Neutral Citation Number: [2014] EWCA Civ 1195
Case No: B4/2014/1880

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Family Court at Swindon
Her Honour Judge Marshall
SN13P00026

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/09/2014

Before:
LORD JUSTICE RYDER
LORD JUSTICE VOS
and
MR JUSTICE DAVID RICHARDS

In the Matter of K (Children)

HW and DW
Appellants

- and -

GK [1]
Respondent

-and-

The Children by their Children's Guardian [2]

-and-

Wiltshire Council [3]

Mr Peter Kent (instructed by **Mowbray Woodwards**) for the **Appellant mother**
The Respondent father appeared in person
Ms Tanya Zabihi (who did not appear below) (instructed by **Withy King Solicitors**) for the **Children by their Children's Guardian**
Ms Margaret Pine- Coffin (who did not appear below) (instructed by the **County Solicitor**) for **Wiltshire County Council**

Hearing date: 30 July 2014

Judgment

Lord Justice Ryder :
The background:
1. On 3 June 2014 Her Honour Judge Marshall sitting in the Family Court at Swindon removed two young men, aged 14 rising 15 and 12, from the day to day care of their mother. The older boy, who I shall call A, was placed with foster carers under an interim care order made pursuant to section 38(1) of the Children Act 1989 [CA 1989] and the younger boy, who I shall call B, went to live with his father pursuant to a child arrangements order made in accordance with section 8 CA 1989. The young men were separated for the first time in their lives in the sense that they were separated from their day to day carers, their mother and her married partner, and also from each other. The judge suspended any contact between the boys and their mother for three weeks and gave directions relating to a pre-existing request for a section 37 CA 1989 report from the local authority. The proceedings were timetabled to return to the judge with the completed section 37 report on 27 August 2014.

2. No doubt because there was no agreement about how the removal and separation was to occur, a recovery order had to be made in accordance with section 34 of the Family Law Act 1986 and the removal happened late at night with the police in attendance. The circumstances were distressing to all involved, including at least one professional. B was so distressed that he evacuated his bladder and had to change his clothes. The removal was described by mother's representatives as 'violent'.

3. The decision taken by the judge was an exercise by her of the ultimate protective functions that are available to the family court when it is exercising its private law children jurisdiction. Those functions have rightly been the subject of anxious and rigorous scrutiny in this court but it should not be forgotten that this decision, like others that have to be taken every day in the family court, was made in the context of asserted urgency of the most immediate nature relating to the safety of the boys concerned, poor quality evidence and little or no time to reflect upon the judgment that was to be made. Although, as I shall describe, this court allowed the appeal in part and set aside the orders made, we did so without criticism of anyone. If there is any lesson to be learned by everyone involved, it is that a judge has to give him or herself time regardless of what anyone else wants that judge to do. I would suggest that the decision that was made in this case would not have been made in the way that it was had time been taken to reflect on the history, the implications for the boys, the options available and the patent need for further and better evidence.

4. This is one of those family cases that a family court judge instinctively knows will cause harm to the children involved whatever decision is made. With that in mind, the analysis that has to be undertaken must bring to bear an acute focus on the balance of welfare factors given the facts of the case. The children are highly enmeshed in their parents' conflict and the order that Judge Marshall came to have to re-consider was expressly made with the words in mind of Wilson J. (as he then was) in *Re M (Contact: Welfare Test)* [1995] 1 FLR 274:

> "Whether the fundamental emotional need of every child to have an enduring relationship with both his parents (s 1(3)(b) of the CA 1989) is outweighed by the depth of harm, which, in the light inter alia of his wishes and feelings (s 1(3)(a)), this child would be at risk of suffering (s 1(3)(e)) by virtue of a contact order."

5. An enduring solution to the problem that exists in a case like this depends upon a comprehensive welfare analysis derived out of specialist case management which identifies the problem with clarity, a well informed judicial strategy based on good practice and good quality evidence and a measure of good fortune. The building blocks for such a solution are rarely available in the context of an urgent safety enquiry i.e. in the heat of conflict and, as will appear from the circumstances of this case, it is not a dereliction of duty to stand back and take time to consider whether the building blocks exist. In this case, they did not.

6. The essential issue between the parents of these two young men was the relationship between them and their father. The children lived with their mother and her partner and were supposed to have a meaningful and equivalent relationship with their father maintained by regular and staying contact. The recent legislative changes have removed the labels of residence and contact so as to help emphasise that in a case where there is no distinguishing welfare element such as the risk of harm from a parent, that relationship is meant to be of equivalent importance i.e. it derives from the equivalence of the parental responsibility which each parent holds for each of their sons. There is no priority of one parent over another and where a child lives (formerly known as residence) is simply that, albeit that there are often very good reasons for ensuring stability of care supported by a practicable routine. The oft cited security, stability and permanence of care that every child needs are features of the parental relationship that they experience from both parents (where there are two parents who are available to exercise and share their parental responsibilities) not simply a consequence of the place where they live or exclusively from the parent with whom they live. Where there are two parents who share their parental responsibilities, they must have a plan or strategy to do that when they no longer have a relationship themselves.

7. The underlying proceedings concern two young men, who for stylistic convenience and with apologies to them, I shall refer to as 'the boys'. Their parents married in 1997 and separated in 2004. In June 2005 their mother married her present partner. The boys lived with their mother, at first with their father and then with her new husband, until the order made on 3 June 2014.

