



Neutral Citation Number [2026] CICA (Civ) 8

**APPEAL OF THE CAYMAN ISLANDS**  
**ON APPEAL FROM THE GRAND COURT**  
**FAMILY DIVISION**

CICA (Civil) Appeal 23 of 2025

**MM**

**Applicant**

**And**

**FF**

**Respondent**

Before: The Hon. Sir Richard Field, JA  
The Hon. Sir Michael Birt, JA  
The Hon. Clare Montgomery, JA

Appearances: Mr Nicholas Yates KC instructed by Yvonne Mullen of Hampson & Company for the Applicant  
Mr David McGrath of McGrath Tonner for the Respondent

Date of Hearing 12 March 2026

Date Judgment circulated: 31 March 2026

Date Judgment Delivered: 17 April 2026

**JUDGMENT**

**Sir Michael Birt, JA**

1. This is an appeal (leave to appeal having been granted by the court at the outset of the hearing) by the Appellant (“the mother”) against an order of Carter J (“the Judge”) dated 10 December 2025

whereby, for the reasons set out in a judgment dated 5 December 2025 (“the Judgment”), she made a sole residence order in favour of the Respondent (“the father”) in respect of the two children of the family, there having hitherto been shared residence between the mother and the father. The judge further ordered that contact with the mother be suspended and only resumed following recommendation to that effect by the court appointed welfare officer.

### **The background**

2. The parties were married in 2009 and separated in May 2021. Divorce proceedings were instituted in August 2021. There are two daughters of the marriage, namely A (who is currently 14 and will be 15 in July) and B, who will be 13 in April (“the children”).
3. The marriage was not entirely conventional in that the father wished to have a polyamorous marriage. In August 2018, the father’s current partner (“the partner”) became involved in the marriage in a ‘*triad*’ (as described by the father) and remained so until the parties separated. She now lives with the father and they have a son, who is therefore a half-brother to the children.
4. Since the separation in May 2021, the children have spent alternate weeks with each parent, i.e. one week with the mother, followed by one week with the father. No formal order has ever been drawn up, but the arrangement has been in operation by informal agreement from that date and remained so at the date of the hearing before the Judge in April 2025. This arrangement is referred to as the ‘*shared care arrangement*’.
5. Following a referral to the Multi-Agency Safeguarding Hub (MASH) by the mother in September 2022 raising issues as to the father’s care following a trip to Europe in the summer of 2022, the court ordered the preparation of a welfare report on the application of the mother. As a result, a welfare report dated 31 March 2023 (“the 2023 Report”) was prepared by two welfare officers. It is a very detailed and thorough report.
6. Although at [42] it quotes the father as saying that the shared care arrangement was working ‘*generally*’, it is clear from the report that there was considerable animosity between the parents.
7. Thus, the father expressed the view that the mother was engaged in alienating behaviour in a number of respects described in the report and stated that if this was not addressed, he would seek a sole residence order to protect the mental health of his children. Conversely, the mother expressed

concerns over a number of aspects of the father's care, including making negative comments about her and asking the children to hide information from her.

8. When seen by the welfare officers, A said that there been a change in her relationship with the father, which had been very good, following his questioning of her as to what she had discussed with the safeguarding officer following the MASH referral. She said that he had also asked her about what issues she had discussed with the social workers who were preparing the 2023 Report. She spoke of feeling terrified of being questioned as she was not certain how the father would react. She said she would keep her feelings bottled up inside until she went to her mother and could spill it out. She said that while she would like to be able to express her feelings to the father and the partner, she did not know how they would react. A said that she would like to live with the mother but she wanted to spend time with the father every two to three days, although she did not wish to spend nights with him. B, who was 9 at the time, said that she would like for the mother and the father to work together and be back together as one family and indicated a desire to share her time between her parents as in the shared care arrangement.
9. The report concluded at [180]-[181] that both parents were fearful of being alienated by the other parent and had adopted unhealthy methods of dealing with this fear, which was placing the children at risk of emotional harm.
10. The welfare officers did not recommend any change to the shared care arrangement but did recommend therapeutic assistance, with the aim of trying to improve the manner in which the parents were dealing with the divorce so that the children were no longer drawn into the conflict. The therapeutic approach would include individual intervention for the mother and the father, individual intervention for A and various other therapy sessions and courses.
11. The father did not enter into any of the recommended therapeutic treatment but the mother did thereafter consult Dr Lam, a chartered psychologist.
12. The shared care arrangement continued and, at [7] of his affidavit dated 8 July 2024, the father stated that it had been working well for nearly three years.
13. However, on 1 July 2024, the father received a Facetime call from the mother's phone in which the children, reading from a pre-set script, said that they wanted to live with the mother and that, although

that might change in the future, that was how it had to be. On 10 July, following an urgent application from the father, the court ordered a return to the shared care arrangement and a planned holiday to England in August with the father went ahead. The court ordered that a further welfare report be prepared and this gave rise to the report dated 16 December 2024 (“the December Report”) prepared by a welfare officer, Ms C. She had not been involved in the 2023 Report but had access to it.

