Neutral Citation Number: [2019] EWHC 237 (Fam)

Case No: 2018/0202

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2019

**Before** :

**MR JUSTICE WILLIAMS**

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**In the matter of H (Childen)**

**(Appeal: Case Management: Part 25 Expert of Treatment)**

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**Ms Laura Briggs** (instructed by **Setfords**) for the **Appellant**
**Mr Lee Young** (instructed by **Taj Solictors**) for the **1st Respondent**
**Ms Melanie De Freitas** (instructed by **Cafcass**) for the **2nd - 4th Respondent**

Hearing dates: 21st January 2019

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# Approved Judgment

I direct that pursuant to FPR 27.9 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE WILLIAMS

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published. 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.

**Mr Justice Williams :**

1. On 29 November 2018, His Honour Judge Levy made an order in case number S016P50045 which concerns three children. The applicant in the proceedings is the children's mother and the respondent is their father. The children are parties to the proceedings and are represented by their Guardian. The mother appeals against the decision of His Honour Judge Levy which is recorded in paragraph 5 of the order headed 'recitals' which reads as follows:

   '*...upon the court, having heard submissions from all parties, determining that the independent social worker and the family psychotherapist are not permitted to give evidence at the final hearing and finding:*

   *(i)…*

   *(ii)*

   *(iii) the evidence of the family psychotherapist is to be admitted as evidence of fact but not evidence of opinion.'*

2. The application which lies behind this appears to be an application for the enforcement and variation of a child arrangements order made on 9 August 2016. The application to vary was issued on 10 January 2017. However on 20 July 2018, the mother also issued an application for a child arrangements order that the children live with her.

3. The hearing on 29 November 2018 was a pre-trial review which had been listed by His Honour Judge Levy on 30 August 2018. At that hearing, the children were made parties and the Cafcass officer was appointed to act as their Guardian. At that hearing the court recorded that:

   '*...upon the court determining that it will be appropriate to hear evidence from the independent social worker and the family psychotherapist...'*

4. On 5 December 2018 the mother issued an appellant's notice seeking permission to appeal against:

   i) paragraph 5 of the order by which the court determined that the independent social worker and the family psychotherapist are not required to give evidence and that the evidence of the family psychotherapist be admitted as evidence of fact but not evidence of opinion, and

   ii) paragraph 7 of the order which listed the matter for final hearing before Her Honour Judge Miller QC on 29 January 2019 and which limited the witnesses at the final hearing to be the parents and the Guardian.

5. The grounds of appeal contain five grounds as follows:

   i) The learned judge was wrong to treat the hearing before him as a pre-trial review when he was not to be the trial judge. This amounts to a serious procedural irregularity. (FPR rule 30.12 (3)(a) and (B)).

ii) The learned judge's decision that the family psychotherapist is a witness of fact and not a witness of opinion (and expert) was wrong (FPR rule 30.12 (3)(a)).

iii) Alternatively to Ground Two, the learned judge's decision that the family psychotherapist is a witness of fact and not a witness of opinion (and expert) amounted to a serious procedural irregularity as their evidence and integrity had not yet been tested in court and this decision was premature (FPR rule 30.12 (3)(B)).

iv) The learned judge was wrong to determine that the family psychotherapist had gone beyond the remit of their instructions, and certainly to the extent that it precluded the court from considering their professional opinion (FPR rule 30.12 (a))

v) The learned judge was wrong to order that the family psychotherapist shall not attend the final hearing to give evidence where the first respondent father challenges their evidence, or otherwise this amounted to a serious procedural irregularity. (FPR rule 30.12 (3)(a) and (B)).

6. On 7 December 2018, Mrs Justice Knowles dealt with the application for permission to appeal on paper. Mrs Justice Knowles listed the appeal for a permission hearing with appeal to follow immediately thereafter if permission was granted. The hearing was listed in that way because of the need for a decision on the appeal to be available in time for the final hearing listed before Her Honour Judge Miller QC, which was listed to commence on 29 January 2019. Mrs Justice Knowles gave directions on the appeal including for the transcript of the judgment of His Honour Judge Levy to be expedited and approved as soon as possible.

The Basis of the Appeal

7. A skeleton argument on behalf of the appellant mother was settled by Ms Brander on 4 December 2018 that ran to some 12 pages. At the commencement of the hearing I was provided with what is described as an *'addendum to the appellant's skeleton argument'* which ran to a further to 42 paragraphs over 12 pages.

