Neutral Citation Number: [2022] EWCA Civ 68

Case No: CA-2021-003314

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
The Hon Sir Jonathan Cohen
FD20P00275

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 February 2022

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE BAKER
and
LORD JUSTICE WARBY

- -

A, B and C (CHILDREN: NESTING ARRANGEMENT)

- -
- -

Catherine Wood QC and Charlotte Baker (instructed by **Selby Lowndes Family Solicitors**) for the **Appellant father**
Anna McKenna QC and Charlotte Hartley (instructed by **Katz Partners LLP**) for the **Respondent mother**

Hearing dates : 27 January 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10:30am on Thursday 3 February 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

LORD JUSTICE BAKER :

1. This is an appeal by a father against an interim child arrangements order made in long-running proceedings concerning his three children, who I shall refer to as A, B and C, all girls aged 17, 15 and 9 respectively. The central question arising on the appeal is whether the judge's decision to vary the existing "nesting" arrangement, under which the children remained living in the former family home while their parents move in and out depending on when it is their turn to provide care, was unfair or wrong.

2. In summarising the factual background relevant to this appeal, it is unnecessary to set out the full history of the family. In particular, there is no need to refer to any specific personal matters relating to the girls.

3. The father is a wealthy and successful businessman. The mother is an artist. Prior to the breakdown of the marriage, the family lived in a substantial home in London and enjoyed a high standard of living, which included many foreign holidays including regular stays in a property abroad owned by the father.

4. The parties separated in 2018. At some point thereafter, (the precise date is disputed), they reached an interim agreement for child arrangements, creating what was described as a 2:2:5:5 nesting pattern each fortnight during the school term whereby each party would take it in turns to vacate the home for periods of two or five days, leaving the other parent at home with care of the children. The father's case was that this agreement was reached because both parties considered it to be in the children's interests. The mother asserted that it arose out of financial necessity because she was unable to afford alternative accommodation. Whatever the original motivation, the arrangement remained in place until the first Covid-19 lockdown in March 2020, when both parties resumed living full time in the family home with the three children.

5. Meanwhile, the mother had started financial remedy proceedings. On 29 November 2019, the first appointment took place before Cohen J. During an exchange with counsel in the course of the hearing, the judge described the nesting arrangement as "desperately unsatisfactory … not a satisfactory long-term solution or even a mid-term solution" and observed that:

> "there is more than enough money to sort it out … with the resources available in this case … it should be more than possible to arrive at a solution where each has their own home and it is the children who do the shuttling rather than the adults."

6. Over Easter 2020, the mother removed C from the house for six days but then returned. At the end of April, the police attended the property after the mother reported that she had been pushed by the father. On 7 May 2020, the mother filed applications for a child arrangements order and occupation and non-molestation orders. At the first hearing of those applications before Cohen J on 15 May, the injunction application was compromised on cross-undertakings and an interim child arrangements order was made providing for the nesting arrangement to continue. Each parent gave an undertaking not to remove the children overnight during their own period of care unless otherwise ordered or agreed and to vacate the home during the other's period of care. The parties agreed to share holidays equally with dates to be agreed and subject to any advice given by the independent social worker whom the parties were given permission to instruct

as an expert to advise as to what living arrangements would best promote the children's welfare.

7. In September 2020, the parties attended a private FDR and financial mediation with Sir Paul Coleridge, leading in due course to a settlement of the mother's financial claim under which she received a sum of €22m. Later, the mother took a lease of another property in London a few miles away where she lives when not caring for the children in the former family home. In November 2020, the family entered family therapy with Mr Philip Trenchard.

8. The next hearing in the Children Act proceedings took place before Theis J on 3 December 2020. The independent social worker appointed at the start of the proceedings had sadly died and a replacement was appointed. Further case management directions were made. Amongst the issues identified as requiring determination in the proceedings was "what child arrangements would best promote the welfare of the children once the parties are living in separate and independent accommodation on a permanent basis". The order recorded that the case continued to be allocated to Cohen J. Meanwhile, the two older children had consulted a solicitor, in circumstances which are disputed between the parties. At the next hearing before Cohen J on 12 January 2021, leading counsel attended on behalf of the children and informed the court that the girls wanted to be kept informed about decisions and the date of the final hearing, but did not wish to be joined as parties. The case was listed for a one-day dispute resolution hearing and a four-day final hearing on or after 7 June 2021. In February, the second independent social worker informed the parties that she was unable to continue and a third, Mr Nicholas Dinnage, was instructed. In the same month, the parties engaged in further mediation with Sir Paul Coleridge and agreed that the final hearing should be adjourned to December 2021. At a further case management hearing in May, the timetable for the proceedings was amended accordingly.