14. The report recorded the father’s strong belief that the mother was seeking to undermine him in the minds of the children and was using alienating behaviour. He felt that this was adversely affecting the children. Thus, he pointed out that A had taken to brushing her teeth for over 40 minutes, although he and the partner had successfully reduced this to 10 minutes. She was also biting her lips consistently, which he believed was a response from the stress of being involved in the case. B was said to be binge eating.
15. Examples of alienating behaviour by the mother upon which the father placed reliance included making the children change their clothes when they arrived back after staying with the father, influencing the children to send the message of 1 July 2024, telling A that mould was on her toothbrush at the father’s house, and encouraging the children to report everything that happened in the father’s home and then taking everything out of context.
16. The mother expressed various concerns about the care which the father and the partner provided to the children. She said that the children had made it clear to her for some time that they did not wish to live with the father and she simply wished to support them and respect their wishes; hence the events of 1 July 2024 which she had discussed in advance with Dr Lam.
17. Although we were informed by counsel at the hearing that the mother had never actually made an application for sole residence, the mother expressed the view to Ms C for the purposes of the December Report that she supported the children’s wish to live with her and having contact one day every month with the father.
18. The welfare officer saw the children in both homes. She also interviewed the children. A expressed the view that no one was listening to her and she was not happy with the decision of the court to order resumption of the shared care arrangement following the events of 1 July 2024. A admitted to eavesdropping on the father and the partner and that she would report back to the mother, but said that the mother had not asked her to do this. She said she wished to live with the mother and visit

the father, but not overnight. However, she would be content to go on vacation with the father. B also told the welfare officer that she did not wish to live with the father but that she would like to see him during the day.

19. The welfare officer interviewed Dr Lam who explained that she only saw the family upon request to assist them with any issue which the family might have. Dr Lam believed that A was taking on too much about her parents' separation and might believe that it was her responsibility to protect the mother. She thought that it was emotionally premature for A to decide to not want to live with her father, although she pointed out that A was very mature for her age and she did have the right to voice her feelings and concerns. She expressed the view that the mother was sharing too much information with her children.
20. In her assessment, Ms C said that she believed that there was sufficient evidence to support the father's concern that the mother was alienating the children from him. She was concerned about the impact which the case was having on the children and that it was damaging them emotionally and psychologically. Whilst both children should have a voice and had shared that they did not want to live with the father, Ms C said she had to consider the level of influence from the mother and how she had impacted the children's decisions. She felt that what the mother wanted in relation to contact far outweighed their true feelings and it was hard to decipher whether not living with the father was what they genuinely wanted.
21. In her recommendations, she saw no reason to vary the arrangement as suggested by the mother and the children and recommended continuation of the shared care arrangement. She also recommended counselling for the children, parenting training for the father and the partner and ongoing individual counselling for the mother.
22. Shortly afterwards, on 9 January 2025, the father issued a summons, accompanied by an affidavit, seeking sole residence of the children. It appears from the document at D86 of the court bundle that the mother's counsel immediately applied for the appointment of a guardian ad litem for the children and the appointment of an independent psychologist to assess the children, but that this was refused by the Judge.
23. The mother filed an affidavit in response dated 10 February and the father filed an affidavit in reply dated 17 February. On 27 March 2025, Ms C filed a further report as directed by the Judge ("the

March Report”). In that report, to which I refer further below, she now recommended that a sole residence order be made in favour of the father with direct contact between the children and the mother being suspended for a period of six weeks.

24. Following receipt of this report, on 2 April, the mother made a further application for the appointment of a guardian and of an independent psychologist, together with an application for an adjournment in order for these events to occur. This application was also refused by the Judge, although we have not seen an order to that effect.
25. The hearing took place between 7 and 11 April 2025. The Judge heard evidence from the mother, the father and the welfare officer and reserved her decision. Pending receipt of her decision, the shared care arrangement continued.
26. It was not until 14 November 2025 (some 7 months later) that the Judge circulated a draft judgment for comment and the final judgment was issued on 5 December 2025, some 8 months after the hearing. As already stated, she made an order for sole residence in favour of the father and suspended direct contact with the mother for a period of six weeks and thereafter until such contact was recommended by the welfare officer.
27. The Judge refused leave to appeal on 17 December 2025 but granted a stay of her order pending application to this court for leave to appeal. That stay was subsequently extended by the President pending the hearing before this court, which took place on 12 March 2026. It follows that the shared care arrangement has continued for virtually a year since the hearing before the Judge.
28. I should add that this court was informed that a final hearing to resolve financial matters following the ending of the marriage took place before the Judge on 26-29 May 2025 but that no judgment had yet been delivered. The court was told by counsel for the mother that assets of some C\$12.2m were built up during the twelve year marriage and one might have expected the assets to be shared broadly equally, but the father was arguing that the wife should only receive some 16% of the assets because of a post-nuptial agreement which the parties had signed on 25 February 2021. The mother was arguing that this agreement was elicited by the father as a result of undue influence, undue pressure and/or coercion. Counsel submitted that it was unfortunate that the judgment had still not been delivered as it increased the tension between the parties and for the family generally. The mother

and the children very much wished to re-house but could not do so until judgment was delivered or the father provided them with some money on account, which, it was said, he had refused to do.

### **The position of the parties before the Judge**

29. There is no transcript of the hearing before the Judge but the court has seen the affidavits, the written submissions before the Judge and the Judge's summary of the evidence as contained in the Judgment.
30. The essence of the father's position was that he considered the children were suffering emotional and psychological harm as a result of the mother's alienating behaviour and that this would continue unless the children moved to live with him. The only way of protecting the children from further harm was to make a sole residence order in his favour with no contact with the mother for three months followed by supervised contact until a further welfare report suggested that contact could progress from there.
31. The mother accepted that she could have dealt with some matters differently. In particular, she felt she could have handled the 1 July 2024 situation better. She was simply trying to reflect the children's wishes as expressed to her and it was never her intention or the children's intention to be alienated from their father. She denied any intention of alienating the children and denied a number of the specific allegations. She noted that, while she had followed up on the recommendations for therapeutic intervention contained in the 2023 Report, the father had not done so. She reiterated that her concerns were about the parenting of the children by the father and the partner as reported to her by the children. She felt that the children's voices should be listened to and it could not possibly be in their interests no longer to live with her when they were asserting that they wished to live with her.
32. The other material before the Judge consisted of the various welfare reports and it is convenient at this point to summarise the key aspects of the March Report.
33. In the March report, Ms C stated that she had not interviewed the mother for the purpose of preparing the report and was instead relying on the mother's affidavit; nor did she visit the children in the mother's home. She did however pay a visit to the father when the children were staying with him and spoke favourably of what she had found there.

