Neutral Citation Number: [2021] EWFC 20

Case No: KH18C00272

IN THE FAMILY COURT
IN THE MATTER OF CHILDREN BB
The Location of the relevant Family Court is omitted in order to preserve the anonymity of the parties

Hearing conducted by CVP

Date: 03/03/2021

Before:

MR DARREN HOWE QC
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

BB (Care Proceedings)(Mid-Trial Dismissal and Withdrawal of Allegations)

- -

Mr Owen Thomas QC and Mr Eifion Williams (instructed by **A City Council**) for the **Applicant Local Authority**
Mr Jeremy Weston QC and Mr Jonathan Wilson (instructed by **John Barkers Solicitors**) for the **1st Respondent**
Mr Bryan Cox QC and Miss Kylie Peach (instructed by **Pepperells Solicitors**) for the **2nd Respondent**
Miss Taryn Lee QC and Miss Liz Shaw (instructed by **Graham & Rosen Solicitors**) for the **3rd Respondent**
Mr Paul Storey QC and Miss Naomi Madderson (instructed by **Williamsons Solicitors**) for the **4th Respondent**
Mrs Gaynor Hall and Mrs Francesca Steels (instructed by **Lockings Solicitors**) for the **5th and 10th Respondents, the Children**
Miss Jacqueline Thomas QC and Miss Marie Harbin (instructed by **Bates & Mountain Solicitors**) for the **1st Intervenor**
Mrs Deborah Miller and Mr Richard Lee (instructed by **Sandersons Solicitors**) for the **2nd Intervenor**
Mr Stephen Brown and Miss Kate Spence (instructed by **Burstalls Solicitors**) for the **3rd Intervenor, a protected party acting by his litigation friend the Official Solicitor**
Miss Julia Baggs and Mrs Rebecca Miller (instructed by **Humphrys Dawson Solicitors**) for the **4th Intervenor**

Hearing dates: 18-22, 25-29 January, 1-2, 8-12, 18, 22-26 February, 1, and 3 March 2021

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Approved Judgment

DARREN HOWE QC

This Judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for handown was deemed to be 1pm on 3 March 2021.

Mr Darren Howe QC:

The Parties and the Proceedings

1. In these consolidated proceedings I am concerned with the welfare of 6 children who range in age from 6 to 17 years old. When issued, the proceedings involved 7 children. However, the oldest child who had made no allegations and denied any knowledge of sexual abuse in the family, reached her 17th birthday last year and was, with the agreement of all, discharged as a party.

2. Of the 6 children who are the focus of these proceedings, 5 were made the subjects of care orders in June 2018. Following the making of final care orders, and over a period of around 14 months, the children made allegations of sexual abuse against a number of adults and young people. They also reported sexual activity as between themselves. Allegations were made against their parents, 2 older brothers, a maternal uncle and aunt, a cousin and the stepson of another uncle. Allegations of sexual abuse were also made against the maternal grandmother and her deceased husband. Further, the children alleged that a maternal cousin was a victim of the sexual abuse they described.

3. As a result of the allegations made, the Local Authority issued applications for permission to terminate contact between the children and their parents. It also issued separate applications for care orders with regard to the cousin and her sister. As all applications were primarily grounded in the same factual allegations, the applications were consolidated.

4. The hearing before me is listed as a fact-finding hearing to determine the allegations made by the Local Authority that it submits meet the requirements of the threshold criteria pursuant to Section 31(2) Children Act 1989 and/or justify the termination of contact. The hearing was originally listed for a period of 10 weeks, a time estimate that did not include judicial reading time or time for the preparation of a judgment. By the application of the principles set out by MacFarlane P in 'The Road Ahead 2021', and effective collaboration between the 6 Queen's counsel and 14 junior counsel that represent the 10 parties and intervenors participating in this hearing, it was possible to complete the hearing of the evidence called by the Local Authority in 4 weeks rather than the 6 originally expected.

5. When referring to the respondents and intervenors in this judgment, I shall refer to them collectively as 'the Respondents'.

The Interim Applications

6. At the conclusion of the Local Authority's case, all those facing allegations made applications that the court either dismiss the Local Authority's applications or otherwise use its case management powers to limit the allegations that would be considered for the remainder of the trial.

7. Upon notice being given by the Respondents of the applications they intended to make, the Court invited the Local Authority to review its case to consider if it wished to make any applications itself, either to withdraw proceedings or specific allegations. That review resulted in the Local Authority informing the court that it sought permission to abandon a number of the findings pleaded in its schedule. The Respondents then filed skeleton arguments in support of their applications. The Local Authority then completed a further review of its case and notified the court of further matters pleaded that it had decided not to pursue, including one allegation made against the Stepson, thereby withdrawing the entirety of its case against that one Respondent.

8. If the interim applications to dismiss the proceedings are unsuccessful, it will be necessary to address evidential matters that arise from the decision of the Local Authority to abandon certain allegations and its decision to withdraw its case against one of the intervenors. It is the submission on behalf of the Respondents that the court should proceed on the basis that the abandoned matters are untrue and can, therefore, be relied on by the Respondents as examples of fantasy/dishonesty by the children. It is also submitted that the court should accept the written evidence of the Stepson and, should the Local Authority dispute the content of that statement, it is for them to challenge that evidence by way of cross-examination. It is the Local Authority's submission that once an allegation has been abandoned, the court should put the evidence concerning those allegations to one side, there being no evidential advantage or disadvantage arising for any party by those allegations no longer being determined. In the alternative, the Local Authority submits that the Court can require the Local Authority to continue with the allegations it seeks to withdraw, if the court takes the view that the examination of those allegations is necessary when considering the 'broad canvas' of available evidence.

9. This is my judgment on those interim issues.

The Evidence

10. This judgment is given part-way through the case. A decision is required urgently to determine if, and how, the case is to proceed. I have heard detailed oral submissions and read detailed skeleton arguments. It has not been possible in the time available to address every issue that has been raised. Although I have confined myself to making only those determinations necessary to resolve the interim applications made, I have taken all that I have read and heard into account in reaching my conclusions.

11. It is not necessary to include anything other than broad detail of the allegations in this judgment. A summary is provided by allegations 1 and 2 from the schedule that had originally contained 90 allegations:

    "1. All 7 children have suffered significant harm by living in households with their parents where sexual abuse of the children within the family was commonplace and/or where there were no sexual boundaries established by the adults.

2. The adults and the children within these 2 households were all aware that the sexual abuse of the children within the family was commonplace and/or that there were no sexual boundaries in place."

12. The findings schedule relied upon by the Local Authority then lists the individual allegations made against each of the Respondents. Although allegations were made against the Maternal Grandmother, the Local Authority have not pursued findings against her. Allegations are made against male siblings, and the stepson. Those allegations are said to have occurred when the male siblings, and the stepson, were children themselves. The Local Authority has treated those males as perpetrators. Although allegations have been made against a female sibling, events also said to have occurred during her minority, she has been treated in the findings schedule as a victim and not as a perpetrator.

