No. FD11P02760

Neutral Citation Number: **[2014] EWHC 3622 (Fam)**
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Friday, 17th October 2014

Before:

DISTRICT JUDGE HESS

(Sitting as a Judge of the High Court)
(**In Private**)

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B E T W E E N :

GO — Applicant

- and -

(1) EN
(2) MN
(3) BN — Respondents

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A P P E A R A N C E S

MISS F. WILEY (instructed by TV Edwards LLP) appeared on behalf of the Applicant.

MR. R. ALOMO (instructed by Hudgell and Partners) appeared on behalf of the First Respondent.

MISS S. ANCLIFFE (instructed by Creighton & Partners) appeared on behalf of the Guardian.

MR. N. PURSS (instructed by the Legal Department) appeared on behalf of Lambeth Borough Council.

THE SECOND RESPONDENT appeared In Person.

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J U D G M E N T

THE DISTRICT JUDGE:

1 I have before me an application by GO ("the mother"). She is represented before me by Miss Francesca Wiley of counsel. The application relates to the mother's oldest child, who is the third respondent in this case, his full name being BN, referred to by everybody, and by me in this Judgment, as "B".

2 B was born on 1st August 2007 and is therefore now aged 7. He is represented via his children's guardian, Kay Demery, by Miss Shiva Ancliffe of counsel. I note in passing that Miss Demery has only been the guardian since August 2014 and that she is the fourth person to occupy this position. Since this litigation began the second guardian, Sharon Garner, left the employment of CAFCASS earlier this year, and the third guardian, Sharon Warren, who was intended to replace Sharon Garner and see the case through to the end, but unfortunately fell ill at some stage during the summer and was unable to continue and was replaced by Miss Demery.

3 The other parties are: the second respondent, MN. With her agreement, and the agreement of everybody else in the case I shall adopt the practice of calling her "MN" in the course of this Judgment. She is a half-sister to B. She has throughout been a litigant in person in these proceedings and, while her case may have been advanced a little differently had she been represented, I am satisfied that she has been able to articulate her views on relevant issues with clarity and certainty. Indeed, as I shall say in due course, part of her evidence I felt she delivered with a rather shocking lack of guile, which I shall develop in due course.

4 The first respondent is EN ("the father"). He has been represented in this hearing by Richard Alomo of counsel. The father has not been present at all during this hearing but he has been represented throughout it. I am told, and accept, that he is in Nigeria and could not, for practical reasons, make it here for this hearing. All parties, including the father, have indicated that they wish the hearing to continue notwithstanding his absence, and this reflects the fact that, in fact, he does not offer himself as a carer for B, and supports MN's position in every way, both as a carer and in the court litigation. I am satisfied that his absence has not caused him any prejudice.

5 The fourth respondent is Lambeth Borough Council (the "Local Authority"). They are represented before me by Nairn Purss of counsel. They appeared, at least by way of legal representation, for the first time yesterday. For reasons which I shall explain in due course they have become interested in these proceedings and, in due course, I shall make them a party to these proceedings for reasons I will explain later.

6 The application has proceeded to a final hearing over five days on 13th, 14th, 15th, 16th and 17th October 2014. Submissions were completed yesterday

afternoon and I have had overnight and this morning to consider all the matters arising, and I am delivering this Judgment on the afternoon of the fifth day, 17th October 2014.

7 In considering this application I have read and considered the core bundle of documents, including up to date statements from all interested parties, and a sufficient selection of documents from earlier parts of the proceedings - perhaps most importantly the core bundle includes the Judgments of District Judge Walker and Wood J, to which I will return later. I have also seen some additional material to which my attention was drawn in the course of the hearing which, whilst not being in the core bundle, has been part of earlier court bundles. I have been able to hear the oral evidence of the mother, of MN, of Sarah Ward, the social worker from Lambeth, of Loraine Hudson, the contact manager/supervisor at the Cassell Contact Centre, and also from the guardian. I have had submissions from all parties, partly in writing and partly orally. I have also seen a bundle of photographs presented to me by the mother, mostly taken by her, of B on contact visits over a number of years. She must remind me to hand that back before we conclude today.

8 The long history of events leading up to this hearing I shall describe in some detail because it is relevant to my decision. I shall describe it as follows. The father was born on 23rd July 1942 and is therefore aged 72. He was originally from Nigeria. He has 11 children by a number of mothers in Nigeria and England. One of his children is MN, who was born on 23rd April 1982 and is therefore now aged 32. His marriage to MN's mother broke down when she was a child and she remained thereafter in his care until she grew up and she is very close and loyal to him. Her own mother lives in Nigeria and she remains in touch with her. MN and the father both ended up living in England and, although I am not sure I have been given the exact date, my impression was that this was established quite a long time ago, probably when MN was a young child.

9 The mother was born on 30th July 1984 and is therefore aged 30. She originates from Cameroon. She had a difficult early life, described by Wood J in these terms:

> *"She originates from the Cameroon. From her earliest years there her life was miserable. She was subject to violence, including sexual violence; her financial circumstances were those of great hardship; and her first born child died of malnutrition. She came to this country on a false Nigerian passport in 2006."*

In 2006 the mother arrived in England and the mother and the father, then aged 22 and 64 respectively, formed a relationship which eventually moved to cohabitation in London. In earlier stages of this litigation there has been a

substantial dispute about how this came about, and I have read District Judge Walker's conclusions about this. She said:

> *"I decline to make a finding about how the mother came to the UK as it was not in my view central to the case, but it was not disputed that she entered the country illegally. She subsequently claimed asylum when she attempted to enter the Irish Republic which was refused, although she appealed against the refusal. She did not attend the appeal hearing which was dismissed. I was, and remain, satisfied that both parents were aware that the mother had entered the country illegally and that there was collusion between them from the time that she arrived."*

I have no reason to reach any different conclusion from that, and my overall view is that how it happened is helpful background information, but does not make a great deal of difference to the decisions I have to make now.

10 Very shortly after her arrival the mother became pregnant with B. At about the same time the mother was diagnosed as HIV positive. This was not contracted from any contact with the father, as he is known not to be HIV positive and, happily, it was not passed on to B. Mother has subsequently been under medical care in the UK and modern medical treatment for HIV being what it is it seems not to have had very much impact on her day to day life. More significantly for this case the diagnosis seems to have been the triggering event for the father to begin to take a very, very dim view of the mother; that view developed, but a good deal of that hostility developed in the early stages of their relationship before even B was born, and all the evidence before me now suggests that his fixed hostile contemptuous view of the mother's character and abilities developed in 2006 and is as strong now, eight years on, as it ever was. Notwithstanding that, B was born on 1st August 2007 and in the period between August 2007 and May 2009 the mother had the care of B.

11 There are significant allegations arising by and against both mother and father from that period. District Judge Walker dealt with them in her fact finding Judgment of November 2013. I refer to a number of her findings. She said in para. 263:

> *"I am satisfied that [the father] was violent towards the Mother and that he did at times hit her."*

In para.267:

> *"The father I do find to be a bully, who ultimately decided that the Mother was not fit to care for B."*

At para. 326:

"I do not make a finding, as the Father seeks me to, that the fact that he met her on the street … shows that she was acting as a prostitute."

At para. 335:

"It is alleged that the Mother is only pursuing this application because it will enhance her case to remain in the country and enable her to obtain settled immigration status here.

The mother does come across, I find, genuinely committed to B.

I am satisfied that her motivation is out of genuine love for her son and her fear that she may lose him altogether.

At para. 338:

"*I cannot find that this indicates that B has been exposed to inappropriate sexual behaviour by his mother."*

At para. 343:

"In terms of [the Mother's] mothering of B and actual care of him I do not make any negative findings."

