

All England Reporter/2008/May/Re W (children) - [2008] All ER (D) 258 (May)

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Re W (children)

[2008] **EWCA Civ 538**

Court of Appeal, Civil Division

Thorpe, Wilson LJJ and Charles J

20 May 2008

Family proceedings - Orders in family proceedings - Specific issue order - Child welfare - Judge's assessment of children's wishes and feelings - Judge's assessment of financial issues - Whether judge erring in refusing mother's application to remove children to Sweden.

Abstract

In the instant case, where the mother of three children had sought an order permitting her to remove her children to Sweden to live, in all the circumstances, the judge had failed to give the children's wishes and feelings, which had been plain enough, greater weight; and he had erred in his assessment of the financial issues in the case. Accordingly, the mother's appeal against the judge's refusal to grant the order would be allowed.

Digest

The parties were Swedish nationals who had lived in London for almost 15 years. The father was an investment banker and the mother was a qualified accountant who had not worked outside the home since the birth of the children, two girls and one boy. The children attended an independent school, where the cost of their education amounted to approximately £45,000 per year. The family lived together in a spacious house in north London until the father's departure in February 2006. The mother petitioned for divorce in July 2006 and applied for financial relief. In May 2007, the mother issued an application to remove the children permanently to Sweden. Thereafter, two contested applications were in preparation, namely, the ancillary relief application and the application under s 13 of the Children Act 1989. In the financial applications, the real issues were a secure home for the wife and children as well as substantial periodical payments to provide for the education and the maintenance of the children as well as that of their mother as their primary carer. The final matrimonial home in north London was worth about £1.8m, but substantial borrowing reduced the net equity to about £1.2m. Financial issues were also prominent in the mother's s 13 application. Her case was that, following the father's departure, she had been faced with multiple problems over cash flow, meeting living expenses and discharging debts. The reduced financial circumstances and the risks overhanging the father's ability to generate the necessary future income dictated the return to Sweden. Fees at the best independent schools in Sweden would be half the level of the London schools and an ideal house could be bought for little more than £400,000. As to the wishes of the children, their feelings had come to the judge through the report of the CAFCASS officer. They had been keen to ensure that the officer recorded their position in terms which they had approved. The judge had considered a paragraph which stated that the children 'were united in expressing their interest in such a move, although they each recognised it would mean leaving the schools which they all enjoy attending and losing regular contact with their friends. Nonetheless, they were all confident that they would make friends easily and they anticipate no significant difficulties making the transition to living in Sweden where they have family and where they regularly visit during their school holidays'. However, the CAFCASS officer had applied her own analysis to the statement

which the children had wished her to advance on their behalf. The end result of that analysis was her advice to the judge to exercise a degree of caution in evaluating the children's wishes and feelings. However, the children's stated position was also contained in a second paragraph, which was not referred to by the judge, which stated that 'the children all appreciate that they all currently attend highly respected and reputable schools ... they are all aware that these schools attract considerable fees. They are aware that they will not be able to continue their studies at these schools if the fees are not met. They are aware that their father's income can change from year to year and this makes them feel uncertain about their future. Further, they do not trust their father to honour his financial commitments, describing him as, 'a bit secretive'. Nonetheless [two of the children] are of the view that if offered some guarantee that their school fees will be met, in addition to the mortgage, and if their current living standard could be maintained, the option of remaining where they are would be more finely balanced with the option of moving to Sweden. Irrespective of any such guarantee that might be achieved, [the other child] tells me that he would still prefer to move to Sweden'. As to the financial factors in issue, the mother's case was that the father had business and financial difficulties, and financial security could only be achieved by moving to Sweden. The judge concluded that 'there is probably sufficient equity to acquire a house for the mother and the children in London which would be acceptable. There are on any view considerable sums available to the parties. It will inevitably not be of the same standard of what is a rather lovely home ... that they have now, but it will be satisfactory'. In carrying out the welfare balance, he decided that two considerations were 'stellar'. The first was the completion of the children's education and the second was the improvement of the fraught relationship between the children and their father. He concluded that those considerations indicated a refusal of the application. The mother appealed.

