Neutral Citation Number: **[2015] EWCA Civ 389**
Case No: B4/2014/2622

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BRISTOL COUNTY COURT
HIS HONOUR JUDGE WILDBLOOD QC
PL12P01463

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/04/2015

Before :

PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE BLACK
and
LORD JUSTICE VOS

RE H-B (CONTACT)

Ms Sarah Evans (Pro Bono) for the **Appellant**
Ms Ceri White (**Direct Access**) for the **1st Respondent**
Ms Kathryn Skellorn QC & **Ms Jessica Wood** (instructed by **Pardoes Solicitors LLP**) for the **2nd Respondent**
Ms Abigail Bond (instructed by **Wollen Michelmore**) for the **3rd Respondent**

Hearing date: 31st March 2015

Judgment

BLACK LJ:

1. This is an appeal from orders made by HHJ Wildblood on 9 July 2014 in relation to two girls, J (who has this month turned 16) and K (who is 14). Judge Wildblood refused the application for direct contact made by the girls' father ("the father"). He made provision for the father to send cards or letters to the girls once every two months and ordered that he should be kept informed about all major matters relating to their welfare. He was to be provided with school reports and permitted to visit the children's school at times when they were not present. The judge also made an order under section 91(14) of the Children Act 1989 ("the Children Act") prohibiting any further applications by the father for child arrangements orders under section 8 of the Children Act until, in J's case, her 18th birthday and, in K's case, 31 July 2017.

2. It is the father who appeals to this court. His appeal is opposed by the mother and both girls. At the time of the July 2014 hearing before Judge Wildblood, the father was in person,

but he now has the benefit of counsel who acts pro bono, as is so often the case these days, and to whom we are grateful for this generous provision of her services and her effective submissions. All other parties have had the benefit of counsel in the normal way throughout. For some time now, J has been instructing her own solicitor. K also does so for the purposes of this appeal but when the case was before Judge Wildblood in July 2014, she was still represented through her children's guardian. Counsel for the girls have had a delicate task and it was clear that they have gone about it with the greatest care. They conveyed the girls' views very clearly to the court.

Section 8 orders in relation to children who have attained 16 years of age

3. Before describing the circumstances of this case, I should make one preliminary point. Now that J is 16, she is in a different position with regard to section 8 orders. Although a child arrangements order can be made with regard to a child up to the age of 18, section 9(6) of the Children Act provides that no court is to make a section 8 order which is to have effect for a period which will end after the child has reached the age of 16 unless it is satisfied that the circumstances of the case are exceptional. A section 8 order made in respect of a child who is younger than 16, ceases to have effect when the child reaches 16 "unless it is to have effect beyond that age by virtue of section 9(6)", see section 91(10) of the Children Act. It follows that any order that Judge Wildblood made would have had a very limited period to run unless the circumstances of the case were considered to be exceptional.

The relevant law and the ambit of the appeal

4. It is not suggested that the judge misstated or ignored the law. The father's complaint is that he failed to take the steps that should have been taken in accordance with it and in the light of the factors that were relevant to his determination. Accordingly, the appeal turns on the particular facts of this case and I do not therefore propose to rehearse the legal background. In *Re W (Direct Contact)* [2012] EWCA Civ 999 at §35 et seq, this court summarised the relevant case law and highlighted the governing principles. Nothing that I say here is intended to alter the existing law.

5. The father was acting in person at the time he began his appeal and he lodged far reaching grounds of appeal. Granting permission for the appeal, Ryder LJ took a narrower view of the case. That no doubt contributed to the provision by counsel of revised grounds of appeal which are much more focussed. They proceed upon the basis that the girls have not been informed of certain findings of fact made by the court in 2010 and have been allowed to persist in the false belief that the father has behaved in a sexually inappropriate manner towards them. The central criticism made of the judge in the grounds is that he failed to order that an expert be instructed to advise and assist him as to how to inform the children of the findings and to ensure that they were informed in the hope that this would enable progress to be made with contact. In counsel's skeleton argument for this court, and in oral argument, it was also submitted that there were other ways to achieve progress which the judge should have pursued. There was also criticism of the court's handling of the case prior to the July 2014 hearing, concentrating particularly on the period up to Judge Wildblood taking over the case in 2010.

The factual situation

6. The parents met in 1993 and were together for 10 years. Following their separation, the children lived with the mother and had contact with the father. From 2005 until June 2008, they used to stay with the father on alternate weekends and he was involved in doing some of the school runs. In June 2008, however, there was an incident which proved to be of

considerable significance.

7. The father had remarried in February 2008. Whilst the children were staying with him and his new wife (W) on the weekend of 7/8 June 2008, there was trouble between J and W. Because of its importance, I will set out what happened in the terms agreed by the parties as an accurate description of the event:

"On 8 June 2008, while J and K were visiting for a contact visit, an incident occurred in which W was angry with J and behaved inappropriately towards her, grabbing her and pushing her down on the sofa, in a manner which was likely to be, and indeed was, frightening for J – then aged 9. This caused superficial injury to J - bruising to the right arm and chest wall ….the father failed to intervene effectively to prevent the incident. When giving his statement to the police on 16 June 2008, the father did not give a full and frank account of the incident and minimised the seriousness of it."

8. The incident prompted an application by the mother, on 19 June 2008, for a residence order in her favour and for the suspension of contact. The father responded by seeking contact.

9. Before the end of the year, there was an initial assessment by children's services and a report was provided by a CAFCASS officer. There were by now a number of allegations about the father's conduct in relation to the girls, particularly in relation to him bombarding them with telephone calls at times and about his behaviour when he encountered them at a school bonfire event. The plan was for there to be a fact finding hearing in February 2009 but it was to be limited to ascertaining what happened on 8 June 2008 (see the order of HHJ Tyzack QC of 10 December 2008). As the CAFCASS officer reported that the girls were saying that they did not want to see the father, he did not pursue contact in the interim. Judge Tyzack joined the girls as parties to the proceedings.