8. In the original skeleton argument Ms Brander expanded upon the grounds of appeal.

9. Ground One

The learned judge was wrong to treat the hearing before him as a pre-trial review when he was not to be the trial judge. This amounts to a serious procedural irregularity (FPR rule 30.12 (3)(a) and (B)):

i) A case involving allegations of parental alienation should have the benefit of continuity of judiciary (***Re E (a child)*** [2011] EWHC 3521 (Fam). The case was referred to His Honour Judge Levy for allocation - he was not the allocated trial judge.

ii) A pre-trial review should be before the allocated trial judge.

iii) It was wrong for His Honour Judge Levy to conduct the pre-trial review when he was not the trial judge.

iv) He ought to have listed a pre-trial review and final hearing having obtained counsel's dates to avoid.

v) He carried out a pre-trial review without the Guardian's analysis having been obtained which was premature.

10. Ground Two

The learned judge's decision that the family psychotherapist is a witness of fact and not a witness of opinion (and expert) was wrong (FPR rule 30.12 (3)(a))

- The psychotherapist was considered by the earlier decisions of the court to be an expert. The orders of November 2017 and later identified them as an expert.

- No objection prior to October 2018 had been made by the father to their appointment as an expert.

- The Guardian and the solicitor had at the hearing on 26 October accepted they were an expert.

- The psychotherapist has previously given evidence in reported cases as an expert.

- The parties and the court had previously accepted that their expert evidence was necessary to assist the court.

- As a result of the court's decision there is a gap in the evidence regarding the families psychiatric psychological make up and specifically that of the children and the court will need to adjourn to obtain such evidence.

11. Ground Three

Alternatively to Ground Two, the learned judge's decision that the family psychotherapist is a witness of fact and not a witness of opinion (and expert) amounted to a serious procedural irregularity as their evidence and integrity had not yet been tested in court and this decision was premature (FPR rule 30.12 (3)(b)):

- The psychotherapist meets the test for being an expert as set out in the case of *Kennedy* v *Cordia*.

- The psychotherapist's evidence assists the court in determining what the problem is (providing a diagnosis) and setting out treatment which the court can then weigh in the balance to determine what if any work could be done to advance the children's welfare. This evidence was necessary in order to facilitate a final determination of the case. Without expert evidence the court is unable to properly consider the options available to the family.

- They are plainly an expert.

- They are impartial.

- There is a reliable body of knowledge which underpins their evidence.

12. Ground Four

The learned judge was wrong to determine that the family psychotherapist had gone beyond the remit of their instructions, and certainly to the extent that it precluded the court from considering their professional opinion (FPR rule 30.12 (a))

- The judge's conclusion that the psychotherapist had not been instructed to provide expert evidence to the court on the question of the future operation of contact was wrong. He was wrong to conclude that they had not been instructed to provide this opinion.

- The letter of instruction required the psychotherapist to set out the steps they proposed to give effect to the work they considered necessary. By making the recommendation for the change of residence they set out that step.

13. Ground Five

The learned judge was wrong to order that the psychotherapist shall not attend the final hearing to give evidence where the first respondent father challenges their evidence, or otherwise this amounted to a serious procedural irregularity. (FPR rule 30.12 (3)(a) and (b))

- The psychotherapist had been directed to file and serve reports following assessment of the family.

- Pursuant to FPR rule 22.2 (a) evidence needs to be proved at a final hearing by their oral evidence because it is substantially challenged.

- The father challenges their factual evidence as well as their opinion evidence. He also challenges their competence, which they ought to have the opportunity to respond to.

- The psychotherapist has spent substantial time working with the family which the Guardian will not be able to replicate

14. In her addendum skeleton argument Ms Briggs, who appears on behalf of the appellant mother, focuses on His Honour Judge Levy's approach to the family psychotherapist's status as an expert and the history of how they came to be instructed. Ms Briggs argues that the judge's conclusion that they were not instructed as an expert nor did they have the expertise to make those sorts of recommendations was wrong. Ms Briggs amplified on this in her oral submissions, albeit she sensibly abandoned ground one.

15. She submitted that it is clear from the application and the order in November 2017 that the psychotherapist was instructed on the basis of being a part 25 expert. She submitted that the order made in January was clearly a continuation of their instruction as a part 25 expert and that His Honour Judge Levy was wrong in concluding that they were not instructed to provide expert evidence to the court on the question of the future operation of contact in the sense of commenting on transfer of residence. Having been required by the order of January 2018 to provide a report as to the progress made by the parties and children in respect of the therapeutic program to include recommendations for any future work and progression of the children's contact with their mother this necessarily

implied recommendations as to transfer of residence if that was required. She also submitted that the third report, that of 18 July 2018 was also properly to be regarded as a continuation of the function that the court had required them to undertake and arose out of the commissioning of further work following the second of July report.