She submitted, inter alia, that (i) the judge had failed sufficiently to consider the wishes and feelings of the children; and that (ii) the judge had erred in relation to the financial factors in issue, in particular, the effect that the refusal of her application would have upon the London home.

The appeal would be allowed.

In all the circumstances, the wishes and the feelings of the children had been plain enough, and the judge should have given them greater weight. In relation to the financial matters, there was simply no evidential foundation for the judge's findings of 'acceptable' and 'satisfactory'. The mother and children would have been forced to downsize and downgrade to a property which could only be categorised as unacceptable and unsatisfactory given the standard to which they were accustomed and the standard that would be commensurate with the schools that the children would continue to attend. The judge had, in all the circumstances, reached his welfare conclusion on an unsustainable basis. The financial considerations had required a choice between a smaller and less central property in the northern suburbs, bearing no resemblance to the home on which the children and CAFCASS officer had set such store, and a house comparable in quality to the family home which could have been purchased in Sweden for approximately £400,000. Outcomes in relocation cases were always fact dependent. Given that all family members were Swedish nationals and their habitual residence was the consequence of the attraction of the financial market in which the father traded was a matter to be stressed.

Indira Ramsahoye for the mother.

Alexander Verdan QC and Barbara Mills for the father.

Vanessa Higgins Barrister.

Judgment

[2008] EWCA Civ 538

COURT OF APPEAL, CIVIL DIVISION

20 May 2008

LORD JUSTICE THORPE, LORD JUSTICE WILSON and MR JUSTICE CHARLES

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

LORD JUSTICE THORPE:

1. The parties to this appeal are Swedish nationals who have lived in London for almost fifteen years. They are in their mid to late forties and are extremely talented. The father is an investment banker working in partnership with two others. The mother is a qualified accountant who has not worked outside the home since the birth of her children. Those children are at heart of this case. They are respectively, J a girl, born on the 17th March 1993, A, a boy, born on 18th October 1994 and, C a girl, born on the 21st July 1996.
2. The children are as talented as their parents and their parents are justly proud of them and of their considerable achievements at school. The three schools that they attend are independent London day schools of the highest repute. The cost of their private education, including extras, amounts to some £45,000 a year.
3. The family lived together in a spacious house in Golders Green until the father's departure in February 2006.
4. The breakdown of the marriage has been particularly acrimonious. The wife felt betrayed by the husband's departure exacerbated by the surrounding circumstances. In July 2006 she petitioned for divorce and applied for financial relief. The resulting financial proceedings were also bitter, a bitterness exacerbated by the husband's failure to make candid disclosure of his financial circumstances.
5. Post separation contact between the father and the three children took place on an ad hoc basis until April 2007 when a more formal regime was substituted.
6. On the 30th May 2007 the mother issued an application to remove the children permanently to Sweden.
7. Thereafter there were two hotly contested applications in preparation: the ancillary relief application and the application under Section 13 of the Children Act 1989. This was essentially London litigation belonging to the Principal Registry of the Family Division. However at some stage the ancillary relief application was transferred to the Watford county court in a belief that its progress would be accelerated there. We were told that in June and October 2007 applications were made for the return of the financial proceedings to the Principal Registry, applications which were understandably refused.
8. In the financial applications the real issues were a secure home for wife and children as well as substantial periodical payments to provide for the education of the children and their maintenance as well as that of their mother as their primary carer. The final matrimonial home in Golders Green was worth about £1.8M but subject to substantial borrowing which reduced the net equity to about £1.2M.

9. Financial issues were also prominent in the mother's Section 13 application. Her case was that following the father's departure she had been faced with multiple problems over cash flow, meeting living expenses and discharging debts. The reduced financial circumstances and the risks overhanging the father's ability to generate the necessary future income dictated the return to Sweden. Fees at the best independent schools in Sweden would be half the level of the London schools and an ideal house in the country could be bought for little more than £400,000. This solution had been thoroughly investigated by the mother and was fully illustrated in her evidence in support of her application.

