

A Local Authority v W, R, S, L (by their Children's Guardian)



No Substantial Judicial Treatment

Court

Family Court

Judgment Date

2 June 2020

Case No: LV19C02014

Family Court

[2020] EWFC 40, 2020 WL 03000177

Before: The Honourable Mr Justice MacDonald

Date: 02/06/2020

Hearing dates: 23 April 2020

Representation

Mr Shaun Spencer (instructed by Ms Elizabeth Emmington) for the Applicant.

Mr Nicholas Stonor QC and Kirsty Robinson (instructed by Butcher & Barlow LLP) for the First Respondent.

Mr Damian Garido QC and Mark Steward (instructed by Susan Howarth Solicitors) for the Second Respondent.

Ms Lisa Edmunds (instructed by BDH Solicitors) for the Third and Fourth Respondents.

Approved Judgment

Mr Justice MacDonald:

Introduction

1. In these public law proceedings under [Part IV of the Children Act 1989](#) the following issues fall for determination at this stage of the proceedings:

- i) Does the court have power at the case management stage to summarily dismiss disputed findings sought by a local authority against a parent in proceedings under [Part IV of the Children Act 1989](#) independent of its case management powers under the [Family Procedure Rules 2010](#) ?
- ii) If the court does have such a power, should it be exercised in the circumstances of this case?
- iii) If the court does not have such a power, should the court in any event decide and direct, pursuant to its case management powers under the [FPR 2010](#) , that it is not necessary for certain of the disputed findings sought by the local authority against the parents in these proceedings to be adjudicated by the court?

2. The applicant in the substantive proceedings under [Part IV of the Children Act 1989](#) is the local authority, represented by Mr Shaun Spencer of counsel. The first respondent mother is W, represented by Mr Nicholas Stonor, Queen's Counsel and Miss Kirsty Robinson of counsel. The second respondent father is R, represented by Mr Damian Garrido, Queen's Counsel and Mr Mark Steward of counsel. The children who are the subject of these proceedings are W, born in 2019 and now one year old and L, born in 2018 and now two years old. The children are represented by Ms Lisa Edmunds of counsel through their Children's Guardian, Ms Anglim.

3. The proceedings have their genesis in a head injury sustained by S in June 2019. The local authority has wavered in respect of whether it seeks a finding in these proceedings regarding the causation of S's head injury, initially deciding that, in light of the conclusions set out in the reports from Professor David and Dr Stoodley, there was no real evidential basis upon which an allegation that S sustained an inflicted injury could be maintained. The local authority has now changed its position and has indicated definitively that it seeks a finding that the cause of S's head injury is either intentional suffocation by one or other of the parents, or was caused by some undisclosed event or circumstance known to the parents, for example co-sleeping/overlay but which is being withheld by them. These allegations are firmly disputed by the parents.

4. Within this context, the father now argues that the court has power, independent of the powers set out in the [FPR 2010](#) and exercisable at this stage of the proceedings, to summarily dismiss disputed findings and that that power should be exercised in this case on the basis that the court can conclude now that the evidence filed cannot support those findings. Further, the father and mother argue that, in any event, it is not necessary or proportionate for there to be a fact finding hearing in relation to the causation head injury sustained by S. On 13 March 2020 I listed these issues for determination by way of a preliminary hearing. Having heard submissions remotely over a video link I reserved judgment and now set out my decision.

Background

5. The family were known to the local authority prior to the commencement of these proceedings. Difficulties within the family are said to have included domestic violence, with the father alleged by the mother to have been controlling and abusive, inadequate housing provision, inconsistent engagement with professionals supporting the family, budgeting issues and lack of food. As a result of these concerns the children were made subject of a Child in Need plan.

6. At 0545hrs on 2 June 2019 S was admitted by ambulance to the Emergency Department at X Hospital. The parents provided an account stating that S was observed to have been awake in his Moses basket at 0010hrs and that when the parents next attended to L, who slept with her parents on an air bed, at approximately 0500hrs S was seen to be floppy and unresponsive and apparently not breathing. S was blue and his eyes were rolled back. An ambulance was called and paramedics observed S to be pale, floppy and grunting with ineffective breathing. S was stabilised in the Emergency Department and admitted to a High Dependency Cubicle.

7. Examination of S's body revealed no evidence of trauma and there were no bruises or other visible injuries. On 6 June 2019 S underwent an ophthalmology review, an EEG and an MRI scan. The ophthalmology review revealed no evidence of retinal haemorrhage. The EEG was reported as abnormal, with evidence of diffuse and cortical damage to S's brain. The MRI was reported as being grossly abnormal. The consultant paediatric neurologist reporting on the MRI considered that the appearance was consistent with a metabolic or mitochondrial disorder, that the features were not those classical of non-accidental injury but that non-accidental injury could not be ruled out as a possible cause of the features seen on the MRI. A CT scan showed no evidence of subdural haemorrhage. The results were discussed with the parents but the possibility of non-accidental injury was not raised with them.

8. On 7 June 2019, five days after admission, the parents asked to speak to a doctor and asserted to that doctor that in the early hours of the morning of 1 June 2019 S's Moses basket had been knocked over and S had fallen to the floor. The alleged incident was said by the parents to have involved a drunken friend of the father's kicking over S's Moses basket. The hospital contends that this was the first time the parents made mention of this alleged incident although both parents stated in their police interviews that they mentioned the alleged incident to the doctor when S was received at the Emergency Department (as Professor David points out, the notes of the Emergency Department doctors are very brief). Both parents accept that they failed to seek medical attention for S after the alleged incident with the Moses basket. On 7 June 2019 the parents gave

consent for L to be accommodated pursuant to [s 20 of the Children Act 1989](#) . S was discharged from hospital on 17 June 2019 and he too was placed with L in foster care with his parents' consent.

9. On 13 June 2019 a report of the skeletal survey carried out on S identified no fractures, as did a repeat skeletal survey carried out on 21 June 2019. Reports were provided by S's treating clinicians dated 10 June 2019, 1 July 2019, 10 July 2019 and 27 August 2019. The provisional report dated 10 June 2019 indicated that S's treating clinicians were investigating the possibility of an underlying medical disorder but were unable at that stage to rule out non-accidental injury as a cause of the features seen on the MRI scan and in the EEG. They however, discounted a fall from a Moses basket as the cause of the head injury to S. The subsequent reports indicate that genetic testing for mitochondrial disease has indicated no evidence of pathogenic variants that would confirm a diagnosis of mitochondrial disorder. Mitochondrial DNA disease results indicated no evidence of a mutation with further testing ongoing to screen the entire mitochondrial genome. Further, metabolic results received to date have returned as normal or with no evidence of an organic acid disorder. The urine amino acid screen detected "several unknown compounds" which may have been drug/diet related metabolites. A repeat urine sample indicated no abnormal purines or other endogenous compounds although the plasma / urine guanidinoacetate and creatine results were slightly unusual and repeat samples were taken.

10. Within the context of these proceedings, two expert reports have been directed pursuant to [Part 25 of the FPR 2010](#) . The first is from Professor David, Emeritus Professor of Child Health and Paediatrics at the University of Manchester and the second is from Dr Stoodley, Consultant Paediatric Neuroradiologist.

11. Professor David has provided a lengthy and detailed opinion on the injuries sustained by S. At the time he reached those conclusions it transpires that he was not in possession of all of the papers and he was asked to produce an addendum report. In his substantive and addendum report, Professor David reaches the following conclusions:

- i) The two possible causes of S's presenting symptoms are (a) a naturally occurring but poorly understood process that interfered with S's breathing and (b) one of his parents intentionally suffocated him.
- ii) It is difficult to find positive medical evidence to support (b) where the aetiology of the intracranial features is non-specific, including hypoxic ischaemic injury and metabolic abnormality, the inability to exclude medically non accidental injury is not positive medical evidence of inflicted harm, and the treating clinician's view that there was no necessity for further child protection medical examination implies everything possible was done to find medical evidence of inflicted injury without success. Professor David acknowledges that evidence of absence is not quite the same as absence of evidence.
- iii) Professor David's own analysis identifies a number of factors "which if anything point away from S's collapse having been an inflicted injury".
- iv) Professor David "cannot state dogmatically" that it is impossible that there was no significant head injury from the fall, but in his view it is highly unlikely.
- v) Professor David cannot exclude with certainty the possibility that the S's collapse was a totally unexpected and extraordinary delayed consequence of a very minor accident but considers this to be no more than a remote possibility.

12. Dr Stoodley's report, dated 21 January 2020, sets out the following conclusions in respect of the head injury sustained by S:

- i) There is no evidence of intracranial haemorrhage or abnormal surface fluid collection and no evidence of acute bleeding or spinal subdural haemorrhage.
- ii) There is no evidence of any significant generalised brain swelling, no evidence of significant generalised curable swelling to the lateral ventricles, basal cisterns and the peripheral subarachnoid spaces appear normal.
- iii) There are no abnormal metabolite peaks to suggest any underlying metabolic abnormality.
- iv) The two main possibilities with respect to the causation of the brain injury are either an acute life threatening event (ALTE) or an episode of unintentional, such as overlaying, or intentional asphyxia, such as attempted smothering.

v) It is not possible to differentiate between these possibilities on the basis of the scan appearances.

13. As will be seen when I come to the submissions of the respective parties, whilst the father bases his application to summarily dismiss the disputed findings sought by the local authority with respect to the causation of S's injuries squarely on the state of the medical evidence and the assertion that there is "no possible basis on which such findings could be made" having regard to that medical evidence, the local authority and the Children's Guardian also highlight the following passage in Professor David's report:

"...having analysed the problem as best one can the final task has been to see if there is sufficient medical evidence to assemble a coherent conclusion that is supported by the medical evidence. If there is insufficient medical evidence to complete the jigsaw or join the dots there needs to be a willingness (on my part) to admit defeat. By being able to take many other factors into account the Court may well be far better placed to complete the jigsaw".

14. Within this context, the local authority and the Children's Guardian submit that there are multiple other evidential matters that will also be relevant, and will fall to be examined by the court when it determines whether the local authority has proved on the balance of probabilities that the cause of S's head injury was either intentional suffocation by one or other of the parents, or was caused by some undisclosed event or circumstance known to the parents, for example co-sleeping/overlay, but which is being withheld by them. Making clear that I am making no findings at this stage of the proceedings, those factors prayed in aid by the local authority and the Children's Guardian as relevant to "completing the jigsaw" are as follows:

- i) On the parents' account, S's fall from the Moses basket occurred late in the evening and as a result of extreme intoxication on the part of the father and his friend. The friend is said to have drunk over 20 pints and kicked the basket. The only witness was the father, who it is said was himself intoxicated by alcohol and cocaine.
- ii) That alleged incident was, on the local authority's case, disclosed by the parents only some five days after S was admitted to hospital. There is a frank dispute of fact in this regard in circumstances where the parents assert they disclosed the incident in the Emergency Department. Expert opinion rules out the alleged incident as a likely cause of S's head injury.
- iii) There is evidence that the father suffers from poor mental health. He has described a voice in his head that tells him what to do. A psychological assessment of the father records difficulties with anger (including the father stating that where he is unable to escape a situation his anger is triggered, with a consequent strong need or urge to cause physical harm), poly-substance misuse and that a complicating feature is a strong inclination towards fabrication, with the father having significant problems with fabrications and lying behaviours.
- iv) There is evidence that both parents have misused cannabis and cocaine, leading them to neglect of the children's basic needs. The father now alleges that the mother is addicted to Tramadol. The father exhibits high levels of alcohol consumption.
- v) There is evidence that the father has been involved in supplying cocaine from the family home as a result of his high levels of cocaine use, thereby exposing the children to risky individuals.
- vi) There has been domestic abuse within the family home resulting in the police being called. The mother informed the Health Visitor that the father was abusive to her and the information provided by the police suggests that the domestic abuse included physical violence by the father.
- vii) There is evidence that, within the context of his mental health difficulties, the father has demonstrated a significant level of aggression, has damaged the family home in temper (including on the mother's account punching the wall to the extent that it woke L) and has acted in an aggressive and abusive manner towards the mother. As recently as 19 March 2020 it is alleged that the father attempted to assault the mother (whilst in the company of the same friend it is said kicked S's Moses basket whilst heavily inebriated). The father has described getting angry every day and that anger is his easiest emotion. The father has stated that he is abusive and aggressive when drunk, with a tendency to be violent when under the influence of alcohol. The father has further stated that when angry he is unable to exit the situation and, if the situation involves a child, he will usually raise his voice and then break down and cry.
- viii) There is evidence that the parents have neglected the needs of the children in several key welfare domains, including making themselves and the children intentionally homeless, failing to register S with a general practitioner, failing to provide L with a bed of her own and failure to provide sufficient food and formula for the children.
- ix) Within this context, there is evidence that the sleeping arrangements for both children were contrary to professional advice, with S being permitted to sleep on his front and to use an adult size pillow as a mattress for his Moses basket and L being permitted to share an air bed with her parents.

- x) There is evidence that the mother was adversely affected by S's cry, describing it as a high pitched scream that goes right through her.
- xi) As at 10 May 2019, on the mother's account the father had ceased taking his medication and this was impacting on his behaviour.
- xii) According to the mother, the father would state that he hated S and would threaten to throw S against a wall. On the night of the 1 to 2 June 2019 the mother has stated that the father made repeated statements that he hated S.
- xiii) There is evidence that on the evening of 1 to 2 June 2019 the father had consumed eleven pints, with evidence that alcohol serves to disinhibit the father with respect to anger control.
- xiv) The mobile phone evidence before the court indicates gaps in the communication traffic between the mother, the father and the father's friend who it is alleged kicked S's Moses basket during the material period. Whilst the parents make reference in their police interview to phone calls made in the period immediately prior to S being discovered moribund, no records exist of such calls. The father contends that he had use of three mobile phones, namely the one he surrendered for interrogation, a friend's phone and a further phone which was destroyed.
- xv) Neither of the parents' phones demonstrate a 999 call being made (the transcript of the 999 call has yet to be obtained).
- xvi) There is evidence that the behaviour of the parents during the period that S was critically ill raised suspicions, as did the father's vigorous and prolific account to the police in interview.

15. It is noteworthy that the father's submissions do not engage in any meaningful way with these aspects of the evidence when seeking to persuade the court that the evidence in this case is such as to justify the summary dismissal at the case management stage of these proceedings of the disputed findings sought by the local authority.

16. Finally by way of background, one other aspect of the expert evidence falls to be mentioned in the context of deciding whether, if such a power exists, it is appropriate to summarily dismiss the disputed findings sought by the local authority as to the causation of S's injury or, more conventionally, whether it is necessary to determine those allegations by reference to the provisions of the [FPR 2010](#) .

17. In his comprehensive expert report, Professor David places some reliance on the views of Professor Sir Roy Meadow. Professor David also relies on research of Professor David Southall. With respect to the work of Professor Meadow, having set out an extensive discussion of the debate that took place surrounding certain of Professor Meadow's views, Professor David concludes that:

"Meadow's publication on unnatural sudden infant death, though the subject of several methodological and statistically (*sic*) difficulties which unfortunately infected most of his publications on inflicted injury, was (unexpectedly) particularly helpful in the case of S."

18. Within this context, Professor David states that, in this case, consideration of Professor Meadow's work, and in particular the eight factors identified by Meadow in his series of unnatural deaths, show that "simply put, the features of S's case match those of naturally occurring as opposed to unnatural sudden infant deaths". Within this context, in his addendum report Professor David lists as one of the factors against concluding that S suffered an inflicted injury as "S's case does not have the profile of an unnatural infant death as set out by Prof Meadow".

19. With respect to Professor David Southall, Professor David summarises Professor Southall's research as follows in his report:

"The date of Southall and his colleagues who spent some years using covert video surveillance to detect 'imposed airway obstruction' or 'intentional suffocation', showed that these cases all followed a similar pattern in which repeated episodes led to repeated hospitalisations, sometimes going on for a prolonged period (months or more), leading eventually to

the clinicians coming to suspect the cause of the illness episodes. It is true that very occasionally the episode 'went wrong, when a mother, trying just a bit too hard to convince the treating team that there really was something seriously wrong with the baby, would suffocate the child for longer than necessary to cause apnoea and loss of consciousness. The catastrophic end result of prolonged obstruction was brain damage resulting from lack of oxygen. This was fortunately a rare occurrence, but I have vivid recollection of one such case occurring on the paediatric ward at the old St Mary's Hospital in Manchester. At the risk of serious oversimplification, for the sake of brevity, the motivation for this behaviour was not to harm the child but was believed to be a form of attention seeking behaviour, the mother deriving 'support' from the extra medical attention given to a sick child".

20. Within this context, whilst not ultimately listed by Professor David in the list of factors set out in his addendum report as militating against an inflicted injury, in his substantive report, on the basis of the work of Professor Southall, Professor David concludes that "the single episode of collapse affecting S does not fit the usual profile of mothers who intentionally suffocate their infants".

Submissions

The Father

21. Through Mr Garrido and Mr Steward, the father contends that, independent of the provisions of the [FPR 2010](#), the court has power to summarily dismiss at the case management stage disputed findings sought by a local authority and denied by the parents in proceedings under [Part IV of the Children Act 1989](#) and that the court should exercise that power in the circumstances of this case. Mr Garrido and Mr Steward submit that the power for which they contend is articulated in the analysis of Sir Mark Hedley in the case of *VBC v AGM and Ors* [2019] EWFC 64, drawing on the decision of the Court of Appeal in *Re TG (Care Proceedings: Case Management Expert Evidence)* [2013] 1 FLR 1250.

22. With respect to the circumstances in which the power for which they contend for may be exercised, Mr Garrido and Mr Steward seek to construe the power in relatively wide terms, submitting that the court is able to summarily dismiss disputed findings sought by the local authority in circumstances where the court concludes at the case management stage that the evidence relied on by the local authority is not sufficient to sustain such a finding. During his oral submissions Mr Garrido contended that such a power to summarily dismiss disputed findings sought by a local authority in proceedings under [Part IV of the Children Act 1989](#) at the case management stage falls to be exercised by the court undertaking a summary evaluation of the evidence before the court in order to decide whether that evidence can sustain the disputed findings sought.

23. As to this case, Mr Garrido and Mr Steward seek to draw a comparison between the situation they contend pertains in respect of the medical evidence in this matter and an example given by Sir Mark Hedley in the case of *VBC v AGM and Ors* of when the power to summarily dismiss proceedings may be used, drawing this court's attention to the following passage from *VBC v AGM and Ors*:

"[67] The first was where you have a case of brain injury, and an alleged shaking case might be a good example, where the only question is the medical evidence in the case and where the medical evidence effectively collapses during the course of the case. It seems to me that, provided that collapse has revealed a benign causation which renders the parents' evidence otiose, it would be entirely appropriate for the court to intervene. That it rarely does is because almost invariably in those circumstances the local authority, with or without the intervention of the court, makes an application to withdraw."

24. Within this context, Mr Garrido and Mr Steward point to the fact that in this case both Professor David and Dr Stoodley identify two possible causes for S's head injury, namely a naturally occurring but poorly understood event or attempted inflicted suffocation, but also point up, in Professor David's case, his opinion that there is a lack of positive medical evidence for the latter possibility and, in Dr Stoodley's case, his opinion that it is not possible to differentiate between each possibility on the basis of the scans. Within this context, during his oral submissions Mr Garrido contended that the medical evidence means that there is "no possible basis on which findings could be made".

25. In these circumstances, Mr Garrido and Mr Steward argue that, where the local authority itself had previously taken the position that there is no real evidential basis for the findings it now seeks regarding the causation of S's head injury (Mr Garrido conceding that the principle of issue estoppel does not apply in this case), the court is in a position in this case, having examined the medical evidence, to conclude at the case management stage and prior to hearing the evidence in these proceedings that the local authority was correct in its initial position and to summarily dismiss the disputed findings relating to the causation of S's head injury. Mr Garrido and Mr Steward contend that the effect of the disputed findings being summarily dismissed at the case management stage will be that, on well-established binary principles, the matters to which they relate must be treated as never having occurred.

26. As I have noted, the father's submissions did not engage substantially with the non-medical aspects of the evidence listed above as relied on by the local authority and the Children's Guardian in opposition to the current application when seeking to persuade the court that the evidence in this case is such as to justify the summary dismissal of the findings sought by the local authority at the case management stage of these proceedings. When pressed on the question of how the court should treat the other evidence before it when carrying out a summary assessment of the medical evidence contended for by Mr Garrido and Mr Steward, Mr Garrido appeared to submit that that evidence, including the statements of the parents and other evidential material, would likewise fall for summary evaluation.

27. Finally, in the alternative, on behalf of the father Mr Garrido and Mr Steward adopt the written submissions made on behalf of the mother and submit that, having regard to the provisions of the [FPR 2010](#), it is neither necessary nor proportionate for the court to determine the disputed findings sought by the local authority concerning the causation of S's head injury.

The Mother

28. On behalf of the mother, Mr Stonor and Ms Robinson submit that the decision of the Court of Appeal in *Re H-L (Children: Summary Dismissal of Care Proceedings)* [2019] 2 FLR 388 (a case decided after *VBC v AGM and Ors* although in *Re H-L* the Court of Appeal was not referred to *VBC v AGM and Ors*) now casts doubt on the correctness of Sir Mark Hedley's conclusion that the modern approach to summary dismissal in the context of public law proceedings is that set out in *Re TG (Care Proceedings: Case Management Expert Evidence)*. Within this context, Mr Stonor and Ms Robinson contend that the question of whether the local authority should be permitted to pursue the disputed findings it seeks in relation to the causation of S's head injury falls to be determined on the conventional application of the court's case management powers under the [FPR 2010](#) and by reference to the seminal decision of McFarlane J (as he then was) in *A County Council v DP, RS, BS (By the Children's Guardian)* [2005] 2 FLR 1031.

29. Whilst Mr Stonor and Ms Robinson submit that it is not necessary and proportionate to conduct a fact finding exercise in relation to the causation of S's head injury, they were suitably realistic with respect to the strength of that submission in both their written submissions having regard to the evidence before the court. During the course of oral submissions, and whilst continuing, nominally, to support the submissions made by Mr Garrido and Mr Steward, Mr Stonor again realistically recognised that, applying the criteria set out in *A County Council v DP, RS, BS (By the Children's Guardian)*, there are, *prima facie*, powerful reasons for concluding that the court should consider and determine the allegations in issue in this case at a finding of fact hearing.

The Local Authority

30. On behalf of the local authority, Mr Spencer submits that there is a distinction to be drawn between the summary determination of disputed findings sought by the local authority at the case management stage and a case management decision that certain disputed findings are not to be litigated because the resolution of those factual matters would be a disproportionate exercise within the proceedings.

31. With respect to the question of summary determination of disputed findings, Mr Spencer submits that the court *does* have a power at the case management stage to summarily dismiss disputed findings sought by a local authority against a parent in proceedings under [Part IV of the Children Act 1989](#), independent of the court's case management powers under of the [FPR 2010](#), to decide that it is not necessary or proportionate for those findings to be adjudicated. However, Mr Spencer submits that that power is to be construed *very* narrowly and is of no application in the circumstances of this case. Within this context, Mr Spencer points to the view expressed by Sir Mark Hedley in *VBC v AGM and Ors* that the power he identified in that case to bring public law proceedings to an end at any time before the conclusion of the final hearing is one that is "very narrow" in

its application and confined to cases where a local authority is acting unreasonably or from malign intent, it ordinarily being the case that the judge should hear all the available evidence before applying the requisite standard of proof.

