advance of the school holidays arriving.

71. In private family cases, judges will commonly exhort parents to compromise, to put aside their hostility to one another, and to prioritise their children's welfare. Those exhortations are sincere and I am sure that sometimes they have a positive effect. However, verbal encouragement alone will be unlikely to resolve parental hostility. In the present case it had been noted that the Respondent could not even make eye contact with the Appellant. The Judge noted that each parent's view of the other was distorted by their own distrust or perceptions. He encouraged the parents to "work upon themselves and hope that it will lead to a more positive relationship…" but did not record any basis on which it could be safely assumed that they would do so or that the relationship would become more positive.

72. Where possible, and where, as here, there are no significant safeguarding concerns, the court should use its orders as a means of encouraging hostile parents to work together. To that extent, an over-defined order might be counter productive. If the order sets out every detail of the arrangements for them, then the parents have nothing to discuss. How will they then ever learn to work together in the best interests of their children? However, where the evidence establishes that it is unlikely that the parents will be able to agree the fundamental arrangements themselves, then an order that says little more than that they must do so is likely to result in further litigation. The court does have the power under CA 1989 s91(14) to restrict further applications but it should not itself create circumstances likely to result in the need for further applications. It would be difficult to criticise either party for applying to the court for directions about

arrangements for school holidays in default of agreement. Some arrangements would need to be made for the benefit of the children.

73. The school holidays order in this case imposed a 50/50 division of time but left all the arrangements to the parents to agree. That, it seems to me, was more likely to result in further litigation than had the order included default arrangements, at least for the most important issue of when the children should be with each parent.

74. Mr Tyler KC does not now rely upon the proposal put on behalf of the Appellant in Ms Markham KC's note and request for clarification on 29 January 2024. With respect, I consider him wise not to do so. The Appellant's proposals to the Judge in late January 2024 were not his preferred position - he had set that out in his witness statement - and were an attempt to provide a mechanism for resolving parental disputes about holiday time. But they were not attractive. The Appellant proposed that he and the Respondent should in turn govern the dates during school holidays in alternate years. This would be a recipe for each parent in turn to exercise control over the other. For alternate summer holidays one parent would dictate all the arrangements. Given relations between these parents, there would be a high risk of tit-for-tat arrangements year after year. Nor was the proposal focused on the children's best interests.

75. I accept that in his judgment, the Judge did not direct his attention to how the children's time should be arranged on special days. In his response to the request for clarification, however, he made it clear that he took a similar approach to the arrangements for school holidays: the parents were expected to come up with arrangements themselves. I accept that he did not provide separate reasoning for that determination, but his evaluation of the parents and his reasoning in respect to holiday time arrangements applied equally to his decision not to make a separate order in respect of special days. It would have been better had the Judge spelled out his decision and reasoning in respect of special days, but I am satisfied that having regard to the entirety of his judgment and clarification he did provide reasons for making no separate order.

<u>Ground 4</u>

76. In *L v F* [2017] EWCA Civ 2121, the Court of Appeal was concerned with a second appeal. The first instance judge had made a "shared care" order dividing the time the children spent equally between each parent. Russell J had allowed the appeal against the first instance decision but her decision was then overturned by the Court of Appeal, restoring the decision at first instance. Peter Jackson LJ said:

> "Shared care
>
> When considering what arrangements are best for a child, the court's powers are broad. There was a time when the orthodox view was that shared care should not be ordered where the parental relationship is bad. There will certainly be cases where that will be the conclusion on the facts, but the authorities show that there is no longer a principle to this effect: *A v A (Shared Residence)* [2004] EWHC 142; *Re R (Shared Residence Order)* [2005] EWCA Civ 542; *Re W (Shared Residence Order)* [2009]

EWCA Civ 370. HHJ Owens was referred by counsel for the father to the first of these cases, so she no doubt had them in mind when she made the observation that "there is clear authority that a failure to be able to communicate effectively is not a bar to shared care arrangements."

