Neutral Citation Number: [2006] EWCA Civ 1179

Case No: B4/2006/0429

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HIS HONOUR JUDGE RYLAND
Sitting as a Judge of the Family Division

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/08/2006

Before :

LORD JUSTICE WALL
LORD JUSTICE WILSON
and
LADY JUSTICE HALLETT

- -

Between :

LTF	**Appellant**
- and -	
LMF	**Respondent**

- -
- -

The Appellant appeared in person and was not represented
Ms Anna Spencer (instructed by **Messrs Johns & Saggar**) for the Respondent

Hearing dates : 11th July 2006

- -

Judgment

Lord Justice Wall :

Introduction

1. This is an application by the father of four children, aged between 7 and 15, for permission to appeal against the decision of a circuit judge who refused to permit him to make an application for the implementation of an order for indirect contact with the children during the currency of an order made by a different judge under section 91(14) of the Children Act 1989 (section 91(14)). He also sought an order that NYAS (National Youth Advocacy Service) be appointed as the children's Guardian. We heard the application on 11 July 2006, and reserved judgment.

2. The application before us was, of course, heard in open court. However, the proceedings are plainly not completed, and it is therefore not a case to which the recent decision of this court in ***Clayton v Clayton*** [2006] EWCA Civ 878, [2006] 2 FCR 405 applies. As an application for permission to appeal, it is, of course, unlikely to be reported or to attract any press attention. However, as the case has, hitherto, been heard at first instance in private, and involves four children, I am of the view that we should impose reporting restrictions forbidding the identification of both the parties and the children in any report of the case. We did not seek argument from the parties on the point during the course of the hearing, and if either wishes to object to our direction over identification, any such objection should be communicated to the clerk to Wall LJ in writing before the judgment is handed down. In the meantime, this judgment will be written anonymously.

3. I have come to the clear conclusion that the father's application should be refused. This judgment explains my reasons for reaching that conclusion. The judgment is, however, much longer than is strictly necessary for the proper resolution of the permission application. It is longer than necessary because it is designed to be read carefully and fully by both parents, although particularly by the children's father. He should reflect very carefully on it. He is an intelligent man, and must take full note of what others, including this court, say about him.

4. The judgment is also very long because it is designed to give a steer, both to the parties and to the court, if proceedings are renewed by the father in November 2006 when the order under section 91(14) comes to an end. That eventuality is dealt with in paragraphs 84 to 89 below. It is my view that direct contact should be capable of resuming between the father and the children. For that to happen, however, the father must learn the lessons of the past, and must change his attitude and behaviour towards his former wife and in particular towards his daughters. He must be prepared to cooperate with whatever strategy the court puts in place in November 2006. To his credit, he has suggested that the National Youth Advocacy Service (NYAS) be instructed to represent the children. If, in November 2006, the court agrees with that course, and if NYAS agrees to act, both parties must use their best endeavours to cooperate with NYAS and to follow NYAS's guidance. In the meantime, as I have already said, the father should read this judgment carefully, and reflect fully on what it says.

The facts and the procedural history of the case in this court

5. The four children concerned are three girls, LA, K, and E, and a boy LE. LA is just 15, the two other girls are rising 13 and 11: LE is 7. The decision which their father seeks permission to appeal was made by HH Judge Ryland, sitting as a judge of the High Court in this building on 15 February 2006. The order under section 91(14) was made by His Honour Judge Walford, also sitting in this building as a judge of the High Court on 24 November 2004. It was of two years' duration, and thus expires on 24 November 2006.

6. As is inevitable in a case of this nature, there is a long history, and the manner in which the application for permission to appeal Judge Ryland's order reaches this court is, itself, complex. Anyone who wishes to grapple with the procedural history should refer to the two judgments which I gave, sitting as a single Lord Justice on 8 November 2005 and 9 June 2006. It is, I think, sufficient for present purposes simply to record that, initially, the father (as I will call him without, I hope, in any way appearing to be patronising, but in the interests of preserving anonymity) applied for permission to appeal against Judge Walford's order (amongst others).

7. On 8 November 2005, I refused permission to appeal against Judge Walford's substantive order granting residence of the four children to their mother, and indirect contact only with their father, but directed that the application for permission to appeal against the order under section 91(14) should be listed on notice to the mother and to the children's guardian, with the appeal to follow if permission was granted. My order on that day was somewhat complicated, as the two questions relating to the children's residence and the father's contact were both intimately bound up with the outcome of the financial proceedings between the parties. These centred on the future of the former matrimonial home and were, in turn, unresolved.

8. However, when the father appeared before me on 9 June 2006, he told me both that the future of the matrimonial home had been resolved, and that he no longer wished to pursue his appeal against Judge Walford's order. He had, in the meantime, been before Judge Ryland, and had attempted to persuade him to hear his application for a variation of the order for indirect contact made by Judge Walford. Judge Ryland had refused to do so, and a consequence, the father now sought permission to appeal against that refusal.

9. I was concerned, as my judgment on 9 June 2006 makes clear, that focusing on Judge Ryland's order might divert attention from the principles underlying Judge Walford's decision to make an order under section 91(14). However, I simply flagged up the issue in my judgment, without attempting to resolve it.

10. In the event, and as the argument in this court developed, it became clear that if the application for permission to appeal against Judge Ryland's order was refused, Judge Walford's section 91(14) order would remain in place until 24 November 2006.

11. The relevance of the former matrimonial home to the proceedings lies in the fact that it is one bed-roomed local authority accommodation which had been purchased by the parties prior to the breakdown of their marriage. When that occurred, the mother and

the four children continued, and continue to live there. It is thus, self-evidently, grossly over-crowded. The dispute between the parties was whether the property should be sold in the open market, or whether it should be sold back to the council, who would then have the responsibility of re-housing the mother and the children in more suitable accommodation. Plainly, a sale to the council would raise much less money than a sale in the open market, but whether it would have been sufficient to enable both parties to re-house themselves is not an issue before us. In any event, the mother's case was that she simply felt unable to contemplate the responsibilities and burdens of home ownership. Equally, however, if the property was sold back to the council, and a smaller sum obtained for it than would have been achieved on the open market, the father's case for a greater share of the proceeds would appear to have been quite strong.

12. We are not directly concerned with, and do not know, the detail of the outcome of the ancillary relief proceedings. Their relevance, for our purposes, is that the children, particularly the two elder girls, have been deeply upset, not to say traumatised by the breakdown of their parents' marriage, and the acrimony which accompanied it; and in particular, there can be little doubt that the trauma suffered by the children has been exacerbated by the cramped circumstances in which the family had been living and the length of time it has taken for the financial proceedings to be resolved.

13. The chronology provided by counsel for the mother records proceedings under the Family Law Act 1996 taken by the mother in March and April 2001, and the filing of a petition containing allegations of domestic violence in July of that year. A decree nisi was granted in September 2001.

14. We have not, of course, investigated any of these matters, and make no findings about them. What, however, is clear from the papers is that the two elder girls, and LA in particular, appear to blame their father for the protracted dispute between their parents and for the fact that they are currently still living in inadequate accommodation.

15. It is, of course, highly unfortunate that proceedings relating both to finance and to the children have been ongoing for so long. It does, however, now appear to be common ground that the future of the former matrimonial home has, at long last, been resolved, and that it is being sold back to the council. Unfortunately, the consequence, we were told, is that the mother and the children will now have to take part in an exchange, and will not be re-housed until suitable accommodation becomes available. No time-scale could be put on this process, which thus may take some months. As a matter of pure common sense, therefore, it seems to me that, irrespective of any other factor in the case, any real opportunity for the relationship between the children and their father to improve is unlikely to occur until they and their mother are properly re-housed.