Further in that paragraph:

"The hostility between the Mother on the one hand and the Father and MN on the other is of an extreme nature."

Paragraph 347:

"[MN] is loyal to her father ... I fear she may not be prepared to face up to the possibility that he has not presented a true picture of [the Mother] to her and I am troubled that she is not prepared to accept the Mother's positive attributes or perhaps to recognise her importance to B."

- that is p.A125 of the later Judgment.

"The father demonstrates extreme toxic hostility towards the mother, which is shared by MN."

12 Nothing I have heard in the five days of this hearing causes me to reach any different conclusions. It is a very real difficulty in this case that neither the father nor MN accept any of these findings. As Wood J observed:

"What is not in doubt is that both the father and MN do not accept the findings of the court, set down in a magisterial judgment of the District Judge of 8th November 2013 … There was, of course, no appeal launched by either of them in respect of any of those findings. It provides a perfect illustration of the forensic 'reality' and the parallel 'reality' adhered to, for whatever reason, by the litigants."

13 In May 2009 B was placed with MN where he has been ever since. Again, there has been a significant dispute about how this came about, and the extent to which it was a deliberate and mischievous plot by MN and the father, and the extent to which the mother entered into the arrangement under duress, as she would have it, or careless as to B's interests as MN and the father would have it. Again, I note some of the comments by District Judge Walker at para. 233:

"I do not find that MN was involved in any plot with her Father to take B away from the care of his Mother. I do not believe that she has colluded with Father to try and ensure that the Mother does not have her child back again. However, she is hostile to the Mother, and some of that I find is misplaced and not ultimately helpful to B."

And at para. 320 she said this:

"… it suited the mother during this period to have B cared for elsewhere other than with her. It may be due to very difficult circumstances."

The reality is that what happened was probably an unfortunate mixture of circumstances, but my overall view is that the events of 2009 are, in the context of my decisions now, a relatively long time ago, that things have moved on since then and that exactly what happened in 2009 does not make as much difference to the decisions I now have to make as MN believes. I have to approach this case from the point of view of B's best interests assessing the present and the foreseeable future, not from the position of punishing the mother for what may have been unwise decisions made in possibly difficult circumstances in 2009.

14 It is clear that from May 2009 onwards B has been living with MN. His basic physical and educational needs have been met, and met, by most accounts, reasonably well. There are some shades of recent criticisms of an absence of toys, for example, but I am not sure these criticisms go very deep. It would, I think, be unfair not to acknowledge that MN has provided a good basic household for B for more than five years, the majority of his life. B and the mother have continued to have visiting contact, sometimes with difficulty but by and large it has happened on something approximate to a monthly basis.

15 In the meantime both the mother and MN have had a child. MN, and her husband CN, have had a child called N, sometimes known as 'C', and she was born on 5th October 2008 and is now aged six. They all live together in a one-bedroom flat at the moment with B. The mother has also had a child, 'K', born on 23rd April 2013, therefore now aged one. K's father does not see K does not live with the mother. The mother and K live in a one-roomed accommodation with shared kitchen and bathroom; this is provided by the Local Authority in the context of mother's immigration status. The Local Authority have no concerns about the respective mothers' care of either of these children. Both families could be said to be living in cramped but adequate circumstances.

16 From May 2009 to December 2011 there was no court involvement at all. On 9th December 2011 the mother issued an application initially for a prohibited steps order to stop the father taking B to Nigeria and also for a non-molestation order. Those orders were made, *ex parte* originally, at the first hearing and, it is believed by everyone in this case, still outstanding, although I have not actually seen a copy of that order. This quickly developed, however, into a Children Act dispute over B's future which was case managed throughout by District Judge Walker.

17 In the subsequent 27 months until February 2014, during which District Judge Walker had the case, there were a remarkable number of court hearings. I have counted at least 20 in The Family Court, as well as various judicial review applications arising out of mother's housing and immigration status. District Judge Walker's order, however, was eventually made on 10th February 2014, and it was for a residence order in favour of MN, with the mother having visiting only contact essentially on alternate Saturdays from 10 am to 5 pm. This represented a substantial victory for the case put by the father and MN, in particular the refusal of overnight staying contact. There are some features of District Judge Walker's reasoning which are worthy of comment at this stage. First, notwithstanding some fairly positive opinions on mother's immigration position by the immigration expert (instructed on a single-joint expert basis) that is Nadine Finch, who said this:

> *"B was granted indefinite leave to remain in the United Kingdom on 5th July 2011. The fact that B is settled here and is also entitled to be registered as a British Citizen is likely to have a significant effect on the likelihood of the applicant being granted leave to remain here in the future. The applicant has a strong bond with B and therefore her removal from the United Kingdom, after a residence or a contact order has been made, is likely to be a breach of Article 8 of the European Convention on Human Rights. If B is registered as a British citizen the applicant will be entitled to leave to remain under para.EX 1 of Annex FM to the Immigration Rules."*

Notwithstanding that opinion, District Judge Walker found the question mark over the mother's immigration status to be a significant negative against the mother. So at para. A121, para. 36 of her Judgment she said this:

> *"Although in addition to applying for discretionary leave the mother has applied for Indefinite Leave to Remain(ILR), the letter states quite clearly that the solicitor does not believe that the Home Office will make a decision on the mother's application for ILR until they know the outcome of these proceedings. They refer to the 'Catch 22' that the mother is in as having seen the position statements from the Guardian the family courts are reluctant to make any final decision while immigration matters are outstanding. It was said by counsel on behalf of the father that it is not only the uncertainty caused by mother's immigration status that causes difficulties, but problems of her current status.*
>
> *Miss Hoyal, on behalf of the mother submitted that the court could and should find on the balance of probabilities that the mother was likely to be granted leave to remain on the basis of the opinion of Nadine Finch. I do not accept that is the right approach. Ms. Finch's opinion is just that, it is an opinion and however learned an expert there can be no certainty that is what the outcome will be. The law, both Statute and case law may change and it would be in my view quite wrong for the court to make a finding that it is likely that mother will be able to stay. There is a risk that she will not ultimately secure settled status and even if that risk is low the consequences for B if the mother were to be removed and he had to go with her would be damaging. I would not expect mother to want to leave without him, although that is possible but given B's own secure immigration status the father and MN might launch proceedings to prevent him from going thereby creating a further period of uncertainty."*

18 Secondly, District Judge Walker found that both the mother and MN were capable of meeting B's basic needs. She said this:

> *"His basic physical needs are being met in the care of MN. I am satisfied that would be so if he lived with his mother . . . His educational needs are met by his attendance at school and the school refer to MN as being conscientious about his schoolwork and attendance, but I have no reason to believe that mother would not do the same."*

Thirdly, she found that MN's view on overnight contact, and I propose to refer to it in this Judgment as her 'ultimatum', whilst it was not rational nor helpful it was sincerely held, and to challenge it by ordering staying contact would risk the stability of B's placement, so she would not order staying contact. In her words:

"It is the Guardian's view that B would benefit from staying contact with his mother and that MN should not be able to hold the court to ransom by saying that she will not care for B if staying contact is ordered. Her rationale for that is that if the court thinks that mother should have staying contact then she would accept that he can be looked after by her. I do not accept that that is a wholly rational position, but believe it is sincerely held.

I accept that B would enjoy more time with his mother and I have no reason to believe that he would come to harm in her care overnight . . . Staying contact, if ordered, and even if agreed to, given MN's strongly held view is likely to undermine the stability of the placement and B's welfare would be compromised. So, although I do not consider MN's position helpful, in making his welfare my paramount consideration I shall not order staying contact."