10. At the hearing in February 2009, which took place in front of HHJ Neligan, the description of the June incident which I have set out above was agreed and directions were given for the further conduct of the litigation. Provision was made for the joint instruction of Dr Gay, a consultant child and adolescent psychiatrist.

11. Dr Gay reported at the end of April 2009. He had found the girls to have quite exaggerated negative responses about the father and his family. He recommended counselling for J to help her deal with the aftermath of the events of the summer of 2008. He advised that both children needed contact with the father but that direct contact should take a backseat for a while.

12. CAFCASS reported on 1 July 2009 that the girls' views about contact had, if anything, hardened. The father had maintained indirect contact with them over the past year but they would not look at his letters. The CAFCASS officer found it hard to see how there could be any movement with contact until the children had therapy and began to unravel some of the hurt, confusion and conflict they were feeling. The officer advised that the father should continue with indirect contact pending any recommendation from the children's therapist.

13. When the case came before Judge Tyzack on 3 July 2009, the parties all agreed that J, and later also K, should have therapy with an identified therapist as a matter of urgency. The judge suggested that the father should write a letter to the girls apologising for the events of 8

June 2008 and he did. However, the letter was not forwarded to the girls because the father had put that he was sorry "that you feel I let you down" and would not accept advice to amend this to an apology "that I let you down". Judge Wildblood said of this in his 2010 judgment (§111) that it was "unwise, intransigent and insensitive" of the father to dig his heels in about the precise wording. The mother attracted criticism from Judge Wildblood for her conduct at around this time as well. She refused to accept assistance from CAFCASS or the family support worker and the judge said that "it was even more unwise, intransigent and insensitive for [the mother] to dig her heels in by refusing to work with CAFCASS" (§111 ibid).

14. Therapy began in September 2009. There were eight sessions. The process came to an abrupt halt in February 2010 following the children making allegations against their father during a therapy session. These included allegations by J of sexual abuse. Judge Wildblood said (§130 ibid) that it was important to put this therapy session in context; it took place against the background of intense hostility between the parents over the preceding months.

15. The matter was referred to the local authority and the police. The girls were interviewed. The local authority began a core assessment which appears ultimately to have concluded that the mother was the source of the girls' allegations.

16. At a directions hearing before Judge Neligan in June 2010, a full hearing was set up to take place before Judge Wildblood in October 2010. The father then issued an application for permission to instruct Dr Weir to advise on how to make progress with contact. Judge Wildblood instead directed that Dr Gay should file a further report.

17. Dr Gay provided his second report in August 2010. He recommended the continuation of therapy for the girls. The children's guardian also filed a report in August 2010. She too recommended therapy and advised that any progression of contact should be on the advice of the therapist. She advised that there should be no more court hearings for a period to give the girls the best opportunity for the therapy to be successful as soon as possible.

18. Judge Wildblood did not follow the recommendation of the guardian because it would have meant therapy continuing without the factual basis for it having been resolved (§167 ibid). He pointed out that it can be highly damaging for children to receive therapy on the basis that allegations are true when they are not. He gave directions for a fact finding hearing to take place before him in December 2010.

The December 2010 hearing

19. The parents and a number of other witnesses gave evidence at the December 2010 hearing. The witnesses included Dr Gay, the social worker who had prepared the core assessment report, and the therapist. The judge gave a comprehensive judgment setting out the history and making findings of fact.

20. A great deal of detail can be found in the judgment; it is unnecessary to rehearse it here and I will simply extract some points, setting them down in roughly chronological order as the judge did. A convenient table of findings can be found at §210 and §211 of the December 2010 judgment. In summary, the judge rejected as untrue or exaggerated much of what the mother alleged against the father, as well as the allegations made by the girls. However he did criticise the father for acting unwisely in a number of respects.

21. The judge was critical of the father's "insensitivity and lack of wisdom" in his approach to the impact on J of the events of 8 June 2008. He considered that the father's failure to apologise to her for what happened was bound to affect her attitude to him, and had plainly done so (ibid §52). He found that the father had bombarded the girls with telephone calls in the autumn of 2008 which was "insensitive and unwise" (§71).

22. Although the breakdown in contact dated from the 8 June 2008 incident, the judge seems to have accepted that there was support for the mother's evidence that there was difficulty between the father and J (but not K) before that (December 2010 judgment §37). However, he rejected the mother's allegation that the father had behaved inappropriately to the girls before then, including thumping them on a routine basis (see, for example, §60).

23. He rejected the account given by the mother and the girls of the meeting at the school bonfire party in November 2008 as "highly exaggerated and, in a number of respects, untrue" (§76, and see §91) and found their response to the "very modest incident" (§87) to be "disproportionate" (§82). The judge found that the father had acted unwisely in a number of respects in relation to this incident, but was not "heavily critical" of him given the circumstances (§82).

24. In October 2009, there was an incident when the parents encountered each other whilst driving their cars, K being with the mother in hers. The mother's account of this was found by the judge to be exaggerated and largely untrue and he rejected her evidence that the father had used an obscene gesture, blocked her way and followed her to harass her (§117). However, the judge did find that it was insensitive and unwise of the father to have turned his car round and approached the mother's car as he did, when he should simply have driven on (§124).

25. In December 2009, an issue arose over a holiday to America on which the mother wished to take the girls. The father's stance in relation to an issue over passports in connection with this was described by the judge as "plainly unwise and unreasonable" but the context was that "both parties were behaving with ridiculous hostility to each other" (§128).