8. There has been litigation about the children before the county court, now the family court, for approximately 10 years. Weekend staying contact had been taking place since the parents' separation and in 2005 an order was made for alternate weekend staying contact between the boys and their father. That appears to have occurred until June 2009. From then until April 2012 there was no staying contact. On 15 May 2012 a new consent order was made, again providing for alternate weekend contact. A pattern of contact was established which sadly broke down in January 2013. There was then a period of no contact until 24 March 2014 when contact was ordered by the Recorder after a contested hearing (the March order). That order re-instated alternate weekend staying contact and also provided for a conditional and temporary residence order in favour of the father in the event that contact did not occur in accordance with the order. The conditional residence order was to have automatic effect and if necessary was to be supported by a recovery order so that the boys lived with their father over the summer.

9. The order imposed on the mother and her husband included an 'activity condition' to the residence order which was made pursuant to section 11C CA 1989. The condition was that they attend the forensic expert instructed in the proceedings on behalf of the children by their guardian, a consultant psychiatrist, for counselling and guidance 'to assist with establishing and maintaining the father's contact with the boys'. There were also protections including undertakings given by the father not to denigrate either the mother or her husband and not to publish any material identifying the boys as being involved in the proceedings. One of the purposes of the order was to try and avoid further litigation, something the Recorder had decided was causing the boys harm.

10. The Recorder's March judgment made it clear that he had been advised and had decided that the 2012 contact agreement which led to a consent order being made on 15 May 2012 was the ultimate solution to the contact problem. It was the bedrock of his judgment and both the objective to be achieved and the underlying rationale for his orders. It was his strategy. It is important to understand that in coming to that conclusion, he fundamentally disagreed with the boys' mother who had made an application that would have led to the cessation of direct contact. Among the findings that he made, he pulled no punches, not only did he disagree with the mother's then or previous stance in withdrawing from any support for the contact, he found that the father had:

> i) breached the contact agreement (by the messages that he had sent)
>
> ii) been dictatorial and hectoring, and
>
> iii) been abusive to the mother's husband.

Despite those findings, he held that the relationship and hence the contact was in the best interest of each of the boys, that the holidays that the boys had enjoyed with their father had been positive and that the father had demonstrated 'just the qualities that are needed to deal with a teenage son (A) who was being difficult'. His determination was that contact should continue as before.

11. The boys saw their father on 4 April 2014, as ordered, for approximately one week but were then said to have refused to see him again. The counselling and guidance broke down after one visit to the psychiatrist, allegedly because a) the mother would not be in the same room as the father and b) the mother would not consent to her own therapist communicating directly with the psychiatrist. The reason for the breakdown was never decided by the court. The father never objected to family therapy, counselling or guidance and appears to have used his best endeavours to obtain any and every assistance he could from the arrangement that was ordered.

12. I make no adverse comment about this element of the case because this court is not sufficiently aware of the context. Furthermore, both family therapy and activity conditions or directions are to be welcomed as positive solutions, but more than one problem about the order needs to be identified for further consideration. It is an elementary principle that therapy, as properly described by a professional who is qualified to undertake it, is a) usually confidential and b) cannot be undertaken without the consent of the participants. I am not at all sure that describing therapy as counselling or guidance avoids the prohibition in section 11C(5) and 11(A)(6) CA 1989 against a condition that is medical treatment (which *prima facie* therapy provided by a psychiatrist would be) nor am I clear how the condition could

work. It was not a section 11A direction but rather a section 11C condition and that created a conditional residence order in favour of the mother. Once the condition was no longer satisfied, one must ask the question, recollecting as I do that the psychiatrist was advising the court against the transfer of residence to the father, what was intended to happen?

13. Furthermore, although it is perfectly possible for an expert who is instructed to advise the court to undertake a clinical i.e. non forensic role in providing professional services to the parties (and vice-versa), there are dangers inherent in that if the functions become blurred and the expert, as happened in this case, becomes conflicted in his role. Finally, there is a worrying line in the Recorder's May judgment where he records that the mother 'seeks to justify her failure to cooperate fully by reference to historic abuse allegations that have never been litigated'. If that is right and the allegations, if proved, would give rise to a material risk to the mother or the children, then that would be a very worrying issue indeed which would require resolution by a fact finding hearing. The father has also raised similar risk issues relating to the mother's new husband that do not appear to have been considered from first principles on the evidence.

14. This court does not know whether the issues I have described were adequately examined before the conditions were imposed and any court subsequently considering the merits will have to investigate those questions if adverse inferences are to be drawn. Although the Recorder's orders were never appealed, it is necessary to identify the issues that arise on the face of the history in this case so that they are adequately examined in relation to their relevance to any future judgment.

15. In any event, the boys' mother applied again to the court to suspend the contact order and the implementation of the conditional residence order. The father cross applied again to enforce the order. As I shall discuss further in due course, the nature and extent of the applications that were made is itself a concern. Precisely what orders were these parents seeking to achieve that were within the jurisdiction of the court?

16. On 23 May 2014 the mother's renewed application was refused with the consequence that the contact and the conditional residence order remained in force (the May order). The Recorder made findings sufficient to come to the conclusion that both of the boys were suffering significant emotional harm within the meaning of section 31 CA 1989 and he exercised his discretion to direct an investigation into their care in accordance with section 37(1) CA 1989 (a course initially asked for by the boys' mother). It is of some significance that the judge was still relying on expert evidence that included the advice that a permanent change of residence in favour of the boys' father would be damaging so that the temporary change of residence over the summer was intended to be a 'back up measure' to ensure that contact took place.