19 The mother appealed against that order and leave was granted on 27th March 2014 and the substantive appeal was heard by Wood J on 22nd and 23rd May 2014. He was critical of District Judge Walker's findings. He said this:

"Whatever might be the genuine or duplicitous views of MN and/or the father, in relation to them, as I understand it, the facts before District Judge Walker supported the following findings:

(i) The mother's observed care, i.e. observed by the professional staff at NRS and by Lambeth Social Services, and by the two guardians of B, was of an entirely appropriate nature.

(ii) The quality of her contact was good.

(iii) She had a loving and affectionate relationship with B and was genuinely committed to him.

(iv) B clearly enjoyed time with his mother and she with him.

(v) He was at ease with her and there was clearly mutual affection between them.

(vi) Whatever the past position she now had appropriate accommodation for him to stay, even though it could not be described as luxurious.

(vii) The father and MN rejected the judicial findings as to the father's domestic violence of any kind, emotional, physical

and/or sexual, and as to whether or not the mother had sexually abused B, and that the mother was using B cynically solely to help in her claims for permanent permission to remain.

(viii) The father demonstrates extreme toxic hostility towards the mother, the District Judge's words not mine.

(ix) The court could have far more confidence in the mother promoting contact with MN and with the father than MN promoting contact with the mother. In that context, I note that teething troubles would appear to have settled down on one version of events and that contact is taking place comparatively smoothly, and yet there are traces, even in the guardian's latest report for that hearing, which suggest there might still be continuing problems. I am not in a position, nor need I for the purposes of this appeal, to come to any conclusions about those contradictory statements in the evidence.

(x) Although MN was found to be genuinely committed to B understanding the nature of his relationship to the other adults and to the guardian she proposed . . . that further attempts should be significantly delayed until at the least he was in his teens.

(xi) The threat of MN to surrender the care of B to his mother if the court extended contact to include staying contact was, since it was found that MN's views were genuinely if mistakenly held, reckless, for she would be sending B to a mother she thought wholly incapable of caring for him appropriately, and believing that he would be at serious risk in his mother's home.

(xii) Even in the early days, when her circumstances were very different (for example, given the violent nature of the relationship with the father), there was no child protection concerns in relation to the mother's care of this little boy."

Having heard further evidence myself during this week I have no reason to depart from any of those findings. They were all borne out by the evidence which I have heard. Wood J continued:

> *"Additionally, it seems to me that [District Judge Walker] adopted the wrong test in assessing the likelihood of success for the mother's application for permanent leave to remain in referring to 'no **certainty** that that is what the outcome will be'. What is required for these*

purposes is, I suggest, a finding that there is no 'probability that is what the outcome will be'. To suggest that all parties, or indeed any of the parties, have to satisfy the court that permission would certainly be granted is putting the bar far too high, bearing in mind the applicable standard of proof in such cases.

Thus, it appears to me to follow that the District Judge over-values the likelihood of the risk that the mother:

(i) Would be administratively removed, and

(ii) that B would go with her to an uncertain life in Cameroon ... or

(iii) that he would remain here . . . but have to deal with all the problems of separation from mother he was just learning to rely upon in every sense.

If the District Judge had applied what I suggest is the correct test to the risk of these outcomes, the risk is significantly reduced.

Finally on the subject, it was, in my view, not open to the court to determine the issue on the basis that' the law, both Statute and case law, may change'. Cases up and down the land are decided on the basis of relevant operative statutory and/or regulatory basis and any authorities of the court relevant at the time of the decision. There might be marginal room to depart from that proposition if there was known to be coming in the immediate and foreseeable future a decisive change to the statutory and/or regulatory structure, or the advice and/ or guidance set out in the authorities."

20 This criticism of Wood J was so well made out by him that in the course of the proceedings before me nobody has sought to take that point and there seems to be no disagreement with the proposition that, on a balance of probabilities, it is unlikely that the mother will suffer any difficulties over her immigration status which would have any effect on the welfare of B. Insofar as that is not agreed I find that to be the case on the evidence that I have heard. It seems to me with B's immigration status, with Nadine Finch's view of that, and from the parameters of the arguments before me, it seems to me, on a balance of probabilities, that in due course she will receive leave to remain in the United Kingdom. Certainly, it would be my view, as it was the view of District Judge Walker, that it would be in B's interest if that were to be the case.

21 I return to the Judgment of Wood J, and he said this:

"Whilst I recognise the enormous difficulty in this case of determining the least detrimental option for B District Judge Walker's analysis puts far too much weight on the ultimatum of MN. In doing so it completely deprives B of the opportunity to have considered by the court living with his mother, albeit she is described in very positive terms in the way I have set out above . . . It was, in my view, wrong for the court to deprive itself of that essential material deriving from staying contact before it had looked at the advantages and disadvantages of a residence order to MN.

It seems to me there was insufficient attention paid to the right of B to be raised by his mother. The problems which the District Judge identifies all emanate from the behaviour and attitudes and threats of the father and of MN.

B has Article 8 rights under the Convention above-referred to in relation to his father, to MN and to his mother and to his half-brother K. There is little or no consideration of the last of these which I can detect in the Judgment, nor of the consequences for B when he grows older and understands his mother is his mother, and questions why he was not brought up by her as K was.

I appreciate that having stated the obvious, namely, that delay should be avoided, the delay caused by the commencing of staying contact, and the assessment process by a court in the light of the proper evidence then available , would further extend the timeframe of these proceedings."

Accordingly, Wood J set aside at least part of the order of District Judge Walker, and he made an order that there should be interim staying contact on an alternate weekend basis from Saturday at 10 am to Sunday at 5 pm. In effect, he decided that B's best interests would be served by taking on directly and clearly the ultimatum laid down by MN. Plainly, he expected MN to co-operate with staying contact. Originally, he listed the case for himself for a final hearing in late 2014 at which he plainly planned to decide whether the circumstances were such that B might now move to live with his mother. No doubt, he hoped to look at the development of staying contact over that period of time.

22 The father and MN did not like Wood J's decision. There was an appeal to the Court of Appeal, I think strictly made by the father, but no doubt supported by MN. McFarlane LJ refused to give permission to appeal in a written order of 19th June 2014, and the appeal has not gone any further than that. So, that having occurred, the staying contact should have begun. The 21st June 2014 was to be the first overnight contact. This was the first test of the ultimatum. What happened on 21st June? I have heard various versions of it but the

version that I propose to accept is the mother's version, and it is helpful if I read out from her statement which I accept on this in its entirety.

