



Neutral Citation Number: [2024] EWCA Civ 793

Case No: CA-2024-000821

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT READING
HHJ Tolson KC
RG23C0011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 July 2024

Before:

SIR ANDREW MCFARLANE, PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE WARBY

T-D (Children: Specific Issue Order)

Richard Jones and Melissa Elsworth (acting pro bono) (instructed by **Duncan Lewis Solicitors, acting pro bono**) for the **Appellant Mother**
Eleanor Howard (instructed by the **Royal Borough of Windsor & Maidenhead**)
for the **Respondent Local Authority**
The **Respondent Father** appeared in person (written submissions were filed by **Laura Hibberd, acting pro bono**)
Cecilia Barrett (instructed by Fairbrother & Darlow) for the **Respondent Children by their Children's Guardian** (written submissions only)

Hearing date: 4 July 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Introduction

1. This appeal concerns two children, aged 9 and 5, who presently divide their time equally between their separated parents. Their mother appeals from an order ('the Order') that gives "over-riding parental responsibility" to their father in three respects. It reads:

"7. Specific Issue Order.

The court directs that the following questions insofar as they may in future arise in connection with parental responsibility for either or both children are to be determined by the father in the event of disagreement with the mother.

- a. All questions relating to schooling, this is to include which schools the children are to attend; who shall attend parents' evenings, sports events etc;
- b. All questions relating to future therapy including whether and if so on what basis therapy is to be provided; by whom, etc.;
- c. All questions relating to interactions with social workers and medical professionals, including what is to be said to them concerning the children and the extent to which they may be involved in the children's lives.

8. For the avoidance of doubt the father must still consult the mother in relation to decision making for all significant events in which he exercises overriding parental responsibility."

The Order, which would last until the children are 16, does not prevent either parent from making applications to the court, including in relation to any of these matters.

2. The two questions for this court are whether the Family Court had the power to make the Order (Ground 1) and, if it did, whether it was wrong to make it in this case (Ground 2).
3. At the end of the hearing, we informed the parties that the appeal would be allowed on Ground 2 only and we remitted the issue of schooling for urgent determination. These are my reasons for joining in that decision.

The background

4. The parents' relationship lasted from 2002 to July 2020. By the end, they were each working in senior management positions, although the mother lost her job in 2021. After the acrimonious family breakdown, the children lived with the mother and spent time with the father on a fortnightly basis. Soon after the separation, the father began a relationship with his present wife, who has children of her own; they married in June 2023.

5. The period since the parents separated has been marked by constant attrition and almost continuous litigation. In September 2020, the father brought proceedings under the Act, seeking shared care. In September 2021, after a contested final hearing, a District Judge determined that shared care was not viable, owing in part to the size of the father's accommodation at that time and the geographical distance between the parents' homes. He dismissed the mother's application to limit the father's contact and instead endorsed a plan for the children to spend three nights on alternate weekends with the father, as well as half the holidays.
6. Meantime, the local authority had become aware of the family following a physical altercation between the parents in July 2020. Incidents of verbal and physical aggression, witnessed by the children, led to a total of nine police reports between August 2020 and January 2021, including an incident where the mother was arrested in January 2021. In February 2021, the children were made subject to Child in Need plans.
7. Unfortunately, matters continued to deteriorate following the District Judge's order and in November 2021 the children were made subject to Child Protection plans under the category of emotional abuse. The local authority was particularly concerned about the mother's oppositional and controlling behaviour and her refusal to engage with the plans.
8. In December 2021, the father returned to court seeking enforcement of the District Judge's order. In February 2022, an order was made under section 37 of the Act directing the local authority to investigate the children's circumstances (though by that stage the pre-proceedings protocol had already been engaged). The ensuing report in April 2022 described the intensity of the mother's aggressive and uncooperative behaviour. A psychological assessment of the family was proposed, together with an independent social work report. There was negotiation about the identity of the professionals to be instructed and eventually the local authority allowed the mother to choose. Even so, there was an almost complete lack of engagement on her part. Having received reports from the psychologist and the independent social worker, the local authority issued care proceedings in January 2023.
9. On issuing the proceedings, the local authority applied for the interim removal of the children from the mother. That was refused, as were two further applications during 2023. Adjustments were made to the children's arrangements at a number of hearings, so that by the time of the final hearing the children were spending five nights a fortnight with their father.
10. By early 2023, there was a disagreement between the parents about where the younger child should go to school. The mother's preference was for the school attended by the older child, while the father suggested a different school. At the time of the hearing before the Judge the two children were attending the school of the mother's choice. However, the older child is due to start at middle school in September 2024 and the choice of school, which was to an extent contingent on where the children were to live, was not agreed. In October 2023, the mother made an application to one school, while the father, who prefers a different school for both children, has now applied to another. At the time of the final hearing there was therefore a pressing need for the schooling issue to be resolved, but we were told

that it had fallen down the court's agenda amidst the disagreement about the division of the children's time.