9. On 5 October, the mother's solicitors wrote to those acting for the father stating that the mother had concluded that it would be in the interests of B (who was in her GCSE year) for the final hearing to be adjourned until July 2022, that Mr Dinnage's work be "paused" for eight months, and that in the interim the family should continue to engage in family therapy with Mr Trenchard and consider whether further mediation with Sir Paul Coleridge would be beneficial. On 14 October, the father's solicitors replied agreeing to the postponement. It seems that the children were informed that the final hearing would be adjourned.

10. Meanwhile, however, Mr Dinnage had in fact completed his work and filed his report on 11 October. He reported that the father contended that the nesting arrangement should continue but that the mother disagreed. The father said he favoured the nesting arrangement because it provided the children with a stable and consistent base, ensured that they remained together "in the only home they have known", and best reflected their lives prior to the breakdown of the marriage. The father blamed the mother and her advisers for the harm the children had suffered. He was opposed to the children staying with the mother in her new home or visiting her there. The mother told Mr Dinnage that the father was a frightening man who would always get his way and gave examples of how she said he had behaved during the marriage and following the breakdown. She said that she did not feel able to sustain the nesting arrangement, and that, even if phased in over time because of the children's wishes and exam schedules, shared living arrangements in two separate houses would be in their best interests. The

parents also discussed with Mr Dinnage their views about holiday arrangements and future therapy.

11. Mr Dinnage reported on his conversations with the children. As stated above, I do not propose to set out their personal circumstances in any detail. The eldest child, A, informed Mr Dinnage that she would continue to live at the former family home, that she did not wish to stay with her mother, and that she strongly opposed her sisters being "separated" or "made to live between two addresses". B told Mr Dinnage that she wanted to remain living at the former family home but did want to spend time with her mother and "sometimes stay with her", adding that her father would not allow this to happen. C similarly told Mr Dinnage that she wanted to remain living in the home, that she would like to visit and stay with her mother sometimes but would prefer to do so with one of her sisters.

12. Mr Dinnage also spoke to Mr Trenchard and a number of other professionals who had been involved with the family, including staff at the children's schools. He concluded that the three girls had "experienced significant disruption and emotional harm consequent of their parents' separation and their subsequent and continuing discord". He found it "difficult not to ascribe to the father's conduct the evident characteristics of coercive and controlling behaviour". Having carried out an analysis based on the welfare checklist in s.1(3) of the Children Act 1989, he recommended that there should be a shared care arrangement such that, over time, the children were able to balance their staying time between both parents in their separate homes. He acknowledged that this recommendation did not reflect the children's stated wishes but concluded that it accorded with their best interests. His report continued:

> "7.1.5. In my experience, nesting arrangements work well and can be of benefit to all when the parents are in accord. I also have experience of such arrangements when the parents continue to be in conflict and where the children remain exposed to the same. I am not aware of such arrangements, where parental conflict and discord remain, that remain in place or afford good outcomes for the children.
>
> 7.1.6. I am concerned that maintenance of the current arrangements will further harm the quality of the children's relationship with their mother. Any transition to new child arrangements will present challenges but, in my opinion, the difficulties associated with the transition will be less significant than the ongoing harm experienced by the children if there are no changes to the current arrangements."

