Neutral Citation Number: [2014] EWCA Civ 733
Case No: B4/2014/0132

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, FAMILY DIVISION
Mrs Justice Parker

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 05/06/2014

Before :

LORD JUSTICE TOMLINSON
LORD JUSTICE McFARLANE
and
LORD JUSTICE DAVIS

Re: H (Children)

Mrs Jane Crowley QC and **Miss Sarah Dines** (instructed by **Garrods Solicitors**) for the **Appellant**
Miss Pamela Scriven QC and **Miss Tina Harrington** (instructed by **Leonard Gray LLP Solicitors**) for the **Respondent**

Hearing date : 14 April 2014

Judgment

Lord Justice McFarlane:

1. This is an application for permission to appeal made by the mother of three boys in which she seeks to challenge the order of Mrs Justice Parker made on 23rd December 2013. The boys are A, born [a date in] 1998, and now aged 15½, B, born [a date in] 2000, and now 13½ and C, born [a date in] 2002 and therefore now aged 11¾ years.

2. Prior to January 2013 all three boys had lived with their father and mother. However, on 18th January 2013 the eldest boy, A, who had for some time displayed violent and destructive behaviour, caused such damage in the family home that he was arrested. Thereafter he was placed in the care of his paternal grandmother for a period of six weeks. One week later, and without warning, on 25th January 2013 the mother left the family home with the two younger boys, B and C. She took up residence in a local refuge where she has resided ever since. A joined the younger children and their mother in mid March 2013.

3. The proceedings before the court were private law proceedings in which the father was initially seeking contact. The case has a busy procedural history including a number of hearings before His Honour Judge Newton and, at other times, Parker J. The order of 23rd December 2013, which is the target of the mother's present application for permission to appeal, provided for the immediate removal of all three children from her care. The judge made a residence order for A to the paternal grandmother until further order, and an order in similar terms placing the younger two boys under a residence order to the father. The order provided that the mother was to have contact on at least one occasion per week, but all such contact was to be supervised by the local authority.

4. The Notice of Appeal, which was filed on 10th January 2014, raised a substantial number of criticisms relating to the process adopted by the judge and, ultimately, challenged her decision to make a "pre-emptory" change of residence at the December hearing. On 8th March 2014, at an oral hearing, I adjourned the issue of permission to appeal to be heard by the full court with the appeal to follow if permission were granted.

5. On 14th April 2014 we heard the mother's application for permission to appeal. At the conclusion of the very clear and helpful submissions by her leading counsel, Mrs Jane Crowley QC, we concluded that permission to appeal should be refused. We announced our decision at the conclusion of the oral hearing, indicating we would set out our reasons in reserved judgments.

Background

6. Although this case has generated a great deal of paperwork, it is possible to identify two central themes within the evidence. Firstly the mother made a range of detailed allegations against the father with respect to his physical and sexual relationship with her, and, separately, on the basis that he had from time to time used excessive physical force in chastising the boys. The second core area of evidence relates to the mother's ability, or inability, to provide consistent, stable, and safe emotional parenting to the boys. This latter factor includes, as the judge came to find, the potential for the mother to manipulate the boys into making allegations against the father and refusing to take part in contact visits to him.

7. In order to make sense of what follows, it is necessary to set out the bare bones of the chronological history which catalogues the development of evidence with respect to each of these two core themes.

8. On 4th April 2013 the mother applied for an injunction against the father under the Family Law Act 1986 and made applications for residence and supervised contact orders with respect to the children. In her witness statement supporting those applications the mother did not complain that she was the victim of any physical or sexual violence from the father save for one occasion nearly twenty years earlier prior to their marriage. She did, however, allege that the father was highly controlling and threatening in his manner towards her and that he would regularly assault the children and, in particular, would take a belt to them if he considered that they had misbehaved. The father issued a counter application for contact and specific issue orders regarding the children's schools.

9. The first court hearing took place on 15th April 2013 before DJ Hodges. At that hearing the mother's position had changed from one of supporting supervised contact between the children and the father. Her case was that the elder boy, A, opposed the two younger children

having direct contact with the father and the mother herself therefore opposed direct contact for any of the children. At the hearing the District Judge explicitly stated that the court would start with the presumption that children should grow up knowing both parents. Some 2 hours after the conclusion of that hearing the mother and A attended the local police station and made allegations about the father's behaviour. The police record shows that, in addition to the allegations of violence towards the children, the mother alleged that the father had also been violent towards her, but that his abuse of her was "mostly emotional and sexual".