11. The older child needs therapy and there was strong scepticism about the mother's willingness to co-operate with this, and about her determination to control access to the children by social workers who wish to do direct work with them.

The Judge's decision

12. The private law and care proceedings came before HHJ Tolson KC ('the Judge') for final hearing between 19 and 23 February 2024. Evidence was taken over five days from two local authority social workers, the psychologist, the independent social worker, the parents, the father's wife, and the Guardian. The parents, who between them gave evidence for over two days, conceded that the threshold was crossed, with each blaming the other. Oral closing submissions were made and judgment was reserved.

13. The parties' positions were as follows:

- (1) The local authority's final care plan was for the children to move to the father's care alongside a supervision order. It argued that shared care had not worked and that the children needed a secure base with the father and his wife.
- (2) The father supported the local authority's plan on the basis of the children's time with the mother being limited.
- (3) The mother sought to maintain the children's primary home with her and to limit the father's time.
- (4) The Guardian advocated a shared care arrangement, with an equal division of the children's time. Her final analysis in October 2023 contained this paragraph:

"86. I respectfully recommend a Child Arrangements Order is made in respect of [the children] which stipulates there is a shared care arrangement in place and that [the father] has the final decision on anything that cannot be agreed by the parents."

The Guardian also recommended that an order under section 91(14) of the Act be made "for a period of time".

14. On 8 March 2024, the Judge handed down a draft judgment, setting out his decision and reasons. On what he described as a fine balance, he made a 'lives with' order for equal shared care, accompanied by a 12-month supervision order and the specific issue order that is now under appeal. He declined to make an order under section 91(14) of the Act, but reserved any future applications to himself, with provision for hearings at short notice.
15. The Judge invited the parties to agree an order and, when they could not, directed further written submissions from the parents, which were provided a week later. The mother's lengthy submissions raised numerous issues about the content of the final order. These included arguments about the difficulty in interpreting an order overriding her parental responsibility, and squarely raised the issue about the choice

of schools. On the father's part, it was suggested that the order needed to be more tightly drafted in relation to choice of schooling, attendance at school events, therapy and interactions with social workers, with forms of words being suggested in each case.

16. The final judgment and the Order were handed down remotely on 25 March 2024. It is not apparent that the Order reflected the written submissions in any significant way.
17. The Judge reminded himself of "the insidious nature of controlling behaviour". He summarised his analysis of the welfare checklist:

"49. ...In my judgment it is the following factors which carry the day: the implementation of [the older child's] wishes; the avoidance of too radical change for [the younger child]; the need to signal the significance of, and ring-fence the father's position; and above all the need for a just solution which might be acceptable to both parents such that a fresh start is possible."

18. As to ring-fencing the father's position, the Judge said that the parents' current inability to negotiate arrangements meant that specific issue orders (and prohibited steps orders, though none was in fact made) were needed to regulate the exercise of parental responsibility in order to avoid future flashpoints:

"53. [This] issue concerns the exercise of parental responsibility as between the father and the mother. The immediate issue is schooling. My view, I regret to say, is that at the present time the mother largely prevents herself from seeing the 'wood' of the children's well-being for the 'tree' of her interactions with the father. In other words I do not currently trust her to put the children's interests first whenever there is a dispute with the father. I do trust the father to place the children first. As I result I believe the order should state that the father is to have the final say in those aspects of parental responsibility which concern (i) all aspects of schooling; (ii) future therapy; (iii) interactions with professionals – social workers and medical professionals; and, (iv) the extent to which day to day parental responsibility can be exercised by his wife. Thus the father may choose which schools the children are to attend (although he should consult with the mother) as well as minor matters (insofar as within his gift) such as to who is to attend parents' evenings, sports events and so forth. I am in no way seeking to curtail the school's discretion in these respects however. I could not do so even if I wished."

When refusing permission to appeal, the Judge stated that the court's jurisdiction to rule on disputed points was not ousted, and that the purpose of the Order was to give the father decision-making powers short of an application to the court.