16. She observed that being a psychotherapist did not preclude them from being qualified to offer an opinion on change of residence as they have done in other cases, to which the Court was referred. I note that in neither of those cases is it clear whether this psychotherapist gave evidence as a part 25 expert or as a treating therapist. She submitted that His Honour Judge Levy was wrong to say that this was outside their competence as a psychotherapist.

17. Ms Briggs urged me to accept that the contents of the reports of the psychotherapist were of central importance to the determination by Her Honour Judge Miller QC because they set out the alternative case to that of the Guardian and the father which seeks in effect a termination of direct contact. Ms Briggs argued that the effect of His Honour Judge Levy's order is to require Her Honour Judge Miller QC to ignore the psychotherapist's opinions.

18. The father's Skeleton Argument avers that the appeal is wholly without merit. In that document and in his oral submissions Mr Young in particular relies on the following points;

    i) A court should only interfere with a case management decision if it is not only plainly wrong but also unjust *Re TG (care proceedings: case management: expert evidence)* [2013] 1 FLR 1250; an appellate court should only interfere with case management decisions if satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.

    ii) None of the matters referred to by the appellant amount to a serious procedural irregularity:

        a) There is nothing in the FPR that requires only the judge hearing the case to hold a pre-trial review.

    iii) The psychotherapist did exceed their remit as they were never required to file a report in respect of change of residence and parental alienation but rather to advise on therapy and the progress of contact.

    iv) At the hearing His Honour Judge Levy was informed of the Guardian's view that the children should not have direct contact, let alone a transfer of residence.

    v) The decision was well within the ambit of judicial discretion arising on a pre-trial review. His Honour Judge Levy is the DFJ and very experienced. He dedicated a considerable amount of time to the hearing including adjourning over the luncheon adjournment in order to ascertain the terms of the instruction.

19. On behalf of the Guardian, Ms De Freitas made the following points in her skeleton argument supplemented by her oral submissions.

i) Ground One; whilst judicial continuity is desirable it is not mandatory and it is not wrong for His Honour Judge Levy to have dealt with the pre-trial review.

ii) Although the pre-trial review was carried out without the Guardian's analysis being available the Guardian's views were conducted to the judge in similar terms to that which eventually found their way into the Guardian's written analysis

iii) In respect of Ground Two, the learned judge was entitled to come to the view that the psychotherapist was a witness of fact and not a witness of opinion. The judge reviewed the part 25 application the letter of instruction and the orders. The order of 23 January 2018 in particular was that they provide a report in respect of the therapeutic program - this was not expert evidence. This report did not give them authority to make recommendations regarding a change of residence.

iv) In respect of Ground Three, the judge was not plainly wrong to regard the psychotherapist as a witness of fact on the basis that their evidence and integrity had not been tested. It cannot be said that the decision was plainly wrong or unjust.

v) In respect of Ground Four they psychotherapist had gone beyond the remit of their instructions. Their position was not an analogous to a social worker in care proceedings advising on where a child should live. The psychotherapist was a therapist who was able to give views about therapy. They were not a child and adolescent psychologist who could give a view as to future recommendations and a possible change of residence.

vi) In respect of Ground Five; it was clearly within the judge's case management powers to decide whether or not they should attend to give evidence. The judge assessed the degree to which they would or would not assist the parties and the court.

Judgment

20. The judgment in respect of the family psychotherapist is expressed in brief terms although one has to read the entirety of the transcript of the hearing to take in fully the arguments. The discussion over the psychotherapist's status appears frequently throughout the transcript of the hearing including at pages 1-5, 8, 11, 14, 16, 18-19 and finally the ruling at page 21.

21. There His Honour Judge Levy says:

'*...so far as the psychotherapist is concerned, I am afraid I disagree completely with Miss Lyons's assertion about them complying with their instructions. They were not instructed to provide expert evidence to the court on the question of the future operation of contact in the sense of being able to say that there should be a transfer of residence. That is simply out with their competence even as a psychotherapist and there are, of course, questions about that and, in those circumstances, their role within the proceedings would be to give factual evidence as to what they observed in the sessions and not opinion evidence and I do not see any role for them as a live witness in this*

*case. Their report should remain in the bundle. Submissions can be made on the factual matters which are contained in it but I do not see that their evidence in fact can assist the court so the live witnesses in those circumstances will be the parents and the children's Guardian...'*

Appeals

22. The test for granting permission [FPR 30.3(7)] is,

i) there is a real (realistic as opposed to fanciful) prospect of success, and
ii) there is some other compelling reason to hear the appeal.

23. FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for procedural irregularity.

24. In *Re TG (care proceedings: case management: expert evidence)* [2013] 1 FLR 1250 the president, Sir James Munby, said this of appeals against case management decisions.

***[35]*** *Fourthly, the Court of Appeal has recently re-emphasised the importance of supporting first-instance judges who make robust but fair case management decisions: Cherney* v *Deripaska [2012] EWCA Civ 1235, paras [17], [30], and Stokors SA* v *IG Markets Ltd [2012] EWCA Civ 1706, at paras [25], [45], [46]. Of course, the Court of Appeal must and will intervene when it is proper to do so. However, it must be understood that in the case of appeals from case management decisions the circumstances in which it can interfere are limited. The Court of Appeal can interfere only if satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge: T&N Ltd (In Administration)* v *Royal & Sun Alliance PLC [2002] EWCA Civ 1964, paras [37]–[38], [47], Fattal* v *Walbrook Trustee (Jersey) Ltd, [2008] EWCA Civ 427, para [33], and Stokors SA* v *IG Markets Ltd, para [46]. This is not a question of judicial comity; there are sound pragmatic reasons for this approach. First, as Arden LJ pointed out* in *T&N Ltd (In Administration)* v *Royal & Sun Alliance PLC, at para [47]:*

*'Case management should not be interrupted by interim appeals as this will lead to satellite litigation and delays in the litigation process.'*

*Secondly, as she went on to observe:*

*'...the judge dealing with case management is often better equipped to deal with case management issues.'*

*The judge well acquainted with the proceedings because he or she has dealt with previous interlocutory applications will have knowledge of and 'feel' for the case superior to that of the Court of Appeal.*

***[36]*** *Exactly the same applies in family cases. Thus in Re C (Children) (Residence Order: Application Being Dismissed at Fact-Finding Stage) Thorpe LJ and I dismissed*

*the appeal notwithstanding what I said was the 'robust view'. His Honour Judge Cliffe had formed when deciding to stop the hearing. And in In the Matter of B (A Child) [2012] EWCA Civ 1545 (unreported) 7 November 2012 I refused permission to appeal from an order of Her Honour Judge Miranda Robertshaw involving what I described (para [16]) as 'appropriately vigorous and robust case management'. I said (para [17]):*

*'The circumstances in which this court can or should interfere at the interlocutory stage with case management decisions are limited. Part of the process of family litigation in the modern era is vigorous case management by allocated judges who have responsibility for the case which they are managing. This court can intervene only if there has been serious error, if the case management judge has gone plainly wrong; otherwise the entire purpose of case management, which is to move cases forward as quickly as possible, will be frustrated, because cases are liable to be derailed by interlocutory appeals.'*

*As Black LJ very recently observed in In the Matter of B (A Child), at para [35]:*

*'... a judge making case management decisions has a very wide discretion and anyone seeking to appeal against such a decision has an uphill task.'*

***[37]*** *None of this, of course, is intended to encourage excess on the part of case management judges or inappropriate deference on the part of the Court of Appeal. There is, as always, a balance to be struck. As Black LJ went on to observe in In the Matter of B (A Child), at para [48]:*

*'Robust case management ... very much has its place in family proceedings but it also has its limits.'*

*I respectfully agree. The task of the case management judge is to arrange a trial that is fair; fair, that is, judged both by domestic standards and by the standards mandated by Arts 6 and 8. The objective is that spelt out in r 1.1 of the Family Procedure Rules 2010, namely a trial conducted 'justly', 'expeditiously and fairly' and in a way which is 'proportionate to the nature, importance and complexity of the issues', but never losing sight of the need to have regard to the welfare issues involved.*

***[38]*** *Fifthly, in evaluating whether an appellant meets the high threshold required to justify its intervention, the Court of Appeal must have regard to and must loyally apply the principles laid down by Lord Hoffmann, speaking for a unanimous House of Lords, in Piglowska v Piglowski [1999] 1 WLR 1360, [1999] 2 FLR 763, at 1372 and 784 respectively. In relation to appeals against the exercise of discretion it is conventional to refer to the classic authority of G v G (Minors: Custody Appeal) [1985] 1 WLR 647, [1985] FLR 894. Nowadays it is perhaps more helpful to refer to Piglowska v Piglowski, where Lord Hoffmann, having set out the key passages from G v G (Minors: Custody Appeal) and from the later decision of the House in Biogen Inc v Medeva plc [1997] RPC 1, continued with this vitally important observation:*