26. The judge set out and analysed at considerable length the evidence concerning the sexual and other allegations made by the children in the therapy session in February 2010 and thereafter. He found there was no truth in them. At §212 et seq, the judge considered why the false allegations may have been made. Of the various possible explanations, he favoured the "development of an environment and culture within the mother's household, in which false and exaggerated allegations were expressed, discussed and allowed to develop and magnify in her mind and in the minds of the children", influenced by a number of factors, including the poor relationship between J and the father, the mother's over-protective and over-anxious care of the children, and the strong emotional alignment of the mother and the children (§215 and §222). He also found that the mother herself had deliberately voiced untrue allegations against the father (§223).

27. The judge said that in view of his findings, the case was "very complex" (§224). It is apparent from the concluding paragraphs of his December 2010 judgment that he was aware of the damage that had been done to the children and the need to proceed carefully in an attempt to rectify it because, he said, "[u]nravelling the past 2 ½ years (i.e. since 8 June 2008) will now be a very complex exercise". He was unwilling to act without hearing from the guardian and said that he would be "very surprised if anything could be achieved without

very skilled expert advice". He therefore listed the case for further directions after Christmas and a further hearing of importance took place in September 2011.

The September 2011 hearing

28. All parties were represented at the September 2011 hearing. The court had new evidence in the form of a report on the father from an adult psychiatrist (who had not found any relevant problems with him), a further report from Dr Gay (whose report and oral evidence were to the effect that direct contact could not be ordered immediately but that there needed to be progress towards it and there should be child-centred therapy for the girls), further reports and oral evidence from the guardian (offering not dissimilar advice), letters from the girls to the judge explaining their wish not to see the father, and an email from the mother's therapist who said she was progressing well. The parents themselves gave evidence and there was evidence from the father's second wife (from whom he was now separated) and his mother.

29. The hearing proceeded upon the basis that the girls did not yet know of the findings made as a result of the December 2010 hearing. Dr Gay considered that the timing of the disclosure of the findings to them would have to be consistent with their progress in therapy. He considered that the girls needed to know that their underlying beliefs about the father's conduct had been found to be untrue but thought abrupt disclosure of the conclusions of the fact finding judgment to them would be detrimental to them (§41 September 2011 judgment). He thought indirect contact was an important way forward. It would be part of a process in which the contents of the judgment were revealed to them and past issues were addressed, leading, he hoped, to direct contact in the longer term.

30. The judge made further findings adverse to the father, namely that:

i) in breach of an assurance to the court that he would not write to the girls, he sent them postcards which included the words "see you soon", knowing that what he was writing would be perceived as invasive and wrong by the mother and the children; and

ii) he harassed and distressed the mother by removing money from an account which he knew had come from child benefit to which the mother was entitled.

The judge said that in his actions in relation to the child benefit, the father "behaved with a startling lack of wisdom and with disregard for how his actions would affect the mother" (§105 ibid).

31. The judge concluded that the girls were entrenched in their opposition to the father and his family. He considered that they have a fundamental need to know both of their parents and their extended families and were highly likely to suffer long term emotional harm if their relationships with their father and his family were not restored (§132 ibid). However, he did not see how direct contact could take place until they understood that the allegations they made against the father had been rejected by the court as false (§131). He took the view that if they were forced to have contact immediately, it would be highly likely to cause long term harm to their trust in adults, including their mother, and the court and would be likely to eradicate any chance of consensual contact in the future (§132).

32. The judge's order was preceded by a recital that it was agreed that the children would undertake therapy with an agreed therapist starting in December 2011. The therapy was said

to be to assist them in "understanding their life experiences and the trauma they have suffered and to assist in enabling them to manage direct contact as in their interests". It was recorded that at an appropriate time during the therapy, the therapist would "discuss with the girls the outcome of the finding of fact hearing". No direct contact was ordered; there was to be indirect contact in the form of a monthly letter or card from the father to the girls and presents for them at Christmas and birthdays. The father was to receive school reports and the mother was to keep the father informed every six months about the girls. As for the proceedings, they were to come to an end, as the guardian and Dr Gay had advised, but the judge made clear that the case could be brought back before him by means of a fresh application.

33. It can be seen from the judgment that the judge was extremely disappointed not to have found a way to secure direct contact. In reaching his conclusion, he had considered all the available options, ranging from simply ordering contact to take place to more sophisticated options such as therapy, a family assistance order, and contact restarting through visits with the paternal family. The final paragraphs of the judgment should have left the whole family in no doubt that the judge remained intent that contact would be re-established between the girls and the father and his family, even if he had had to resign himself to the impossibility of achieving that as things stood. His final paragraph of his judgment set out his expectation that the mother would write to the paternal grandmother in due course explaining what progress had been made in therapy and setting out proposals for her to see the girls or explaining why she could not do so.

After the September 2011 judgment

34. Therapy for the girls did not commence until March 2012. The judge said that the reasons for the delay in getting started were "feeble" (September 2013 judgment §24). It ended again in May 2012 after only four sessions. The girls were said to be reluctant to attend and the therapists considered that they had no mandate to work with them any longer. A report was provided by the therapists dated 26 June 2012 which signalled that the process had ended. In November 2012, after a period of time trying to sort out public funding for representation, the father restored the matter to court by making an application for contact with both children. Directions were given in mid January 2013 and at intervals thereafter.

35. The substantive hearing of the father's application was scheduled for 9 September 2013. In the intervening months, there were a number of hearings before Judge Wildblood which addressed a variety of issues. They included an application by the mother to take the children on holiday abroad and an application to change J's school. The question of expert evidence was raised but no one, it seems, pursued an application for there to be further assessment of the children's situation or for an expert (or anyone else) to be instructed to inform the children of the findings of fact made in December 2010. The children were again made parties to the litigation but had a new guardian, who had to meet them and familiarise herself with the case, and there was an issue as to whether the children should have their own representation, separately from the guardian.