> *"Saturday, 21st June 2014. I received a text message from MN at 9.05 stating that B would not be coming to my house to stay over so I should not bother to come. I decided to go to the house.*
>
> *I knocked on the door. The Second Respondent did eventually come to the door. I insisted that she called B, which she did do albeit reluctantly . . . I lent towards B, gave him a high five gesture and asked if he was ready to come. He told me he was and looked to the Second Respondent [MN] asking if he should go. [MN] asked B why he was asking her because she said he had told her that he did not want to go with me. B replied saying that he promised he would come back if he went with me. [MN] said plainly that she had already told him that if he goes, he is not coming back. There was some repetition between B and MN at this point in which he was promising to return and she was telling him he could not come back if he went. I reassured B and told him to go and change. He stated directly to [MN] that he would go with me but that he promised to come back and that he would not sleep over. [MN] asked B if he was sure he wanted to go with me and he said yes before turning to climb the stairs to change. As B was about to go up,[MN] asked me if I would return B at 5.00 pm. I told her that if he changed his mind and wanted to stay overnight then I would let him but I would bring him back if not. She responded angrily, she would not therefore let B leave and she told B not to go and change. [MN] told me that she would be working at 5.00 pm and she would not be available to telephone the police to have B brought back if I did not return him. She repeated getting the police involved several times in the presence of both B and her daughter, N, who was also in earshot. I told her it was not appropriate to keep mentioning the police in the presence of the children. B then asked if he could say something to which MN responded initially by telling him to go upstairs and not to say a word. She then changed her mind and told him to say what it was he wanted to say. B said he was confused. He said he did not know who his real mummy was and that he had not yet decided. He said he found it difficult to make a decision to go for a sleepover because it would upset MN, but if he did not go that 'G' would be upset. [MN] told B that as he has a new guardian she could decide. This is in direct breach of the Order which had been made less than a month before. However, I was really concerned by B's reaction and whilst I could see that he wanted to stay over with me, I did not want him to feel pressured any further so decided it was best to leave. I told B that I loved him very much, that I would always be his mummy and no matter what, I would always love him. I offered pleasantries to [MN] and left."*

23 This was, perhaps, the first sign that MN intended to obstruct the order of Wood J by all means possible including the direct involvement and recruitment of B to her cause. It is a deeply unattractive picture with potentially alarming consequences for B's emotional care. In my view, MN demonstrated a grave absence of insight into B's emotional needs and risked causing him significant emotional harm.

24 After that day it was suggested in correspondence that the contact visit should be rearranged for the following Saturday, 28th June. Again, I accept mother's version of what happened on that and quote from her statement:

> *"Saturday, 28th June 2014. MN did not deliver B to Tulse Hill Station so I attended her home. I knocked at the door but received no reply . . . I waited outside for almost two hours continuing to knock and politely request that [MN] come to the door with B. It was pouring with rain and I was soaking . . .*
>
> *[Later], the door was opened all of a sudden by B and N. I don't think I was in view from the spot I was sitting, and B told me they thought I had left . . .*
>
> *I suggested to B that we have a chat. [MN] was at the door by this point and stepped in front of B pushing him behind her and told him not to say a word and stay there. I repeated again to B that we just have a chat. [MN]insisted that this was not going to happen, and that they were going out . . .*
>
> *I had brought B's scooter with which he loves to play, and I could see him looking at it . . . I took this opportunity to talk with B. [MN] telephoned the police on 999.*
>
> *[She] told the police that 'someone' would not leave her property. I did not think it was helpful to call the police in the presence of the children . . . In a sensitive manner I encouraged B to come with me and reassured him that I would return him at 5 pm if he did not wish to stay overnight. I reminded B that I loved him and was there for him . . . I could see that again, he wanted to go with me but his voice was faint when he was speaking as he was clearly scared to do so but he nodded his head and said 'Okay'.*
>
> *[MN] all of a sudden dropped the phone, marched towards us, grabbed B's right hand, started pulling him and pushed me telling me to leave. B was actually slightly in front of me on his scooter so I went down on my knees and held him to my chest in a reassuring hug to try and stop [MN] dragging him. She was shouting repeatedly telling me to leave and becoming increasingly louder. B was screaming and I could still hear*

the piercing in my ears. It was heart-breaking. I told [MN] to stop as she was hurting my boy. It was clear that she could not see or feel B's pain, which as a mother, I could. [MN] was trying to pull B around from my front who was crying with his face towards me.

There were neighbours opposite who started shouting across the street to the Second Respondent to leave him alone . . . B was continuing to scream and I could no longer bear seeing B in pain so I moved aside. The neighbours then came over and as [MN] saw them coming she forcefully took B inside."

In my view this incident was primarily caused by MN's militant refusal to comply with Wood J's order without any good reason. I do not criticise the mother for going to MN's house, indeed, I was told that this was on her own solicitor's advice. Again, it is my view that MN's demonstrated a grave absence of insight into B's emotional needs, and risked causing him significant emotional harm.

25 On 30th June 2014 the new guardian, Sharon Warren, having been told about the events which I have just mentioned, went to see B at school. She wrote a note which appears at p.C80 in my bundle, and it says this:

"B's disclosed, in the presence of me and of a teaching assistant, that MN beats him with a cane. He told me that the reason he will not stay overnight at mother's house is because his carer has warned him that if he agrees to this he will be beaten with a cane and he will not be allowed to return home. I asked him later in the conversation if he is beaten with a cane, he replied he was, and that his carer also shouts at him and tells him to go to bed, and he will not wake up. In my professional opinion this little boy is possibly experiencing both emotional and physical abuse by his carer. There is a court order for the birth mother to have overnight contact with B, however his carer is resistant to this and has threatened to relinquish responsibility for him. My concern is for B, to keep him safe whilst he remains in her care. I do not know how MN will behave towards him when she discovers what he has said. The head teacher has been made aware of the disclosure and this referral."

26 As a result of that disturbing conversation, the matter was referred to the Local Authority, and Sara Ward became involved, she is the social worker. She is a social worker of some competence, but little experience, having been qualified only 18 months or so. Notwithstanding that, she is well used to dealing with children, having been a teacher for 15 years before she was a social worker. In any event, the assessment was given to her to carry out and she carried out an assessment and completed it, sometime later, in fact on 22nd August 2014, but

I mention it at this point because much of it is relevant to the incident that I have just mentioned. She said this:

> *"B also spoke about his mother when we were talking about his worries. He said: 'G gives me bad dreams, she's really rude to me. I get scared by her, sometimes don't. Boring stuff with G, going for a walk and that's it. When I asked him what happened if he got into trouble B said that he had to kneel and had time out. This time he has not disclosed that he was hit with a cane. He reported kneeling for a long time when he wet himself. It was only when I directly asked the question, which MN had encouraged me to do, that B said: 'Never get smacked, not really, she's stopped it now. When I make mega extra trouble, only when I'm in big trouble, and cane. It doesn't hurt me. My mum hits me with a cane'."*

He clarified he was talking about MN rather than the mother.

> *"Gets cane and hits me. She definitely smacks. She just says that she used to do it. B told me that the cane was kept with the cooking things."*

Further on:

> *"MN said that she did not use physical chastisement on B, and that he is sanctioned by having time out and by losing his tablet. She reported that when he has time out he kneels or sits and we discussed how kneeling may not be appropriate. She said that she did not agree she has physically chastised B, but she is willing to sign an agreement confirming she will not resort to this in the future. "*

A little further on she says this:

> *"Based on the information I have available at this time, from the information I have read and meeting with MN and B, and his evidence, that this is a complex case. With regard to the specific area of concern that MN used a cane to hit B, it is my view that this has possibly happened. B told me that it had happened and was able to describe some specifics about where the cane was kept and what it looked like. I am of the view that it is unlikely a child of seven years would make this up. However, I would note the account he gave to me was not consistent. During my conversation with B I also felt that at times he seemed to be careful about what he should say. It seemed that he had either been coached or had overheard inappropriate adult conversations. I have clearly explained that it is inappropriate and illegal to use an implement and that physical chastisement is not an effective sanction. MN has denied using a cane, however, has signed a written agreement indicating that she will not resort to this. Based on this, it is my preliminary view that this case should transfer to a Long*

Term Child in Need team. This would mean that an allocated social worker would have ongoing oversight of his emotional well-being and would be able to provide B with ongoing support. The Local Authority is also able to offer specialist parenting classes to all parties. This would mean that they would provide her with education in respect of child development, issues of identity, attachment and relationship, and the need for B to receive consistent nurturing care from all those who care for him. The allocated social worker could reinforce this through direct work. It is also my view that B would benefit from therapeutic intervention. He has presented to professionals as confused about his parenting. As he grows and develops he needs to understand his circumstances and have strategies is to manage the pleadings that he will have. Based on the information I have at this time I am of the view that B should remain living with MN and her husband. His basic care is good and he speaks highly of his family. I believe to remove him would be detrimental to is emotional wellbeing."