*'... reasons for judgment will always be capable of having been better expressed ... reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so*

*well known as those specified in s 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.'*

Background

25. I have been provided with a chronology which charts the progress of the case from 14 June 2015 through to today.

26. The litigation in respect of the children commenced in January 2016, the mother having left the family home and gone to a refuge in June 2015. In May 2016, District Judge Brown conducted a fact-finding hearing. Items 1 to 5 of the Scott Schedule contained allegations against the mother. The parties agreed that no findings were required in respect of those. In respect of allegations 5 to 10 the District Judge made findings that:

i) the mother was manhandled and abused by various members of the family including the father and was beaten by her sister,

ii) the mother's passport had been withheld from her,

iii) there was an unpleasant incident at a restaurant in which the mother was verbally abused by the father,

iv) the father did little or nothing to prevent two of the children verbally abusing the mother in his presence,

v) an appallingly vitriolic text message composed by the mother's sister was forwarded to the mother by the father,

vi) in December 2015 the mother was pushed and manhandled, she herself became angry.

27. In May 2016 the Cafcass officer provided a report to the court. She concluded that the children had aligned themselves with the father and been exposed to adult influence. A final order for indirect contact was made in August 2016. Proceedings resumed in early 2017 and an independent social worker, Ms A was later instructed to address why the children were saying they did not wish to have contact with their mother and what contact there should be in the future. She reported on 25 July 2017. The children expressed views were clear in that they did not wish to see their mother. She considered that the family would not benefit from the involvement of a child psychiatrist or psychologist and concluded that any attempt to direct face-to-face contact would be wholly detrimental to the children and likely doomed to failure.

28. It seems that as a result of that pessimistic recommendation the family psychotherapist was approached; their practice apparently having considerable experience in intractable contact cases in particular where allegations of alienation are live.

29. By an application dated 15 August 2017, the mother sought an order pursuant to part 25 FPR to release papers to the psychotherapist seeking what is described as input, but presumably meant advice, as to whether therapy may assist the parties so that direct

contact can once again happen. This application was determined by District Judge Cawood on 8 November 2017 in the course of a hearing that was listed for a final hearing but was adjourned at least in part because the application for the part 25 expert was approved. The order records;

*Recitals*

*Upon the court having granted the mother's application for permission to instruct the family psychotherapist to prepare a paper-based assessment as to whether the children and the parties can be assisted therapeutically so as to resolve the children's hostility to contact with the mother.*

*The court orders*

*2. The court considering it both necessary and proportionate so to order for there to be a proper determination of the issues, permission is granted to the applicant mother to disclose the case papers to the family psychotherapist and for the parties to jointly instruct the psychotherapist to undertake a paper-based assessment as to whether the children and the parties can be assisted therapeutically…*

*3. For the avoidance of doubt, the expert directed above shall not have permission to examine and assess the children at this stage…*

30. The application was listed before District Judge Cawood for a directions hearing on 23 January 2018. At that hearing, the District Judge considered a report from the psychotherapist dated 6 December 2017 and emails dated the 15th and 17th of January 2018. The relevant extracts include:

*'...and upon the parties agreeing to engage with a 12 week therapeutic program recommended by the psychotherapist in their report which shall include the children meeting with the psychotherapist and an observed session of contact between the children and the mother.*

*Order*

*The psychotherapist has permission to assess and meet with the children for the purposes of the therapeutic program, and to observe the children for one session of contact with the applicant mother.*

*The psychotherapist shall file and serve a report as to the progress made by the parties and the children in respect of the therapeutic program to include recommendations for any future work and progression of the children's contact with their mother by 7 May 2018.'*

31. It is immediately apparent that the wording of the order is different to that adopted in November 2017. Ms Briggs submits that the report requested was clearly a continuation of the November order and thus is clearly a direction for a Part 25 expert report even though there is no reference to part 25, to the court considering that such a report was necessary nor to it being an expert report. If one looks at the substance of what was to take place in terms of the psychotherapist's work it is clear that they were conducting

therapeutic work and reporting to the court on the outcome of their therapeutic work. In cases where either a treating clinician is permitted to provide a part 25 expert report or in cases where a part 25 expert subsequently carries out therapeutic or other substantive work there is clearly scope for the blurring of the boundary between their functions. In the course of argument, Ms Briggs accepted that in the public law field an assessment under section 38(6) of the Children Act 1989 will only fall within the parameters of that section if it is a true assessment rather than a therapeutic piece of work or at least that the assessment is the dominant purpose of the report and therapy a secondary component. Whilst such assessments are not entirely analogous to the sorts of private law assessments it does illustrate the distinction that should properly be drawn between part 25 expert assessment and the conducting of therapeutic work and reporting on the outcome.