He acknowledged that A was opposed to this arrangement but advised that she be included and so able to join her sisters when she felt able to do so. For the younger children he recommended (at paragraph 7.1.6 of his report) that they should be spending an equal proportion of their time with both parents by, at the latest, the start of the summer holidays 2022. He continued:

> "7.1.10 The younger children will, in my opinion, need time and support to rekindle their trust in the mother and to disassemble the prevailing narrative that [she] is unable to provide safe care

> for the children. I would recommend that in the build-up to the Christmas period B and C have four or five overnight stays with the mother and, at this initial stage, that they stay with [her] together.
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> 7.1.11 I would further recommend that a post-Christmas staying schedule is agreed by the parents, in discussion with the children and, if available, with the likely further support of Mr Trenchard. This schedule to take the children to the position recommended in 7.1.6 above."

13. Following Mr Dinnage's report, the mother's solicitors wrote to the father's solicitors on 27 October 2021, asking him to confirm he was willing to adopt the recommendation that the nesting arrangement be phased out and to agree to the mother being released from her undertaking not to remove the children from the former family home overnight. They proposed that prior to Christmas B and C should have single overnight stays with the mother at her home and that thereafter there be no restriction on the children spending time with the mother there at weekends and in school holidays. They also proposed a defined division of the holidays, cross-undertakings by each parent not to intrude on the other's time with the children, continuation of the current therapy arrangements unless the parties reached a contrary agreement, further discussion of the details of post-Christmas contact with Mr Trenchard and/or Sir Paul Coleridge, and an adjournment of the litigation until June or July 2022. On 3 November, the father's solicitors replied rejecting these proposals, stating that "before the court can make any findings about Mr Dinnage's opinion, his evidence if not agreed will have to be tested" and proposing that the forthcoming hearing be adjourned and Mr Dinnage's report be disclosed to the treating professionals, including Mr Trenchard, for comment.

14. On 9 November, the mother's solicitors replied saying that some court time would be needed "before the end of the calendar year in order to resolve the interim arrangements" and enclosing a draft joint letter to be sent to the court by both parties stating inter alia:

> "whilst the parties agree to the adjournment of the final hearing, they have unfortunately not been able to agree interim child arrangements pending an adjourned final hearing. The court appointed independent social worker Mr Dinnage has now filed his section 7 report but the parties are not in agreement with regards to his interim and long-tern recommendations.
>
> We therefore propose that the PTR listed on 26 November 2021 be used to resolve these interim issues and one day of the final hearing being retained should further court time be necessary."

The letter, which enclosed a draft order, was signed by the father's solicitors and sent to the court. On 17 November, Sir Jonathan Cohen made the order as agreed by the parties. The order included agreed terms for child arrangements during the Christmas holidays and February and May half term holidays, adjourned the final hearing to June or July 2022, but added:

> "save that 9 December 2021 be retained to resolve any change to the existing interim child arrangements during term time, the remaining school holidays, and any further directions necessary."

The time for filing statements by the parties was extended to four weeks prior to the adjourned final hearing. It was recorded that the case remained allocated to Sir Jonathan Cohen. I note that no provision was made for further statements to be filed for the hearing on 9 December or for oral evidence to be given at that hearing.

15. A further exchange of correspondence took place in which the mother made a more detailed proposal for term time child arrangements pending the final hearing which was rejected by the father who pressed for the continuation of the existing nesting arrangement and further discussions involving the children with Mr Trenchard.

16. In her position statement for the hearing on 9 December, leading counsel for the mother invited the court to change the interim arrangements from the current 2:2:5:5 division to alternate weeks ("7:7") and to discharge the undertaking not to remove the children from the former family home overnight. The mother indicated that she would follow Mr Dinnage's advice about introducing the children to overnight stays at her home gradually and proposed that initially this should occur only on those weekends when the children were with her so that the nesting arrangement would remain in place for the remainder of each fortnight. In her position statement, leading counsel for the father argued that it was a misnomer to characterise Mr Dinnage's report as containing an "interim recommendation" and submitted that it was not appropriate for orders to be made at the hearing. To do so would allow the mother to secure what would effectively be a final outcome on the basis of a report that had not been subject to challenge. It was asserted that Mr Dinnage offered an incorrect and over-simplistic view of the family dynamic and had been unfairly critical of the father. It was untrue that there was a prevailing narrative that the mother was unable to care safely for the children or that she was a victim of coercive control. The changes proposed by the mother were significant and it would be counter-productive to impose them on the children against their clearly stated wishes. In such circumstances, the court should reconsider whether they should be given party status, although not at this stage. It was said that Mr Trenchard did not agree with Mr Dinnage's recommendations and the father proposed that any changes to the child arrangements should be achieved through the therapeutic process.

