IMPORTANT NOTICE

In any published version of this judgment no person other than the advocates or the solicitors instructing them and other person named in this version of the judgment may be identified by name or location. In particular the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Case No: B4/2015/1367

Neutral Citation Number: [2016] EWCA Civ 89

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT SITTING AT WEST LONDON
RECORDER WOOD QC
KT12P00084

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2016

Before :

LORD JUSTICE PATTEN
LADY JUSTICE BLACK
and
MR JUSTICE BAKER

- -

RE D (CHILDREN)

- -
- -

Simon Rowbotham (instructed through the **Northern Circuit Free Representation and Advice Scheme)**) for the **Appellant father**
Francis Wilkinson (instructed through **the Bar Pro Bono Unit**) for the **First Respondent mother**
Jerry Fitzpatrick (instructed by **NYAS**) for the **children by their guardian**

Hearing date : 17th December 2015

- -

Judgment

The Honourable Mr Justice Baker :

1. By a Notice of Appeal dated 24th April 2015, a father seeks permission to appeal against orders made on 3rd April by Miss Recorder Wood QC in long-running proceedings involving his two children, a girl I, now aged 9, and a boy, L, now aged 6. His grounds of appeal principally focus upon the recorder's order that his contact with his children should be supervised and her imposition of an order under section 91(14) Children Act 1989. He also challenges an order that the recorder made as to payment of the costs of an independent social worker who was engaged to supervise his contact visits.

2. By order of Ryder LJ dated 16th June 2015, the application was adjourned to the full Court, with the appeal to follow if permission was granted. The hearing before the full Court took place on 17th December 2015 following which judgment was reserved.

3. The Court was assisted at the hearing by counsel on behalf of the father, mother and guardian representing the children, all of whom appeared pro bono. We are grateful to all of them, and in particular to Mr. Simon Rowbotham who took on the task of re-formulating the arguments on behalf of the father (who had appeared in person before the recorder and had filed the Notice of Appeal and initial skeleton argument) and presented the arguments in support of the application in writing and orally with clarity and thoroughness.

Summary of facts

4. The parties met in 2004 and were married in 2006. I was born on 15th November 2006, and L was born on 17th February 2009. The parties separated in 2010, the father petitioned for divorce in March 2011, and decree nisi was pronounced in June of that year and made absolute the following March. Financial issues were concluded by a consent order in May 2012. Issues concerning the children, however, have been the subject of ongoing proceedings for nearly three years which, save for an initial case management hearing, have been conducted by Miss Recorder Wood.

5. It has been the mother's case throughout these proceedings that she was repeatedly subjected to acts of physical violence by the father during their marriage. The mother alleged that the father had been violent towards her in a series of incidents throughout the marriage dating back to when she was pregnant with I. It was her case that on occasions in the course of arguments he had pushed her, kicked her, thrown her across the room, put his hands round her neck and, on several occasions, trapped her between the door and door frame and then repeatedly slammed the door against her. Some of these assaults had occurred in the presence of the children who had on occasions attempted to intervene to protect their mother. Ultimately, at the beginning of 2012, the mother went to the police and filed a complaint. The father was interviewed, arrested and bailed pending further investigations. One of the conditions of the bail was that he should not return to the family home. He went to live with his own mother in another part of the country and has remained there ever since. In the event, this investigation did not lead to a criminal prosecution.

6. On 3rd January 2012, the mother applied ex-parte to the family proceedings court for a non-molestation and occupation order under the Family Law Act 1996. The magistrates made the orders and transferred the proceedings to the county court. On

27th January, the father issued an application for contact. The matter then came before District Judge Stewart on 13th March 2012 who made an interim order by consent setting out child arrangements, including staying contact on alternate weekends and during the holiday. The Family Law Act application was compromised on the basis of undertakings given by the father.

7. Subsequently, however, the father raised allegations against the maternal grandfather. He asserted that during a family weekend in June 2007, at which the mother, father, grandfather and other members of the mother's family were present, there was a conversation during dinner at which the mother and her sister related an incident in their childhood when the grandfather had behaved in a sexually inappropriate way towards them in the bath. The mother and grandfather strongly denied that any such incident, or conversation, had taken place. A few weeks later, in June 2012, the father alleged that I had told him that the grandfather had exposed himself to her. The father telephoned the mother and reported what he said I had told him. The mother subsequently spoke to I, who told her that her father had kept asking her about grandpa's penis so she had just said that she had seen it once when he was going to the toilet. On 14th June, the mother applied to suspend contact. That application was granted on an ex-parte basis by the district judge. On the following day, the father applied to discharge that ex-parte order and filed an application for a prohibited steps order preventing unsupervised contact between the children and their maternal grandfather. At a subsequent case management hearing, the application was set down for a fact-finding hearing in September 2012 in respect of the mother's allegations against the father of domestic violence and the father's allegations against the maternal grandfather of sexual misconduct and abuse. The substantial number of allegations set out in the original schedule of findings sought by the mother was reduced at the court's direction.

8. At the fact-finding hearing in September 2012, the father substantially denied all the allegations of domestic violence. He reiterated his allegations against the grandfather and gave further details of the conversation which he said had taken place with I in June 2012. He also alleged that the grandfather had admitted the allegation that he showed his penis to I. He further gave evidence that during the conversation in June 2007 (referred to in paragraph 7 above) there had been discussion about the grandfather's heavy use of pornography and the fact that the mother and her sister as children had chanced upon the pornographic material stored in the garage. In cross-examination, however, he accepted that in his statement of arrangements filed with his divorce petition he had not referred to the allegation which he said the mother had made about her father behaving in an inappropriate way towards her when she was a child. Both the mother and the grandfather gave evidence in which they strongly denied these allegations.

9. The recorder found the mother to be a credible, measured and reliable witness who in her evidence had recalled events which she had experienced. She rejected the father's assertion that the mother had set out to lie, fabricate, embellish or sensationalise her evidence. The recorder described the father as being assertive and controlled in his evidence, intent on highlighting what he saw as inconsistencies in the mother's evidence. The recorder did not find him to be a credible witness and concluded that, where his account differed from the mother's, she unhesitatingly preferred the latter.