32. Within this context, Mr Spencer argues that the local authority's decision to pursue findings in this case with respect to the causation of S's head injury cannot be demonstrated to be borne out of *mala fides* or demonstrated to constitute an abuse of process requiring rectification by the court. Rather, Mr Spencer submits that the decision of the local authority to pursue the relevant findings is borne out of a further and careful review of the evidence in a case in which the cause of S's brain injury has not been unequivocally revealed by the written evidence and in which, in the circumstances, it cannot be argued that the parents' evidence is otiose. Rather, in such circumstances and where the case law clearly established that an important part of the court's consideration of the overall circumstances will be an assessment of the broad canvass of evidence (including the weighing of the expert evidence in the context of the evidence as a whole and examining the parents' descriptions of events and their credibility), Mr Spencer submits that there is a real necessity to hear and test the evidence of the parents in light of the equivocal medical evidence. As I have noted, in this regard Mr Spencer reminds the court again of the opinion expressed by Professor David in his report that:

"...having analysed the problem as best one can the final task has been to see if there is sufficient medical evidence to assemble a coherent conclusion that is supported by the medical evidence. If there is insufficient medical evidence to complete the jigsaw or join the dots there needs to be a willingness (on my part) to admit defeat. By being able to take many other factors into account the Court may well be far better placed to complete the jigsaw".

33. Accordingly, Mr Spencer submits that, whilst it exists, the very narrow power to summarily determine disputed findings sought by a local authority in proceedings under [Part IV of the Children Act 1989](#) has no application in this case and the question of whether the findings in question should be the subject of adjudication falls to be determined more conventionally by reference to the [FPR 2010](#) and the decision of McFarlane J (as he then was) in *A County Council v DP, RS, BS (By the Children's Guardian)*. In this context, Mr Spencer submits that applying the principles set out in that decision it is plain that it is both necessary and proportionate in this case for the court to determine the local authority's allegations concerning the causation of S's head injury.

The Children's Guardian

34. Ms Edmunds on behalf of the children submits that the court does not have a power at the case management stage to summarily dismiss disputed findings sought by a local authority against a parent in proceedings under [Part IV of the Children Act 1989](#) independent of the court's case management powers under the [FPR 2010](#) to decide that it is not necessary for those allegations to be tried. In this regard, Ms Edmunds also relies on the decision of the Court of Appeal in *Re H-L (children: Summary Dismissal of Care Proceedings)*.

35. In any event, if a power to summarily dismiss disputed findings sought by a local authority against a parent in proceedings under [Part IV of the Children Act 1989](#) exists independent of the court's case management powers under the [FPR 2010](#), Ms Edmunds submits that that power is a strictly constrained one to be exercised only rarely and in exceptional circumstances. Within this context, she submits that such a power is not applicable in this case.

36. In the circumstances, and as argued by the local authority, and indeed the mother, Ms Edmunds submits that the appropriate analytical framework within which to consider the father's application is what Ms Edmunds describes as the more established and familiar discretionary route provided by the [FPR 2010](#) and the factors set out by McFarlane J (as he then was) in *A County Council v DP, RS, BS (By the Children's Guardian)*. Within this context, Ms Edmunds joins with Mr Spencer in submitting that it is plain that it is necessary in this case for the court to determine the local authority's allegations concerning the causation of S's head injury. In particular, Ms Edmunds submits that the court is in the best position to piece the jigsaw together, the medical evidence is just one part of that jigsaw, there is a plethora of other relevant evidence that the court must consider alongside the medical evidence, that until the court has undertaken that exercise it cannot safely predict the evidential outcome, that it is clearly in the children's interests to ensure that a thorough inquiry is undertaken and until there is resolution of those facts it will prove near impossible to mount a properly understood welfare investigation.

Law

The Fact Finding Exercise

37. As recognised by Sir Mark Hedley in *VBC v AGM and Ors* at [46] to [48], in considering the existence and ambit of any power to summarily determine a disputed question in proceedings under [Part IV of the Children Act 1989](#), it is important to keep in mind the cardinal legal principles that govern such proceedings. Within this context, given the power contended for by the father is a power to summarily determine disputed findings of fact at the case management stage, it is important to hold in mind the now long established legal principles that govern the fact finding exercise in public law proceedings under [Part IV of the Children Act 1989](#). These principles provide the proper context in which to consider the existence and ambit of the summary power contended for by the father:

- i) In care proceedings the court has to test the evidence and piece together the parts of the jigsaw in order to determine whether a clear picture emerges (*Re A (A Minor)(Retinal Haemorrhages: Non-accidental injury)* [2001] 3 FCR 262).
- ii) The decision on whether the facts in issue have been proved to the requisite standard of proof must be based on all of the available relevant and admissible evidence including that from the alleged perpetrator and family members (see *Re I-A (Allegations of Sexual Abuse)* [2012] 2 FLR 837) and the wider context of social, emotional, ethical and moral factors (see *A County Council v A Mother, A Father and X, Y and Z* [2005] EWHC 31 (Fam) at [44]). This is sometimes referred to as "the wide canvas" (see *Re U (Serious Injury: Standard of Proof)* [2005] Fam 134 at [26]).
- iii) Although the medical evidence is of very great importance it is not the only evidence in the case. The opinions of the medical experts will need to be considered in the context of all the evidence before the court as the court must consider each piece of evidence in the context of all of the other evidence (*Re T* [2004] 2 FLR 838 at [33]).
- iv) Explanations given by carers and the credibility of those involved with the child concerned are of great significance. All the evidence, both medical and non-medical, has to be considered in assessing whether the pieces of the jigsaw form into a clear, convincing picture of what happened (*Re A (A Minor)(Retinal Haemorrhages: Non-accidental injury)* [2001] 3 FCR 262).
- v) The court is the ultimate arbiter of fact and as such it is open to the court to accept or reject expert opinion on the basis of the all evidence. Expert evidence may favour an innocent explanation (or be equivocal or equidistant between innocent and sinister) but the judge, surveying the totality of the evidence, is still entitled to find that a child has suffered inflicted injury (*A Local Authority v K, D, & L* [2005] EWHC 144 (Fam), *Re M-W (Care Proceedings: Expert Evidence)* [2010] EWCA Civ 12 and *Re BR (Proof of Facts)* [2015] EWFC 41)

38. Finally, with respect to expert evidence, the court does not proceed by simply accepting that expert opinion at face value. In *Loveday v Renton* [1990] 1 Med LR 117 at 125 Stuart-Smith LJ observed as follows with respect to the court's task when evaluating expert evidence:

"In reaching my decision a number of processes have to be undertaken. The mere expression of opinion or belief by a witness, however eminent, that the vaccine can or cannot cause brain damage, does not suffice. The court has to evaluate the witness and soundness of his opinion. Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence. The judge also has to decide what weight to attach to a witness's opinion by examining the internal consistency and logic of his evidence; his precision and accuracy of thought as demonstrated by his answers; how he responds to searching and informed cross-examination and in particular the extent to which a witness faces up to and accepts the logic and proposition put in cross-examination or is prepared to concede points that are seen to be correct; the extent to which a witness has conceived an opinion and is reluctant to re-examine it in light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held; whether or not a witness is biased or lacks independence."

Purported Power Summarily to Dismiss Disputed Findings of Fact

39. It is important to be clear about the nature of the power contended for by the father in this case. Mr Garrido and Mr Steward submit that the court has a power within public law proceedings under [Part IV of the Children Act 1989](#) and *independent* of its case management powers under the [FPR 2010](#), to summarily dismiss disputed findings sought by a local authority at the case management stage. Accordingly, the issue before the court is not whether a court has power to summarily dismiss public law proceedings as a *whole* but, rather, whether a court has power, independent of the [FPR 2010](#), to decide summarily at the case management stage that a given disputed finding sought by a local authority is incapable of proof on the balance of probabilities. Within this context, as I have noted, the father relies on the decision of Sir Mark Hedley in *VBC v AGM and Ors* as establishing that latter power.

40. In *VBC v AGM and Ors* the question that taxed Sir Mark Hedley was the extent to which the court has jurisdiction to bring public law proceedings as a whole to an end before the conclusion of the final hearing. Within this context, in *VBC v AGM*

and Ors Sir Mark was required to determine an application to dismiss the local authority's case in a case concerning an alleged paedophile ring having heard the local authority's evidence, including oral evidence from two of the three complainants at the final hearing. Drawing on the observations of Sir James Munby in *Re TG (Care Proceedings: Case Management Expert Evidence)* [2013] 1 FLR 1250, which had their foundations in the private law case of *Re C (Children) (Residence Order: Application Being Dismissed at Fact Finding Stage)* and another private law case, *Re R (Family Proceedings: No Case to Answer)* [2009] 2 FLR 83, Sir Mark concluded that the correct modern approach to the summary dismissal of public law proceedings is that set out in *Re TG (Care Proceedings: Case Management Expert Evidence)* and that in public law proceedings the court does have an exceptional and sparing case management power to bring proceedings to an end at any time before the conclusion of the final hearing based on something which impinges on the integrity of the trial process or otherwise amounts to an abuse of the process of the court.

41. *Re TG (Care Proceedings: Case Management Expert Evidence)* [2013] 1 FLR 1250 the Court of Appeal (in which Hedley J (as he then was) was also a member of the constitution) was concerned with the question of whether a judge had correctly refused to grant permission for expert evidence. As I have noted, in the course of expounding on the nature and extent of the court's case management powers under the FPR 2010 Sir James Munby referred to his decision in *Re C (Children) (Residence Order: Application Being Dismissed at Fact Finding Stage)* [2013] 1 FLR 1089 at [14] and [15], in which he had observed, in the context of private law proceedings, that in an appropriate case the court may summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter.

42. Within the foregoing context, two matters fall to be noted with respect to the decision in *VBC v AGM and Ors* on which the father seeks to rely as establishing the power of the court, independent of the provisions of the FPR 2010, to summarily dismiss at the case management stage disputed findings sought by a local authority and denied by the parents in public law proceedings under Part IV of the Children Act 1989. First, Sir Mark Hedley was concerned with the question of the court's power to summarily dismiss public proceedings as a whole prior to the conclusion of an ongoing final hearing and not the question of a power to summarily dismiss certain disputed findings at the case management stage. Second, Sir Mark's conclusions in *VBC v AGM and Ors* were reached by reference primarily to authorities dealing with the position in private law proceedings, rather than in public law proceedings concerning child protection.

43. Within this context, following the decision of Sir Mark Hedley in *VBC v AGM and Ors* the Court of Appeal decided *Re H-L (Children: Summary Dismissal of Care Proceedings)*, although, as I have noted, the Court of Appeal was not referred to *VBC v AGM and Ors*. In *Re H-L* Jackson LJ noted as follows at [10] regarding the applicability or otherwise of *Re C (Children)* in public law proceedings:

"In terms of case management authority, I finally refer (but only for reasons that will become apparent) to the earlier decision of this court (Thorpe and Munby LJ) in *Re C (Children)* [2012] EWCA Civ 1489. That was a private law case in which the judge had effectively stopped the proceedings having heard the applicant because he took the view that the application would inevitably fail and that there was no purpose in continuing. In giving the leading judgment, Munby LJ said at [18]: "It is pre-eminently a matter for the trial judge in a case of this sort to determine the form of procedure which will best meet the welfare needs of the children." I have to say that I do not regard that decision as being of assistance in the present case, and I note that Sir James Munby, a member of the court in both *Re C* and *Re S-W*, took a very different approach in the later case, no doubt because it concerned child protection and state intervention within a formal framework."

And, in this context, at [46]:

"Rather than seeking to cast doubt on the analysis undertaken by this court in *Re S-W (Children) (Care Proceedings: Case Management Hearing)* [2015] EWCA Civ 27, [2015] 1 WLR 4099, [2015] 2 FLR 136, by which he was bound and which was and remains authoritative guidance on the summary determination of public law care proceedings, he should have applied it."

Conventional Case Management Powers

44. In *Re H-L (Children: Summary Dismissal of Care Proceedings)* the Court of Appeal was concerned with the probity of a decision to strike out care proceedings without conducting any investigation into how a child had come to be injured. In allowing the appeal, Jackson LJ noted as follows with respect to the ambit the court's case management powers in public law proceedings under the FPR 2010:

"[5] In referring above to established case management practice, I mean in particular [Part 12, Ch 3 of the Family Procedure Rules 2010 \(FPR 2010\)](#) of which contains special provisions about public law proceedings. [Part 12](#) is supplemented by the Guide to Case Management contained in Practice Direction 12A , which itself incorporates the Public Law Outline. This is not the occasion for a full survey of those provisions, but two points are of relevance to this appeal:

(1) The provisions are a self-contained code designed to assist the parties and the court to deal with care proceedings justly and efficiently. [Part 12](#) is a specific application to care cases of [Part 1](#) (the Overriding Objective) and [Part 4](#) (General Case Management Powers) and contains detailed provisions reflecting the spirit of those earlier parts of the Rules. [Part 12](#) is therefore likely to contain all the powers that the court needs, making it unlikely that recourse to the more general procedural provisions will be necessary; at all events, in a case to which [Part 12](#) applies the earlier provisions do not represent an alternative procedural regime.

(2) [Part 12](#) and the Public Law Outline are the most recent in a series of initiatives designed to achieve good, timely outcomes in care cases. They set out stages to the process, list matters to be considered at main hearings, promote judicial continuity and set timescales. The aim is to cut down on superfluous hearings, while maintaining some flexibility. So, r 12.25(1) provides for just one case management hearing with r 12.25(2) permitting a further case management hearing only where it is necessary. By r 12.25(4) the issues resolution hearing can itself be a final hearing, where it is possible for all the issues to be resolved. Extensions of time are closely controlled by [s 32](#) of the 1989 Act, which specifically states that extensions are not to be granted routinely and are to be seen as requiring specific justification; this is reflected in r 12.26A. Seen overall, the system encourages and empowers strategic thinking within a standardised framework; indeed, it requires it. It is a deliberate move away from ad hoc case management under which cases often developed organically and without structure. It places very considerable demands on all participants, but that is what Parliament has required for the benefit of the children and families concerned; moreover, experience shows that non-compliance usually causes even greater difficulties."

45. [FPR Part 1](#) provides as follows with respect to the court's overriding objective in family proceedings:

"The overriding objective

(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that it is dealt with expeditiously and fairly;

(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

(c) ensuring that the parties are on an equal footing;

(d) saving expense; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Application by the court of the overriding objective

(1) The court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by these rules; or

(b) interprets any rule.

Duty of the parties

The parties are required to help the court to further the overriding objective.

Court's duty to manage cases

- (1) The court must further the overriding objective by actively managing cases.
- (2) Active case management includes–
 - (a) setting timetables or otherwise controlling the progress of the case;
 - (b) identifying at an early stage–
 - (i) the issues; and
 - (ii) who should be a party to the proceedings;
 - (c) deciding promptly –
 - (i) which issues need full investigation and hearing and which do not; and
 - (ii) the procedure to be followed in the case;
 - (d) deciding the order in which issues are to be resolved;
 - (e) controlling the use of expert evidence;
 - (f) encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
 - (g) helping the parties to settle the whole or part of the case;
 - (h) encouraging the parties to co-operate with each other in the conduct of proceedings;
 - (i) considering whether the likely benefits of taking a particular step justify the cost of taking it;
 - (j) dealing with as many aspects of the case as it can on the same occasion;
 - (k) dealing with the case without the parties needing to attend at court;
 - (l) making use of technology; and
 - (m) giving directions to ensure that the case proceeds quickly and efficiently."

46. In addition, [FPR Part 4](#) provides as follows with respect to the court's general case management powers:

The court's general powers of management

(1) In this Part, 'statement of case' means the whole or part of, an application form or answer.

(1A) When the court is considering whether to exercise the power to strike out a statement of case, it must take into account any written evidence filed in relation to the application or answer.

(2) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(3) Except where these rules provide otherwise, the court may –

(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);

(b) make such order for disclosure and inspection, including specific disclosure of documents, as it thinks fit;

(bb) direct that any proceedings in the High Court be heard by a Divisional Court of the High Court; ([Rule 37.15\(6\)](#) (b) makes specific provision in relation to Divisional Courts.)

(c) adjourn or bring forward a hearing;

(d) require a party or a party's legal representative to attend the court;

(e) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;

(f) direct that part of any proceedings be dealt with as separate proceedings;

(g) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;

(h) consolidate proceedings;

(i) hear two or more applications on the same occasion;

(j) direct a separate hearing of any issue;

(k) decide the order in which issues are to be heard;

(l) exclude an issue from consideration;

(m) dismiss or give a decision on an application after a decision on a preliminary issue;

(n) direct any party to file and serve an estimate of costs; and

(o) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective."

47. In the context of the issue before this court it is also important to note that the power under [FPR r 4.4](#) to strike out a case by reason of there being no reasonable grounds for bringing or defending the application or the statement of case being an abuse of the court's process or otherwise likely to obstruct the just disposal of the proceedings or by reason of a failure to comply with a rule, practice direction or court order, is *expressly* excluded with respect to public law proceedings by [r 4.4\(1\)](#).

Further, the authors of the Red Book note that, unlike the CPR , the FPR 2010 contains no power of summary judgment and that this omission was deliberate.

48. Within the foregoing context, and as Jackson LJ made clear in *Re H-L* , FPR 2010 Part 12 is a specific application to public law cases of Part 1 and Part 4 of the FPR 2010 and contains detailed provisions reflecting the spirit of those earlier parts of the rules. In this context, pursuant to FPR Part 12 , rule 12.25(1)(c) in public law proceedings the court will conduct a case management hearing (CMH) with the objective, *inter alia* , of identifying the issues in the case that require adjudication. In *Re W (Care Proceedings: Functions of Court and Local Authority)* [2013] EWCA Civ 1227, [2014] 2 FLR 431 Ryder LJ (as he then was) observed as follows:

"[72] ...It is the court which decides what the key issues are, that is the matters of disputed fact and opinion that it is necessary to determine in order to make the ultimate decision asked of the court."

49. Where the decision for the court, when identifying the issues, is whether or not to determine a disputed finding of fact the courts have, within the foregoing procedural framework, continued to apply the approach set out by McFarlane J (as he then was) in the seminal decision of *A County Council v DP, RS, BS (By the Children's Guardian)* [2005] 2 FLR 1031 . In that case McFarlane J held that, when deciding whether to order a fact-finding hearing in care proceedings, the following factors (which, as I observed in *A Local Authority v X, Y and Z (Permission to Withdraw)* [2018] 2 FLR 1121 , in their totality embody the concepts of both necessity and proportionality) fall to be considered:

"[24] The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise: (a) the interests of the child (which are relevant but not paramount); (b) the time that the investigation will take; (c) the likely cost to public funds; (d) the evidential result; (e) the necessity or otherwise of the investigation; (f) the relevance of the potential result of the investigation to the future care plans for the child; (g) the impact of any fact finding process upon the other parties; (h) the prospects of a fair trial on the issue; (i) the justice of the case."

50. In *Re F-H (Dispensing With Fact-Finding Hearing)* [2008] EWCA Civ 1249, [2009] 1 FLR 349 Court of Appeal endorsed this approach as being the correct analytical framework where the court is deciding whether to determine a disputed finding or findings of fact:

"[26] There is no doubt that in family proceedings the court has a discretion whether to hear evidence in relation to disputed matters of fact with a view to determining them. In *A County Council v DP and Others* [2005] EWHC 1593, [2005] 2 FLR 1031 , McFarlane J, at para [24], helpfully identified, by reference to previous authorities, nine matters which the court should bear in mind before deciding whether to conduct a particular fact-finding exercise. I have no doubt that, notwithstanding that in the present case a decision had been made in the exercise of such a discretion to arrange for the disputed facts, in relation in particular to the allegations against A, to be determined at the hearing fixed to begin on 7 April 2008, Her Honour Judge Hughes also even at that stage retained a discretion to decline to conduct it. Nevertheless in my view additional considerations fall to be weighed by a judge who is considering, at the outset of a prearranged fact-finding hearing, whether in effect to abort it. That judge should weigh, with appropriate respect, the previous decision that the exercise should be undertaken and should ask whether any fresh circumstances, or at least any circumstances freshly discovered, should lead her or him to depart from the chosen forensic course. Equally she or he should weigh the costs already incurred in the assembly of the case on all sides and the degree to which a refusal at that stage to conduct the hearing would waste them. Furthermore she or he should weigh any special features such as, in the present case, the facts that a girl then aged 16 had been shown the court room, that she had participated in discussions with the guardian as to the way in which she would prefer to give evidence and that she was thus expecting that she would imminently be giving oral evidence in some way or another, although the judge should not on the other hand ignore the girl's likely apprehension at that prospect. What needs, however, to be avoided at all costs is a sudden decision to abort the hearing in circumstances in which, later, the findings not then made might after all be considered to be necessary. So a judge in the position of Her Honour Judge Hughes on 8 April should in my view act most cautiously before putting the forensic programme into reverse."

51. Whilst that decisions in *A County Council v DP, RS, BS (By the Children's Guardian)* and *Re F-H (Dispensing With Fact-Finding Hearing)* predated the introduction of the FPR 2010 , since the introduction of the FPR 2010 the courts have

repeatedly endorsed the approach set out in *A County Council v DP, RS, BS (By the Children's Guardian)* (see for example *Re T (Case Management: Discharge of Party)* [2013] 2 FLR 795 at [17]).

Discussion

52. Having considered carefully the helpful and comprehensive submissions of leading and junior counsel and having considered the evidence currently before the court, I have reached the following conclusions:

- i) It is the court's case management powers under the [FPR 2010](#) that govern the manner in which the court determines which disputed findings require determination by the court and which do not. It is not necessary or appropriate to look for a power to summarily dismiss a disputed finding of fact that exists independently of the court's case management powers under [FPR 2010](#), whether grounded in the decision of *VBC v AGM and Ors* or otherwise.
- ii) Pursuant to [FPR r.12.25 \(c\)](#), the court is required at the case management stage of public law proceedings to identify the issues in the case as a specific application of the provisions of [Part 1](#) and [Part 4](#) of the [FPR](#) to public law cases, by which Parts the court is given power to determine which issues need full investigation and hearing and which do not and to exclude an issue from consideration.
- iii) Within this clear procedural framework, the proper analytical framework for identifying at the case management stage whether a court should adjudicate on a particular disputed finding in proceedings under [Part IV of the Children Act 1989](#) is that set out by McFarlane J (as he then was) in *A County Council v DP, RS, BS (By the Children's Guardian)*.
- iv) In the particular circumstances of this case and on the evidence currently before the court, applying the requisite legal principles it would be wrong to direct, pursuant to the court's case management powers, that it is not necessary to determine the allegations made by the local authority regarding the causation of the head injury sustained by S.

My reasons for so deciding, with the consequence that the court *will* proceed to determine the allegations made by the local authority regarding the causation of the head injury sustained by S at the forthcoming finding of fact hearing, are as follows.

Power Summarily to Dismiss Allegations

53. Mr Garrido and Mr Steward seek to draw a distinction between a power of summary dismissal, for which they argue, and the power of the court under the [FPR 2010](#) to decide that a disputed finding need not be adjudicated upon. I am however, satisfied that, contrary to those submissions, is not necessary or appropriate to look for a power to summarily dismiss at the case management stage a disputed finding of fact in public law proceedings that exists independent of the court's case management powers under [FPR 2010](#), whether grounded in the decision of *VBC v AGM and Ors* or otherwise.