19. Underpinning the Judge's orders were these core findings:

- (1) The level of conflict between the parents that has caused the private law dispute to descend into care proceedings is unusual, given the intelligence and social standing of the parents, and the fact that they have none of the usual disadvantages experienced by parents entering care proceedings. The family needs a fresh start and the mother needs to make the greater changes.
- (2) The parents are equally capable of meeting the children's basic care needs and both desire and promote the children's education. "They may be unable in consultation to determine which school the children should attend, but that is a different matter." (paragraph 42).
- (3) There are positive aspects to the mother's parenting, seen particularly in the younger child's good functioning.
- (4) The mother does not present a physical threat to the children, but she has a controlling personality and has exerted pressure on professionals. She does not deal well with opposing views. The father has been the victim of her controlling behaviour over a long period.
- (5) The mother's evidence gave real cause for concern, while the father was a good and apparently accurate witness.
- (6) The mother is unable to promote the children's need for a positive relationship with the father. She refuses to co-operate with him and has failed to communicate constructively with him. She cannot be trusted to place the children first whenever there is a dispute with the father. In contrast, the father is anxious for a good relationship between the children and the mother to continue and can be trusted in relation to decisions about the children.
- (7) The case differs from many of the so-called 'alienation' cases. The mother does not deny the children a relationship with the father, nor does she seek to prevent them spending time with him, but she needs to exercise control over the circumstances of that relationship.
- (8) Although the decision is not much more than a question of how the children divide their time, the situation is precarious and the outlook bleak. The case is incapable of settlement and the parents are currently unable to negotiate arrangements between themselves.
- (9) The mother's case has nothing to recommend it.
- (10) The local authority's plan, supported by the father, is perfectly reasonable and may be required in future if the problems persist. The likelihood of a return to court, with that outcome, has to be avoided if at all possible.

The appeal

20. On 23 May 2024, I granted permission to appeal on the two grounds identified (while expressing doubts about Ground 1), and refused permission on other grounds relating to more peripheral aspects of the Order.
21. We are grateful to the parties for their written and oral submissions, and in particular to those legal representatives who have acted pro bono on the appeal.

22. The mother does not challenge the Judge's findings of fact, the division of time under the child arrangements order, or the supervision order. Nor, in the end, did Mr Jones and Ms Elsworth seek to sustain Ground 1. Their submissions focused on Ground 2, as to which they make these arguments:
- (1) On the facts of the case, the Order is an inappropriate and disproportionate delegation of overriding parental responsibility. The judge's brief reasoning at paragraph 53 falls short of justifying such an unusual order, and a lack of trust in the mother was an insufficient reason.
 - (2) The Order is at odds with the normal expectation of equality and co-operation that a shared 'lives with' order creates.
 - (3) It is wrong that it is unlimited in time.
 - (4) Its lack of specificity (including the unusual appearance of the expression "etc." in a court order) renders it unworkable in practice.
 - (5) The court should have taken its own decision on schooling: *Re P (Parental Dispute: Judicial Determination)* [2002] EWCA Civ 1627; [2003] 1 FLR 286 (CA, Thorpe LJ and Bodey J) ('*Re P*').

In the course of argument, Mr Jones accepted that, had the judge made specific orders about choice of school, attendance at therapy, and access to social workers, the mother could not have complained.

23. The local authority opposes the appeal. Ms Howard refers to the extent of the Judge's findings about the mother's personality and behaviour, and her manifest obstructiveness, as corroborated in the professional evidence. He made a finding of fact that the father was to be trusted to act in the children's interests while the mother was not. That was the important context in which the Order was deemed necessary. The Judge did not make the more extreme orders proposed by the local authority and, by making the specific issue order, was hoping to avoid that outcome. The order was made after judicial determination, not before (as happened in *Re P*). In argument, Ms Howard accepted that the issue of school choices had been a live one at the hearing. She also accepted that the Judge could have made specific orders to deal with each of the three domains, but argued that he was entitled to choose the different orders that he made.
24. The father also opposes the appeal. By written submission, Ms Hibberd accepts that the order is unusual but argues that it was available in law and justified on the facts to avoid the flashpoints of disagreement that the judge identified. There was no indication that the mother's approach would change but, if it did, the Order could be varied. It could have been more detailed, but the mother would find fault with any drafting. We also heard from the father in person. He told us that the situation is serious and that he needs the court's help. He explained the current issue about schooling and raised an unresolved matter about upcoming holiday contact. He would have liked precise orders at the end of the hearing, but felt that the Order could be made to work. His overriding desire was for the conflict to end for the children's sake and he was very concerned about the Order being removed without any effective replacement.