The recorder further found the maternal grandfather to be an impressive and dignified witness who came across as a kind, caring and loving grandfather.

10. The recorder found all the mother's allegations of domestic violence proved. As for the father's allegations against the grandfather, the recorder completely rejected his evidence concerning the mother's alleged assertion that the grandfather had behaved in a sexually inappropriate way towards her as a child. The recorder concluded that the conversation alleged in 2007 had never happened and that the father had simply invented this allegation. The recorder was satisfied on a balance of probabilities that I had said something about having seen her grandfather's penis to her father. She was not satisfied, however, that it was a spontaneous comment and accepted the mother's account of her conversation with I and concluded that the father had persistently asked I whether she had seen her grandfather's penis. She concluded the father had made these allegations maliciously, knowing that they had absolutely no foundation in truth.

11. In short, the recorder found that the father had (1) committed serious acts of domestic violence upon the mother, some in the presence of the children; (2) fabricated allegations against the grandfather of sexually inappropriate behaviour; (3) attempted to coach I into making allegations against her grandfather and (4) lied concerning all these matters in court. The judgment has never been the subject of any appeal, but the father resolutely refuses to accept the findings. This court of course proceeds on the basis that those findings are true.

12. Following the fact-finding judgment, a risk assessment of the father was carried out by Dr Chris Newman, a psychologist specialising in domestic violence assessment and treatment. In the interim, the mother was directed to make the children available for indirect contact via Skype or telephone three days a week. In his report, Dr. Newman concluded that the father exhibited few of the established static risk factors for domestic violence, other than those reflected in the findings of fact. He reported that the father cooperated during the assessment and was keen to engage with the process. The father did not completely deny that he had been physically aggressive towards the mother and accepted that the fact that this had happened in front of the children was wrong and shameful. On the other hand, Dr. Newman found that the father minimised the extent and impact of his acts of violence and aggression. He exhibited no understanding of, or remorse for, the likely impact of his behaviour on the mother. Dr Newman found the father to hold extremely hostile attitudes towards the mother, saying for example that "the children are being parented by a sociopath". He showed a strong tendency to interpret the mother's actions as deliberately obstructive and aimed at persecuting him. He showed little personal awareness and lacked insight into the motives for his abusive behaviour. Dr Newman reported that the father expressed an intention to use his work contacts in the media to "leverage" contact with his children if he was unable to achieve contact following the next hearing. It was Dr. Newman's assessment that the father had failed to prioritise his children's emotional needs over his own feelings towards the mother. A further concern was that he had been prepared to lie to cause great disruption and emotional hurt within the maternal family. The implied threat that he made to expose the grandfather in the media if he did not see the children immediately also showed a disregard for the potential effects of such actions on his children.

13. Overall, if unsupported contact were to take place, Dr. Newman concluded that, while there was no risk of physical harm to the children, the father posed a moderate risk of committing acts of physical violence to the mother, and a substantial risk of displaying intimidation and verbal aggression towards her. The father told Dr Newman that the risk of further conflict between himself and his former wife was irrelevant to his contact with the children as he envisaged contact arrangements where there would be no need for him to meet her. Dr Newman, however, had strong concerns as to whether such an arrangement could be workable. He noted the finding that the mother had been repeatedly subjected to emotional and psychological abuse by the father often in front of the children. At his interview with Dr Newman, the father said that he had never and would never insult or denigrate the mother while the children were in his care, but he spoke about the mother in what Dr Newman described as a particularly derogatory manner. Dr. Newman concluded that his current level of hostility would require a very skilled, resilient and neutral third party to act as an intermediary between the couple for some considerable time. Unless adequate protective measures were adopted, or unless the father made the necessary personal changes, the children would be at risk of exposure to verbal and physical aggression against the mother in the context of unsupported contact.

14. At the date of the assessment, the father was refusing to take part in any treatment programme. Dr Newman identified a programme run by Relate which at that stage he considered to be appropriate. Dr Newman recommended that, if the father subsequently decided to participate in such a programme, the service provider should be supplied with a detailed outline of the domestic violence concerns. Dr Newman was concerned that, unless such information was made available, there was a danger that the father would present himself to the programme with a greatly minimized version of events.

15. At a telephone hearing on 24th January 2013, the father accepted, as an interim measure, that contact could be supervised as a means of reinstating direct contact. The court directed CAFCASS to provide an expedited report as to professional supervision and set the matter down for a final hearing. That hearing took place in March 2013, following which judgment was handed down on 23rd April 2013. Having accepted Dr. Newman's analysis and recommendations, the recorder made a residence order in favour of the mother; a prohibited steps order preventing the father removing the children from her care, a contact activity direction under s.11B requiring the father to undertake a domestic violence treatment programme provided by Relate, and a further order for indirect contact, including contact via Skype once a week. She refused the father's application for the immediate resumption of direct contact.

16. The CAFCASS officer concluded that the course selected did not meet the requirements because Relate did not provide reports following the completion of the course. It would thus be impossible to discern whether or not the father's attitude and behaviour had changed. The CAFCASS officer identified a course run by an alternative treatment provider, but the father refused to attend and instead started the Relate course. At a further hearing on 30th August 2013, the children were joined as parties to the proceedings and NYAS was invited to accept appointment as their guardian under FPR rule 16.4. In September 2013, the father sent an email to the local authority repeating the allegation against the maternal grandfather that the recorder had dismissed in her fact-finding judgment. No further action was taken by the local

authority. In October 2013, the father completed the Relate course. A short letter was sent to the court simply stating that he had attended for 18 sessions, engaged well and completed the programme. At a further case management hearing on 6th November, the recorder gave directions for a final hearing in January 2014.