10. The father in response maintained that the children's welfare depended upon continuity in their Golders Green home and in their London schools. He maintained that the Golders Green home remained affordable and that his prospects enabled him to assure the court that there would be no reduction in the children's standard of living and no change in their settled course of education.

11. It is to me obvious, certainly with the benefit of hindsight, that these separate but closely interlinked applications required to be heard together by an experienced specialist judge, either a judge of the Division or a deputy. If for any reason the applications could not be heard together then as a poor second best the financial application needed to be determined first. Its determination would enable the rival contentions on finance in the context of relocation to be evaluated in the light of the mother's achieved entitlement rather than on the basis of speculation as to what that entitlement might be. Thus when the Section 13 application was listed for hearing before His Honour Judge Richards in the Principal Registry on the 21st January 2008 in advance of an anticipated hearing of the application for ancillary relief in the Watford County Court in March 2008 unnecessary difficulties were immediately imported.

12. The judge heard evidence and submissions over the course of three days and on the 25th January delivered a written judgment which was comprehensive, profoundly considered and sensitively written. At the end of his judgment he refused the mother's application. He also refused permission to appeal "with some diffidence".

13. The rationale for the judge's conclusion is clear. In carrying out the welfare balance he decided that two considerations were "stellar". The first was the completion of the children's education and the second was the improvement of the somewhat fraught relationship between the children and their father. Both those considerations indicated a refusal of the application.

14. The Appellant's Notice was received in this court on the 2nd February supported by a skeleton argument of the 3rd March settled by Mr Chamberlayne who acted for the mother in the ancillary relief proceedings, in the absence of Miss Ramsahoye, who had appeared below. On the 14th March I ordered an oral hearing on notice with appeal to follow. That hearing was fixed for one day on 23rd April.

15. At the hearing the mother was again represented by Miss Ramsahoye who put her criticisms of the judgment under four heads.

16. Her first submission was that the judge had given insufficient weight to the emotional and psychological impact on the mother of refusal. She submitted that the mother's case in this area was clear and strong, that it was corroborated by medical evidence and that the CAFCASS officer had failed to investigate and assess it. Miss Ramsahoye submitted that the judge had underestimated this consideration by essentially accepting the evidence of the father given in answer to clear questions from the judge at the conclusion of his re-examination. Finally Miss Ramsahoye relied upon fresh evidence, which we admitted despite the objections of Mr Verdan QC on behalf of the father. The fresh evidence related to the mother's psychological state between the date of judgment and 8th April 2008.

17. At first blush there seemed to be considerable force in this first submission. But having heard Mr Verdan in response I came to understand how the judge reached a justifiable conclusion.

18. The aspects that had caused me concern are these: -

(a) The mother had expressed her sense of desperation at the prospect of refusal to the CAFCASS officer in a telephone conversation on the 30th November 2007. That assertion was repeated in her second statement dated 17th December 2007. Yet the CAFCASS officer did not investigate that aspect and did not make any independent assessment of its foundation and thus of its importance. The judge dealt with that lacuna as follows: -

"one aspect that she did not deal with was ...the effect on the mother. I think the reality of that is that she said: "I am sorry. I just did not have the time to do it." And one knows that CAFCASS officers have a substantial load. They have a lot of work to do and she addressed what she thought were the key points and, in fairness to her confined herself to those when she gave evidence. If it is a failing it does not detract from her conclusions."

(b) The CAFCASS officer's assessment of "what she thought were the key points" was likely to be mis-directed given that, although she said she had done many reports in relocation cases, she was unaware of the decision of this court in *Payne v Payne* and the principles there expressed for the guidance of trial courts. Just as CAFCASS officers focus in Section 8 cases on the Section 1(3) welfare checklist so in relocation cases should they focus on the factors identified in *Payne v Payne* as determinative of outcomes. It is surely self evident that the judge should have the assistance of the CAFCASS officers on the crucial factors that he must weigh in deciding the relocation application.