17. In coming to his decision in May, the Recorder described how the expert had come to the conclusion that he no longer had a role to play in the proceedings. That was, I think, the consequence of the breakdown of trust between the mother and the psychiatrist or at least her alleged non cooperation with him, but as this court now knows it was also as a consequence of the circumstances having exhausted the expert's skill and experience. That was a further potentially important factor for Judge Marshall given that hitherto the Recorder had relied on that expert, who had been instructed on behalf of the boys by the children's guardian, because his assistance was necessary to help her undertake her duties and because his expertise was said to be outwith the court's skill and expertise in what was obviously regarded by the

Recorder and the parties as a complex case. Given that the circumstances had become more complex and the court's strategy was dependent on advice from an expert who had withdrawn and a children's guardian who was dependent on that expert, how did the court propose to deal with the evidential issues that arose?

18. As a consequence of the implementation of the conditional residence order, the boys were then meant to be living with their father from 25 May 2014 for a period until the end of the summer holidays when they would return to the care of their mother and her partner. That did not occur. They 'absconded' from their father's home in the early hours of 27 May 2014 and were found in the care of a former child minder. An issue arose as to how that had come about and the allegation made was that their mother and/or her partner had been complicit with the boys in helping them to abscond contrary to the court's order and in circumstances of some risk to the boys themselves. I can deal with that allegation shortly. Judge Marshall concluded that the allegation was not made out and the fact that the boys had communicated with and ended up with a child minder they had not seen for some time was not found to be the responsibility of any of the adult parties in the proceedings.

19. This court was told that the hearing before the family court was arranged at relatively short notice because of what were referred to as 'safeguarding issues' in respect of the boys. Their temporary placement with their father had apparently broken down but the residence orders remained in force. Despite the detailed consideration given to this case by the Recorder, there was no strategy to deal with this eventuality. Although the Recorder's orders had not been appealed, no-one seems to have asked the experts what was intended to happen if the solution designed by the expert and the guardian and accepted by the court did not work. That solution was a temporary change of residence which was designed to follow the decision of Coleridge J in *Re A (Suspended Residence Order)* [2010] 1 FLR 1679. That decision provides an example of the use of the court's powers to transfer a child's living arrangements where the 'residential parent' fails or refuses to safeguard and promote the welfare of the child by facilitating contact with the other parent. So called 'conditional or suspended residence orders' have as a consequence become more common.

20. That was what was provided for in this case but with one significant and arguably fatal distinction. As was canvassed before us in discussion, the boys' father in this case has not to date made an application for a residence order or what would now be a child arrangements order to that effect. Furthermore, the expert was not recommending a transfer of residence to the father on a permanent basis. Accordingly, the conditional residence order in this case was only intended to provide summer holiday contact if it had not been afforded by other means. The care of the boys was always intended to revert to their mother at the end of the summer and its impact was time limited. It was not intended to have any long term effect. If one accepts that the temporary change of residence was not intended to be an inappropriate coercive device i.e. it was intended to provide for the children's best interests, then its failure left a vacuum which required another solution to be tried: unless of course the experts were suggesting a further trial of their experiment.

21. That takes us to the hearing in question. It might have been thought that the solution to the problem that had occurred would have been within the skill and expertise of the guardian and the expert who had recommended the strategy to date: sadly, it was not. As I have described, the expert had written to the court and the parties some time before the summer placement had broken down to say that the circumstances were beyond anything with which his clinical guidance could assist. That was surprising but in fairness there was also the issue

of trust that had arisen because of the dual function that the expert had been expected to perform. The result was that the court lost the expert that it had previously decided was necessary. To add to that unfortunate circumstance, the guardian conceded during questions put by this court that she had no public law experience and that the good practice, research based options and/or evidential materials which should be the meat and drink of any public law Cafcass practitioner were not part of her skill and expertise.

22. The consequence has been, as she informed this court, that she has asked the family court for her functions to be transferred to another more experienced public law guardian i.e., as I understand it, an application for the termination of her appointment and her substitution by another guardian will be made before the next hearing. With the benefit of hindsight, the children's guardian should have asked Cafcass management for assistance and that should of course have been disclosed to the court, leading to an application to the court to add another guardian (which is possible under the rules) or substitute guardians for the hearing before Judge Marshall.

23. It is not at all clear how much of this the judge knew. Some of it she could not have known because it was revealed to this court when it asked questions which had the benefit of hindsight. In any event, it would have needed a more detailed and nuanced hearing to establish that which is now known or identified as respects the problem to be solved.

The grounds of appeal:

24. I turn now to the grounds of appeal, the skeleton arguments filed by the parties and the transcripts this court has had the opportunity to read. During the hearing before this court and without objection, the court identified five errors, procedural and substantive, which taken individually or together arguably made the determination of the family court wrong:

> i) The nature and extent of the applications that were made by the parties, the orders that could be made in consequence and in particular the welfare options underlying those orders, were not identified with sufficient or any clarity;
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> ii) There was no sufficient welfare analysis of the options that were available;
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> iii) The proportionality of the removal of A on the grounds of 'safety' from the care of either or both of his parents was not justified;
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> iv) The separation of the boys from each other was neither considered nor justified; and
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> v) The determination of the court was inappropriately influenced by a discussion between the judge and the boys.