17. At the hearing on 9th and 10th January 2014, the father applied for the immediate reintroduction of unsupervised contact. The mother argued that all contact should now cease. The guardian, whose position varied during the course of the hearing, ultimately recommended that the court should order direct supervised contact. In evidence, the father was asked what he had learned from the Relate course. According to the recorder's judgment, dated 10th February 2014, he spoke of having been made aware that the "power dynamic was wrong" and that his position was "diminished". The recorder concluded that he did not regard himself as being responsible for his behaviour during the marriage. She concluded that, whilst the counsellor had indicated that the father had engaged in the counselling process, the process was of limited value since it was likely that the counsellor had not read the fact-finding judgment and had therefore been only partially informed about the extent of the father's behaviour.

18. In the judgment, the recorder accepted that the father did not present a physical risk to the children and that there was no risk of abduction, but remained concerned that the mother would be at risk of physical abuse from the father were an opportunity to arise when they were in close proximity in an uncontrolled setting. The principal risk, however, was that the father would cause emotional harm to the children. The recorder accepted that the children wanted to see their father and had a close bond with both parents, but their wishes had to be balanced against the need to protect them from emotional harm. She therefore concluded contact would have to be professionally supervised by an independent social worker ("ISW"), not only to manage the risks but also to support the mother in her role as the children's carer by ensuring that contact is safe and thereby reducing her anxieties.

19. The order following this hearing dated 10th January 2014 provided that (1) supervised contact was to take place approximately every six weeks; (2) NYAS should file and serve a schedule by 21st March setting out the times and dates of each visit; (3) the identity of the ISW should be agreed between the parties; (4) in default of agreement, each party was to provide details of two ISWs and the court would determine who should be instructed; (5) the ISW should prepare a report on each contact session; (6) NYAS should make available, and the ISW should read, identified judgments and the reports of experts and professionals in the court bundle; (7) the cost of the instruction of the ISW should be borne by the father, the relevant costs being reading time, the cost of supervision, the cost of preparing the sessional reports, and the cost of attending the next hearing if required by any party; (8) the mother should continue to make the children available for contact via Skype once a week; and (9) the matter be listed for a final hearing on the first available date after 7th February 2015, time estimate two days. Case management directions were made for the review hearing. The recorder considered but rejected at that stage an application by the mother for an order under s.91(14) of the Children Act 1989.

20. Following this order, an ISW chosen by the father, Ms Dana Barrett, was accepted by the mother. Unfortunately, as the recorder subsequently described in the judgment now under appeal, the planning of the supervised contact fell short of what she had

envisaged. Ms Barrett did not meet the parties or the children before the first visit. After two sessions of contact, the arrangements broke down in circumstances which were disputed between the parties. A further dispute arose as to an invoice submitted by the ISW which the father claimed was excessive. The matter returned to court for a further case management hearing on 14th November 2014. On this occasion, the recorder made a further order providing for further sessions of contact prior to the review hearing which was fixed for 24th February. She adjourned determination of the issue about the outstanding invoice to the review hearing, but made a further, more specific, order covering payment of the ISW's costs for the subsequent contact sessions.

The hearing and order under appeal

21. The review hearing took place on 25th and 26th February 2015. The court heard evidence from the parents and the guardian. Judgment was reserved and handed down on 3rd April 2015. The recorder accepted supervised contact sessions had been a positive and enjoyable experience for the children. It was plain, as it had been throughout the proceedings, that the children loved their father, enjoyed their contact and wanted to see him. The recorder also found, however, that the father's attitudes and behaviour outside contact were unchanged. He continued to focus on what he perceived as "wrongs" and had lost sight of the children's needs. In the judgment, she recalled Dr Newman's concern that the father was unable to hold the children's best interests in mind when he was angry. She found that, during one Skype contact session on 25th July 2014, after the contact arrangements had broken down, the father had told the children that he would not be seeing them and that this was their mother's fault. In fact, as the recorder found, the responsibility for the break down of the contact arrangements lay with the father. The recorder was shown a number of emails passing between the parties, including one from the father sent in August 2014, at the time of the breakdown in the contact arrangements, in terms which the father accepted had been hostile. His explanation for this email was: "it's tit for tat, she did it to me in 2011, I deliberately did it".

22. At the hearing, the father sought unsupervised contact. He proposed an arrangement whereunder he would be able to let the mother know by email when he could travel to London on a particular weekend, collect the children on a Friday after school and return them to school on a Monday morning. He said he would arrange accommodation where he and the children would be staying at the home of a friend. He was confident that the friend would assist him, although he had not asked him since the previous hearing. The father said that he had moved on from being hostile to the mother and would give undertakings as to his future behaviour during unsupervised contact. The mother argued that supervision remained essential to ensure that the physical and emotional welfare of the children was protected. It was the father's evidence that, having at one stage been in well paid employment, he had been out of work for several years, so that he was unable to pay for any ongoing supervision, although the recorder noted that he was optimistic about getting back into work after the proceedings had come to an end.

23. The mother again asked for an order under section 91(14) of the Children Act. The father said in his closing submissions that, whilst he understood the concept of such an order, and he generally would welcome anything that put an end to such an adversarial process, he was concerned that there were too many loose ends and

unknowns which might mean that leaving the proceedings open even for a temporary period might be more preferable.

24. The guardian supported the mother's proposal that contact should remain supervised. She was concerned the father might remove the children from the mother's care. The guardian said that the children adored their father and that made them very vulnerable. The supervised sessions had provided a safe and contained environment for the children to be with their father and there was a strong warm relationship between the children and their father. But the guardian described him as being "volatile, unpredictable, aggressive, arrogant, undermining and lacking in empathy." She considered that the risks identified by Dr Newman in relation to unsupervised contact were still present. She thought that the children would have to be in their mid-teens before they would have developed sufficient skills to have unsupervised contact with the father. Unfortunately, Ms Barrett, the independent social worker who had supervised contact up to that point, was no longer able to continue. The recorder noted in her judgment that Ms Barrett had carried out her role entirely appropriately and rejected the suggestion made by the father in one email that she had undermined him. As a result of withdrawal, however, it would be necessary for a new supervisor to be identified.