13. The court bundle provided for this hearing contains some 20,000 pages. As part of their investigation the police seized a number of devices, the interrogation of which produced download material exceeding 130,000 pages. That material was analysed by the parties and a further 1316 pages of relevant material was agreed to be added to the court bundle.

14. The bundle is presented electronically on the Caselines system. The use of Caselines has provided all parties with online remote access to the court papers. The use of Caselines has also enabled the documentary evidence to be displayed on-screen by the Caselines page direction feature and additionally by the CVP screen sharing function. This has been essential for the fair operation of this remote hearing involving so many lay parties.

15. Although a number of legal teams have been together with their clients at solicitors' offices or barristers' chambers and joining the video hearing as a group, there have been in excess of 40 participants logged into the CVP video platform for the majority of the days of this case. I am grateful to the Local Authority for its provision of a supported witness room within a Local Authority building, from where most of the witnesses gave their oral evidence. I have absolutely no doubt that the use of Caselines has saved a considerable amount of court time. I am also satisfied that the hearing of the evidence via the video hearing platform provided a fair, and full, opportunity for those facing allegations to challenge the case raised against them by the Local Authority.

16. I have heard oral evidence from a number of professionals who received and recorded allegations made by the children. Those witnesses have included the 2 interviewing police officers, the supervising investigating officer, the foster carers for the children, 2 fostering agency supervising social workers, 2 local authority social workers and a fostering agency support worker. All of these witnesses, except the fostering agency support worker, have accepted that their meetings with the children, be they formal interviews or not, have breached the terms of the Achieving Best Evidence [ABE] Guidance. All of the witnesses, save the fostering support worker, accepted to a greater or lesser degree that their manner of questioning of the children either did or may have influenced the responses of the children. All of the witnesses accepted that they failed to take adequately detailed

notes that included detail of the questions asked of the children. All of the witnesses, save the fostering support worker, accepted that they should, in hindsight, have behaved differently and all, other than the foster support worker, agreed that they would now behave differently.

17. The children have been accommodated in 2 separate foster placements. The foster carers accepted that one group of siblings were told of the allegations made by the younger 2 siblings before the older children had made allegations. The foster carers accepted that the children spoke about their allegations between themselves. The carers accepted that they received allegations from the children when the children were together and contributing to the account given by another child.

18. The witnesses accepted that the children were given praise and attention when allegations were made. It has been accepted by all that they had questioned the children and not just listened and recorded the allegations made. All of the witnesses, save one interviewing officer, said that they believed the children's allegations and as a result of that belief accepted that they had not kept an open mind. Both of the interviewing officers accepted that they conducted the interviews with the aim of having the children repeat the allegations they had made to the foster carers or to the fostering support worker.

19. All of the professionals receiving allegations from the children had received either no training concerning the application of the ABE guidelines, had attended training but many years ago that had not been repeated or had received training but could not adequately recall its content. Where some principles had been recalled from training received, all witnesses accepted that they had not applied those principles consistently, or at all, when interacting with the children.

20. It is these breaches of the ABE guidance that form the basis of the submissions made by the Respondents that no court could properly make findings of sexual abuse on the basis of the evidence this court has received. The Respondents have provided detailed schedules describing the breaches of guidance that they submit are present. These schedules particularise the breaches said to have occurred in the investigation of each allegation made by each child.

21. The Local Authority accepts there were very many breaches of the ABE guidance, although it has not in its response to the interim application engaged in any way with the particulars provided by the Respondents. The Local Authority accepts that the court may reach the conclusion that it cannot make the findings sought but it submits that the court cannot make that determination until it has heard all of the evidence in the case, including the evidence of the Respondents.

The Application to Dismiss the Proceedings

The Law

22. Before turning to the submissions made on behalf of the Respondents it is convenient to set out the legal principles relied upon as, although there is dispute as between the Respondents and the Local Authority as to how the jurisdiction is

to be applied, there is no dispute that the court has the power to order that which the Respondents seek.

23. Mr Storey QC, who took the lead in making the submissions on the law, relies on the decision of Sir Mark Hedley in AA v 25 others (Children) (Rev 2) [2019] EWFC 64. At paragraph 36, Sir Mark concluded:

> 36. I have come to the conclusion that the correct modern approach to this is to be found in the case of Re T G (Care Proceedings: Case Management Expert Evidence) [2013] 1 FLR 1250.
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> 37. Paragraphs 24 to 28 are expressed in the typically trenchant language employed by the then President, Sir James Munby, and I have in particular in mind paragraph 27 where he says this:
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> "In this connection, that is to say dealing with evidence, I venture to repeat what I recently said in Re C (Children Residence Order. Application Being Dismissed at Fact-Finding Stage) [2002] EWCA Civ 1489. These are not ordinary civil proceedings, they are family proceedings where it is fundamental that the judge has an essentially inquisitorial role, his duty being to further the welfare of the children, which is by statute his paramount consideration. It has long been recognised, and authority need not be quoted for this proposition, that for this reason a judge exercising the family jurisdiction has a much broader discretion than he would in the civil jurisdiction to determine the way in which an application should be pursued. In an appropriate case he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter. He may determine that the matter is one to be dealt with on the basis of written evidence and oral submissions without any need for oral evidence. He may decide to hear the evidence of the applicant and then take stock of where the matter stands at the end of that evidence."
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> 38. "The judge in such a situation will always be concerned to ask himself: Is there some solid reason in the interests of the children why I should embark upon, or having embarked upon, why I should continue exploring the matters which one or other of the parents seeks to raise? If there is or may be a solid advantage for the children in doing so, then the enquiry will proceed, albeit it may be on the basis of submissions rather than oral evidence, but if the judge is satisfied that no advantage to the children is going to be obtained by continuing the investigation further, then it is perfectly within his case management powers and the proper exercise of his discretion so to decide and to determine that the proceedings should go no further."
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> 39. I venture with becoming diffidence to add one further paragraph from that judgment, I having been a member of the constitution, and just refer to some words that appear at paragraph 82:
> "In a highly conflicted case where permanent removal and placement are serious possibilities, and that is increasingly the case with young children,

> it is only the judge upon whom the responsibility for case management should fairly rest. To leave it to the parties is to impose on them a burden potentially so onerous as to be unfair for especially on behalf of parents, no stone should be left unturned, however small it may seem. Of course, if that responsibility is to be discharged, it is essential both that the judge has had sufficient opportunity to master the case and also that judicial continuity is provided."
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> 40. I cite that paragraph for two reasons. One, because it indicates that judicial case management is an art form rather than an application of scientific principles, and also because it seems to me that the court intended all its observations to apply right across family proceedings, even if the illustration in the language used by the President was actually taken from a private law case.
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> 41. As I say, I have concluded that that properly represents the modern approach to case management and, accordingly, I am satisfied that the court does have jurisdiction to bring proceedings to an end at any time before the conclusion of the final hearing. I am satisfied that the combination of statute and rules give the widest powers of control of case and trial management to the individual judge.