25. Despite the strong views to which this court came, I shall be as careful as I can not to express conclusions on issues about which evidence will need to be heard, although it must be noted that some issues of fact have been determined which are not the subject of this appeal. It is also important to recognise that now that the applications of the parties are to be re-heard, the issues upon which the urgent hearing focussed or which have been the focus of this court's consideration may not be the dominant issues at the re-hearing which will need to consider the evidence on the applications afresh without any pre-conceived value judgments.

The welfare options and the welfare analysis:

26. The applications before the court were identified by the judge: one on behalf of the mother 'to dismiss' the Recorder's March and May orders and the other by the father 'to enforce' the same. I take the descriptions used by the judge in her judgment because whatever the parties intended, the lack of clarity exposed by the same is illuminating. Given that there had been no appeal against the Recorder's March and May orders, the mother's application had to be an urgent application to prevent the Recorder's conditional residence orders taking further effect during the summer holiday (i.e. for an interim child arrangements order for the boys to live with her) and for there to be no direct contact between the boys and their father either in the long term or until new arrangements could be put into place. The father's application was not an application to enforce an existing order in the classic sense by committal, at least if it was it was not considered to be so by the judge. It was, as she identified, a more careful response to the circumstance that had arisen, asking the court to maintain the status quo of a child arrangements order in his favour relating to the younger boy B and a short term alternative for A, again pending longer term re-consideration. The boys' father confirmed to this court that he had not yet decided to issue an application for child arrangements orders that would have the effect, if granted, of both boys living with him.

27. It is clear from what the judge records in her judgment that the question of a foster care placement for one or other of the boys was raised as an option for the court to consider. We have been shown material that confirms the fact that mother's counsel raised it before the Recorder (presumably as a hypothetical option should all else fail and the court was determined on its strategy for contact against the opposition of the boys and/or their mother). The father raised it with the judge in relation to A who was far more opposed to contact than was B and we were told without objection that the judge raised the question at the beginning of the hearing and asked the local authority social worker who was a witness to investigate the local authority's position and resources. At least by the time the judge came to give judgment the position of the local authority was known because she records it: it did not seek to have the boys placed with it under interim care orders.

28. Beyond the brief description of the applications and the parties' positions, there was no analysis of the purpose of the hearing i.e. the ultimate order(s) / decision(s) to be made and the problem to be solved, the key issues to be decided and the evidence that it would be necessary to hear to decide those issues. An urgent hearing, like a without notice hearing, can have a determinative influence on the issues in a case. Such hearings do not have the benefit of a case management hearing in advance to prepare the ground. It is accordingly essential if the issues and options are to be properly investigated and analysed that the court takes time to have a case management hearing within the hearing before the conflict is allowed to be played out before it and before evidence is given so that everyone knows what the issues are to which the evidence will be relevant and what the ultimate problem is to be solved. A case management opportunity would have flagged up the questions I have asked and not answered as issues in the case.

29. Although no application had been made to the court for an interim care order, the fact that such an order was in contemplation should have caused the court to consider the Family Procedure Rules 2010 Part 12 and in particular Practice Direction 12A (Care, Supervision and Other Part 4 Proceedings: Guide to Case Management) (The Public Law Outline). The PLO would have signposted the case management issues that the court needed to consider and would not have threatened the need for expedition if that was necessary. Furthermore, the applications were private law children applications, to which Practice Direction 12B

(Child Arrangements Programme) applied.

30. It is an inevitable consequence of time not being taken to case manage applications, that if the purpose and key issues are not identified then the identification and analysis of the available options is likely be flawed. So it was in this case. At no stage in the judgment were the options available to the court identified and examined whether as a consequence of the applications of the parties or the position taken by the local authority. It was almost as if the urgency of the hearing drove everyone, in particular the children's guardian on whom the court relied, to come to the inexorable conclusion that the children would suffer 'a high level of emotional harm' if they remained in the care of their mother. That was the evidence of the guardian supported by the hearsay opinion of the court's former expert who she had informally consulted, who advised that both of the children 'should have gone into foster care' when the arrangements with their father broke down. The weight to be given to the former expert's opinion is itself an important issue in this case, not least because he was never made available so that his hearsay opinion could be challenged.

31. In order to conduct a comparative welfare analysis of the options for each of the boys it was necessary to identify them. That did not happen. If there was no welfare analysis of each option i.e. an analysis of the benefits and detriments of the option by reference to the factors set out in section 1(3) CA 1989 (the 'welfare checklist'), then there could be no comparative analysis of one option against the other. In a private law case where the issue is the removal of a child from the care of one parent or the denial of a relationship with a parent by the cessation of contact, nothing less than an analysis of this kind will do. The balance sheet approach of benefits and detriments that has been recommended in public law children cases is equally applicable to the welfare analysis of options in private law children cases.

32. The lack of an analysis of the kind I have described vitiated the judge's conclusion that the balance of harm favoured a foster care placement for A. There was no conclusion in relation to the best interests of B save by inference from the judge's conclusions that his father could probably continue to safeguard his best interests whereas his mother could not. An experienced specialist judge need not mechanistically set out the welfare checklist but a decision of this kind needs more sophisticated reasoning than that undertaken by the judge on the evidence available to her.