25. The recorder accepted that the contact sessions had been happy, enjoyable and positive experiences for the children. On the other hand, she concluded that none of the risk factors identified in her previous judgment had been ameliorated and they were as real and present as they had been a year previously. She found that the father was not prepared to address any of the mother's genuinely-held anxieties surrounding contact, seeing them instead as part of the battleground. The recorder did not agree with the guardian and the mother that there was a risk the father would abduct the children, or that he was a physical risk to them, although she accepted that the mother was genuinely concerned about these risks. Despite the positive contact reports, the recorder concluded that she was not satisfied that in an unsupervised setting the father would not seek to undermine the mother and the children's relationship with their maternal grandfather. For those reasons, she was satisfied that contact would have to continue to be professionally supervised.

26. The recorder noted the father's case that he could not afford to finance the supervision. His case before the recorder was that, without such funding being available, an order for supervised contact was tantamount to a no contact order. The recorder made clear that she was not making a no contact order because she was of the clear view that that would not be in the children's best interests. She added, however, that it would equally not be in their interest to make an order for unsupervised contact. She thought it possible that the father's case in relation to finances was a tactical one designed to push a court into ordering unsupervised contact. She added:

> "Ultimately, if the father is genuinely saying that supervision can't be afforded, full stop, then unfortunately, indirect contact on Skype will be all that is available to him and the children for the foreseeable future or until such time as his financial situation changes. This will represent a considerable loss to the children but in the circumstances of this case an unavoidable one."

The recorder indicated that she assumed the parties would be able to resolve the issue of the identity of the supervisor by 5th May 2015 and directed the father to inform the mother by that date whether he will be taking up the contact and if so whether it would be three times a year or six times a year. She considered that Skype contact had been beneficial to the children and directed that it should continue on a weekly basis. The father had warned that, in the event that supervised contact was ordered, he would decide to stop the Skype contact. The recorder expressed the hope that this would not happen but added that if this was his choice she would release the mother from her obligation to facilitate it in accordance with the order.

27. The recorder concluded that a section 91(14) order was now in the interests of the children. She noted that the mother in particular needed some respite from the litigation not least so she could focus on her own work. The recorder found that, if the order was made, the mother's general sense of wellbeing would improve and that in turn would benefit the children. In terms of the length of the bar, she noted the guardian's view that contact would have to be supervised until the children were 14 or 15. The recorder thought it impossible to predict how matters might change on the ground for the children and how they might develop over time. She added, however, that it was highly unlikely that the father would ever take proper steps to address the issues identified by Dr Newman. Given the age of the children, the recorder concluded that the period in which no further applications would be permitted without leave of the court should be three years.

28. Finally, noting that the earlier order had provided for the father to pay the costs of the instruction of the independent social worker, and that the father had only paid some of those costs, she directed that he should now pay all of Ms Barrett's cost, the outstanding sum being in the region of £620.

29. Following the hearing, therefore, the recorder made an order which provided inter alia that

    (1) the mother should make the children available for supervised contact with their father on up to six occasions a year to take place during each of the three main school holidays and each half-term holiday;

    (2) each session of supervised contact should be supervised by a suitably qualified person, should last for a minimum period of two hours and a maximum period of eight hours and take place within the London area;

    (3) the supervisor would be responsible for deciding the time, activity, venue and all arrangements in relation to contact;

    (4) neither party should discuss the arrangements for contact with the children until they had been confirmed by the supervisor;

    (5) all email communications passing between the parents and the supervisor in relation to supervised contact should be copied into the supervisor, the mother and the father;

    (6) the supervisor was to be in earshot of all conversations during contact;

(7) the supervisor was to have the up to date registration number of the father's car, home address and mobile number;

(8) the non-molestation and prohibited steps orders were to be observed at all times and in all arrangements;

(9) the mother would provide the father with the CVs and costs of three potential supervisors by 20th April and that the father would select one of the mother's named individuals to supervise contact and inform the mother of his choice by email no later than 5th May;

(10) the father would be responsible for paying all the supervisor's fees;

(11) in the event that the father was not prepared to engage in the process of identifying a supervisor, or indicated an intention not to pay the costs of supervision, or did not take up the contact ordered, or failed to confirm by 5th May that he intended to see the children as provided in the order, the mother would be released from her obligations to make the children available for supervised contact;

(12) the mother should make the children available for Skype contact once a week on a Friday, with detailed provisions as to the mechanisms for this contact taking place;

(13) in the event that the father chose not to take up Skype contact, or that he misses without valid reason three consecutive Skype calls, the mother would be released from her obligation to facilitate Skype contact in accordance with the order;

(14) there should be such other supervised contact as agreed between the parties and reasonable indirect contact by way of cards and presents at appropriate times, including from the paternal family;

(15) pursuant to section 91(14), neither parent should apply for a child arrangements order without the court's leave for a period of 3 years;

(16) that any further applications should be reserved to Miss Recorder Wood QC;

(17) the father should pay the outstanding balance of the ISW's fees.

Grounds of appeal

30. In his Notice of Appeal, the father specified nine grounds of appeal, the principal grounds being that the recorder had been wrong to order that contact should continue to be supervised, and wrong to make the order under s.91(14). He also claimed that the requirement for him to pay the ISW's outstanding costs was wrong.

31. At the hearing on 16th June, Ryder LJ, in adjourning the application for permission to appeal to the full court, observed inter alia:

> "There are nine grounds of appeal, but before turning to those, there is one overwhelming submission made by the father today that may have merit.

> That is that having regard to the fact that he cannot go back before the court without leave for a period of three years and, given the fact that the judge knew he could not afford the supervised contact arrangements when his present charitable funding expires this year, he will be unable to take benefit nor will the children have the benefit of the supervised contact unless there is a further hearing before the court, which is barred by the terms of the order. Furthermore, he submits there appears to be no logical basis for a s.91(14) order for three years given that the supervised contact was intended to lead to something. It may well be that the judge has not carefully thought through what the purpose of supervised contact was intended to be, namely to lead to direct contact at some time in the future."