54. In *Re H-L*, the Court of Appeal made clear, albeit within a slightly different context to that arising in the present case, that a decision to determine summarily issues in public law proceedings is governed by the procedural rules set out in [Part 12 FPR 2010](#) and not any alternative procedural regime. In this context, pursuant to [FPR r.12.25\(c\)](#), the court is required to identify at the case management stage the issues in the case, as a specific application of [Part 1](#) and [Part 4 of the FPR 2010](#) to public law cases, by which Parts the court is given power to determine which issues need full investigation and hearing and which do not and to exclude an issue from consideration. With respect to children proceedings, the [FPR 2010](#) expressly prohibits the striking out of a statement of case in such proceedings and the [FPR](#) contains no power to order summary judgment.

55. I am satisfied that it follows from the decision in *Re H-L* that it is the court's case management powers under the [FPR 2010](#) that govern the manner in which the court determines at the case management stage which disputed findings require determination by the court and which do not. Further, and within this procedural framework, I am likewise satisfied that the proper analytical framework for identifying, at the case management stage, whether a court should adjudicate on a particular disputed factual issue in proceedings under [Part IV of the Children Act 1989](#) is that set out by McFarlane J (as he then was) in *A County Council v DP, RS, BS (By the Children's Guardian)*. That it is the principles set out in that case that are the principles that govern the decision whether or not to proceed to determine a particular issue of fact has been made clear repeatedly in the authorities decided since the judgment in *A County Council v DP, RS, BS (By the Children's Guardian)*.

56. These conclusions are entirely consistent both with the nature and purpose of public law proceedings, concerned as they are with the protection of children, and with the cardinal principles applicable to a fact finding exercise within those proceedings as summarised above. Within this context, the task of identifying in public law proceedings whether a disputed finding or set of findings should be determined is and must be, as demonstrated by the factors delineated by McFarlane J in *A County Council v DP, RS, BS (By the Children's Guardian)*, a multifaceted one. Further, the approach set out in *A County Council v DP, RS, BS (By the Children's Guardian)* is sufficiently flexible to encompass cases where the disputed findings

demonstrably lack an evidential basis, in which case the requirement in *A County Council v DP, RS, BS (By the Children's Guardian)* to consider the evidential result would tend in such a case to lead to a conclusion that the disputed allegation should not be adjudicated upon. Likewise, where the disputed findings are borne out of *male fides* on the part of the local authority, the requirement in *A County Council v DP, RS, BS (By the Children's Guardian)* to consider the justice of the case would likewise tend in such a case to lead to the conclusion that the disputed allegation should not be adjudicated upon.

57. Within this context, I am entirely satisfied that to seek to carve out a bare power of summary judgment with respect to disputed findings of fact in public law proceedings existing outside the *FPR 2010* is both unnecessary, having regard to the court's existing case management powers, and inappropriate, having regard to the nature of public law proceedings and the legal principles applicable to the process of fact finding therein. The procedural framework provided by the *FPR 2010* and the principles articulated in *A County Council v DP, RS, BS (By the Children's Guardian)* are far better suited to deciding whether, in the context of public law proceedings, a disputed finding or set of findings should or should not be determined by the court.

58. Finally, and for the avoidance of doubt, I make clear that I do not consider the decision in *VBC v AGM and Ors* to be authority for the existence of the power contended for by Mr Garrido and Mr Steward, namely the power to summarily dismiss disputed findings at the case management stage. Sir Mark Hedley was not concerned in *VBC v AGM and Ors* with the question of deciding, at the case management stage, whether a disputed finding or group of disputed findings should or should not be summarily determined. Rather, he was concerned with the power of the court in public law proceedings to decide to bring the proceedings as a whole to an end prior to the conclusion of an ongoing final hearing. It remains to be seen whether the analysis in *VBC v AGM and Ors* can survive the later decision of the Court of Appeal in *Re H-L* but that is not a question for this court. For the present purposes, it is sufficient to observe that the decision in *VBC v AGM and Ors* is simply not on point having regard to the nature and extent of summary power contended for on behalf of the father in this case.

Application of Conventional Case Management Powers

59. Within this context, and having regard to my powers under the *FPR 2010*, I turn to examine the factors set out in *A County Council v DP, RS, BS (By the Children's Guardian)* in determining whether to proceed to adjudicate on the disputed findings sought by the local authority as to the cause of S's head injury.

(a) Interests of Children and Relevance of Potential Result

60. I am satisfied that the determination of the disputed findings sought in respect of the causation of S's head injury is central to both the children's interests and relevant to the future plans for the care of the children, providing as it will a firm foundation on which professionals and the court can rest welfare decisions. There is a marked difference in the consequence for the welfare evaluation as between a finding of inflicted injury, a finding of accidental injury and a finding that the injury remains unexplained. Within this context, a decision as to whether the injury was deliberate, accidental or unexplained is not only relevant in that it will inform the care plan for the children and the welfare stage of these proceedings, but is also in each of the children's interests in that it has the potential to mean the difference between a plan of rehabilitation and a plan of permanency. Further, the determination of the disputed findings sought in respect of the causation of S's head injury will inform the ability of the parents to care for any future children they may have. Finally, and in addition, a resolution of the disputed findings will provide for S, and for L information that will assist in due course to explain a major event with a lasting impact in each of their lives. It is in the interests of both children for the account of their personal history to be as accurate as possible. I agree that a conclusion one way or the other as to the disputed findings with respect to causation will assist the children in understanding the reasons they were taken into care and the welfare decisions that were taken for them.

(b) Timescales

61. Having regard to the matters that this court will in any event have to investigate were it to determine not to adjudicate the disputed findings on the causation of S's head injury and taking into account the busy nature of the court lists, I am satisfied that a decision to determine the disputed findings will not add appreciably to delay in this case.

(c) Cost

62. Once again, having regard to the fact that the court has already directed disclosure of the evidence relevant to the determination of the disputed findings and obtained jointly instructed expert reports in this matter, and having regard again to the fact that this court will be required to investigate other matters even were it to determine not to adjudicate the disputed

findings on the causation of S's head injury, I am satisfied that determining the disputed findings will not add appreciably to the cost to the public purse of these proceedings. Within this context, any increase in cost that does occur is likely to be minimal.

(d) Evidential Result

63. With respect to the question of evidential result, in their submissions, Mr Garrido and Mr Steward characterise the evidence of Professor David and Dr Stoodley as meaning that there is no possible basis on which findings could be made regarding the causation of S's head injury. I am not able to accept that characterisation having regard to the well-established case law I have set out above that articulates the process the court must adopt with respect to making findings of fact in public law proceedings under [Part IV of the Children Act 1989](#) .

64. As made clear by the Court of Appeal in *Re U ; Re B (Serious Injury: Standard of Proof)* , the fact that the experts jointly instructed in public law proceedings consider the injury to be unexplained does not prevent the court, in an appropriate case and on the totality of the evidence before it, making a positive finding as to the causation of the injury in issue. Likewise, the fact that the experts jointly instructed in public law proceedings cannot identify, as between two or more possibilities, the cause of an injury to a child does not prevent the court making a finding on the *totality* of the evidence before it as to causation in an appropriate case. Indeed, Professor David recognises this much in his report when he makes clear that by being able to take many other factors into account the Court may well be far better placed to complete the jigsaw than he is. The approach articulated in *Re U ; Re B (Serious Injury: Standard of Proof)* is particularly important where the cause contended for by the local authority may, in some cases, not be evidenced medically or not be capable of being so evidenced. For example, in this case Professor David makes clear that when considering the issue of suffocation there are rarely any other *medical* indicators to reach this as a safe and evidenced based conclusion for an infant's sudden collapse.

65. Within this context, I am satisfied that the father's application proceeds on the misconception that if no definitive *medical* explanation can be offered for S's condition then the evidential result *must* be that court is precluded from making a finding as to causation. This is not the position in law. Rather, the authorities make abundantly clear that even where the only tenable conclusion on the medical evidence is that there is more than one possibility for the cause of the injuries or that the injuries are medically unexplained, the court may, having regard to the wider canvas and in an appropriate case, nonetheless conclude that parent was responsible for deliberately causing the injury.

66. In this case the wider canvass, as I have summarised above, incorporates a range of other evidential matters relevant to the disputed finding sought by the local authority, particularly in circumstances where explanations given by carers and the credibility of those involved with the child concerned are of great significance and fall to be considered carefully by the court. Within this context, in circumstances where the medical evidence is just one part of the evidential jigsaw and where there is a range of other relevant evidence that the court must consider alongside the medical evidence, until the court has undertaken the exercise of examining that evidence within the forensic crucible of a final hearing it would be entirely premature to conclude that the evidential result in respect of the disputed findings in this case will be that they will not be not made out to the requisite standard of proof.

(e) the Necessity or Otherwise of the Investigation

67. As I have already articulated, I am satisfied that the investigation of the disputed findings is necessary in this case to properly inform the welfare assessment in respect of both children in circumstances where there is a marked difference in the consequence for the welfare evaluation as between a finding of inflicted injury, a finding of accidental injury and a finding that the injury remains unexplained. An accurate factual foundation for the welfare assessment is particularly necessary in circumstances where the court is required to evaluate the future options for the children based, *inter alia* , on the extent to which those options are a proportionate response to the identified welfare needs of the children. Plainly, the source, nature and extent of the harm suffered by the children or that they are at risk of suffering will be one of the factors that will necessarily inform the assessment of proportionality.

68. Further, in this case I am satisfied that an investigation of the disputed findings sought by the local authority is also rendered necessary by reference to a particular feature of the medical evidence in this case. As I have articulated above, in his report Professor David relies on research conducted by Professor Sir Roy Meadow and Professor David Southall, identifying within that research certain matters that he then uses to inform his expert opinion on the question of causation. Within this context, I accept Mr Spencer's submission that the court will, in deciding what weight to attach to the expert medical evidence in this case within the context of the totality of the evidence before the court, need to examine carefully the reliance placed on research by Professor Sir Roy Meadow and Professor David Southall, whose professional integrity has been called into question in other contexts (as Professor David is at pains to acknowledge). This is not to pronounce one way or the other at

this stage on the probity of relying on such research in formulating an expert opinion, which reliance may or may not prove to be justified, but rather to point up a further factor that I am satisfied renders necessary in this case the investigation of the disputed findings as to the causation of S's injuries.

(f) the Impact of Any Fact Finding Process

69. I accept that determining the disputed findings of fact with respect to the causation of S's injuries will extend the length of the final hearing, and therefore will introduce a degree of delay as a longer hearing will take longer to list. However, that impact on the children of that delay must be balanced against the impact on the children of basing the care planning for the children and the court's welfare evaluation on an incomplete investigation into his head injury where the wider evidence raises significant question marks regarding the circumstances in which that injury was sustained. I am clear that the latter impact plainly outweighs the former.

(g) Prospects of a Fair Trial

70. There is no suggestion in this case that it is not possible to have a fair trial on the disputed findings with respect to the causation of S's injury. The parents are represented by highly experienced legal teams and have the benefit of both leading and junior counsel. The court has ensured that the local authority has clearly pleaded its case so that the parents are on proper notice of the allegations that they face. The court has also ensured that the parents have access to all of the evidence upon which the local authority relies to prove its case, the burden of proof at all times resting on the local authority. This is not a case where the court is looking into matters memories of which have been dulled by the passage of time or conducting a hearing in other circumstances that may threaten a fair trial. Within this context, I am satisfied that the parents will receive a fair trial with respect to the disputed findings.

(h) the Justice of the Case

71. Finally, I am satisfied that the justice of this case requires the court to determine the disputed findings. Where a child has been deliberately injured there is a public interest in identifying those who cause deliberate injuries to a child. Equally, where a child has not been deliberately injured, there is a public interest in the removal of unjustified speculation and suspicion that may have fallen wrongly on those who are not in fact culpable. These public interests belong to the children who are the subject of these proceedings as much as they do to the public at large, in addition to it being, as I have said, in each of the children's interests to have an accurate account of their respective histories. Further, this is not a case in which the local authority is seeking blindly, or by reason of malice, to pursue findings that have no evidential basis. Rather, having regard to the background of this matter the local authority properly brings the disputed findings before the court for determination. Within the foregoing context, and for the reasons set out under the other headings above, I am satisfied that the justice of the case requires the court to resolve the disputed findings with respect to S's head injury.

Conclusion

72. For the reasons set out above, rejecting the power contended for by Mr Garrido and Mr Steward and applying the settled legal principles I have articulated I am satisfied that it would be wrong to direct, pursuant to the court's case management powers, that it is not necessary to determine the allegations made by the local authority regarding the causation of the head injury sustained by S. In the circumstances, the court *will* proceed to determine the allegations made by the local authority regarding the causation of the head injury sustained by S at the forthcoming final hearing.

73. That is my judgment.

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Cumbria County Council v AT, CB, T (By His Children's Guardian)



No Substantial Judicial Treatment

Court

Family Court

Judgment Date

11 September 2020

Case No: BW19C00125

Family Court

[2020] EWFC 58, 2020 WL 05801313

Before: The Honourable Mr Justice MacDonald

Date: 11/09/2020

Hearing date: 9 September 2020

Representation

Mr Michael Jones (instructed by Cumbria County Council) for the Applicant.

Ms Gillian Bundred (instructed by Clarkson Hirst) for the First Respondent.

Ms Ginny Whiteley (instructed by Makin Dixon) for the Second Respondent.

Mr Patrick Gilmore (instructed by Bendles) for the Third Respondent.

Ms Vanessa Lau (instructed by Isherwood and Hose) for PR.

Mr Salim Ibrahim (of Russell and Russell) for the JJ.

NN appeared in person.

JS appeared in person.

Approved Judgment

Mr Justice Macdonald:

Introduction

1. The court is concerned with the welfare of T, now aged 6 years old. T is represented by Mr Patrick Gilmore of counsel through his Children's Guardian. The mother of the T is AT, represented by Ms Gillian Bundred of counsel. The father of T is CB, represented by Ms Ginny Whiteley of counsel.

2. The substantive application before the Court is Cumbria County Council's application for a care order dated 8 July 2019. The local authority is represented by Mr Michael Jones of counsel. Prior to this there were private law proceedings in respect of T concerning the father's application for a child arrangements order, issued on 13 November 2018. On 10 July 2019 the private law proceedings were stayed and T was made subject to an interim care order. The interim care plan provides for T to remain in the care of the mother, which he has done to date.

3. A number of persons have been invited to intervene in these proceedings in circumstances where the mother, but not the local authority, seeks findings against them of the sexual abuse of T and others. On 14 May 2020, HHJ Forrester joined eight individuals as intervenors to these proceedings. I discharged one of those intervenors, CR, at the last hearing. At present, the following remain intervenors in these proceedings:

- i) NN;
- ii) JJ;
- iii) JS;
- iv) LB;
- v) PZ;
- vi) PR;
- vii) HS.

4. To date only NN, PR, JJ and JS have sought legal advice. None of the other intervenors have made contact with the local authority. Before the court today, NN appears in person, PR is represented by Ms Vanessa Lau of counsel and JJ is represented by his solicitor, Mr Ibrahim. Mr Ibrahim helpfully informed the court that he had also been approached by JS. but that it had not been possible to secure legal aid for him. Mr Ibrahim made clear that JS. denies the allegations said to have been made against him, as do each of the other intervenors who have appeared at this hearing.

5. This matter now comes before the court to consider whether or not it is necessary and proportionate for the court to determine the findings of fact sought by the mother against the current intervenors and, accordingly, whether or not it is appropriate for each of the intervenors to be discharged as intervenors in these proceedings.

Background

6. For the purposes of the case management decision that falls to be made by the court, the background to this matter can be taken largely from the comprehensive Case Summary prepared by the local authority for this hearing. At this interim stage I make clear that I have made no findings with respect to the matters that I now proceed to set out.

7. Private law proceedings in respect of T commenced in 2018 when contact between the father and T ceased following the mother asserting that T had made allegations against the father, indicative of sexual abuse having taken place. With respect to the allegations said by the mother to have been made by T, these involved alleged statements by T that he had been sexually abused by his father. The allegations were also said to encompass T's elder half-sibling, NN. T is also said to have made allegations concerning graphic violence and allegedly gave accounts of being exposed to bizarre actions of a sexual nature when in his father's care. As I have noted, NN, and adults against whom T is alleged to have later made allegations, have been joined as intervenors to these proceedings.

8. The majority of the allegations said to have been made by T have been made to the mother alone. T has also made limited statements to the social worker. On 11 February 2020 he told the social worker that his father had abused him anally. The local authority submit that it is notable that this was during a school visit to see T that the social worker was undertaking in order to share indirect contact from his father and that the mother had been made aware that this visit would be taking place when at a court hearing on 10 February 2020. The mother disputes that she was made aware of the date of the visit.

9. T also, to a limited extent, made allegations to police officers during an ABE interview. T was the subject of three ABE interviews by the police. The local authority and the Children's Guardian submit that an objective assessment of these interviews demonstrates numerous and repeated breaches of the ABE guidance. With respect to the substantive allegation

made by T in the second ABE interview undertaken on 12 October 2018, T stated that his father touched him inappropriately. The local authority submits that it is notable that this allegation is made immediately upon his return to the ABE interview suite, T having been allowed to leave the room for a period of three minutes, during which absence he spoke to his mother.

10. Within the foregoing context, it is important to note that T made no *direct* allegations either to the social worker or in his ABE interview regarding the alleged actions of any of the intervenors in this matter. Whilst it is the case that T mentioned NN during the course of one of the ABE interviews, as Ms Bundred conceded during her submissions at this hearing, at no point does T make a *direct* allegation of sexual abuse against RN, certain of T's statements during the course of the ABE interview are contradictory and certain of his descriptions involve the use of dolls without an accompanying clear narrative of sexual abuse. In addition, as I have noted, the local authority and the Children's Guardian submit that an objective assessment of the ABE interview in which NN was mentioned by T demonstrates numerous and repeated breaches of the ABE guidance.

11. On 9 October 2019 T was subject to a child protection medical by a Dr Tee. Dr Tee considered that her findings, namely that perianal scars were evident, were strongly suggestive of anal abuse in the absence of other convincing history of witnessed trauma. Dr Tee also noted a reddening of T's penis. The local authority invites the court to note that, with respect to the anal findings, no differential diagnosis such as constipation was considered by Dr Tee. A subsequent report was provided by Dr Thornton within the private law proceedings. Dr Thornton concludes that:

"With regard to the anal images, again these are of very good quality. I agree that there appears to be a deviation of the median raphe as it meets the anal margin. In my opinion this could represent a healed scar, but it could also represent a variation of normal. It was very close to the median raphe, and in my opinion it is not possible state with certainty that it was a scar, nor is it possible to exclude that it was a scar."

Dr Tee has expressed agreement to Dr Thornton's further observation that the reddening to the child's penis was within normal limits.

12. On 14 February 2020 it was confirmed by the police that no further action would be pursued against the father. The intervenors have never been subject to any police investigation resulting from the T's alleged statements to the mother relating to them.

13. Within the foregoing context, the local authority seeks findings that the allegations said to by the mother to have been made by T in relation to the father engaging in, and facilitating acts of sexual abuse are untrue and that they are the result of either (i) the mother having developed an unreasonable and false belief that T was sexually abused by the father, or (ii) the mother deliberately fabricating false allegations of sexual abuse and inducing T to make false allegations of sexual abuse against the father. No findings of sexual abuse are sought in the by the local authority in the alternative, either against the father or the intervenors, the local authority contending that, on a neutral and objective analysis of the available evidence, it is simply not possible to making findings on the balance of probabilities that the sexual abuse said to have been alleged by T took place.

14. Within this context, and in opposition to the case against her, the mother herself seeks findings in this case that T has been sexually abused by the father and by the intervenors in the manner she states T has alleged to her and in the limited statements made by T to the social worker and to the police in his second ABE interview. To this end, the mother has filed and served a 'Scott Schedule' of findings sought against the father and the intervenors.

15. At the last hearing, and having examined the documentary evidence, this court engaged in a detailed review of the 'Scott Schedule' provided by the mother. This was necessary due to the schedule in its original format being unclear as to what

positive findings were being sought against the various intervenors in the case, in addition to the need to clarify the precise nature and ambit of the findings sought against the father. The court was able thereby to crystallise the mother's position at the last hearing and a finalised schedule of findings was produced at the hearing that pleaded specific facts against the father and against the intervenors, with which schedule the intervenors were served.

16. The father denies all allegations that T has been sexually abused in his care, including by way of being exposed to sexual activity between others or to pornographic material. Likewise, as I have noted, those intervenors before the court deny the allegations of sexual abuse made against them by the mother.

17. These proceedings have been the subject of considerable delay. In particular, the impact of the Covid-19 pandemic has caused further delay to what were already protracted proceedings. It is now 14 months since care proceedings were issued and eight months since the finding of fact hearing was first due to be heard. A further finding of fact hearing listed in May 2020 had to be adjourned as a result of the Covid-19 pandemic. The current situation is that T does not wish to see his father and there has been no contact between them since September 2018, save for some items of indirect contact that have passed from father to T via the social worker. T has, accordingly, not seen his father for two years, a significant proportion of his life.

Submissions

The Local Authority

18. The local authority submits that each of the intervenors should now be discharged, it being neither necessary nor proportionate for the court to determine the allegations of sexual abuse that the mother makes against them. The local authority submits that an objective analysis of the available evidence leads inevitably to the result that the court could not make findings of sexual abuse against the intervenors to the requisite standard of proof. The local authority submits that the evidential deficiencies are numerous and include the repeated failure to adhere to the ABE guidelines during ABE interviews, the timing of the allegations in relation to issues regarding contact, the evidence produced by the mother in the form of recordings of the allegations, in which numerous leading questions are asked of T, and the seemingly bizarre nature of some of the allegations themselves.

19. If the court determines that it is not necessary or proportionate to determine the findings sought by the mother against the intervenors and discharges them as intervenors, Ms Bundred indicated that the mother will still seek to have those persons appear as witnesses before the court and to challenge their denials in support of her case that the local authority's findings are not made out. In the circumstances, an additional issue arises as to whether this justifies continuing intervenor status. With respect to that question, on behalf of the local authority Mr Jones submits that the local authority will be actively advancing a case pursuant to its schedule of findings and, thus, the local authority's case will be supportive of the position of each of the intervenors, namely that either (i) the mother has developed an unreasonable and false belief that T was sexually abused by the father, or (ii) the mother has deliberately fabricating false allegations of sexual abuse and inducing T to make false allegations of sexual abuse against the father. Accordingly, Mr Jones submits that the local authority's case is, in effect, identical to that of the intervenors and that the local authority will challenge any assertions made by the mother regarding the intervenor's denials by way of testing the evidence through cross examination and by way of submissions. Mr Jones further points out that this position is mirrored by the father, who will in effect, likewise be advancing the same case.

20. Within this context, Mr Jones submits that, particularly when considering the paucity of the evidence against the intervenors, the rights of each of the intervenors can be sufficiently protected in this case without them having to be maintained as intervenors putting forward individual cases, even in circumstances where the mother seeks to put allegations to them as witnesses.

21. Each of the foregoing submissions by the local authority was adopted by Ms Lau on behalf of PR and by Mr Ibrahim on behalf of JJ. Each was content that their clients' respective rights would be protected in circumstances where their respective cases are mirrored by the case of the local authority and the father.