24. Although accepting that a jurisdiction to dismiss proceedings was available, Sir Mark explained that it was not a power that was comparable to a submission of no case to answer in criminal proceedings. At paragraph 42, Sir Mark said:

    "This is not, I stress, to introduce a concept of an application of no case to answer in the conventional criminal sense. I accept unreservedly the assertion that that as a concept has no proper place in family proceedings. But that is not the end of the matter because I do accept that there is a place at any stage of the proceedings for the court to intervene in terms of case and child management power. Those interventions are exclusively the responsibility of the court, but I see no reason in principle why a respondent should not have the ability to invite the attention of the judge to it if, as is undoubtedly the case here, such an invitation would be a responsible use of advocacy."

25. Sir Mark then expressed the view that, although the court had the power to bring an end to a hearing in this way, it was a jurisdiction that would be used only in the most exceptional of circumstances. The examples given concerned medical evidence in an injury case changing substantially during the trial, revealing a benign causation for the injury that required no explanation by the parents in oral evidence. Sir Mark also accepted that the pursuit of care proceedings as a vendetta against a parent, in circumstances that amounted to an abuse of the process of the court, could be a further situation in which the court may wish to force an end to a hearing. In both circumstances, it was Sir Mark's view that it would only be appropriate to exercise this jurisdiction when there is "something which impinges on the integrity of the trial process".

26. The decision in AA v 25 others was considered by MacDonald J in A Local Authority v W and Others (Application for Summary Dismissal of Findings)[2020] 2 FLR 1219. The facts of the case before MacDonald J were very different and involved an application to dismiss proceedings at an early case management hearing. At paragraph 54 of the judgment, MacDonald J explained
"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. "

27. At paragraph 58, MacDonald J said:

"Sir Mark Hedley was not concerned in [*AA v 25* Others] 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 [AA v 25 Others] can survive the later decision of the Court of Appeal in *Re H-L* but that is not a question for this court…"

28. As described above, I have not heard argument concerning whether the jurisdiction identified by Sir Mark Hedley has survived the decision of the Court of Appeal in Re H-L (Children: Summary Dismissal of Care Proceedings) [2019] EWCA Civ 704. The dispute before me concerns its application. Mr Storey submits the examples given by Sir Mark of when such a power would be used were illustrative and not exhaustive. Mr Storey argues that the investigation and evidence-gathering in this case has so corrupted the reliability of the evidence that it undermines the integrity of the trial process. Mr Storey asks, 'if the court will not intervene on the facts of this case when would it ever intervene?'.

29. The Local Authority submits that the court would be extending the reach of the jurisdiction identified by Sir Mark if it was to accept Mr Storey's submissions and dismiss this case. It is submitted that the Local Authority case may well be in difficulty but it has not collapsed. It is said breaches of guidance do not necessarily result in a conclusion that all of the Local Authority's evidence has no weight. It is submitted that the court has to undertake an evaluation of the effect of the breaches of guidance it might find proved on the evidence obtained. It is submitted that the need for that evaluation takes the facts of this case beyond the reach of the power identified in Re AA, as such an evaluation can only take place once the court has heard the oral evidence of the Respondents.

30. As the Local Authority submits that there would be an impermissible extension to the identified jurisdiction, in my judgment it is necessary to consider what effect the decision in Re H-L (Children: Summary Dismissal of Care Proceedings), has on the power to dismiss as identified in AA v 25 Others. In Re H-L, the Court of Appeal allowed an appeal against the decision of a Circuit Judge to dismiss a Local Authority's case at a case management hearing. The Court of Appeal described the case as unprecedented as "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".

31. Peter Jackson LJ characterised the case management provisions of Part 12 of the Family Procedure Rules 2010 and Practice Direction 12A as providing 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."

32. In AA v 25 Others, Sir Mark Hedley found that he had jurisdiction, beyond that found in part 12 FPR 2010, to dismiss a Local Authority case by drawing on observations made by Sir James Munby in Re TG (Care Proceedings: Case Management Expert Evidence) [2013] 1 FLR 1250 and Re C (Children)(Residence Order: Application being Dismissed at Fact Finding Stage)[2012] EWCA Civ 1489. Of the later, Peter Jackson LJ said the following in Re H-L:

> "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 LJJ) 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]:
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> > "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."
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> 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."

33. Having carefully considered the decision in Re H-L, in my judgment the Court of Appeal said nothing that directly undermines the decision of Sir Mark Hedley in AA v 25 Others. Peter Jackson LJ said that part 12 is likely to contain all the case management powers required in a part 4 application, but that does not of itself exclude exceptional situations, such as those described by Sir Mark. It is the Local Authority's own submission that Sir Mark's conclusions do survive the judgment of the Court of Appeal in Re H-L.

34. I have found no good reason to disagree with Sir Mark's decision. In such circumstances I am required to follow the approach as described by Lord Neuberger in *Willers v Joyce (No 2)* [2016] UKSC 44, [2018] AC 843 where, at paragraph 9, he said "So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary". I accept the jurisdiction to dismiss care proceedings, as described by Sir Mark Hedley, survives the decision in Re H-L.

Does the Power to Dismiss apply to the facts of this case?

35. I have heard a great deal of argument concerning whether or not the facts of this case fall within the first or the second of the 2 examples given by Sir Mark Hedley as appropriate circumstances for exercising a power to dismiss the Local Authority's case. However, I agree with Mr Storey that the examples given by Sir Mark were not intended to be exhaustive. In my judgment, the 2 scenarios identified simply give examples of where there was no forensic advantage to hearing further evidence (example 1 where the expert evidence in an injury case changed) or where the court had reached a conclusion that its process was being abused (example 2 where a vendetta was being pursued).

36. Mr Storey has sought to portray the identified inadequacies of the police and local authority investigation as an attack on the integrity of the trial itself. In my judgment, the trial retains its integrity unless the court concludes that hearing further evidence will serve no forensic purpose. If the hearing of further evidence has no advantage to the determination of the facts, I agree that to continue would be unprincipled, as would be a decision to allow the questioning of witnesses in such circumstances, as to do so would offend the requirements of the overriding objective contained within r1.1 FPR 2010.

37. I also agree with the submission that it is the effect the behaviour has on evidence gathered from the investigation and not the intent of those working within that investigation that is the key consideration for the court. In my judgment, if the court is able to conclude that it will not be assisted in its determination of the facts by hearing evidence from the Respondents, it is open to the court to use the exceptional case management power identified in AA v 25 Others to bring the proceedings to an early conclusion.