34. She also saw the children at her office. On this latter occasion, A had become very emotional and had made a *'heartfelt request'* to live with the mother full time and see the father. A also accused Ms C of misrepresenting the true position when she had said in the December Report that A was biting her lip in response to anxiety. Ms C considered A's emotional reaction in her office to be an indication of her being impacted by parental alienation.
35. She said that B showed fewer overt signs of being impacted in this way but she noted that the father was saying that B was not eating and there were concerns about her secret eating. Ms C was of the view that A was being impacted in a similar way to her sister. She was also experiencing persistent abdominal pain, which was a condition which had been linked to emotional stress.
36. Turning to her assessment, Ms C concluded that there was clear evidence that the mother was engaged in behaviours that appeared to be alienating the children from their father. At the beginning of her report, she had listed seven instances of what she termed alienating behaviour, although some of these were denied by the mother. She said that in her opinion the alienating behaviour reached its peak when A disclosed that the mother had shared with her (A) some of the contents of the December Report, in particular the issue of A biting her lip. Ms C questioned (at [42]) whether the mother's ultimate intention was to alienate Ms C from the children in an effort to gain leverage in the proceedings.
37. Having at [38]-[44] considered the question of alienating behaviour and parental alienation and having found that the mother was engaged in behaviours that appeared to be alienating the children from their father, Ms C at [45] discussed possible alternative ways of addressing alienation and then went on express her conclusion in two paragraphs at [46] and [47] in the following terms:

*"46. It is not normal for a child to want to leave one parent without a plausible reason. I agree with the concerns being raised by [the father] that the level of emotional distress coming from [A] is not normal, nor is it sustainable. I believe that a quick and decisive actions (sic) needs to be taken if we are to see positive changes in the girl's overall health and wellness.*

*47. I am therefore recommending that [the father] receives Sole Residence of his children [A] and [B] with the following recommendations being observed.*

- In-depth therapeutic services for [A] and [B].*

- *Direct contact with [the mother] to be suspended for a period of 6 weeks.*
- *[The mother] should have daily contact via telephone and video call, which should be done in the presence of [the father] or [the partner].*
- *Children are to continue having counselling support at school.*
- *[The father] and [the partner] are to engage in parenting training.*
- *It is also recommended that both [the father] and [the mother] seek individual counselling.”*

### **The Judgment**

38. The Judge summarised the father’s evidence at [6]-[17], the welfare reports including in particular the March Report at [18]-[37], counsel’s submissions on the March Report at [38]-[49] and the mother’s evidence at [50]-[65]. At [46] and [47], the Judge noted the objection on behalf of the mother to much of the father’s evidence insofar as it related to psychological commentary about the mother and the children and said that the court would direct itself to the factual evidence given by the father as the court was aware that the father was not qualified to give expert evidence.
39. Having noted certain aspects of the law at [66]-[72], the Judge adopted as appropriate the approach suggested by counsel for the father which was as follows:

*“A suggested route to verdict*

- 1. We respectfully submit that the Court will likely want to pose four foundational questions in this case:*
  - (i) Has FF satisfied me on the balance of probabilities that A and B have been subjected to alienating behaviour?*
  - (ii) If yes, has FF satisfied me on the balance of probabilities that that behaviour was conducted by MM?*
  - (iii) If yes, has FF satisfied me on the balance of probabilities that the children have suffered harm as a result of MM’s behaviour?*
  - (iv) If yes, am I satisfied that, unless I act, the children are likely to continue to suffer emotional psychological or physical harm?*
- 2. If the answer to each of these questions is ‘yes’, we submit that the Court should then turn to what is likely the decisive question: what action is necessary and proportionate in accordance with the paramountcy principle embodied in section 3(1) Children Act (2012 Revision) to protect and secure the children’s welfare?”*

40. At [75]-[83] the Judge found that there was a close relationship between the father and the children and that the mother did not fully appreciate the degree of harm that had resulted from some of her actions, although the Judge accepted at [83] that the mother was sincere in recognising that she was at fault for the actions she took in July 2024.
41. The Judge set out the welfare checklist from section 3(3) of the Children Act and then at [85]-[88] she recorded in detail the submissions of counsel for the father and the mother respectively on each paragraph of the welfare checklist.
42. Having set out the order that the father was seeking and the recommendation of Ms C in the March Report at [89]-[90], the Judge recorded at [91] that it might well be that the court would have been assisted by a psychological assessment and went on to say at [92]:

*“There is now in place a Shared Residence Agreement whereby the children are with the parties for one week on and one week off during the course of one month. I am concerned at the level of change sought by the [father] and that any disruption caused thereby may lead to further harm in the case of the children. To this end I had considered whether instead of a one week on one week off arrangement that the children stay with each parent for a two-week period with the [father] having some access during the two weeks that the children are with the [mother]. However, given the relationship between the parties I am not convinced that this will allow the children’s needs to be addressed in the manner and with the necessary space or freedom to facilitate the therapeutic intervention that they each seek for the children.”*