16. The matter is further complicated by the fact that the mother has not enjoyed good physical and mental health. The details of this will emerge as the judgment progresses It is, however, readily apparent that whilst the mother has some insight into her own difficulties, and the stresses they have imposed on the children, the father has no such insight, and plainly needs to acquire it if contact is to be successfully resumed.

17. I have taken some time to deal with these aspects of the case as they seem to me heavily to impinge on the two critical issues before this court, which are (1) the father's access to a court of first instance, and the function which further proceedings

can achieve; and (2) in a much wider sense, the restoration of the children's relationship with him. In order to address these questions, however, I need to recite the history of the proceedings and of the father's contact with the children since the parties' separation. I will then examine the judgment of Judge Walford in November 2004, and review the decision making process of Judge Ryland on 15 February 2006.

The history of the proceedings and of the father's contact

18. The chronology provided by counsel for the mother charts the course of the father's contact with their four children. On 13 December 2002, when the children were aged respectively 11, 8, rising 8 and rising 4, there was a consent order whereby he was to have contact with his son, LE every Sunday from midday to 6.00pm. The mother's position was that the three eldest children did not wish to see him and a report from CAFCASS was ordered for a hearing to take place on 3 February 2003. At that hearing, the CAFCASS Officer reported that the children were caught in a tense situation, and that their mother was not well. She had a thyroid condition. By consent, the father's contact with LE remained the same: E was to have contact between the same hours once a fortnight. An order for indirect contact was made to the two eldest girls. A further contact report was ordered.

19. The chronology records that between February and May 2003, the two older children had contact with their father, with their mother's support. During the same period, E is reported as having the contact ordered on 3 February 2003, and LE was having contact over and above that previously ordered.

20. However, on 27 May 2003, the CAFCASS Officer reported that contact between the father and the two eldest girls had broken down.

21. On 10 June 2003, a district judge made orders in the financial proceedings. She ordered the father to transfer his interest in the property to the mother to allow her to sell in back to the council. The balance of the cross-applications for ancillary relief appear to have been adjourned to November 2003. In the meantime, on 14 July 2003, district judge Maple made an order that the father was to have contact with all four children, and the father agreed to cooperate with counselling at a children's centre. The contact with LE was as before, although when the father acquired suitable accommodation it was to move to fortnightly overnight contact between Saturday at 4.00pm to Sunday at 6.00pm. The father's contact with the three older children was fixed at fortnightly on Saturdays from 4.00 to 6.00pm. His application for residence of the children was dismissed.

22. On 21 July 2003, the father issued a notice of appeal against the order for the transfer of the former matrimonial home made by the district judge on 10 June. This followed the issue of an application by the mother for a district judge to execute the relevant conveyancing documents on the father's behalf.

23. In October 2003, the mother's fragile mental health took a turn for the worse, and she was referred to the community mental health team and the crisis resolution team. In November 2003, the contact arrangements broke down. The local authority had concerns about the mother's mental health, and offered respite foster care for the children. In December 2003, there was a report under section 7 of the Children Act

1989 from the local authority stating that the children found the contact process distressing due to continued tension between their parents.

24. On 19 December 2003, the father applied for a penal notice to be attached to the order for contact made on 14 July 2003, and a notice was attached. It is said that the order was served on the mother late at night in the company of a police escort and with the children present.

25. On 14 February 2004, the father applied for the mother's committal. The application was adjourned on the basis that the mother would co-operate and comply with any reasonable request made by the contact centre with a view to the centre facilitating and observing contact. However, it subsequently became clear that the centre would not be involved in the process, and would not write a report. As a result, the father renewed his application for residence, and restored the committal proceedings.

26. On 31 March 2004 the committal proceedings were adjourned generally. The contact order was suspended until 6 May 2004, and indirect contact substituted. The children were joined to the proceedings as parties, and a further report under section 7 of the Children Act 1989 ordered.

27. On 6 May 2004, the suspension of the contact order was continued; interim indirect contact by means of letters was continued; the CAFCASS Officer was appointed as the children's guardian and a final hearing in relation to residence and contact was listed for 17 November 2004, with a time estimate of three days.

28. On 7 June 2004, Mr. Peter Jackson QC, sitting as a High Court Judge gave permission for the guardian to instruct a consultant child and adolescent psychiatrist to assess the children. (This turned out to be Dr. Lionel Bailly, who reported on 28 September 2004, and to whom further reference is made below). On 20 July 2004, Bracewell J refused an application for interim contact. Between August and November 2004 several interlocutory orders were made which, initially, the father sought permission from this court to appeal. I dismissed those applications on 8 November 2005.

The decision of Judge Walford on 24 November 2004

29. This is a highly important decision which has, effectively, governed subsequent events, although it was made at a time when the proceedings for ancillary relief were still unresolved. The judge heard the father's applications relating to the children over a period of six days. He gave a careful, reasoned judgment. He dismissed the father's application for shared residence. He gave residence of all four children to the mother. He ordered indirect contact only between the father and the children, and he made an order under section 91(14) for a period of two years. He refused the father permission to appeal.

30. Since Judge Ryland was, in effect, following Judge Walford's two year moratorium on applications by the father, it is necessary to examine the latter's judgment (and the material upon which he based it) with some care.

31. Both the mother and the children were represented by counsel, the latter by Miss Gillian Brasse. The father appeared in person, with the assistance of Dr Michael

Pelling as his ***McKenzie*** friend. Dr Pelling was also present throughout the hearing before us, although he did not act as the father's ***McKenzie*** friend.

32. Judge Walford described the father as representing himself "with great passion and no little skill". That is a description which, speaking for myself, I would endorse. He also said that he said allowed the hearing to go beyond its time estimate to ensure that the father, who had "expressed great frustration with the court process" had been given every opportunity to put his case.

33. Judge Walford described the case as "extraordinarily difficult". Once again, that is a description with which I agree. However, the judge added: -

> "Deciding issues such as those which arise in this case are never easy, but what has made this case particularly difficult has been the atmosphere of anger and resentment which has crackled across the courtroom. At times I have had to tread an emotional tightrope; at times, particularly in the early stages of the case, when Father was cross-examining Mother and I sought to move things along, Father accused me of showing bias against him by doing so, and on one occasion, after I had allowed the Father a certain amount of lee-way, Mother's counsel accused me of favouring Father.
>
> The hearing has been punctuated by angry exchanges between the parents. Both parents have become angry and upset. Also, both parents have, from time to time, become angry with counsel, with witnesses, and towards me.
>
> The one advantage that I have gained from this protracted hearing is a greater opportunity to assess the parents, their personalities, and the way they behave towards each other. I should say that both, when in the witness box, have shown an inability to stick to the point, and answer the questions that they have been asked. I have to confess that it has been extremely difficult to marshal the vast amount of evidence which has been adduced in the course of the case, both in a conventional and in an unconventional way.
>
> I would have preferred to delay giving judgment until tomorrow, but that has not been possible. I trust that given the desirability of this matter being brought to a conclusion that some tolerance will be exercised if this judgment is not as polished or as comprehensive as I would otherwise have liked it to be. But, in fact, I am satisfied, given the approach adopted most recently by Father in his closing submissions that the area of real dispute requiring resolution in this case has been reduced in scale."