36. The father did not attend the 9 September 2013 hearing. Prior to it, he had told the court that he wished for an adjournment in order to pursue public funding. The judge refused that and said that he must attend but he failed to do so. Notwithstanding his absence, it is plain from the judgment of 9 September 2013 that Judge Wildblood applied himself to the issues in the case with the utmost care and attention. He concluded once again, in line with the advice of the new guardian, that there should be only indirect contact between the father and the children every two months. He did so having directed himself in terms that left no doubt that

he continued to have in mind the relevant case law. He proceeded on the basis that the children would be damaged by not knowing their father and that there must be "exceptional circumstances, supported by compelling reasons" before a court concludes that it is in the interests of a child to have no direct contact with a parent (September 2013 judgment, inter alia at §44).

37. The judge was critical of both parents. He commented that both of them had "behaved in ways that are destructive to the prospects of contact". He said that some of the father's behaviour had been "startlingly unwise" (§48 ibid), that he lacked understanding and sensitivity and did not fall within the category of the "unimpeachable father" found in some of the authorities (§64(5)). He spoke of a lack of effective maternal support for direct contact and a failure on the part of the mother properly to support the therapy (§64(4) and (7)). Condemning both parents, he said:

"these parents are simply not able to organise themselves responsibly in relation to the father's contact and they bear the burden of knowing that, between them, they have destroyed the relationship between these children and the father and his family." (§70 ibid)

38. The judge set out twelve reasons why he had very reluctantly concluded that direct contact could not be ordered (§64). In short, he considered that the girls were now entrenched in their fierce hostility towards the father and his family. Everything had been tried and there were no further suggestions from any quarter as to how progress could be made. He took the view that, after such lengthy litigation, the girls needed to know that the controversy was at an end and be permitted to pursue their education without constantly being the subject of proceedings (§66).

Following the 9 September 2013 decision

39. The father filed a notice of appeal to this court against the decision of 9 September 2013. The proposed appeal was ultimately withdrawn, with guidance from Ryder LJ, on the basis that the father would make an application to Judge Wildblood for the determination made in his absence to be set aside. That application was made but, pursuing a suggestion of Ryder LJ's that a specialist mediator might be able to help, the proceedings were adjourned for mediation. There were multiple hearings due to the difficulty in setting up the mediation and agreeing the identity of the mediator but ultimately a very experienced mediator was instructed. She was unable to assist the parties to reach a solution. There came a point when she thought that the father accepted that the girls did not want to hear from him but, if he ever had accepted this, he did not continue to accept it. Everyone agreed that the whole issue of contact should be revisited at a substantive hearing. That hearing took place in July 2014 and led to the orders that the father now seeks to appeal.

40. The judge commenced his judgment by laying the blame for the lack of progress towards restoring contact at the doors of both parents. He said:

"2. ....The guardian in this case describes the conduct of both parents towards their children in relation to the issues before me as 'inexcusable'. In my opinion that adjective is at least apposite and is, if anything, unduly mild.

3. This case represents one of the most abject failures of parental responsibility by two otherwise intelligent parents that I can remember in 34 years as a family lawyer. In my opinion the mess that these parents have made of their shared responsibility for their children

is a disgrace. I predict that it will only be in later life that the manifestations of what these parents have done to their children will become apparent as the children struggle to function as adults following the skewed childhood that their parents have both chosen to give them."

41. The father accepted no fault at all in respect of the continuing lack of contact. Nothing had changed in his attitude and approach since the previous judgments, the judge said (§6).

42. As for the mother, in the judge's view, she had been a destructive influence and was now standing back and saying that the children did not want to see their father (§10).

43. The children, for their part, were now resolutely hostile to any form of contact (§11). The judge proceeded on the basis that no effective work had been done with them to alter the mistaken perception that they held about their father's conduct in the past and that the mistaken perception had become "an ingrained feature of the children's understanding" (§13).

44. The judge said that as the proceedings had continued:

"the family dynamics have merely become more destructive and undisciplined, leaving parents and children now polarised into two ring fenced and opposing camps in which false images of the other camp abound" ("15).

45. The guardian opposed any direct contact order, whilst supporting some continuing indirect contact, and proposed that further applications by the father should be restricted by an order under section 91(14) of the Children Act. J was by now separately represented, but the guardian conveyed to the court K's wish, and need, for the proceedings to come to an end.

46. The judge reaffirmed the twelve reasons why he had found in September 2013 that contact could not take place, adding to the list the failure of mediation. He clearly considered whether it would be feasible just to order direct contact but rejected the idea because it would be futile, positively damaging to the children, and against all the professional opinion that had been advanced over the many years of the litigation. The reasons for refusing the application for direct contact were, in his view, overwhelming. Applying the established guidelines in *Re P (Section 91(14) Guidelines – Residence and Religious Heritage)* [1999] 2 FLR 583, he made an order under section 91(14) because he considered that otherwise the father would try to keep the litigation going, as he had said in evidence that he would, which would be very damaging to the girls.

The appeal

47. The primary focus of the grounds of appeal is the failure to inform the girls of the findings of fact made in December 2010, particularly the rejection of the allegation that the father had behaved inappropriately in a sexual way towards them. In the grounds, the judge is criticised for not ordering the appointment of a suitably qualified expert to advise and assist him to ensure the children were informed and the mother is criticised for failing to inform the children herself. By implication, the judge is criticised for bringing the proceedings to an end prematurely when further steps to achieve contact were possible and should have been taken, and thereby breaching the article 8 rights of the children and the father. The making of the section 91(14) order is said to be wrong in the circumstances.