38. The applications made on behalf of all of the Respondents rely on the court making a determination that the deficiencies in the investigation were on a scale that no court could properly make the findings of abuse as sought by the Local Authority. It is submitted on behalf of all Respondents that there is nothing that could be put to any of the Respondents that would 'save' the Local Authority's case.

39. I have read all the written arguments filed and listened with care to the oral submissions. I have reached the firm conclusion, on the facts of this case, that the application for dismissal made by the Respondents should only be granted if I conclude that I am now in a position, having heard only the evidence called by the Local Authority, to determine that there is *no* forensic purpose to be served by hearing further evidence. In my judgment, such a conclusion would be a further example of the application of the jurisdiction for reasons comparable to the example of an injury case collapsing, as was given by Sir Mark. It would not, in my judgment, be an extension of the jurisdiction itself.

40. The Respondents submit that I can make that determination now. The Local Authority argue that I cannot.

<u>The Submissions on Behalf of the Local Authority</u>

41. It is appropriate to first deal with the submissions made by the Local Authority as the Local Authority relies on what it describes as fundamental principles of part 4 care proceedings.

42. Mr Thomas submits "evidence which has to be answered in the family court does not have to come from the Local Authority. It might lie on the other side of the fence and come from a co-respondent(s) or an intervenor(s). It may come from the cross-examination (or, indeed, but somewhat less likely, from the evidence-in-chief) of a respondent or intervenor. They are all compellable. This is the distinguishing feature of the family jurisdiction. It is always the case at half-time that the court has but a partial picture. The Local Authority is entitled to rely, in the discharge of its burden of proof, upon evidence which comes from respondents and/or intervenors".

43. Mr Thomas relies on the provisions of r22.2 FPR 2010 that says:

> "The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved (a) at the final hearing by their oral evidence and (b) at any other hearing by their evidence in writing."

44. It is, submits Mr Thomas, the general 'rule' that all parties to Family Proceedings will give oral evidence. Mr Thomas relies on the words of Sir Mark Hedley in AA v 25 Others where he said:

"57.. where parties have filed statements of evidence upon which they wish the court to rely at the final hearing, they are under an obligation to go into the witness box to confirm those statements and to answer questions about it. That is underlined, in my judgment, fairly firmly by section 98(1) of the Children Act.

Generally speaking, in civil proceedings nobody is obliged to answer questions which might tend to incriminate them. It will be very obvious that in many Part IV proceedings, precisely such questions are at issue in the case.

58. Section 98(1) says this:

> "In any proceedings in which a court is hearing an application for an order under Part IV or V, no person should be excused from (a) giving evidence in any matter or (b) answering any questions put to him in the course of his giving evidence on the ground that doing so might incriminate him or his spouse or civil partner in an offence."

59. It seems to me that that section is drawn in clear terms and, if the compensating provisions in section 98(2) are not as clear as they might be in terms of their operation in practice, it is certainly my conclusion that every party in care proceedings is obliged to give evidence and to answer all questions that are put to them. Technically, of course, that could be enforced by committal proceedings, but the convention or practice of the court is not to do that, it is rather to draw an adverse inference from a failure to give evidence, that adverse inference being that the party has something to conceal which they are not willing to risk in those proceedings, and I have to say that, in my experience, both as the trial judge and as an occasional member of the Court of Appeal, I cannot recall any case in which a party has refused to give evidence and has not had an inference drawn against them. Others' experience may, of course, differ."

45. It is the submission of the Local Authority that its case is not over until the court has heard oral evidence from the Respondents. In Y v K [2003] EWCA Civ 669 at paragraph 35, Hale LJ as she was then, described the obligation on the Respondents to give oral evidence in the following terms:
"Parents can be compelled to give evidence in care proceedings; they have no right to refuse to do so; they cannot even refuse to answer questions which might incriminate them. The position is no different in a split hearing from that in any other hearing in care proceedings. If the parents themselves do not wish to give evidence on their own behalf there is, of course, no property in a witness. They can nevertheless be called by another party if it is thought fit to do so, and the most appropriate person normally to do so would be the guardian acting on behalf of the child."

46. Mr Thomas has informed the court that should any of the Respondents refuse to give oral evidence, it is likely that the Local Authority would seek an order to compel them to do so. Mr Thomas submits that he has legitimate questions to put to the Respondents. During the course of his oral submissions, he gave some examples of references contained in the messages downloaded from the seized devices that he submits, he is entitled to put to the respondents to seek their explanation.

47. I did not require the Local Authority to specify all the matters that it seeks to put to the Respondents as I did not make the same demand of the Respondents before

allowing them to cross-examine the Local Authority's witnesses. However, I did press Mr Thomas to give some explanation, beyond simply putting the Local Authority's allegations to each witness, for why the hearing of the evidence from the Respondents was necessary to the fact-finding process in circumstances where it is asserted that the Local Authority case was fatally undermined by cross-examination and the Local Authority had not, deliberately I am sure, engaged with those arguments in its written submissions.

The Submissions of the Respondents

48. In addition to relying on extracts from the text messages, that in respect of Mr Weston's client and Mr Cox's client are opaque enough possibly to refer to the sexual abuse allegations and their responses to them, Mr Thomas submits there are messages from which legitimate questions can be put concerning drug use, drug dealing and lifestyle more widely. Mr Thomas submits that there is evidential value in the answers to such questions and credibility issues arise. Mr Thomas submits that the Local Authority must be permitted to ask questions on matters that arise from the answers given by the Respondents in their police interviews, in terms of internal inconsistency and on matters where inconsistent accounts are given as between the Respondents. Mr Thomas says there is merit in the Local Authority exploring with a mother why she believed her husband to be capable of sexual abuse of her children but did not express the same belief about her brother. Mr Thomas argues that the Local Authority is entitled to ask questions of the parents concerning the source of the sexual knowledge of the children, that is displayed in the allegations that they have made. It is also the Local Authority's submission that it must be permitted to explore the dynamics between family members as are apparent in the records in the bundle. Mr Thomas submits there are proper questions to be asked of the Respondents over and above the need for them to respond to the allegations pleaded against them although, argues Mr Thomas, those allegations are reason enough for the Respondents to give oral evidence to answer them.

49. The position of all Respondents is that there is no 'smoking gun' buried in the case papers. It is submitted that there is nothing that can be put to any of the lay parties that will heal the local authority's fatally wounded case. Many of the advocates describe the facts of this case as being unique in their experience. There is, it is submitted, no aspect of the Local Authority's evidence that is uncontaminated by breaches of the guidance. It is submitted that this is a case in which professionals have done nothing right and everything wrong. There is, it is submitted, breach upon breach. Mr Cox QC submits that the breaches of the guidance have been pernicious throughout the process. He submits that the process is so corrupted that it has removed from the court the tools it relies on to assess the evidence. Mr Cox submits that the product of the investigation has so little evidential value, and the Local Authority case is so damaged, that nothing said under cross-examination by any Respondent can repair that damage.