(c) When questioned by Miss Ramsahoye the CAFCASS officer said that she had not read the medical report exhibited to the mother's second statement: perhaps another indication that she had been under pressure. She then read the report and was asked the question as to what would be the impact on the mother if not permitted to take the children out of the jurisdiction. She answered as follows: -

"I've not asked her but she volunteered that she would be desperate, and she said this when she telephoned me...she said: "I'm ill, if I don't get permission to go ...I'll just be desperate", and I was concerned and I said: "what do you mean when you say 'desperate'?" And she said: "I just don't know what I'll do..." and that was our last conversation, but it did concern me when she spoke of feeling desperate and not knowing what to do."

(d) My final concern is the weight that the judge attached to the father's evidence. The fact that the judge questioned the father clearly and at length and the fact that the father offered detailed and pertinent responses support the judge's use of the material. However the husband's assessment of any emotional response from the wife as transient, lasting a few weeks or at most two months, was essentially self serving evidence. Any frank acceptance that the wife was frail and emotionally vulnerable would have been damaging if not fatal to his case. Just as the judge must be guarded against elaboration by the applicant so he must be guarded against a respondent's assessment that down plays the risk.

19. Against that there are a number of powerful considerations. First the judge had the opportunity of

observing and assessing the mother over the course of approximately a day in the witness box. He concluded that she was an exceptionally strong personality.

20. Second the evidence as to the impact of refusal given in the mother's first statement was minimal and the evidence produced from her NHS Practitioner was hardly impressive. She recorded that her patient's weight loss in the aftermath of divorce had been substantially recovered. The high point is only thus: -

"She would like to move back to Sweden with the children where she feels that she could buy a house and educate the children at a much reduced cost, and would therefore be financially independent from her husband and so the main cause of stress would be removed."

21. Third, and for me the most impressive consideration, is that in Miss Ramsahoye's final submissions she placed virtually no reliance on the impact of refusal. Her written and only closing submissions below were produced during the course of the hearing in response to Mr Verdan QC's request. Between paragraphs 18 and 23 she had dealt with the mother's evidence and it is hard to find there any reference to the emotional impact of refusal. In paragraph 29 she referred to the father's evidence and in paragraph 11 to the absence of inquiry by the CAFCASS officer. She only concluded: "it will be for the court to assess in accordance with paragraph 40 and 41 of Payne the effect on the mother of a refusal of her application".

22. Given the way that the mother's case was put to the court in conclusion in my judgment it was perfectly open to the judge to make the assessment which he did and accordingly Miss Ramsahoye fails on her first ground.

23. I acknowledge that the fresh medical evidence from the mother's private G.P. suggests that the judge's assessment of the mother's buoyancy and the transient nature of her emotional reaction to refusal are both misjudged. However I accept Mr Verdan's submission that it would be unprincipled to place critical weight on a report which in a number of respects would be open to challenge on cross examination.

24. Miss Ramsahoye's second submission is that the judge did not sufficiently consider the wishes and feelings of the three children. Nor did he look at them individually.

25. The children's wishes and feelings came to the judge only through the report of the CAFCASS officer. Miss Ramsahoye told us that she had given consideration to an application for their separate representation under Rule 9.5 of the Family Proceedings Rules but had decided against it on the ground that it would lead to an adjournment of the trial.

26. The three children are particularly intelligent and also mature and sophisticated for their different ages. Accordingly it is not surprising that they were keen to ensure that the CAFCASS officer recorded their position in terms that they had approved. The judge therefore took paragraph 21 of the CAFCASS officer's report as the children's *ipsissima verba* as follows:-

"The children are all aware of their mother's proposal regarding a move to Sweden. They were united in expressing their interest in such a move, although they each recognise it would mean leaving the schools which they all enjoy attending and losing regular contact with their friends. Nonetheless, they were all confident that they would make friends easily and they anticipate no significant difficulties making the transition to living in Sweden where they have family and where they regularly visit during their school holidays. They tell me that they each have some conversational Swedish and they are also taking Swedish lessons. In relation to contact with

their father they believe he could visit regularly and stay at their flat in Stockholm."

27. However the CAFCASS officer then applied her own analysis to the statement which the children wished her to advance on their behalf. The end result of that analysis was her advice to the judge to exercise a degree of caution in evaluating the children's stated wishes and feelings.