48. The skeleton argument filed on behalf of the father ranged wider in its criticism,

including the submission that this is "a cautionary tale of inaction, prevarication and abdication of responsibility on the part of the family justice system as a whole". Counsel for the father, Ms Evans developed this theme in oral argument. She sought to liken this case to that of *Re A (Intractable Contact Dispute: Human Rights Violations)* [2013] EWCA Civ 1104 [2014] 1 FLR 1185, arguing that there were, amongst other things, too many hearings, too many judges involved, too much delay, and an absence of strategy and robust action. I will not go through the detail of all of the criticisms that she made but I will give some examples. She submitted that the court failed to recognise at an early stage that the case was one of implacable hostility on the part of the mother and to act robustly to deal with it, making a contact order and enforcing it. There was no need for a fact finding hearing following the June 2008 incident, she argued, and if contact had simply been ordered, things may have been different. Another example related to the ending of the court proceedings when therapy was agreed upon for the purpose of informing the children of the findings. The right course would have been, in her submission, for the judge to have kept control of the process. A further example was that the judge should have involved a different expert who would have had particular expertise in dealing with the issues in the case, rather than relying on the guardians and Dr Gay. In Ms Evans' submission, it was irrelevant that the father had not asked the court to take some of the steps which she now argued should have been taken; the court had the power, and the duty, to act of its own motion.

49. It is in the light of these criticisms that I set out the history of this case in some detail earlier in this judgment. In my view, it does not support counsel's characterisation of events as a "tale of inaction, prevarication and abdication of responsibility" and I do not accept that this case is in the same category as *Re A.*

50. Certainly it is true that the proceedings have been protracted; this is because the problem within the family has been intractable. Judge Wildblood found that *both* parents had contributed to it. It was the unfortunate incident on the weekend of 8 June 2008 that brought to an end contact which had been functioning satisfactorily until then. The father must bear some responsibility for how he dealt with the aftermath of that event and it cannot be said that from its inception this was simply a case of an obdurate mother impeding contact. Other conduct of the father's in the relatively early stages (and later on) was also open to criticism as can be seen from what Judge Wildblood said about it. There was, however, undoubtedly a significant problem with the mother's attitude to the father/contact and this was recognised quite early on (see, for example, the initial assessment of social services and the CAFCASS officer's 2008 report) and can be seen clearly described in Judge Wildblood's judgments.

51. The management of the case was not, in my view, obviously flawed in these early stages, or indeed later on. It is typical of cases such as this that there may be more than one way to handle things. It is vital not to look back, with the arrogance of hindsight, and criticise a judge for failing to proceed in one way rather than another unless it really is very plain that he or she should have known to make different decisions. I cannot agree that a fact finding hearing was clearly unnecessary in relation to the June 2008 incident or that it would have been obviously right to proceed immediately to make and enforce a contact order. The decision having been made that there should be a fact finding hearing, one was arranged, there were assessments by social services and CAFCASS, and the hearing took place in February 2009. Expert help from Dr Gay was sought promptly thereafter and contact was shelved whilst his recommendation of therapy was pursued. The recital to the July 2009 order shows that all parties were agreed on the therapy route. It foundered when allegations were made in the February 2010 session. This was not expected and not the fault of the family

justice system.

52. Following the February 2010 allegations, the focus shifted, necessarily, to investigating them. Further advice was also sought from Dr Gay who provided his second report in August 2010. There followed the comprehensive fact finding hearing before Judge Wildblood in December 2010. From that point on, it was Judge Wildblood who dealt with the case on virtually every occasion so there was almost complete judicial continuity. In so far as there was not judicial continuity in the earlier stages of the proceedings, it has not been demonstrated to me that that made any difference to the outcome of the case.

53. Judge Wildblood directed himself impeccably at all times as to the law. At all times, he recognised the need for direct contact and the harm that would be done to the girls if it could not be secured and, right up to the end, he was plainly intent on securing it if he could. However, he also rightly recognised the complexity of the case and the need to proceed with caution so sought further expert advice. As at all stages in the proceedings, so following the December 2010 hearing, he had the advice of CAFCASS, by now in the person of the children's guardian. In August 2011, Dr Gay provided a third report. Once again, the recommended course was therapy and in September 2011, the parties agreed that it would take place. It was on the advice of Dr Gay and the guardian, in the interests of the girls, that the proceedings were brought to an end at that point. This was a decision which was well within the range of decisions that it was open to Judge Wildblood to make and he was clear that the case could be restored to court if need be.

54. After a delay, not of the court's making, the therapy commenced in March 2012, ending in May 2012. There was then a gap of around six months before the father restored the matter to court by applying again for contact and further directions were given from January 2013 onwards. There were various applications and issues to deal with in the period prior to the 9 September 2013 hearing. That hearing produced a careful judgment, notwithstanding the father's absence. There was a relatively short diversion to the Court of Appeal at the father's behest, before the matter returned to Judge Wildblood and mediation was tried unsuccessfully. That takes us to the July 2014 hearing.

55. To my mind, what all of this shows is an attempt by the court, using the assistance of CAFCASS and other appropriate experts such as Dr Gay, therapists and a mediator, to establish contact in the face of difficulties. There was no lack of strategy; the problem was that plans which were entirely suitable in prospect did not work out in practice. It is clear from the judge's judgments that many possible ways to resolve matters were considered. By the time of the July 2014 hearing, the girls (now teenagers) remained committed to there being no contact and no one had any more suggestions to offer the judge as to how to proceed. It may appear, looking back, as if there were times when the court process could have proceeded with greater despatch or when a different judge might possibly have chosen a different course, but it is very difficult to criticise when one was not there and did not experience the practical problems or have to deal with the recurrent ancillary applications. In short, I see nothing in the chronology of these proceedings that would lead me to criticise the way in which the legal system has handled the case. This is not a situation, as in *Re A*, where there have been wholesale failings which necessitate the case starting all over again. The appeal can only proceed therefore as a challenge to the decisions made by Judge Wildblood in July 2014.