The Mother

22. The mother now concedes that, save in respect of NN, she is the only person to whom J has made allegations in relation to the persons who are now intervenors in this case. Ms Bundred further, and sensibly, accepted on behalf of the mother that there is no other evidence corroborating the allegations said to have been made against any of those intervenors. Whilst stopping short of expressly conceding that it is not necessary and proportionate for the court to determine the findings in respect of those intervenors, Ms Bundred made clear that were they to be discharged as intervenors by the court the mother would still seek to put certain matters to them in support of her case as witnesses.

23. Ms Bundred further sought to draw a distinction with respect to NN. Ms Bundred submitted that that distinction lies in the fact that NN is, at points, referenced by T during the course of one of his ABE interviews. Ms Bundred submitted that T made allegations against RN from an early stage in the criminal investigation and has since expanded and repeated them. Against this however, during her oral submissions Ms Bundred reasonably conceded that at no point has T made a direct allegation of sexual abuse against NN to anyone other than the mother, that certain of T's statements during the course of the ABE interview are contradictory and that certain of his descriptions involve the use of dolls without an accompanying clear narrative of sexual abuse. As I have also noted, the local authority and the Children's Guardian submit that an objective assessment of the ABE interviews demonstrates numerous and repeated breaches of the ABE guidance. Ms Bundred did not, in her submissions, seek to gainsay that assertion.

24. Within this context, Ms Bundred accepted on behalf of the mother, again reasonably, that it is unlikely that the evidential result of the court examining the material relating to NN will be a finding on the balance of probabilities that NN sexually abused T, that he subjected T to and/or exposed him to inappropriate and/or abusive behaviour and/or to inappropriate materials, including sexual and violent conduct and that he sexually abused others in T's presence. Again, whilst stopping short of conceding that it is not necessary or proportionate for the court to determine the findings sought by the mother against NN, as I have noted Ms Bundred made clear that the mother would still seek to put certain matters to NN in support of her case were he to be discharged as an intervenor.

The Father

25. The father submits that it is unnecessary and disproportionate for the court to determine the findings sought by the mother against the intervenors and that, accordingly, it is not necessary for them to continue to be intervenors in these proceedings. Within this context, on behalf of the father Ms Whiteley adopted the submissions made by the local authority.

The Children's Guardian

26. On behalf of the Children's Guardian, Mr Gilmore likewise adopted the submissions of the local authority. Mr Gilmore further submitted that, having carried out a neutral evaluation the ABE interview, the Children's Guardian is clear that the ABE interview of T failed to comply with the requisite guidance. Mr Gilmore points to the fact that, on his submission, these were clearly a difficult interviews with a young child who at times appeared disinterested in the questions asked and that this led to an increasing number suggestive and at times openly leading questions. Mr Gilmore further submits that it is plain that the allegations made are lacking in any sufficient detail in terms of timing, date, nature and location.

The Law

27. In *Re W (Care Proceedings: Functions of Court and Local Authority)* [2014] 2 FLR 431 Ryder LJ (as he then was) observed as follows:

"[72] ...It is the court which decides what the key issues are, that is the matters of disputed fact and opinion that it is necessary to determine in order to make the ultimate decision asked of the court."

28. Where the decision for the court, when identifying the issues, is whether or not to determine a disputed finding of fact the courts have continued to apply the approach set out by McFarlane J (as he then was) in the seminal decision of *A County Council v DP, RS, BS (By the Children's Guardian)* [2005] 2 FLR 1031. In that case McFarlane J held that, when deciding whether to order a fact-finding hearing in care proceedings, the following factors (which, as I observed in *A Local Authority v X, Y and Z (Permission to Withdraw)* [2018] 2 FLR 1121, in their totality embody the concepts of both necessity and proportionality) fall to be considered:

"[24] The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise: (a) the interests of the child (which are relevant but not paramount); (b) the time that the investigation will take; (c) the likely cost to public funds; (d) the evidential result; (e) the necessity or otherwise of the investigation; (f) the relevance of the potential result of the investigation to the future care plans for the child; (g) the impact of any fact finding process upon the other parties; (h) the prospects of a fair trial on the issue; (i) the justice of the case."

29. In *Re F-H (Dispensing With Fact-Finding Hearing)* [2008] EWCA Civ 1249, [2009] 1 FLR 349 Court of Appeal endorsed this approach as being the correct analytical framework where the court is deciding whether to determine a disputed finding or findings of fact:

"[26] There is no doubt that in family proceedings the court has a discretion whether to hear evidence in relation to disputed matters of fact with a view to determining them. In *A County Council v DP and Others* [2005] EWHC 1593, [2005] 2 FLR 1031, McFarlane J, at para [24], helpfully identified, by reference to previous authorities, nine matters which the court should bear in mind before deciding whether to conduct a particular fact-finding exercise."

30. As I have noted above, if they are discharged as intervenors, Ms Bundred makes clear that the mother will still seek to have those persons appear as witnesses before the court in support of her case, namely that the local authority cannot demonstrate on the balance of probabilities that either (i) the mother has developed an unreasonable and false belief that T was sexually abused by the father, or (ii) the mother deliberately fabricated false allegations of sexual abuse and inducing T to make false allegations of sexual abuse against the father. In the circumstances, an additional question for the court (or, alternatively, part of the examination of the justice of the case within the framework provided by *A County Council v DP*) is whether a person appearing as a witness in public law proceedings who will face allegations being put to him or her during the course of the hearing, but against whom findings are not sought, justifies maintaining their intervener status. With respect to this question the following legal principles are relevant.

31. It has been long established that it may be appropriate to give a person leave to intervene in proceedings for a specific purpose (see *Re S (Care: Residence: Intervener)* [1997] 1 FLR 497 CA). In the context of a case that involved allegations of sexual abuse, the Court of Appeal in *Re H (Care Proceedings: Sexual Abuse)* [2000] 2 FLR 499 held that where specific allegations of sexual abuse are made in care proceedings against a non-party and brought before the court by the local authority for trial as a preliminary issue, it is vital that that person's evidence is before the court at that stage, even if he or she is unlikely to have party status at the substantive hearing, Lord Justice Thorpe observing:

"[31] If there is any generalisation to be drawn from an investigation of the history of this case, it seems to me to be this. Local authorities bringing a specific allegation of sexual abuse against a named individual for trial at a preliminary issue must at the very least apply to the court to consider whether that individual should be joined, even if he is unlikely to have party status at the substantive hearing, when welfare considerations will predominate and long-term will be decisions taken as to the future of the children. This case seems to me to demonstrate a general proposition that unless the accused adult deliberately absents himself from the proceedings, thereby inviting condemnation, it is vital that his evidence should be before the court. Unless he is made a party, that is left to the discretion of the other parties marshalling their cases. Unless he is a party, he will not be sufficiently represented and protected during the forensic process. Unless he is a party, he will not be joined in the collection of essential expert evidence."

32. However, with respect to non-parties against whom specific allegations of sexual abuse are made, it is important to note that the same year, in *Re H (Care Proceedings: Intervener)* [2000] 1 FLR 775, the Court of Appeal made clear that there is no *right* for non-parties against whom allegations are being made by a local authority in public law proceedings to intervene.

In that case Butler-Sloss P made clear that each case has to be looked at on its own merits and that the court has to identify the particular reason why it is *necessary* for a person to intervene. Within this context, there are a number of examples in the authorities where intervener status has not been considered necessary notwithstanding allegations may be made against the person in question during the course of proceedings.

33. In *Re H (Care Proceedings: Intervener)*, the Court of Appeal allowed an appeal against a decision to accord a non-subject sibling intervener status where the proposed intervener was a witness in the proceedings against whom an allegation of perverting the course of justice was to be put, and who was at risk of being prosecuted for conspiracy. In *Re BJ (Care: Third Party Intervention)* [1999] Fam Law 613 the Court of Appeal upheld the judge's ruling refusing to allow a non-subject 12-year-old boy to intervene in care proceedings relating to his nephew where allegations of sexual misconduct had been made against that 12-year-old child and, where, accordingly, he was at risk of findings being made. In *T (Children)* [2011] EWCA Civ 1818 consideration was given by the Court of Appeal to how the evidence of a former intervenor would have to be treated if he was no longer an intervenor but his alleged conduct was nonetheless relied on by one party and disputed by another within the context of public law proceedings. At [26] and [27] Ward LJ observed as follows with respect to the effect of hearing former intervenor, identified in the case as DH, as a witness rather than as an intervenor, pursuant to the decision of the judge under appeal:

"As things stand at the moment, it would be for the judge to judge the credibility of this boy. He may be able to say "I am not satisfied by him, therefore I cannot be satisfied that the complaint against the father is made out." That is the end of it. He can, of course, come to a conclusion that, having heard DH, he is quite satisfied that DH has in fact abused KE and N and, although he said he is not intending to make findings, he may be driven not to make findings in the care proceedings as such, but to explain his judgment by expressing his conviction in that way. In any event, he, the judge, will deal with this on the disposal. He will have seen four weeks of this case. He will know full well how much weight to place upon the various factors and how important it is in the life of these five children whether or not this boy has done what is alleged against him."

34. Also relevant to the question of whether it is appropriate to accord a person intervener status in proceedings will be the provisions of the overriding objective in [FPR 2010 r 1.1](#). The overriding objective requires the court, when making case management decisions, to have regard to the need to ensure that the case is dealt with expeditiously and fairly, dealt with in a way that is proportionate to the nature, importance and complexity of the issues, in a way that ensures the parties are on an equal footing, in a way that saves expense and in a way that allots to the case an appropriate share of resources, whilst taking into account the need to allot resources to other cases. In this context, I note that in *Re H (Care Proceedings: Intervener)* Butler-Sloss P observed as follows at [12]:

"Another element is this. These are of course ...proceedings which are largely, if not entirely, funded by the state, one way or another, either through the local authority, both ratepayers and state money. Both the parents, who are separately represented for care proceedings, and if this girl is allowed to intervene, D, will no doubt be represented on legal aid. There will be, inevitably, a proliferation of documents because, although it is suggested they should be edited and she might not get all the documents in the case, since she is crucial to the case she would have to have all the documents which concerned her. I would have little doubt that they would be at least half, if not the majority of the documents in the case. Of course, her counsel would have to have the right to examine his client in chief and to cross-examine every other witness in the proceedings. No doubt he would exercise the restraint that counsel always do, but he would have the right, where relevant, to deal with these matters in some detail. This would be an increase of the expense of these proceedings which is a relevant factor, even when one is urged (as we are in this court) to uphold the judge, whose primary task was looking at the welfare of this not yet 18-year-old girl."

35. Within this context, and having regard to the pressures currently placed on the family justice system by the COVID-19 pandemic, I must also bear in mind paragraph 46 of the President's Guidance entitled '*The Family Court and COVID 19 – The Road Ahead*', which makes clear as follows:

"[46] Parties will not be allowed to litigate every issue and present extensive oral evidence or oral submissions; an oral hearing will encompass only that which is necessary to determine the application before the court."

36. Finally, two further matters must be borne in mind when considering whether a person appearing as a witness in public law proceedings who will face allegations being put to him or her during the course of the hearing, but against whom findings are not sought, nonetheless requires intervenor status.

37. First, where the allegations concern conduct that is criminal, the question of self-incrimination. The privilege against self-incrimination is a common law privilege. At common law, no person is bound to answer any question in civil proceedings where the answer may tend to expose them to any criminal charge or penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for (*Blunt v Park Lane Hotel [1942] 2 KB 253* at 257). However, this common law rule can be qualified by statute. Within the context of these public law proceedings, the common law privilege against self-incrimination is qualified by the [Children Act 1989 s 98](#) . The protection afforded by [s 98 of the Children Act 1989](#) is not absolute as [s 98](#) does not prevent the use of a statement or admission made in proceedings under [Part IV or V of the Children Act 1989](#) from being used in a criminal investigation. In *Re EC (Disclosure of Material) [1996] 2 FLR 725* the Court of Appeal held that transcripts of an admission made by the father when giving evidence could be disclosed to the police, who would then be free to use the transcript in interview. The admissibility of the contents of the interview would then be, ultimately, a matter for the trial judge in the criminal proceedings.

38. Second, in general, the answers of an opponent's witness on matters of credit or other collateral matters will be treated as conclusive and may not be contradicted by calling other evidence (see *Harris v Tippett (1811) 2 Camp. 637* and also *Palmer v Trower (1852) 8 Exch. 247*). However, this rule is not absolute. More importantly in this case, the reliability of a witnesses' denial of sexual abuse is not a matter going simply to the credit of that witness, nor a collateral matter in circumstances where the issue to be tried is whether (i) the mother developed an unreasonable and false belief that T was sexually abused by the father, or (ii) the mother deliberately fabricated false allegations of sexual abuse and induced T to make false allegations of sexual abuse against the father. In the circumstances, the mother would not be bound simply to accept the denial of the witness and could seek to contradict the denial with other evidence, *if* such evidence exists.

Discussion

39. Having considered carefully the submissions made by the parties on the case management decision that is before the court today, I am satisfied that it is not necessary or proportionate for the court to determine the findings of fact sought by the mother against the intervenors in this case. Within this context, I am further satisfied that it is appropriate to discharge each of the current intervenors as intervenors in these proceedings. My reasons for so deciding are as follows.

40. There is no suggestion in this case that it is not possible to have a fair trial on each of the disputed findings sought by the mother against the intervenors. Further, it is plainly in T's best interests for decisions regarding his future welfare to rest on a clear and reliable factual foundation. Within this context, it is important that those facts that constitute that foundation are determined where those facts are in dispute.

41. Within the context of the task for this court of determining whether the threshold are met in these public law proceedings pursuant to [s 31\(2\) of the Children Act 1989](#) and, if so, whether the care plan advanced by the local authority is in T's best interests, the *key* factual issue before the court is whether, as contended for by the applicant local authority on whom the burden of proof rests, the mother has developed and irrational belief that the father has sexually abused T or has fabricated the allegation by T that he has done so or, as contended for by the mother, the father has in fact sexually abused T. Whilst the

additional findings sought by the mother against the intervenors are not entirely without significance in this context, it is not in my judgment *necessary* to determine those findings in addition to the central issue of fact before the court in order to come to an properly considered view on the question of threshold and, if the threshold is met, the question of T's future welfare. This is particularly so in circumstances where, none of the intervenors seek the care of, or contact with T and therefore the relevance of the potential result of the investigation into the allegations against the current intervenors to the future care plans for the child is marginal from the perspective of determining T's welfare. In addition, having regard to the pressures currently placed on the family justice system by the COVID-19 pandemic, I am also mindful of the clear injunction at paragraph 46 of the President's Guidance entitled '*The Family Court and COVID 19 – The Road Ahead*' that parties will not be allowed to litigate every issue and present extensive oral evidence or oral submissions and that an oral hearing will encompass only that which is necessary to determine the application before the court.

42. In any event, even were I to have concluded in this case that it was necessary to determine the findings sought by the mother against the intervenors, or some of them, and that that determination would potentially inform the future care plan for T, the court cannot avoid the forensic difficulties in that course of action when looking, as it must, at the likely evidential result of proceeding in that manner.

43. In the context of the findings set out in the revised 'Scott Schedule', and as I have noted, Ms Bundred conceded in her oral submissions that with respect to all the intervenors save for NN, the mother is the only person to whom T has made allegedly allegations in relation to the persons who are now intervenors in this case and that there is no other evidence corroborating these allegations, the medical evidence being, on the face of it, equivocal. Further, with respect to NN, Ms Bundred also realistically conceded that, whilst mentioned by him in one of his ABE interviews, T made no direct allegations either to the social worker. As I have noted, whilst it is the case that T mentioned RN during the course of one of the ABE interviews, Ms Bundred further conceded that at no point does T make a direct allegation of sexual abuse against NN, that certain of T's statements during the course of the ABE interview are contradictory and certain of his descriptions involve the use of dolls without a clear narrative of sexual abuse.

44. In addition to these matters, and whilst at this stage I reach no definitive conclusions as to the quality of the investigation of the ABE interviews of T, it is appropriate to note for the purposes of the case management decision I am tasked with making that both the local authority and the Children's Guardian submit that an objective assessment of the ABE interviews demonstrates numerous and repeated breaches of the ABE guidance *and* that Ms Bundred did not seek to gainsay that assertion during the course of her own submissions.

45. Within the foregoing context, the court is faced with a situation where, beyond he allegedly having made statements to his mother, T has not directly alleged sexual abuse against *any* of the intervenors to any other person. There is no cogent evidence to corroborate the allegations that he is said to have made to his mother. Those asserted allegations are lacking any specificity in terms of detail, date, time and location. Where other children feature in the allegations, those children are not named. Further, those allegations made by T in his ABE interview fall to be considered in the context of contended for repeated failures to adhere to the ABE guidelines during ABE interviews. In addition, on the face of the papers before the court, there are additional forensic issues concerning the timing of the allegations against the intervenors, the approach of the mother to the allegations made by T against the intervenors and the nature of some of those allegations themselves.

46. Taking each of the foregoing matters into account, it is very difficult to see how the evidential result of determining the findings of sexual abuse made by the mother against the intervenors could be anything other than that those findings cannot be proved to the requisite standard of proof.

47. In addition to these matters, whilst there is in respect of all intervenors save for NN a complete absence of corroborating evidence, and in respect of NN a paucity of such corroborating evidence, I must also bear in mind that it is nonetheless the case that the addition of seven intervenors to the finding of fact hearing will lengthen the time estimate for that hearing and, particularly within the context of the current public health emergency, accordingly lengthen the time before the court can accommodate a hearing of sufficient length. I must also have regard in this context to the inordinate delay that these proceedings have already suffered as a result of the aforementioned public health emergency.

48. In addition to the further delay, the cost to the public purse of seven intervenors participating in a finding of fact hearing is not inconsiderable. That cost arises not only out of legal aid for the respective intervenors (if they are entitled to the same on a means tested and merits tested basis) but also in terms of the use of court resources. In addition, the continued intervention of the current intervenors would result in a further proliferation of documentation in this matter.

49. Finally I have considered whether, in circumstances where Ms Bundred has made clear that the current intervenors will be required by the mother to attend as witnesses and will face allegations being put to them in support of her case that the local authority has not made out the findings it seeks on the balance of probabilities, the justice of the case requires their intervenor status to be maintained notwithstanding the matters I have set out above. I conclude that it does not.

50. In these public law proceedings, no findings are sought against the intervenors by the local authority which brings the proceedings. Accordingly, this is not a case in which the court is being asked in public law proceedings to determine on the balance of probabilities a specific allegation of sexual abuse made against a non-party by a local authority and brought before the court for trial as a preliminary issue. Rather, in this case the local authority, upon whom the burden of proving the findings it seeks rests, simply points to the denials of sexual abuse maintained by the current intervenors as supportive of a finding that either (i) the mother developed an unreasonable and false belief that T was sexually abused by the father, or (ii) the mother deliberately fabricated false allegations of sexual abuse and induced T to make false allegations of sexual abuse against the father.

51. Further, and for the reasons I have set out above, this court has determined that it is neither necessary nor proportionate to determine the findings sought by the mother against the current intervenors. Within this context, the mother now seeks to examine as witnesses the current intervenors in support of her own case that she has not developed an unreasonable and false belief that T was sexually abused by the father and/or has not deliberately fabricated false allegations of sexual abuse and induced T to make false allegations of sexual abuse against the father.

52. Within this context, insofar as the local authority seeks to point to the denials of the current intervenors as supportive of its case and the mother seeks to challenge the credibility of those firm denials in support of her case (which challenge will be necessarily circumscribed by the fact that there is no cogent evidence to gainsay those firmly maintained denials), the task of the court will be to assess whether the evidence of those now witnesses is sufficiently credible to support the findings sought by the local authority or sufficiently lacking in credibility to be capable of lending support to the case run by the mother. Whilst I accept that, in challenging the credibility of a given witness's denial, the mother will be entitled to put to the witness that their denial is false and should not be believed, and that the implication contained in within that challenge is that T is telling the truth about what it is said he has alleged, the judgment of the court on the question of the reliability or otherwise of the denials maintained by the witnesses in question does not amount to a finding of fact on the balance of probabilities. Rather, in the current context, it amounts simply to an assessment of the reliability of the evidence before the court within the overall exercise of determining whether the *local authority* has, or has not discharged the burden of proving its case to the requisite standard.

53. Further, and as Mr Jones comprehensively articulated during the course of his submissions, in this case the denial by the current intervenors of any inappropriate behaviour with T or any other child is co-terminus with the case of the local authority, and indeed the father. In these particular circumstances, I am satisfied that the rights of each of the intervenors can be sufficiently protected in this case without them having to be maintained as intervenors putting forward individual cases, even in circumstances where the mother seeks to put allegations to them in the witness box. I am reinforced in this view by the fact that, at all times when giving evidence the witnesses will have the protection of [s 98 of the Children Act 1989](#). Any statement or admission made by the witnesses in the course of giving evidence in these proceedings will not be admissible in evidence against that witness or his or her spouse or civil partner in proceedings for a criminal offence other than perjury. Whilst I accept that the protection afforded by [s 98 of the Children Act 1989](#) is not absolute, prior to giving their evidence each of the witnesses can be given the relevant warning by the court. Further, in the unlikely event of an application by the police or CPS for a transcript of the evidence of the relevant witnesses, this court retains a discretion whether to permit the disclosure of such material to the police or CPS. Whilst it would not be appropriate to pre-judge any such application, were such an application to be made, then amongst the factors the court would have to take into account would be the fact that no findings were sought against the witnesses in question before this court, that the conclusions reached by the court regarding the witnesses' evidence do not amount to formal findings made by the court on the balance of probabilities and that, in appearing before the court the witnesses were just that, witnesses, and not intervenors and represented before the court by a legal team. In addition, during the course of their evidence, the court will, of course, remain vigilant to ensure that the proceedings remain fair for the witnesses who are required to give evidence. In particular, the court can intervene if the counsel for the mother strays into areas of cross examination that are not appropriate having regard to the evidence before the court.

54. Finally, having regard to the factors set out in [FPR 2010 r 1.1](#), whilst the overriding objective rightly balances against matters of time and expense the need to ensure that the court deals with proceedings fairly, for the reasons I have given, I am satisfied that the current intervenors can be dealt with fairly as witnesses without the need to maintain their intervenor status.

Conclusion

55. When determining whether or not it is necessary and proportionate to determine a given finding or findings, the court applies the analytical framework set out by McFarlane J (as he then was) in *A Local Authority v DP*. When considering whether to accord a person intervenor status on a specific issue within proceedings, each case has to be looked at on its own merits and the court has to identify the particular reason why it is necessary for a person to intervene or to remain an intervenor.

56. As I announced at the conclusion of the hearing yesterday and for the reasons set out herein, applying these principles I am satisfied that it is not necessary or proportionate for the court to determine the findings of fact sought by the mother against the intervenors in this case. Within this context, I am further satisfied that it is appropriate to discharge each of the current intervenors as intervenors in these proceedings.

57. In the circumstances I direct that the intervenors shall be discharged as intervenors in these proceedings. I further direct that at the finding of fact hearing the court will determine *only* those findings set out at Paragraphs 1., 1a., 1b., 1c., 1d., 2., 2a., 3., 4., 5. and 6 of the final version of the Scott Schedule. I invite counsel to submit a draft order accordingly, to include the other case management directions made by the court at the conclusion of yesterday's Case Management Hearing.