28. In relation to this a number of points must be made. First the children not only wanted the CAFCASS officer to advance the formulation which they had agreed, they no doubt understood that she would do so. She did not return to them to explain her intention to finesse away their stated position by her own analysis.

29. Second their stated position was contained in two paragraphs and the judge nowhere refers to paragraph 22 which was in these terms: -

"The children all appreciate that they all currently attend highly respected and reputable schools. They were pleased, but unsurprised, to learn that each of their schools regard them as very capable students. However, they are all aware that these schools attract considerable fees. They are aware that they will not be able to continue their studies at these schools if the fees are not met. They are aware that their father's income can change from year to year and this makes them feel uncertain about their future. Further, they do not trust their father to honour his financial commitments, describing him as, "a bit secretive". Nonetheless, J and C are of the view that if offered some guarantee that their school fees will be met, in addition to the mortgage, and if their current living standard could be maintained, the option of remaining where they are would be more finely balanced with the option of moving to Sweden. Irrespective of any such guarantee that might be achieved, A tells me that he would still prefer to move to Sweden."

30. Paragraph 22 is clearly more emphatic than paragraph 21 and leaves the reader in no doubt of their commitment to Sweden, A absolutely, and J and C more narrowly if guaranteed that neither home nor schools would change.

31. The judge may have seen difficulty here since at the end of the first day he posed the question: "Is it thought that the judge should meet the children in this case? Well I will let you think about it."

32. On the following morning Miss Ramsahoye, on instructions, responded positively to the judge's suggestion. Mr Verdan in response submitted that the CAFCASS officer should have advised the judge as to whether he should see the children and if yes how it should be handled. He continued that his client considered the assessment of their wishes and feelings to be a complex issue and that there was therefore little point in the judge merely meeting them superficially. There the matter was left. Miss Ramsahoye did not press the point.

33. The participation of children in private law Children Act proceedings is a matter of particular topical concern. The Family Justice Council has created a sub-committee, "The Voice of the Child", to advise government and to stimulate professional debate as to the way forward. As a generalisation it can be said that the committee is strongly in favour of judges seeing children much more frequently than has been our convention. This case well illustrates the argument. J in particular, at nearly 15 years of age, would in another context be judged Gillick competent. She is an autonomous person with clear rights. If major issues are to be decided, determining the whole course of her remaining minority, she is at a minimum entitled to be heard. That can be achieved in three ways; separate representation, discussion with the judge or through a CAFCASS intermediary. Each of these methods has different advantages and disadvantages. The one

selected in the present case has the obvious disadvantage that at the conclusion of the process J can only feel that her wishes and feelings were insufficiently considered by the judge because they were diminished by the very professional whom she trusted to advance them. This conclusion might have been avoided had the judge had a meeting with the children, and particularly with J. He suggested that course and, in my judgment, it is regrettable that he was dissuaded from it.

34. Thus my conclusion is that the wishes and feelings of the children were plain enough and the judge should have given them greater weight. In consequence I conclude that Miss Ramsahoye succeeds on this second ground.

35. Miss Ramsahoye's third ground is in my judgment far the most substantial. It relates to the financial factors in issue and in particular the effect that the refusal of the application would have upon the London home that would be shared by the mother and the children.

36. As I have already established the mother's case was simple. The father had business and financial difficulties and financial security could only be achieved by moving to Sweden. In his first statement of 19th September 2007 the father made plain that his proposals were:-

(a) that the mother and the children remain in the family home until C finishes full-time secondary education, whereupon the property would be sold and the net proceeds divided equally.

(b) that the children's English school fees and extras would be paid by him until they each finished their secondary education.

(c) that the mother continued to receive global child and spousal maintenance in the sum of £4,500 per month to allow her to meet her own needs and the children's needs.

37. In his second statement, filed only 6 days before the trial opened, the father continued to propose that the mother and children should remain in the former matrimonial home, he assuming all mortgage payments and the joint debt, until C finished full-time secondary education. Only in the alternative did he offer the mother 75% of the net equity to purchase a new home for herself and the children to the value of about £650,000.