27 I have listened carefully to Sara Ward describing this investigation, and I have heard what MN has said in reply. I was very struck with MN's explanation of the conversation between B and the guardian on 30th June. She did not accept that B had said what was alleged to have been said and asserted that the guardian had deliberately made up this conversation. I quote from the note that I made of her evidence:

"I have never said that to B. I don't know how he reaches that conclusion. It is my view but I've never told him that. I'm a hundred per cent sure I have never said that to B. I don't believe he said that. The guardian has made that up."

28 Although I have not heard directly from this guardian, because she subsequently became ill, I, without hesitation, reject MN's assertion that this conversation was made up. It seems to me inconceivable that a guardian would invent such a thing. In any event, it was repeated, at least in part, to Sara Ward the social worker, and the sentiment of the comments i.e. acute hostility to staying contact and the consequences of not returning to her home if he does have overnight contact, accurately and with power represents the view held by MN, and held by her very strongly. Also, this is not the first time that B has made allegations involving an element of corporal punishment, there are some references earlier in the papers, C35 and C57, and at this point I will not go back to them.

29 Having reviewed all this evidence on a balance of probabilities I do find that MN has on a few occasions used a cane or similar corporal punishment on B. I do find that MN has told B that if he agrees to overnight staying contact he will be caned. I do find that MN has told B that if he agrees to overnight staying contact he will not be allowed to return to MN's home. I regard these,

especially in the context of the court's deliberate decision to order overnight staying contact, to be illustrative of a grave absence of insight into B's emotional needs, carrying with it substantial risk of causing him significant emotional harm.

31 Contact having failed on 28th June 2014 a further session was arranged on 5th July 2014. Once again, I accept the mother's version in its entirety of what happened on that day:

> *"Saturday, 5th July 2014. B was brought to Tulse Hill on that day after a long wait. The first thing said by [MN] was: 'Say what you have to say to B, who stood silent before me. He then proceeded to state, as outlined in the transcript obtained from a recording made by [MN] during the handover, he said that he wanted me to stop disturbing him, that he really didn't want to come with me, and pointing out what I had [supposedly] done to his head. He also said that I was trying to kill him."*

Then there were some further conversations:

> *"... but B was listening to what I had to say and at that point, [MN] intervened and said: "Come on, let's go."*

There is a transcript of that conversation because MN recorded it on her mobile phone. I think it would be right to say that the transcript is unhelpful because some parts where words are plainly being said by B are labelled "G", and some parts which are plainly being said by G are labelled "MN", but doing one's best to untangle that riddle it is plain that the recording confirms that B said at least these words:

> *"I don't want to come with you. See what you've done to my head, it really hurt it. So just, just, I don't want to come with you, stop disturbing me. You are trying to kill me."*

Further on in the conversation the mother said:

> *"Do not talk to me like you're talking to someone in the street. I am your biological mum. I gave birth to you in the hospital."*

And B says:

> *"No, you didn't. It's all a lie."*

32 So, in the light of these unhappy contact experiences the matter returned to court, and Wood J dealt with the matter again on 9th July 2014. He made an order which required there to be three specific sessions at the Cassell Contact

Centre, the third of which was to involve the guardian. In contrast to what I have just been talking about the first of these three occasions, on 23rd July 2014, went ahead. I was able to hear compelling evidence about this event from the contact manager, whose name is Loraine Hudson. She told me a number of things. She commented that MN made little effort to encourage the contact to take place, that on this occasion B did not require very much persuasion to go on the contact. The contact went well. It was a happy occasion. He was pleased to see his mother. He got on well with his mother, also his friend, M, who lives in the same house as the mother does, and that although, in the course of the trip to the park, he fell and had a small graze, that was, in Loraine Hudson's view, a very minor matter which no reasonable person could say led to any blame. Loraine Hudson reported in her written report that at the end of the contact session B was happy and excitedly told of the fun that he had, and that he took, indeed, some encouragement to return back to MN as he wished to continue to play with his friend and to talk with his mother. He was pacified on departure at the news that he would see his mother and M again the following week. She says once B had met with his mother and his friend he was quite keen to spend time with them in the park.

33 So that was a happy event, consistent with the many previous contact sessions which had occurred before things went wrong earlier on this year. It fits with the photographs that I have seen, as provided by the mother. I am always cognisant when I see photographs that one has to treat them with care because they are only literally a snapshot of events which could hide a different presentation. But, with those caveats, I am satisfied that this contact, as with many other previous contacts, went extremely well and that B was very happy to be with his mother. Yet, MN could not bring herself to accept that there were any benefits in this. She very grudgingly in her evidence before me said that it was just because M was there that he enjoyed his contact. Whilst it is true she was there, I reject that explanation. I regard this contact as providing good evidence of B having a good, underlying loving relationship with his mother when he is left with space to do so. Since that date there has been no contact at all.

34 On 30th July 2014, B was brought to the Cassell Centre, but he, B, refused to have contact. I have seen the notes and I can see that B said to the operations manager, Mr. Bishop, on that occasion that he did not want ever to see G again, that she was evil and he shook his head and said he did not want to see her. On that occasion the manager decided not to force the issue. The notes provide little evidence of any encouragement by MN. We have to remember that just a week earlier B, as I have already said, had not wanted contact to end, yet here he is a week later expressing apparently a strong hostile view about his mother.

35 Similarly, on 14th August, the third of these three sessions - this was the one which was to be facilitated by the guardian. She was present, and she has

described what happened, and to summarise she observed B in tears, getting out of the car, he tried to run away, refusing to have contact saying: "No, no, I don't want to go." It was a very fraught situation. She noted in her written report that at no point did MN offer any encouragement to B to see his mother. She, like the manager on the previous occasion, felt it could not be pushed on that occasion and so there was no contact. It is my view, having heard all of the evidence about these events, that B's resistance to contact on 30th July and 14th August had nothing whatsoever to do with a small graze which he had suffered on 23rd July. In my judgment it had everything to do with what MN must have said to him both before and after 23rd July. Having heard MN's evidence I do not doubt that she conveyed to him her true hostile views about the mother, both clearly and directly, and that MN is responsible for B's attitude on those occasions. I regard these instances as further illustrations of a grave absence of insight by MN into B's emotional needs with, again, a substantial risk of causing him significant emotional harm. Indeed, the combination of these events from May 2014 onwards caused me to conclude, on a balance of probabilities, that B has already been caused significant emotional harm, with the risk that if I do nothing it will continue and get worse. He is a confused and unhappy little boy. In my view this is as a direct result of MN's behaviour towards him.

36 Because of these unhappy events the matter was brought back again before Wood J on 15th August 2014. His order of that day accelerated the listing to this week and provided that it should still be in the High Court. For the avoidance of doubt, I am sitting this week as a District Judge of the High Court. It was made clear on the face of his order that the hearing before me would, *inter alia*, involve my consideration of where B would live and what support would be needed in the arrangement. I note in passing - I will return to this issue later - that nobody made any application either on this date or before, before Wood J or, I gather, even mentioned the possibility of obtaining expert evidence. The father was represented by counsel on each of those occasions.