25. The Guardian opposes the appeal. In her written submissions Ms Barrett argues that the Order has profound, beneficial implications for the children's future welfare by enabling the father to make decisions about issues which have been the subject of longstanding dispute between the parents. It represents the court's attempt to protect the children from the harmful effects of future litigation. 3½ years have passed since the local authority first became involved. The mother had been found responsible for domestic abuse and misuse of her parental responsibility. The resources of the court (and by extension the local authority and Cafcass) do not extend to repeatedly adjudicating on the exercise of parental responsibility in 'high conflict' cases such as this. The Order was unusual but the Judge had the benefit of hearing the parents' evidence. The terms of the Order are easy to understand and it would not have been possible to specify an end-date.

The statutory framework

26. Section 2(2) of the Children Act 1989 ('the Act') provides for an unmarried mother to have parental responsibility, and for an unmarried father to acquire it.
27. Section 4(1) contains the means by which an unmarried father may do this: by registration at birth, as in this case; by parental responsibility agreement; or by court order. Section 4(2A) empowers the court to order that parental responsibility acquired in any of these ways shall cease.
28. Section 3 provides that parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.
29. Section 8 of the Act, concerning court orders, defines a specific issue order as:

“an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child”

A prohibited steps order is:

“an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court”

30. Section 1 of the Act is then engaged. By sub-section 1(1), when a court determines any question with respect to the upbringing of a child the child's welfare shall be the court's paramount consideration. When a court is considering whether to make a Section 8 order, it is required by sub-section 1(4) to have regard in particular to the welfare checklist factors listed in sub-section 1(3). Among those factors is “the range of powers available to the court under this Act in the proceedings in question”: sub-section 1(3)(g). Sub-section 1(5) provides that the court shall only make an order if it would be better for the child than making no order.
31. Section 11(7) of the Act provides that a Section 8 order may contain directions about how it is to be carried into effect, and that the court impose conditions on the person

in whose favour it is made, or on anyone who is a parent of the child, or who has parental responsibility or with whom the child is living. The court may also make orders for a specified period or containing provisions which are to have effect for a specified period, and it may make such incidental, supplemental or consequential provision as it thinks fit.

32. The Children Act 1989 sprang from the Law Commission Review of Child Law: Guardianship and Custody (Law Com. No 172), which included this passage about specific issue orders at 4.18:

“As with conditions attached to other orders, the object is not to give one parent or the other the “right” to determine a particular point. Rather, it is to enable either parent to submit a particular dispute to the court for resolution in accordance with what is best for the child. A court can determine in the light of the evidence what decision will be best for the child at the time. It may equally be content for decisions to be taken by each parent as they arise in the course of everyday life in the future. It may even attach a condition to a residence or contact order that certain decisions may not be taken without informing the other or giving the other an opportunity to object. But to give one parent in advance the right to take a decision which the other parent will have to put into effect is contrary to the whole tenor of the modern law. A court can scarcely be expected to know in advance that the first parent’s decision will be the best for the child.”

Relevant caselaw

33. We were referred to a number of cases about the use of Section 8 orders to decide issues or allocate parental responsibility between parents.

34. *Re M (Leave to Remove Child from Jurisdiction)* [1999] 2 FLR 334 was an international relocation case. A mother’s application was granted, despite her inability to provide the court with the usual prospectus for the children after a move. At 339, Hale J observed that:

“... the Children Act 1989 was designed to provide a range of orders for the court to use in disputes between parents and other private individuals which was much more flexible than in the past. In the past there had tended to be the rigid categories of custody and access, whereas s 8 of the 1989 Act allows the court to make any one of a number of orders appropriate to promote the welfare of the child.”

35. *Re H (A Child: Parental Responsibility)* [2002] EWCA Civ 542 (CA, Thorpe LJ and Moses J) concerned a child who needed major ongoing medical care. It was an appeal from the refusal of parental responsibility to a father who had been denied contact by the court. Allowing the appeal to what it described as a very limited extent, this court substituted a parental responsibility order, but accompanied it with a specific issue order giving the mother sole responsibility for all decisions relating

to medical treatment, and a prohibited steps order preventing the father from attempting to locate her address. At [16], Thorpe LJ stated:

“The notion that he should involve himself profoundly with the consultants and other professionals treating L is completely inconsistent with his acknowledgment that in that area the mother has sole responsibility. There is simply no basis upon which he could justify an involvement with medical services equal to, or anywhere near approaching, the involvement of the mother.”