It may be that equal shared care arrangements are unusual for children of D's age, but HHJ Owens gave several reasons for deciding that a week on/week pattern was suitable "on the actual facts of the case before me." She referred to the fact that it minimised change as it had been the reality for D for most of his life, and that D was thriving despite the difficulties. She noted the likelihood that the parents' communication would improve. She considered that equal shared care would neutralise any opportunity for one parent to seek to exert greater rights than the other.

When dealing with this issue, Russell J said this:

"The judge simply split the child's time between two homes in what may seem to be an even-handed approach to a difficult and all too common problem. This is unsophisticated, over-simplistic approach, all too often taken by the Family Court when making child arrangements orders, to attempt to adhere to the amendments to the CA brought in by the Children and Families Act 2014 by making an order for shared care which is an even split of time and to compel parents to co-operate. Splitting a child between two homes which are antagonistic and unsupportive of each other is not consistent with the best interests of a child nor congruent with that child's welfare."

I am afraid that analysis is wrong in a number of ways. In the first place, the approach of HHJ Owens was the very opposite of how it is characterised. In no sense did she make the child arrangements order in a weak attempt at even-handedness. Nor did she make it because of the amendments to the Children Act in October 2014, which do not speak for equal shared care but provide that the court is to presume, unless the contrary is shown, that involvement of a parent in the life of a child will further the child's welfare (s.1(2A)), but that this does not mean that there should be any particular division of a child's time (s.1(2B)). Instead, Judge Owens made her order for the reasons that she gave and she should not have been castigated for doing so. Secondly, the last sentence in the above passage is plainly wrong as a matter of law and goes beyond the proper role of the appeal court, which is to review the decision under appeal, not to substitute the view of the appeal court for that of the judge who heard the evidence.”

77. Applying CA 1989 ss1 and 8, and the dicta from *L v F*, the following principles apply to a decision whether or not to make a shared lives with order:

    i) The choice of whether to make a shared lives with order or a lives with/spend time with order is not merely a question of labelling – it is likely to be relevant to the welfare of the subject children and must be made by applying the principles of CA 1989 s1. In some cases where, for example, an unmarried father does not have parental responsibility, a shared lives with order will result in him having parental responsibility whereas a lives with/spend time with order (the children living with the mother) will not. That is a material difference to take into account, although it did not apply in the present case. In every case the appropriate choice of order depends on a full evaluation of all the circumstances with the child's welfare being the court's paramount consideration.

    ii) The choice of the form of any lives with order should be considered alongside the division of time and any other parts of the proposed child arrangements order.

    iii) A shared lives with order may be suitable not only when there is to be an equal division of time with each parent but also when there is to be an unequal division of time.

    iv) It does not necessarily follow from the fact that the parents are antagonistic or unsupportive of each other that a shared lives with order will be unsuitable.

78. In the present case there was effectively a straight choice between a shared lives with order and a lives with/spend time with order. The Judge made clear determinations about the division of the children's time as between each parent and the form of lives with order would not change that division. It is unfortunate that the Judge referred to the decision about whether to make a shared lives with order or a lives with/spend time with order as "label litigation". In fact, he did allude to the possible advantages and disadvantages of the alternative orders, showing that he was aware that this was not merely a question of attaching a label. He referred to the impact of a lives with order on the balance of power within a parental relationship, which might be particularly important where one parent regards themselves as being in control. He referred to the impact of the order on the stability of the children. He referred to the possibility that the type of order made might make a difference to the "actions of either parent". However, he did not apply those general observations to the case before him. The Judge did not give anything more than very brief reasons for electing to make a lives with/spend time with order. He concluded, "the reality of the lived experience of these children when looking at their welfare is that they continue to live with mother and spend time with father." He held that in those circumstances "that is what should be reflected in the order." That was the sole reasoning given.