56. I turn therefore to the father's complaint as to the court's handling of the girls' ignorance

of the findings with regard to their allegations. It is quite wrong to suggest that the judge did nothing about this. It seems that the idea of the mother telling the children was ruled out as inappropriate (see the guardian's report of March 2013 §84 at E67). Dr Gay's advice at the time of the September 2011 hearing was that the timing of the disclosure to the girls of the findings would have to be consistent with their progress in therapy and that an abrupt disclosure would be detrimental to them (§41 of the 2011 judgment). Therapy followed but foundered and it was not until the beginning of 2013 that the contact issue was brought back to court.

57. The father's argument that the judge should then have sought expert assistance with this issue is inevitably weakened considerably by the fact that he did not suggest this to the judge. The court orders of 15 January 2013, 28 January 2013 and 21 February 2013 show that the issue of the instruction of an expert was live but the father never pursued an application to do so. Nobody appears to have suggested trying therapy for a third time, or indeed made any practical proposal at any point thereafter as to how the girls should be informed.

58. In his July 2014 judgment, the judge was very much alive to the children's mistaken perceptions and that they had now gone on for at least six years and were an ingrained feature of their understanding. There was still no suggestion of any way to address this. I do not think it fair to criticise the judge for not devising a way to unblock the impasse himself. Given his experience of all that had been attempted so far and his clear understanding of the issues in the case, he was entitled, in my view, to proceed upon the basis that everything that was practical had been tried and, indeed, to conclude that the children, given their age and stage in life, required a release from the perpetual litigation that had dogged their childhoods.

59. Counsel for the father suggested various routes that should, she said, have been considered. I will take these in turn:

i) *The making of wardship orders*

I do not see how this would improve the chances of informing the girls of the truth or assist in any other way on the facts of this case. The problem is not one of a lack of legal framework or powers on the part of the court but a practical, human problem which has not been solved by the experts so far involved and would be no more likely to be solved in the context of wardship than in the context of the Children Act.

ii) *Remitting the case to the Family Division Liaison judge who could direct the appointment of a very senior and experienced officer from CAFCASS and a named child psychiatrist*

Although I have great faith in those to whom reference is made, this case has already had input from an experienced and careful judge who has been assisted by expert advice of various sorts and it would be inappropriate, in my judgment, to override his assessment that the time has come to draw a line under the proceedings and naïve to think that another team would have more success.

iii) *Direct contact with the paternal family with a view to it leading to the re-establishment of contact with the father*

The judge considered this carefully in September 2011. The children's views were negative about the paternal grandmother, although the judge considered her to be a loving

grandmother and she wished to see them. However, the judge concluded that the difficulties were insurmountable at that time (see for example §134 and §136 of the September 2011 judgment). His parting words in that judgment expressed his expectation that the mother would address the grandmother's situation. He said that the grandmother would need to consider whether to apply for permission to seek contact formally if there was no success. As far as I am aware, no such application was made and I do not think that the possibility of contact starting through the grandmother was raised at the July 2014 hearing.

iv) *Contact order (or more accurately its child arrangements equivalent)*

No one ever advised the judge just to make a contact order. The professional advice was unanimous in recommending that a gentler approach was called for. The judge himself did however consider whether he should 'just do it' but considered that it would be futile and positively damaging (§35 of the July 2014 judgment). That was a view that he was entitled to take.

v) *A residence order*

This was never sought and never recommended by any of the professionals involved. It would not be something that the judge would attempt of his own motion, in the circumstances of this case. With children of the age of J and K, like an order for contact, it would be a high risk strategy and almost certainly doomed to fail if they did not agree with it.

60. The judge made no mistake in his understanding of the law which it is obvious he had well in mind at all stages of his involvement with these proceedings. The order that he made in relation to contact and his order under section 91(14) were open to him in accordance with that law and nothing that has been said in argument has persuaded me that he was erred in proceeding as he did. We have not had the great advantage that he had of a long acquaintance with the matter and with the people involved. It would be quite wrong to interfere with his careful evaluation of the prospects of establishing direct contact and of what would now serve the best interests of the girls. I would therefore dismiss this appeal.

61. Sometimes, family cases present problems that regrettably the courts cannot solve despite all their endeavours and this is one such case. It is very sad to see children being avoidably harmed by what is going on in their own family. Like Judge Wildblood, I have no doubt that J and K *have* been harmed by the events of the last 6 and a half years. It is not just the lack of contact with their father and their wider paternal family that is damaging, although it is beyond question that it is. The whole atmosphere in which they have been living will have harmed them as well and their lives must have been dominated by the protracted litigation between their parents.

62. These parents would do well to read the postscript added by McFarlane LJ to his judgment in *Re W (Direct Contact)* (supra), talking about the duties and responsibilities of parenthood in this situation, as would all other parents attempting to sort out arrangements for their child in the aftermath of their own separation. The fact that the courts cannot solve the problems presented by a case such as this one does not mean that they are insoluble. The solution so often lies in the hands of the parents. In this particular case, whatever the rights and wrongs in the past, the parent who is likely now to be able to influence things for the better is the mother. The girls have a close relationship with her and, if she changes her tune, there is a very good chance that they will listen. She owes it to them to try. She also owes it

to herself to try because if she does not help the girls to gain a more accurate picture of their father and to make contact with him and his family again, it may have consequences for their relationship with her sooner or later.

