HAS THERE BEEN A CHANGE IN APPROACH IN RESPECT OF SUMMARY DISMISSAL OF CARE PROCEEDINGS AND FINDINGS & DISCHARGE OF INTERVENORS?

In the context of robust case management decisions at first instance and applications to dramatically curtail the nature and scope of public law proceedings, courts have recently been required to consider the limits of case management decision-making, and how that should be approached. This is in the light of the recent Covid-2019 pandemic and increasing pressures on court resources.

When faced with such issues, where to look and what to consider (whichever side of the argument you are on):

1. Starting Point

i. Case management powers under the FPR 2010 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.

a. Part 1 (the Overriding Objective)*, Part 4 (General Case Management Powers, including '*exclude an issue from consideration*') and Part 12 (Public Law Proceedings) of the FPR 2010 and Practice Direction 12A (Guide to Case Management) are of particular relevance.

*(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.

b. Pursuant to r12.25(1)(c), the court will conduct a case management hearing in public law proceedings with the objective 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 observed at [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*'.
c. PD 12A, which incorporates the Public Law Outline, states that the identification of additional parties, including intervenors, should take place at the case management stage.
d. Unlike the CPR, the FPR expressly prohibits the striking out of a statement of case in public law proceedings (FPR r4.4(1). The FPR also contains no power to order summary judgment.

2. Recent Case Law

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

i. *H-L (Children: Summary Dismissal of Care Proceedings)* [2019] EWCA Civ 704 concerned an appeal by the local authority against the decision of HHJ Wicks to summarily dismiss care proceedings at an interim procedural stage. At first instance, the local authority sought interim supervision orders and a fact-finding hearing to determine potential non-accidental injury. HHJ Wicks' decision to terminate proceedings was largely predicated on the local authority's delay in issuing proceedings and his acceptance of arguments that

the injured daughter was doing well in the care of her father (a possible perpetrator).

ii. The local authority's ground of appeal relating to summary dismissal was as follows:

> [39] '*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 an interim position with the final assessment that would take place when full evidence was available*' (emphasis added).

iii. The appeal comprehensively succeeded, and the Court of Appeal set aside HHJ Wicks' order dismissing the proceedings. It was found that threshold was plainly crossed: the fact that the injuries were unexplained raised an unassessed likelihood of future harm.

Further, he should have '*cautioned against terminating proceedings when that course did not have the support of the Guardian*'. Jackson LJ powerfully stated:

> [46] '*[HHJ Wicks] 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*'.

HHJ Wicks should not have cast doubt on the analysis in *Re S-W (Care Proceedings: Case Management Hearing* [2015] EWCA Civ 27*),* by which he was bound, and which remained authoritative guidance on the summary determination of public law proceedings.

Re S-W (Care Proceedings: Case Management Hearing)

(Permission McFarlane LJ, '*the judge's approach could not have been more robust')*

King LJ

[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 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' (emphasis added).

Lewison LJ

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'.

Robustness cannot trump fairness – see r1.1 FPR 2010 - the duty of the court is to *'deal with cases justly, having regard to any welfare issues involved'.*

Munby LJ

As Pauffley J warned in Re NL (A Child) (Appeal: Interim Care Order: Facts and Reasons) [2014] EWHC 270 (Fam) [2014] 1 FLR 1384 at [40], *'justice must never be sacrificed upon the altar of speed'.*

A Local Authority v W and Others (Application for Summary Dismissal of Findings)

i. In *A Local Authority v W and Others (Application for Summary Dismissal of Findings)* [2020] EWFC 40, the father argued that;
    a. the court had a separate power of summary dismissal outside its ordinary case management powers.

b. The findings of non-accidental injury sought by the local authority (alleged causation of an infant's head injury was asphyxiation by one of the parents) should be summarily dismissed because the expert medical opinion did not support the findings.

ii. In relation to the issue of a separate power of summary dismissal, Macdonald J held as follows:

> [57] *'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 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 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'* (emphasis added).
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> *A County Council v DP, RS, BS (By The Children's Guardian)* [2005] 2 FLR 1031 (McFarlane J) and endorsed by the Court of Appeal in *Re F-H (Dispensing with Fact-Finding Hearing)* [2008] EWCA Civ 1249. The nine factors that fall for consideration when deciding whether to determine a disputed fact are as follows:
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> e. the interests of the child (which are relevant, but not paramount);
> f. the time that the investigation will take;
> g. the likely cost to public funds;
> h. the evidential result;
> i. the necessity or otherwise of the investigation;
> j. the relevance of the potential result of the investigation to the future care plans for the child;
> k. the impact of any fact-finding process upon the other parties;
> l. the prospects of a fair trial on the issue; and
> m. the justice of the case.