79. It is right that the children were spending, and would continue to spend, more time with the Respondent than the Appellant. In some cases, perhaps, that might be a reason to make a lives with/spend time with order but the Judge did not explain why it would be a reason in the present case. He did not analyse the welfare implications of the choice of order for these children – he only made general observations, referred in an anecdotal fashion to case law, and then decided to make an order that he considered reflected the

children's "lived experience" without explaining why that would be better for their welfare.

80. It does not follow that because the children's "lived experience" (a term which has a variable meaning, and is sometimes regarded as being tautologous, but which in this context I take to refer to their experience of daily life) is of spending more time with one parent than the other or even because they regard one parent's house as their "home", that a shared lives with order is necessarily unsuitable or that at lives with/spend time with order must be made.

81. The welfare advantages for each child of a shared lives with order in the present case would be that:

   i) It would make it more difficult for either parent to regard themselves as being in control of contact or to seek to control contact – a problem that the Judge had specifically identified.

   ii) In particular, it would mitigate the effects of the Respondent's attempts to control contact which the Judge had noted from the ISW's evidence and had himself observed were not positive. Rather than ordering the Respondent to make sure the children spent time with the Appellant, a shared lives with order would set out arrangements for the division of time in the same terms for each parent, if not the same periods of time. It would thereby put the parents on an equal footing when seeking to make arrangements for the children.

   iii) It would also put the parents on an equal footing with regard to holidays abroad including during school holidays when the children are going to spend equal time with each parent.

   iv) A shared lives with order would signal to each parent that each was of value in the lives of the children, something the Judge had found each parent failed to appreciate.

   v) It would also signal to the children that each parent has, in their capacity as parent, the same inherent importance in the children's lives.

   vi) It would promote a sense of stability within the family: whatever the disagreements between the parents, the court had ordered that the children shall live with both of them.

82. Until the parties' separation the children had lived with and had been brought up by both parents, albeit the parents had different roles. The parties were now separated but the children would be spending extensive periods of time through the year with both parents. A joint lives with order is not reserved for cases where the children's time is divided equally between the two parents. It can be the right order to make even if the children will spend more time with one parent than with the other. It might well not be suitable if the children would spend only a very small proportion of their time with one parent, but even in such a case, a joint live with order is not automatically excluded.

83. I am afraid that none of these considerations can be said to have been addressed by the Judge when he found that the reason to make a lives with/spend time with order rather

than a shared lives with order was that the "reality of the lived experience of these children… is that they continue to live with mother and spend time with the father."

Ground 5

84. This ground of appeal focuses on one part of the child arrangements order in which the Judge decided not to change the ongoing arrangement that the children would return to the Respondent's home on the Sunday evening of the weekends they spent with the Appellant during term time. The Judge referred to the wishes and feelings of the children, saying that he did not accept that the children wanted to stay overnight on those Sundays. He did not record that they did not want to stay on Sunday nights but the Respondent directed me to the ISW's notes which appear to record that R, at least, told the ISW she did not want to stay overnight on those Sundays. It is difficult to interpret all of the ISW's handwritten notes in relation to the other children's wishes and feelings about this issue. I agree with Mr Tyler KC that the structure of the Judge's judgment meant that he determined this issue about overnight time with the Appellant without considering all the welfare checklist – he made a final determination of this discrete issue within his consideration of the children's wishes and feelings before he then went on to consider the other elements of the checklist.

85. Nevertheless, the Judge can be taken to have considered the children's best interests in all the circumstances and it was clearly open to him to have decided not to extend weekend contact in term times to Sunday evenings. Consideration of the other elements of the welfare checklist would have been very unlikely to have changed the Judge's decision on this issue. This particular decision is of a kind routinely made in the Family Court and does not require a detailed analysis by the Judge. This Judge did give reasons for his decision and I have to consider the judgment as a whole. He did not want to disturb the arrangements during term time because he considered they were working well. He took into account the children's wishes and feelings on this issue. Having regard to the legal tests on appeal, I do not regard this ground of appeal as having a real prospect of success or that there is a compelling reason why the appeal on this ground should be heard and I refuse the renewed application for permission to appeal. As follows, if I had given permission, I would have refused the appeal on this ground.