17. The hearing on 9 December proceeded on the basis of submissions only. In his judgment, the judge started by summarising the background, the parties' respective positions and the relevant legal principles. He accepted the father's submission that cases are not determined by independent social workers but observed that Mr Dinnage's report was

> "a valuable resource to which I can turn because it provides me with a holistic picture of everything that is going on in and around the children's lives."

At [9], the judge summarised Mr Dinnage's accounts of his conversations with the children. He described the passages about the children's experiences since the breakdown of the marriage (which I have not cited in this judgment) as "essential and

depressing reading". He quoted Mr Dinnage's observations about nesting arrangements in paragraph 7.1.5 of the report and commented:

> "My experience is the same. He is concerned that the maintenance of the current arrangements will further harm the quality of the children's relationship with their mother and, although any transition to new arrangements will present challenges, in his opinion, the difficulties associated with the transition will be less significant than the ongoing harm experienced by the children if there are no changes to the arrangements."

18. At [16] the judge continued:

> "My primary focus is the children and I am clear that the nesting arrangement has significantly overextended beyond the time that it has been helpful to the children. It has with it a number of drawbacks. In my judgment, it gives false promises to the children as to the reality of their parents' separation. It deprives the children of spending quality time with their mother in the new home that she has established. It seems to me that to expect the mother to see the children away from her home directly impinges on her ability to be as good a mother to them as she possibly can be. It is not right that it should continue for another seven months, as Ms Wood [the father's counsel] asks me to say, that these children should continue to be spending all their time at the family home, which was once their parents' home but is now the father's, and is simply what is left after the parents' marriage has long since come to an end."

19. In place of the graduated approach proposed in the report, the judge decided that, after the Christmas holidays, the arrangements should move to a 7:7 cycle and that until 1 March the children should be permitted to spend two weekend nights per fortnight at the mother's new home increasing to three nights thereafter. He said [18]:

> "I am in no doubt that it is time for the family to move on from the current situation and it is right that I should reflect that in an order made today. The parents are completely at loggerheads over this issue. It helps no one for Mr Trenchard to spend weeks and weeks trying to see if some sort of agreement can be navigated. I think I have to take this issue and deal with it."

He concluded his judgment by dealing with the remaining issues about school holidays and ongoing therapy, which do not arise on this appeal.

20. The father's counsel then drew attention to matters which, she contended, had not been addressed in the judgment. Following this exchange, the judge added these further remarks:

> "24. Ms Wood asks me to deal by way of supplemental judgment with her client's complaints that: first, the report of

> Mr Dinnage is unfairly critical of the father in circumstances in which he has not had the opportunity to cross-examine Mr Dinnage or file a statement in reply; secondly, that the overriding objective is better met by the parties not being engaged in litigation; thirdly, that this trial has not followed due process and is unfair; and, fourthly, that he has been deprived of the opportunity to put forward his proposals for the further care of the children.
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> 25. I do not regard any of his complaints as made out. The passages that I referred to in Mr Dinnage's report are largely those that are child-centred rather than parent-focused. It is his report on the children and what is said of the children that has influenced my decision more than anything said about the parents. Secondly, whilst I accept that the father has not had the opportunity to cross-examine Mr Dinnage, oral evidence on interim arrangements is not normally required. As I also made clear, I did not rely simply on Mr Dinnage. As it happens, my views are very similar to his both as to the utility of long-term nesting arrangements and the effect of this litigation on the children, which I have been reading about for some two years or so. Thirdly, the fact that the children had been very heavily impacted upon by the parental warfare is obvious. It does not come just from Mr Dinnage; it is confirmed by very many sources. Nothing that the father might wish to put in a statement can get round that fact, any more than I am sure he would want to try and get round it. Fourthly, all the points that he would wish to make have been made powerfully by Ms Wood in the course of her submissions. Fifthly, my focus throughout has been on the welfare of the children.
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> 26. The father's only proposal was that, in effect, I leave the matter for another seven months to see if something different is agreed between the parties. In the events that transpired, I regard the concept of leaving matters until what might be another final hearing in July as plainly contrary to the children's best interests. I do not accept that the points that he made amounts to any unfairness and I am satisfied that he has suffered no prejudice by my conducting the hearing in the way that I have."