50. Miss Lee QC reminds the court that the police, when giving oral evidence, conceded that there is nothing contained in the material downloaded from the devices that supports the allegations of sexual abuse. If that is right, as Ms Lee says it is, the Local Authority are wrong to submit that questions about text messages are likely to assist the court to determine the sexual allegations. Ms Lee submits that this is a unique case in which the evidence of all 10 professional witnesses heard have been completely undermined by cross examination. Ms Lee submits that the court should ask itself 'what is the point in carrying on' when it would be oppressive for the family members to be forced to answer distressing questions in circumstances where the case has not come up to proof.

51. Mr Weston QC complains that the Local Authority has not properly scrutinised its case to assess whether its evidence can now support the case it seeks to put to the Respondents. Mr Weston submits that the Local Authority has not engaged with, nor properly replied to, the submissions made by all Respondents that the numerous breaches of the guidance have completely undermined the ability of the court to make the findings the Local Authority seeks. It is Mr Weston's submission that the Local Authority should identity those issues it intends to put in cross-examination, that it submits will cure the deficiencies in its case as, in his submission, no such evidence exists and his client should not be ambushed by something new.

52. Ms Thomas QC submits that her client did not have his device seized so there is nothing in the device download material that can help prove the allegations against him. Ms Thomas describes the Local Authority case as an illogical mess that is hard for her client to respond to. It is not clear, submits Ms Thomas, who the Local Authority are treating as credible witnesses and who they are not. She submits that the withdrawal of some allegations made by one child but the pursuit of others from the same child that were made at the same time and in the same manner is illogical. Ms Thomas observes that the Local Authority were given the opportunity to make additions to their schedule of findings upon receipt of the device download material but, despite a number of extensions of time to do so, no additional findings were pleaded. It is now too late, submits Ms Thomas, for the Local Authority to suggest that there are new matters to be put that come from their examination of that material.

53. Ms Miller, Mr Brown and Ms Baggs all adopt and support the main thrust of the submissions put by others. They submit that the Local Authority's allegations are unsustainable and cannot now be proved. Nothing can be drawn from any witness in cross-examination to correct the flaws in the investigation and the Respondents should not, they submit, be required to give evidence in these circumstances.

54. Mr Brown reminds the Court that due the particular vulnerabilities of his client, a case management decision was made many months ago that his client would not be required to give oral evidence. He submits the case against his client is over now and it cannot be proved on the evidence as it is now. However, Mr Brown concedes that as Ms Miller's client is alleged to be present during an abusive incident involving his client, what is said by that witness could possibly be relevant to his client's position.

55. In her written submissions, Ms Hall on behalf of the children, reminds the court of the judgment of Thorpe LJ at paragraph 7 of his judgment in Re S- A-K (children) [2011] EWCA Civ 1834, when he said:

> "The protection of children in public law proceedings is primarily in the hands of other agencies, but when the case is brought into the judicial arena, the judge is an important partner in the process of child protection. Accordingly, it is incumbent on any judge to dig deep, as deep as is reasonably practicable, before arriving at the conclusion that there is no danger to the child and that the child's account of abusive experience is incredible, not to be believed. It is not a case in which the judge can say that the child is mistaken. A rejection of the local authority's case inevitably carries the conclusion that the child had made a false allegation against her stepfather. That outcome should not be reached without the judge having the best available evidence."

56. Ms Hall supports the Local Authority submissions that the evidence cannot be evaluated until it has all been heard, including the evidence of the Respondents. Although the judgment was given in a private law case, Ms Hall relies on the words of Thorpe LJ in Re R [2008] EWCA Civ 1619 where the following is said:
"So, if I were formulating a general test, I would inclined to say that trial judges in preliminary fact-finding hearings involving serious allegations of domestic violence should never terminate the case without hearing all available evidence. It may be dangerous to say 'never', but I can only conceive of a termination that rested on a concession from the applicant that that was inevitable or appropriate at the conclusion of the evidence. So long as the applicant sails on into the gunfire I think the judge has the obligation to hear the case out. His obligation derives from his responsibilities to the child. There are many obvious instances in which what may seem to be a frail case at the conclusion of the applicant's evidence, nonetheless at the conclusion of all the evidence can be seen to be one that is not without substance or foundation"

57. Ms Hall reminds the court of the words of Sir Mark Hedley at paragraph 49 of AA v 25 Others:

> "It is extremely important to underline that in family proceedings the cost of a mistake either way is equally serious. If I make a finding in this case against a parent when I should not have made a finding, not only would that be a gross injustice to the parent, but it would disturb, upset and possibly frustrate the lives of children throughout the whole of their childhood, if not beyond. If, on the other hand, I were to fail to make a finding when I should have made a finding, it would be to expose children immediately returned to that person's care to wholly unacceptable risk of abuse in the future. The cost either way is equally grave and that is an important factor to bear in mind when one is examining what the purposes of hearings under Part IV actually are."

58. Ms Hall submits that the court should make no determinations until all the evidence is heard.

Discussion and Decision

59. I have reached the clear conclusion that I cannot, until I have heard all of the available evidence including the evidence of the Respondents, determine the factual allegations pleaded by the Local Authority. In my judgment, there is an evidential purpose to hearing the evidence of the Respondents and I am unable to conclude that no court could properly make the findings sought by the Local Authority. I have reached these conclusions for the following reasons:

(a) I accept the Local Authority's submission that, in family case, there is an expectation that the parents, and others who have voluntarily intervened, will give oral evidence to answer the allegations raised against them. In *Re I-A (Children*) [2012] EWCA Civ 582, Etherington LJ said there is a "need for a particularly conscientious and detailed examination of all the evidence" in cases involving allegations of sexual abuse, including the evidence of those accused and any evidence of previous dishonesty by the children making the allegations. At paragraph 22, Etherington LJ said "In my judgment, it would have been right and proper, in a case of this kind where there was a requirement for a detailed and conscientious assessment of all the evidence in relation to each specific allegation, for each specific allegation to be put to the witness so that there was a possibility of refuting it in whole or in part or at any event providing more details". In my judgment, the need for conscientious examination of all the evidence does not just apply to those aspects of the evidence that might support those facing allegations. It also, in my judgment, applies to the consideration of the Local Authority's case and the allegations made by the children.