Ryder LJ then reformulated the grounds of appeal incorporating a tenth ground encompassing the point identified in the passage just cited.

32. Before us, Mr. Rowbotham has sensibly re-shaped the grounds again, abandoning three, leaving the following seven:

(1) The recorder erred in ordering supervised contact, there being no evidence from any of the existing supervised contact sessions to support the requirement of supervision.

(2) The recorder erred in finding that the father undermined the mother in front of the children during the Skype call on 25th July 2014.

(3) The recorder was wrong to order supervised contact when there was evidence that it was not affordable.

(4) The order pursuant to s.91(14) was unjustified.

(5) The recorder, in ordering supervised contact, placed too much weight on one email dated 1st August 2014.

(6) The requirement that the father pay the outstanding ISW costs was wrong and outside her jurisdiction.

(7) There is no logical basis for an order pursuant to s.91(14) for three years given that the supervised contact was intended to lead to something and, upon expiry of his present charitable funding in Easter 2016, neither the children nor the father will be able to take advantage of supervised contact without a further hearing before the court.

33. I shall consider these grounds under three headings: the requirement that contact be supervised; the s.91(14) order; and the order in respect of the ISW's outstanding fees.

34. Before doing so, however, I record that we were told that, following the last order, a new contact supervisor was agreed and instructed, and several supervised contact sessions have taken place, all of which, it is agreed, have been enjoyed by the children.

The requirement that contact be supervised

35. Mr. Rowbotham submitted that any requirement for contact to be supervised must be supported by evidence, and in this case there was no, or no sufficient, evidence to justify long-term supervision. The evidence from all the supervised contact sessions had been uniformly positive. There was no evidence that the father had sought to denigrate the mother or her family during the sessions. Mr. Rowbotham submitted that the recorder had allowed what he described as her suspicions to justify a finding as to the father's future behaviour in circumstances where his behaviour during contact had been exemplary. Furthermore, she had placed excessive weight on the hostile email sent by the father in August 2014, failing to acknowledge that this was one email amongst many passing between the parties during the previous year. She had been too quick to apportion blame to the father for the breakdown of the contact arrangements during 2014. Mr. Rowbotham further criticised the recorder's analysis of the evidence concerning the Skype contact on 25th July in which, as she found, the father had undermined the mother in front of the children by blaming her for the fact that direct contact had broken down. He asserted that the recorder had failed to give sufficient weight to, or analyse properly, inconsistencies in the mother's evidence on this issue. Mr. Rowbotham also submitted that the recorder had placed too much weight on the evidence of the guardian, which he described as "histrionic".

36. In the alternative, Mr. Rowbotham submitted that, even if long-term supervision of contact was justified, there was no evidence to justify the requirement that the supervision be entrusted to a professional. The recorder had failed to explain why such a requirement was necessary. In order to justify the infringement of the father's article 8 rights that professional supervision would involve, the court needed to satisfy itself that a less restrictive alternative would not suffice. In this context, he submitted that a further important factor which ought to have weighed heavily with the court was the father's lack of money. The recorder had been wrong to order professional supervision when the evidence demonstrated that it was not affordable in the long term. The father had managed to obtain support from charitable funding but only until Easter 2016. In those circumstances, the recorder failed to ensure that her order was sustainable. Mr Rowbotham submitted that any child arrangements order that places an unsustainable condition upon which contact is to take place is wrong in principle: *Re M (Contact: Restrictive Order: Supervision)* [1998] 1 FLR 721 per Thorpe LJ. The recorder had been over-influenced by what Mr. Rowbotham characterised as her "hypothesis" that "it is possible that the father's case in relation to his finances is a tactical one". In the absence of a finding to that effect, such a consideration was plainly wrong. The court should therefore have ruled out professional supervision as a sustainable long-term option and gone on to consider alternative forms of supervision. In particular, the recorder should have considered whether to seek assistance from social services or CAFCASS, perhaps under the umbrella of a family assistance order.

37. To my mind, however, Mr. Rowbotham's submissions do not address the principal reason for the recorder's conclusion that contact would have to be supervised for the foreseeable future, namely her earlier very serious findings (which the father refuses to accept) that he had repeatedly committed acts of domestic violence upon the mother, some in the presence of the children, fabricated allegations against the grandfather of sexually inappropriate behaviour, attempted to coach I into making allegations against her grandfather, and lied concerning all these matters in court. In addition, she had in mind Dr. Newman's assessment and recommendations, and her own evaluation in subsequent hearings (which was plainly much more than mere

"suspicions") that there had been no appreciable change in the father's attitudes or behaviour. These factors were more than sufficient to support her conclusion that contact would have to remain professionally supervised for the indefinite future. It does not follow from the fact that nothing untoward had occurred during supervised contact that the father can now be trusted not to behave in a way that causes the children emotional harm if contact is unsupervised.

38. The recorder's analysis of the evidence concerning the hostile email, and the Skype contact on 25th July, and the weight she chose to give to her findings on those issues were plainly matters that fell within her discretion. As for the evidence concerning the funding of supervision and the father's capacity to pay, in my judgment the recorder was entitled in the exercise of her discretion to conclude that there were grounds for thinking that the father would ultimately be able to meet the costs but, if not, the risk of harm from unsupervised contact was sufficiently high to outweigh the benefits of such contact to the children. One advantage of judicial continuity in family proceedings is that a judge develops a deeper understanding of the case and the parties. The recorder was rightly relying on her experience of these proceedings, and in particular her knowledge of the father, in reaching her conclusions.