The above nine factors, in their totality, embody the concepts of both necessity and proportionality *(A Local Authority v X, Y and Z (Permission to Withdraw)* 2 [2018] FLR 1121.

iii. He went on to allow the local authority's application and order that the court should determine the allegations at a final hearing. Applying the procedural framework of the FPR 2010 and the principles laid down in *A County Council v DP, RS, BS,* Macdonald J found:

> [37] '*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:*
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> *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).*
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> *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]).*
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> *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]).*
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> *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 all the 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).

…[66] '*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 made out to the requisite standard of proof*' (emphasis added).

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' (emphasis added).

Cumbria County Council v T (Discharge of Intervenors)

i. *Cumbria County Council v T (Discharge of Intervenors)* [2020] EWFC 58 concerned findings sought by the mother that her child had been sexually abused by the father and seven intervenors. The local authority sought cross-findings that the mother had either developed an unreasonable and false belief that her son had been sexually abused, or that she had deliberately fabricated the allegations. The case management issue before the court was whether or not it was necessary and proportionate to determine the findings sought by the mother against the intervenors (rather than the F), and accordingly, whether it was appropriate for each of the intervenors to be discharged.

ii. There were numerous deficiencies in the evidence to support the mother's findings.

    a. The child made no direct allegations against the intervenors;
    b. his ABE interview included numerous leading questions in breach of ABE guidance;
    c. medical reports were inconclusive; and
    d. the intervenors had never been subject to police investigation.

iii. The court held it was neither necessary nor proportionate for the court to determine the findings of fact sought by the mother against the intervenors. All of the intervenors were therefore discharged as intervenors in the proceedings. Macdonald J concluded that:

[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 in A County Council v DP, RS, BS, 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'.*

iv. In reaching its decision, the court found that:

a. Given that the child had not directly alleged any sexual abuse against any intervenor; that there was no corroborative evidence; and that the allegations lacked any specificity; it was difficult to see how the findings sought could be proved to the requisite standard.
b. It was not necessary to determine the additional findings of fact the mother sought against the intervenors in order to come to a view on threshold and the child's future. None of them sought care of or contact with the child, and so were marginal in terms of determining his welfare.
c. Having regard to the pressures on the family justice system due to the pandemic, the parties would not be allowed to litigate every issue and present extensive oral evidence (para 46 of the President's Guidance in *The Family Court and Covid-19: The Road Ahead*).

GC (A Child) (Withdrawal of Care Proceedings)

i. In *GC (A Child) (Withdrawal of Care Proceedings)* [2020] EWCA Civ 848, the Court of Appeal found that a judge had erred in permitting a local authority to withdraw an application for a care order prior to a fact-finding hearing. A conclusion could not be reached as to the cause of the child's head injuries on the basis of the written medical evidence alone, and so the Court of Appeal considered that the lower court should have gone on to hear the evidence in full.

ii. In restating the principles applicable to the determination of an application to withdraw care proceedings, the Court of Appeal identified two categories of proceedings. The first category includes cases where the local authority is unable to satisfy the threshold criteria *(Redbridge London Borough Council v B, C and A* [2011] EWHC 517), and such an inability to do so is 'obvious' *(Re J, A, M and X (Children)* [2014] EWHC 4648). The second category includes cases where, on the evidence, it is possible for the local authority to satisfy the threshold criteria. In such cases, an application to withdraw the proceedings must be determined by considering:

a. whether withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned; and
b. the overriding objective under the FPR.

iii. The relevant factors to consider in such a case will include those identified in *A County Council v DP, RS, BS,* coupled with the paramountcy of the child's welfare and the overriding objective in the FPR [20].

iv. Applying the above factors to the case, the Court of Appeal found that:

> *[34] 'this [was] a paradigm example of a case where a judge needs to hear all the evidence, to assess whether the lay witnesses' evidence is truthful, accurate and reliable, and evaluate the medical opinion evidence, tested in cross-examination, in the context of the totality of the evidence. It is simply not possible for the judge to reach a conclusion as to the cause of G's injuries on the basis of the written evidence alone'* (emphasis added).