The father's application for permission to appeal was then refused.

21. An order was drawn reflecting the judge's decision, with precise definition of the dates on which the two younger children would live with each parent prior to the final hearing, including a provision that from 17 January 2022 the termtime arrangements shall be that the children shall live with the mother for seven continuous nights, thereafter with the father for seven continuous nights, with handover to take place with a return to school on Monday morning, and a provision that for the purposes of those defined child arrangements, the children

> "shall return to [the former family home] to sleep overnight save for:
>
> "(a) [provision for the Christmas holidays 2021];
>
> (b) from January 2022, during school holiday periods, there shall be no restriction on where the children spend time with their parent with care; and
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> (c) until 1 March 2022 in termtime there shall be no restriction on where the children spend time with their parent with care for up to two weekend nights per fortnight per parent; and
>
> (d) from 1 March 2022 in termtime there shall be no restriction on where the children spend time with their parent with care for up to three weekend nights per fortnight per parent; and
>
> (e) additional time away from [the former family home] as may be agreed…."

The order included further case management directions for the final hearing, including an addendum report from Mr Dinnage.

22. A notice of appeal was filed with this Court, permission to appeal granted and the order stayed pending appeal. Three grounds of appeal were put forward:

(1) The judge was wrong to proceed to determine interim arrangements for the children in circumstances where the ordinary principles of fairness and justice could not be met.

(2) The judge was not an impartial tribunal.

(3) The learned judge was wrong to conclude that it was in the children's interests for the existing arrangements to be changed at all and/or at this stage of the litigation and/or to impose a week on week off arrangement and in circumstances where the children did not support change.

The appeal was presented by Ms Catherine Wood QC leading Ms Charlotte Baker for the appellant father and by Ms Anna McKenna QC leading Ms Charlotte Hartley for the respondent mother. The arguments advanced on both sides were lucid and succinct.

23. Under the first ground of appeal, Ms Wood submitted that the only material before the judge had been Mr Dinnage's report. The report had been commissioned for a final hearing and the original directions had provided for it to be followed by statements from the parties. Given the extensive criticisms of the father in the report, which contributed to the recommendations, the court's reliance on the report where there was no opportunity for cross-examination was fundamentally unfair to the father. The judge had been wrong to say, in his supplemental remarks following judgment, that the aspect of the report which informed him were those passages that related to the children and not the adults. The recommendations had been based on the negative assessment of the father and his view of the dynamic between the parents and were not in keeping with

the children's expressed wishes. In relying on Mr Dinnage's report, the judge had failed to take account of the positive view which both parents held about the nesting arrangements for over two years up to the arrival of the report and had wrongly characterised the marriage in terms which overlooked the extensive evidence of co-operation between the parties, including their commitment to family therapy and other professional assistance, and the successful use of the services of Sir Paul Coleridge. Instead of taking account of the amicable co-parenting arrangement that existed on the ground, the judge had been misled by the report's portrayal of discord. There had been no opportunity for the father to correct the false picture given by Mr Dinnage since he had not had the opportunity to file a statement nor cross-examine the expert. As a result, a number of important factual matters were simply and unfairly overlooked by the judge

24. Under the second ground – lack of impartiality – Ms Wood drew attention to the judge's remarks about nesting arrangements at the earlier financial first appointment in 2019 (cited above), coupled with his comments in the course of the judgment under appeal. The fact that the judge formed a clear view about the father without hearing him give evidence added to the sense that the judge was not impartial. Ms Wood submitted that there was a "worrying lack of neutrality throughout the judgment".