10. On the following day, 16th April, police visited the mother and the children at the refuge. Notes of that visit indicate that C and A made allegations of physical assault by their father, but that these were not substantiated by B's account. The mother's complaint was of emotional and mental abuse. She made an historical allegation that he had raped her and she stated that he had physically abused her, but that this had not happened for some years. In subsequent police interviews (in April and in September) the mother came to make allegations of repeated rape and controlling behaviour.

11. On 23rd April A undertook a formal Achieving Best Evidence ["ABE"] interview with the police in which he made various allegations of physical assault by the father, including the use of a belt.

12. Matters then took a striking turn when, on 30th April, the father filed a statement exhibiting a number of notes and other documents written by the mother which described how she had herself been violent to the children, that she was unable to cope and was unable to control her consumption of alcohol.

13. At his subsequent police interview the father denied the allegations of rape, violence and controlling behaviour. He accepted that during one of A's violent outbursts he had physically intervened.

14. The first hearing before Parker J took place on 7th May 2013 in which the judge heard oral evidence from the mother, father and paternal grandmother. The judge's judgment on that occasion indicates that the background material produced by the father, originating as it did from the mother's own hand, suggested that the father's case that the mother was emotionally very troubled, was borne out. The judge said that the material that had been produced "worries me in the extreme, particularly the mother's reference to drinking, Alcoholics Anonymous and being physically out of control with regard to the children". The case was thus one in which allegations flowed in both directions.

15. Having heard the mother's oral evidence with regard to the father's behaviour and, in particular, his use of a belt on the children, the judge was plainly unimpressed with her credibility and stated "I thought that the mother's evidence with regard to the belting was all over the shop to put it bluntly as to what actually she said had happened and what precisely she knew". The judge was, however, plainly impressed with the "quite excellent" paternal grandmother who the judge described as being "true as steel, stout as oak".

16. As a result of this, her first encounter with this case, the judge developed a very clear strategy as to the way forward. Whilst expressing concerns that the mother's presentation, and the children's allegations, might indicate that the children had become "recruited children", in the sense that they had fallen in with their mother's view of matters, the judge was prepared to accept, for the moment, that these matters were as a result of her troubled emotions and

were not deliberate acts. The judge therefore ordered that the two younger children should be made available for contact with their father each Saturday during the day, but that all such contact should be supervised by the paternal grandmother and a paternal aunt. A was free to attend contact with his father and brothers should he desire. The judge fixed a further hearing for the end of June.

17. Three days later, on 10th May, the mother made a without notice application to stay the contact order. Fortunately it was possible for the father and his legal team to attend court on that hearing before Parker J, who, having heard the matter, dismissed the mother's application. It is apparent that, again, the judge heard oral evidence from the mother on that occasion. The judge records the mother as saying that she was not relying on her serious allegations of domestic violence against herself and the children in opposing contact, but upon the need for the family to "heal" from the difficult marriage and marital circumstances and for the children to repair their relationship as siblings before contact could take place. The judge expressed great concern about what she perceived as the mother's shifting stance in the proceedings, which did not demonstrate a solidly-founded mindset upon which the court could place any confidence. The mother's application for a stay was founded upon A refusing point blank to attend any contact with the father and the younger children being said to be visibly upset and awake all night after being told of the proposal for contact. The judge on this second hearing expressed herself as having far more cause for concern as to the extent to which the children had been drawn into adult concerns and adult perceptions. The judge considered that the mother's "havering and wavering about what her case actually is" supported her view that a firm grip was needed to be taken on contact before there was further opportunity for matters to deteriorate. The judge therefore repeated that she expected contact to take place in accordance with the order.

18. On 28th June all three children were interviewed by police and made allegations of violence against their father.

19. The judge had directed the local authority to provide a report pursuant to Children Act 1989, s 37. In that report, which is dated 26th July, the local authority recommended that no contact with the children's father should take place "for the time being".

20. At the end of September, and again in a revised document one week later, the mother filed a detailed schedule of allegations. That second (revised) document raised, for the first time during the court process, allegations of rape "on numerous occasions" from l992 onwards.