The proportionality of the removal of A into care:

33. The judge had in her mind from the beginning of the hearing the jurisdiction of the family court to make an interim care order under section 38(1) CA 1989 where a section 37 report has been directed. The procedural protections of notice and an opportunity to be heard apply to a jurisdiction that is available to the court of its own motion just as much as they do to a jurisdiction invoked on a party's application. It appears that the judge announced that she would be considering this option and no-one took exception to it, except perhaps the local authority. In an emergency, that may be all that can happen and all that is required to embark upon a safety enquiry. That is not the focus of this ground of appeal as no-one makes complaint about the procedure adopted. However, in order for a court to decide whether anything more is required, it is necessary to identify with particularity the safety issue that has been raised so that an investigation of the range of best interest solutions can be factored in to the procedure adopted by the court.

34. It is the nature and extent of the safety issue which has troubled this court. There are a number of possibilities: the fact that the boys left their father's home in the early hours of the

morning, the guardian's conclusion and that to be implied from the opinion of the former expert that the boys would suffer a high level of emotional harm if they returned to their mother's care (described by father to the judge as 'likely to be catastrophic') or the conclusion to which the judge came that the boys were 'out of control'. There may have been other possibilities, some of which were described to this court for what appeared to be the first time. The reason that I express myself in such cautious and hesitant terms is that the safety issues were not identified with clarity and should have been.

35. The tests to be applied where a removal into public care is being considered by this route are: a) whether the court 'is satisfied that there are reasonable grounds for believing that circumstances with respect to the child are as mentioned in section 31(2)' (the interim threshold as set out in section 38(2) CA 1989); b) whether the court is satisfied that the child's safety demands immediate separation (see the authorities reviewed in *Re L-A (Care: Chronic neglect)* [2010] 1 FLR 80 CA); c) whether the court is satisfied that removal is in the best interests of the child (the welfare analysis required by sections 1 and 1(3) CA 1989; and d) having regard to a comparative welfare analysis of the options, whether the court is satisfied that removal is a proportionate interference with the child's and other relevant persons' article 8 ECHR rights.

36. The interim threshold was satisfied by the determination made by the Recorder in his May judgment but that was not enough in itself to demonstrate an application of the other tests. The safety question described by Thorpe LJ in *Re L-A* was neither asked nor answered. It could not be because of the poor quality of the evidence before the court. In the absence of quality evidence on the point, not only was the safety issue not identified with sufficient clarity or particularity, but of necessity there could be no analysis of the evidence relating to it in order to conclude that a removal was justified.

37. *Re L-A* is the domestic legal test for the justification of removal that takes note of the Strasbourg jurisprudence i.e. the interference of the state in the article 8 rights of those involved in circumstances where there is an issue of safety. In order to identify the nature and extent of an alleged risk to the physical or emotional (psychological) safety of a child the court needs evidence relating to the prima facie facts. As has been explained by the President in *Re G (Interim Care Order)* [2011] 2 FLR 955, it is also necessary for the court to undertake a broad proportionality evaluation of the comparative welfare analysis of the options for each of the boys on the facts of the case to cross check whether a 'more proportionate' option than separation is available. That did not happen, but in fairness it could not happen, because those options were not identified and analysed in the evidence. The absence of this reasoning is fatal to the decision made in respect of A in this case.

38. It is almost an aside in this case to remark that even where the court has rightly decided to make an interim care order, it should as part of the process consider what in practice will happen to a child if the order is made i.e. the local authority's proposals or their care plan if by then it exists. That is not the statutory obligation imposed on a family court by section 31(3A) CA 1989 because the requirements relating to a section 31A care plan do not by section 31A(5) apply to interim care orders. It is simply essential good practice to ascertain how the local authority that finds itself in this position is going to exercise its statutory responsibilities. That evidence is bound to be relevant to the welfare analysis and proportionality evaluation. I do not believe that in this case the divergence of professional view between the children's guardian and the local authority social worker on the point was

sufficiently investigated in evidence. It is perhaps sufficient to record that this court was told that if one includes respite, A has experienced three foster care placements already.

39. There were no formed proposals in this case because the local authority did not at the stage the order was made accept that an order should be made. This was not a case of a local authority being difficult. The only time available to the local authority to put together their proposals was the time during which the hearing was taking place where the local authority was not a party and its witness was not its decision maker. What was needed was more time for mature consideration. A plan, using that word in its non-technical sense, would of necessity have been skeletal and would probably not have extended beyond describing the means of recovery, the immediate placement into which A would go and the assessment or other planning process to decide what to do next. At the very least the court should have found time to give consideration to this question.

The separation:

40. I need not do more than state the obvious in a case of this nature. As young people who have experienced family courts, public care and relationship breakdown make very clear in, for example, the proceedings of the Young Peoples Board of the Family Justice Board, the separation of siblings can be one of the most traumatic elements of their experience, particularly where no provision is made for the sibling relationship to be maintained so as to safeguard their long term welfare into adulthood. Generalisations are dangerous, the intensity of sibling relationships can be very different and this court has not been taken to any of the research studies that consider this issue. However, it is sufficient to say that a sibling relationship is central to both the article 8 respect for family life which is engaged in a decision to make a public law order such as an interim care order and welfare, which by section 1 CA 1989 is the court's paramount consideration when it 'determines any question with respect to the upbringing of a child'. It will be a relevant factor in all or nearly all of the section 1(3) factors to which the court is required to have regard.