58. That is my judgment.

Crown copyright

H-L (Children: Summary Dismissal of Care Proceedings)



No Substantial Judicial Treatment

Court

Court of Appeal (Civil Division)

Judgment Date

17 April 2019

Case No: B4/2018/3134

Court of Appeal (Civil Division)

[2019] EWCA Civ 704, 2019 WL 01643122

Before: Lord Justice Patten Lord Justice Floyd and Lord Justice Peter Jackson

Date: 17th April 2019

On Appeal from the Family Court at Northampton

HHJ Wicks

NN18C0138

Hearing date: 11 April 2019

Representation

Hannah Markham QC and Clare Meredith (instructed by LGSS Law Limited) for the Appellant Local Authority.

Hannah Mettam (instructed by Morgan & Wiseman Solicitors) for the Respondent Mother.

Aidan Vine QC and Kit Firbank (instructed by Family Law Group) for the Respondent Father Mr L.

Michelle Christie (instructed by Woodfines Solicitors) for the Respondent Father Mr H.

Matthew Brookes-Baker (instructed by Sally Wilcock & Co Solicitors) for the Respondent Children through their Children's Guardian.

Robert Pettitt (instructed by Bastian Lloyd Morris Solicitors) for the Intervener Ms E.

Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. A two-year-old child is examined by a hospital paediatrician. She is found to have about 20 bruises, including groups of bruises on the face, neck and arms that are in the doctor's opinion highly likely to have been caused by forceful grabbing by an adult. There are three people who could be responsible: the mother, the father, and a non-family carer. The local authority is immediately informed and it begins child protection inquiries. The police also investigate. All three adults deny causing any injury. Plans need to be made for the child and for her six-year-old half-sister. The mother and the two fathers have different views about where the children should be placed.

2. A scenario of this kind would be familiar to any social services department and to any family court. Both agencies are given wide and flexible powers, mainly under the [Children Act 1989](#), that they are under a duty to use to protect children and promote their welfare, while at the same time being fair to adults. Both agencies will recognise that a child that has suffered transient injuries may be more seriously injured over time and that other children in the household may face similar risks. They will also recognise that delay and inefficiency will work against the interests of the children and may well be harmful to them. Accordingly, on these facts the local authority will undertake a swift assessment and, on it becoming clear that the source of the risk has not been established, will take steps to ensure that proper plans can be made for the children. This requires an adjudication on responsibility for the injuries, something that can only be done by the court. The local authority will therefore issue proceedings to allow the court to reach a factual conclusion and to make any orders that may then be necessary. The court process should in all normal circumstances (and there is nothing particularly abnormal about these) be completed within the statutory period of 26 weeks, allowing the children and their family to move on with their lives on the basis of sound plans, built on the best possible understanding of what went wrong and how it might be avoided in future. That understanding is not only needed for the sake of these children, but also for the sake of any other children for whom the parents may in future be responsible.

3. Unfortunately, that is not what happened in the present case. Neither of the key agencies acted correctly. The local authority secured alternative arrangements for the children without having any legal standing for doing so, and it then delayed for three months in issuing proceedings, which it then pursued in what the court rightly described as a shambolic manner. For its part, the court departed from established case management practice and authority before striking out the proceedings in week 15 without conducting any investigation whatever into how the child came by her injuries. In doing so, it accepted and adopted a legal argument born of a profound misunderstanding of the basic statutory regime governing proceedings of this kind. During the lifetime of the proceedings the court did not make any statutory orders to govern the arrangements for the children, even to the extent of making the interim supervision orders requested by the local authority, being the least level of protection that the situation required.

4. The net result is that almost a year has passed since the child went to hospital without there being the smallest increase in our understanding of how she was injured. In the meantime, the children's lives have continued on the basis of arrangements brokered (until the proceedings were dismissed) by the local authority without legal authority or (since the proceedings were dismissed) by the parents themselves. The process has been unproductive and substantial amounts of public money have been wasted on legal costs, along with the depletion of scarce professional time. The process has also been hard for the children, who have been separated from their main carer and from each other, and for the parents, who have been bewildered by the actions of the agencies. If there is any silver lining it is that they have to some extent become united in their bewilderment, so that their relationship with each other may be better now than it was before the events arose. It can at least be said that this case may be unprecedented, in that neither this court nor counsel appearing before it are aware of a previous instance, reported or not, of care proceedings being dismissed at an interim procedural stage against the opposition of the local authority and the Children's Guardian.

5. In referring above to established case management practice, I mean in particular [Part 12 of the Family Procedure Rules 2010](#), Chapter 3 of which contains special provisions about public law proceedings. [Part 12](#) is supplemented by the Guide to Case Management contained in Practice Direction 12A, which itself incorporates the Public Law Outline. This is not the occasion for a full survey of those provisions, but two points are of relevance to this appeal:

(1) The provisions are a self-contained code designed to assist the parties and the court to deal with care proceedings justly and efficiently. [Part 12](#) is a specific application to care cases of [Part 1](#) (the Overriding Objective) and [Part 4](#) (General Case Management Powers) and contains detailed provisions reflecting the spirit of those earlier parts of the Rules. [Part 12](#) is therefore likely to contain all the powers that the court needs, making it unlikely that recourse to the more general procedural provisions will be necessary; at all events, in a case to which [Part 12](#) applies the earlier provisions do not represent an alternative procedural regime.

(2) [Part 12](#) and the Public Law Outline are the most recent in a series of initiatives designed to achieve good, timely outcomes in care cases. They set out stages to the process, list matters to be considered at main hearings, promote judicial continuity and set timescales. The aim is to cut down on superfluous hearings, while maintaining some flexibility. So,

r.12.25(1) provides for just one Case Management Hearing with sub-rule (2) permitting a further Case Management Hearing only where it is necessary. By sub-rule (4) the Issues Resolution Hearing can itself be a final hearing where it is possible for all the issues to be resolved. Extensions of time are closely controlled by section 32 of the Act, which specifically states that extensions are not to be granted routinely and are to be seen as requiring specific justification; this is reflected in r.12.26A. Seen overall, the system encourages and empowers strategic thinking within a standardised framework, indeed, it requires it. It is a deliberate move away from *ad hoc* case management under which cases often developed organically and without structure. It places very considerable demands on all participants, but that is what Parliament has required for the benefit of the children and families concerned; moreover, experience shows that non-compliance usually causes even greater difficulties.

6. In referring above to case management authority, I particularly have in mind the decision of this court in *Re S-W (Children) [2015] EWCA Civ 27; [2015] 1 WLR 4099*. That was a case in which a judge had without warning made final care orders at a first case management hearing. The court, consisting of Sir James Munby P, Lewison LJ and King LJ, allowed the appeal on the basis that this premature disposal was unfair and contrary to the interests of the children. Giving the leading judgment, King LJ (at [24] onwards) thoroughly surveyed the Family Justice Reforms and the Public Law Outline. At [39], she cited the earlier decision of this court in *Re B [1994] 2 FLR 1*, a contact case, concerning the circumstances in which orders can be made without a full hearing. Having done so, King LJ said this at [40]:

"... it may be exceptionally that, if all parties consent, or there is otherwise a clear case for it, then a court will make final orders at a CMH but, unless the decision goes by concession or consent, it will only be exceptionally, in unusual circumstances and on rare occasions, that this can ever be appropriate."

In the following paragraph, she added

" i) Where there remains any significant issue as to threshold, assessment, further assessment or placement, it will not be appropriate to dispose of the case at CMH.

ii) It can never be appropriate to dispose of the case where the children's guardian has not at least had an opportunity of seeing the child or children in question and to prepare to a case analysis in which he/she considers the section 31A care plan of the local authority."

7. In his concurring judgment, Sir James Munby, said this at [61]:

"Quite apart from the fact that such a ruthlessly truncated process as the judge adopted here was fundamentally unprincipled and unfair, it also prevented both the children's guardian and the court doing what the law demanded of them in terms of complying with the requirements of the *Children Act 1989* and PD12A."

8. *Re S-W* was the mirror image of the present case, in that it involved the summary granting rather than the summary dismissal of the local authority's application, but the guidance given in that case applies equally to both situations.

9. Another decision that was drawn to the attention of the judge by the local authority was *Re K [2018] EWCA Civ 2044*. In that case a judge had dismissed an application for a care order at a final hearing and made a private law order that the child should live with her mother as he found that the threshold had not been made out. Proceedings had been issued at birth on the basis of likely harm and the child had spent time in a mother and baby foster placement. The mother had done reasonably well but given her troubled history was assessed negatively as a sole carer. The appeal was allowed on the basis that the judge had not asked the right question – was the threshold satisfied at the date proceedings were issued? – and instead became side-

tracked by the mother's performance in the foster placement. He had entangled questions of threshold and welfare which are two separate exercises, one preceding the other.

10. In terms of case management authority, I finally refer (but only for reasons that will become apparent) to the earlier decision of this court (Thorpe and Munby LJ) in *Re C (Children)* [2012] EWCA Civ 1489 . That was a private law case in which the judge had effectively stopped the proceedings having heard the applicant because he took the view that the application would inevitably fail and that there was no purpose in continuing. In giving the leading judgment, Munby LJ said at [18]:

"It is pre-eminently a matter for the trial judge in a case of this sort to determine the form of procedure which will best meet the welfare needs of the children."

I have to say that I do not regard that decision as being of assistance in the present case, and I note that Sir James Munby, a member of the court in both *Re C* and *Re S-W* , took a very different approach in the later case, no doubt because it concerned child protection and state intervention within a formal framework.

11. Lastly, during the course of these proceedings there was (because of the delay in issuing the application) much discussion of the leading authority on the 'relevant date' for assessing the threshold conditions. The correct approach to this issue was settled in the early years of the Children Act by the House of Lords in *Re M (A Minor)(Care Orders: Threshold Conditions)* [1994] 3 WLR 558 , in which Lord Mackay, with whom the other members of the court agreed, stated:

"I would conclude that the natural construction of the conditions in section 31(2) is that where, at the time the application is to be disposed of, there are in place arrangements for the protection of the child by the local authority on an interim basis which protection has been continuously in place for some time, the relevant date with respect to which the court must be satisfied is the date at which the local authority initiated the procedure for protection under the Act from which these arrangements followed. If after a local authority had initiated protective arrangements the need for these had terminated, because the child's welfare had been satisfactorily provided for otherwise, in any subsequent proceedings, it would not be possible to found jurisdiction on the situation at the time of initiation of these arrangements. It is permissible only to look back from the date of disposal to the date of initiation of protection as a result of which local authority arrangements had been continuously in place thereafter to the date of disposal. It has to be borne in mind that this in no way precludes the court from taking account at the date of the hearing of all relevant circumstances. The conditions in subsection (2) are in the nature of conditions conferring jurisdiction upon the court to consider whether or not a care order or supervision order should be made. Conditions of that kind would in my view normally have to be satisfied at the date on which the order was first applied for. It would in my opinion be odd if the jurisdiction of the court to make an order depended on how long the court took before it finally disposed of the case. A local authority cannot apply for a care order unless at the date of the application the child is suffering or is likely to suffer significant harm. Once the local authority has grounds for making an application, the court has jurisdiction to grant that application. If between the date of the application and the date of the judgment of the court, circumstances arise which make a care order unnecessary or undesirable, the local authority can withdraw its application for a care order or the court can refuse to make a care order."

Lord Slynn stated that Parliament cannot have intended that if a child is removed by a local authority from a situation in which the child is suffering harm, the local authority loses the capacity to ask for a care order; Lord Nolan similarly observed that:

"Parliament cannot have intended that temporary measures taken to protect the child from immediate harm should prevent the court from regarding the child as one who is suffering, or who is likely to suffer, significant harm within the meaning of section 31(2)(a) , and should thus disqualify the court from making a more permanent order under the section. The focal point of the inquiry must be the situation which resulted in the temporary measures being taken, and which has led to the application for a care or supervision order."

12. With that introduction, I turn to the circumstances of the present case.

The background

13. I shall call the two children Lara (now aged 7) and Nina (now aged 3). Their mother, Ms D, had a volatile 7-year relationship with Mr H, the father of Lara. It ended in animosity, but after a time Lara began to have regular contact with her father. Ms D then began a 4-year relationship with Mr L, the father of Nina. That relationship too was marred by domestic violence. The local authority became briefly involved in January 2017 through the Early Help scheme. Concern was felt about the mother suffering from depression and about Mr L's use of physical chastisement. The couple separated in the summer of 2017, when Nina was only 18 months old; after that she would spend alternative weekends with her father. So it can be seen that up to this point in time, although the children had not had a very stable family situation and each of the parents may have had shortcomings, there were no major child protection issues.

14. That changed in May 2018. Nina, then 2 years 3 months old, stayed overnight with her father on Sunday 13 May. On the Monday morning, he returned her to her mother, who placed her with a family friend, Ms E, between about 9.00 am and 3.30 pm. After the mother collected Nina, she says that she saw marks on her body. She took her to the GP, from where she was referred to hospital. The bruises were noted. Blood tests were normal. A child protection medical examination was carried out by a consultant paediatrician, Dr A. In her report dated 24 May, she gave the opinion that it was highly likely that the bruising was non-accidental.

15. At the time of Nina's admission to hospital, the local authority was told of the care arrangements that had existed over the previous days and of the medical opinion. On 14 May it insisted that the children move to their respective fathers' care, seemingly overlooking the fact that Nina had been in her father's care during a period when her injuries may have been sustained. The mother reluctantly complied; she now says that she had no idea that the local authority was not entitled to insist. The girls did not see their mother for two weeks or each other for eight weeks. After that, supervised contact occurred. Lara returned to her mother in December 2018, the proceedings having ended. Nina remains with her father, Mr L, with limited contact with her mother and with Lara.

16. The local authority held a legal planning meeting on 28 May, when it was advised that the threshold for court proceedings was crossed. On 7 June an Initial Child Protection Conference took place and the children became subject of child protection plans. On 22 June the local authority held a legal gateway meeting at which it was decided to take the matter to court. On 9 July the social worker completed her statement. On 12 July an 'intent to issue' meeting was held. Despite that, it took the local authority until 23 August 2018 to issue care proceedings, seeking interim supervision orders in the short term and an expeditious fact-finding process.

17. A further consequence of the local authority's delay in issuing was that the parents were not fully legally represented during the period of the delay. Nor did the children have a Guardian to represent them or monitor their situation. Also, the mother in particular was distressed at the children's removal from her care, but was not given a forum in which she could readily challenge it. In the meantime, Lara told her school in July about arguments at her father's home. With the approval of the local authority, she was briefly placed with an aunt, but she soon returned to her father's care, he having in the meantime separated from his partner and their new-born baby.

The proceedings

18. There were no fewer than eight hearings: 14 September, 19 September, 1 October, 10 October, 16 October, 30 October/1 November, 23 November and 7 December. The first was conducted by a district judge and the remainder by the allocated judge, HHJ Wicks. This court has seen transcripts of the last five hearings.

19. Before coming to the individual issues, it must be observed that the sheer number of hearings became an issue in itself. At the five transcribed hearings, the local authority was represented by three different counsel, and the same is true of the Guardian. The position of Ms E, who had become an intervener, was particularly difficult. She was not entitled to legal aid and could not afford to be represented at this number of hearings, and accordingly she was represented at some but not others. A review of the transcripts shows that a range of topics were repeatedly discussed with little progress being made and with new representatives making fresh interventions that, far from focusing the case, made it more diffuse. In the meantime, there was no continuity of social worker, there having been three since the children were removed from their mother. The parents say that their experience of attending hearings was that they never knew what the local authority would ask for next, or how the court would respond.

20. On 19 September, the judge authorised a paediatric overview, but no doctor had been identified and when one was, he could not report until the end of January 2019. However, at the hearing on 23 November the judge said that he suspected that the paediatric overview that he had ordered would not assist in determining the perpetrator of the injuries.

21. On 16 October, the judge understandably raised concern as to the current placements of the children, especially Nina, given that Mr L might have caused her injuries. Yet, although the only party opposing the making of an interim supervision order was Mr H, the judge did not make such an order.

22. Other issues that flowed backwards and forwards related to whether or not the parents should be tested for drugs, what contact the mother should be having, and whether or not there should be a split hearing. On the last matter, on 16 October, the judge directed that there should be a fact-finding hearing with a time estimate of 5 - 7 days on the first open date after 1 March 2019. No good reason was given for this ostensibly simple case, which in reality revolved around one issue, being forward-listed to a date outside the statutory time limit. There is no doubt that the judge and the Guardian were expressing constant concern about the performance of the local authority, to the point that the judge directed the attendance of a senior manager at one hearing, but it should have been clear that the practical remedy was to move to an early hearing to identify, if possible, the perpetrator of Nina's injuries.

23. One issue that did not seem to be contentious was the question of the threshold. The parties and the court proceeded at the outset on the basis that it had obviously been crossed, at least for the purposes of any interim orders, on the basis of likelihood of harm to both children arising from Nina's injuries; indeed on two occasions the voluminous court orders included recordings to that effect. To take one example, the position statement on behalf of Mr L for the very first hearing on 14 September, stated: "*Interim Threshold is clearly crossed in this case, an ISO with a Child Arrangement Order is rightly considered by the Local Authority as commensurate orders...*" However, that apparent consensus was disturbed at the hearing on 1 November, by which time the proceedings had been on foot for ten weeks. To understand how this arose, it is necessary to trace the way in which the local authority had pleaded the threshold. At the outset, it pinned its case on the injuries to Nina and alleged that either the mother or Ms E was responsible. Then, on 22 October, it alleged that Mr L (with whom Nina was of course living) might also be responsible. Finally, on 15 November, it widened the threshold by alleging past domestic violence involving mother and both fathers, and by Mr H in his latest relationship, misuse of drugs by the mother and Mr L, physical chastisement of Nina by Mr L, and so on.

24. Also at the hearing on 1 November, discussion started about the 'relevant date' for proving the threshold. The local authority had asserted that this was the date of the issue of proceedings, but counsel then vacillated by telling the judge that

the relevant date was 14 May before returning to the pleaded case. For their part, counsel acting for Mr H and for the Guardian submitted that if the relevant date was 14 May, it was arguable that the threshold was not met since the children had been placed by the local authority with people with parental responsibility. This issue was taken up by the judge who, no doubt exasperated by the local authority's approach, said: "*I cannot think of any better way of expediting proceedings than the court concludes that threshold is not crossed and the application is dismissed.*" There then followed this exchange between the judge and counsel for the Guardian:

JUDGE: ... If 14 May is not the relevant date and the relevant date is the date on which the proceedings were issued, how does the Local Authority prove that on that date, either of the children were at risk of significant harm?

COUNSEL: ... If the relevant date is the date of the issue of proceedings, then in my submission, the likelihood of significant harm for Lara flows from the risks that are posed by mother being within the pool of perpetrators.

JUDGE: At the time the proceedings were issued, Lara was in the care of her father...so, how could she be at any risk of significant harm?... I am intrigued, because this is a point that has never really been developed before... But it is a point that might actually be fatal to the local authority's case.

25. The judge said there was a real question mark in his mind as to whether or not the local authority could possibly succeed, and something to be said for the court determining the issue on "a quasi-summary basis". He therefore listed this issue and others for legal argument on 23 November and directed skeleton arguments to be filed. This led to the parties filing over 60 pages of legal submissions on this and other issues, something that I consider to be completely inimical to the scheme of the legislation. This whole sequence of events shows that the court had strayed from its mission, which was to seek to discover how a small child had received worrying injuries.

26. At the hearing on 23 November, Mr L (who, it will be recalled, had conceded in September that the interim threshold was obviously crossed) was represented by leading counsel, Mr Vine QC. It was by now common ground that the relevant date was the date of the issue of proceedings, avoiding any need to consider complex arguments about whether protective measures had been put in place in May that might have complied with the criteria set in *Re M* (above). I set out the core of Mr Vine's argument, in fairness to the judge, because it is the argument he went on to accept:

"24. While the Local Authority now correctly identifies the 'relevant date' in their revised threshold document as being 23 August 2018, the date of issue of the application for care orders, it is not able to establish that the [section 31 \(2\)](#) threshold conditions were satisfied at that time *unless* it can establish Mr L as a possible perpetrator of Nina's injuries... This is because, as at the relevant date, (a) Nina was *already* in his care, (b) the child protection plan was being complied with, in particular, the mother's contact (certainly in relation to Nina) was being supervised, and (c) there was no need for a care or supervision order.

25. If that is correct, there is no statutory basis for these public law proceedings, and if mother seeks to resume care of the children or unsupervised contact in a departure from the child protection plans, her remedy (absent judicial review) is to apply for child arrangements orders under s. 1 (*sic*). In that event, there would still be a role both for (a) fact-finding in respect of Nina's injuries, and (b) Local Authority welfare evidence by way of a [section 7](#) welfare report, but that does not mean that these proceedings should proceed on a flawed footing."

27. At the hearing, there were lengthy exchanges between the judge and counsel then acting for the local authority. They included these:

"JUDGE:... I mean, the wording of the relevant provision of [Section 31](#) is in the present tense, so it means that the court looks at 23 August and asks itself the question, is the child at risk of suffering significant harm as at that date, or has the child suffered significant harm as at that date.

COUNSEL: Well, we know in respect of Nina, that is right. She has suffered –

JUDGE: Well no, because she had suffered significant harm arguably back in May... and by the time you issued your proceedings, she has... effectively from the point of view of the Local Authority at that time been removed from the source of that danger, has she not.... I have a real conceptual difficulty at the moment with understanding how one can say as at 23 August 2018 the children were at risk of significant harm. I make no bones about it. I have had that difficulty right from when this case first came before me."

And later:

"JUDGE: ... So, does it come down to this then... or am I oversimplifying it, that the risk of harm as at 23 August, in fact stems from the fact that Nina is living with someone you now say was responsible for or may have been responsible for her injuries in May?

COUNSEL: Yes ... Firstly, because of course you're not just considering this father. Of course, [section 31\(2\)\(b\)](#) relates to 'a' parent... the mother is also in the pool of perpetrators –

JUDGE: But as at 23 August the child is not living with the mother... So the child cannot be at risk of suffering significant harm from anything attributable to the mother."

Counsel for the local authority unavailingly pressed her case. She stressed that a dismissal of the proceedings would mean that there would be no determination of the issues. The judge, probably inspired by Mr Vine's submissions, said that the matter could be dealt with in private law proceedings between the parents, to which counsel responded that this would lead to the "*farcical*" result that the local authority would then be asked to provide a [section 37](#) report and "*we are then back where we are now.*"

Further exchanges included (in telescoped form):

JUDGE: ... What you have done is... you have taken some steps, as the Local Authority thought, to protect children and then 3 months later, [you] issue proceedings and are now trying to argue that that the three-month delay is really immaterial...

COUNSEL ... But it cannot be right surely just because we didn't issue on 14 May that then we should have not gone on to issue with, as I say, the injuries unexplained to this child... And in looking at the risk of harm, one looks at the risk of harm presented by either of these parents, not both parents... one has to consider the risk looking backwards. That includes the injuries. It also then considers the risks going forwards, beyond those injuries, in as much as how it is that the parents are then preventing that risk of harm for that child going forward.... It's a live risk that was still present then on 23 August. Whilst the child wasn't in the mother's care at that time, there is still the risk of significant harm because she was part of the pool of the unexplained injuries. It cannot be right that the court says, just because therefore the risk isn't there because the child is not with the mother therefore threshold is not met."

28. Mr Vine then pursued his written submissions to the effect that the threshold could not be established in Nina's case, unless there was a real possibility of Mr L being responsible for the bruising. He relied on the case of *Re C* (above). He submitted:

"You can decide the case summarily. You don't need to wait until the evidence has been tested if the propositions are not capable of being established, and you can exclude an issue."