Conclusions as to Grounds 1, 2, and 4

86. Returning then to grounds 1, 2 and 4. Firstly, I am satisfied that ground 1 has a real prospect of success and that permission should be granted. I have therefore considered these three grounds together in the light of the analysis set out above. I begin by acknowledging that the Judge's experience and the care with which he evaluated the parental relationship. His conclusions about the parents were insightful. CA 1989 gave the Judge a wide discretion as to the appropriate child arrangements to make and, in this case, I must only interfere with the decisions made by the Judge if I am satisfied that, given the judge's findings and evaluation the orders he made in his discretion exceeded the generous ambit within which reasonable disagreement is possible, and were plainly wrong.

87. Having regard to the judgment, the Judge's clarifications, and the matters referred to above, my conclusions are as follows:

    i) The child arrangements order relied entirely on the parents to work together in the best interests of the children to agree the equal division of time during school holidays. The order did not provide for binding arrangements in default of agreement.

    ii) The Judge found that "these are parents who, as a result of the end of their relationship, cannot work together" [139] and that this was detrimental to the welfare of the children. Whilst he encouraged the parents to change, he did not find that they were likely to do so nor that his order would bring about positive changes so that the parents would be capable of reaching agreements in the children's best interests.

    iii) Accordingly, on the Judge's findings and evaluation, it was unlikely that the parents would be capable of working together to agree the terms of the equal division of time in the school holidays. They ought to be capable of doing so and they ought to change their behaviour, but the Judge's findings and evaluation showed that they could not do so and therefore this was not likely to happen.

    iv) In the event of the parents failing to agree the arrangements to divide holiday time equally, there would be uncertainty for the children, a likely exacerbation of the poor parental relations, and a probable need for applications to be made to the court for orders regarding holiday arrangements. All of those outcomes would be detrimental to the children's welfare.

    v) In contrast, a defined arrangements order that would take effect in default of parental agreement would provide certainty for the children, clarity for the parents, and be likely to prevent the need for (reasonable) further applications to the court.

    vi) Such a default provision need not have been prolix or difficult to draft.

    vii) The Judge expressed his general antipathy to detailed or defined orders but did not provide reasons why in this particular case it was inappropriate to provide a default position for holiday arrangements in the event that the parents could not reach agreement. I have considerable sympathy for the Judge's view that the parents ought to be able to reach agreements, but his findings were that that they "cannot work together".

    viii) In the present case I am persuaded that the combination of orders, including the school holidays order and the lives with order in favour of the Respondent alone, resulted in child arrangements orders that gave much greater control to the Respondent than the Appellant. The question of removing the children from the jurisdiction is much more likely to arise during school holidays than in term time. Under the Judge's order, the Respondent may take the children abroad without the Appellant's agreement but the Appellant cannot do so without the Respondent's agreement. This gives the Respondent more control over arrangements than the Appellant. Furthermore a lives with/spend time with

order requires the Respondent to make sure the children spend time with the Appellant rather than requiring the parents together to divide the children's time between them. She is the parent who has to take steps to make the order work. She is put in the driving seat.

ix) The Judge expressed concern at [126] of his judgment that it was not positive that either parents should seek to control the children's contact with the other, something he had recorded that the ISW considered that the Respondent had done. However, as set out above, the child arrangements order he made was likely to embed the notion that the Respondent was in charge when making arrangements for the children. Indeed the post-hearing correspondence underlines that risk. A shared lives with order would encourage the parents to work together on an equal footing rather than the Respondent being in the driving seat. Far from creating "chaos" as the Respondent submitted, a shared lives with order would regularise their equal standing in relation to each other which would be more conducive to working relations. The Appellant would not feel that he was regarded in any way as inferior as a parent. The Respondent would not feel that she was regarded in any way superior as a parent. This would be beneficial to their discussions about child arrangements.

x) The Judge did not adequately consider the welfare implications for the children of making a lives with/spend time with order as opposed to a shared lives with order, regarding this as a "labelling" issue and applying the label that reflected the "reality of lived experience of these children."