37 Since the order of 15th August 2014 there has been no contact at all. On one visit by the guardian to MN's house in this period B produced a letter to her, it is in my bundle at p.78. I have read it in full. The guardian told me that she found it an odd letter in its construction and wording. It sits uneasily alongside the evidence of what happened on 23rd July 2014 and on previous contact visits. It fits unhappily with MN's view of the situation and, although MN denied it, I find on a balance of probabilities that this letter was dictated and procured by MN to further the views that she takes in this case. I cannot regard it as representing B's true wishes and feelings. So we arrive at this week's hearing with the mother not having seen B since 23rd July, nearly three months ago.

38 The position of at least some of the parties in this hearing has moved during the course of this week for reasons I shall develop in a minute. It is important

for me to track how things have changed over the last five days. At the outset of this hearing the positions of the various interested persons were as follows. MN and the father wished to revert to the order of District Judge Walker of 10th February 2014, i.e. for B to live with MN, with visiting contact only to the mother. The mother wished there to be an immediate transfer of B's arrangements so that he would be living with his mother, with contact arrangements to the father and MN to be arranged. Her primary case was that this should happen outright with an immediate handover to her care, but her secondary position was that I should make orders under s.37 and s.38 of the Children Act 1989, with the effect that B would be placed into the care of the Local Authority under an interim care order with a plan for immediate removal to a foster placement, though work to be done to bring about, as soon as it could be achieved, the transfer of B's living arrangements to the mother.

39 The Local Authority recommendation was that there should, in due course be a transfer of B to live with his mother but, for the time being the living arrangements should be left as they are. They, via, Miss Ward or her successor, would implement a Child in Need Plan, with the intention of working with MN over a period of time to bring about the transition. They felt there were possibilities for working with MN and persuading her to work with them, doing some constructive life story work with her, leading on to her support for a gradual transition of the living arrangements of B from her to the mother.

40 The guardian produced a written report, but in essence she wished to see how the evidence developed before giving a final view. On day one Sara Ward gave her evidence in accordance with the Local Authority view at that time. Everything she said in her evidence supported the proposition which I have just mentioned, which was the Local Authority's opening stance. She went off at the end of day one and at that point we did not expect to see her again. On day two MN gave her evidence. The guardian is a very experienced guardian with nearly 30 years of professional practice doing children's cases. She plainly has come across many adults in that time with implacable positions, but she listened to MN's evidence, and it plainly had a profound effect on her view of the case. It would be fair to say that one can trace a change in her view from the written version in her report to her evidence subsequent to hearing MN's evidence, and she has been criticised for changing her mind as a result of that. I do not criticise her for that at all.

41 I found MN's evidence to be similarly striking, and such preliminary views that I may have had about the case, based on reading the papers, did not survive hearing that evidence. Perhaps the guardian and I should not have been so struck by what we heard, as there is ample warning in the paper work to that effect. But the stark, uncompromising, blinkered, extreme, message delivered provided quite a startling experience. The fact that it was delivered by a person who, from most angles appeared sensible, reasonable, pleasant and

courteous underlined that message yet further. I shall summarise some of what I noted down from MN's evidence to illustrate what I have just said:

> *"My problem is with staying contact. The mother can't be trusted to have overnight contact. If there was overnight staying contact I would not look after B. I would just then be a child minder, I would just be an unpaid child minder. If you find that there should be overnight contact then it will follow that my view is that B should go and live with his mother. If an overnight contact order is made I would relinquish care. It would be a hard thing to do but I have to think of my family and my daughter. I really do not like the mother. I believe she sexually abused B. It is a sexually deviant thing for her to do what she did to B. I think District Judge Walker got that wrong. I have a good relationship with my father; I will take his side. I do not agree with Judge Walker on her findings on sexual behaviour. Nothing you say will persuade me that the mother did not the cause of B's sexualised behaviour. It is clear that all she wants is her immigration status sorted out. It is all because of her immigration status. I feel that she will abandon B as soon as she gets her immigration status sorted out. I would not be prepared to look after B in that scenario. I agree it is not a responsible decision. I have to say what is right to protect my family. B would be exposed to sexualised behaviour and, having learned that, he would come back to my house and would pollute my daughter. I cannot take the risk. If it happened and he went I would not be comfortable. I would not have that boy in my house again. I am owed gratitude. I take no responsibility for what happened on 28th June. If B went to live with his mother I would not let C (N) see B. For me, no. I might let C(N), if she asks. If he wants to see me, yes, fine, but I would not have him overnight in my house. If the decision was that I was to relinquish his care under a planned transfer I would not co-operate. Once he had overnight contact that would be it, he would not be able to come back to my home. He calls me 'mum', he grew up in my house. I gave him the care. I deserve to be called 'mum'.*

42 On the third day of the case the guardian told me that she had listened to that evidence, pondered overnight and reached the conclusion that the Local Authority plan for working with MN was naïve and had no chance of success at all. She had formed the view that something more direct would have to be done. She recommended that the social worker should be told about this and should be asked to come back and reconsider her position. I agreed with her view on this and arranged for a message to be sent to the social worker to return to court. I am very grateful to Miss Ward for agreeing to do this, because I am very aware that she has had to abandon other pressing duties with little warning, and I want to record that she has gone out of her way to be helpful to the court and I am very grateful for that.

43 As requested Sara Ward duly returned on Wednesday afternoon and she was brought up to date with the evidence that I have just summarised. She was not dismissive of what the guardian had said, but wanted further opportunity to explore whether what she had said is right. She felt, given a meeting between her and MN, and MN's husband, CN, that there was a real possibility she could bring them around and recruit them to working on her 'softly softly' transition plan. Going beyond the call of duty she agreed to meet them after hours on Wednesday evening. That meeting happened early on Wednesday evening, and Sara Ward came, once again, back to the court on Thursday morning. She told me about what had happened the night before. It was clear by Thursday morning that her optimism that MN's husband, CN, would exert a sensible calming influence on the situation had not been borne out. His view was every bit as extreme as MN's. In short, his view was that the mother was a promiscuous individual, had been sexually abusive to B and would be so again. If there was any overnight contact he would not be welcome in their house and they would not co-operate in any transition work at all.

44 As a result of this evidence the parties all pondered their up to date situation, and we reached the end of the case with the positions as follows. The guardian and the mother are now taking the same line, they invite me to make orders under s.37 and s. 38 of the Children Act 1989, with a plan for immediate removal of B from MN's care, that he be placed in foster care with a plan for rehabilitation to the mother as soon as this can be done commensurate with his best interests. The father and MN have not changed their position, save that they say that if I am contemplating any kind of removal I should not order this without obtaining expert evidence from a child psychologist or a child psychiatrist first. Unless I agree with the order of District Judge Walker being reinstated they seek an adjournment of the case for me not to deliver any Judgment at all, and they seek my direction for expert evidence to be obtained.

45 The Local Authority's primary position is that, whilst I should deliver a Judgment indicating an in principle decision that the transition of B to the mother as soon as possible is the preferred course of action, immediate removal should not be carried out and that instead I should simply adjourn the implementation of what I have decided in principle to allow further work to be done to bring that about, perhaps with the assistance of a child psychologist, or a child psychiatrist. The Local Authority were not offering to pay for that. The Local Authority view, however, is that if I do agree with the guardian and the mother about a s.38 order, that they would sign up to a care plan incorporating immediate removal into Local Authority foster care, and they would facilitate this. It seems to me an entirely reasonable position for them to take.

46 So, what is the law? Of course, I remind myself that I am in private law proceedings under the Children Act and that I need to bear in mind all the matters set out in s.1 of the Children Act:

"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."

Of course the welfare of B will be at the forefront of my mind in dealing with this case and will always be my paramount consideration. I am reminded of s.1(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."