63. It has become apparent from the girls' dealings with their legal representatives for the purposes of this appeal that each in fact does know, to a greater or lesser extent, about the result of the fact finding hearing back in 2010. Both apparently maintain their firm opposition to contact nevertheless. However, it may be that this appeal has begun a process that will lead ultimately to a fuller and more accurate appreciation of what has occurred and what each member of the family can offer the girls.

VOS LJ:

64. I entirely agree with the judgment of Black LJ. I only add a few words of my own because the unfortunate outcome of this case is that J and K will be deprived of any direct contact with their father in the immediate future.

65. It is well established that it is in the best interests of all children that, save in exceptional circumstances, they should have direct contact with the parent with whom they are not living. J and K are no exception to this principle. Indeed, as Black LJ has pointed out, the judge thought that they were likely to suffer long term emotional harm if their relationships with their father and his family were not restored.

66. On that premise, I was surprised that counsel for the mother submitted that this court should refuse an order for direct contact with the father on the grounds that J and K would not attend any such contact in compliance with such an order. It is part of the mother's parental responsibility to do all in her power to persuade her children to develop good relationships with their father, because that is in their best interests. It is quite unacceptable for the mother to accept, let alone promote, J and K's apparently entrenched opposition to contact with the father and his family. I very much hope that the mother will, once she has digested the judgments of this court, change her approach; that would, I am sure, go a long way towards ameliorating the emotional harm that J and K are suffering or will otherwise suffer.

PRESIDENT OF THE FAMILY DIVISION:

67. I agree with everything said by my Lady and my Lord. I add some words of my own because of the importance of the matter, in particular for these parents and most of all for J and K.

68. There are occasions, though I hope that the introduction in 2014 of the Child Arrangements Programme will make this increasingly a thing of the past, when a parent can truly say that they have been failed by the family justice system. Shaming examples include *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam)**,** [2004] 1 FLR 1226, and *Re A (Intractable Contact Dispute: Human Rights Violations)* [2013] EWCA Civ 1104, [2014] 1 FLR 1185. This is not such a case. With all respect to those who might seek to contend otherwise, the stark truth is that responsibility for the deeply saddening and deeply worrying situation in which J and K now find themselves is shared by their parents and by no-one else.

69. My Lady has already set out the words which His Honour Judge Wildblood QC used in his judgment, but they bear repetition:

"The guardian in this case describes the conduct of both parents towards their children in relation to the issues before me as 'inexcusable'. In my opinion that adjective is at least apposite and is, if anything, unduly mild.

This case represents one of the most abject failures of parental responsibility by two otherwise intelligent parents that I can remember in 34 years as a family lawyer. In my opinion the mess that these parents have made of their shared responsibility for their children is a disgrace."

That such language can be used, and in my judgment justifiably used, by a judge of this experience and, if I may say so, a judge not known for extravagance of language, is striking. *Both* parents need to ponder long and hard.

70. They also need to consider very carefully – *both* of them – the judge's next words:

"I predict that it will only be in later life that the manifestations of what these parents have done to their children will become apparent as the children struggle to function as adults following the skewed childhood that their parents have both chosen to give them."

This is a matter to which I must return. For the moment I confine myself to this. I very much hope that Judge Wildblood's prediction does not become reality. But I very much fear that unless their parents, *the mother in particular*, take urgent steps to improve things, this will indeed be the future for J and K. It is a future which does not bear thinking about.

71. Judge Wildblood referred to 'parental responsibility'. It is a legal phrase, defined in section 3(1) of the Children Act 1989:

"all the rights, *duties*, powers, *responsibilities* and authority which by law a parent of a child has in relation to the child and his property". (emphasis added)

Too often, warring parents focus on their "rights" whilst overlooking or minimising their "duties" and "responsibilities". As McFarlane LJ pointed out in *Re W (Direct Contact)* [2012] EWCA Civ 999, [2013] 1 FLR 494, para 47, "The phrase under consideration is not 'parental rights' but 'parental responsibility'." He went on, and I entirely agree:

"where two parents share parental responsibility, it will be the duty of one parent to ensure that the rights of the other parent are respected, and vice versa, for the benefit of the child."

He returned to the point (para 74):

"along with the rights, powers and authority of a parent, come duties and responsibilities which must be discharged in a manner which respects similarly-held rights, powers, duties and responsibilities of the other parent".

72. However, and I wish to emphasise this, parental responsibility is more, much more, than a mere lawyer's concept or a principle of law. It is a fundamentally important reflection of the realities of the human condition, of the very essence of the relationship of parent and child.

Parental responsibility exists outside and anterior to the law. Parental responsibility involves duties owed by the parent not just to the court. First and foremost, and even more importantly, parental responsibility involves duties owed by each parent to the child.

73. Deriving from this, another aspect of parental responsibility, rightly emphasised by McFarlane LJ (paras 74, 76), is that:

"it is the parents, rather than the court or more generally the State, who are the primary decision makers and actors for determining and delivering the upbringing that the welfare of their child requires … the courts are entitled to look to each parent to use their best endeavours to deliver what their child needs, hard or burdensome or downright tough though that may be. The statute places the primary responsibility for delivering a good outcome for a child upon each of his or her parents, rather than upon the courts or some other agency."

I agree with every word of that.

74. In relation to contact, McFarlane LJ said this (paras 77-78):

"77 Where there are significant difficulties in the way of establishing safe and beneficial contact, the parents share the primary responsibility of addressing those difficulties so that, in time, and maybe with outside help, the child can benefit from being in a full relationship with each parent … the only interests that either parent should have … in mind [are] those of each of their two children.