36. *Re P (Parental Dispute: Judicial Determination)* [2002] EWCA Civ 1627; [2003] 1 FLR 286 (CA, Thorpe LJ and Bodey J) was a schooling dispute between divorced parents about their two children. The judge’s order had been that:

“1 M shall go to [name] senior school with effect from September 2002.

2 In respect of both M and O future questions which may arise about either child’s schooling, including O’s senior school, shall be finally determined by the children’s mother following consultation with their father, MP.”

Allowing the father’s appeal, and replacing the second paragraph with an order that, absent agreement, matters be determined by a judge, Thorpe LJ said this:

“[6] Despite Mr McCarthy’s valiant efforts, I am in no doubt at all that Mr Horowitz QC is entitled to succeed in his fundamental submission that the judge’s design, however laudable, amounted to the plainest failure to adjudicate, coupled with a failure to address evidence material to that adjudication. This was, says Mr Horowitz, an abdication of judicial function and an unprincipled empowering of one parent to disempower the other.

[8] ...Of course, it is important that judges use their power and influence to steer parents from unnecessary discord whenever they can. In that function they must have the broadest of discretions. A judge may adjourn a case, expressing the strong view that the parents should mediate or that they should seek professional help to enable them to resolve their differences. But in the end, the parents have a right to a judicial determination, and this was a case in which two highly intelligent parents had reached convinced positions that were most unlikely to shift through further discussion, negotiation or even mediation.

[11] ...[T]he end result is an unprincipled order which cannot stand. Mr Horowitz is right to say that in situations such as this, where clarity is required, the final decision is the decision of the judge. It is not as a matter of principle open to a judge to abdicate that responsibility and simply appoint one of the parents with more or less absolute responsibility.”

37. *A v A (Shared Residence)* [2004] EWHC 124 (Fam), [2004] 1 FLR 1195 was a bitter dispute between professional parents. An order for equal shared residence was made. At [118], Wall J emphasised that parents should not be seeking to interfere with one another in matters which are taking place when they do not have the care of their children.
38. *Re P (Shared Residence Order)* [2005] EWCA Civ 1639, [2006] 2 FLR 347 (CA, Thorpe, Scott Baker and Wall LJ) concerned a child who lived almost equally with both parents, with neither parent seeking to interfere with the other parent's care when the child was living with the other. The father's proposal for a shared residence order was refused by the judge but was granted on appeal. At [16] Thorpe LJ observed that:

“It is not a case in which there is any evidence of either parent having interfered, or having sought to interfere, with the exercise of responsibility and judgment of the parent in possession.”

while at [22] Wall LJ stated that:

“[F]irst, a shared residence order is most apt to describe what is actually happening on the ground; and, secondly, that good reasons are required if a shared residence order is not to be made. Such an order emphasises the fact that both parents are equal in the eyes of the law, and that they have equal duties and responsibilities as parents. The order can have the additional advantage of conveying the court's message that neither parent is in control and that the court expects parents to co-operate with each other for the benefit of their children.”

39. In a small number of cases the court has prohibited a parent from taking some steps or any steps at all to exercise parental responsibility:
- (1) *P v D* [2014] EWHC 2355 (Fam) concerned formerly married parents. The mother and children were living in hiding and the father was serving a lengthy prison sentence for extreme violence and rape of the mother. Baker J made a prohibited steps order prohibiting the father from taking any steps in the exercise of his parental responsibility, and a raft of other orders to protect the mother and children. He observed at [110] that
- “In some cases, it is necessary for the court to make a prohibited steps order restricting a parent from taking steps that he or she would normally be entitled to take in the exercise of parental responsibility. That power extends, in very exceptional cases, to making an order prohibiting a parent from taking any steps in the exercise of parental responsibility. Such orders could be made in very exceptional cases.”
- (2) *H v A (No 1)* [2015] EWFC 58 concerned formerly married parents. The mother applied to revoke the parental responsibility of the father who was serving a life sentence for driving a car into, and setting fire to, the family home when she and the children were present, and then, from prison,

soliciting other inmates to murder her. MacDonald J held that parental responsibility acquired under section 2(1) of the Act could not be revoked, but he declared that the mother was under no obligation to inform or consult with the father in respect of the exercise of her parental responsibility, and that the father was prohibited from exercising any parental responsibility throughout the children's childhoods. In making the order, he stated:

“55. Finally, it is important to note that, however extreme or exceptional the facts of a particular case, a prohibited steps order is a statutory restriction on the exercise by a parent of their parental responsibility. Any such order made by the court must accordingly be based on objective evidence. There is a high responsibility on the court not to impose such a restriction without good cause and reasons for imposing a restriction must be given (see *Re C (Due Process)* [2013] EWCA Civ 1412, [2014] 1 FLR 1239). Specific consideration must be given to the duration of the prohibition (see *R (Casey) v Restormel Borough Council* [2007] EWHC 2554 (Admin) at [38]).