25. Under the third ground, Ms Wood submitted that the judge had failed to take into account the fact that the parties had chosen to extend the nesting arrangement for three years since the breakdown of the marriage and, until the arrival of Mr Dinnage's report, had been in full agreement that it should continue until the summer 2022. He had also failed to take proper account of the firm and clear views of all three children, and the fact that, since A was refusing to go to her mother's home, the new arrangement would separate the children, contrary to their wishes. Given the fact that the two older children had consulted a solicitor at an earlier point, no decision which went against their wishes should have been approved without giving them a chance to reconsider whether they wanted to seek advice and/or make direct representations. Ms Wood made further submissions about the particular circumstances of one of the children whom she contended would be particularly adversely affected by the proposed change in circumstances. She submitted that, by imposing a "week on, week off" regime, the judge had effectively determined one of the ultimate issues that the final hearing was designed to resolve when there was no welfare-based reason to do so at that stage and no urgency requiring an immediate change in the arrangements. Furthermore, in the absence of evidence from the parents themselves, the judge proceeded without proper consideration of the practical difficulties created by the change. In defining the dates when the children would be permitted to spend nights away from the home, the judge had in fact gone further than Mr Dinnage who had proposed that the details be resolved in the course of family therapy with Mr Trenchard.

26. Despite Ms Wood's cogent submissions, none of the grounds of appeal, or her arguments in support, persuades me that this Court should interfere with the judge's decision.

27. As Ms McKenna reminded us, under FPR rule 22.7(1), the general rule in family proceedings is that evidence at hearings other than the final hearing is to be by written statement unless the court, any other rule, a practice direction or any other enactment requires it. Under rule 22.8(1), where, at a hearing other than a final hearing, evidence is given in writing, any party may apply to the court for permission to cross-examine the person giving the evidence. The scheme of the rules is therefore clear. Only written

evidence is permitted at interim hearings unless an application is made and granted for the witness to attend for oral evidence. The onus is thus firmly on the party who wishes to challenge the written evidence to apply for the witness's attendance.

28. In this case, no such application was made for Mr Dinnage to give evidence at the hearing on 9 December, and no direction for statements from the parties was included in the agreed case management directions put before the judge in November. In short, the parties agreed that the court should determine the issue on submissions. This was in no sense an unusual situation. As Ms McKenna pointed out, important interim decisions about children are frequently made in the family court without oral evidence, including not only decisions in disputes between parents about child arrangements but also decisions to remove children from their parents into the interim care of a local authority.

29. There was manifestly sufficient opportunity for the court to be asked to direct Mr Dinnage to attend to give evidence. It would have been difficult for the mother to oppose such a request and unlikely that the court would have declined to endorse such a direction. Similarly, there was scope for the parties to agree to file short statements on the interim arrangements. Yet no such directions were included in the agreed directions order submitted for approval. There was plainly sufficient time at the hearing (time estimate one day) for Mr Dinnage and the parents to give oral evidence on the interim arrangements. When this point was put to Ms Wood by the court in the course of the appeal hearing, she responded that the judge should have adjourned the hearing once it became clear that he could not proceed without hearing Mr Dinnage cross-examined. Since no one asked him to adjourn for that purpose, and given the need to resolve the issue and the demands on the court's time, I do not think the judge can really be criticised for not taking that course.

30. In the circumstances, the father cannot complain of any unfairness in the procedure. On the contrary, as the father had not asked for Mr Dinnage to attend for cross-examination, and given that the parties had, by consent, set up the hearing on the basis that the interim arrangements should be determined on submissions, it was arguably unfair to the mother for the father to assert that in Mr Dinnage's absence it was not open to the judge to adopt the course she was plainly seeking.

31. It would perhaps have been better if the matters raised in the supplemental remarks had been mentioned in the course of the main judgment, but that was of course delivered ex tempore. Having read the clear written submissions provided by counsel, supplemented by what I am confident were equally clear oral submissions, I have no doubt that the judge had the arguments about procedural fairness in mind when reaching his decision.

32. Turning to the second ground, I do not accept that the judge was biased or partial or that he prejudged the issue or that his professed scepticism about nesting arrangements closed his mind to an objective assessment. It is true that he had expressed views in clear terms at the financial remedy hearing in November 2019. After that, however, he had endorsed the continuation of the nesting arrangement on more than one occasion, including the resumption of the arrangement in May 2020 following the first lockdown. The case remained allocated to this judge. The parties had opportunities to argue that it should be allocated to a different judge (notably at the hearing conducted by Theis J) but did not do so. No application for recusal was made at any stage – indeed the intervening orders, including orders made by consent, expressly provided that the case remained allocated to this judge. As the continuation of the nesting arrangement was

the primary issue at the hearing on 9 December, it was incumbent on the father to raise any challenge to the judge continuing with the case before the hearing. No such application was made.