43. Returning to the suggested ‘route to verdict’, she stated at [94] that her answer to each of the questions posed was in the affirmative. She then set out three actions of the mother which she found to be instances of alienating behaviour to which the children had been subjected, namely encouraging the keeping of a ‘negativity journal’, arranging for the children to send the message on 1 July 2024 and sharing some of the contents of the December Report with A. She expressed that conclusion in the following terms:

*“95. The Respondent caused the children to keep a journal, what had been referred to as a negativity journal. This court was not persuaded by the Respondent’s explanation surrounding this journal, that it was only a coincidence that it seemed that the only things in the negativity journal were negative or unhappy things mainly in relation to the Petitioner and what happened when they spent time with him. It was telling that the Respondent never indicated*

*that she tried to engage in what was written with the children, leaving negative views and impressions to fester and thereby causing damage to the relationship between the children and the Petitioner. This attitude seemed to be reflected in the therapy session on 18 March 2024 where it was recorded that the Respondent's attitude was that she did not care anymore.*

96. *I find that the Respondent's actions on the 1<sup>st</sup> July 2024 to be another instance of alienating behaviour. In building up the children's expectations that they could unilaterally determine not to have contact with the Petitioner and having them communicate that fact to him, the Respondent thereby damaged the relationship between the children and the Petitioner. Her actions caused the Petitioner to have to seek a court order to ensure contact, an action which in the context of what the children were told on this issue, could only have resulted in the Petitioner being viewed in a negative light by the children.*

97. *The Respondent's actions in defying the court's orders regarding exposure of the children to the welfare reports prepared in this matter is another example of alienating behaviour. Without context in the form of the Petitioner and the welfare officer having knowledge of the fact that the children had been exposed to those reports, it is obvious from the evidence of Ms C that there was a resulting impact on the relationship between the children and Ms C. One can extrapolate from this that it would also have affected the children's interaction with the Petitioner, without him having the benefit of knowledge of this exposure. I find the Respondent could only have been seeking to damage the relationship between the children and the Petitioner. There is no other explanation for showing them these reports. As I have stated above, the Respondent has not fully grasped that her actions have had alienating consequences. The fact that the Respondent considers that she did not intentionally seek to alienate the children from the Petitioner does not equate to her actions not having that effect."*

44. The Judge went on at [98] to say:

*"I am satisfied that the children have suffered from this behaviour. I am also satisfied that they may continue to suffer emotional or psychological harm if action is not taken."*

45. She noted that each party had agreed that the children needed to attend counselling and having also noted that there was precedent for a protected placement period, as suggested by the father, in *Re H* [2019] EWHC 2723 (Fam) and *Re S* [2020] EWHC 1940 (Fam), as well as in the Cayman case of *X v Y, Unreported*, 26 August 2020, the Judge announced her conclusion at [104] in the following terms:

*“Mindful of the above, the evidence of the parties, the submissions of counsel, and the evidence of Ms C and also given my findings above, my order is as follows....”*

46. The Judge then set out her detailed order which, as already stated, granted sole residence of the children in favour of the father, with a suspension of contact with the mother. The order also appointed Dr Braier, a psychologist nominated by the father, as the Lead Family Therapist with responsibility to direct and oversee all therapeutic work concerning the children.

### **The applicable law**

47. As with all decisions concerning the upbringing of children, the court must apply section 3 of the Children Act (2012 Revision), the relevant terms of which are as follows:

*“Welfare of the child*

*3(1) Where a court determines any question with respect to –*

*(a) the upbringing of a child; or*

*(b) ...*

*the child’s welfare shall be the court’s paramount consideration.*

*(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.*

*(3) In the circumstances mentioned in sub-section (4) a court shall have regard in particular to:*

*(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);*

*(b) his physical, educational and emotional needs;*

*(c) the likely effect on him of any change in his circumstances;*

*(d) his age, sex, religious persuasion, background and any characteristic of his which the court considers relevant;*

*(e) any harm which he has suffered or is at risk of suffering;*

*(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; and*

*(g) the range of powers available to the court under this Law in the proceedings in question.*

*(4) The circumstances are that:*

*(a) the court is considering whether to make, vary or discharge a Section 10 order, and the making, variation or discharge of the order is opposed by any party to the proceedings....”*

48. The leading authority in connection with allegations of alienating behaviour is the decision of Sir Andrew McFarlane, President of the England and Wales Family Division, in *Re Y (Experts and Alienating Behaviour: The Modern Approach)* [2026] EWFC 38. In that judgment, the President referred to his own judgment in *Re C (Parental Alienation; Instruction of Expert)* [2023] EWHC 345 (Fam) and also commended the general application of the ‘*Family Justice Council Guidance on responding to a child’s unexplained reluctance, resistance or refusal to spend time with a parent and allegations of alienating behaviour*’ dated December 2024 (“the Guidance”).
49. The Guidance deals with RRR which it defines as ‘*reluctance, resistance or refusal behaviours by a child concerning their relationship with, or spending time with, a parent, which may have a variety of potential causes*’.
50. Alienating Behaviours is defined in the Guidance as ‘*psychologically manipulative behaviours, intended or otherwise, by a parent towards a child which have resulted in the child’s reluctance, resistance or refusal to spend time with the other parent*’. [Original emphasis]
51. At [10] the Guidance describes what is needed in order to establish that Alienating Behaviours have occurred in the following terms:

*“10. A court will therefore need to be satisfied that three elements are established before it could conclude that Alienating Behaviours had occurred:*

- (1) the child is reluctant, resisting or refusing to engage in, a relationship with a parent or carer; and*
- (2) the reluctance, resistance or refusal is not consequent on the actions of that parent towards the child or the other parent, which may therefore be an appropriately justified rejection by the child (AJR – see Glossary above), or is not caused by any other factor such as the child’s alignment, affinity or attachment (AAA – see Glossary); and*
- (3) the other parent has engaged in behaviours that have directly or indirectly impacted on the child, leading to the child’s reluctance, resistance or refusal to engage in a relationship with that parent.”*  
[Original emphasis]

52. Although I refer to certain passages below, it is not necessary for the purposes of this appeal to rehearse the contents of *Re Y* and the Guidance in detail. But in any future case concerning RRR or alleged alienating behaviour, courts in this jurisdiction should have in mind and apply the principles set out in the Guidance and *Re Y*.