56. Within this context, and in circumstances where a prohibited steps order constitutes an interference with the Art 8 rights of both the parent against whom the order is made and the child who is the subject of the order, the making of, the terms of, and the duration of a prohibited steps order must be proportionate to the mischief that the order is designed to address.”

- (3) *In re B and C (Children) (Change of Names: Parental Responsibility: Evidence)* [2017] EWHC 3250 (Fam), [2018] 4 WLR 19 concerned children who had been retained in Iran by their father before being brought back to the UK by their mother. They were living at an undisclosed address because of the risk of re-abduction. Cobb J approved a change of names, and he made a prohibited steps order preventing the father from taking any steps in the exercise of any aspect of his parental responsibility and a specific issue order permitting the mother to make all decisions and give parental consent unilaterally and without reference to the father in all matters relating to the children's upbringing. In making the order he said:

“42. ...The mother seeks, by her applications, to disenfranchise the father in practice as a holder of responsibility for the children, and to create for the children wholly new identities which are deliberately to be secret from the father. Orders of this gravity should plainly only be made by a court if there is a solid and secure evidential and factual basis for doing so, and where the orders are palpably in the best interests of the children concerned.”

- (4) *His Highness Sheikh Mohammed Bin Rashid Al Maktoum v Her Royal Highness Princess Haya Bint Al Hussein* [2021] EWHC 3480 (Fam), [2023] 1 FLR 12 concerned maximally oppressive behaviour by one parent towards the other, so that the children's lives were dominated by the consequence of their father's abusive actions. The mother was given sole responsibility for

determining all issues relating to the children’s medical care and schooling. Sir Andrew McFarlane P observed that the order was outside the norm, but that there was no dispute that the power to make it existed: [77, 80]. He noted at [94] that the mother could not contemplate sharing parental responsibility with the father, and concluded:

“[95] The decision to afford the mother sole responsibility for these important matters is justified by the need to reduce the potential for continuing harm to the children. It is very much in their interests for the balance to be recalibrated and for their mother to feel that she now has enhanced autonomy as a parent and that this will be protected by a court order.”

- (5) *Re A (Parental Responsibility)* [2023] EWCA Civ 689 (CA, Sir Andrew McFarlane P, Moylan LJ and Dingemans LJ) concerned the distinction drawn by the Act between married and unmarried parents with respect to the court’s power to revoke parental responsibility. The father had been guilty of violent, abusive and coercive/controlling behaviour by towards his wife and children, both before and after separation, such that they had had to move to a confidential location and change their names. The mother had, by a combination of prohibited steps and specific issue orders, been given the right to exercise parental responsibility exclusively and without reference to the father. When setting out the legal framework, Sir Andrew McFarlane cited a number of the above cases and remarked:

“10. Irrespective of whether or not there is a statutory power to bring parental responsibility to an end, in every case the court may control and limit a parent’s ability to exercise parental responsibility through the making of prohibited steps orders, and may enhance the ability of the other parent to exercise parental responsibility with respect to specific issues...”

Whilst a prohibited steps order and/or a specific issue order may normally be made to regulate one or more aspects of the exercise of parental responsibility, it is accepted that, where the facts of the case justify it, the court may make a combination of orders which have the effect of prohibiting a parent from taking any step in the exercise of his or her parental responsibility and clothing the other parent with the exclusive right to exercise parental responsibility without reference to any other person who holds parental responsibility.”

40. There are also cases where parental responsibility has been removed from unmarried fathers by an order under what is now section 4(2A) of the Act. Examples are:
- (1) *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048 (Singer J), where a father who had acquired parental responsibility by agreement with a mother was deprived of it after causing serious injuries to the child that had left her permanently physically and mentally disabled.

- (2) *C v D and B (A Child)* [2018] EWHC 3312 (Fam) (Frances Judd QC), where a father who had by birth registration acquired parental responsibility for a child with extensive needs was deprived of it because he was using it to obstruct the obtaining of professional support and to threaten the mother and professionals.