21. At this stage the father filed additional material including video, audio and photographic evidence which included a film apparently taken by A of a violent assault by C on B. It was apparent that the father was not present in the house and the children were in the care of the mother, who, apparently, can be seen ineffectually attempting to stop the assault and then leaving the room. This material was viewed by Parker J during a hearing on 29th October. That hearing, which had been intended to be a substantial fact finding process, was thwarted in two respects. Firstly, sadly, the mother's father had died some five days earlier and she was not available to attend for all of the three or four day trial. Secondly, as a result of a failure by the police to respond to orders for disclosure, the court did not have access to key police records. The case was therefore adjourned part heard. However, at this hearing the court again heard evidence from the mother, father and paternal grandmother. In a short judgment given on 30th October the judge concluded that the risk of the children being put

under pressure by the mother was very high in the light of the mother's inability (apparently demonstrated in the witness box) to restrain herself in airing what she says about the father, including allegations of rape, in the children's presence. The judge concluded that professionally supervised contact was not in the children's interests, as there was a high risk that the children would understand that they should behave badly at contact so that this behaviour would be seen by the contact supervisors.

22. Although the judge was plain that the fact finding process was not concluded, and that she kept an open mind, she was struck by the fact that the two younger children had not made assertions of being belted by their father until after the judge herself had made her adverse comments relating to the mother's oral evidence at the May hearing. The judge seriously entertained the view that the younger children may well have sought to provide corroboration for the allegations that were being made by picking up from the mother's conversation, either directly with them or by overhearing what she said to A, what the issues in the case were. The judge therefore considered that contact should be reinstated to the father as soon as possible for the younger two children. The judge was clear that, because of A's alliance with his mother, he should not attend those contact visits, but could, if he wished, have supervised contact with the father. The matter was set down to conclude the fact finding process at a two day hearing on 19th December.

23. Between the October and December hearings contact took place, but not without incident. It is not necessary to spell out the details, but in consequence of the difficulties on 4th December the father applied to enforce the contact order and applied for a residence order with respect to the two younger boys.

24. The fact finding hearing concluded on 19th and 20th December with judgment being given on Monday 23rd December. On the first day of the hearing the court ordered that B and C should stay overnight that night with the father. During their stay the two boys received a text message on their mobile phone from their elder brother A encouraging them to disrupt their time with the father. Part of the message read "fight, break stuff and argue to get out of this situation…you know what to do to get out of this situation…if you don't act [F] will have custody of you after tomorrow. Good luck. Break, destroy and burn."

25. At the conclusion of the hearing on 23rd December the judge made an immediate order transferring residence of the two younger boys to the father and making a residence order for A to the paternal grandmother. It is against those orders that the mother now seeks permission to appeal.

The basis of the appeal

26. The grounds of appeal contain twenty-four specific criticisms of the process adopted by the judge in support of an overall assertion that the mother did not receive a fair trial. At an earlier stage in this appeal process I described the grounds of appeal as lacking focus and adopting a scattergun approach. Fortunately the revised skeleton argument distils the proposed appeal down to seven distinct basic points as follows:

i) The judge reached a premature adjudication on the issues of fact prior to hearing all of the evidence and in a manner which clouded her judgment as further evidence became available.

ii) In her conduct of the hearing the judge unfairly limited the witnesses that the mother was permitted to call, and drastically curtailed the ability of her counsel to adduce evidence from

her client in chief and to cross-examine the other witnesses.

iii) On the morning of the second day of the hearing (20th December), being the night after the two younger boys had stayed with their father, the judge conducted interviews with the boys. The judge was in error in holding those interviews at that stage in the process and unfairly relied upon material that she gleaned during that process.

iv) The judge failed to give adequate reasons for the conclusions to which she came.

v) The court should have granted the mother's early application for the instruction of a psychologist. In proceeding without an expert opinion, the judge fell into the trap of making her own psychologically based evaluation upon which she founded her decision to change the residence of the children.

vi) The decision to make an immediate change of residence on 23rd December was peremptory and was not justified on any basis.

vii) Finally, six specific examples of unfair process are relied upon.

27. In making her oral submissions to this court Mrs Crowley has helpfully distilled the mother's arguments yet further under two headings namely:

(a) The judicial interviews with the children

(b) Process

(a) Judicial interviews

28. On the morning of the second day of the December hearing the judge conducted two judicial meetings with the children, firstly with the younger two and secondly with A. Depending on the circumstances of any given case, a judge may see a child for a variety of purposes. Such purposes are, however, likely to fall under one or both of two heads, namely providing an opportunity for the young person to say anything that they wish to say to the judge and, secondly, providing an opportunity for the judge to explain the process being undertaken by the court and to otherwise enhance the young person's understanding of, and feeling of engagement with, the court proceedings. Judges are encouraged to adhere to the guidelines issued under the authority of the President of the Family Division by the Family Justice Council (*Guidelines for Judges Meeting Children who are Subject to Family Proceedings* (April 2010) [2010] 2 FLR 1872). The guidelines make it plain that a judicial meeting is not for the purposes of gathering evidence:

"It cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence. That is the responsibility of the CAFCASS officer. The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her"

29. It is clear that the meeting with the judge occurred in consequence of the judge's conclusion that such a meeting was likely to be beneficial, rather than arising out of any request from any of the children. The judge indicated both at the October hearing and on the first day of the December hearing that she considered a meeting with the children was likely to be useful. Mrs Crowley submits, and the transcript supports her, that the meeting arose

from a desire on the part of the judge to inform the children of the process and of the orders that might be made, rather than to ascertain their wishes and feelings, which were well recorded. On 19th December the judge told the parties that she perceived a need to be open with the children and to "put her cards on the table" at that stage of the process.

30. The judicial interviews were conducted entirely in accordance with the guidelines. The judge saw the boys in the court room, albeit no doubt in an informal configuration, so that the encounters were recorded and have been transcribed. She was accompanied by her usher, her clerk and the Children's Guardian. First of all the judge saw the two younger boys together. In addition to hearing the boys give a short account of their wishes and feelings, and their reaction to spending the previous night in the father's home, the judge used the encounter to describe the possibility that the court might order a change of residence and her expectation that the young people, as would be the case with the adult parties, would co-operate with her decision and abide by it. The boys were plain in stating that they did not want to go to live with their father. During the second interview with A the judge adopted an approach which was commensurate with his age and sought to explain to him that he was not "the man of the family" and that it was the grown ups who had to take responsibility for the arrangement of the affairs of the children.

31. Mrs Crowley accepts that it is permissible for a judge to hold a meeting with children at any stage in proceedings, but in this case she submits that the judge was in error in doing so before she had determined the outcome of the fact finding process. In choosing the morning after the first overnight stay the judge became drawn into eliciting the children's views on that issue. Mrs Crowley did, however, accept that her argument on the timing of the interview was to some degree linked with her submission that, by that stage, the judge had come to a premature conclusion on the factual allegations. If, as is submitted, the judge had largely concluded her factual investigation by the morning of the final day of the hearing, the potential for the judicial interview to contaminate the process would be reduced.

(b) Unfair Process

32. The range of detailed points about the judge's conduct of the proceedings all, to a greater or lesser extent, come back to the central submission that the judge formed a premature conclusion on the factual material which was adverse to the mother's case. That the judge had formed a preliminary view by, at the latest, the end of the October hearing, seems clear. In the light of that view, and conscious of the very tight timetable within which the December hearing had to be completed (given that the judgment was in fact handed down on the first day of the vacation), the judge may have been justified in excluding certain matters entirely from consideration in oral evidence, limiting the witnesses and the time available for cross-examination. On this point Mrs Crowley's core submission is that the judge was wrong to use the early adverse view she had formed of the mother's evidence to determine the allegations that had been made by each of the three children and to do so without a proper evaluation of the primary material that only became available to the court at the December hearing. That primary material comprised of the disclosure that was received from the police, including, importantly, the records of the various interviews undertaken by the children and the parents together with a DVD recording of A's ABE interview. In particular, a point is made concerning the judge's assumption that the younger boys only made allegations of physical assault by their father after Parker J had made adverse observations about the mother's credibility at the May hearing. That assumption was shown to be erroneous with respect to C on disclosure by the police on the eve of the December hearing of a note of the interview with him undertaken by the police on 16th April. Mrs Crowley submits that the

judge simply failed to engage with this new material and did not refer to it in the judgment.

33. In this respect Mrs Crowley is correct. At paragraph 63 of her December judgment the judge deals with the issue in this manner:

"I have thought very hard, notwithstanding the evidence that I have heard about good contact, whether there could have been incidents when the father had taken a belt to the children, whose behaviour was, as I have said, seriously out of control at this time. But as a result of the combination of the timing; the older boy's assertions; the fact that the children were taken to the police station, as they must have been, in order to make this disclosure; the fact that I had made comments in my judgment only weeks previously about the lack of any assertion by the boys; I have come to the conclusion that I cannot place any reliance on these allegations. Also, the mother's case about what she knew at the time has been markedly unreliable and inconsistent. She cannot possibly have not known about beatings at the time had they happened."