53. What emerges from the Guidance and *Re Y* is that the court must first determine as a fact whether there has been Alienating Behaviour as explained in [10] of the Guidance. This will require identification of the three elements set out in [10]. In relation to whether there is RRR at all, [39] of the Guidance states:

*“If Alienating Behaviour is raised, the court should ascertain whether it is accepted that the child has been reluctant, resistant or has refused to spend time with the parent. If the child/children is/are spending time regularly with that parent, the assertion of Alienating Behaviour is unlikely to be made out. The court should look for evidence of children being reportedly unwilling to see or stay with the parent and the reasons given for the child’s RRR.”*

54. What is also made clear is that where there is an allegation of domestic abuse, the court must consider whether that is the cause of any RRR. The Guidance emphasises at [41] that it is the court which must decide upon the facts and that a welfare officer is not an arbiter of fact. Similarly *Re Y* at [45]-[46] emphasises that the factual matrix around allegations of alienating behaviour is a matter for the court alone; it is not a matter for expert psychological evidence.

55. The Guidance further emphasises that, once Alienating Behaviour is found, the court must then move on to consider the welfare of the child, i.e. what order should be made in the child’s best interests? In this connection, consideration should be given as to whether to join the child as a party and appoint a guardian and whether expert evidence is required. The Guidance suggests that the former will usually be the case (see [68] and [78]).

56. The fact that there has been a finding of Alienating Behaviour does not necessarily mean that the court should not consider the wishes of the child. Thus, the Guidance states (so far as relevant) as [69]-[71]:

*“69. The importance of a child’s participation in decision making about them and considering their ascertainable wishes and feelings when making decisions in well-established. The court is directed to have regard to the wishes and feelings of the child concerned – considered in the light of their age and*

*understanding... There is also good evidence of the potential benefits of such involvement....*

70. *Allegations of Alienating Behaviours can impact on how the wishes and feelings a child expresses are viewed. Children in this context can experience professionals as dismissive of their reported experiences and views. This can undermine efforts to promote their wellbeing and their trust in professionals, particularly if they experience repeated questioning as disbelieving of their account, an attempt to alter their expressed wishes or to prove that these are not their 'true' wishes by catching them out in some way.*

71. *Care should be taken not to dismiss the voice of the child in the absence of compelling evidence to show that psychological manipulation has impacted on their capacity to freely express their wishes. Care should be taken not to assume that the style of language a child uses when speaking to professionals, in isolation, confirms an allegation of Alienating Behaviour or 'coaching'...."*

57. Similarly, a finding of Alienating Behaviour does not necessarily lead to a change in the child's placement. Thus, at [74] the Guidance states:

*"74. A finding that a parent has acted to alienate a child from the other parent is usually only one part of the factual matrix. The court should not treat a finding of Alienating Behaviour by the parent with whom the child lives as an automatic trigger for a change in a child's placement..."*

75. *Just as with findings of other safeguarding risks, the fact that a child's relationship with one parent has been disrupted by the behaviours of the other parent, is a factor to be weighed in the balance in determining the child's overall welfare. The court should bear in mind the wider factual matrix, which may include findings of alignment or other safeguarding issues, when considering next steps."*

58. In summary, as stated at [90] the welfare of the child/children remains the paramount consideration.

59. The Guidance states at [93] that the welfare checklist will need to be applied as relevant to the individual circumstances of the child and their family. The Guidance then goes on to provide a non-exhaustive list of issues that may be considered and these include considering the wishes and feelings of the child, the impact of a separation from the current parent with care and the risk of harm both from an exposure to continuing Alienating Behaviour and from disruption of the child's current living arrangements.

**The contentions on appeal**

60. The mother's grounds of appeal number fourteen in all, but I would summarise the key submissions made by Mr Yates on her behalf as follows:
- (i) The delay in issuing the Judgment meant that the evidential basis underpinning it was materially out of date, that it was inherently less reliable and that it was highly indicative that the decision was wrong, because were such a draconian order necessary, the decision would have been more or less instant.
  - (ii) The Judge provided no, or no adequate, reasons for concluding that the welfare of the children required the drastic step of making a sole residence order in favour of the father. Following supply of the Judgment in draft, the mother's attorneys, in compliance with their duty in such circumstances, had written to the Judge explaining that the Judgment lacked proper reasoning, in particular the lack of application of the welfare checklist including consideration of the balance of harm, and although the Judge changed a few parts of her draft following the request, there were no material changes or amplifications.
  - (iii) Whilst the Judge recorded in detail the submissions which each party had made on the various paragraphs of the welfare checklist, the Judge had not conducted her own assessment and application of it and similarly the March Report, upon which the Judge had placed considerable reliance, did not consider the welfare checklist either. In particular, the Judge never addressed the children's expressed wishes or feelings or explain why she felt that they could be rejected, nor did she consider the balance of harm as between maintaining the shared care arrangement on the one hand and transferring residence to the father on the other. In essence, the Judge had simply failed to provide any reasons for her welfare decision.
  - (iv) The route to verdict was wrong and did not properly address the welfare issue.
  - (v) The Judge's finding of possible psychological harm was not appropriate where there was no evidence from a psychologist.
61. The father, on the other hand, emphasised the limited circumstances in which an appellate court can interfere in a case of this nature. The Judge had the advantage of seeing and hearing the witnesses and of having a feel for the case and the evidence as a whole. Mr McGrath referred the court to *Volpi v Volpi* [2022] EWCA Civ 464 where at [2] Lewison LJ had conveniently summarised the position in relation to appeals on questions of fact as follows:

*“The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:*

- (i) An appeal court should not interfere with the trial judge’s conclusions on primary facts unless it is satisfied that he was plainly wrong.*
- (ii) The adverb “plainly” does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion, what matters is whether the decision under appeal is one that no reasonable judge could have reached.*
- (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.*
- (iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in its judgment). The weight which he gives to it is however pre-eminently a matter for him.*
- (v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge’s conclusion was rationally insupportable.*
- (vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.”*

Although *Volpi* related to pure findings of fact, similar limitations on an appellate court’s role apply where the appeal is from a discretionary or evaluative decision of the trial judge. The present case involves findings of fact in relation to alienating behaviour and thereafter a discretionary or evaluative decision as to what welfare order should be made in the children’s best interests.

62. Mr McGrath accepted that it was unfortunate that there had been such a delay between the trial and the handing down of the Judgment but submitted that that delay did not undermine the reasoning for the orders made by the Judge.

63. In relation to the welfare checklist, Ms C was a very experienced social worker and the Judge had clearly had the welfare checklist in mind. It was set out in the Judgment and she then made reference to each paragraph of the welfare checklist by reference to both the father's submissions and the mother's submissions. In context, it was clear that she had considered the welfare checklist when coming to her decision.
64. As to the children's wishes and feelings, she was clearly aware of the children's wishes as they were referred to in the Judgment, but she was right to pay scant regard to those wishes once she had made a finding of alienating behaviour by the mother. The children's expressed wish to live with the mother had to be seen in the context of the emotional / psychological harm that the children had suffered as a result of the mother's alienating behaviour and the pressure / influence she had sought to place them under in respect of their living arrangements.
65. As to lack of reasoning, as stated in *Volpi*, the Judgment should not be subject to analysis as if it were a contract or legislation. Taken in the round, it was clear that the Judge had found that there was alienating behaviour, that this was causing harm to the children and that moving the children to reside with the father would be better for their welfare than remaining where they were because of the need to try and bring the harm being caused by the alienating behaviour to an end.

### Discussion

66. I begin with the issue of delay. The members of this court are aware of the heavy workload faced by judges of the Grand Court. However, a delay of some 7 months for production of a draft judgment in a case involving the welfare of children is wholly unacceptable. As section 3(2) of the Children Act (quoted at para 47 above) states, the court must always have regard to the general principle that any delay in determining a question concerning the upbringing of a child is likely to prejudice the welfare of the child.
67. On the Judge's finding, that might be thought to be particularly relevant in the present case. The Judge had concluded that the harm being suffered by the children under the shared care arrangement because of the mother's conduct was such as to require the very significant step of transferring sole residence to the father; yet the effect of the delay in producing her judgment has been to prolong the exposure of the children to this harm for a further 7 months.

68. However, as Mr Yates accepted, delay is not of itself a reason to allow an appeal. As the Court of Appeal of England and Wales stated in NatWest Markets Plc v Bilta (UK) Limited [2021] EWCA Civ 680 at [45]:

*“Nevertheless, it is quite clear from the authorities that delay alone will be insufficient to afford a ground for setting a judgment aside. However, the delay will be an important factor to be taken into account when an appellate court is considering the trial judge’s findings and treatment of the evidence, and the appellate court must exercise special care in reviewing the evidence, the judge’s treatment of that evidence, his finding of fact and his reasoning.”*

I adopt that approach in this case.

69. I cannot leave the issue of delay without noting that there has also been a delay of at least 10 months in the production by the Judge of her decision on financial matters, which will no doubt have added to the stresses and strains being suffered by this family.
70. Taking first the question of alienating behaviour and bearing in mind that this is purely a question of fact, it seems to me that, in view of the evidence before her and having heard both the father and mother give oral evidence, it was open to the judge to find that the mother had been guilty of alienating behaviour in the three respects listed at [95]-[97] of the Judgment as quoted above at para 43 and that there are no grounds upon which this court could properly interfere with that finding.
71. It follows that this appeal must be considered on the basis of whether, given the finding of alienating behaviour, this court should uphold the Judge’s decision that there should be a transfer of sole residence to the father in place of the shared care arrangement.
72. I have come to the clear conclusion that the Judge has simply failed to provide any reasoning to explain why it was necessary in the children’s best interests to make the order which she did and, as a result, has not apparently had regard to important material considerations. I would summarise my reasons for reaching this conclusion as follows:
- (i) I begin by accepting that caution must be exercised before an appellate court allows an appeal on the basis of a lack of reasons. As Munby LJ said in *Re A & L (Fact-Finding Hearing: Ex Tempore Judgment)* [2011] EWCA Civ 1611 at [34]:

*“There are two principles in play here. The first is that explained by Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360, [1999] 2 FLR 763 at 1372 and 784 respectively. So far as concerns a judge’s approach to a case and his reasoning, his ‘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’. An appellate court, Lord Hoffmann continued, ‘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’.”*