What the Act and the caselaw tell us

41. By its clear terms, the Act provides the court with the broadest and most flexible powers to make welfare decisions. The powers, which are themselves a welfare checklist factor, can be used individually or in combination. No two cases are the same and, where orders are needed, judges should use the powers that Parliament has given them in the way that they think best meets the needs of the case.
42. At the same time, court orders represent an interference with the freedom of parents to make their own decisions and must be used in a way that is proportionate to the presenting problem. The interference must be no more than is necessary to achieve the desired outcome for the child.
43. The court has a broad discretion as to whether orders should be made or not. There will be some disagreements that are too insignificant to warrant an order, and some questions may fall too far into the future to allow a welfare decision to be made. But where an important issue has crystallised, the court will need a sound reason for declining to decide it. For clarity, there is no inconsistency in this respect between the decisions in *Re H* and *Re P* (see paragraphs 35 and 36 above). The first case involved a welfare decision (unopposed) to exclude a father from medical decision-making, while the second case involved the delegation by the court of an issue that had been presented to it for decision.
44. Cases where the court has made a shared ‘lives with’ order do not, as was once thought, require parents to be co-parenting amicably. However, shared orders are generally made with a view to encouraging parents to co-operate with each other.
45. The great majority of private law cases arise from immediate parental disagreements that can (subject to the no order principle) readily be addressed by one or more of the Section 8 orders. There will be other situations where orders can be made to resolve an issue that is likely to require a series of future parental decisions, although the details may not yet be known, or where an order may be needed to prevent an issue from arising in the first place. The court’s powers are equal to all these situations and more.
46. In a few cases, conventional, issue-specific Section 8 orders may be inadequate to the scale of the problem, and the court has been driven to go further. Sometimes, using its statutory power, it has removed the parental responsibility of an unmarried father. In other cases, notwithstanding the view expressed by the Law Commission, it has used Section 8 orders to deprive one parent of the right to exercise parental responsibility in one or more broad domains, or altogether. Such a power undoubtedly exists.
47. However, as seen above, these orders have only been made in extreme cases. It is one thing to interfere with a parent’s ability to make an individual decision, and

another to deprive them of decision-making power more generally. Where a conventional order can be made, it may be disproportionate to go further. In other cases, nothing less will be adequate to protect the welfare of the child.

48. It can also be seen that in these extreme cases, the court has generally deployed a prohibited steps order as one means of achieving its objective. Where parental responsibility is being removed in specific domains, a properly drafted prohibited steps order will have the advantage of clarifying what the affected parent can and cannot do.

Analysis and conclusion

49. I would start by recognising that this appeal concerns one particular matter and that the broad contours of the Judge's decision are beyond criticism. There is no appeal from his findings of fact, which expose the precarious emotional state that this family has lived in for years. The parental disharmony has been so intense that the local authority finally took public law proceedings at the beginning of last year, a highly unusual step given the parents' professional profiles, and even then the conflict did not lessen. The Judge saw the parents give evidence at length. He found that the main problem arises from the mother's obdurate disrespect for the father's parental responsibility, and generally for the opinions of others, and he was pessimistic about the future. He was understandably concerned at the effect of her behaviour on the father and about the knock-on effect on the children. In short, there can be no complaint about his diagnosis of the nature and cause of the problems that exist in this family.
50. Having made his diagnosis, the Judge inevitably prescribed a package of treatment. There can equally be no complaint about almost every element of his prescription: the child arrangements order, the supervision order, or the order reserving the case to himself with provision for swift access to the court if necessary. He was narrowly unpersuaded that the children needed to be removed from the mother at this stage, and he devised a carefully-considered package of measures in an attempt to shore up equal shared care.
51. The arguments we have heard about the specific issue order must therefore be seen in the context of the Judge's otherwise unimpeachable overall approach. I can readily see why the mother's insidious sabotaging of the normal operation of parental responsibility led him to consider strong measures to rebalance the situation in the father's favour in order to protect him and the children from her behaviour. The case for doing that was compelling.
52. The narrow issue for us however is not whether strong measures were necessary to control the mother's behaviour, but whether the remedy chosen by the Judge was reasonably open to him. In my view, it was not, for these reasons:
- (1) This specific issue order is unlikely to be effective. The Judge wished to lead the parents away from conflict, but the Order invites differences of interpretation, and any decision taken by the father can be contested by the mother making an application to the court. More fundamentally, the Judge

foresaw that shared care might not be successful. It was therefore particularly necessary for the ground rules to be unmistakably spelled out. That was much better achieved by (a) reducing the scope for disagreement in relation to choice of schools, and (b) making clear, straightforward orders about the other matters that the mother had a history of obstructing. If she complied with orders of that kind, she could be reassured that she was more secure in her care of the children, but if she did not, she would have received fair warning. The Order as it stands lacks this clarity and effectiveness. The Judge was rightly seeking to identify “a just solution acceptable to both parties”, but it is difficult to see how it could have been viewed in this way by the mother in a manner that laid foundations for the future.

