

Private Law Case Law Update

Lauren Davies

August 2026

An appeal arising from private law Children Act proceedings concerning the living and spending time arrangements for a five-year-old child. The mother appealed the decision to increase fathers time with the child, challenging the trial judge's findings of alienating behaviour, the approach to allegations of domestic abuse, the procedural fairness and the application of the welfare principle.

[XZ v YZ \[2026\] EWHC 1521 \(Fam\)](#)

Background

This appeal arose from private law proceedings under the Children Act 1989 concerning the living and spending time arrangements of a five-year-old child, ZZ. The parties separated in March 2022, when ZZ was approximately 18 months old. Proceedings commenced in May 2022 and were ongoing henceforth.

In November 2023, the court made a child arrangements order providing for ZZ to spend alternate weekends and half of the school holidays with the father. Throughout the proceedings, the mother's allegations of domestic abuse, relating to both the period prior to and post the parties separation, remained a central feature of the case. Despite this, no fact-finding hearing was directed.

In December 2024, the father applied to enforce the existing child arrangements order and sought a variation to increase the time ZZ spent in his care. Although the court found that the mother had not breached the 2023 order, it granted the father's application to vary the spending time arrangements. In its judgement handed down in December 2025, the court considerably increased the time ZZ spent with the father, ordering that ZZ spend three out of every four weekends with him, together with an equal division of the summer and Christmas holiday period.

The mother sought permission to appeal in January 2026. Permission was granted on the papers in February 2026.

Grounds of Appeal

The mother advanced seven grounds of appeal, which are set out in full at paragraph 5 of the judgement. In summary, she contended that:

1. The judge erred in law and acted in a procedurally unfair manner by making findings against the mother in relation to alleged alienating behaviour.
2. The judge materially erred in law by treating the alleged alienating behaviour as a central issue, whilst failing to treat the mother's allegations of domestic abuse as a live and determinative issue.
3. The judge failed to provide the mother with appropriate special measures, diminishing the quality of her evidence and her participation in proceedings.
4. The judge erred in departing from the Cafcass recommendations without providing clear and properly reasoned justification for doing so.

5. The judge wrongly excluded the evidence of mother's independent domestic violence adviser (IDVA) on the grounds that:
 - a. The judge was unaware of the IDVA's qualifications or experience;
 - b. Her evidence was said to be hearsay and
 - c. Her views were characterised as "no more than personal opinion"
6. The imposition of a two-year barring order was unjustified in both law and on the facts of the case.
7. The judge erred in law by ordering that the father spends three out of every four weekends with ZZ during term time, a routine which was substantially more extensive than the CAFCASS recommendations and unsupported by a proper welfare analysis.

Legal Framework

In reaching its decision, the court began by considering the appeal test under FPR 2010 r.30.12(3), namely that an appeal may only be allowed where the decision was wrong or unjust because of a procedural irregularity. Applying *G v G (Minors: Custody Appeal)* [1985] FLR 894, the court considered the circumstances in which a decision may be considered "wrong" including where:

- there has been an error of law;
- the decision falls outside the range of reasonable conclusions open on the evidence;
- the judge has given insufficient or excessive weight to a material consideration; or
- the exercise of discretion falls outside the bounds of reasonable judicial decision-making.

The court also considered the principles of procedural fairness as set out in *Re L (Fact-Finding Hearing: Fairness)* [2022] EWCA Civ 169 and *EY (Fact Finding Hearing)* [2023] EWCA Civ 1241. It confirmed that, whilst a judge is not confined to the findings advanced by the parties, any additional findings must be supported by the evidence and reached through a fair process, with adequate notice and opportunity to respond. The court emphasised that the "essential touchstone is fairness, and the question is whether the proceedings taken as a whole were fair."

Grounds 1 and 2: Alienating behaviour, domestic abuse and procedural fairness

The appeal was allowed on both grounds. The court held that the trial judge's findings of alienating behaviour against the mother were unsafe and procedurally unfair. Those findings had then been relied upon to justify a substantial increase in the father's contact to counteract the mother's alleged "influence" over the child.

Although allegations of alienating behaviour were within the "known parameters" of the case and had been considered in the formulation of the Section 7 report, neither the father nor the court had put the mother on notice that findings of alienating behaviour might be made against her. No schedule of allegations had been filed, the father had not sought such findings, and the mother had not been cross-examined on the issue. Given the seriousness of the findings and the weight placed upon them in the ultimate welfare decision, the process was procedurally unfair.

The court also held that the judge had adopted the wrong analytical approach by considering allegations of alienating behaviour in isolation from the mother's allegations of domestic abuse, including allegations of both litigation and post-separation abuse. Endorsing the approach in the Family Justice Council's 2024 Responding to Allegations of Alienating Behaviours guidance and the President's judgment in *Re Y (Experts and Alienating Behaviour: The Modern Approach)* [2026] EWFC 38, the court confirmed that where allegations of domestic abuse and alienating behaviour coexist, the court must first determine the domestic abuse allegations. They must then consider whether the

child's reluctance to engage with a parent represents an appropriate justified reaction by the child, protective behaviour from the other parent or a trauma response before considering whether alienating behaviours are established.