And also s.1(3):

"(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."

47 So, how do I apply those factors to this case? I start with the **ascertainable wishes and feelings of B, considered in the light of his age and understanding.** B is young (aged 7) and, as I have already described in some detail, has lived and is living under a regime of wholly inappropriate pressure from MN and although I do have various expressions of his views in the papers, some of which I have mentioned already, I cannot regard the things he

has said about his mother and about contact, particularly in the letter, which I have referred to, at p.C78, or what he has said at various handovers as being illustrative of his true wishes and feelings. In my view, given space, he would want to have a relationship with his mother but he is not being allowed to do this and not being given space to express that view by MN.

48 **His physical, emotional and educational needs, any harm which he is suffering or is at risk of suffering, his age, sex, background and any characteristics of his which the court sees relevant, and how capable each of his parents and any other person in relation to whom the court considers the question to be relevant of meeting his needs**. There seems to be little challenge in this case to the proposition that both the mother and MN could meet B's physical and educational needs. The issue in this case really relates to emotional needs. In my view B needs to have the opportunity to have a good and full and developing relationship with his mother. This is his European Convention Article 8 right, but it does not really need Article 8 to spell it out, it is a matter of common sense. Absent some real problem with his mother any child has a right to have a relationship with her and, given the funds I have mentioned, there is no reason why that should not be the case here. Indeed, having seen the mother giving evidence at some length I was impressed by her warmth, sensitivity and intelligence, and I did not recognise the picture of her painted by MN. There is no reason why she should have a full relationship with B and every reason why she should do so. The present arrangements, entirely by reason of MN's behaviour, and even more so since May 2014, are not permitting this.

49 I have been referred to a number of cases under the general title of "intractable contact disputes". Some of these are referred to in a recent case of *Re A* [2013] EWCA (Civ) 1104 by McFarlane LJ. I tend to follow the spirit of his Judgment and quote one small part of it, para. 39, where he says this:

> *"Where, as in the present case, there is an intractable contact dispute, the authorities indicate that the court should be very reluctant to allow the implacable hostility of one parent to deter it from making a contact order where the child's welfare otherwise requires it (Re J (A Minor) (Contact) [1994] 1 FLR 729). In such a case contact should only be refused where the court is satisfied that there is a serious risk of harm if contact were to be ordered (Re D (Contact: Reasons for Refusal) [1997] 2 FLR 48).*

In fact, those cases and those sentiments do not really do justice to the facts of this case where the protagonists are not one parent against another, but they are a mother and a sister, and the father is really on the side lines. If the court should be reluctant to allow the implacable hostility of a parent to deter it from making a contact order, how much more should a court be reluctant to allow the implacable hostility of someone who is not a parent to deter it from making

a contact order? I am entirely satisfied that B's relationship with MN and the father will be much more appropriately promoted by mother if B is with her than MN and father have promoted B's relationship with mother under their, or particularly under MN's care. I am afraid that in view of all the matters I have set out above leaving B with MN runs the very real risk of his suffering very substantial emotional damage, more of the sort that, sadly, he has already suffered. These factors point very strongly towards B living with the mother.

50 I go on to consider the likely effect on B of **a change in his circumstances**. There is a legitimate area for concern about how a change of circumstances, that is a move to mother's care would impact on B. He has lived with MN for a long time and any move is likely to create uncertainty and distress for him. The instinct of the guardian and the Local Authority and, indeed, mine initially at the outset of this case, was this might be most sensitively handled over a period of time. Surely, MN was a sensible enough person to work together in B's best interests so as to limit the dangers arising from a change in circumstances? Surely, with appropriate life story work and other therapeutic input that change could, over a period of time, be made easier for B? I am afraid MN's attitude has really ruled out the possibility of a gradual change. It is abundantly clear that MN and her husband will not work with it and will simply undermine it. That is unfortunate, and I need to consider what mechanism to adopt. It is unfortunate that this increases the possibility that a change in circumstances will have a harmful effect. However, taking into account all of those circumstances, weighing one with another I have reached the very clear conclusion that the factors I have discussed above point inexorably to B's best interests being served by B moving to live with his mother as soon as that can be arranged.

51 The next question that I am faced with is how to bring this about. I need to consider the **range of powers available** to the court under the Children Act. Having looked carefully at this there seem to me to be two options: (i) should I make no order at this stage simply having expressed the in principle conclusion that I already have, simply adjourn the case possibly directing expert evidence to inform a future hearing about the mechanism of transition; or (ii) should I take a more immediate and direct approach and make orders under s.37 and s.38 of the Children Act 1989 contemplating immediate removal into foster care as the mechanism for moving B.

52 Mr. Alomo has said, persuasively, that I should not do anything without expert evidence. It must be said that neither he nor his predecessors have made a Part 25 application save for what he did on the hoof in submissions yesterday, certainly nothing in writing, either at this hearing or at any of the three direction hearings previously before Wood J. I do not attach too much weight to that because I think to take that line would, perhaps, be too technical, as the s.38 issue has really only crystallised in the course of this hearing and, in fairness to him, he draws my attention to the case of *Re S* (*Transfer of*

Residence) [2011] 1FLR 1789 where His Honour Judge Bellamy, sitting as a Judge of the High Court, said this at para. 59 of his Judgment:

> *"A relatively small number of cases of alienation inevitably means that not every childcare professional will have experience of dealing with a case involving an alienated child. In this case, for example, in her final statement, Mrs. K very frankly conceded that, despite my 21 years of experience in social care, high conflict cases and child protection prior to this case I do not have any previous experience in alienation. In making that point I do not, in any way, seek to undermine the sterling work she has undertaken in this case. Her dedication and commitment have been exemplary. However, I am bound to say that for my part I am in no doubt that in determining any high conflict case involving an alienated child it is essential the court has the benefit of professional evidence from an expert who has personal experience of working with alienated children."*

53 For my part, whilst I read that and note that paragraph, I do not regard that as laying down any kind of unbreakable rule. It was his view on the facts of that case, but it does not fit every case. Sometimes it may not be necessary to do that. It may have been the sensible way forward in that case, although I note, in fact, the evidence that was obtained turned out to be controversial and not ultimately successful in that case, but that, no doubt, turned on the facts of that case. But, I do note that in the Court of Appeal in the case of *Re H* [2014] EWCA (Civ) 733 fairly recently, 14th April 2014, the Court of Appeal, mostly through the Judgment of McFarlane LJ, dealt with a situation where Parker J had removed the children in mid-proceedings, against the view of the social worker and the guardian, without any professional evidence. On appeal McFarlane LJ refused to interfere with that decision, and he said this at paras. 45 and 46:

> *"An immediate change of the primary residence of children during the course of ongoing court proceedings, where further assessment has been ordered, must be supported by evidence which establishes that such an interventionist step is proportionate to the need to safeguard the children's welfare on an interim basis. I am satisfied that the judge approached her decision on that basis. In paragraph 75, on two occasions, she states that the mother 'cannot safely' have unsupervised contact to the younger boys and that it would be 'unsafe' for them to spend Christmas with the mother and her family. The determination of the factual allegations on 23rd December was itself a dynamic event. Given the mother's previous track record, as found by the judge, the court was entitled to consider whether that dynamic event, the making of the findings of fact, materially altered the potential for the children to suffer emotional harm if they were to remain in the care of the mother.*

The judge's conclusion was that it did and that they could not remain with her, or even have unsupervised contact to her at that stage.

Despite the clear submissions of Mrs Crowley to the contrary, for which I am genuinely grateful, it is, in my view, simply not possible to categorise the judge's order changing residence as being wrong or disproportionate to the circumstances of these young people as she found them to be."