xi) The Judge appears to have conflated the unequal distribution of time spent with each parent with the children's "lived experience" being that they "lived" only with the Respondent. He did not consider the possibility that the children might regard themselves as living with both parents.

xii) The Judge did not consider whether, whatever the children's "lived experience", their interests might be better served by making a shared lives with order. He failed to consider the possible advantages of a shared lives with order for these children in this case.

xiii) The Judge had found that, "both parents need to appreciate the value of the other person in the lives of the children, appreciate how much better the children's lives will be if that occurs…" [141]. The Judge failed to consider that, in the light of his findings, for this family, a shared lives with order would signal that each parent was indeed equally important as a parent and would thereby be beneficial to the parents' perceptions of each other, and the children's view of their parents.

xiv) The Judge failed to recognise that, pursuant to his other orders, the arrangements were going to change, with more extensive time spent with the Appellant during school holidays, which would in any event change the experience of the children. He reasoned that a lives with/spend time with order reflected the current arrangements but he did not consider what form of order was appropriate given the new arrangements.

xv) The Judge must be taken to have been aware of CA 1989 s13 and the implications for taking the children on holiday abroad but he did not address s13 expressly and he did not consider the effect of s13 on this family in which the children were used to being taken abroad during school holidays. Holidays abroad are of particular importance for this family. A shared lives with order would put the parents on an equal footing in that regard, enabling each to take the children on holidays abroad without the permission of the other parent.

88. Standing back and again reminding myself of the law applicable to the appellate jurisdiction, I regret that I am driven to conclude that the Judge was wrong not to direct any defined arrangements for the children to spend time equally with each parent during school holidays in the event that the parents could not agree arrangements. That part of the child arrangements order was, on the Judge's own findings, likely to fail leading to uncertainty for the children, further parental animosity, and further litigation. A defined default arrangement need not have been complex. The holiday arrangements were particularly important to these children who were used to going abroad and seeing family abroad during the school holidays. I am acutely mindful that an appellate court should not lightly interfere with such an order and have considered very carefully whether it was open to the Judge to make the order that he did. I have concluded that having found that the parents cannot work together in the interests of the children, it was irrational to leave the parents to agree the equal time holiday arrangements without any default provision. The order made was outwith the range of orders that the Judge could reasonably have made in this case and on the findings and evaluation that he had made. In my judgment the Judge was wrong and I allow the appeal under ground 1.

89. The Judge decided to make no order in relation to arrangements during religious holidays and did not make any order for arrangements for other special days. He did not give adequate reasons for making no such orders but, after some hesitation, I have concluded that the Judge was entitled to conclude that no separate orders were required or appropriate. Having found that the Judge should have provided a default position for school holidays I have to explain why I find he was entitled not to provide a default position for special days. Primarily, it is because there would be a default position even without a specific order dealing with special days. Once term time arrangements are defined, as was the case, and holiday arrangements are either agreed or resort to a default defined order, then special days fall within those arrangements. If a birthday falls on a day when the child is to spend time with the Appellant, then that is the arrangement. The children will spend days during Eid with whichever parent they are due to be living with or spending time with on those days. By alternating the first week of each holiday period annually as being with the Respondent and then the Appellant, Christmas (which the family does not in any event celebrate as a religious festival) and Easter, and other religious festivals and birthdays during school holidays, will be likely to fall sometimes during time with the Appellant, and sometimes during the time with the Respondent. A complex set of defined arrangements for religious festivals and other special days could be devised but it would not necessarily be better for the children to do so. The Judge was entitled to leave such special days where they lay and not to make a separate or further defined order. The Judge was entitled to decline to make any separate order in this regard and I refuse ground 2 of the Grounds of Appeal.