38. The security of the children's existing home was a matter to which the CAFCASS officer attached considerable importance. In her written report at paragraph 46 she said:-

"The father acknowledges that his previous, "cash-flow" problems and failure to instruct a solicitor earlier in these proceedings have perhaps undermined the mother's trust in his ability to meet his financial commitments. He wishes to fully assure the court that he is able to meet all the necessary costs to allow the children to remain at their home with their mother in London, to continue attending their private schools, and to continue enjoying their current lifestyle. In relation to the children's schooling he tells me that he is willing and able to deposit £150,000 in a school fund, which he believes, would meet the cost of all secondary school fees."

39. In her oral evidence Mr Verdun asked what would be the children's reaction if their education were secure but that they would have to move home. This was her answer:-

"I think they would be very happy to know that their schooling was financially secured and I think they would be devastated to think that they would have to move from that house, but I don't know how that would then balance out really. I think on the whole they would be saying "why can't we go to Sweden?" I think that is the most likely effect".

40. Earlier in response to Mr Verdán she had said:-

"I mean that lifestyle in that house, and I can remember actually J saying "If we did stay, we want to stay at our home", that has always been their home for ever - not for J, the others have been there for ever. This is when J was with C at father's house, she said: "If we did stay, we'd want to stay at our home" and then she said something like: "I'm not being funny", she said "I wouldn't want to go anywhere else". I gathered she was saying "I don't want to kind of downsize", or "I don't want to go out of that area", that's where she wanted to be."

41. To like effect she later said:-

"I think the two big things for them are: their home, where they are - two monumental things for them are their home and their education. If in any way those two things could be secured, you know, I think that is the way forward.

On the following page of the transcript she said:-

"they have got a very strong -I've got to say this-emotional attachment to this house."

42. However Mr Verdán did put specifically to the CAFCASS officer an evaluation of "staying in a £650,000 house in Golders Green" or moving to Sweden. The CAFCASS officer chose the former on the grounds that the risks of the move to Sweden were greater because less was known.

43. No doubt Mr Verdán put questions in that form because he was aware of what his client would say in his oral evidence, in the course of which he announced that he had resigned himself to accepting that the family home would have to be sold. Thereafter Mr Verdán presented his case on the basis that the likely outcome of the forthcoming ancillary relief proceedings was that the mother and children would inevitably have to downsize but would have a fund of approximately £640,000 gross, or £610,000 net of costs of purchase, to spend in the housing market.

44. I interpolate that the parties ultimately compromised the financial proceedings and a consent order was made by His Honour Judge Overall QC on the 25 February 2008. The result of the compromise suggests that the wife would probably have something nearer £600,000 net to spend in the housing market. That is an immaterial difference and accordingly it is not necessary to judge this appeal on the basis of any subsequent financial development. Rather we must evaluate the evidence before the judge as to what a purse of £610,000 would have bought for the mother in January 2008. Certainly it would not have bought her a fitting house in Golders Green. The only evidence before the judge was 11 pages of particulars of properties in North and West London then on the market in the bracket £600,000 - £650,000. They were available to the mother only 6 days before trial and during the weekend she had inspected one, a four bed roomed house between Golders Green and Brent Cross at £645,000. Her inspection had revealed it to be in poor condition and within 100 metres of a busy railway line. Neither factor appeared from the document in evidence. The

husband conceded that the property was unsuitable.

45. What was the judge's conclusion on this vital issue? At page 38 of his judgment he said:-

"I form the view that it is more likely than not that the other aspect of this case, namely the finances, is such that there is probably sufficient equity to acquire a house for the mother and the children in London which would be acceptable. There are on any view considerable sums available to the parties. It will inevitably not be of the same standard of what I think is a rather lovely home in Golders Green that they have now, but it will be satisfactory."

46. There is simply no evidential foundation for the judge's findings of "acceptable" and "satisfactory". All he had was the 11 pages to which I have referred. An analysis of those pages shows that with £610,000 to spend the mother and children would be forced to downsize and downgrade to a property that could only be categorised as unacceptable and unsatisfactory given the standard to which they were accustomed and the standard that would be commensurate with the schools that the children would continue to attend.