33. The view expressed by Mr Dinnage about nesting arrangements could hardly be said to be controversial and the judge's observations were to my mind equally unobjectionable. In the event, the judge's treatment of the issue of nesting arrangement in this case in his judgment, in particular at [16], is notably balanced and, as he observed, child-focused. He acknowledged that the arrangement had been helpful to the children but concluded that it now had a number of drawbacks. Specifically, (1) it gave false promises to the children as to the reality of their parents' relationship; (2) it deprived them of the chance to spend quality time with their mother in her new home, and (3) it impinged on her ability to be as good a mother to them as she could possibly be. I do not regard this conclusion as indicative of partiality or a closed mind. On the contrary, I accept Ms McKenna's submission that this amounted to an objective analysis of the issue.

34. The third ground of appeal is really a challenge to the judge's overall welfare analysis. He was plainly aware of the relevant factors to be taken into account. In those circumstances, the challenge is to the weight he attached to those factors. A party seeking to overturn a judge's decision as to the weight to be attached to relevant factors faces a high hurdle in this Court and the appellant here has fallen well short. The strongest argument in favour of retaining the status quo was the expressed wishes of the children. The judge carefully considered the wishes of each child but concluded that they were outweighed by the evidence that the unvaried extension of the existing arrangements would be harmful to them. In varying the arrangements, however, he was careful to restrict the mother's power to take the children to her home to initially two, then three, nights each fortnight. For the rest of the fortnight during term time, the children will remain overnight in the nest. On any view, this is a modest departure from the previous arrangement. It leaves open the possibility that the court may endorse the extension of the nesting arrangement in some form after the final hearing. It was a measured and proportionate conclusion with which this Court should not interfere.

35. A judge should of course be careful about making an interim order under the Children Act which effectively determines a final issue. But a judge has to make orders in accordance with the statutory principles in s.1 of the Children Act. If he concludes that a certain course is necessary in the interests of a child's welfare, he is required to take it. In fact, I do not agree that the variation of the interim arrangements precludes the court at the final hearing from reverting to the earlier arrangement, just as it will be open to the court at that point to decide on a division of parenting time that departs from the equal division under the present order. I disagree with Ms Wood's submission that the order under review had "all the hallmarks of a final order". To my eyes it has all the hallmarks of an interim order.

36. I am satisfied that the judge was fully aware of the particular circumstances of all the children (not all of which have been recited in this judgment) and that he took them into account when reaching his decision. The children's voices were clearly heard through Mr Dinnage's report. The solicitor consulted by A and B prior to the hearing in January 2021 had had no further involvement and there was nothing to suggest that the children had changed their minds about becoming parties to the proceedings. The children had clearly indicated through leading counsel earlier in the proceedings that they did not

wish to be joined as parties. There was no justification in adjourning the hearing to check if that was still the case.

37. The judge, who has had a longstanding involvement with the case, concluded that there was a welfare-based reason to change the interim arrangements. There was plainly evidence to support that finding and for my part I see no basis for this Court to interfere with his assessment which was neither unfair nor wrong.

38. I would therefore dismiss the appeal.

39. It is not for this Court to express any view as to the ultimate resolution of the issues about child arrangements. On any view, however, it is imperative that these proceedings come to an end at the hearing in June/July this year at the latest. By that point, nearly four years will have passed since the breakdown of the marriage, and over two years since the start of the proceedings. It is not good practice for proceedings about children to be extended indefinitely. The court's role is to resolve disputes about child arrangements as swiftly as possible. Its resources are limited and the demand is increasing. At the hearing in June/July, the proceedings must be concluded so that the three children and their parents can move on to the next stage in their lives.

LORD JUSTICE WARBY

40. I agree.

LADY JUSTICE ASPLIN

41. I also agree.