- (2) The issues of residence and schooling were integrally connected, and the court was obliged to deal with them both. In circumstances where there is such a high level of parental conflict, the children’s schools are especially important to them. The choice of schools for the next academic year was obviously a significant matter and it was likely to be strongly influenced by the decision about residence. Once a shared care order was made, the issue of school choices became even more contentious. The court was referred to *Re P*, and it was not sensibly open to it to decide one issue without deciding the other. The issue of schooling required immediate resolution, failing which the new carer arrangements were bound to be overshadowed by parental disagreement from the very outset.
- (3) The evidential basis for the order about school choices is not apparent. In regard to schooling, the Judge found that the parents were each genuinely interested. There was nothing about the mother’s otherwise deplorable behaviour that would justify the conclusion that she should not have equal input into such an important decision, particularly in the light of her relevant professional background. Without doubting the father’s good faith, his choice was understandably likely to be influenced by the circumstances in his new family and it was not right for the court to delegate the decision to him.
- (4) Lastly, the Order was in my view unnecessary and disproportionate. The Judge was bound to face up to the fact that there is no reported precedent for an order depriving a fully-engaged carer of significant elements of their parental responsibility. He was referred to the decision in *In re B and C*, in which Cobb J explained that the (much wider) orders sought were exceptional and rare. In all of the cases cited above the father was absent or only minimally involved in the children’s lives. The Judge emphasised that the present case was unusual, and his orders were of course of a narrower kind. However, his reasoning does not establish why it was necessary to go down the road of depriving the mother of active parental responsibility in relation to the three issues in question, and of doing so indefinitely. The choice of schools was ripe for a conventional specific issue order. Attendance at school events, therapy and access to professionals could easily be achieved by a combination of ordinary specific issue and prohibited steps orders. For the reasons given above, orders of that kind would give the

father and children greater protection than the current order, and might thereby enhance the uncertain chances of shared care working.

Outcome

53. In this narrow respect, the appeal is entitled to succeed. The mother should not misunderstand our decision. The intention is not to relax the regime prescribed by the Judge, but to give him the opportunity to make it more focused and effective so that, if the mother can only play her part, the children might benefit.
54. After the hearing, we made the orders below. We are grateful to the Judge for accommodating the urgent hearing regarding schooling. The order about the children's holiday with their father was made after hearing brief submissions from the parties because a decision was required immediately.

“IT IS ORDERED THAT:

1. The appeal is dismissed on Ground 1.
2. The appeal is allowed on Ground 2.
3. The matter is remitted to His Honour Judge Tolson KC:
 - (1) For urgent determination of the schools that the children are to attend next school term.
 - (2) For him to make such other orders as he may consider appropriate in due course in the light of the judgments of this Court.
4. For the purpose of the urgent determination of the schooling issue:
 - (1) There shall be a hearing before HHJ Tolson KC on 16 July 2024.
 - (2) By noon on Wednesday 10 July 2024, the Appellant Mother and the Respondent Father shall send to each other and to the other parties and to the Family Court a statement setting out their position regarding the children's schooling next term. The statements shall include a list of all the available options in the order of their preference, explain what steps, if any, they have taken to secure places for the children at each school, and attach any relevant documents.
5. Paragraph 7a of the Order of 25 March 2024 (concerning schooling) shall be set aside at the point when HHJ Tolson KC makes an order under Paragraph 3(1) above.
6. Paragraphs 7b and 7c of the Order of 25 March 2024 (concerning therapy and professional access to the children) shall be set aside

at the point when HHJ Tolson KC makes an order under Paragraph 3(2) above.

7. The stay of Paragraph 7 of the Order of 25 March 2024 that was granted on 28 May 2024 shall remain in effect, save that:
 - (1) The current arrangements for the children’s therapy and access to professionals shall not be affected by the stay.
 - (2) The Respondent Father may (if he considers it appropriate for the children to miss the last week of term) take the children on holiday in Europe from 20 July 2024, giving notice to the school.
8. The Court may make further orders when handing down its judgments.
9. There shall be no order for costs.”

Lord Justice Warby:

55. I agree.

Sir Andrew McFarlane P:

56. I also agree.