(b) At the 'half-time' stage of a case, the Court has heard only part of the evidence. In my experience, the case of a Respondent can often be described as being at its height at the end of the Local Authority case as skilled cross-examination of the Local Authority's witnesses can often appear to have undermined the reliability of the Local Authority's evidence. However, save in exceptional circumstances, it is in my judgment the responsibility of the court to provide the Local Authority, and the children represented by the Guardian, with the same fair opportunity to cross-examine the Respondents as the Respondents have had to challenge the Local Authority's evidence. This ensures the court is able to reach its conclusions on the basis of the best evidence. In my judgment the court should not readily reach a conclusion that cross-examination of a witness would serve no purpose. As described by Munby P in Re S-W [2015] EWCA Civ 27, at paragraphs 55 to 59:
"58. ... 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."

In my judgment, these same principles must also apply to the Local Authority as they do to the Respondents. If the court is informed by the Local Authority, in this case an authority represented by Queen's Counsel, that it has legitimate and forensically necessary questions to put to the Respondents, the Court should be very slow indeed to deny the Local Authority the opportunity it seeks. Of course, the Local Authority's questions need to be more than a fishing expedition and be addressed to issues that the court must determine. As with any cross-examination, the matters upon which the questions refer must have some basis in the evidence before the Court. If there is no evidence, the witnesses can simply deny the suggestion and the matter goes no further.

(c) In my judgment, the investigation of inconsistency and dishonesty by the cross-examination of family members is an essential part of the process in public law care proceedings. Much of what the court has to examine takes place behind closed doors. The Court is most often in the dark about what actually took place and has to piece together a picture of what is most likely to have occurred from the jigsaw pieces of evidence, pieces that come from many different sources available and from the different perspectives of each participant in the events being considered. In my judgment, the court should only deprive itself of this otherwise essential source of evidence where it can be satisfied that there is nothing that can be said by the witnesses that will inform its conclusions.

(d) I accept the submission made by the Local Authority that the court will be assisted by hearing evidence from the Respondents, particularly from the parents concerning the sexual knowledge demonstrated by the children in the allegations that they have made. Asking the parents questions on these issues is not reversing the burden of proof. It is a legitimate enquiry to enable the court to understand what might be the sources of this knowledge. The parents may simply not know but, equally, the answers to such questions might provide the court with some insight into how this knowledge developed. The answers to this legitimate and necessary area of enquiry are as likely to assist the parents as the Local Authority.

(e) Similarly, I agree with Mr Thomas that an exploration of the views of one mother as expressed in her police interviews may provide evidence of particular relevance. Why this mother seemingly accepted that her husband had sexually abused the children and, during her interview, threated to kill him as a result of that belief has obvious relevance to the court's determinations.

(f) In my judgment, the Court can only reach a conclusion that no court could safely make findings after having heard all the available evidence. The Respondents rely on the decision of the Court of Appeal in JB (A Child)(Sexual Abuse Allegations)[2021] EWCA Civ 46, and the decision by Baker LJ not to remit the case for a rehearing on the basis that the breaches of the ABE guidance were 'on a scale that no court could properly make the findings of abuse'. The decision of Keehan J in Re EF, GH, IJ (Care Proceedings) [2019] EWFC 75 was also relied upon. At paragraph 286, Keehan J said "I am satisfied that the conduct of the police investigation by DC Andrews was so woeful and her conduct with the ABE interviews so seriously and serially breached the ABE Guidance that I can attach little or no weight to the allegations made by the boys and in those police interviews". Both judgments are said to be illustrative of the likely outcome in this case, it being said that the breaches of guidance here are as bad, if not worse, than those in the aforementioned cases. However, the conclusions in JB (A Child)(Sexual Abuse Allegations) were reached on an appeal following a first instance trial hearing during which all the evidence had been heard. In his judgment in Re EF, Keehan J describes in detail his impression of the family witnesses and how hearing that evidence supported his ultimate decision that the allegations of the children were unreliable.

There are other reported Court of Appeal decisions that do not order a retrial after a successful appeal (Re W, Re F [2015] EWCA Civ 1300 being just 1 example) on the basis that no court could reasonably have found the allegations proved on the basis of the evidence before the court but no party has drawn my attention to a reported case where such a serious, and determinative, conclusion has been reached without having heard from those accused of perpetrating abuse.

I remind myself that I am considering the evidence in this case and it is not my function to reach a conclusion that 'no court' could make the findings sought. My function is to examine the evidence in this case and decide if I find the Local Authority's allegations proved to the required standard.

(g) I accept that a judicial evaluation of the evidence is required for the 2 examples given by Sir Mark Hedley in AA v 25 Others. However, in my judgment the evaluation of the evidence that is required in this case is much more detailed than is appropriate to undertake at this stage of the case. An expert witness informing the court that an image on an X ray is not, as was previously thought, a fracture may remove from consideration all evidence of an inflicted injury having occurred. There is very little judicial evaluation required. That is a very different situation to the court having to consider each of the breaches of guidance alleged to have taken place and then trace through the chronology to assess how that breach has affected the reliability of the evidence that has come later. In my judgment the number of breaches highlighted by the Respondents does not reduce or remove the need for the court to undertake a detailed evaluation of all the evidence. The number of breaches in this case is closely matched by the number of allegations. What connection one has with the other, if any, is a matter requiring close examination that should, in my judgment, occur only once all the evidence has been received.

60. In my experience, where there are blanket denials of allegations of sexual abuse, the hearing of the evidence from those facing allegations can be a surprisingly quick exercise. If it is said that these events did not happen and are a product of a child's imagination, the answers to questions are often a simple 'it did not happen'. However, I have reached the conclusion for the reasons given above that there is a clear forensic purpose to hearing that evidence. The Respondents were present in both homes at times when it is said that these events were taking place. It is, in my judgment, essential that the court hears from them in response to the allegations that are made.

61. It may well be that in reaching my final conclusions, having heard all the evidence, that I will agree with the submissions now made by the Respondents. I may not. As I said during the hearing of the evidence, I accept that Family Court judges are expressing views about the reliability of the evidence they hear on a daily basis, both at the case management stage of proceedings and during the hearing of the evidence in trial. A 'judicial steer' to the Local Authority is an integral part of the Family Justice system that helps to ensure the appropriate use of the court's resources. In the circumstances of this case, I have required the Local Authority to keep its case under review but I take the view that any further 'steer' is unnecessary as Mr Thomas is aware of the difficulties now present in the case he advances on behalf of the Local Authority. I have reached the clear conclusion that it would be inappropriate for me to express any view concerning the consequences of the breaches of guidance on the ability of the Local Authority to prove its case. My conclusions can only be reached after a careful examination of all the evidence and for the reasons given above, I will not make any determinations until after the Local Authority has had an opportunity to ask questions of the Respondents.