32. The matter was listed for further hearing on the 17 May 2018. That hearing was vacated and relisted for 25 July 2018. The May hearing appears to have been adjourned because the psychotherapist was still carrying out work on the therapeutic program and their report would not be complete in time for 17 May hearing. The order of the 9 May 2018 which was a consent order provided that

'*the psychotherapist to file and serve a report as to the progress made by the parties and the children in respect of the therapeutic program, to include recommendation for any future work and progression of the children's contact with their mother, shall be extended to 26 June 2018.'*

The next hearing was listed for 30 August 2018.

33. On 2 July, the pyschotherapist filed a second report identifying two options

i) Plan A supported contact: the children would immediately begin a programme of supported contact tailored towards a two-week stay in the summer holidays then immediately moving to every other weekend with the mother. The psychotherapist proposed this be carried out by clinic staff and would be overseen by the psychotherapist themselves.

ii) Plan B: the court to consider a transfer of residence.

Clearly that report was what the court had provided for initially by its order in January and subsequently by the 9 May 2018 order. The report contemplated that if the parties were in agreement that the implementation of Plan A would be dealt with at the hearing in July and any agreement would be mandated by the court. In the email which accompanied the report the psychotherapist again referred to the fact that the structured reintroduction under Plan A would have to be agreed in court.

34. Thereafter there appears to have been email communications between the mother, father and psychotherapist which led to an agreement that the psychotherapist would see the mother and children together. It seems that this was outside the parameters of Plan A and Plan B but was pursued in the hope that it would lead to progress in contact. The meeting was unsuccessful and an email from the psychotherapist dated 18 July was subsequently received which said:

*'I'm preparing my report in this case now. I have concerns about the harm which is being caused to these children and the risk of further harm being done to them whilst in the sole care of their father. My view is that these children urgently need therapeutic work to rectify the harm done to them during the separation of their mother and father but that it is not possible to deliver that to them whilst they remain in the sole care of their father. I'm concerned about father's insight and the ongoing matter of disguised compliance in which he appears to comply on the surface but underneath his psychological resistance to the children's relationship with their mother continues. Father in my view relies upon his belief that the children's mother lied about past events and that the children's resistance is evidence of that. Father continues in my view to question the judgment in this case and leaks his beliefs that his children's resistance is justified in his interactions with them around matters concerned with their mother…It is my view that the children are alienating and that they hold distorted views of their mother in the present day and in the past as a result of this…It is my view that the only option to remedy the current graves position is a residence transfer to mother, to enable the delivery of the therapeutic work which is necessary.'*

35. That email was followed up by the third report of the psychotherapist dated 18 July 2018. Although Ms Briggs argued that this report was a continuation of the report of 2 July which had been authorised by the court the circumstances in which it came into existence do not support that contention. Whilst it may have been the product of the parties' agreement to the psychotherapist carrying out further work it was certainly not a further report which had been expressly authorised by the court whether under part 25 or as part of a report on therapeutic work.

36. It is the contents of that report that are at the centre of the mother's appeal because it is that report which recommends the transfer of residence.

37. On 20 July 2018 the mother issued her application for a child arrangements order that the children should live with her - that plainly being a response to the receipt of 18 July email and report.

38. On 8 August 2018 the father issued an application for the children to be joined to the proceedings and for a Guardian to be appointed. In the application it states that

'*...the applicant father is wholly disputing the psychotherapist's report and recommendation for transfer of residence…The psychotherapist is solely blaming the father for the views of the children are taking. The father denies influencing the children.'*

39. As I have already noted at the hearing on 30 August 2018 District Judge Grand gave further directions for the determination of the disputed issues including determining that it would be appropriate to hear evidence from the independent social worker and the family psychotherapist. The children were joined as parties and extensive directions were given for the preparation of evidence. That order provided for a three day final hearing on the first available date after 8 November 2018 with the allocation of the judge to determine the final hearing being referred to His Honour Judge Levy. That order also provided for a pre-trial review at least four weeks prior to the final hearing which was to be before the trial judge. Given that the order provided for a pre-trial review the provision made by the order in respect of the independent social worker and

family psychotherapist giving evidence can only have been intended to be provisional; such issues being fairly and squarely within the parameters of the pre-trial review.