29. Counsel for the mother and for Mr H echoed Mr Vine's submissions. Counsel for the Guardian expressed concern about the children's position and distinguished the case of *Re C* , but did not squarely confront the legal issue of the threshold. By contrast, the Guardian's submissions on the appeal crisply note that the proceedings had been dismissed without the Guardian filing an interim analysis, without the evidence of the paediatrician and without consideration of the risks that might be posed by the mother, regardless of the position of the fathers.

The Judge's decision

30. In a reserved judgement given on 7 December, the judge dismissed the proceedings, and with them the direction for the paediatric report. He also amended the orders dated 10 October and 16 October "pursuant to the slip rule" by removing recordings that the court had found the s.38 interim threshold had been crossed and substituting recordings that the threshold had remained in dispute.

31. The judge described the case as "deeply troubling". He expressed his concern about the local authority's approach to the proceedings. He confirmed that he had kept the welfare of the girls in the forefront of his mind. They had gone from being with their mother and each other to being separated and living with their respective fathers and seeing their mother only for contact. He continued:

"11. ... I am acutely aware that whatever decision I make today will not immediately improve their position and that, inevitably, there may be further delay before final decisions are made about their future."

32. The judge then directed himself on the law, starting with [section 31](#) , and then considering the decision in *Re M* in some detail. He next quoted most of [Part 1](#) and all of [Rule 4.1\(3\) of the Family Procedure Rules](#) , saying that:

"17. I have read those provisions out in full because they serve to emphasise in my judgement, the very broad case management powers that the court has and the obligation on the court to manage cases actively and, indeed, robustly."

33. Next, the judge cited at length from the judgment of King LJ in *Re S-W* . He then said this:

"19. I accept the general proposition identified in that case, that robustness in case management cannot trump fairness. In this case, however, the parties have had ample notice of the issues to be determined and have prepared accordingly and have had a proper opportunity to present their arguments. I make these further observations about the *Re S-W* case.

20. First of all, the Court of Appeal did not in that case, consider, nor were they referred to, the courts general case management powers under [Part 4](#) , and nor do they expressly consider the provisions of [Part 1 of the Family Procedure Rules](#) , other than the requirement to deal with the case justly.

21. Secondly, they did not have cited to them the case of *Re C [2012] EWCA Civ 1489* . These were private law proceedings, although it seems to me that the principles articulated in them are just as much applicable with appropriate modifications to public law proceedings. ..."

The judge then cited extensively from the judgement of Munby LJ in *Re C* before continuing:

"22. I do not go so far as to suggest that the decision in *Re S-W* was made per incuriam but it does seem to me that it was a decision that was made without reference to a relevant authority."

He also referred to the requirement for the local authority to prove its threshold case with focused evidence, and cited extensively from *Re A* [2015] EWFC 11.

34. The judge began his analysis of the case before him by stating that it was now common ground that the relevant date for determining whether the threshold was crossed is 23 August 2018, the date on which the proceedings were issued. He continued:

"25. ... Thus, the primary issue in this case... may be put simply thus: on the Local Authority's threshold document, as it is now pleaded, is the threshold for making orders under [Section 31](#) crossed? If the answer to the question is 'no', then these proceedings must be dismissed. It seems to me that this is not necessarily an issue that requires oral evidence. Indeed, the court could safely proceed on the assumption that the Local Authority is able to prove each of the factual issues set out in its threshold statement. The question then is whether those allegations, if proved, can or should lead to a conclusion that, at the relevant date, the children were suffering, or were at risk of suffering significant harm and that the harm, or the risk of it, were attributable to the care of the parents, and that is one that again seems to me is capable of being dealt with on submissions.

26. Furthermore, it seems to me to be entirely proportionate to deal with the issue in this way, given the volume of family work in this court, as in many other courts, and the consequent significant pressure on the court lists. This case may otherwise take many months to resolve and, if at the end of those proceedings, the Local Authority cannot prove its case, those would have been wasted months for the children."

35. Next, the judge reviewed the latest edition of the local authority's threshold document. He continued:

"29. If the proceedings had been issued at, or shortly after, Nina had been admitted to hospital, the court, it seems to me, could have little difficulty in concluding that, physically and emotionally, Nina was suffering from significant harm. By 23 August 2018, the date that these proceedings were issued, the bruises had healed and Nina, this was common ground, had suffered no further unexplained injuries. Indeed, the local authority seemed, on balance, to be perfectly content with the care given to Nina by Mr L and has never sought to remove Nina from his care. Can it be said that Nina continued to suffer significant emotional harm as at the relevant date attributable to these injuries, if they had been inflicted by either mother or Mr L?... Again, there is nothing in the material, which is now substantial and runs to the 3 lever arch files, to show that Nina continues to suffer significant emotional harm which is attributable to the injuries she sustained in May....

30. The conclusion that I reach, therefore, on this aspect is that the Local Authority [*sc.* cannot] now prove its case that Nina is suffering or is at risk of suffering harm, on the basis that she is in the care of a potential perpetrator of her injuries. This is an unattractive position, especially given that she is there only at the behest of an intervention by the Local Authority. Furthermore, the Local Authority does not demonstrate at all on the material available, how it can be realistically said that there is a real possibility that Mr L is the perpetrator..."

36. The judge then reviewed the other matters in the threshold document, unrelated to Nina's injuries and concluded that they would not individually or cumulatively cross the threshold. He ended his judgement in this way:

"42. I entirely accept that if these bruises were proved to be deliberately inflicted, that that would be significant harm, but the time for state intervention in respect of that harm was at the time that those injuries were suffered or shortly thereafter, not 3 months later, and that delay, in my judgement, is fatal to the Local Authority's case. Overall, therefore, I am driven to the conclusion that, on any view of the evidence, the Local Authority fails to establish that, as at the relevant date, the threshold for making orders under [Section 31](#) of the 1989 Act is crossed. It follows from that that as their application is for care or supervision orders under [Section 31](#) , those proceedings must be dismissed."

37. The judge therefore based his decision on the delay in issuing the proceedings, although he also seems to have relied upon the argument that the threshold could not be crossed because Nina was said to be doing well in her father's care.

38. The local authority and the Guardian asked for permission to appeal. In doing so, counsel for the Guardian argued that it was manifestly in the children's best interests for there to be a judicial determination of who had caused the injuries. The judge agreed that this would be so if these were private law proceedings, but not in a public law case where the threshold was not crossed.

The grounds of appeal

39. The local authority's grounds of appeal can be summarised as follows:

- (1) **Failure to hear evidence:** In dismissing the case the Judge failed to establish who caused the injuries that led to the separation of the children and their mother, the risk (if any) posed by the mother or by Mr L and the likelihood of harm to the children and the ability of the fathers to protect them.
- (2) **Finding no evidence of harm :** The judge was factually wrong.
- (3) **Relevant date :** The judge misapplied the test contained in *Re M* .
- (4) **Summary dismissal :** The judge erred in summarily dismissing the application at an interim stage prior to consideration of an awaited expert report and without hearing any evidence when there were three possible perpetrators. He exceeded his case management powers and took an approach which is inappropriate in the inquisitorial sphere of care proceedings. He thus failed to have regard to the paramountcy of the children's welfare and confused an assessment of the interim position with the final assessment that would take place when full evidence was available.
- (5) **Excluding Mr L :** The judge was wrong to exclude Mr L as a possible perpetrator without a proper forensic examination of the evidence and without the expert's report. He prevented himself from assessing the credibility of each witness and the totality of the evidence. He was wrong to limit his consideration of the evidence to the limited aspects of the threshold and in doing so conflated welfare and threshold issues.
- (6) **Prejudgement :** The judge's comments on 23 November demonstrated that he had formed a view about the application to dismiss the case and thus he failed to consider the submissions with an open mind.
- (7) **Slip rule :** the Judge was wrong to change previous orders under the slip rule.

40. I granted permission to appeal on 14 February 2019.

Submissions

41. We have had written submissions from all parties and oral submissions from Ms Markham QC for the local authority, Mr Vine QC for Mr L, and Ms Mettam for the mother. Those parents' counsel appeared before us *pro bono* because their legal aid certificates had expired with the dismissal of the proceedings.

42. On behalf of the local authority, Ms Markham (who had no prior involvement) fully accepted the shortcomings in its performance. It had had no legal standing to insist upon arrangements for the children and it should have issued proceedings far earlier. However, the legal case put by its counsel to the judge on 23 November was a sound one, and he should not have rejected it. He made a plain error of law in relation to the requirements of [section 31](#) and he was wrong to have used his case management powers to dismiss the case. He failed to recognise that the threshold can be met by the actions of one parent alone (here, on any view, potentially the mother). His binary view that the threshold was not met just because the children are now in supposedly safe placements simply cannot be the case. He conflated arguments about the strength of the evidence, the requirements for considering the pool of perpetrators and the issue of delay and reached a conclusion that was wrong. The case should be remitted to a different judge so that responsibility for the injuries could be determined. It is now acknowledged

that this is in reality a single issue case, and the latest threshold statement will be replaced by the one filed on 22 October, which alleged that each of the three adults might be responsible for the injuries, and no more. In the meantime, the parents have been cooperating with the local authority under the revised child protection plan.

43. On behalf of Mr L, Mr Vine stood by his legal submissions and supported the judge's decision to dismiss the proceedings on the basis that it was a factual determination that he was entitled to make. If the matter was to be remitted, it should be to Judge Wicks. His client would not oppose an interim supervision order in that event.

44. Ms Mettam emphasised the difficulty of the mother's position. She likewise did not oppose an interim supervision order, provided the matter was to be remitted on the basis of the narrower threshold statement.

45. The appeal was not supported by Mr H, the father of Lara, or by Ms E, the non-family carer. I have already referred to the position of the Guardian.

Conclusions

46. As will be apparent from what I have said above, and as we informed the parties at the end of the hearing, this appeal comprehensively succeeds. The judge erred in law by failing to recognise that the threshold for intervention was plainly crossed on the basis that at the date of the issue of proceedings both children were likely to suffer significant harm arising from the clear evidence about the very worrying injuries to Nina, for which one or other of her parents might, when the evidence was heard, be shown to have been responsible. He was in no position to prejudge that matter, and wrong to do so. It is a matter of regret that he should have been faced with such obviously fallacious legal arguments, particularly when advanced by leading counsel of Mr Vine's standing. However, those arguments were clearly exposed as fallacies by counsel then acting for the local authority, and the judge should have given them short shrift. He should have affirmed that the threshold is to be approached from the perspective of the children, not from the perspective of the parents, one of whom may have been responsible for Nina's injuries. He should have appreciated that delay in bringing proceedings, however lamentable, cannot of itself be determinative of the threshold. He should have realised that the fact that injuries are unexplained does not make them irrelevant, but rather raises an unassessed likelihood of future harm, aptly described in the local authority's submissions to the judge as "*a live risk*." Rather than seeking to cast doubt on the analysis undertaken by this court in *Re S-W*, by which he was bound and which was and remains authoritative guidance on the summary determination of public law care proceedings, he should have applied it. He should particularly have cautioned himself against terminating the proceedings when that course did not have the support of the Guardian, nor any written analysis from her. He should ultimately have seen the absurd impracticality of this unprecedented outcome, and the inappropriateness of private law proceedings as a surrogate forum for child protection. The injuries to this child cried out for investigation and the law, far from preventing it, positively demanded it.

47. For all that the judge's task was made more difficult by the inadequacies of the local authority, courts have to work with the resources available to them. The sterile outcome in this case could easily have been avoided through normal case management procedures and loyal application of well-established law. Instead, the proceedings drifted with no strategic direction and a dissipation of energy on irrelevant issues, all greatly to the disadvantage of these children. They and the adults are entitled to a judicial determination of how Nina's injuries were caused, and the directions that we now give will ensure that this happens as soon as reasonably possible. The order of 7 December will be set aside, so that the proceedings revive. The case will be allocated to another judge, by arrangement with Keehan J as Family Division Liaison Judge, and will be listed for an early single case management hearing at which it can be decided whether or not a split hearing remains appropriate and whether the direction for a further paediatric report remains necessary. We will also make an interim supervision order, to continue until the conclusion of the proceedings.

48. In light of the above, it is unnecessary to consider the peripheral grounds of appeal concerning the use of the slip rule and alleged prejudgement.

49. These are my reasons for allowing the appeal.

Lord Justice Floyd

50. I agree.

Lord Justice Patten

51. I also agree.

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Oxfordshire County Council v D P, R S, B S, By his Children's Guardian



Positive/Neutral Judicial Consideration

Court

Family Division

Judgment Date

20 July 2005

OX04C00158

High Court of Justice Family Division

[2005] EWHC 1593 (FAM), 2005 WL 1801199

Before: Mr Justice McFarlane

Wednesday 20 July, 2005, Hearing dates: 19th and 20th July 2005

Representation

John Vater (instructed by Oxfordshire CC) for the Applicant.

Piers Pressdee (instructed by Jackson West) for the 1st Repondent.

Robin Tolson QC and Susan Freeborn (instructed by Johnson and Gaunt) for the 2nd Repondent.

Michael Trueman (solicitor advocate) for the 3rd Respondent.

Judgment

Introduction

1. By an application made on the 14th April 2004, Oxfordshire County Council (the local authority) applied for a care order with respect to 'B S', who was born on 10th September 2003 and who was then aged 7 months old. For present purposes it is sufficient to summarise the background to the application in the words of the local authority's position statement:

- i) 'B S' is the second child of 'D P' (21/1/71) and 'R S' on (15/11/74). 'B's full sister is 'K', born on 17th January 2001. 'DP' and 'R S' were married in October 2001, having met in March 2000.
- ii) On 10th June 2002, a Supervision Order (for 8 months) was made in favour of Oxfordshire County Council in relation to 'K'. That Order followed proceedings in which 'Mr.S' admitted fracturing a number of 'K's ribs non — accidentally — see **A6 ff.** . Those injuries were found to have occurred during February 2001 on two separate occasions. Happily, following intervention from Dr. Jones and his team at the Park Hospital, it was possible for the family to be reunited.
- iii) 'B' was admitted to hospital on 29th March 2004 in asystolic cardiac arrest. He was alone in his father's care at the time of the collapse. On 30th March 2004, skeletal surveys revealed a healing undisplaced spiral fracture of the mid/lower shaft of B's right humerus. That injury is thought to be approximately 1–3 weeks old. Concerns were expressed by 'B's clinicians that they were suspicious in relation to both the fracture and 'B's collapse.
- iv) 'B' remained in hospital until 2nd May 2004, when he was discharged into foster care. Fortunately, the parties and the extended families were able to work towards a plan for supervised reunification between B and his mother. A plan of supervised care was agreed in July 2004, and on 23rd August 2004 'B' was returned to his mother's care, subject to supervision, where he has remained and will remain for the rest of his minority should the Local Authority'. 'Mr. S' has enjoyed supervised contact each week. 'B' has made a full recovery from his injuries.

The Preliminary Issue

2. By order dated 25th October 2004 (wrongly dated 2005) [A43], made by the case management judge, Mrs Justice Baron, the application was listed for a 10 day final hearing starting on the 18th July 2005. At the pre-hearing review before Baron J on the 28th June 2005, counsel for the 2nd Respondent father indicated that a preliminary issue was to be raised over the legality and scope of any fact finding exercise.

3. In summary the preliminary issue raised by the father arises from the fact that, following a full assessment, there is unanimity between all the parties to the effect that neither a care order nor a supervision order is required in this case. There is agreement that 'B' shall continue to live with his mother and 'K' under a residence order and that the father's contact shall remain limited to once per week on a Saturday provided that it is supervised by various approved family members. Whilst the father has conceded that he may have accidentally caused the fracture to 'B's right arm, he does not concede the threshold criteria and makes no admissions about the cause of 'B's respiratory collapse or, if that collapse was inflicted, its perpetrator. The local authority, mother and children's guardian, despite there being agreement as to the orders that are to be made, seek findings of fact against the father with respect to the arm fracture and respiratory collapse. The father claims:

- a) That, in the circumstances of no public law orders now being sought, it is unlawful for the local authority to seek such findings and for the court to embark on the proposed fact finding hearing; and
- b) If (a) fails, and the court has power to hold a fact finding hearing, the court should exercise its discretion against doing so.

4. Baron J directed that the preliminary issue be considered by the trial judge at 2.00pm on the first day of the hearing. Due to an administrative error, only counsel for the father attended before me, as the trial judge, at the appointed time on the 18th July. All the parties, however, attended at 10.30 on Tuesday 19th July when full argument was heard on the issues raised by the father. At the conclusion of the argument I reserved judgment. In view of the time constraints, and in view of the benefit (if possible) in having a written record of the judgment on this issue, I do not propose to do more than summarise the arguments raised by both sides on this important and apparently novel issue. This course is in no way intended to show disrespect for the full and clear written arguments produced by each party which were supplemented by thoughtful and relevant oral submissions. I hope that it goes without saying that I am extremely grateful to the advocates for the skill that they have each deployed in presenting their cases.

5. Before turning to the legal arguments that have been raised, it is helpful to consider the reality of the father's position in these proceedings. His formal 'Response to Threshold Findings' dated 4th July 2005 [prelim pages of bundle page 109] asserts that the fracture to 'B's arm may have occurred on the 19th March 2004 at bath time when 'B' wriggled free of the father's grasp and the father grabbed his arm to stop him falling. The father does not accept that this concession is sufficient to cross the s 31 threshold. He goes on to deny any attempt to smother or otherwise harm 'B' on the day of his collapse or at any other time.

6. The father's stated position in relation to 'B', coupled with the earlier findings and risk assessment with regard to 'K', would not normally support the imposition upon him of a regime of restricted supervised contact for the indefinite future, yet he is content to accept just such a regime in this case. Following questions from the court, Mr Tolson explained the father's position in this way:

"He puts up with this contact arrangement because he has a horror of being found guilty of an offence he did not commit [ie the alleged assault leading to 'B's collapse] leading to a possible prison sentence and to putting his relationship with his children in jeopardy."

It is, says Mr Tolson, a pragmatic position.

7. There is, therefore, in reality, a very wide gulf between the case of abuse asserted against the father and his denial of any culpable behaviour. This gulf is not however reflected in a similar head on clash over the arrangements for 'B's future care, solely because the father, for the 'pragmatic' reasons reported by his counsel, has decided to accept greatly restricted contact arrangements in order to avoid a contested fact finding hearing.

(1) *Lawfulness — The Submissions*

8. Mr Tolson's primary submission is that, as there is no effective application for a public law order, any investigation of whether the CA 1989, s 31 threshold is crossed would be unlawful. In particular he submits that:

- a) The court in care proceedings can only function within the statutory context established by CA 1989, Part IV;
- b) The need for the court to be satisfied about the s 31 threshold only arises if the court is being asked to make a care or supervision order;
- c) The line of cases including *Stockport Metropolitan Borough Council v D* [1995] 1 FLR 873 (see below for list) ('the Stockport cases') where the court has considered whether or not a particular fact finding exercise is justified, have all been cases where some public law order is either agreed or in issue;
- d) The local authority are now solely or mainly seeking findings against the father on criminal matters for their own sake;
- e) Relying upon both Magna Carta and the ECHR, a finding of fact hearing which is conducted neither within criminal proceedings nor in pursuit of an effective application for a public law order, but in some ill defined statutory vacuum, is neither lawful nor "necessary".

9. The arguments raised against this position on behalf of the other three parties are:

- a) The court is in control of its own proceedings. The public law application has not been withdrawn and, even if all the parties agreed that it should be withdrawn, the court retains a discretion whether to permit such withdrawal and, if withdrawal were refused, may require the local authority to press on with its application;
- b) The intended fact finding investigation is lawful in that it comes within the statutory context of the scheme for private law orders (and in particular the need to consider harm within the welfare principle — CA 1989, s 1(3)(e)) and/or public law orders under CA s 31. Alternatively the court should undertake the exercise relying upon High Court's *parens patriae* role and, if necessary, by giving the local authority leave under CA s 100 to make application under the inherent jurisdiction;
- c) Until the court has determined the facts as best it can, and evaluated whether or not the threshold is passed, it is not appropriate to say that there will in fact be no public law order. All that can be said at the present stage is that no party is positively seeking such an order. It is for the court to go through the two stage process of 'threshold' followed by 'welfare decision';
- d) There can be no challenge to the lawfulness of the local authority's actions in commencing the proceedings after 'B's collapse, why should such proceedings become 'unlawful' simply because the authority conclude that the child is sufficiently protected without a public law order;
- e) There is a pressing need for clarity and it is in accordance with the child's welfare for there to be a finding of fact, the proposed hearing is therefore justified and proportionate;

(2) *Lawfulness — Analysis*

10. In so far as the skeleton arguments focus upon the determination of the s 31 threshold criteria, as opposed the fact finding exercise that might support a threshold finding, I consider that focus to be incorrectly aimed. The s 31 threshold, important though it may be, is no more than a jurisdictional gateway through which a court must pass before it is empowered to make either a care or supervision order. The real focus of Mr Tolson's argument is to prevent a finding of fact hearing, whether or not that is to underpin a threshold finding or for use in evaluating private law residence or contact plans.

11. Magna Carta is not habitually quoted in support of legal argument in the Family Division, it is however of interest to be reminded of the terms of its Chapter 29 and to measure them up against the more modern and well known provisions of ECHR, Art 8. There is in my view very little difference between the requirements laid down in these two instruments, despite the passage of over 700 years between the two. That this is so is really of no surprise. Both are fundamental statements of core human rights. For the purposes of the 'lawfulness' argument raised in this case, I fully accept that any process upon

which this court embarks to find facts in these proceedings must be “by lawful judgment” and “by the law of the land” (per 1215) or “in accordance with the law” (per 1950).

12. I do however consider that Mr Tolson is wrong to import the “necessary” provision of Art 8 into this stage of his argument which is confined to legality. Necessity, proportionality and pressing need are all matters that are properly to be considered at the discretionary stage, but they cannot assist on the core question of whether or not the process is lawful in itself.

13. These are properly constituted care proceedings under CA 1989, Part IV. The issue of the proceedings following the apparent life threatening event (ALTE) experienced by ‘B’ and the discovery that he had an earlier spiral fracture of the right humerus was both legitimate and proportionate and is not the subject of any challenge as to legality. The proceedings have not been withdrawn and there is no application to withdraw them. Mr Vater for the local authority explains that there is no application for withdrawal because the local authority sees the making of findings of fact as being an integral part of the proceedings, notwithstanding that the authority does not intend to seek a public law order at the end of the case. These are, he says, serious allegations; the evidence in support is strong; there is no concession from the father that the s 31 threshold is met and such concessions as he does make about the arm do not fit with the medical evidence. It is necessary, within the context of Art 8, from the point of view of ‘B’, if not from that of his parents as well, for the factual evidence to be called and tested.

14. On the lawfulness issue, the father's argument rests entirely upon the fact that, at this stage of the proceedings, no party is asking the court to make a care or supervision order. Mr Trueman, for the child, in his helpful and perceptive argument, from the agreed basis that the proceedings were lawful when they commenced, asked at what stage they became unlawful. Mr Tolson's reply was that the proceedings became unlawful at the moment that the local authority decided not to press for a public law order. Mr Tolson also conceded that if the mother in this case was positively seeking these findings, then the court would not be acting unlawfully in conducting the hearing. If, therefore, as might have been the case, either the local authority's or the guardian's position had been in favour of a s 31 order then the lawfulness point would not have been available for argument.