34. It can be seen that the judge's understanding of the timing of the boy's allegations, coming after her adverse comments in the May judgment, is but one of the factors relied upon by the judge. It must also be borne in mind that the interview with the boys at the police station on 16th April, whilst happening prior to Parker J's observations, took place within 24 hours of DJ Hodges indicating that the presumption would be for direct contact to take place.

35. In her skeleton argument in response to this application, Miss Pamela Scriven QC for the father submits that the premium now placed upon ensuring judicial continuity in these cases is partly justified by the fact that it is beneficial for a judge, over the course of successive hearings, to form a developing view of the evidence as it unfolds. I entirely agree with that submission, and Mrs Crowley does not seriously dispute it. It is, in my view, wholly artificial to regard one part of the series of hearings conducted in front of Parker J to be, in some manner, a free-standing, fact finding hearing in which the judge must ignore any previous views she had developed as a result of evidence heard on prior occasions. In a case such as this, where, fortunately, judicial continuity had been largely maintained, the proceedings before the judge, at successive hearings, should be regarded as one single process. Before the start of the December hearings this judge had heard the mother give oral evidence on three previous occasions. At the December hearing she received the material that had been disclosed by the police and watched A's ABE interview.

36. In her judgment the judge rejected the allegations that were made by the mother having expressly referred, once again, to the "marked inconsistencies" in the mother's accounts. With respect to A's ABE interview the judge observed that his demeanour was "quite remarkably flat" with no sense at all of any emotional engagement. The judge observed that "there was every sense of giving an account which had been repeated, perhaps in his own mind, on many occasions, rather than being any form of spontaneous recall". That description is not challenged within this appeal and we have not been invited to view the ABE interview ourselves. The judge concluded that the father may very well have been over-rough with A on one particular occasion, but she observed the difficulties in dealing with a child whose behaviour is physically very challenging.

37. The judge reviewed the evidence relating to allegations made by the boys more generally, and, in particular, about being hit by the father with a belt. I have already set out the judge's conclusion on this point which is at paragraph 63 of her judgment. The reasons given by the

judge, save for her misunderstanding as to the timing of the first allegations made by the younger boys, is supported by the evidence to which she refers and the conclusion to which she came was plainly open to her on that evidence.

38. Once it is established, as I consider it is, that the judge was entitled to form a preliminary view of the veracity of the mother's core case following hearing her oral evidence at the two hearings in May, I consider that the criticisms of the robust case management that the judge undoubtedly deployed in December must fall away.

39. Two further points merit consideration, namely the judge's approach to the need, or otherwise, to instruct an expert and her decision to make an order changing the boys' residence with immediate effect.

Instruction of an expert

40. Given the extreme behaviour displayed on occasions by A and given the striking content of the mother's own handwritten notes reflecting on her own behaviour and emotional stability, the question of whether or not the assistance of a child and adolescent psychiatrist or psychologist inevitably arose for consideration. On the first day of the hearing in December the judge indicated that an expert of a particularly high calibre was required. She indicated that she had a particular expert in mind, but, on the second day of the hearing the judge reported that she had made enquiries which had ascertained that that particular expert was not available to take this case on. The judge therefore concluded that no other expert should be considered and the case would proceed without additional expert involvement.

41. That sequence of events had initially been one of the grounds of appeal. However, matters have moved on and subsequent to the December hearing A's behaviour has further deteriorated to the extent that he has now been removed from his grandmother's home and placed in local authority foster care. In February the judge was persuaded to instruct the team lead by Dr Eia Asen at the Anna Freud Centre to conduct an assessment of this family. Although any appeal on the question of whether or not an expert should be instructed therefore falls away, Mrs Crowley criticises the judge's approach to this matter, on the one hand considering that only an expert of high calibre should be instructed but, on the other, taking it upon herself to assess the situation. She submits that as indicating that the judge went outside the boundary of her judicial role in developing an analysis of the family dynamics which, wrongly it is submitted, supported the decision to make an immediate change of residence.

42. Although I understand the argument as is so clearly put by Mrs Crowley, I do not consider that the judge's approach to this matter is open to that criticism. The residence arrangements that are currently in place are plainly interim arrangements pending the further assessment by Dr Asen and the further consideration of the court. Given that the judge was required to make findings of fact in December, and given that those findings were so adverse to the mother, the question naturally arose as to whether the children could be emotionally "safe" if they continued in their mother's care after those adverse findings had been made. The judge having concluded that the allegations made by the boys were not grounded in reality, it was necessary to consider other explanations to explain the fact that the boys had nevertheless said what they had said to the police. Of the limited range of alternative explanations available, the judge's conclusion, at that stage of this ongoing process, that the allegations in some manner arose out of a dysfunctional relationship with the mother is not, in my view, seriously open to challenge.