39. In most cases supervised contact is used as a short-term measure – a stepping stone on the way to unsupervised contact. There are, however, a minority of cases where the risks to the children are such that contact must remain supervised indefinitely. In such cases, an order for indefinite supervision of contact is not wrong in principle and the recorder was entitled to conclude that such a course was warranted on the facts of this case. An appeal against her order that contact should be professionally supervised would therefore have no prospect of success and I would therefore refuse permission to appeal.

The order under s.91(14)

40. S.91(14) of the Children Act provides:

> "On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court."

41. The leading authority on this provision remains the decision of this Court in *Re P (Section 91(14) Guidelines) (Residents and Religious Heritage)* [1999] 2 FLR 573 in which Butler-Sloss LJ at pp592-3 set out the following guidelines (which she stressed were "only guidelines intended to assist and not to replace the wording of the statute"):

> "(1) S.91(14) should be read in conjunction with s.1(1) which makes the welfare of the child the paramount consideration.
>
> (2) The power to restrict applications to the court is discretionary and in the exercise of its discretion the court must weigh in the balance all the relevant circumstances.

(3) An important consideration is that to impose a restriction is a statutory intrusion into the right of a party to bring proceedings before the court and to be heard in matters affecting his/her child.

(4) The power is therefore to be used with great care and sparingly, the exception and not the rule.

(5) It is generally to be seen as a useful weapon of last resort in cases of repeated and unreasonable applications.

(6) In suitable circumstances (and on clear evidence), a court may impose the leave restriction in cases where the welfare of the child requires it, although there is no past history of making unreasonable applications.

(7) In cases under para (6) above, the court will need to be satisfied first that the facts go beyond the commonly encountered need for a time to settle to a regime ordered by the court and the all too common situation where there is animosity between the adults in dispute or between the local authority and the family and secondly that there is a serious risk that, without the imposition of the restriction, the child or the primary carers will be subject to unacceptable strain.

(8) A court may impose the restriction on making applications in the absence of a request from any of the parties, subject, of course, to the rules of natural justice such as an opportunity for the parties to be heard on the point.

(9) A restriction may be imposed with or without limit of time.

(10) The degree of restriction should be proportionate to the harm it is intended to avoid. Therefore the court imposing the restriction should carefully consider the extent of the restriction to be imposed and specify, where appropriate, the type of application to be restrained and the duration of the order.

(11) It would be undesirable in other than the most exceptional cases to make the order ex parte."

42. Further guidance as to the procedure to be adopted when such an order is under consideration was given by Wall LJ in ***Re C (Litigant in Person: Section 91(14) Order)*** [2009] EWCA Civ 674 at paragraph 13:

(1) Ideally, such an application should be made in writing on notice in the normal way….

(2) There will, however, be cases in which the question of a s.91(14) order arises either during or at the end of a hearing. It may arise on the application of one of the parties, or on the court's own initiative. One or more of the parties before the court may be unrepresented.

(3) In the circumstances identified in para (2), the court may make an order under s.91(14). It is, however, of the utmost importance that the

party or parties or other persons affected by the order, particularly if they are in person: (a) understand that such an application is being made, or that consideration is being given to making a s.91(14) order; (b) understand the meaning and effect of such an order, and (c) have a proper opportunity to make submissions to the court….

(4) ….

(5) Where the party affected by a proposed s.91(14) order is in person, it is particularly important that he or she (a) understands the effect of such an order, and (b) is given a proper opportunity to respond to it. This may mean adjourning the application for it to be made in writing and on notice.

(6) Where the parties are both or all in person, there is a powerful obligation on any court minded to make a s.91(14) order to explain to them the course the court is minded to take. This will involve the court telling the parties in ordinary language what a s.91(14) order is, and what effect it has, together with the duration of the order which the court has in mind to impose. Above all, unrepresented parties must be given the opportunity to make any submissions they wish about the making of such an order, and if there is a substantive objection on which a litigant wishes to seek legal advice the court should either normally not make an order; alternatively it can make an order and give the recipient permission to apply to set it aside within a specified time."

43. In the present case, the order made under s.91(14) was in the following terms:

> "Neither the father nor the mother shall make applications for child arrangement orders (section 8 of the Children Act 1989) without the leave of the court until 4 pm on 2nd April 2018."

The recorder's reasons for making the order are set out in paragraph 103 of her judgment:

> "In relation to the s.91(14) order, which of course acts as a filter to any further applications being made, I consider that an order is now in the children's interests. The mother in particular needs some respite from the litigation not least so that she can focus on her work (she is the sole financial provider for the children at present) and life away from the court arena: I find that her general sense of well being will improve and that in turn will benefit the children. In terms of the length of the bar, the guardian thought that the contact would have to be supervised until the children were 14/15. I think it's impossible to predict how matters might change on the ground for these children and how they might develop over time (in terms of any self-protective strategies for coping with the risks of unsupervised contact that I have identified …) Equally I think it highly unlikely that the father will ever take proper steps to address the issues identified by Dr, Newman – but I might be being unduly pessimistic – were he to do so this

could only benefit the children. These are young children and I think on balance the proper period is 3 years."

44. On behalf of the father, Mr. Rowbotham put forward several arguments for seeking permission to appeal the s.91(14) order. First, he submitted that it was wrong to make such an order in circumstances where the father, acting in person before the recorder, had not been made aware of any application prior to the hearing. Secondly, he argued that the recorder's rationale for making the order – that the mother needed respite from litigation and that an improvement in her sense of well-being would benefit the children – was not supported by sufficient evidence and, in any event, not a legitimate use of s.91(14). Mr. Rowbotham submitted that there was simply no evidence for making what he described as a "draconian and overused order". Finally, drawing on the observations of Ryder LJ in listing the application for permission to appeal before this court, he argued that there was no logical basis for an order lasting three years given that the supervised contact was intended to lead to something and, upon the expiry of his present charitable funding in Easter 2016, neither the children nor the father would be able to take advantage of supervised contact without a further hearing before the court.