15. In my view the stated position of a party before the start of a final hearing is not a very sound foundation upon which to determine the lawfulness or otherwise of the court's power to conduct the hearing. If Mr Tolson's argument is right the court's jurisdiction to conduct the hearing might be determined on something akin to a whim. Moreover, a party's position may legitimately change from time to time as more information becomes known, thus, on this argument, bringing into prospect proceedings that may become ‘unlawful’ and then return to be ‘lawful’ depending upon the local authority's changing view as to the order to be sought. More seriously, the opening position adopted by each party might, once the evidence is heard, not be justified as being the proportionate position to protect a child.

16. I favour the argument of Mr Tolson's opponents, summarised above, to the effect that until the court has determined the facts as best it can, and evaluated whether or not the threshold is passed, it is not appropriate to say that there will in fact be no public law order. All that can be said at the present stage is that no party is positively seeking such an order. That is insufficient to render otherwise ‘lawful’ proceedings ‘unlawful’ in so far as they may consider various findings of fact.

17. Once properly constituted care proceedings have been commenced within the statutory context of CA 1989, Part IV, they remain lawfully established unless and until they are either concluded or withdrawn. The question of whether or not a particular fact finding exercise is conducted within those proceedings is a question for the court's discretion and is not a matter that will, of itself, be ‘unlawful’.

18. Mr Tolson's submissions, possibly anticipating the above conclusion, go further. He submits that, if (which is not the case here) all the parties to a case apply to have the proceedings withdrawn, then the court has no option but to grant their request and cannot keep the case alive contrary to the common will. The implication of his submission is that, given the positions of the other parties in this case, they should be applying to withdraw the s 31 application and that if that application were made it would have to be granted. The result thus reached would deprive the court of its jurisdiction to conduct the fact finding hearing.

19. The fall back submission set out at paragraph 18 (above) fails in my view for two reasons:

- i) The local authority are not in fact applying to withdraw the application for the reasons summarised by Mr Vater. Those are, in my judgment, legitimate and sound considerations;
- ii) I do not accept the submission that a court is bound to allow the withdrawal of proceedings where all of the parties agree that that should occur. FPR 1991, r 4.5(4) expressly provides that a precondition of withdrawal is that ‘the court thinks fit’. There is thus a judicial discretion and it does not therefore follow as night follows day that the courts jurisdiction to

continue with the proceedings would end simply because the parties all agree that the proceedings should be withdrawn. The withdrawal provisions (and indeed the guardian system in public law itself) came into existence as a result of child care tragedies in the 1970's and 80's. The court's role in such matters is not to be that of a neutered 'rubber stamp' for the parties' requests.

20. In view of my conclusion that these are and remain lawfully constituted proceedings under CA 1989, Part IV, it is not necessary for me to consider whether there is alternative jurisdiction within private law proceedings arising in part from the need to consider 'harm' within the context of the welfare checklist (s 1(3)) or under the inherent jurisdiction. In view of the time available for the preparation of this judgment, I will not therefore consider the merits of those submissions.

(3) *Exercise of Discretion*

21. If it is lawful for the court to conduct a fact finding exercise despite the fact that at this stage no party is seeking a public law order, it is common ground that the court has a discretion whether, on the individual facts of each case, it is right and necessary to do so.

22. The relevant case law is to be found in the following decisions:

Re G (A Minor) (Care Proceedings) [1994] 2 FLR 69 [Wall J]
Stockport Metropolitan BC v D [1995] 1 FLR 873 [Thorpe J]
Re B (Agreed Findings of Fact) [1998] 2 FLR 968 [Butler-Sloss + Thorpe LJJ]
Re M (Threshold Criteria: Parental Concessions) [1999] 2 FLR 728 [Butler-Sloss LJ and Wall J]
Re D (A Child) (9 August 2000) [Schiemann, Thorpe and Mummery LJJ]

23. It is not necessary to read substantial parts of this case law into this judgment. Indeed I note that, in a former life, I was myself rightly discouraged in *Re M from taking the Court of Appeal* through the authorities because the law on this point is not in any particular doubt [see p 731B].

24. The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:

- a) The interests of the child (which are relevant but not paramount)
- b) The time that the investigation will take;
- c) The likely cost to public funds;
- d) The evidential result;
- e) The necessity or otherwise of the investigation;
- f) The relevance of the potential result of the investigation to the future care plans for the child;
- g) The impact of any fact finding process upon the other parties;
- h) The prospects of a fair trial on the issue;
- i) The justice of the case.

25. I am well familiar with the concept of 'necessity', arising as it does from [ECHR Art 8](#) and, indeed, from the pre [Human Rights Act 1998](#) case law to which I have been referred. It is rightly at the core of Mr Tolson's submissions in this case and, without overtly labouring the issue by including substantial descriptive text in this judgment, it is at the forefront of my consideration of the point. Amongst the pertinent questions are: Is there a pressing need for such a hearing? Is the proposed fact finding hearing solely, as Mr Tolson puts it, 'to seek findings against the father on criminal matters for their own sake'? Is the process, which will be costly and time consuming, with potentially serious consequences for the father if it goes against him, proportionate to any identified need?

26. For the father it is said that the following factors point against a hearing taking place:

- a) It will not change the outcome (in terms of orders sought) of these proceedings;
- b) Any adverse finding will not be accepted by the father and therefore nothing will be resolved;
- c) There is already an identified need for caution with regard to this father's care of children arising from the previous findings relating to K;
- d) It is not clear that 'B's welfare would be best served by holding this hearing, for example, how is it in his interest to know more clearly that his father broke his arm and/or attempted to smother him (if those be the eventual findings);

e) As a result of the manner in which the experts' meeting was conducted any fact finding hearing could not now be procedurally fair.

27. The other parties (and so far as the first point is concerned the father) refer to the following:

- a) The very substantial gulf between the limited concession made by the father and the serious allegations of physical assault and attempted smothering;
- b) (a) goes nowhere near meeting the justice of the case;
- c) without a finding, there is little to preclude the father seeking more extensive and unsupervised contact in the future;
- d) if he did so, there would then be the potential for a fact finding hearing on this evidence. The hearing is set up now and ready to be heard (as a result of substantial cost and effort). The evidence is as fresh as it will ever be. A hearing now is plainly preferable to one in some years time;
- e) the public interest for those who cause NAI to be identified if possible;
- f) a child's right to know the truth about whether they were injured and, if so, who by;
- g) it is important for the wider interests of the family (including the father) for there to be as much clarity as possible;
- h) if the mother died, or became reconciled with the father, there would be no findings on these issues and nothing to prevent the father exercising his parental responsibility as he saw fit;
- i) ironically, there may be over (or an unjustified level of) protection of 'B' if there is no attempt to achieve clarity;
- j) The Case Conference awaits a fact finding decision before determining whether or not the mother can indeed be exonerated from blame and a consequent decision can be made concerning 'B's continued registration on the Child Protection Register [**minutes of child protection review conference 7th June 2005 — not in bundle**] .

28. The factors against holding the proposed investigation are significant. The cost and the time involved will be substantial. I have therefore been keen to consider whether such a hearing is truly necessary and proportionate.

29. Dealing shortly with some of the arguments that have been raised I would make the following observations:

- i) It is not possible for me to hold at this stage, without further investigation, that the experts' meeting process was procedurally flawed so as to be unfair. Any [ECHR Art 6](#) unfairness is, in any event, to be judged in relation to the proceedings as a whole and not solely one element of them. Now is therefore not the stage at which this argument can come into play or be given any substantial weight;
- ii) The gulf between the father's position and the central allegations is indeed wide. I note that in all of the reported cases, the parents had made significant concessions on threshold and/or the factual substrata. That is not the case here;
- iii) If there is a real potential for these facts to be litigated in the future then they should be litigated now and not some years hence. The father has made it plain to the guardian [C148] that his eventual aim is unsupervised contact to include staying contact. Mr Tolson says that this is in the long term, when either 'B' is seen to be too old to be at risk of this form of abuse and/or is asking for more contact;
- iv) The public interest in the identification of the perpetrators of child abuse and the public interest in children knowing the truth about past abuse are important factors (see *Re K (Non-Accidental Injuries: Perpetrator: New Evidence)* [2004] *EWCA Civ 1181*; [2005] 1 *FLR* 285).

30. In addition I am struck by what, with respect to him, I may call the intellectual dishonesty of the father's position. His stance on the factual dispute (which is in effect to accept no culpable behaviour) is completely incompatible with his acceptance of limited, long-term, supervised contact. This, as is candidly admitted, is a 'pragmatic' position to avoid the feared consequences of the proposed investigation. It is a tactical position. It is not child focussed and has no internal logic. The apparent unanimity of view about the final orders hides the reality of a very substantial and important factual dispute between the father and the other parties.

31. Drawing all of these matters together I have come to the clear view that a full hearing of the factual evidence in relation to the fracture of 'B's arm and his respiratory collapse is necessary, justified and proportionate. Such a hearing is in 'B's best interests. In particular I regard it as almost inevitable that there will be a request for more open contact by the father in the future. I see his current tactical position as being temporary and opportunistic. There is a pressing need for these facts to be considered and findings, if possible, to be made one way or the other on the evidence.

32. For the avoidance of doubt, because of the manner in which this case (and others) has been listed and heard I have as yet only conducted a preliminary reading of the documents. The decision that I have reached on this preliminary issue has been approached on the basis of the arguments and the principles to which I have referred. I approach the fact finding process with

an open mind and the fact that I have decided against the father's submissions is in no manner an indication of any view of the merits of the case. I have no such view at present and cannot have one until I have fully digested the written material and heard the oral evidence. Whilst I have made observations about the father's tactical position within the context of the legal argument and the merits of the preliminary issue as a whole, looked at narrowly and in human terms I regard his position as readily understandable and irrelevant to any decision on the factual issue which is yet to be determined.

Crown copyright

Re S-W (children)



Positive/Neutral Judicial Consideration

Court

Court of Appeal (Civil Division)

Judgment Date

30 January 2015

Case No: B4/2014/2970

Court of Appeal (Civil Division)

[2015] EWCA Civ 27, 2015 WL 56000

Before: Sir James Munby President of the Family Division, Court of Appeal Lord Justice Lewison and Lady Justice King

Date: Friday 30th January 2015

On Appeal from Liverpool County Court

His Honour Judge Dodds

LV14C01877

Hearing date: 11th December 2014

Representation

James Holmes (instructed by Jackson and Canter Solicitors) for the Appellant.

Clive Baker (instructed by Liverpool City Council) for the 1st Respondent.

Carl Gorton (instructed by MSB Solicitors) for the 2nd Respondent.

Kate Burnell (instructed by Paul Crowley & Co Solicitors) for the 3rd Respondent.

Judgment

Lady Justice King:

1. This is an appeal from final care orders made at the Family Court, sitting at Liverpool on the 7 August 2014, in respect of the three children of the appellant mother; ES born on the 27 July 2000 (14); LW born on the 9 October 2003 (11); and AW born on the 17 July 2004 (10).

2. On the 18 July 2014, Liverpool City Council made an application for a care order in respect of all three children. At the first hearing, known as a Case Management Hearing (CMH), held on 7 August 2014, (less than three weeks after the application was made), the judge made final care orders in respect of each child. The mother sought permission to appeal the orders by an appellant's notice dated the 8 September 2014; her Grounds of Appeal being directed at the summary disposal of the case at such an early stage of the proceedings.

3. Permission to appeal was granted by Lord Justice McFarlane on the 30 October 2014. In granting permission, McFarlane LJ identified an issue of wider application saying:

“In any event, there is a compelling reason sufficient to justify this case being considered by the Court of Appeal. The judge's approach could not have been more robust. He sought to justify such an approach on the basis that recent family justice reforms and case law. There is a need for the Court of Appeal to consider whether such a robust summary approach is justified and/or required by the recent extensive changes to procedure and case law and, if so, how the basic requirements of a fair trial and judicial analysis are to be accommodated in such a process”.

4. Neither Liverpool City Council nor the children's guardian seeks to uphold the orders made. All parties are therefore agreed that the appeal should be allowed and that the matter should be remitted to Her Honour Judge de Haas QC, the Designated Family Judge for Liverpool.

Background

5. The brief facts are as follows: The family have been known to Liverpool Children's Services since 2006 although it was not until November or December 2012, that the children were removed from their mother's care and accommodated under a [s20 Children Act 1989 \(CA 1989\)](#) agreement. The concerns of the local authority centred on the general neglect of the children, against a backdrop of alcohol and drug use, together with the mother's inability to break free from a violent relationship.

6. LW and AW were placed with their paternal grandmother and ES with his maternal grandmother. ES and AW continue to live with their respective grandparents and it seems likely that that will continue to be the case. LW and AW have the same father, LW Snr, who has been represented in the proceedings but who is presently remanded in custody in relation to criminal proceedings. ES's father is not in contact with his son and had not been served with notice of the care proceedings by the date of the CMH.

7. Unhappily, LW has fared less well than his brothers since he left his mother's care in about November 2012. He has had 14 different placements, including two since the making of the care orders in early August 2014. LW is academically capable and has been described as ‘over achieving’ in school. LW is currently in local authority foster care but very much wishes to be allowed to live with his mother.

8. Despite the longstanding concerns about the family, the local authority did not issue care proceedings until 18 July 2014. In February 2014 the mother had been told that there was the potential for LW to return to her care. During a pre-proceedings meeting which took place on the 19 March 2014, it was decided that the mother would be assessed as a potential carer for all the children, a decision which led to a parenting assessment being filed on the 4 July 2014. That assessment was not positive and ruled out rehabilitation of all the boys to their mother. Notwithstanding that conclusion, in light of LW's continued instability, distress and fervent desire to go home, active consideration continued to be given to some sort of placement which would allow LW to be with his mother.

9. Upon the issuing of the care proceedings a Guardian, Ms Deborah Cotterell, was appointed. As is required under the terms of the revised *Public Law Outline (PLO)*, [Part 12 Family Proceedings Rules 2010 \(FPR Part 12 : PD12A\)](#), the Guardian familiarised herself with the evidence then available and filed an Initial Evaluation for use at the CMH hearing. There is no expectation, either in the [FPR 2010](#), or in practice, that the Guardian will have seen either the children or any of the parties

prior to preparing her report for the CMH; indeed it would be wholly unrealistic to do so as, by [FPR Rule 12](#) ; PD12A, the CMH is required to be listed between Day 12 and 18 starting from the date of issue of the care proceedings.

10. The initial evaluation of Ms Cotterell, the Guardian, brought to the attention of the court three significant matters:

- i) She had not seen any of the children, each of whom was expressing a desire to live with their mother and ES was already 14 years old;
- ii) She set out her grave concern for the welfare of LW and the need for the local authority to explore all available options for him, whether within the family or, potentially, with a foster carer experienced in providing therapeutic support. Her concern to ensure that the local authority conducted a proper assessment of placement options for LW was heightened by the fact that the local authority had, at one stage, placed him with his father, a man with convictions for supplying Class A drugs. When LW subsequently made complaints of ill treatment at the hands of his father, the local authority, following some investigation, sent him back to live with his father against his wishes. The placement broke down again in circumstances which have resulted in the father being charged with assault on LW;
- iii) She recorded that she wished to have the opportunity to read the social work records, and wanted to see a wide range of documents, ranging from school reports to viability assessments of kinship carers.

11. Prior to the listed CMH, an Advocates meeting was held as is required by the PLO: (PD12A: *Stage 2*). Discussions were held at the meeting and agreement reached as to the future progress of the case, details of which were noted down by Mr Baker, Counsel instructed on behalf of the local authority, with a view to them being put into the form of an order following further discussions which it was anticipated would be held at court immediately prior to the hearing.

12. When they arrived for the hearing both the Advocates and Guardian were in agreement, subject to the judge's approval, as to both directions and a timetable along the following lines:

- i) The local authority would pay for a drugs hair strand test on the mother. This was a matter of considerable importance ...because
- ii) the local authority were to convene a Family Group conference in order to see if a way could be found for LW to return, in whole or part, to the care of his mother. It was hoped that if that could safely be achieved, it might act as a break on the disruptive behaviour which was leading to the constant breakdown in his placements. The local authority note of the meeting says "is it just about good enough with mum, may be able to go back." The timetable was to provide for an addendum to the parenting assessment already filed by the local authority;
- iii) Efforts were to be made to trace the father of ES who had not been served;
- iv) Neither of the grandmothers wished to be considered as foster carers and therefore Special Guardianship assessments were to be carried out by the local authority with a view to securing the future of those two children by the making of Special Guardianship Orders;
- v) It was agreed that a slimmed down number of documents from that listed by the Guardian in her report would be disclosed, but that only one or two of those documents would be placed in the bundle. This would allow the Guardian to carry out a full review of the case whilst ensuring compliance with Practice Direction 27A – Family Proceedings: Court Bundles (Universal Practice to be applied in the High Court and Family Court)(the Bundles Direction) para 5.1 which limits the court bundle to 350 pages of A4 text; (see also [Re W \(Children\)\(Strict Compliance with Court Orders\) \[2014\] EWFC 22](#));
- vi) The matter would be listed for an early Issues Resolution Hearing (IRH) with a view to the case being concluded substantially within 26 weeks.

The Hearing

13. On the morning of the hearing the court had, in addition to the Guardian's analysis and the parenting assessment, a report from the social worker. The mother had filed a statement setting out the changes she said that she had made in her

life, her desire to have the children rehabilitated to her care, emphasising her considerable concern for LW and her wish for him to live with her.

14. The Guardian was not at court having sustained an injury of some sort, but was available on the telephone.

15. All parties anticipated that the matter would be dealt with by way of a directions hearing which would provide for an early IRH and which would record on the face of the order, that the IRH may well be treated as a final hearing. For the mother her expectation that the matter was to be dealt with by way of directions was of fundamental importance to her, providing as it was for the local authority to fund hair strand drug testing of her to confirm (or otherwise), her alleged cocaine use, there having previously been inconsistent results as between a hair strand test and her routine urine tests. The results would inform a decision as to whether further consideration would be given to the rehabilitation of LW to her.

16. The local authority had filed interim care plans in relation to each child in preparation for the hearing. The plans were already significantly out of date; for example LW's plan, whilst dated on the front sheet 3 July 2014, had in fact been signed off on 14 February 2014. LW had been through at least two further placements since the foster placement identified in the interim care plan as a long term placement. The plan failed to recognise the current thinking about a possible placement of LW with his mother saying that the mother would "take no role in the day to day care" of LW. The judge could not have been other than misled by the content of these plans when carrying out his pre-reading for the hearing; unfortunately however, his determination to conclude the proceedings without more ado prevented any misconception he may have been under from being adequately corrected by any of the parties during the course of the hearing.

17. The position was more straight forward for ES and AW as they seemed to be settled with their grandparents. The plan for them was that in the event of favourable special guardianship assessments, a special guardianship order would be made by consent and there would have be no necessity for a care order ever to be made.

18. A transcript of the hearing in front of the judge has been made available; it reveals that within a matter of minutes, the judge had made abundantly clear, in trenchant terms, his determination to conclude the case there and then by making final care orders. The judge was fortified in his approach, he told the parties, by the fact that the previous week (30 July 2014), an application for permission to appeal in relation to another final care order he had made at the CMH in a different case had been refused by McFarlane LJ: Re H (Children) Case No: B4/2014/2033 .

19. The judge was scathing of the Guardian's report and her reasons for requesting further information, saying that "advice about the practice direction that came in on 31st July" (a reference to the new Bundles Direction), would signal the end to what he referred to as "this sort of Victorian detail".

20. In relation to LW's situation he said that whilst he wished LW "every good luck in the world but the [Children Act](#) and the court has nothing to do with it".

21. All the parties crumbled under the judge's caustically expressed views, and as a consequence, were unable to explain to the judge that the situation was more complicated than the one the judge clearly saw, and expressed. The judge viewed the case as one in which he had before him three children each of whom had been in care for well over a year, two of whom were in settled placements. The mother he saw had had a recent positive drugs test, and therefore in his mind, the inevitable

outcome was the making of care orders. The judge said that all future placement decisions in relation to LW would be made by the local authority through the Looked After Children review process (LAC reviews).

22. At one stage the judge referred to the mother as looking “upset and bewildered”. It is hard to see how she could have looked otherwise given the course the proceedings were taking.

23. The judge gave neither a judgment nor reasons prior to making final care orders in relation to all three children.

The Family Justice Reforms and the Public Law Outline

24. A key feature of the family justice reforms now found in the [CA 1989](#) as amended and [FPR 2010 Part 12 and Practice Direction 12A](#), has been the use by the courts “vigorous and robust case management” as a tool for ensuring that, wherever possible, delay is minimised and the statutory 26 week requirement found at [s32 CA1989](#), is achieved. It is undoubtedly the case that, as a result of the reforms, there has been a significant change in culture, driven through by dedicated judges and specialist counsel and solicitors up and down the country. Many care cases are now concluded at either the IRH or well within 26 weeks, to the considerable benefit of the children involved. The Liverpool area has been notable in its successful implementation of the reforms and its early achievement of the routine disposal of care cases within 26 weeks.

25. Part of the way in which effective case management is achieved is by virtue of the judge allocated to the case retaining considerable flexibility in the manner in which he manages the particular case before him; [FPR 2010](#); [PD12A](#) has at Para 2, “*Flexible powers of the court*” Provision is made for:

- i) steps which ordinarily take place at various stages in the proceedings, to be taken at another step. ([PD12A](#) para 2.2);
- ii) the paragraph anticipates cases in which the IRH will be the final hearing ([PD12A](#) para 2.3)
- iii) for oral evidence to be heard at CMH or IRH although [PD12A](#), para 2.3 specifies that the court must be notified in advance of such an intention and directions sought for the conduct of the hearing at which it is intended evidence will be heard, ([PD12A](#) para 2.5), thereby ensuring that no party can be caught unawares.

26. So far as CMHs are concerned [PD12A](#) para 2.6 provides:

“It is expected that full case management will take place at the CMH. It follows that the parties must be prepared to deal with all relevant case management issues, as identified in Stage 2 of the Public Law Outline. A FCMH should only be directed where necessary and must not be regarded as a routine step in proceedings.”

27. The CMH then is precisely that and to that end a number of matters are prescribed for consideration at the CMH within the *PLO: Stage 2*, these include:

- (i) Drawing up a timetable for the child.
- (ii) Identifying any additional parties and interveners.
- (iii) Identifying key issues.
- (iv) Identifying evidence necessary to enable the court to resolve key issues.
- (v) Deciding whether there is a real issue about the threshold.
- (vi) Determine any application under [Part 25](#) (experts).
- (vii) Identifying additional disclosure.
- (viii) Giving directions for any proposed placement order proceedings.

28. The expectation is therefore that a CMH will ordinarily be an essential management hearing designed to get the case in proper order to enable it to be ready for disposal, whether by consent or following a contested hearing, within 26 weeks. This is in contrast to the IRH when all the evidence, including expert evidence should be filed and where, unlike the CMH, the rules specifically require consideration to be given as to whether the IRH “can be used as a final hearing” (PD12A *Stage 3- Issues Resolution Hearing*)

29. Every care judge will be conscious that, whilst it is in a child's best interests for their future to be determined without delay, it is equally in their best interests that the management of the case which determines their future should be fair and [Article 6](#) compliant. The danger lies when, as unfortunately happened here, vigorous and robust case management tips over into an unfair summary disposal of a case.

Care Plans

30. It is accepted by all parties that the court must be alert to the danger of trespassing upon the province of the local authorities with regard to the making and implementing of care plans. With effect from 22 April 2014 the prohibition which had hitherto prevented the court from making a care order without considering a care plan has been repealed. The new section [s31 CA 1989](#) . provides as follows:

“(1) Where an application is made on which a care order might be made with respect to a child, the appropriate local authority must, within such time as the court may direct, prepare a plan (“a care plan”) for the future care of the child.