41. The absence of a value judgment soundly based in evidence about the effects on each of them of the separation of the boys was, in my judgment, almost as fundamental a flaw on the facts of this case as the failure to consider the safety issue and the proportionality of interference in relation to A. It went directly to the quality of the outcome of the court's intervention for each of the boys.

The discussion with the boys:

42. At the beginning of the hearing with which we are concerned the judge decided that she wanted to see both of the boys. Very properly she told the parties and an arrangement was made for that to happen. The purpose of the discussion was less clear. The judge wanted to see them to explain that she had taken over the case and for them to understand what the court process would involve, in the context that previous judges had done likewise. It was a very professional and courteous thing to do. The judge was clear, however, that she would be unable to discuss with the boys their wishes and feelings. That was because this issue was at the forefront of the proceedings and the judge did not want to fall into the trap of taking evidence from the boys in an informal setting that did not have the advantage of most of the ordinary protections of evidence gathering.

43. There is a difficult history relating to the boys' wishes and feelings which could on any basis be described as evidence of the deep enmeshment of the boys in their parents' conflict. They could be said to have become partisan and to have lost the ability to see their

objective needs as distinct from their emotional allegiances. Whether that is right or not, they have such strong views that they are in near terminal conflict with their own solicitor and the children's guardian. They did not want to be separated. There could have been little doubt that the boys wanted to express their wishes and feelings to the judge and the question should have been asked whether in that circumstance the judge's wish to have a meeting was the right course. If it was, the advocates needed to engage in the detail of how the meeting was to be handled i.e. what was its purpose, what was the agenda for the discussion and how would it be recorded in the inevitable circumstance that the boys sought to use the opportunity to give the judge important information.

44. The nature and extent of A and B's wishes and feelings could not have been clearer. The Recorder in his May judgment described in some detail the letters and emails written by the boys, including to the court, from at least 2011. I have read those letters and emails. Although I well understand how damaging it has been for the boys to be enmeshed in their parents' conflict and how that could be exacerbated by involvement in these proceedings, I simply fail to understand how, given their age and understanding, the court was advised in January 2014 that the boys did not have sufficient understanding to instruct a solicitor. That confused an assessment of their best interests with the question of their actual or 'Gillick' competence.

45. Each of the boys has made it clear over time that they do not want to have contact with their father. As the Recorder points out in his May judgment, some if not all of the reasons expressed for their views have not been adjudicated upon by a court. Their patent requests for separate representation have not been determined by a court because of an implicit understanding that separate representation would cause them more harm. That conclusion may be right, it may even be said that their competence was overborne by the influence of others, but in the absence of an application properly made on their behalf which is adjudicated upon with the benefit of evidence, it is no more than a paternalistic value judgment that fails to treat their autonomy with sufficient respect. It may be that they should not be separately represented and that their welfare interests should prevail, but that should have been decided by the court. It is hardly surprising given the history that the judge concluded that the boys 'have taken upon themselves the role of trying to put their own case'.

46. The boys saw the judge but were told this was not an opportunity to discuss any issues in the case including their wishes and feelings. It is plain from the transcript of the discussion that they could not believe what they were hearing and the judge observed that 'they were very concerned and very disappointed'. The judge in seeking to avoid a discussion about the evidence clearly felt unable to listen to them. She entered into a discussion about the inadvisability of the boys' written communications that it is difficult to characterise as being other than an admonition. They boys left the process distressed and apparently even more convinced in their view that no-one was prepared to listen to them.

47. This case has not been about judges seeing young people. I shall return briefly to the wealth of material on that topic. The question which arose out of the discussion with the boys was whether, despite her best intentions, the judge inappropriately relied upon her impressions of the boys and what they said to her to come to conclusions in the case. Sadly, perhaps as an inevitable consequence of the charged emotions in this case, the judge made that error. There are a number of passages in her judgment where the problem is highlighted. I shall choose three:

"[26] The findings that I make on this evidence need to be considered in the context of the opportunity I had to meet with the boys this morning. The parties are aware that I felt that they are at the moment presenting as being rather out of control, not subject to parental influence or indeed able to set appropriate boundaries for themselves. I also formed the view that they had perhaps rather lost touch with reality in relation to what was going on and I do have a concern that they are rather immature and may somehow view this as some sort of fantasy adventure.

[…]

[24] […] My own experience this morning is that these children could exhibit considerable distress and yet were able to calm themselves very quickly and the word 'histrionic' was exactly the one which I would have used in relation to their behaviour that I observed.

[…]

[47] I was particularly struck by something that the Guardian said, which is that "it is almost like the children expect someone to put their arms around them and to say 'do not do this anymore'". Again that exactly resonated with my own assessment after seeing the children this morning. They are out of control. "

48. I need go no further than the recent judgment of this court in *Re KP (A Child)* [2014] EWCA Civ 554 for a comprehensive statement of the law that takes account of the Family Justice Council's [FJC] April 2010 'Guidelines for Judges Meeting Children who are Subject to Family Proceedings' [2010] 2 FLR 1872, the FJC's Working Party December 2011 'Guidelines on Children Giving Evidence in Family Proceedings' [2012] Fam Law 79 and the recent decision of the Supreme Court *in the Matter of LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] 2 WLR 124. It remains an essential principle of the guidance and the relevant authorities that a meeting with a child is not for the purpose of gathering evidence. There is likewise an emphasis on the court hearing the voice of a child and of the court reminding itself that a child's wishes and feelings may not be capable of being represented to the court by the adult parties. The court should ensure that the child's access to justice is effective, whether that be through formal separate legal representation or the offices of a guardian, a family court advisor or a parent. Even where formal representation is appropriate there is a wide discretion in the court to determine the extent of a child's participation.