34. Having set out the history, the judge records that he was invited to follow good practice and undertake a preliminary determination of whether or not the father had subjected the mother to domestic violence. The judge did so, in the process hearing

both parents and a number of witnesses called by the father, including the paternal grandmother. The judge's assessment of the mother includes the following: -

> "Mother has been dogged by ill-health for years. There is with the papers a report from Dr Jean Ginsberg. Mother's thyroid condition developed in 1988. According to Dr Ginsberg's report the symptoms were treated with anti-thyroid drug therapy until 1990 when they, as I understand it, were alleviated. But, they returned at the beginning of 1994, and drug treatment resumed thereafter. There were further relapses in 1995 and, it would seem, after the parties separated in 2002. According to Dr Ginsberg's report mood swings, irritability, and unreasonable behaviour are associated with over-activity of the thyroid gland. Emotional and other stress can precipitate thyrotoxicosis. Furthermore, emotional disturbance and stress may, in turn, result from the development of thyroid over-activity, thereby creating a vicious circle. In short, this condition affected Mother's emotional stability, added to which she did from time to time suffer from bouts of depression.
>
> In assessing Mother's evidence I have also borne in mind her very real anger and bitterness towards the Father, which I have witnessed throughout this case. I have also considered the supporting evidence bearing in mind that it consists of brief notes from the general practitioner and scant records, and that the authors of such notes and records have not been available for cross-examination. I have also considered what the children have said about their parents' arguments and fights.
>
> Father, for his part, says that whilst there were arguments, there was no violence on his part towards Mother – indeed, such violence as there was emanated from her upon him."

35. The judge then made an assessment of the father. Once again, the passage which I extract from the judgment is lengthy, but in my judgment, an extensive citation is justified. This is what he said: -

> "Central to the issues which I have to decide in this case is the personality of the Father and the way in which he has behaved towards other people – in particular his ex-wife and his four children. I have, in assessing his personality, seen and read the various reports that have been filed in the case (principally by Dr Bailly). I have read the many views of friends, family and colleagues who have written in. I have also heard evidence from the witnesses to whom I have referred. All speak well of him.
>
> What is not in issue here in general terms is this Father's character and reputation, and how he relates to the outside world. I am quite satisfied that he is someone who is able to gain, and keep, friendships. He is someone, in my assessment

of him – because I have also had the opportunity to assess him over the course of this hearing – who is obviously intelligent; obviously articulate; hard working, and (to use a modern idiom) highly focused. He can be charming. But, there is, in my judgment, another side to his character. This is the side to him which affects his relationships with those over whom he has dominion, and relevant to this case particularly his former wife and his children. His manner towards them can be aggressive, belligerent and intimidating. It may be that this is not his true nature, but this is how he presents to them. The case papers record that many of those who have been involved with this case have felt the same.

I have obviously sought to make allowances for the fact that he is someone, I am quite certain, who loves his children, and feels passionately about maintaining contact with them. I have also been conscious of the fact that he feels thwarted by a lot of what has gone on within the court process. But, it did concern me that to begin with his attitude was confrontational. There was not a hint of conciliation or compromise; no acceptance of the need for him to change in any way.

What I did become aware of was that when cross-examining his ex-wife, notwithstanding the fact that she became clearly upset, he persisted. He knows she had, and still has, health problems which are exacerbated by stress, but it seemed to me that rather than go easy on her, he was determined to increase the stress upon her.

He has, in my judgment, a strong personality, and as between the two of them, he has a stronger personality than her.

Whilst dealing with my assessment of him, he has also, in my judgment, a cruel streak, illustrated for me not only by his cross-examination of the Mother, but also by his refusal to pay for LA to go to Euro Disney and his subsequent attempts to prevent her going last year. Father says he did so because LA had cut him dead. Mother says it was to punish her for telling the truth to the CAFCASS reporter. Whatever the true reason, it was, in my judgment, a completely disproportionate response, even if LA had been rude to him. It was in my judgment a cruel and unfeeling act.

I also, in my assessment of him, believe that he can be manipulative. It is documented in the bundle – the report of Dr Bailly – that he sought to influence Dr Bailly "to assist him to arrive at the correct conclusions" so it is recorded. I have sensed that on more than one occasion he has sought to manipulate me. It is an unfortunate fact that he has questioned the competence, integrity and impartiality of so many people who have been involved from time to time in this case."

36. However, when it came to specific findings, the judge found it impossible to make them. In paragraphs 28 and 29 of the judgment, he dealt with this aspect in the following way: -

> "So far as the specific findings of fact which I am invited to make, I have found it impossible, given the paucity of the supporting evidence, to make findings in respect of specific incidents which are alleged to have happened – particularly those which are alleged to have happened ten years ago. What I am able to find is that the parties' relationship and subsequent marriage were characterised by frequent arguments, which involved shouting and verbal abuse, and occasional violence which Father used towards Mother. I also consider it probable that latterly, or when ill, Mother hit Father. The Father admitted in evidence that there were occasions when he pushed the Mother when she had attacked him. I do not accept that that is all that happened, but it also provides some confirmation that there were physical assaults.
>
> Of more significance than the physical abuse was, in my judgment, the emotional abuse to which, I find, Father subjected the Mother. Mother gave a wholly convincing account of the way in which the Father undermined her self-confidence on mundane items, either for the children or for herself. She gave evidence of a particularly poignant example which I accept as having happened, and reject the Father's account – of her having to ask for tampons when she had her menstrual periods. I also found convincing her saying in evidence that "There was never an end to an argument until I said "***Sorry***"." Father admitted that he liked to be in control of finances, and I find, in my judgment, that he liked to be in control of more than that."

37. The judge then proceeded to direct himself as to the law. Having done so, he addressed the father's primary case: -

> "The Father seeks a shared residence order, though in my judgment what he is seeking is a contact order. The Mother's opposition to direct contact rests largely on what the children have said to various people about not wishing contact to take place for the time being. I am not going to refer in this Judgment to each and every passage where the children's views are recorded, save to say that they are recorded in statements/reports prepared by Ruth Todd, Helena Owusu, Jo Selway, Dr Bailly, and the children's guardians.
>
> It is Father's case that these views have been influenced by Mother, who has stood in the way of contact, except when it has suited her. He does not accept the independence of the Guardian. He believes that she has aligned herself with Mother. He does not think that Dr Bailey has gone about his

> work in an independent manner – nor in the detail that is necessary to get to the truth in a case such as this. He further contends that the children have told a lot of lies; that they are not frightened of him, as it is recorded they have said they are; that the Mother is an evil and bitter woman; and that everyone's wishes are respected except his own."