Immediate change of residence

43. Neither the social worker nor the Children's Guardian supported an immediate change of residence. In justifying her conclusion in favour of an immediate change of residence, the judge explained her reasons for disagreeing with these two professionals as follows:

"72. The social worker, JW, who is warm, caring and committed, urges me to leave the children living with the mother because that is what they say they want. Until I enforced contact she was also saying that there should be no contact, because that is what the boys say they want. The proof of that pudding has been very much in the eating, on present showing. I have more than once stressed in this case, as in others, that the word used in the Children Act about wishes and feelings is "ascertainable" and not "expressed". "Ascertainable" often means that the Court has to look at actions rather than words. The ascertainable wishes and feelings of these boys have been demonstrated by the evidence that they are more than happy to be with their father. I suspect they may feel some relief being out of the maelstrom. Their grandmother is calm and robust.

73. The Children's Guardian also urged me to do nothing and not to intervene because of what the boys say they are not willing to see their father. She has done remarkably little as a Guardian. She has not read most of the papers, she hardly knows the boys. When it was put to her that if this was a case of parental manipulation and recruitment, then this could be or would be emotionally abusive to the boys, she took that on board seemingly, or at least superficially, but then said, "But the boys say they don't want to go." She was reminded that they were fine when they went on contact. "Oh," she said, "but the boys don't want to go."

44. At paragraphs 74 to 76 the judge then set out her conclusions:

"74. I regard parental manipulation of children, of which I distressingly see an enormous amount, as exceptionally harmful. It distorts the relationship of the child not only with the parent but with the outside world. Children who are suborned into flouting court orders are given extremely damaging messages about the extent to which authority can be disregarded and given the impression that compliance with adult expectations is optional. Bearing in mind the documented history of this mother's inability to control these children, their relationship with one another and wholly inappropriate empowerment, it strikes me as highly damaging in this case. I am disappointed that the professionals in this case are unable truly to understand this message. The recent decision of the Court of Appeal, Re M (Children) [2013] EWCA Civ 1147 requires to be read by all practitioners in this field. Lady Justice Macur gave firm and clear guidance about the importance of contact. Parents who obstruct a relationship with the other parent are inflicting untold damage on their children and it is, in my view, about time that professionals truly understood this.

75. I am in no doubt that I am entitled to disagree with the view of both the Guardian and the social worker, both of whom, although expressing their own views forcefully, recognise that the decision is for me, having surveyed all the facts and depending upon the findings that I make. I disagree with them because they have not taken into account the degree of parental manipulation and the dangers presented to the younger children from the inappropriate power given to the eldest boy. I am in no doubt that the mother's track record is such that she cannot safely have unsupervised contact to her two younger boys at the moment. Much though I would like to give these boys a Christmas as they want it, or as they believe they want it, it is unsafe for them to spend Christmas Day with their mother and her family. Quite apart from

anything else, the mother accepts that the two younger children should spend Christmas with the father and his family. They should be told that that is now the parental agreed plan.

76. I am in no doubt that the boys must remain living with their father until this case can be looked at again. I see no chance of any significant change to divert me from that view. I am not inclined to bring this matter back before the circuit judge in January, when I am away, unless there is some emergency which needs to be dealt with. There does need to be some form of further investigation. I am not at the moment persuaded, particularly because an expert of proper calibre has not been identified, that there needs to be any form of psychological assessment. That simply detracts from the judicial role and, after all, it is not experts who make findings and decisions; it is the Court. I would like to see how things settle down."

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

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

47. Permission to appeal was therefore refused on 14th April 2014 for the reasons that I have now explained.

48. Before concluding this judgment I would stress that this case for this family is still ongoing. The judge's determination establishes the arrangements for the interim period during which a high level multi-disciplinary assessment is to be conducted. The final outcome of that assessment and of the proceedings is unknown. Nothing that I have said in this judgment should indicate any view whatsoever as to how matters should proceed in the future. Not only would it be wrong for me to express such a view, I do not in fact hold any such view. I anticipate that both parents readily accept that, for whatever reason or reasons, their relationship with each other and their children's experience of that relationship is rightly described as dysfunctional and, given A's behaviour, potentially damaging for each of their sons. I would therefore encourage both of the parents to commit themselves fully to the assessment process which is now underway.

Lord Justice Davis
49. I agree.

Lord Justice Tomlinson
50. I also agree.