## Analysis

40. The pre-trial review came before His Honour Judge Levy on the 29 November 2018. It is immediately apparent from the transcript that His Honour Judge Levy had concerns about the status of the psychotherapist; he identifying a concern over whether they were instructed as an expert or not and whether the instruction was a therapeutic one and whether they had gone beyond their remit in expressing a recommendation on a psychological basis which was outside their instructions or their area of expertise. As the hearing progressed, His Honour Judge Levy expressed the view that it may be appropriate for them to give factual evidence but doubts were expressed about whether they had permission to file opinion evidence. Enquiries were made about the letter of instruction that had been sent to them and it seemed to emerge that no one had questioned their status as an expert up until that point. Both the father's counsel and the Guardian's counsel submitted that the psychotherapist had exceeded her role and was not appropriately qualified to make the sort of recommendation that they had.

41. Ultimately His Honour Judge Levy's ruling concluded that they psychotherapist was not instructed to provide expert evidence to the court on the question of the future operation of contact in the sense of advising on a transfer of residence. He concluded that was outside their competence even as a psychotherapist. He identified that they would be able to give factual evidence as to what they observed in the sessions but not opinion evidence and thus concluded he did not see a role for them as a live witness.

42. It seems clear from the documentation that the original instruction of the psychotherapist was on the basis of them being a part 25 expert. The application and the order tie in with each other and the order clearly uses the language of part 25. However the form and substance of the order of January 2018 are in my view different. The task that the psychotherapist was to carry out pursuant to that order was a therapeutic task and they were to report on the outcome of that therapeutic work. Thus the report that was sought was a report upon the therapy and a recommendation as to further therapeutic work. Thus the substance of the work was not an assessment but rather therapy and the report was the treating therapist's recommendation as to the future. I appreciate that boundaries can become blurred when experts undertake therapy and that it is not necessarily at the forefront of the minds of the parties, their advisers, or the Judge, the status of the report and whether it is still that of an expert or whether it has transmuted into a report from a treating therapist. The latter will be essentially a factual report in terms of its forensic status rather than a Part 25 expert report although conceivably it might fulfil a dual purpose.

43. His Honour Judge Levy clearly concluded that the January 2018 order which gave permission for the second report to be filed was in substance authorising the obtaining of a therapeutic and thus non-part 25 expert report. Having considered the terms of the order and the nature of the work that was done this seems to me to be a perfectly legitimate interpretation of that order. It does not seem that there was a further letter of instruction to the psychotherapist pursuant to part 25. The fact that their reports contained the standard part 25 rubric at their conclusion does not convert the report into a Part 25 expert's report if it was not commissioned as such.

44. The third report, namely that of 18 July 2018 was not commissioned in compliance with a court order at all. It might of course of been possible for the mother to have retrospectively sought permission to rely on the report as a part 25 expert report but that application was not made to His Honour Judge Levy and given his observations on the extent to which the psychotherapist had gone beyond their remit it is of course highly improbable that he would have granted such retrospective permission had it been applied for. Whilst the second report identified the possibility of a transfer of residence as an option it did not advocate it in the way that 18 July report does. The identification of that possibility in the second report is arguably within the remit of the court order of January 2018 if one interprets the order in a broad sense and analyses the recommendation as being part of that which looks to '*future work and the progression of the children's contact with their mother'.* On the other hand it is equally possible to argue that such a recommendation cannot be described as falling within the definition of future work or progression of the children's contact with their mother. As I pointed out, one would usually expect to see in a part 25 instruction to an expert in this sort of situation explicit reference to the issue of potential transfer of residence and one would expect usually to see a detailed letter of instruction setting out questions which would be directed to this possibility. Thus, His Honour Judge Levy's conclusion that the opinion contained within the second report was not something they had been instructed to provide was well within the range of reasonable interpretations of that order. It is not possible to argue that he had erred in principle taken into account irrelevant matters failed to take into account relevant matters or came to a decision so plainly wrong it must be regarded as outside the generous ambit of the discretion entrusted to him. To the extent that His Honour Judge Levy also doubted whether advice as to a transfer of residence was within their area of competence or expertise as a psychotherapist I think this has to be viewed within the overall context of his having concluded that they had not been instructed to provide expert evidence of the sort that they ultimately offered. I do not read His Honour Judge Levy's observations as inferring that there were no circumstances in which this psychotherapist could offer advice on with whom a child should live. Ultimately it is probably a matter which is case specific and would depend upon the precise nature of the instruction they were given. I have little doubt that a psychotherapist could from a therapeutic perspective provide advice to parties on the issue of whether therapy could be effective depending on who the children were living with. How that translates into the forensic or legal arena is not something I need to address.