38. It is very clear from the judgment that the judge was both impressed by and accepted the evidence of Dr. Bailly, the consultant psychiatrist who had been brought into the case pursuant to Mr. Jackson's order of 7 June 2004. I shall need to return to Dr. Bailly's report slightly later in this judgment. For present purpose, it is sufficient to record that Dr. Bailly was very impressed by the girls' maturity and insight. He was satisfied that they had not been "brainwashed" by their mother. He was clear that all the professionals in the case had been vigilant to consider whether or not the girls' support for their mother was a consequence of her influence over them. The judge recorded Dr. Bailly's evidence on this point in paragraphs 36 to 38 of his judgment: -

> "So far as the girls are concerned, having paid tribute to their maturity and insight, he told me – and he said in his report – that he was very conscious (as I am satisfied that everyone has been) that where conflict arises, and where it is alleged, or suspected, that children may be voicing the views of the parent who is looking after them, that vigilance has to be shown in assessing whether brain-washing has taken place; whether there has been anything which could lead to the children expressing not their own views and feelings, but those of the custodial parent. It is entirely understandable in a situation such as has arisen, that the children should identify with their mother, particularly so, in my judgment, when they feel both protective and anxious in relation to her past and future state of health. That is understandable. What would be inexcusable would be if there was an element of their having been brain-washed into holding, or expressing, views which were not their own.
>
> I am satisfied that Dr Bailey, and the Guardian, and, indeed, the earlier people involved in the case – Ruth Todd, Helena Owusu, and No Selway – were particularly vigilant for this. Children do tell lies, and the Father was able to demonstrate that Lauren has told a lie in relation to spending some money. But, it seems to me that that is very far removed from children telling lies about a matter as important and as significant as their father. These are intelligent, mature children who showed considerable insight.
>
> It was also telling when, in his evidence, Dr Bailly told me that he was very impressed by the ability of the girls to express themselves, and about understanding their situation. He told me that "The flexibility of their answers to my questions convinced me that they were expressing their own minds, and not someone else's. They seemed to be very resilient children.

> They function very much as a coherent group. They confide in each other, and comfort each other.""

39. The judge also records the reasons Dr. Bailly gave for his recommendation that there should be no direct contact between the father and the girls at this stage: -

> "He was challenged about his recommendation that there be no direct contact at this stage. He said in his report that "As far as the children's needs are concerned, they need their father to change enough to start to listen to them and understand their points of view. The consequences of forcing the children to have contact with their father would be to send a very strong message that their opinion does not count, and that the professionals have not listened to them. This could seriously undermine their trust in the system, and their co-operation with it" He also added "In practical terms it is very difficult to force LA and K to go to contact sessions, which are potentially traumatic, to physically compel them to do so." Also he adds "From the children's statements, it appears that Mr F very often makes statements against their mother to them, and it is very likely that this will continue if he is allowed to see LE and E and his criticisms are also likely to extend to include the older girls. The solidarity between the siblings and their love for their mother have been the strongest protective factors in their lives that have enabled them to weather quite difficult times and emerge in sound mental health, and forcing the youngest members of the group to attend contact sessions runs the risk of undermining this.
>
> It is Dr Bailly's view that the children need to be listened to, and the Father to understand what it is that they are saying. For his part, Father believes that he is a good listener. But, as I have already indicated, I am satisfied that where his children are concerned, he is not.
>
> The fact that LA has been able to speak of the love she has for her father, and how good things were in the past, but how things have changed in that 'he now frightens and intimidates me' she says, again lends support to my conclusion, that these are not views that the children are expressing which have been influenced by their mother. I also consider the fact that contact has taken place for periods of time since the separation is indicative that the Mother has not intentionally blocked contact; that when contact has stopped, it has been because the children have felt unhappy about it."

40. The judge then turned to the possibility that the father should have contact with LE, the only boy, on his own. He was satisfied that there had been good contact between the father and LE. He recorded Dr Bailly's view of this proposal in paragraph 48 of the judgment.

> "When asked about contact between L (LE) and his father, Dr Bailly said "It would put L in a difficult position because of the tensions it could create with his siblings, and one of the most stable influences in his life has been the sibling group. It would be damaging because it would deprive him of one of his main support systems". In the circumstances, the doctor felt that it might be more difficult for him to derive any real benefit from contact at this stage. I accept that conclusion."

41. In paragraphs 49 and 50 of his judgment, the judge addressed the important issues of the children's identity, and how he saw the case developing:-

> "I am very conscious of the importance in a mixed race marriage of the children retaining and respecting their cultural identify. I am satisfied that in this case the children's cultural identity is sufficiently well-established. I am also satisfied that it can be preserved and encouraged by indirect contact, as well as by the family's established social links.
>
> It seems to me that what is most needed with this family, and with all these children, is a breathing space. There have been numerous applications to the Court and court hearings, regarding not only residence and contact, but also ancillary relief. Whilst I am conscious of what Father has said – that he has not put stress on them by virtue of anything that he has done – it is inevitable, because of the stresses and strains felt by Mother, that the children should also have become stressed. It is also right to say, as Dr Bailly has identified, and I accept his evidence on this point – as far as the children are concerned – and this is what I am concerned about – there have to be some changes by Father, and that seems to me to hold the key to the future of direct contact. I very much hope that direct contact can take place, but it is a question of when and how. It seems to me that what Father needs to address are the matters that are set out in the concluding paragraphs of Dr Bailly's report. These are simple practical things that Dr Bailly identifies that Father might be able to undertake, that would allow contact to be possible in the medium term. He should accept and respect the wishes of the children. When and if the children agree to see him, as they feel he does not listen to them, he should make an effort to listen more. He should refrain from trying to convince them that he is right against their own views. Importantly, both Mother and Father should refrain from any attempt to influence the children's minds against each other."

42. The judge then considered the welfare check-list and the evidence of the guardian, who agreed with Dr. Bailly that there should be no direct contact at that stage. The judge rejected shared residence as inappropriate and not reflecting the reality of the situation, and concluded his judgment by stating both what could be achieved and why he was making a section 91(14) order.

> "It seems to me that in the best interests of these children, the only sensible order I can make is that there be no direct contact but that there be indirect contact in the form of letters, cards and presents at appropriate times. Of course, indirect contact is a two-way matter. So, the children should be encouraged to write 'Thank You' letters and to overcome the feelings that they have expressed about fear of their father and his attitude towards them, because whilst I am quite satisfied that Father needs to work on his attitude towards the children, work should also be done with them to effect, in due course, a reconciliation with Father.
>
> So far as the findings I am invited to make for reasons which I can fully understand, I am quite satisfied, as I hope I have made clear, that this is not a case of an implacably hostile mother. I am quite satisfied that what these children need – and this will, I hope, provide a basis for future direct contact – is a period of peace and stability with their mother, and also to see their mother given help and treatment for her health to improve. Hopefully, something can be done about their accommodation and their financial circumstances. These will clearly have been a worry to them. It is also important that as far as they are concerned, that their father begins to listen to them. Indirect contact gives him an opportunity to begin that process.
>
> With regard to the Section 91 (14) application, I am satisfied that the spectre of further court applications and hearings needs to be lifted. To provide a reasonable breathing space, it seems to me that it would be appropriate to impose a condition that no further applications be made to the Court without leave for a period of two years. Of course, if within that time the Father can demonstrate that he has altered his attitude sufficiently to suggest that direct contact would be of benefit to these children, he can seek leave to make such application. In the meantime, it would not be right that further applications be made without leave being granted."

The report of Dr Bailly

43. Before leaving the judgment of Judge Walford, it is, I think, necessary to look at the reports of Dr. Bailly and the children's guardian, Kathryn Warren, although reference to them inevitably involves a degree of overlap with my citations from the judgment. Dr Bailly records his instructions in paragraph 4 of his report. They were in the following terms: -

> 1. Please access each child's current functioning and needs taking into account."
>
> (a) Mrs F's serious illness
>
> (b) The divorce of their parents

(c) The antagonistic and acrimonious relationship which continues between Mr & Mrs F.

(d) The additional burdens which may have been placed on one or more of the children as a result of Mrs F's ill health

(e) The impact on the children of their very cramped living arrangements.

2. Please comment upon the nature and quality of the relationship between each of the children and (a) Mr F (b) Mrs F.

3. What recommendation would you make, if any, in respect of any therapeutic or other intervention that is required for (a) any or each of the children, (b) Mr F, (c) Mrs F?