49. I have regrettably come to the clear conclusion that the judge's discussions with the boys strayed beyond reassurance, explanation and listening. It was certainly not the latter and to the extent that the boys needed it to be, the judge could and should have adopted the practice of listening, disclosing what was said and not placing reliance on it in her judgment. It is entirely possible to listen without gathering evidence. Where a process is intended to or as here inadvertently leads to evidence being gathered, including by very firm impressions and judicial assessments about the boys' needs, wishes, feelings, behaviours and the risks which their own needs might occasion, then consideration should be given to whether that evidence should be gathered or considered by a suitable neutral person (an expert or a guardian who is not conflicted). In a case where the conflict that had arisen in this case does not exist, the children's guardian could have been asked to sit in with the judge or read the transcript of the discussion to assess the material in context. A process needed to be agreed that permitted the

evidence to be challenged without harming the boys themselves.

50. The judge's reliance on her own assessments of the boys derived from her discussion with them was procedurally unfair and to the extent that her primary concern was that they were 'out of control' it dominated her thinking. That was a value judgment derived from evidence gathered by the judge in a discussion that was not intended for that purpose and which could not be effectively challenged by others.

51. It may be useful for the part of this judgment which touches on discussions with children and their representation in court to be considered alongside the guidelines and the recent authorities I have set out above by the FJC and the President's 'Children and Vulnerable Witnesses Working Group' (see their interim report dated 31 July 2014). It is not practicable for this court to give its own guidance: we have not been addressed on many of the interesting points that arise and the President's working party is already seised of the relevant issues.

Conclusion and interim measures:

52. For the reasons I have described, the court came to the conclusion that the judge had been wrong to make the decisions that she did. We decided to allow the appeal in part and set aside the orders that were made. We decided to remit the applications and any application that may be made by the local authority to a judge of the High Court sitting in the family court to be heard in full when the section 37 report is available i.e. without any further delay and in accordance with the same timetable put into place by Judge Marshall for the review hearing in the family court in Swindon, which we vacated. We directed that a judge of the High Court should undertake a full case management hearing. It will be necessary for that judge to consider the question of the representation of the boys.

53. It then fell to this court to put in place interim measures. We undertook an analysis of the prima facie position given the conclusions to which we had come. In essence that was that the section 38 CA 1989 interim threshold was satisfied in respect of both boys by the Recorder's findings and value judgments. The safety test for the removal of the boys from either parent into public care had not yet been evidenced, albeit that there may be evidence capable of satisfying the same. There was no evidence to suggest that it was in the interests of either boy to be separated from the other, quite the contrary. The welfare options for the boys were care by their father, by their mother or by the local authority. It was not presently in the interests of A to be placed with his father given his adamant refusal to co-operate and his urgent need for therapy which is to be arranged through CAMHS. The only realistic options that remained were joint placement of the boys with their mother and her husband which carried the real risk of further emotional harm by the continuation of their inappropriate antagonism towards their father or joint placement in the interim care of the local authority which carried as yet un-assessed risks, no guarantee of a joint placement and would involve a removal that could neither be justified on a safety nor a proportionality evaluation on the un-appealed material available to this court.

54. We came to the conclusion that the best interest solution for each of the boys was to keep them together for the short duration of the interim period until the next full hearing and accordingly to place them back with their mother and her husband. That will not necessarily be their long term placement. In order to protect them and given the satisfaction of the interim threshold, we placed them in the interim care of the local authority so that parental responsibility would be shared with the local authority whose duties would extend to

promoting contact with their father. The local authority acquiesced in an interim care plan that would permit the boys to remain at their mother's home until the full hearing but with defined contact to their father and an urgent CAMHS referral for A. B was to have section 34(4) CA 1989 contact with his father every other weekend for not less than two nights staying contact on each occasion and the local authority were to use their best endeavours to re-introduce A to contact with his father at the same time as B. While I would not want to pre-judge the evidence that a future court will hear, it may be that the failure of contact would lead to a child arrangements order whereby the boys went to live with their father. We came to the conclusion that the interim solution I have described to the problem identified was the most proportionate in all the circumstances.

55. The judge in this case was not well served by the evidence or the problems created in part by the history of the case and the supposed urgency of the situation. The circumstances that dominated the hearing were not those which were the most important in the case and she was left to make a decision with poor quality material. Although articulate and intelligent, the father was a litigant in person who would have been simply unable without legal assistance to pursue the legal issues that have been pursued before this court. I question whether in the absence of legal representation he is able properly to put forward a sustainable position to the court.

56. The absence of a determination on the question of separate representation and the severe conflict that has arisen between the boys and their guardian and solicitor mean that I am persuaded that they have not been afforded access to justice. A separate representation application must be properly considered with evidence as soon as possible. I say to the boys who should be asked whether they wish to read this judgment, that the degree to which they may be harmed by being even further enmeshed in their parents' conflict and inappropriately being involved in the decisions that have to be made by adults, will have to be balanced by the harm that is being done by their perception that no-one is listening to them. The conclusion of an application is by no means clear but whatever the conclusion is, it must provide for them to be listened to and to participate to an appropriate extent.