47. I have considerable sympathy for the judge. His unsustainable conclusion is the product of a radical shift in the father's case reserved for his oral evidence and only half put to the CAFCASS officer. Had he from his first statement accepted that a sale of the family home was inevitable and the likely consequence was that the mother and children would have only some £610,000 with which to re-house the consequential issues would have been fully and properly explored and the judge would not, I think, have reached the conclusion which he did.

48. However, as it is the judge has reached his welfare conclusion on an unsustainable basis. The reality is that financial considerations required a choice between a smaller and less central property in the northern suburbs, bearing no comparison to the home on which the children and the CAFCASS officer set such store and a house comparable in quality to the family home which it was common ground could be purchased in a Swedish country town for approximately £400,000. Furthermore the London housing fund available to the mother contained the father's Mesher investment of about £150,000. If the mother relocated to Sweden not only would she be able to re-house comfortably with her own share of approximately £440,000 but the father would have immediately released to him his share of approximately £150,000.

49. Miss Ramsahoye's final submission was that the judge had reached an erroneous conclusion when he held that the children's relationship with their father could not equally well be maintained under the contact proposals advanced by her client. She submitted that the judge had focused exclusively on the problems of the alternate weekend contact in Stockholm during school holidays and had effectively ignored the school holidays and half-terms which would be equally shared and which would give the father approximately seven and a half weeks of staying contact in each academic year.

50. I found this submission quite unpersuasive. The judge's conclusions on this issue were clearly open to him on the evidence.

51. The judge's erroneous conclusion as to the consequences for the mother and children of the inevitable loss of the family home is of a much greater magnitude than any error in weighing the wishes and feelings of the children. The exercise of a judicial discretion that underweighs a relevant factor may nevertheless be upheld on appeal. A factual finding unsupported or contradicted by evidence will generally result in a successful appeal, certainly where the factual finding is clearly so material to the judge's conclusion.

52. Outcomes in relocation cases are always fact dependent and the present case is no exception. Here I stress only the fact that all family members are Swedish nationals and their habitual residence here is the consequence of the attraction of the financial market in which the father trades. I would not only allow the appeal but grant the permission which the judge refused. That is the principled consequence of the conclusion that mother and children could not be re-housed to an acceptable standard within the available housing fund.

53. At the conclusion of the hearing of 23rd April we simply reserved our judgments and did not invite submissions on how the relocation of the children should be managed. We will invite written submissions on implementation and on costs in the expectation that it will not be necessary for the parties to be represented when our judgments are handed down.

LORD JUSTICE WILSON:

54. I agree that the appeal should be allowed for the reasons given by Thorpe LJ. But I have also read the judgment of Charles J which will follow mine and I agree with his qualification. My concurrence with the judgment of Thorpe LJ is thus similarly qualified.

55. The fact is that at the outset a wheel fell off the father's opposition to the mother's application to remove the children to Sweden. For he is financially unable to sustain the life of the mother and the children in London at an adequate level. This would have been much clearer at trial if the mother's application for ancillary relief had been heard together with her application referable to the children. The evidence even raises doubts as to whether the father can maintain the mother and the children adequately in London. In that regard the terms of the consent order for periodical payments subsequently made (which oblige him to pay £54,000 p.a. for their general maintenance, in addition to school fees plus reasonable extras currently amounting to about £45,000 p.a.) appear to make adequate provision; but the history of the father's erratic maintenance of the family during the two years following separation, apparently reflective of his erratic income, raises questions whether he will prove able to sustain payments at so substantial a level. More obviously, however, the father cannot accommodate the mother and the children adequately in London with a fund of only £610,000. To many that proposition will seem extraordinary. But adequacy is relative - both to the quality of accommodation which they have enjoyed and to that which they would enjoy in Sweden. By reference to those criteria, a house costing £610,000, with at least four, preferably five, bedrooms and within manageable reach of schools in central London, would be so grossly inferior, and would engender such resentment in the mother and the children, that it could only properly be described as inadequate.