- (ii) However, the other principle in play is that a judge’s expressed reasons must reach a certain level of adequacy. In *Re B (Appeal: Lack of Reasons)* [2003] EWCA Civ 881, Thorpe LJ said at [11]:

*“Certainly it is not incumbent upon the judge to adopt some formula for judgment or simply to parrot statutory provisions. For my part. I would say that the essential test is: does the judgment sufficiently explain what the judge has found and what he has concluded as well as the process of reasoning by which he has arrived at his findings, and then his conclusions?” [Emphasis added]*

To like effect is the judgment of Peter Jackson LJ in *Re A (Special Guardianship: Competing Applicants)* [2018] EWCA Civ 2240 where at [18] he said:

*“Lastly, the substantive nature of the entire process was described by Sir James Munby P in *Re F (Children)* [2016] EWCA Civ 546.... at para [22]:*

*“Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law.” [Emphasis added]*

- (iii) The Judge’s reasoning in connection with welfare is sparse in the extreme. Having at [98] found that the children had suffered from the mother’s alienating behaviour and that they may continue to suffer emotional or psychological harm if no action is taken, she refers at [99] and [100] to the respective proposals for therapeutic treatment and then refers to three cases, *Re H*,

*Re S and X v Y* where orders for transfer of residence have been made. She goes on to express her conclusion in one sentence in [104] by saying:

*“Mindful of the above, the evidence of the parties, the submissions of counsel and the evidence of Ms C and also given my findings above, my order is as follows.....”*

- (iv) As stated earlier, the Guidance makes clear that the fact that alienating behaviour has been found does not of itself lead to a transfer of care of children. The court must consider carefully all the welfare ramifications for a child if an order for the transfer of a child’s care is made.
- (v) In my judgment, the Judgment does not properly address the welfare issues and explain why a sole residence order in favour of the father is in the children’s best interests. It gives the impression that once the court has found alienating behaviour which is causing harm to a child, a transfer of residence is appropriate. This may have been a consequence of the Judge adopting the ‘route to verdict’ which at question 2 does not ask an open question as to what is in the best interests of the children.
- (vi) The Judgment does not consider or apply the welfare checklist. The Judge does of course summarise the contentions of the parties on each paragraph of the checklist in the Judgment but nowhere does she explain her own conclusions as to how the most relevant paragraphs apply to the facts of the case.
- (vii) I accept of course that judges are not required, slavishly, to set out the welfare checklist in every single judgment but it is necessary for the judge to highlight those aspects of the checklist which are considered to be relevant to the issues in the case; see for example the observation of McFarlane LJ in *Re H (A Child)* [2016] EWCA Civ 921 at [34] which, although made in the context of a public law case, is equally applicable in respect of private law disputes about children. The Children Act draws no distinction between private law and public law cases in relation to the welfare checklist. Indeed, as stated above, the Guidelines at [93] emphasise the need to apply the welfare checklist to the individual circumstances of the child and their family and set out in some detail the relevance of particular paragraphs of the checklist in cases of alienating behaviour.
- (viii) Not only does the Judge not explain her conclusions in relation to the welfare checklist, nor did the March Report upon which the Judge placed considerable reliance. In that report, the welfare officer explains in some detail why she has concluded that the mother has been guilty

of alienating behaviour, but her reasons for recommending sole residence in favour of the father are essentially contained only at [46] which is quoted at para 37 above. She offers no real explanation for the change of recommendation for shared care as recently as the December Report. Of her seven instances in the March Report of alienating behaviour on the part of the mother (see para 36 above), only one (sharing some of the content of the December Report with A) took place after the December Report and was therefore a new factor.

- (ix) On any view, a number of the paragraphs in the welfare checklist are of critical significance to a consideration of what was in the best interests of the children. Thus, paragraph (a) states that a court shall have regard to *‘the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)’*. The evidence before the Judge was that, since the time of the 2023 report, A has been consistent in saying that she wishes to live with the mother and not stay overnight with the father, although she wishes to spend time with him. Since the time of the December Report, that has also been the expressed wish of B. At the time of the hearing before the Judge, the children were 13¾ and 12 respectively and therefore of an age where their views might be expected to carry some weight. As stated above, the Guidance makes clear that care needs to be taken not to dismiss the voice of the child in the absence of compelling evidence to show that psychological manipulation has impacted on their capacity to freely express their wishes. It was therefore incumbent upon the Judge to consider the position in relation to the wishes expressed by the children and whether such views could be treated as their own views or whether they were views which were only being expressed because of the mother’s influence and generally to consider what, if any, weight needed to be given to their views in this case. However, the Judge does not discuss or express her own conclusion in relation to this important consideration.
- (x) Paragraph (c) of the checklist requires the court to have regard to *‘the likely effect on him of any change in his circumstances’*. As the Guidance makes clear, this required the Judge to consider the impact of a separation from the mother and a suspension of contact with the mother for what might be an uncertain period. Apart from mentioning at [92] that she was concerned at the level of change sought by the father and that any disruption caused thereby may lead to further harm to the children, the Judge does not address this matter in the Judgment.
- (xi) Paragraph (e) of the checklist requires the court to have regard to *‘any harm which he has suffered or is at risk of suffering’*. Again, as the Guidance suggests, this required the Judge to

have regard both to the risk of harm to the children from exposure to continuing alienating behaviour and the difficulties that might be causing to the relationship with the father on the one hand and the risk of harm to the children from disruption of their current living arrangements on the other. The Judge had to consider the balance of harm and explain where the balance came down and why. Again, this is not addressed in the Judgment.