90. I have considered the effect of the orders as a whole, but even if the school holiday order were to have included a defined default arrangement, as I have found it ought to

have done, I have concluded that the Judge was also wrong to have made a lives with/spend time with order rather than a shared lives with order. The Judge had indicated that he did not want either parent to feel in control of making the child arrangements. He knew that travel abroad was important for this family. He knew that there had been allegations and counter-allegations by the parents about the exercise of control. The unequal division of time spent by the children with each parent did not, in this case, mean that one parent was any less important to them than the other, as a parent. The Judge did not identify any factor that weighed against making a shared lives with order. The only reason he gave for making a lives with/spend time with order was that it reflected the children's experience. I am not sure that it did so: the fact that the children spent less time with the Appellant than the Respondent did not mean that they did not regard themselves as living with him when they were with him. But, in any event, the Judge was changing the arrangements and therefore the children's experience.

91. Notwithstanding the respect that must be accorded to the advantages of the trial judge, and the fact that there were only two alternative lives with orders for the Judge to consider in this case, I have concluded that the Judge was wrong not to make a shared lives with order. He did not give adequate reasons for his choice of order. He failed to consider the impact on these children's welfare of the alternatives of a lives with/spend time with order or a shared lives with order. For the reasons I have set out at sub-paragraphs 86 (viii) to (xv) of this judgment, had he done so he could only rationally have decided to make a shared lives with order. Accordingly, the order lives with/spend time with order he made was outwith the range of orders he could reasonably have made. For those reasons I allow the appeal under ground 4.

92. The appeal having been allowed under grounds 1 and 4 alone I now consider what should follow. Both parties urged me not to remit the case for further consideration in the Family Court. Further delay would be detrimental to the children's interests. As to ground 4 there is only one order to make and that is a shared lives with order. There is no need to remit the case to make that determination and I shall make a shared lives with order. With respect to ground 1, I agree with the parties that it will be beneficial to avoid delay and further hearings and I have concluded that I should replace the Judge's order in relation to school holidays with one that provides a defined default position. I take into account the parties' respective cases as put to the Judge. The children's best interests are my paramount consideration and I apply all the principles set out at CA 1989 s1 including the welfare checklist. I need not repeat all the considerations set out above but I take them into account.

93. The order I shall make applies to all the children together but it does not prevent the parents agreeing arrangements specific to one child, for example if one child wished to go on a school summer camp or to share a holiday with a friend. Under the default arrangements set out below the children may sometimes return to school from the Appellant's home and sometimes from the Respondent's home I see that as a benefit for the children so that they can experience each parent getting them ready for school. Each parent is perfectly capable of doing so. For the purposes of the order I shall refer to the parties as the Mother and Father. Except as set out below, the Judge's order shall remain in force. Hence, the children shall divide their time between the Mother and Father during term time as the Judge decided. I shall also accord respect to the Judge's determination that a simple order was required and that, for example, no directions as

to handovers was required. The lives with/spend time with order shall be set aside and replaced with a shared lives with order. The school holidays spends time order shall be set aside and replaced with the order below. The new orders shall be:

i) A shared lives with order: the children shall live with the Mother and shall live with the Father and shall divide their time as set out in the orders below.

ii) During all school holidays, the children shall live with each parent for an equal number of nights, the dates and times to be agreed by the parties in writing no later than six weeks before the commencement of each holiday. In default of the parties reaching a written agreement by that time, the following arrangements shall apply:

a) Summer, Winter, Easter, and half term holidays: the children together shall live with each parent alternately, changing after:

i) The fifth night during a one-week half term holiday;

ii) Every eighth night for a longer half term holiday and during the Winter and Easter holidays;

iii) Every fourteenth night during the Summer holidays.

b) The children shall live with the Mother for the first block of consecutive nights during every school holiday in even numbered years (including years ending with 0) and with the Father for the first block of consecutive nights in odd numbered years.

iii) No separate order is made in respect of Bank Holidays, religious festivals or celebrations, birthdays or any other special days.

94. I shall invite Mr Tyler KC to draw the whole of the new child arrangements order reflecting this judgment, and the orders on appeal, to be sent to the Respondent for her comments before being forwarded to me for approval.