56. I agree with Thorpe LJ that the wishes and feelings of the children were not satisfactorily weighed by the judge, probably because they were conveyed to him by a CAFCASS officer who was in the awkward position of making a recommendation which conflicted with them. It is unusual for a contested application of this character to relate to children as old as almost 15, 13 and 11, indeed to children older even than that in terms of intellectual and other attainment; and the conflict under which the CAFCASS officer laboured, itself also uncommon, might have contributed to a strong argument for their separate representation by a guardian ad litem other than her. Or the officer might have sent a copy of her entire report to the children and invited their written comments upon it, if any, for transmission, unedited, to the judge. Or, as Charles J suggests, their interviews with the officer might have been videotaped, with the result that their views would have been conveyed to the judge in more vivid a format.

57. What however does concern me, with respect to Thorpe LJ, is his comment at [34] above that it is regrettable that the judge did not meet the children, particularly J, in order to collect for himself their wishes and feelings. Whether judges should meet children (and, even if so, whether they should do so for the purpose of collecting their wishes and feelings) is a difficult and controversial subject which, as Thorpe LJ points out, is currently under examination at a high level, no doubt in particular by reference to the

experiences of jurisdictions in which such meetings are more common. It may be that, presumably under the guidance of a set of fully debated and carefully drawn principles and perhaps following a degree of judicial training, the practice of the family courts in England and Wales will come to encompass such meetings (at any rate for some purposes) more frequently. Presently, however, the discretion of our judges to meet children privately is largely untrammelled by authority; and all that is clear is that such is currently the exception rather than the norm. I would be concerned that a parenthetical expression of opinion, in a case in which the judge was not pressed to see the children and was not criticised by counsel in this appeal for having failed to do so, might, because of the respect in which my Lord's opinions are held, pre-emptively alter that neutral state of affairs. For that reason only, and without wishing to criticise any judge who might choose to proceed otherwise, I record that, had I been conducting the hearing of the mother's application and had I reached the decision which he favoured:

(a) I would have met the children, albeit not for the purpose, nor at the stage, commended by Thorpe LJ.

(b) I would have met the children very shortly after giving judgment in order to explain to them the reasons for my decision; I would have done so in the light of their ages and intelligence and in particular because my decision was contrary to their wishes.

(c) In the light of the ages and intelligence of A and of C, it would not have crossed my mind to meet J without them.

(d) I would not have met the children prior to judgment, for the purpose of collecting their wishes and feelings, because at present I am unpersuaded that the potentially important evidence collected in such strained circumstances would be either a balanced and comprehensive reflection of their views or easily susceptible of later forensic examination.

MR JUSTICE CHARLES:

58. I agree that this appeal should be allowed for the reasons given by Thorpe LJ with the following qualification.

59. Although I agree that the views and wishes of the children, and in particular J, were not given sufficient weight I am not convinced that a meeting between the judge and the children (or J) would have been appropriate or provided a solution that was fair. If I had been the judge in this case I would not have felt it appropriate for me to see the children to hear, assess and perhaps test their views on whether they should move to Sweden on a basis that any part of our discussion was confidential, or indeed without representatives of the parents being present on the basis that they could tell their clients everything that was said.

60. As Thorpe LJ has pointed out the manner in which the views of children should be provided to courts is under debate. Additional possible methods of doing this are (i) for the child to give evidence in court or by video, and (ii) for their interviews with CAFCASS officers (or some of them) to be videoed. The debate, and the conclusions and changes it may lead to, are important.

61. At present it seems to me that before any meeting takes place between the judge and a child at least the following need to be carefully addressed and defined: (i) the format, structure, content and purpose of the meeting, (ii) the role of the judge, (iii) the participation and presence of others in or at the meeting, (iv) what

is to be passed on to anyone not present or represented at the meeting, (v) how matters asserted by a child to the judge are to be tested, (vi) whether anything that is not passed on to the parties can be taken into account by the judge, and (vii) what explanation is to be given to the child before and after the meeting.