45. In respect of the third report the arguments in respect of the psychotherapist's status as a part 25 expert or therapist are of even greater weight given that the third report was not filed in response to any court order at all. It seems that the parties wished to press on before the matter had returned to court. Had it returned to court no doubt consideration would have been given to the question of further reports from the psychotherapist. However the parties chose not to await further court determination but requested a further report which plainly had not been authorised by the court. That being so the report and the opinions expressed in that report plainly could not be interpreted as being filed pursuant to permission being granted by the court for an expert report. That report can only be categorised as a report from a treating therapist. The court was not asked to grant retrospective permission for it to be treated as an expert report although I suppose one could interpret the submissions made to His Honour Judge Levy as such an application given that the mother's counsel was plainly arguing that it was an expert report. However for appellate purposes the question is whether His Honour

Judge Levy was wrong in his conclusion that the third report (taken together with the second report) contained opinion evidence which was not part 25 expert evidence and which therefore stood as evidence of fact rather than part 25 expert opinion. I can only conclude that His Honour Judge Levy's evaluation was correct; even more so in respect of the third report than the second given the circumstances in which it came into existence.

46. Thus the decision that the psychotherapist's reports were not part 25 expert reports was not wrong. His linked decision that the psychotherapist should not be called to give oral evidence is an even more pure case management decision. The judge had concluded that three days of court time was an appropriate share of the courts resources to allot to this case. He identified that the essential witnesses were the mother the father and the Guardian. Together with reading and judgment delivery time it would seem that a three day time estimate would allow for those three witnesses and the completion of the trial process. Given he had concluded rightly that the psychotherapist's evidence was properly characterised as factual rather than expert he was entitled within his discretion to determine that they need not be called.

47. Having read the skeleton arguments filed on behalf of the mother and having considered Ms Briggs's eloquent oral submissions I'm not persuaded that the decision of His Honour Judge Levy was either wrong or that it amounted to a procedural irregularity. I prefer the analysis that is apparent from the transcript of the hearing and His Honour Judge Levy's ruling and the submissions of Mr Young and Ms De Freitas. Mrs Justice Knowles gave directions as she did because of the imminence of the final hearing which commences on 29 January 2019. I'm satisfied that the appeal had and has no realistic prospect of success and thus I refuse permission to appeal and dismiss the appeal.

48. In the course of submissions, a question arose as to whether the effect of His Honour Judge Levy's order was to require either the exclusion of any opinion expressed by the psychotherapist or indeed the redaction of their report so as to exclude such opinions. Neither Mr Young nor Ms De Freitas argued for this. Where evidence is filed from a treating clinician almost inevitably it will contain matters of pure fact and matters of opinion. A GP who takes a patient's temperature, examines their throat and sees redness and swelling and diagnoses a cold is recording matters of pure fact but also a diagnosis which is an opinion. That does not mean that the court cannot read or consider the opinion. The difference is that it is not the opinion of a court appointed independent expert but rather the opinion of a treating clinician. That of course has consequences in terms of the weight that the evidence will be given by the court. The purpose of the part 25 process, including the court authorising the expert, identifying the questions and imposing obligations pursuant to part 25 gives the part 25 expert evidence greater weight and authority (subject to challenge) than that of a treating clinician who is not subject to the same rigours of that process.

49. Thus the evidence of the family psychotherapist in this case forms part of the factual substrata to the case which is before the court. Such evidence is admissible pursuant to general principles in children cases. Their record of things said or observed but also their opinions as expressed are part of their factual evidence. They will be before the court. If Her Honour Judge Miller QC as the trial judge and having considered the trial papers takes a different view of the situation it is open to her as the trial judge to deal with the matter differently. Case management directions whether given at PTR or otherwise are intended to ensure that the parties are able to prepare efficiently and the

court is able to conduct the trial effectively. However they are not intended to be an absolute shackle on the trial judge's discretion as to how the trial is to proceed. Ultimately it is the trial judge's decision as to what is required to reach a just outcome that is article 6 compliant and which will enable the trial court to appropriately evaluate the child's paramount welfare. No doubt in most cases the case management decisions taken at an earlier stage will ensure this outcome at the trial but inevitably there are cases where the trial judge feels it is necessary to depart from earlier case management decisions in order to ensure that justice is done at the final stage.

50. That is my decision.