The court considered that the judge had erred in assessing each alleged incident of abuse in isolation rather than considering whether the father's conduct formed part of a wider pattern of coercive and controlling behaviour. For example, the judge failed to consider the relevance of paragraph 3.9 of the Family Justice Council's Guidance on Covert Recordings, which recognises that recording can itself amount to surveillance and abusive conduct. By attributing ZZ's reluctance to spend time with his father to alienating behaviour without first addressing the mothers allegations and whether ZZ's reluctance was a justified response to alleged abuse, the judge fell into error and the appeal was allowed.

Ground 3: Participation directions

The court also allowed the appeal due to serious procedural irregularity arising from the trial judge's failure to consider participation directions for the mother, despite her allegations of domestic abuse. The final hearing took place remotely, with both parties remaining visible to the other whilst the mother gave evidence. The mother contended that this adversely affected the quality of her evidence.

In reaching its decision, the court considered the mandatory obligations imposed by Section 63 of the Domestic Abuse Act 2021, FPR Part 3A and PD3AA, which require the court to consider whether a party or witness is vulnerable and, if so, whether participation directions are needed to enable them to participate effectively and give their best evidence. Referring to *Re O (Appeal: Duty to Consider Fact-Find)* [2024] EWHC 839 (Fam), the court emphasised that this is a positive duty resting on the court itself and does not depend on an application for special measures being made.

The court held that there was nothing to suggest the trial judge had considered the mother's vulnerability or the need for participation directions. The absence of an application for special measures did not relieve the court of its positive duty to consider what measures were necessary to enable the mother to give her best evidence. The decision serves as an important reminder that consideration of participation directions is a judicial obligation, particularly in cases involving allegations of domestic abuse, and cannot be left solely to the parties or their representatives.

Grounds 4 and 5: Departure from the CAFCASS Recommendations and the IDVA's evidence

The appeal court found that the judge failed to provide adequate reasons for departing from the CAFCASS officer's welfare recommendations, including the officers expressed concern about the emotional impact on ZZ of spending seven consecutive nights away from the mother and recommendation of limiting holiday contact.

Whilst reaffirming the established position that a court is not bound by the recommendations from CAFCASS or of any expert, they emphasised that any departure must be supported by sound reasoning.

The trial judge's criticism was that the CAFCASS report was unbalanced because the Family Court Adviser (FCA) had utilised information provided by the mother's Independent Domestic Violence Adviser (IDVA). The appeal court rejected this approach. Although an IDVA is not an expert witness, they are an experienced professional whose evidence and observations about domestic abuse are

both relevant and admissible. Any concerns about the partiality of such evidence, go to the weight attached to it, not its admissibility. The trial judge erred in dismissing the IDVA's evidence as inadmissible hearsay, particularly given that hearsay evidence is routinely admissible in family proceedings.

The court further observed that it was perfectly appropriate for the FCA to obtain information from the IDVA as part of her welfare assessment. The FCA had made clear that she had reached her own independent conclusions and that her recommendations would have remained unchanged irrespective of the information provided by the IDVA. The judge's criticism did not justify rejecting the CAFCASS recommendations and the appeal was allowed on this ground.

Ground 6: Barring order

The court acknowledged that the trial judge had the power to make a barring order under Section 91 (4) pursuant to Section 91A (2) of the Children Act 1989 on the ground that the continuation of parental conflict and dispute posed a risk of harm to ZZ. However, in this case, the order was made on an erroneous basis. The judge's approach to the ultimate welfare determination, including the assessment of risk and harm, was flawed for the reasons already established. Therefore, the section 91(14) order against both parents was overturned and remitted for reconsideration at the rehearing.

Ground 7: Welfare analysis

The appeal court held that the trial judge's final welfare decision could not stand as it was grounded in his findings that the mother had engaged in alienating behaviour. As those findings were unsafe, the basis for significantly increasing ZZ's time with the father also fell away.

The court was further concerned that the judge appeared to approach the case on the basis that shared care, or increased contact, was the preferred outcome. That was an error of law. There is no presumption of equal or shared care, nor is there a general "pro-contact imperative". The court's consideration is the child's welfare, applying the paramountcy principle in s.1 of the Children Act 1989 and undertaking a proper analysis of the welfare checklist under s.1 (3). The appeal court ultimately found that the judge had failed to carry out that exercise in any meaningful way and the appeal was allowed on this basis.

Conclusion

The appeal was therefore allowed on all seven grounds. The case was remitted for rehearing before a different Circuit Judge.



Lauren Davies

E: lauren.davies@stmarysfamily.co.uk

T: 0115 950 3503