45. As to his first submission, it is correct that no formal application was made for an order under s.19(14) by either the mother or the guardian. It was, however, raised in the position statement filed on the mother's behalf for the hearing before the recorder which, citing ***Re C*** (supra), reminded the court that, as the father was in person, the fact that the court was minded to consider such an order should be explained to the father at the earliest opportunity and, if necessary, a short adjournment should be granted. Although we do not have a full transcript of the hearing, the judgment recites the father's submissions on this issue which were to the effect that, whilst he understood the concept of a s.91(14) order in broad terms and generally would welcome anything that put an end to such an adversarial process, he was concerned that there were far too many loose ends and unknowns which might mean that leaving the proceedings even for a temporary period might be more preferable. In these circumstances, the course taken by the recorder was in accordance with the guidance given by Wall LJ in ***Re C***. Although no formal application was made, the father plainly understood the meaning and effect of an order, and had an opportunity to make submissions on the issue, which he duly did, identifying arguments for and against the order.

46. When considering the recorder's reasons for making the order, it is again important to note that she had been dealing with the case for several years and had conducted a number of substantive hearings which provided plenty of opportunities to observe the parties and the impact of the proceedings upon them. Mr. Wilkinson drew our attention to comments in two earlier judgments. The first is in paragraph 59 of the judgment of 23rd April 2013:

> "In relation to the mother, I formed the view that she has indeed become worn down and worn out by the whole situation. I think she is truly exasperated by what she regards as the father's approach and absolute refusal to engage in the process …. I find that she is overwhelmed by the father's intransigence and his attitude in general."

The second is in paragraph 41 of the judgment of 10th February 2014:

> "I do not find the father has made the application as a means of continuing the process of violence, intimidation or harassment against the mother. I am, however, clear that these proceedings are extremely stressful for the mother, that her concerns are genuine and that the situation in general terms is hugely pressurising for her."

Given these repeated findings at various points in the long history of these proceedings, the recorder's conclusion that a period of respite would lead to an increase in the mother's sense of well-being which in turn would benefit the children was manifestly one which she was entitled to reach.

47. In submissions to the recorder, counsel for the mother had proposed a 5-year period for the s.91(14) order, and had further invited the court to stipulate that on any application by the father for leave to apply for a s.8 order during that period he should demonstrate that he had fully engaged with a domestic violence perpetrators programme and properly addressed the issues identified by Dr. Newman. The recorder declined to adopt this suggestion, holding instead that the period for the s.91(14) order should be three years and should apply to both parties without further condition. I do not accept Mr. Rowbotham's submission that in taking this course the recorder was acting illogically. As explained above, it was not the recorder's intention that supervised contact should lead to unsupervised contact. The fact that the charitable funding which currently facilitates the supervision of contact may cease before the expiry of the three-year period does not invalidate the recorder's assessment that three years was the appropriate length of time for the s.91(14) order to remain in force. The order is not a complete bar on any applications. If the father has bona fide grounds for making a further application during the three-year period, his remedy is to apply for leave.

48. In my judgment, the recorder's order preventing either party re-applying for a s.8 order without leave for three years was not draconian but, rather, measured, proportionate, and fully justified, given the history of the proceedings and her findings. An appeal against the s.91(14) order would have no prospect of success and I would therefore refuse permission to appeal.

Outstanding invoice

49. Finally, I turn to the issue of the outstanding invoice submitted by Ms Barrett, the ISW, for services in connection with the supervision of contact pursuant to the order of 10th January 2014.

50. By that order, in which she directed the initial six sessions of supervised contact, the recorder ordered that the costs of the instruction of the ISW should be borne by the father, adding ("for the avoidance of doubt") that the relevant costs would cover time spent in reading the relevant documents (identified by her as all the judgments save that as to costs, and the reports of all the professionals and experts in the court bundle); the cost of supervision; the cost of preparing sessional contact reports; and the costs of attending the subsequent review hearing if required by any party. Following that order, Ms Barrett was instructed and a letter of instruction sent by NYAS. As already described, contact duly took place, although the arrangements subsequently broke down. On 7th August 2014, Ms Singleton of NYAS forwarded the ISW's invoice to the father. He replied the following day raising objections to a

number of items on the invoice, and proposing that the sum payable should be reduced by £355. At the hearing on 14th November 2014, the recorder directed that the issue in respect of the outstanding invoice be adjourned to and dealt with at the final hearing. In respect of the two further contact sessions then ordered, the recorder directed that the father was to be responsible for meeting the ISW's costs "which, in relation to these 2 contact sessions only, are to be limited to the supervision of 4 hours of contact (8 hours in total), the ISW's travel time, and 1 hour of contact report writing in respect of each session (total 2 hours)". The recorder further directed that NYAS was to be responsible for invoicing the father in respect of these further costs by 1st December; that the father was to pay the further invoice by 5th December (i.e. in advance of the contact); that upon receipt of the cleared funds NYAS was to inform both parties at once so that contact could take place as directed; and that, if the father failed to comply with the directions as to payment, the mother was to be released from her obligation to make the children available for contact. Following these tightly-drafted directions, a further invoice was duly submitted and paid in advance, and as already described the further contact sessions took place as directed.

51. At the hearing in February 2015, the recorder heard evidence and submissions from the parties (though not from the ISW, who did not give oral evidence at the hearing) on the disputed invoice. She dealt with this issue in the following brief passage towards the end of her judgment at paragraphs 105-6:

> "105. The father has paid some but not all of the costs. In my judgment, he should pay all of Ms Barrett's outstanding fees. Having been invoiced, [the father] took on the role of taxing master (a judge who decides on which costs in a case have been reasonably incurred), he told me he didn't think that Ms Barrett was 'cooking the books' but that in relation to some items she had for example claimed an excessive amount of travel time, or for time spent writing her report. The invoice was rendered in August 2014 in the sum of £812.80, [the father] has paid £197.80. The balance to be paid within 28 days.
>
> 106. I have been told that Ms Barrett made no charge for all the work she undertook in trying to set up the contact on the 28th July 2014. I don't mention that because it affects my decision in the slightest, but I think this reflects on the sort of person Ms Barrett is and why it is especially sad that she has withdrawn from being the supervisor."