4. Please consider each of the children's stated reluctance to resume contact with their father and should the children's opposition to contact continue, the likely consequences or effects upon each of the children of seeking to force them to have contact.

5. There are allegations and counter-allegations by each of the parents that the other has been violent towards them. Please consider the consequences and effects upon each of the children.

6. Please comment on any other issue you consider may be relevant and is within your area of expertise."

44. Dr Bailly conducted lengthy interviews with both parents and with the children. He was impressed with the children. He thought they had coped remarkably well with their mother's serious ill-health, the breakdown of their parents' marriage and the acrimony between their parents. In paragraph 113 of the report, Dr. Bailly stated: -

> "The four children, faced with a difficult situation, have coped remarkably well; they have not been damaged by the events. Their anxieties are reasonable and well-founded. At this stage what they need is some peace and stability. They need to see their mother given help and treatment, and they need to see her health improving in a definitive way. They need to move into bigger accommodation, and they need the conflict between their parents to stop. They also need their father to change enough to start to listen to them, and understand their point of view. At the moment, it is clear to them that his reasons for wanting to see them are self-centred, rather than being in their interests. If all this is sorted out and still they remain anxious, then it would be time to assess whether they need therapeutic help. At present, their level of anxiety seems related directly to

> real-world circumstances and events that are worth being anxious about, and about which they have an accurate and undistorted perception."

45. As I have already made clear, Dr Bailly's evidence was that the children had not been "brainwashed" by their mother, and that the opinions they expressed about their parents were their own. In paragraph 114, Dr. Bailly described their relationship with their father: -

> "The children are principally afraid of their father. They all, apart from LE, who is very young, are able to express the ambiguities of their feelings, saying that the relationship had been good, that they had loved their father etc. but that his behaviour towards them made it more and more difficult to do so. The older two girls are able to describe a transition between thinking that the level of violence and abuse they witnessed at home was normal, to realising that it was not acceptable, and then rejecting their father as a result. They also identify a change in his relationship with them as they grew up, for example, L says that when contact began "he was ice for a few weeks and then he started to be horrible with me…" As mentioned in the previous answer, LE's relationship with his dad is particularly complex, as he is the favourite, and he is the only boy. However, at this point, he appears to be more discomfited than delighted by the special treatment he receives."

46. As to their relationship with their mother, Dr. Bailly said the following at paragraph 115 of his report: -

> "All four children have a warm and loving relationship with their mother. They are all scared that they will lose her one way or another because of her illness, either through hospitalisation or death. They are almost superstitiously silent about the illness, as if they cannot quite believe that the current recovery is permanent. They are all very concerned about her being badly treated by their father. LA's relationship with her mother appears to be the most complex, and she seems to be aware of some of the ambivalent areas in it; for instance, she says, of her mother's incapacity: "I didn't understand what Mum had before. I felt so hard-done-by with Mum being ill, I did not realise how bad it was about to be…" It is likely that she does resent having been forced to take on the role of carer to her mother, although she is mature enough to excuse her mother for an illness that was beyond her control. All the children are aware of their mother's psychological as well as physical fragility; even E mentions at one point the time that her mother 'thought she was a child. She now knows that she's a grown up'. Displays of such weakness in the mother are very disturbing to small children, but these children appear to have coped well with it."

47. Dr Bailly's answer to the third question posed in his instructions is set out at paragraphs 116 – 118 of his report: -

> "As stated in response to question 1, at this stage, I have no recommendation for therapeutic help for the children. The help they need is practical: they need a bigger home, and they need to see solid improvement in the health of their mother; they need also to be given time and space away from their father, and not feel the threat of his demands upon them.
>
> In my interim report, I suggested that Mr F might benefit from psychotherapeutic input with an experienced psychotherapist to deal with issues around violence, his relationship with the central female figures in his life, his own childhood and his inability to take into consideration other people's feelings. Having now interviewed Mr F, I feel that only a very experienced psychotherapist with a specialisation in personality disorders would be able to make any progress with him. A report by an adult psychiatrist might also be useful.
>
> Mrs F's health is of paramount importance in the wellbeing of both herself and her children. It appears that she is already receiving some psychotherapeutic support, and has been treated with anti-depressants at her local mental health clinic. Her GP seems to be very involved in her care and aware of the family circumstances. Some social support to get larger accommodation would also be very important."

48. Dr Bailly then addressed question 4 of his instructions, which he answered in the following way: -

> "The consequences of forcing the children to have contact with their father would be to send a very strong message to them that their opinion does not count and that the professionals have not listened to them. This could seriously undermine their trust in the system and their co-operation within it.
>
> In practical terms, it would be very difficult to force LA and K to go to contact sessions, and potentially traumatic to physically compel them.
>
> LE, because of his very young age, would be easier to compel to go to contact sessions, but it would put him in a very difficult position in relation to his sisters and his mother. It would expose him to the sort of questioning from Dad that E described as having taken place at a contact.
>
> In addition, from the children's statements, it appears that Mr F very often makes statements against their mother to them, and it is very likely that this will continue if he is allowed to see L (LE) or E, and his criticisms are also likely to extend to include

> the older girls. The solidarity between the siblings and their love for their mother has been the strongest protective factors in their lives, that have enabled them to weather quite difficult times and emerge in sound mental health, and forcing the youngest member of the group to attend contact sessions runs the risk of undermining this."

49. Dr Bailly's answer to question 5 is set out at paragraphs 123 and 124 of his report|: -

> "The children have been exposed to upsetting scenes of violence in the home that the older two girls described in their interviews. The younger two did not speak of specific incidents, quite possibly because they were very young when the parent split up (LE was only two). The four children have been exposed to unpleasant and disturbing scenes, such as when the police came to their house, or when their father knocked at the door continuously, and argued with their mum. The older ones describe the episodes as very embarrassing. However, they have not been traumatised by these events, but have managed to work through them by means of their own understandings and intellectualisation of their situation. However, it is clear that they all fear Mr F's emotional violence towards them. Having interviewed Mr F and experienced myself how difficult it is to have a real dialogue with him, I could see that if the children are left unsupervised with him, they might be exposed to a situation in which they have to passively accept his monologues. This is likely to force them to develop pathological defence strategies, such as dissociation and inhibition of thought (blanking), which are often cognitively damaging in the long term.
>
> With regard to the allegations and counter-allegations, what is important is that the children are not involved in the conflict, and are protected from taking sides in it. So far, in the clinical interviews, they did not say very much about the relationship between their parents, but confined their reasons for not wishing to see their father to their own relationship with him. This is a healthy sign that so far, they have not been too closely drawn into taking sides. They also seem to be aware that they are in danger of being manipulated in this way, and E has described how her grandma has been influenced against her mother, as well as attempts made by her father to persuade her that her mother was mad."

50. Dr Bailly concluded with the following paragraph in answer to the invitation contained in paragraph 6 of his instructions: -

> "Mr F loves his children, insofar as he can discern them as individuals; he does want to be involved with them and contribute financially and emotionally to their upbringing. Apart from the kind of therapy mentioned above, there are

> simple pragmatic things that Mr F might be able to undertake to do that would allow contact to be possible in the medium-term. Firstly, he should accept and respect the will and wishes of the children. Secondly, when and if the children agree to see him, as their perception is that he doesn't listen to them, he should make an effort to listen more. Thirdly, he should refrain from trying to convince them that he is right, against their own views. Both mother and father in this case should refrain from any attempt to influence the children's minds against each other."