Permission to appeal was refused.

54 In the present case, the guardian is expressly advocating proceeding to removal now, in the absence of any expert evidence, and for the reasons expressed I fear, as she does, that the passing of time, if that were not done would run a very real danger of very serious and more harm being done to B insofar as it has not been done already. The history of this case, and my assessment of MN as set out throughout this Judgment points inexorably to the clear conclusion that MN is not going to stop trying to influence B after this decision. Indeed, now she knows what my Judgment says she has every reason for increasing her efforts and the pressure on him could be very detrimental indeed and could, as the guardian said, undermine the very plan which she advocates and I have decided is the right one. I am entirely satisfied, on the basis of the evidence that I have heard, in particular supported by the guardian's evidence, with all the background evidence that I have gone into, that this step is proportionate to the need to safeguard the child's welfare on an interim basis. I am satisfied that it is supported on the evidence. I also note on the question of the delay that I should have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child. B has already gone three months without any contact and the danger of adjourning further is that delay itself, particularly if it is bracketed with an absence of contact, will cause harm.

55 What of the other option - orders under s. 37 and s.38 of the Children Act 1989? Section 37 tells me:

"(1) Where, in any family proceedings in which a question arises with respect to the welfare of any child, it appears to the court that it may be appropriate for a care or supervision order to be made with respect to him, the court may direct the appropriate authority to undertake an investigation of the child's circumstances.

(2) Where the court gives a direction under this section the local authority concerned shall, when undertaking the investigation, consider whether they should—

(a) apply for a care order or for a supervision order with respect to the child;

(b) provide services or assistance for the child or his family; or

(c) take any other action with respect to the child."

Section 38 reads:

"(1) Where—

(b) the court gives a direction under section 37(1),

the court may make an interim care order or an interim supervision order with respect to the child concerned.

(2) A court shall not make an interim care order or interim supervision order under this section unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2)."

56 So, do the facts of this case meet those sections? I am assisted in that respect by the very helpful Judgment of Wall J (as he then was) in the case of *Re M* [2003] EWHC 1024 (Fam) where he said this:

"This was the second time I had used the s.37 procedure to remove children who were being denied all contact with their non-residential parent and were suffering significant harm because of the residential parent's false and distorted belief system about the non-residential parent which the children had imbibed. I am conscious of the fact that there is a tendency in family law to see an outcome such as this as a panacea, one-size fits all solution. I emphasise that this is not the case, indeed, this Judgment comes with a series of strong health warnings. Firstly, of course, s.37, which I have set out above, can only be used if the facts of the case meet its criteria. It must appear to the court that it may be appropriate for a care or supervision order to be made with respect to the children in question. In other words, at the very lowest the court must be satisfied there are reasonable grounds for believing that the circumstances with respect to the children meet the threshold criteria under s.31(2), that is to say the children are suffering or are likely to suffer significant harm. Section 37 is accordingly a well-focused tool to be used only where the case fits its criterion. It is sometimes forgotten that the court has the power to make an interim care order when it gives directions under s.37. The definition of 'specified' proceedings includes private law proceedings for contact or residence orders."

Then, a little further on:

> *"Although this case is but an example, it does seem to me that it is possible to extract some general considerations of wider application from it. I put these forward tentatively as each case is different and what fits one may not fit another. Some points are self-evident but need stating nonetheless. I will state them in short form and then expand on them where necessary:*
>
> *(1) The court must be satisfied that the criteria for ordering a s.37 report is satisfied.*
>
> *(2) The action contemplated for removal of the children from the residential parent's care either for an assessment or with a view to change of residence must be in the children's best interests. The consequences of removal must be thought through. They must ensure that there be a coherent care plan of which temporary or permanent removal from the residential parent's care is an integral part.*
>
> *(3) Whereas here the allegation is that the children have been sexually or physically abused by the absent parent the court must have held a hearing at which those issues were addressed and findings made about them.*
>
> *(4) The court must spell out its reasons for making the s.37 order very carefully and a transcript of the Judgment should be made available to the Local Authority at the earliest opportunity.*
>
> *(5) The children should be separately represented.*
>
> *(6) Preferably the s.37 report should be supported by professional expert advice.*
>
> *(7) Judicial continuity is essential apart from saving time, because also this means that applications can be made to the judge at short notice and he or she can keep tight control over it.*
>
> *(8) Undue delay must be avoided.*
>
> *(9) The case must be kept under review if the decision of the court is to remove the children from one parent to another."*

57 Running through Wall J's conditions:

(1) I am satisfied that the criteria under s.37 are justified on the facts of this case. MN's resistant behaviour and its effect on B amply engage s.37(1) and it is entirely appropriate that the Local Authority considers the matters in s.37(2). It is to be hoped that in fairly quick order a care order will be discharged because B has been successfully transitioned into the mother's home. I suspect that even then some services and/or assistance will be necessary to ensure that B settles and maintains a relationship with his father's side of the family.

(2) I am satisfied that the move is in B's best interests. I have weighed the potential harm of leaving him where he is against the harm of moving him and reached the conclusion that the balance favours immediate removal. The plan for removal is that B will go into foster care to provide a hopefully temporary and neutral setting where the work necessary to prepare him for the move can be done with very much more prospect of success than could be hoped if he remained with MN.

(3) I would be minded not to make any specific orders for contact but to leave it to the Local Authority to make decisions within the normal statutory framework. I would suggest that contact with the father and MN in the foreseeable future needs to be supervised and carefully monitored.

(4) I am satisfied that findings of fact have been made to support this plan and that everybody interested in this exercise has had the opportunity to make representations about the plan.

(5) I intend to retain judicial continuity with a tight timescale by making an order for the case to return to me after a suitable and not very long interval. I will discuss the details at the end of my Judgment.

I want to make clear that the matters I have referred to above, in particular MN's behaviour to B, more than adequately give me reasonable grounds for believing that the s.31 criteria are made out. In my view, B is suffering significant harm as a result of MN's care and would be likely to suffer more significant harm if this order is not made. I should not make a care order unless I am satisfied that the children are suffering or likely to suffer significant harm, and that the harm, or likelihood of harm, is attributable to the care being given to the children or likely to be given to them if it were not being what it would be reasonable to expect a parent to give them. "Harm" under s.31(9) includes

ill-treatment or the impairment of health or development. "Development" includes emotional and social development.

58 I also remind myself of the many cases which are set out in the **Family Court Practice** to which I have been referred in the course of argument, which make it clear that an interim care order should only be made to hold the balance and to do the least possible harm to the child. It can only be used as a temporary measure to safeguard the child's welfare. If immediate removal is being considered, as it is, then I need to take into account a number of principles. The decision taken by the court must necessarily be limited to the issues that cannot await the final hearing. Separation is only to be ordered if the child's safety demands immediate attention. I remind myself that justification of this standard must meet a high standard. I need to be satisfied that the children's safety requires interim protection and I, of course, remind myself of Article 8 of the European Convention on Human rights: Everyone has the right to respect for his or her private and family life.

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In this case, of course, it is the protection of B that arises.

59 I agree with the guardian's view in the light of MN's behaviour there are very real dangers that B's emotional safety will be significantly at risk if I do not remove him from MN's home immediately. Insofar as the Local Authority do not agree with that analysis, I prefer the evidence of this very experienced guardian.

60 So, for all of those reasons I am going to make an interim care order under s.38 of the Children Act and also an order under s.37 of the Children Act, and I am going to order that the matter comes back before me fairly shortly.

61 That is my Judgment.