<u>The Exercise of Case Management Powers to Exclude certain allegations from Further Consideration</u>

62. In November 2020, the findings schedule filed for this hearing contained 90 allegations. At a case management hearing listed in December 2020, I expressed the view that a number of the allegations appeared to the court to be unnecessary for determination as the outcome would have limited relevance to the welfare determinations that might need to be made in the future. A further case management hearing was fixed for 14 January 2021. By that date I had read a great deal of the evidence in the bundle and gave the Local Authority clear indications concerning the matters that I viewed as necessary determinations in the proceedings and those that I did not. Mr Thomas made submissions to the court seeking to justify the presence in the findings schedule of some of the matters that I had referred to as unnecessary. It is right to record now that my reading between the hearing in December 2020 and the hearing in January 2021 had assisted me to understand the reasons why the Local Authority persisted with some allegations that appear to be more peripheral.

63. On 18 January 2021, the Local Authority filed a further findings schedule. Many of the allegations had been amended but only 4 of the allegations had been

removed. I accepted the amendments and the limited redactions and the trial commenced.

64. On 25 February 2021, following the Local Authority's review of its case, a further schedule was filed. 18 allegations have been removed from the schedule. I will consider below the evidential consequences of those allegations not being pursued by the Local Authority. However, the Respondents submit that the Local Authority's review of its case does not go far enough and they submit that the court should exercise its case management functions, following the guidance given by MacFarlane J, as he was then in A County Council v DP, RS, BS (By the Children's Guardian) [2005] 2 FLR 1031. That decision was considered by the Court of Appeal in Re F-H (Dispensing with Fact-Finding Hearing) [2008] EWCA Civ 1249. The Court of Appeal endorsed the approach taken by MacFarlane J as the correct framework for deciding whether to determine disputed allegations:

"[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 a 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".

65. At the commencement of this hearing, I agreed that it was necessary and proportionate for the Local Authority to pursue the findings that remained in

the schedule, accepting as I did the submissions made by Mr Thomas concerning certain of the allegations that I had expressed views about. I have read with care the submissions filed on behalf of each of the Respondents but I am of the view that my decision at the commencement of the hearing was the correct one and, although it is accepted that I have the jurisdiction to review that decision now, to do so would require an evaluation of the evidence that I have already determined to be inappropriate for this half-way stage.

66. It is crucial in case as complex as this that the court is able to assess all the evidence relating to all of the allegations as a whole. As is recognised by the Local Authority, some of the allegations may not be proved on the evidence before the court. In my judgment an unreliable allegation is as important to the court's consideration of the facts in this case as those allegations the Local Authority asserts to be reliable.

67. It is the function of the court to survey all the material available to reach a decision. Having permitted the case to proceed on allegations that, it is submitted were weak from the outset and so weak say some to obviate the need for witnesses to be called to face cross-examination, I can see no advantage to the fact-finding exercise but many disadvantages to now removing those aspects of the case from consideration. How the evidence on one issue might fit together, or not, with the evidence given on other issues remains to be seen.

68. During the oral submissions all advocates expressly, or by stealth, avoided inviting the court to express a view on the evidence. As I have described above, Family Court judges express views about the evidence they hear, or are to hear, as a necessary pre-cursor to the case management decisions that they make. I have given no indications of my views other than to invite the Local Authority to keep its case under review. At the stage these proceedings have now reached, I have concluded that all that is now required is for me to hear evidence from the Respondents on the allegations that the Local Authority still seeks to prove. To do otherwise requires the court to assess the detail of each allegation, the evidence both for and against and decide whether it can now be said that the evidence is so weak as to require the Local Authority to again justify why the court should hear further evidence. That is a hugely time-consuming exercise and should now only be undertaken once all the evidence has been heard.

69. I have received very detailed and helpful written submissions from the Respondents addressing what they say are the weaknesses in the Local Authority's case against each Respondent. The Local Authority did not engage with the detail of those submissions in its responses. As a result, I will have all those alleged weaknesses in my mind as I hear the remainder of the evidence in this case without concurrent knowledge of the Local Authority's response.

<u>The Evidential Consequences of the Local Authority's Proposed Withdrawal of Allegations</u>

70. In Re A (A Child) (No 2) [2011] EWCA Civ 12 Munby LJ, as he was then, described the fact-finding exercise as follows:

> "…the purpose of a fact-finding hearing in the Family Division is to give the judge the essential factual platform upon which to build his further 'welfare' findings as he decides – as he must – what form of final order is in the best interests of his ward. Should the ward live with the one parent or the other, or perhaps with someone else in the wider family? Should the ward have contact with the other adults? If the guiding principle of law is that the interests of the ward are paramount (section 1 of the Children Act 1989), the determination in any particular case of what is in the best interests of this child necessarily involves an intense and anxious scrutiny of all the relevant circumstances. The task can often appear daunting even to the most experienced judge. And, as any judge who has had to conduct such fact-finding hearings will know all too well, wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty. Yet as Baroness Hale of Richmond tartly observed in Re B [2009] 1 AC 11, para [31], "it is the task which we are paid to perform to the best of our ability." The task, as she acknowledged, is a difficult one, to be performed without prejudice and preconceived ideas. Judges, as she explained, "are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses."

71. It is of course trite law that the Family Court must treat allegations not proved to the required standard as not having happened. However, the binary system' that applies in the court does not, as a matter of fact, always apply in the community or with all professionals. Although the legal consequences are the same a 'not proved' conclusion is not always treated in the same way as a finding that the allegation is not, and never was, true.

72. The distinction between the 2 outcomes was considered in Re A, where Munby LJ said the following:

> "…notwithstanding the 'binary system' explained by the House of Lords in In *re B (Children)* [2008] UKHL 35, [2009] 1 AC 11, para [2] (Lord Hoffmann) and para [32] (Baroness Hale), it may be relevant at the subsequent 'welfare' hearing to know, and thus for the judge as part of his fact-finding to record, whether a particular matter was not found proved because the judge was satisfied as a matter of fact that it did not happen or whether it was not found proved (and therefore in law is deemed not to have happened) because the party making the assertion failed to establish it to the relevant standard of proof but in circumstances where there is nonetheless continuing suspicion. It is of course a cardinal principle that at the 'welfare' or 'disposal' stage, as at any preceding fact-finding hearing, the court must act on facts, not on suspicions or doubts; for unproven allegations are no more than that: see the

analysis by Baroness Hale in In *re B (Children)*, following and declining to overrule what Butler-Sloss LJ had said in In *re M and R (Minors) (Abuse: Expert Evidence)* [1996] 4 All ER 239, page 246, and the obiter dicta of Lord Nicholls of Birkenhead in In *re O and another (Minors) (Care: Preliminary Hearing),* In *re B (A Minor),* [2003] UKHL 18, [2004] 1 AC 523, para [38]."

73. The Local Authority now seeks to withdraw a number of allegations from consideration, adding a 3rd label to 'proven' and 'unproven', that of the 'undetermined'. The Local Authority submits that an undetermined allegation cannot be relied upon as evidence of truth or fantasy. It is simply put to one side and ignored. The Respondents submit that such an approach is in all but name a reversal of the burden of proof and is an impermissible approach when considering the long-established principles of fairness within which Local Authorities must operate.