M (Children) v Wiltshire Council

i. In *M (Children) v Wiltshire Council* [2020] EWCA Civ 1717, the Children's Guardian successfully appealed against a decision to permit the local authority to withdraw proceedings in circumstances where a 4-year-old girl was found to have gonorrhoea. The Court of Appeal noted that whilst the pool of possible perpetrators was likely to be wide, it was nonetheless important for the court

to determine whether the child had been subjected to sexual abuse as this would impact on her future protection.

ii. At [36], the Court of Appeal highlighted the factors set out in *A County Council v DP, RS, BS* and endorsed the statement of the relevant principles to be applied in *GC (A Child) (Withdrawal of Care Proceedings).* In applying these principles, the court found that:

> [37] '*the nature of the harm that has befallen the subject child cannot by itself be determinative of the outcome of withdrawal proceedings, however serious it may be. Likewise, evidential complexity alone should not be determinative of outcome if forensic scrutiny could reasonably establish the relevant facts upon which to determine welfare considerations, whether by reason of positive or negative 'threshold' findings'* (emphasis added).

iii. In finding that the application to withdraw proceedings was premature, the Court of Appeal drew attention to two key evidential factors:

a. The parents did not accept that the child had been subjected to sexual abuse. Their views plainly had implications for the future parenting and protection of the children, which called for a clear determination as to whether the child had been a victim of sexual abuse.
b. The lower court judge had been unintentionally misled as to a crucial fact which could impact on whether a meaningful investigation of attribution was possible. Notably, the dormant period of infection differs between pre-menopausal women and pre-pubertal children. The time frame is considerably shorter in the latter, which meant that the identification of a pool of possible perpetrators was a more feasible proposition.

3. A Change of Approach?

i. The recent case law shows that we have largely come full circle with respect to the summary dismissal of proceedings, summary dismissal of findings and discharge of intervenors.

ii. *Re S-W (Care Proceedings: Case Management Hearing),* remains authoritative guidance on the summary determination of public law proceedings.

iii. *H-L (Children: Summary Dismissal of Care Proceedings* serves as a cautionary tale against prematurely disposing of public law proceedings as a whole. The lower court departed from established practice by effectively striking out proceedings without conducting any investigation into the child's injuries and without making any protective orders. This approach was found to be wholly erroneous by the Court of Appeal.

iv. *A Local Authority v W and Others (Application for Summary Dismissal of Findings)* endorses the conventional, established and familiar route set out in *A County Council v DP, RS, BS,* coupled with reference to the FPR, as the proper framework for determining whether disputed findings are adjudicated. The case also confirms that no separate power of summary dismissal exists outside of the court's general case management powers under the FPR.

v. Where there is wider canvas evidence that is relevant to the disputed findings, providing a forum to hear and test that evidence is both necessary and proportionate. Expert medical evidence is only one part of the jigsaw, and so it will likely be premature to dismiss disputed findings without considering that evidence in light of non-medical evidence. Quite apart from that, it is in the public interest to conduct a thorough inquiry where a child may have been deliberately injured (Macdonald J at [71]).

vi. *Cumbria County Council v T (Discharge of Intervenors)* also represents a retrenchment of the principles arising from *A County Council v DP, RS, BS.* Once again, when a court is determining whether or not to pursue certain findings and/or accord a person intervenor status, the nine factors in the latter case are to be borne in mind. Unlike in *A Local Authority v W and Others (Application for Summary Dismissal of Findings),* the court in *Cumbria County Council v T (Discharge of Intervenors*), decided not to pursue findings against the intervenors, and accordingly discharged them as parties altogether. This difference in outcome was the result of faithful adherence to the nine factors and the application of those factors to the individual facts of each case.

vii. *GC (A Child) (Withdrawal of Care Proceedings)* and *M (Children) v Wiltshire Council* both adopt and endorse the factors set out in *A County Council v DP, RS, BS* in relation to determining withdrawal applications where the threshold criteria can be satisfied. *GC (A Child) (Withdrawal of Care Proceedings* clearly states that, when considering those factors, the paramountcy of the child's welfare and the overriding objective of the FPR must be borne in mind. *M (Children) v Wiltshire Council* warns that the nature of the harm and evidential complexity alone should not be determinative of such applications.

viii. Overall, it would appear that necessity and proportionality remain the key touchstones in determining which findings to pursue and whether parties are accorded intervenor status. In light of the Covid-19 pandemic and the President's Guidance in *The Family Court and Covid-19: The Road Ahead,* it may be that the courts are taking a somewhat stricter approach to the application of the nine factors in *A County Council v DP, RS, BS* to ensure that satellite issues are not being litigated.

ix. In conclusion, despite recent attempts to push the boundaries over the summary dismissal of proceedings and findings and the discharge intervenors, it would appear that, at least for now, we remain firmly anchored to *A County Council v DP, RS, BS.*

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