[78] Parents, both those who have primary care and those who seek to spend time with their child, have a responsibility to do their best to meet their child's needs in relation to the provision of contact, just as they do in every other regard. It is not, at face value, acceptable for a parent to shirk that responsibility and simply to say 'no' to reasonable strategies designed to improve the situation in this regard."

Nor, I should add, is it acceptable for a parent to shirk their responsibility by sheltering behind the assertion that the child will not do, or even that the child is adamantly opposed to doing, something – and this, I emphasise, is so whatever the age of the child.

75. As McFarlane LJ observed (para 75), the responsibility of being a parent can be tough, it may be 'a very big ask'. But that is what parenting is all about. There are many things which they ought to do that children may not want to do or even refuse to do: going to the dentist, going to visit some 'boring' elderly relative, going to school, doing homework or sitting an examination, the list is endless. The parent's job, exercising all their parental skills, techniques and stratagems – which may include use of both the carrot and the stick and, in the case of the older child, reason and argument –, is to get the child to do what it does not want to do. That the child's refusal cannot as such be a justification for parental failure is clear: after all, children whose education or health is prejudiced by parental shortcomings may be taken away from their parents and put into public care.

76. I appreciate that parenting headstrong or strong-willed teenagers can be particularly taxing, sometimes very tough and exceptionally demanding. And in relation to the parenting of teenagers no judge can safely overlook the teaching of *Gillick v West Norfolk and Wisbech Area Health Authority and anor* [1986] AC 112, in particular the speeches of Lord Fraser of Tullybelton and Lord Scarman. But parental responsibility does not shrivel away, merely

because the child is 14 or even 16, nor does the parental obligation to take all reasonable steps to ensure that a child of that age does what it ought to be doing, and does not do what it ought not to be doing. I accept (see *Cambra v Jones* [2014] EWHC 2264 (Fam), paras 20, 25) that a parent should not resort to brute force in exercising parental responsibility in relation to a fractious teenager. But what one can reasonably demand – not merely as a matter of law but also and much more fundamentally as a matter of natural parental obligation – is that the parent, by argument, persuasion, cajolement, blandishments, inducements, sanctions (for example, 'grounding' or the confiscation of mobile phones, computers or other electronic equipment) or threats falling short of brute force, or by a combination of them, does their level best to ensure compliance. That is what one would expect of a parent whose rebellious teenage child is foolishly refusing to do GCSEs or A-Levels or 'dropping out' into a life of drug-fuelled crime. Why should we expect any less of a parent whose rebellious teenage child is refusing to see her father?

77. I return to the present case. Where did the impasse begin? My Lady has quoted the key finding, but it needs to be emphasised:

"On 8 June 2008, while J and K were visiting for a contact visit, an incident occurred in which [the father's new wife] was angry with J and behaved inappropriately towards her, grabbing her and pushing her down on the sofa, in a manner which was likely to be, and indeed was, frightening for J – then aged 9. This caused superficial injury to J – bruising to the right arm and chest wall …. the father failed to intervene effectively to prevent the incident. When giving his statement to the police on 16 June 2008, the father did not give a full and frank account of the incident and minimised the seriousness of it."

Without wishing in any way to minimise the seriousness of this frightening incident, it needs to be kept in proportion. The parents – both parents – need to ask themselves, honestly, candidly and with soul-searching, how on earth it is that they and their children came from this beginning to find themselves today in the situation described so vividly by Judge Wildblood.

78. I need not repeat what has already been set out by my Lady, but the overall picture is clear. Both parents share the responsibility, putting it plainly, both parents share the blame. Initially, the preponderant blame probably attached to the father. More recently, the preponderant blame attaches to the mother. Overall, the mother is at least as much to blame as the father, on balance probably rather more. Be that as it may, it is quite obvious as matters stand today, when the reality is that neither J nor K has any meaningful relationship with their father, that it is only the mother who is in any position to move matters on.

79. What, then, of the way forward? What is needed of the mother? What do her children need of her? What, indeed, is her parental duty to her children? I suggest the following:

i) Recognition, and at least internal acknowledgement, that, in common with the father, she has failed her children.

ii) Recognition, and at least internal acknowledgement, that the children have already suffered significant harm and, unless something is done, are likely to continue to suffer significant harm for the remainder of their childhood and into adulthood.

iii) Recognition that everything must be done to restore her children's relationship with their

father.

iv) Recognition that, at least initially, the entire responsibility for trying to achieve that rests with her.

80. I urge the parents, the mother in particular, to think very carefully about everything we have said, not only in these judgments but also during the hearing of the appeal, when each of them was present in court. Unless they can, as they must, even at this late stage, sort things out and restore the father's relationship with J and K, the future for all of them is bleak. There will be no winners here; all will be losers.

81. J and K have an image of their father which, however it has come about, is distorted and profoundly damaging to them. But it is unrealistic for anyone, the mother included, to imagine that this state of affairs will continue indefinitely. Sooner or later, and it may be much sooner than the mother believes or would wish, the children will come to discover the full story of their parents' failures. Sooner or later, and it may be much sooner than the mother believes or would wish, the children will demand to see the court papers and to read the judgments. What will they think? How will they react? In particular, what will the children think, how will they react, when they discover, as one day they will, that their father is not the man they currently believe him to be? Will they then turn against their mother? Will they reject both parents? The mother needs to ponder these questions and think hard about what the answers might be.

82. It is simply too dreadful to imagine a future where both parents are estranged from their daughters, where they are cut off from their grandchildren, and where they are left with nothing but regrets and remorse. It is, as I said to them in court, the kind of outcome which haunts me in cases like this. It is a future which does not bear thinking about. It is not yet too late; perhaps this appeal can be the catalyst for change.