52. In his skeleton argument for this hearing, Mr. Rowbotham submitted that the recorder's order that the father should pay the ISW's costs was wrong and outwith her jurisdiction. Unless the ISW fell within the category of expert (which he submitted she did not), the obligation to pay her was purely contractual and therefore only enforceable in the county court. He submitted that the powers conferred by statute on the family court do not include the power to make orders for payment for services by a party to a non-party. In the alternative, he submitted that, even if the family court had such powers, the recorder was wrong to dismiss the father's objections summarily. The concerns raised by the father were legitimate, and in declining to deal with them, the recorder failed to act in a way that was just or proportionate.

53. In reply, Mr. Wilkinson for the mother submitted that the order was no more than enforcement of previous orders; that the court's powers under s.11(7) of the Children

Act 1989 to attach conditions to a s.8 order are broad enough to encompass a requirement to pay the costs of contact supervision, and that, as the order was made at a hearing at which the father was present and where he did not object to such payment, he could not now be heard to say that he should not pay a sum which has been assessed as reasonable by the court. On behalf of the guardian, Mr. Fitzpatrick acknowledged that the recorder did not address the issue of jurisdiction to make the order, but submitted that a prospective appellant should first seek elaboration from the judge as to the jurisdictional basis for the decision. He further submitted that, in all the circumstances, including the fact that she was required by the order of 10th January 2014 to write a report as to each contact session, that the ISW was acting as an expert so that her remuneration fell within the court's jurisdiction under Part 25 of the Family Procedure Rules. He further suggested that the court might think it a "grossly inequitable outcome" if the ISW were out of pocket as a result of the father's non-payment or if NYAS, as a registered charity, felt obliged to reimburse the ISW from its income.

54. I have much sympathy with the recorder having to deal with this comparatively minor issue at the conclusion of another difficult hearing in these long-running proceedings which she has handled adroitly and sensitively. On this occasion, however, I consider that she fell into error. It seems that she was not addressed on the question of jurisdiction and it is not clear from her judgment exactly what jurisdiction she thought she was exercising. Her disapproving reference to the father taking on the role of a taxing master suggests that she proceeded on the basis that he was obliged to pay the invoice without demur. Given the father's conduct throughout the proceedings, her approach was perhaps understandable but in my view mistaken. As the basis on which the ISW was to be remunerated was not precisely specified by the terms of her instruction, the father was entitled to challenge her invoice if he considered it excessive and, unless the dispute can be resolved by some other means, he is entitled to have his challenge judicially determined by a court with jurisdiction rather than summarily dismissed.

55. I reject the submission that the ISW was acting as a court-appointed expert. Although an ISW is capable of acting in that capacity, Ms Barrett was not doing so in this case. Accordingly, any power the family court may have under Part 25 to determine issues as to the payment of experts is irrelevant. S.11(7) of the Children Act provides inter alia that a section 8 order may contain directions about how it is to be carried into effect, impose conditions which must be complied with by any person in whose favour the order is made, or who is a parent of the child concerned, and make such incidental, supplemental or consequential provisions as the court thinks fit. The broad terms of this subsection enable a court to lay down precise and comprehensive terms concerning the payment of costs of supervising contact. That is indeed what the recorder did in her subsequent order of 14th November in which she not only fixed the number of hours for which the ISW could charge but also provided for payment in advance to avoid any further issue arising after the event. The earlier order of 10th January, however, whilst containing a number of details, did not specify precisely the hours to be taken on each item, and therefore left open the possibility of a dispute if the party responsible for paying the costs objected to the number of hours taken by the ISW. Although s.11(7) enables the court, when making an order for contact, to specify conditions as to payment of the costs of supervision, it does not in my

judgment invest the court with jurisdiction to resolve a subsequent dispute about those costs, at least when the dispute is with a non-party.

56. I accept Mr. Rowbotham's submission that the obligation to pay the ISW was contractual, but although this court was shown the letter of instruction, the information contained therein was insufficient to identify with confidence the terms of, or parties to, the contract. I also accept Mr. Rowbotham's submission that the family court's jurisdiction, as defined in s.31A of the Matrimonial and Family Proceedings Act 1984, and schedules 10 and 11 of the Crime and Courts Act 2013, is confined to family proceedings and does not include jurisdiction to resolve any contractual dispute involving a third party. If the contract was between the ISW and the father, such a dispute must be determined under the small claims procedure in the county court, unless resolved by agreement or alternative dispute resolution. In such circumstances, the family court would have no role to play. If, however, the contract was between the ISW and NYAS, then NYAS would be entitled to seek reimbursement from the father within the family court proceedings of sums paid in respect of the invoice by seeking to enforce the terms of the order of 10th January, at which point it would be open to the father to ask the court to reduce the sum payable by him to NYAS on the grounds that it was unreasonably high.

57. Accordingly, on this issue, I would grant permission to appeal and allow the appeal. Pursuant to CPR 52.10(2)(b), I would refer the matter back to the recorder for determination of the following issues: (1) the identity of the parties to, and terms of, the contract for the services of the ISW as contact supervisor pursuant to the order of 10th January 2014; (2) if the contract was between the ISW and NYAS, what order, if any, should be made by way of enforcement of the order, having regard to the father's challenges to the invoice; (3) alternatively, whether the application for enforcement of the order should be stayed pending resolution of any contractual dispute. Given the small sum involved, it would be preferable, if possible, for any contractual claim and any application for enforcement of the order in the family court to be resolved by the same judge. On any view, however, it plainly makes sense for the parties and the ISW to attempt to resolve this issue by some means that avoids any further legal costs.

58. For the reasons explained above, I conclude that none of the other grounds advanced on behalf of the father has any real prospect of success, and, save in respect of the order for payment of the outstanding invoice, I would refuse permission to appeal.

Lady Justice Black

59. I agree.

Lord Justice Patten

60. I also agree.