The report of the guardian

51. The guardian, in her report, describes her discussion with the father about Dr. Bailly's conclusions, which the father did not accept. The father adhered to his view that the children had been influenced against him by their mother. The mother, for her part, accepted Dr Bailly's analysis. She said she hoped the father could accept the help proposed, and said she would support direct contact if that was what the children wanted. She made it clear, however, that the stress of the ongoing proceedings was affecting her health. The guardian expressed her conclusions in paragraphs 34 to 37 of her report in the following terms: -

> "It is my view that Dr Bailly as provided a very full and thorough report which clearly addresses those questions put to him. He does not consider LA, K, E and LE to have been turned against their father by Mrs F. He clearly attributes responsibility for the children's views of their father to Mr F's own behaviour towards them. It appears that the onus rests upon Mr F to bring about change in his behaviour towards the children, which he can demonstrate to them, thus opening up the possibility of direct contact in the future. LA, K and E are considered by Dr Bailey to be far from hostile and rejecting of their father, rather that they feel they need to protect themselves from him by refusing contact at this time.
>
> I endorse the suggestions made by Dr Bailly regarding how contact might be possible in the future. However, I have not received from Mr F an indication that he can accept these recommendations and he questions the process by which Dr Bailly has reached his conclusions. He did express a willingness to consider family therapy. However, it seems that any such referral would need to be preceded by individual work with Mr F in order to maximise the effectiveness of any therapeutic work which involves the whole family. For example, Mr F's difficulty in hearing, considering and accepting an opinion that differs from his own, would be contrary to one of the basic principles of family therapy.
>
> LA, K, E and LE do not express the wish to see their father at any time. The conclusions of Dr Bailly's report do not support direct contact between the children and their father at this time.

I therefore propose to the court that a final order for indirect contact be made. It is possible that through such a medium, Mr F can demonstrate to the children that they have nothing to fear from him and in due course they may seek direct contact of their own volition.

A final order is required to provide an end to court proceedings that have been stressful for the children and have compromised the health and wellbeing of their main carer, Mrs F. This in itself has caused the children concern and has been perceived by them as a further demonstration of Mr F's failure to recognise what is important to them, i.e. to have a healthy mother who is available to care for them. For her part, Mrs F needs to ensure that the children are protected from any negative views she may have of Mr F and she should encourage the children to consider responding to any letters or cards that their father may send."

The operation of Judge Walford's order for indirect contact

52. Paragraph 3 of Judge Walford's order made on 22 November 2004 was to the following effect: -

> The Respondent mother do permit the children to have indirect contact with the Applicant father, in that he may send cards, letters and presents. The Respondent mother shall encourage the children to acknowledge the permitted communications from the Applicant father by way of writing to him.

53. The father's complaint, and the reason he applied to Judge Ryland, was that Judge Walford's order for indirect contact, he said, was simply not working. I shall return to the father's case in his respect in a moment.

54. On 9 June 2005, the father made an approach to NYAS over the telephone. The latter replied on 14 June 2005, enclosing an information pack and stating that if the court decided to give NYAS permission to consider the papers in the case, it would consider them and would advise the court if it felt able to assist.

The judgment of Judge Ryland on 15 February 2006

55. Judge Ryland refused the father permission to make an application to review Judge Walford's order. Unfortunately, in so doing, he made two clear errors. Firstly he said that I had given permission to appeal against the making of the two year section 91(14) order "with an indication that there may well be at least an arguable case" that Judge Walford had been wrong. This conclusion "fortified" Judge Ryland's view that if such an appeal was successful it would mean that the application before him would not have been necessary.

56. As will be apparent, I had not granted permission to appeal. I had directed that the father's application for permission to appeal should be listed on notice to the mother's advisers, with appeal to follow if permission was granted. That is quite different. The judge was, accordingly, wrong both in thinking that I had granted permission and in allowing that error to influence his thinking.

57. Secondly, Judge Ryland criticised the father for making the application ***ex parte***, that is to say without notice to the children's mother. Once again, he was quite wrong to do so. Paragraph 4 of Judge Walford's order specifically directed that any application for permission to make an application to the court "shall be ex parte in the first instance".

58. The father was represented by counsel before Judge Ryland – indeed by the same counsel who had appeared before me on 8 November 2005. I am, accordingly, at a loss to understand why counsel did not correct the judge's errors.

59. The fact remains, however, that the errors were not corrected, and the question I have to address is whether or not they vitiate the decision Judge Ryland reached on 15 February 2006.

60. The judge gave three reasons for dismissing the father's application. The first two, which I have already identified, were plainly wrong. It is, however, clear that he attached most importance to the third reason, because in paragraph 25 of his judgment, he said: -

> " ….. but much more importantly than either of these reasons is the fact that I think on the substantive issue of whether or not he has an arguable case for the setting aside, the lifting of the stay for the purposes that he wants it, has not been established to my satisfaction. "

61. The judge had plainly read the letters both written to the children and received by the father from them. In paragraph 4 of the judgment, the judge says: -

> "…. The father has written various letters to the children, sent them various presents of a quite generous nature and, it is true to say, that in some instances the children have replied to those letters from the father ……
>
> Some of the answers that have been received by the father to his letters to the children have been accompanied by messages which the father's counsel today submits are inappropriate the children of the age of about 10 or 11 and younger, containing messages concerned with the incidents that have arisen in this case and in the litigation process that has been ongoing for quite a long time between the mother and father of these children. It is submitted to me that this is an appropriate case where I ought to lift the stay to enable the father to make an application before the court to be heard that the question of the indirect contact order of Judge Walford be reconsidered by the court, so that he can make an application for direct contact by

> the children to him, and that the question of the children's guardian can be gone into, because the father wishes that the CAFCASS guardian be replaced by a NIAS guardian, who he considers would be more child-friendly and more focussed on the children."

62. The judge returned to the question of the letters in paragraphs 15 to 21 of his judgment, which read as follows: -

> "The statement shows that the father has written on a number of occasions to each of the children, as I say, enclosing sums of money as presents and asking for replies to his questions to the children. He, in some cases, has got a reply. Some of the replies are appropriate, some of the replies are couched in terms that are, on the face of them, somewhat surprising, because they seem to demonstrate a more intimate knowledge of the proceedings than perhaps these children have, or should have. However, when I look at those letters, and it is right to say that in addition to the various letters written or said to be written by the children themselves, that there are a number of letters, I think some seven or eight letters, including a draft of a letter from one of the girls to the father, which was sent back by the mother when the father sought the return of some of his possessions out of the former matrimonial home.
>
> The bundle of letters includes all those letters, or some of them, that were written by the father and sent to the children by recorded delivery. They are in the original envelopes. The envelopes have been opened and it is apparent that the letters have been returned into the envelope. The father invites me to say that by a combination of saying that the inappropriateness of the wording of the letters from these fairly young children, and from the sending back of those letters written to him to the children, that there is a strong presumption that the mother is interfering in the children's reading of the father's letters, perhaps not letting them read the letters, or certainly it is submitted, not encouraging the children to reply to those letters.
>
> I find myself certainly on the evidence in front of me not satisfied that that matter has been made out. I think that when one reads through the judgment of Judge Walford, it is plain that he found that these children were bright, that they were involved in the case, whether or not that was because of the mother I am fairly sure that it probably was because of the mother, but nevertheless, they have become involved in the case between the mother and the father. It seems to me that is a finding which Judge Walford accepted.
>
> I cannot say, looking at the letters as such, although some of them may be slightly surprising in their maturity, that they are not written by the children at their own behest, so to speak,

> having become involved in this case, but dictated or suggested by the mother.
>
> Further, I cannot say that it is my view that there is therefore an arguable case that this father should have permission to re-open the question of indirect contact, notwithstanding the ban of two years that was put upon him in order to seek the permission of the court to enable him to do so. I do not think that he has demonstrated, even taking his case at the highest level, that there is an arguable case to show that the mother has brainwashed these children or suggested to these children that they should write in such a manner to the father. The father accepts that the three girls are in a state of mind that they do not want to have contact with him, but he is very concerned about L(LE), the only boy, who is younger than his sisters.
>
> He submits to the court that the evidence that exists shows that really the mother is not fulfilling her obligations under the indirect contact order of Judge Walford, namely that she should both show the letters to the children and encourage them to answer those letters, so that hopefully there would be a bit of trust returning into the relationship between father and the children.
>
> I do not think on a *prima facie* basis that the evidence establishes that. "

It was, accordingly, on this basis that Judge Ryland refused the application.