(2) While the application is pending, the authority must keep any care plan prepared by them under review and, if they are of the opinion some change is required, revise the plan, or make a new plan, accordingly.

(3)

(4)

(5)

(6) A plan prepared, or treated as prepared, under this section is referred to in this Act as a “ [section 31A](#) plan”.

31. Underpinning the drafting of a care plan is a range of regulations and authority; for example the care plan must accord with *the Care Planning, Placement and Case Review (England) Regulations 2010 (Part IV)* , which regulations are supported by four sets of statutory guidance.

32. In the present case the local authority had not yet filed a “ [section 31A](#) ” plan, only the misleading and out of date interim care plans. The local authority cannot however be criticised for the absence of certain other information which would be required under the regulations in a “ [section 31A](#) care plan” such as the identification of the Independent Reviewing Officer.

33. Once a “ [section 31A](#) plan” is filed, the provisions for the scrutiny of the plan by the court hearing the case is now expressed in terms of “requirements” and are found in [section 31\(3A\) CH 1989](#) and [section 31\(3B\) CA 1989](#) :

Care plans

(3A) A court deciding whether to make a care order—

(a) is required to consider the permanence provisions of the [section 31A](#) plan for the child concerned, but

(b) is not required to consider the remainder of the [section 31A](#) plan, subject to [section 34\(11\)](#) .

(3B) For the purposes of subsection (3A), the permanence provisions of a [section 31A](#) plan are such of the plan's provisions setting out the long-term plan for the upbringing of the child concerned as provide for any of the following—

(a) the child to live with any parent of the child's or with any other member of, or any friend of, the child's family;

(b) adoption;

(c) long-term care not within paragraph (a) or (b).”

34. It can be seen that a court is “required” to consider permanence plans but, save as to contact ([s34\(11\) CA 1989](#)), it is “not required” to consider the remainder of the care plan. The fact that the court is “not required” to consider certain other aspects of the plan does not mean it is prohibited from doing so; one can imagine any number of situations where a particular child's individual identified needs will mean that the court, whilst not seeking to trespass on the exercise of parental responsibility of the local authority, forms the view that the child's welfare necessitates the court satisfying itself in relation to certain important aspects of the care plan not found within the permanence provisions themselves.

35. In addition, Miss Burnell, on behalf of the Guardian, rightly draws the court's attention to the provision in [section 31\(3B\)](#) , which provides a definition of “permanence provisions” which, includes:

(a) the child to live with any parent of the child's or with any other member of, or any friend of, the child's family”

36. This subsection, Miss Burnell submits, should be read disjunctively, it is not sufficient she argues for a care plan simply to refer to a “family/friend placement”; the precise placement anticipated must be indentified and adequate information about the placement provided to allow proper consideration by the court. Miss Burnell reminds the court that it is not uncommon for the focus of a welfare hearing to be upon which of two possible family/friend placements is the appropriate placement for the child in question; it cannot have been intended that the court should be excluded from hearing evidence in relation to the various options within that class of potential carers.

37. I accept Miss Burnell's submission. Where a care plan anticipates that a child will live permanently with a family or friend, the identity and sufficient information about that family member or friend must be before the court. Without such information the court will be unable properly to consider the proposed permanency provisions. Such an approach chimes with the position, as it has been for many years, in relation to the treatment of long term foster placements where, if it is intended that a child is to remain in a long term foster placement, the care plan must contain a description of the placement and of the foster carers to be provided by a social worker who knows the foster carers in question. *Re J (Minors) Care: Care Plan* [1994] 1 FLR 253 .

Discussion

38. The judge relied on McFarlane LJ's written reasons for refusing Permission to Appeal in *Re H (Children)* Case No: B4/2014/2033 as justification for the course he adopted. In that case McFarlane LJ said:

“In circumstances where it is accepted that the only outcome of the proceedings would be the making of a full care order and the only issue was one of timing and process, the case management decision of the judge to press ahead and make the final hearing at the first hearing was entirely reasonable”

Two things should be noted in relation to the use to which *Re H* was put by the judge:

- i) reasons for giving or refusing permission to appeal are not binding on the courts and should not be used as precedents (see Practice Direction 9 *April 2001* paragraph 6.2 [2001] 1WLR 1001)
- ii) in this case, far from there being acceptance of the outcome and/or the only issue being as “timing and process,” the mother did not agree to the care plan in relation to any of the three children; the Guardian was not in a position to express a view and the local authority had not filed a “ [section 31A](#) ” care plan without which the court is not in a position to scrutinise the permanency plans.

39. In *Re B [1994] 2 FLR 1 Butler Sloss P considered* the circumstances in which courts could make final orders in a number of different situations without a full hearing. In this context a number of her observations are still of value (page 5):

“...Applications for residence orders or for committal to the care of a local authority or revocation of a care order are likely to be decided on full oral evidence, but not invariably. Such is not the case on contact applications which may be and are heard sometimes with and sometimes without oral evidence or with a limited amount of oral evidence.

.....The considerations which should weigh with the court include:

- (1) whether there is sufficient evidence upon which to make the relevant decision;
- (2) whether the proposed evidence (which should be available at least in outline) which the applicant for a full trial wishes to adduce is likely to affect the outcome of the proceedings;
- (3) whether the opportunity of cross-examine the witnesses for the local authority, in particular in this case the expert witnesses, is likely to affect the outcome of the proceedings;
- (4) the welfare of the child and the effect of further litigation – whether the delay in itself will be so detrimental to the child's well-being that exceptionally there should not be a full hearing. This may be because of the urgent need to place the child, or as is alleged in this case, the emotional stress suffered by both children, and particularly D;
- (5) the prospects of success of the applicant or a full trial;
- (6) does the justice of the case require a full investigation with oral evidence?

40. The considerations listed by Butler Sloss P were directed towards a contact application but have a resonance in care cases and it may be exceptionally that, if all parties consent, or there is otherwise a clear case for it, then a court will make final orders at a CMH but, unless the decision goes by concession or consent, it will only be exceptionally, in unusual circumstances and on rare occasions, that this can ever be appropriate. Generally the very nature of the hearing and its description as found in the PLO militates against such an outcome not least because:

- i) It is listed within days of proceedings being issued, often solicitors will only just have become involved and had only limited time to take instructions it follows that the evidence to be relied on by the parents at a full trial is unlikely to be available, even in outline;

- ii) The Guardian is unlikely to have read more than the Checklist documents served with the application and may well not have seen the decision making records which are only disclosed on request; further, unless he or she have been involved with the family in relation to other children he or she is unlikely to have seen the parties or the children, a significant omission particularly where, as here, there are older children who have lived with a parent for many years;
- iii) A “[section 31A](#)” [CA 1989](#) care plan will not, in all likelihood, be available.

41. It follows that whilst one can conceive of cases where a final order will be made at the case management hearing,(the application for permission to appeal of *Re J* referred to above was one such case), in reality it is likely that such a course will be appropriate only occasionally and in any event:

- i) Where there remains any significant issue as to threshold, assessment, further assessment or placement, it will not be appropriate to dispose of the case at CMH.
- ii) It can never be appropriate to dispose of the case where the children's guardian has not at least had an opportunity of seeing the child or children in question and to prepare to a case analysis in which he/she considers the [section 31A](#) care plan of the local authority.
- iii) Where, unusually a case is to be disposed of at CMH, adequate notice must be given to the representatives of the parents and Guardian; reluctance on their part will ordinarily be fatal to the proposed course. Having said that, where all that is required is for the parties to have a little more time or for the local authority to prepare a [section 31A](#) care plan one can envisage cases where the matter is adjourned for a further CMH with the intention that final orders will be made at the adjourned hearing., Another example where in exceptional circumstances it may be appropriate to make final orders at the CMH could be where, the outcome is inevitable and the child's need for an immediate resolution to the proceedings is critical to his or her welfare.
- iv) A care order should not be made without some reasons or a judgment no matter how concise. It is not enough to proceed on the basis that the reasons for making a care order, and still more a placement order, can be distilled from the transcript of discussion between the judge and the parties at court. Whilst appreciating the ever increasing burden on family court judges in the preparing and giving of judgments there must at least be a short judgment/reasons noting the available options, the positions of the parties and confirming that the outcome for the child is in his or her best interests and is proportionate and therefore Convention compliant.

Outcome

42. All parties agree that this is a case where the judge, in his desire to embrace and put into effect the family justice reforms, has unilaterally disposed of a case prematurely in circumstances where such a summary disposal was not only unfair to the mother but contrary to the interests of the children with whom he was concerned. It follows that for the reasons outlined above I would allow the appeal and remit the matter to HHJ de Haas.

Lord Justice Lewison:

43. It has long been a fundamental principle of English law that justice must not only be done, but must be seen to be done. Where a judge has apparently made up his mind before hearing argument or evidence that principle has undoubtedly been breached. A closed mind is incompatible with the administration of justice. But in such cases it is always possible that justice itself has not been done either. As Lord Neuberger MR recently put it in *Labrouche v Frey* [2012] *EWCA Civ 881* at [24]:

“Any experienced judge worthy of his office will have had the experience of coming into court with a view, sometimes a strongly held view, as to the likely outcome of the hearing, only to find himself of a very different view once he has heard oral argument.”

44. Longer ago in *John v Rees* [1970] *Ch 345* , 402 Megarry J said:

“As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.”

45. Moreover where parties arrive at court expecting to participate in a hearing that is to deal only with procedural aspects of progressing a case towards a final hearing, it is quite wrong for the court, on its own initiative and without prior notice to the parties – let alone any invitation from any of them – to treat the procedural hearing as if it were the final hearing and to make such a drastic order as the judge made in the present case. Had a party invited the judge to make the order that he in fact made without notice to the other parties one would have described it as “an ambush”. The fact that it came from the court makes it worse, not better.

46. Parties are also entitled to know why judges make the decisions that they do. This necessarily entails giving reasons for decision, not merely announcing conclusions. The reasons may be brief but they must be explanatory. Justice will not be done if it is not apparent to the parties why one has won and the other has lost: *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409 at [16].

47. In both civil and family cases the Court of Appeal has said on more than one occasion that it will uphold robust but fair case management decisions by first instance judges: *Cherney v Deripaska* [2012] EWCA Civ 1235 at [17], [30]; *Re TG (a child) (care proceedings: biomechanical engineering evidence)* [2013] EWCA Civ 5, [2013] 1 FCR 229 at [35], [36]. Both adjectives are important. Robustness cannot trump fairness.

48. Family cases, however inquisitorial and streamlined they may be, are not exempt from these basic principles. As the President put it in *Re TG* at [37]:

“The task of the case-management judge is to arrange a trial that is fair; fair, that is, judged both by domestic standards and by the standards mandated by arts 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in [Sch 1 to the Human Rights Act 1998](#)) (the Convention).”

49. It was for these reasons, as well as those given by the President and Eleanor King LJ, that I joined in the decision to allow the appeal.

Sir James Munby, President of the Family Division:

50. I agree so completely with the judgments of my Lady and my Lord that there is little I need to add. However there are a few points which I wish to emphasise.

51. My Lord has drawn attention to the famous words of Lord Hewart CJ in *R v Sussex Justices [1924] 1 KB 256*, 259. In the present case it is unhappily all too apparent that no dispassionate observer of the proceedings or reader of the transcript could think that justice was done, let alone that it was seen to be done. It was not.

52. Vigorous and robust case management has a vital role to play in all family cases, but as [rule 1.1 of the Family Procedure Rules 2010](#) makes clear, the duty of the court is to “deal with cases justly, having regard to any welfare issues involved”. So, as my Lord has emphasised, robustness cannot trump fairness.

53. In the context of case management, fairness has two aspects: first, the case management hearing itself must be conducted fairly; secondly, as I observed in the passage in *Re TG* to which my Lord has referred, the task of the case management judge is to arrange a trial that is fair. Here, there was a failure in both respects.

54. We are all familiar with the aphorism that ‘justice delayed is justice denied’. But justice can equally be denied if inappropriately accelerated. An unseemly rush to judgment can too easily lead to injustice. As Pauffley J warned in *Re NL (A child) (Appeal: Interim Care Order: Facts and Reasons) [2014] EWHC 270 (Fam), [2014] 1 FLR 1384*, para 40, “Justice must never be sacrificed upon the altar of speed.”

55. [Rule 22.1](#) gives the case management judge extensive powers to control the evidence in a children case: see *Re TG*, paras 27-28. But these powers must always be exercised, especially in care cases where the stakes are so high, in a way which pays due regard to two fundamental principles which apply as much to family cases as to any other type of case.

56. First, a parent facing the removal of their child must be entitled to put their case to the court, however seemingly forlorn. It is one of the oldest principles of our law – it goes back over 400 years, to the earliest years of the seventeenth century – that no-one is to be condemned unheard: see *Re G (Care: Challenge to Local Authority's Decision) [2003] EWHC 551 (Fam), [2003] 2 FLR 42*, paras 28-29. As I observed (para 55):

“The fact, if fact it be, that the circumstances are such as to justify intervention by the State, ... does not absolve the State of its duty nonetheless to act fairly. It is not enough for the State to make a fair decision: the State must itself act fairly in the way in which it goes about arriving at its decision.”

A parent who wishes to give evidence in answer to a local authority's care application must surely be permitted to do so.

57. Secondly, there is the right to confront ones accusers. So, a parent who wishes to cross-examine an important witness whose evidence is being relied upon by the local authority must surely be permitted to do so.

58. I stress the word important. I am not suggesting that a parent has an absolute right to cross-examine every witness or to ask unlimited questions of a witness merely with a view to ‘testing the evidence’ or in the hope, Micawber-like, that something may turn up. Case management judges have to strike the balance, ensuring that there is a fair trial, recognising that a fair trial does not entitle a parent, even in a care case, to explore every by-way, but also being alert to ensure that no parent is denied the right to put the essence of their case to witnesses on those parts of their evidence that may have a significant impact on the outcome.

59. Quite apart from the fundamentally important points of principle which are here in play, there is great danger in jumping too quickly to the view that nothing is likely to be achieved by hearing evidence or allowing cross-examination, in concluding that the outcome is obvious. My Lord has referred to what Megarry J said in *John v Rees*. The forensic context there was far removed from the one with which are here concerned, but the point is equally apposite. As I said in *Re TG*, para 72:

“Most family judges will have had the experience of watching a seemingly solid care case brought by a local authority being demolished, crumbling away, at the hands of skilled and determined counsel.”

60. I agree with my Lady that there can, in principle, be care cases where the final order is made at the case management hearing. But, unless the decision goes by concession or consent, it will only be exceptionally, in unusual circumstances and on rare occasions, that this can ever be appropriate. *Re H*, to which my Lady has referred, was such a case, but the particular and unusual facts which there justified a summary process need to be borne in mind. *Re H* is not and must not be treated as justification for any general principle, let alone for proceeding as the judge did in the present case.

61. Quite apart from the fact that such a ruthlessly truncated process as the judge adopted here was fundamentally unprincipled and unfair, it also prevented both the children's guardian and the court doing what the law demanded of them in terms of complying with the requirements of the [Children Act 1989](#) and PD12A. I agree with my Lady's analysis, in particular in relation to care plans and the meaning and effect of the various provisions in [sections 31 and 31A](#) of the Act to which she has referred.

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Family Procedure Rules 2010/2955

rule 1.4 Court's duty to manage cases



Law In Force

Version 3 of 3

22 April 2014 - Present

Subjects

Civil procedure

1.4.— Court's duty to manage cases

(1) The court must further the overriding objective by actively managing cases.

[

(2) Active case management includes—

(a) setting timetables or otherwise controlling the progress of the case;

(b) identifying at an early stage—

(i) the issues; and

(ii) who should be a party to the proceedings;

(c) deciding promptly—

(i) which issues need full investigation and hearing and which do not; and

(ii) the procedure to be followed in the case;

(d) deciding the order in which issues are to be resolved;

(e) controlling the use of expert evidence;

(f) encouraging the parties to use [a non-court dispute resolution]² procedure if the court considers that appropriate and facilitating the use of such procedure;

(g) helping the parties to settle the whole or part of the case;

(h) encouraging the parties to co-operate with each other in the conduct of proceedings;

(i) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(j) dealing with as many aspects of the case as it can on the same occasion;

(k) dealing with the case without the parties needing to attend at court;

(l) making use of technology; and

(m) giving directions to ensure that the case proceeds quickly and efficiently.

]¹

Notes

- 1 Substituted by Family Procedure (Amendment) (No.5) Rules 2012/3061 [rule 3](#) (January 31, 2013)
- 2 Words substituted by Family Procedure (Amendment No. 3) Rules 2014/843 [rule 3](#) (April 22, 2014)

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Family Procedure Rules 2010/2955

rule 4.1 The court's general powers of management



Version 3 of 3

4 June 2018 - Present

Subjects

Civil procedure

4.1.— The court's general powers of management

- (1) In this Part, “*statement of case*” means the whole or part of, an application form or answer.
- (2) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.
- (3) Except where these rules provide otherwise, the court may—
 - (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);
 - (b) make such order for disclosure and inspection, including specific disclosure of documents, as it thinks fit;
 - [
 - (bb) direct that any proceedings in the High Court be heard by a Divisional Court of the High Court;
 -] ¹
 - (c) adjourn or bring forward a hearing;
 - (d) require a party or a party's legal representative to attend the court;
 - (e) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;
 - (f) direct that part of any proceedings be dealt with as separate proceedings;
 - (g) stay^(GL) the whole or part of any proceedings or judgment either generally or until a specified date or event;
 - (h) consolidate proceedings;
 - (i) hear two or more applications on the same occasion;
 - (j) direct a separate hearing of any issue;
 - (k) decide the order in which issues are to be heard;
 - (l) exclude an issue from consideration;
 - (m) dismiss or give a decision on an application after a decision on a preliminary issue;
 - (n) direct any party to file and serve an estimate of costs; and
 - (o) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.

(Rule 21.1 explains what is meant by disclosure and inspection.)[(Rule 37.15(6)(b) makes specific provision in relation to Divisional Courts.)]²

(4) When the court makes an order, it may—

- (a) make it subject to conditions, including a condition to pay a sum of money into court; and
- (b) specify the consequence of failure to comply with the order or a condition.

[

(4A) Where the court has made a direction in accordance with paragraph (3)(bb) the proceedings shall be heard by a Divisional Court of the High Court and not by a single judge.

]³

(5) Where the court gives directions it will take into account whether or not a party has complied with any relevant pre-action protocol^(GL).

(6) A power of the court under these rules to make an order includes a power to vary or revoke the order.

(7) Any provision in these rules—

- (a) requiring or permitting directions to be given by the court is to be taken as including provision for such directions to be varied or revoked; and
- (b) requiring or permitting a date to be set is to be taken as including provision for that date to be changed or cancelled.

(8) The court may not extend the period within which [an application for]⁴ a section 89 order must be made.

Notes

1 Added by Family Procedure (Amendment) Rules 2018/440 rule 3(a)(i) (June 4, 2018)

2 Words inserted by Family Procedure (Amendment) Rules 2018/440 rule 3(a)(ii) (June 4, 2018)

3 Added by Family Procedure (Amendment) Rules 2018/440 rule 3(b) (June 4, 2018)

4 Words inserted by Family Procedure (Amendment) Rules 2012/679 rule 4 (April 6, 2012: insertion has effect subject to savings and transitional provisions specified in SI 2012/679 rule 30(2))

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Family Procedure Rules 2010/2955

rule 4.4 Power to strike out a statement of case



Version 3 of 3

6 April 2016 - Present

Subjects

Civil procedure

4.4.— Power to strike out a statement of case

(1) Except in proceedings to which [Parts 12 to 14](#) apply, the court may strike out^(GL) a statement of case if it appears to the court—

- (a) that the statement of case discloses no reasonable grounds for bringing or defending the application;
- (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;
- (c) that there has been a failure to comply with a rule, practice direction or court order; or
- (d) in relation to applications for matrimonial and civil partnership orders and answers to such applications, that the parties to the proceedings consent.

[

(1A) When the court is considering whether to exercise the power to strike out a statement of case, it must take into account any written evidence filed in relation to the application or answer.

]¹

(2) When the court strikes out a statement of case it may make any consequential order it considers appropriate.

(3) Where—

- (a) the court has struck out an applicant's statement of case;
- (b) the applicant has been ordered to pay costs to the respondent; and
- (c) before paying those costs, the applicant starts another application against the same respondent, arising out of facts which are the same or substantially the same as those relating to the application in which the statement of case was struck out,

the court may, on the application of the respondent, stay^(GL) that other application until the costs of the first application have been paid.

(4) Paragraph (1) does not limit any other power of the court to strike out ^(GL) a statement of case.

(5) If [the court]² strikes out an applicant's statement of case and it considers that the application is totally without merit—

- (a) the court's order must record that fact; and
- (b) the court must at the same time consider whether it is appropriate to make a civil restraint order.

Notes

- 1 Added by Family Procedure (Amendment) Rules 2016/355 [rule 3](#) (April 6, 2016: insertion has effect subject to transitional provision specified in SI 2016/355 rule 9)
- 2 Words substituted by Family Procedure (Amendment No.3) Rules 2013/3204 [rule 7](#) (April 22, 2014: substitution has effect on April 22, 2014 being the date on which 2013 c.22 s.17(3) was brought fully into force subject to transitional and saving provision specified in SI 2013/3204 rule 137)

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Family Procedure Rules 2010/2955

rule 12.25 The Case Management Hearing and the Issues Resolution Hearing



Law In Force

Version 2 of 2

22 April 2014 - Present

Subjects

Civil procedure

[

12.25.— The Case Management Hearing and the Issues Resolution Hearing

- (1) The court will conduct the Case Management Hearing with the objective of—
 - (a) confirming the level of judge to which the proceedings have been allocated;
 - (b) drawing up a timetable for the proceedings including the time within which the proceedings are to be resolved;
 - (c) identifying the issues; and
 - (d) giving directions in accordance with [rule 12.12](#) and Practice Direction 12A to manage the proceedings.
- (2) The court may hold a further Case Management Hearing only where this hearing is necessary to fulfil the objectives of the Case Management Hearing set out in paragraph (1).
- (3) The court will conduct the Issues Resolution Hearing with the objective of—
 - (a) identifying the remaining issues in the proceedings;
 - (b) as far as possible resolving or narrowing those issues; and
 - (c) giving directions to manage the proceedings to the final hearing in accordance with [rule 12.12](#) and Practice Direction 12A.
- (4) Where it is possible for all the issues in the proceedings to be resolved at the Issues Resolution Hearing, the court may treat the Issues Resolution Hearing as a final hearing and make orders disposing of the proceedings.
- (5) The court may set a date for the Case Management Hearing, a further Case Management Hearing and the Issues Resolution Hearing at the times referred to in Practice Direction 12A.
- (6) The matters which the court will consider at the hearings referred to in this rule are set out in Practice Direction 12A. ([Rule 25.6](#) (experts: when to apply for the court's permission) provides that unless the court directs otherwise, parties must apply for the court's permission as mentioned in [section 13\(1\), \(3\) and \(5\)](#) of the 2014 Act as soon as possible and in [Part 4](#) proceedings and in so far as practicable other public law proceedings no later than the Case Management Hearing.)

]¹

Notes

1 Substituted by Family Procedure (Amendment No. 3) Rules 2014/843 [rule 25](#) (April 22, 2014)

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