- (xii) At [101], the Judge notes that there is precedent for a protected placement order as suggested by the father and mentions three cases. However, those cases were very different both in relation to their facts and by reference to the careful explanation which the judge in each case gave as to why the order was being made.
- (xiii) In *Re H*, after some 10 years of “*extremely good contact*” with the father, there was then no contact at all for a year before the hearing as a result, on the judge’s finding, of alienating conduct by the mother. Following a report from a chartered clinical psychologist and having explained his reasoning in considerable detail, the judge held that the child should live with the father with a suspension of contact with the mother for three months.
- (xiv) In *Re S*, the mother, with whom the child lived, was strongly affiliated with a cult which had been held to be socially harmful and its leader to be a sexually predatory charlatan who had assaulted female students and had an indecent interest in children. The mother’s affinity, from which she would not desist, had led to alienation of the child from the father. Having specifically considered the balance of harm from the exposure to the cult’s beliefs and likely termination of the child’s relationship with the father on the one hand and the undoubted harm that would arise from the separation of the child from the mother to whom she was emotionally enmeshed on the other, the judge ordered that there be a transfer of residence to the father with a suspension of contact with the mother.
- (xv) In *X v Y*, the mother had continually made unfounded allegations of sexual abuse by the father upon the child and there was no contact between the child and the father. In the circumstances, Williams J considered that the child’s best interests were served by transferring residence to the father with no contact for some three weeks.
- (xvi) If, despite the lack of reasons to support the Judgment, it was clear that the children’s welfare required a sole residence order in favour of the father, this court would uphold the Judge’s decision. However, that is not the position in this case. Mr Yates submitted that, given that the shared care arrangement was continuing and that the children spent every alternative week

staying with the father, this was not in fact a case of RRR. I express no view on that submission which was only made in passing. However, even accepting that there is RRR, the level of RRR is very different from the normal case (and the cases relied on by the Judge) where contact with the non-carer parent has either come to a complete end or something very close to it. In this case, the children are in fact spending every alternate week living with the father and the evidence of both the December and March Reports was that there appeared to be a happy household when the children were staying with the father.

(xvii) Accordingly, this is, in my view, not a case where the children's welfare obviously requires the very significant step of changing the shared care arrangement to one of sole residence with the father and a suspension of contact with the mother. A careful and thorough assessment of the different options and their implications for the children's welfare was required. In these circumstances, adequate reasons to explain the Judge's decision were essential. As explained by Sir James Munby in *Re F* (quoted at para 72(ii) above), this is both to enable the parties to understand why they have won or lost and to provide sufficient detail and analysis to enable this court to decide whether or not the Judgment is sustainable.

73. In summary, this court is simply not in a position to know what the Judge considered in relation to the above matters and why any consideration of them would lead to the decision to place the children in the sole care of the father. In particular, it does not appear from the Judgment that the judge had regard to the critical elements of the welfare checklist (as discussed above) which were clearly very important factors when assessing the children's welfare. In circumstances where, even accepting the finding of alienating behaviour on the part of the mother, there were clearly perfectly tenable arguments on each side as to whether the children's welfare would be best served by continuing the shared care arrangement with appropriate therapeutic treatment or transferring sole residence to the father with therapeutic treatment, the failure of the Judge to explain why she preferred one course over the other and her apparent failure to have regard to very material considerations means that this appeal has to be allowed.

74. In the light of the decision on these overarching grounds, I do not think it necessary to lengthen this judgment by considering the other grounds of appeal other than to say that to the extent the Judge found that the children were suffering psychological (as opposed to emotional) harm and would continue to do in the absence of a transfer, the absence of any evidence from a psychologist, suggests that that was a finding which cannot confidently be relied upon.

75. During the course of the hearing, both counsel accepted that, if this court were to uphold the appeal, there was no realistic alternative to remitting the matter to the Grand Court for a fresh hearing before a different judge. That is unfortunate given that it will lead to further delay and of course, given A's age in particular, it is getting closer to the time when she will attain the age of 16 and the court may not make orders in respect of her residence. However, by reason of the delay, there is simply no evidence before this court as to how the shared care arrangement has been working for the year since the hearing and whether the harm which the Judge found is still being caused and, if so, the nature and gravity of it.
76. This decision does not suggest a preference from this court for one outcome rather than another; that will be a matter entirely for the judge hearing the case who will be able to consider all matters afresh, including any finding as to whether there has been alienating behaviour. As set out in the Guidance above, this would include any allegation, if it is made, of abuse or coercive control against the father which might be argued to have contributed to any reluctance on the part of the children to stay with him.
77. In my judgment, it would undoubtedly be beneficial for a Guardian to be appointed to represent the interests of the children and, if the father wishes to persist in his suggestion of psychological harm to the children, I would have thought that an independent psychological assessment would also be of importance.
78. In summary, I would allow this appeal by quashing the order of the Judge and remitting the father's application for sole residence for determination by a different judge of the Grand Court. In the meantime, the shared care arrangement will continue and I would strongly urge the parties on a voluntary basis to put the various recommendations for therapeutic treatment for the mother, the father and the children into effect. Furthermore, as the Judge correctly identified at (xiii) of her order, it is extremely important that neither parent should make negative or disparaging remarks about the other to, or in the presence or hearing of the children. The children should not be drawn into adult matters or exposed to blame, hostility or commentary that undermines their emotional safety or relationship with either parent.

**Clare Montgomery, JA**

79. I agree.

**Sir Richard Field, JA**

80. I also agree.