The father's argument in this court

63. For the hearing in this court, the father produced three very substantial documents. These included a statement dated 6 July 206, and a response to a skeleton argument filed on the mother's behalf.

64. In the statement dated 6 July 2006, the father pointed out that Judge Walford had warned both parents against any attempt to influence the children's minds against the other, and that indirect contact was a two-way process. The children accordingly, should have been encouraged to write "thank you" letters and to overcome the feelings that they had expressed about fear of their father and his attitude to them. He also pointed out that the judge had expressed the hope that a two year period of peace and stability would provide a basis for future direct contact.

65. The father's case was that he had fully complied with Judge Walford's order. However, he thought it possible that the children had only been encouraged to reply to selected letters, and that they may well not have received all the letters and gifts he had sent to them. In short, his view was that the order had not worked in the manner originally hoped for.

66. The father detailed his correspondence with the children between the date of Judge Walford's order and the hearing before Judge Ryland. It is plain that he wrote a

number of perfectly sensible and proper letters to the children to which there were no replies. Equally, however, there are some replies which are significant. There is, for example, a letter dated 2 August 2005 from LA, which the father did not receive until 27 August, which reads as follows: -

> It has come to my attention that it is in your thoughts to reopen the Children Act case to drag me, K, E and LE through the court system, hell, and distracts us from the most important years of our lives. As you know I have my GCSEs next year and am going to do excellently and I am certainly not going through the torture of the last three years EVER! again. I don't really know what you are trying to gain by making us as miserable as you can but for me it is just making it harder for me to understand you.
>
> And insisting that we live like tramps in a one bedroomed house with two teenage girls and two young children.
>
> I am not a young child anymore and can see things clearly, you feel anger of the strongest possible type towards mum but your obvious revenge against her is destroying me, K and E and LE's lives.
>
> And you say you care and want us to be friends well this isn't the way. I personally can't justify being friends with someone who is trying to destroy me and my family.

67. Speaking for myself, I readily accept that it must have been very distressing for the father to receive such a letter, and he is entitled to make the point that its opening words do not have the spontaneous ring of language used by a young woman who was then 14. However, the letter undoubtedly contains a message which the father needs both to hear and to heed.

68. The father's attitude is also demonstrated in a letter in the bundle which he wrote to the mother's solicitors on 20 July 2005. The latter had written on 18 July 2005 conveying their client's instructions that she had done her best to encourage the children to acknowledge receipt of his letters: indeed, she had done so, they said, to the point at which she thought that to do more would constitute emotional abuse of the children.

69. This letter provoked an angry response from the father which begins by describing the majority of the contents of the letter of 18 July as "at best …defensive and at worst yet another "spinning" exercise" in overlooking your client (sic) contempt for court contact orders". I do not propose to set out the remainder of the letter, save to record that it states that a complaint had been initiated against both the writer of the letter and the firm.

70. The father is similarly critical of Mrs. Warren and CAFCASS, and included in his bundle is the record of a complaint which he made to the London Independent Complaints Advocacy Service in relation to his request for the medical records relating to his children. One of his concerns was the need which all three girls general practitioner felt to obtain their consent before disclosing their records – a stance vigorously defended by the general practitioner in a letter dated 17 February 2006

71. I do not think that this already overlong judgment will be improved by further citations from the father's bundle of documents or the arguments he placed before the court. He invited us to conclude that Judge Ryland had been plainly wrong in finding that there was no arguable case for a renewed judicial investigation, and that we should give him permission to appeal against the order.

The argument for the mother in this court

72. For the mother, Miss Anna Spencer of counsel relied on the familiar argument that the judge had been properly exercising a judicial discretion, and was entitled to come to the conclusion that there was no arguable case for lifting the prohibition imposed by the section 91(14) order. The existence of the various letters from the children to the father demonstrated that indirect contact had indeed been taking place, and there was no case at the present time to expand that into direct contact. The purpose for which the section 91(14) order had been put in place still appertained, and there remained a serious risk that the children and the mother would be exposed to unacceptable strain if the father was allowed to prosecute a further application for contact within the moratorium period. The circumstances of the mother and the children's accommodation had not changed: they were still living the one-bedroomed former matrimonial home. They continued to require the "breathing space" provided by the order under section 91(14) and the application for permission to appeal itself detracted further from the period of peace and calm which the children needed.

The report of the guardian dated 21 April 2006

73. Miss Spencer had support from an unexpected quarter. The guardian, who had ceased to be involved following Judge Walford's order, became aware of the father's application for permission to appeal against the section 91(14) order, not least because in my order of 8 November 2005, I directed that the father's application for permission for appeal against the section 91(14) order should be listed on notice to her. As a consequence, she met the children on 18 April 2006 at the Wells Street Family Proceedings Court, and filed a short report dated 21 April 2006. No objection was taken by the father to this report's admissibility: indeed, he included it in his bundle of documents.

74. The purpose of the guardian's meeting with the children was to establish what indirect contact they had been having with their father, to ascertain the impact on them of the section 91(14) order and to find out whether their views regarding direct contact with their father had changed since her previous enquiries in September 2004, some 18 months before.

75. The guardian sets out the views of the children in paragraphs 5 to 10 of her report. In my judgment, this deserves citation in full: -

> "LA, K and E were united in their views, expressed to me separately, that the order of His Honour Judge Walford on 24th November 2004 constituted a "good decision" for them. They described indirect contact with their father as meeting their need to maintain contact with him in a way that was manageable for them and in a manner that minimised the stresses they continue to state he has placed upon them in the

past. It was agreed that their father writes to them on significant occasions and has sent them money, vouchers and gifts. In general, LA replies to their father on behalf of the sibling group or each child individually writes to him to thank him for specific gifts. Most recently, I understand LE was helped by his sisters to write and than Mr F for his birthday gifts. It is the concern of L (LA), K and E however, that their father appears to them to continue his differential treatment of then, in particular that he favours L (LE). They all cited his recent Easter gifts as an example of what they perceived to be their father's attempt to create an argument between them in that he sent eggs and chocolates of varying sizes so that decisions needed to be made about, for example, who had the largest egg. LA, K and E spoke about "pulling together" as a family to support each other in managing their father's behaviour towards them.

LA, K and E told me the knowledge that their father had been prevented from making applications to the court regarding contact had been a relief to them. They all told me that had helped their mother regain her health, which was very important to them. Each child described individually what it had meant to them. LA said she now felt "relaxed", that she could stop worrying constantly about what her father may do next. She described feeling protected by the court order and as though their father can no longer seek to control or intimidate her. She said "lots of stresses have been lifted and I no longer feel so wrapped up and terrified by him". LA felt that she could now understand that their father "has the problems", not her, and there is nothing she can do to "fix it". She described not allowing her father's behaviour to upset her anymore and that she feels in control of her relationship with him. LA told me "I'm really happy with the way things are now and I don't want any changes to contact". She said she does not want to see their father.