57. I return in conclusion to the boys' parents. Mother should not and must not continue to believe that she can override the repeated conclusions of the court. It is, as the court has repeatedly said, desirable that the boys should have a close parental relationship with their father. The mother's approach has contributed to the damage that has been caused to the boys' emotional welfare. This cannot continue. The father must understand that the court cannot achieve the impossible. He has been responsible for at least some of the conflict that exists and the boys have suffered because of that.

58. The problem in this case is the maintenance of a meaningful relationship between the boys and their father. As is too frequently the case, the problem was caused by the parents of the children who are locked into a damaging, deteriorating spiral of conflict which desperately needs to be resolved. Without that resolution, whatever the court orders and no matter what steps are taken to enforce the court's orders, harm will continue to be caused to the children. Cases of this kind are unhelpfully and generically referred to as 'implacable hostility' cases because of the parental conflict that exists. The label provides no insight into or assistance with the myriad of circumstances and features that such cases present.

59. Mothers, fathers or both are just as likely to be responsible for the precipitating circumstances in such a case which may be far removed from and are sometimes if not often,

irrelevant to the conflict which endures. Such research as there is into available and workable solutions suggests either a) that there should be a careful analysis of the reasons for the conflict by fact finding to identify and assess risk to the children and sometimes to one or other of the adults and/or b) that if the reasons for the conflict do not present identifiable risks to the children or their carer and sometimes even if they do, a resolutions approach to the conflict can be adopted to try and resolve it by professional intervention such as individual or family therapy, external support from local authority children's services or education and assistance from the various parenting programmes and activity directions that are now available under the CA 1989 or otherwise. Sometimes it is necessary to fundamentally alter a child's arrangements by removing that child from the adverse influence and control of one parent by placing the child with the other parent and making a child arrangements order that has the effect of limiting the relationship with the harmful parent. In an extreme case (and I emphasise they are and should be rare) where the child is suffering significant harm or is likely to suffer significant harm, the court can intervene and exercise its ultimate protective function by removing the child from its parents and by placing the child into public care so that the local authority shares parental responsibility with the parents.

60. The removal of a child from the care of a parent whether by a transfer of living arrangements from one parent to another or by placing the child into public care is not and must never be a coercive or punitive measure. It is a protective step grounded in the best interest of the child concerned. In so far as there was a perception in this case that either the transfer of the conditional residence of the boys to their father by the Recorder or their subsequent removal from their mother was a punishment of the boys for their behaviour and for being unwilling to accept contact with their father, then that was inappropriate.

61. For a family to be facing the possibility of a wholesale change of living arrangements between parents because of the harm that one or both of the parents is causing is bad enough, for a family to face the removal of children into public care when they are both capable of caring for their children is, frankly, sad beyond measure. This is such a family. I say that without attributing any causative blame to one parent or the other in the sense of saying that one or other parent is responsible for the problem that now arises. That may or may not need to be determined by a fact finding exercise. This court does not yet know. Where the parents are to blame is that neither of them has facilitated a joint approach to the resolution of their conflict for the benefit of their children. It is time for this court to start saying that which is obvious. The family court is empowered to make decisions for parents who cannot make them for themselves but it cannot parent the children who are involved. When parents delegate their parental responsibility to the court to make a decision, that decision will be in the form of an order. The court cannot countenance its orders being ignored or flouted unless an appropriate and lawful agreement can otherwise be reached. That is not simply to preserve the authority of the court, it is to prevent continuing and worsening harm to the children concerned. Parents who come to court must do that which the court decides unless they agree they can do better and there is no court order that prevents that agreement.

62. In this case, the parents were both to have a meaningful relationship with their sons. That should have involved active practical and emotional steps to be taken by both parents to make it work. Instead the case is suffused with anger and arrogant position taking that has nothing to do with the children. There has undoubtedly been mutual denigration, true allegations, false allegations, irrelevant allegations, insults, wrongly perceived insults and the manipulation of the boys to an outrageous degree. The idea that the court can wave a magic wand and cure all of those ills is dangerously wrong. It cannot - its function is to make a

decision. It does not have available to it a supply of experts, be they psychiatrists, psychologists, therapists, counsellors, drug, alcohol and domestic violence rehabilitation units, social and welfare professionals or even lawyers who can be 'allocated' to families. Experts that the court relies upon are either forensic experts i.e. they are specifically instructed to advise upon the evidence in a case or they are experts who are fortuitously already involved with the family through one agency or another. Their role in proceedings is to advise the court. There is no budget to employ them or anyone else to implement the court's decision save in the most limited circumstances through the local authority, Cafcass or voluntary agencies.

63. One can only sympathise with any family court judge who is faced with such a case. There are no right answers but inevitably there are many wrong answers. To make it worse, in this case, the proceedings had to be re-allocated because of judicial indisposition so that the new judge came to the case without the detailed knowledge of the previous ten years of litigation. The hearing was said to be urgent so that, no doubt, all other judicial work stopped and the case took priority. It was said to be a case that needed an immediate order. Hindsight is a wonderful thing and the nearest a first instance family judge can get to it is to take time for reflection.

Lord Justice Vos:
64. I agree.

Mr Justice David Richards:
65. I also agree.