In contrast to LA, K and E, as slightly younger children, described their father's behaviour as still upsetting and confusing to them at times. E told me she can feel "angry and frustrated" when she feels he is still treating them differently. However, E said she is "beginning not to care what he does" as there is no point worrying, "he won't change". She described feeling relaxed and not nervous anymore and said she feels she has experienced "happiness and freedom" since their father has not been able to try and see them. She said she feels she is "in a good place now and I don't want to be anywhere else". E acknowledged that she does miss having a dad but that Mr F is not able to be the dad she wants him to be. E also told me she is satisfied with indirect contact and does not want to see their father.

> K told me indirect contact has been "fine" for her but she has not seen any signs through is correspondence that their father has changed. However, she feels he "can't actually do anything to upset us, he has no more power over us". K suspects their father may seek direct contact, as he wants his power back and has no regard for the effect that would have on the family. K said she had felt "heard at last" by the Judge in November 2004 and told me she wants to remain at a distance from their father. She said "I want him as my Dad but not fully in my life". She thought that if direct contact took place again, she would feel "scared", "fearful" "upset and uncomfortable". She did not think it was possible to have a relationship with their father that allowed everyone to be happy and therefore contact should remain on an indirect basis.
>
> LA, K and E were all aware that should they wish to have direct contact with their father, there is nothing preventing them from doing so. All three girls also spoke of their concern should L (LE) only see their father. They felt this would place intolerable strain upon L (LE) and the family as a whole. Each of them said that they would want to accompany L (LE), as they would worry for his emotional welfare should he be along with their father.
>
> LE was, understandably due to his age, less able to articulate the reasons for his wishes and feelings. He thought he last saw their father when he was four years old and said since then, there has been indirect contact. He told me abut the gifts his father sent for his recent birthday, which he liked. LE told me he does not want to see their father and could think of nothing good about doing so. He said he does not think about their father or miss him and thought it unlikely their father was missing him or thinking about him. LE did not think he would change his mind and want to see their father in the future. "

The father's response to the guardian's report of 21 April 2006

76. The father produced a detailed, and critical response to the guardian's report. He described it as unreliable, inaccurate due to the guardian's failure to make meaningful enquiries and to recognise the children's need for support. The father argued that the guardian had previously informed him that she no longer had a role in the children's live following Judge Walford's order and that she refused his requests to address issues relating to indirect contact on this basis. The father argued strongly for a change of guardian.

Discussion

77. I am in no doubt that the father is a deeply disappointed and frustrated man. I an equally in no doubt that he loves his children dearly, wishes to be a proper father to them, and that his frustration and anger largely stem from the fact that he feels excluded from and disempowered in relation to what he believes to be his proper role

in the children's lives. For that, he blames his former wife. He is, however, unable at the present to acknowledge his own contribution to his children's attitude to him.

78. The father is also deeply disillusioned with the family justice system. He turned to it in the belief that he would give him what he craves, and in his eyes it has failed him. Nobody pretends that the family justice system is perfect, but I have to say that, once again, I think the father wholly fails to appreciate his part in, and responsibility for, the breakdown of his relationship with his children. He cannot blame that on the family justice system.

79. Speaking for myself, I do not find Judge Ryland's judgment impressive. He makes two careless errors which, even given the fact that he should have been put right by counsel, are not acceptable. A simple reading of Judge Walford's order would have told him that the father was right to make the application ***ex parte***: a simple reading of my judgment of 8 November 2005 or the order which I made on that day would have told him that I had not given the father permission to appeal. Making every allowance for the fact that this was clearly an extempore judgment, I nonetheless fully understand the father's natural concern that the judge has not done justice to his case, and that his decision is vitiated by unnecessary errors which plainly influenced his overall thinking.

80. Had the judgment stood alone, I might have been minded to give the father permission to appeal against it. But, of course, it does not. I am, in particular, influenced by the following factors. The first is the continuing need for the father to treat his daughters in particular as individuals in their own right, and not a ciphers reflecting their mother's antagonism. He must learn to understand and sympathise with his children's predicament; to listen to what they are saying and to relax what is perceived as his authoritarian attitude. It is natural and right that the children love and are supportive of their mother. The tragedy of this case is that the mutual parental hostility, and the father's rigid and authoritarian attitude has driven a wedge between the children and their father, so that the latter are currently incapable to expressing their underlying love and affection for him.

81. The second factor is that the children are still living in grossly overcrowded circumstances (a fact for which they hold their father responsible). I find it difficult to see how the children's relationship with their father can improve until the children and their mother are re-housed.

82. The third factor is the attitude of the children reported by the guardian in her report of 21 April 2006. I am in no doubt that the guardian is reporting accurately what the children are currently feeling. The question is what can be done about it.

83. I am satisfied that the family needs the added breathing space available until November, and that there is no arguable case made out for allowing the father to go back to the court before then. I would therefore refuse permission to appeal against Judge Ryland's order. However, I do not think that the matter can be left there. What follows is, I acknowledge, unnecessary for the purposes of disposing of the application for permission, but I do not think that this court can properly leave this case without expressing its views on how the matter should proceed henceforth.

84. My overarching view is that this father should be having regular and beneficial contact with his children. The question is how that can be achieved. I am satisfied that it cannot be achieved without (a) a change of mindset in the father himself; and (b) proactive intervention by qualified third parties.

85. It is a commonplace of intractable contact disputes that estranged parents, because of the emotional baggage which they bring from the breakdown of their relationship, frequently cannot by themselves achieve working contact arrangements. They need professional help. This, in my judgment, is such a case. It is one thing to obtain an expert opinion which advises the parties and the court what the problem is. It is quite another addressing it, and implementing a programme of contact.

86. It is plain to me that the father has lost confidence in CAFCASS, and in my judgment, the limitations which inevitably apply to the time and effort which a CAFCASS guardian, however competent, can put into a case such as the present mean that the time may well have come by November to think of alternatives.

87. Thus, when (as I imagine he will do) the father makes an application to the court in November 2006, it should, in my judgment, be heard by a full Judge of the Division, who should then retain judicial responsibility for it. Further, I respectfully invite that judge to consider carefully the question of the children's representation, and give serious thought to the father's suggestion that NYAS should be so appointed. The advantage of NYAS, if they accept the role, is that they will be able to provide both legal and social work involvement: - see ***A v A (Children) (Shared Residence Order)*** [2004] 1 FLR 1195. In my view it would be sensible if, as a preliminary measure, permission were sought to show a copy of this judgment to NYAS.

88. I wish to make it as clear as I can, however, that successful contact between the father and his children depends critically on his capacity to recognise and sympathise with the position of the mother and the children, and to acknowledge that he bears a large share of responsibility for their current attitude to him. If NYAS is appointed, he must be prepared to work with the NYAS guardian, and acknowledge the need to change his attitude to the children's mother.

89. Finally, it may be necessary post November 2004 to consider the position of LE on his own and independently of his sisters. I would be reluctant to advocate that course, but it is a matter which the judge hearing the case, and NYAS will need to address.

90. For all these reasons, deliberately expressed at length, I would refuse this application.

Lord Justice Wilson

91. I agree

Lady Justice Hallett

92. I also agree.