74. As set out in *Kent County Council v A Mother* [2011] EWHC 402, a Local Authority has a duty to the court and parties to give full and frank disclosure. That duty includes disclosure of any documents, which (i) adversely affect its own case; (ii) adversely affect another party's case; or (iii) support another party's case. In conducting their preparation for the hearing, the Local Authority has to carry out a proper examination of the background material, including relevant files held in the social services department in order to comply with obligations as to disclosure and to assist in the preparation of statements of evidence.

75. The requirement of fairness is, in care proceedings, a necessarily high one to ensure the correct decisions are made and children are not wrongfully removed from the care of their families. In my judgment, where the Local Authority relies on allegations made by a child in circumstances where there is no other evidence to support the allegations other than the account given by the child, the responsibility to act fairly is all the more important. In such circumstances it is, in my judgment, incumbent on the Local Authority to present its case fairly by putting before the court the evidence that supports the conclusions it invites the court to reach but also highlighting the evidence that points the other way. This is what is required by the decision in *Kent County Council v A Mother* [2011].

76. What would be the purpose of requiring the Local Authority to provide all relevant evidence if, having done so, the Local Authority can then choose to ignore the evidence that undermines its case and proceed with the evidence that is supportive of its position? The Local Authority submits that, once it has abandoned an allegation, the burden falls on the Respondents to prove that an allegation is untrue. The logical extension of that submission is that where required, it will be necessary for a Respondent to call the evidence not relied upon by the Local Authority for the Respondent to discharge the burden that, it is submitted then falls to them.

77. A Family Court judge can, as a case management decision, require the Local Authority to call evidence of relevance to issues before the court. Once aware

of evidence that might undermine a child's credibility, the court can use the jurisdiction within its general case management powers to require a Local Authority to call witnesses that it would otherwise decline to call. An example of this can be found in Re M-Y (Children) [2018] EWCA Civ 1306 in which McCombe LJ described the decision of the trial judge who refused to direct the Local Authority to call a social worker, who was able give evidence concerning the reliability of the child, as unfortunate where "the credibility [of the child] was the essence of the factual assessment to be made".

78. In these proceedings, the lawyers instructed combed through the evidence produced by the Local Authority. Witnesses whose evidence might have an impact on the assessment of the child's credibility were identified and the parties notified the Local Authority of those witnesses required to give oral evidence. The Court approved the witness requirements. The witnesses were called by the Local Authority and then cross-examined by the parties, that cross-examination aimed at drawing out for the attention of the court the evidence that impacts on the credibility of the children making allegations.

79. The Court having required the Local Authority to call evidence that might undermine its case, or part of it, it is not in my judgment then open to the Local Authority to seek to avoid the consequences that might follow the hearing of that evidence by removing from consideration the allegations that same evidence has then undermined. It perhaps need not be said that a finding of unreliability on allegation A falls to be considered by the court when assessing the reliability of allegation B. As I have already said on a number of occasions in this judgment, the court must survey all the relevant evidence in reaching its conclusions.

80. In Re M-Y (Children) [2018], McCombe LJ was of the view that the credibility of the child concerning the allegations against her mother of assault and her credibility when making allegations of sexual abuse against her mother's partner were "enmeshed" with each other. I have not yet heard all the evidence in this case to enable such a determination to be made but on the evidence already heard in this complex case, it is likely that the Respondents will submit that all the allegation evidence is very much interlinked.

81. In undertaking its review of the evidence, the Local Authority have now reached conclusions on certain allegations that it expresses in the following way:

"This, and the allegation relating to abuse by strangers, as it seems to us, might reasonably be expected to be bolstered by corroborative evidence. We have made the point. Its absence causes us to doubt that we will prove it. In taking that view, we do not concede that the allegations are false, only that the evidence in of them makes it unlikely that we would prove them."

And

"We accept that our application to delete this recognises its inherent improbability. In saying that, we do not make any concession about its veracity.

It is not for the LA to determine truth or otherwise. We were asked to reflect; we have done so; and we consider that we are unlikely to prove it. "

82. I accept there may be a perceived tension between only pursuing allegations that are absolutely necessary to inform welfare decisions and the advancement of allegations that are unlikely to be proved. However, it is necessary for the court to consider all the evidence that is likely to have a bearing on the court's assessment of the children's reliability. In this case the assessment of the children's credibility is, to use the words of McCombe LJ, the 'essence of the factual assessment to be made'. The evidence relevant to credibility is thereby of central importance and falls squarely within those matters that must be determined and is fully complaint with the expectations of 'The Road Ahead 2021'.

83. In my judgment, in the circumstances of this case where there is perhaps now less than 10 working days until all of the oral evidence will be completed, there is no place for 'undetermined' allegations. The allegations pleaded by the Local Authority have been before the court since the first detailed findings schedule dated 27 February 2019. As these allegations were pleaded, and the Respondents directed to file replies, all Respondents have provided statements that contain a statement of truth. Those statements are evidence before the Court. In my judgment the Local Authority must decide whether it will challenge those statements or accept the content of them.

84. In simple evidential terms, evidence that is not challenged is to be treated as accepted. At §12.12 of Phipson on Evidence provides:

"In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point…The rule applies in civil cases as it does in criminal.
This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected".

85. When considering this issue within the context of a sexual abuse fact-finding hearing, at paragraph 16 of I-A (Children) [2012] EWCA Civ 582 Etherington LJ said:

"That answer was not the subject of cross-examination at all and so effectively was conceded".

86. There are circumstances that can arise when there is no unfairness if a witness is not cross-examined on a particular issue, particularly on matters that may not have appeared so central at the time a witness was giving evidence, as described by Peter Jackson LJ in B (A Child) [2018] EWCA Civ 2127, but that situation is not comparable with the facts of this case.

87. In my judgment, there are 2 courses of action open to the Local Authority. The first would be to continue to pursue the allegations pleaded in the schedule at 3, 12, 13, 27, 30, 61, 86(i) and 90. The unconnected non-sexual allegations can be withdrawn. The Court will then determine those important sexual allegations alongside all the others. The Court will attach such weight as is appropriate when considering the overall evidential picture. The alternative course would be for the Local Authority to accept that it can no longer prove the allegations and concede that those allegations are unreliable and examples of the children making untruthful accusations. Of course, the Court must be alive, as I am on the facts of this case, to the cautions outlined in Re H-C (Children) EWCA Civ 136, and R v Lucas [1981] QB 720, that a witness may for many reasons tell lies about one issue but still be reliable on another.

88. The Family Court operates on a binary system. As set out in Re B (Children) [2008] UKHL 35 at [2], Lord Hoffman described the burden and standard of proof in this way:

    "If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

89. The Local Authority seeks to draw a distinction between reliance on an allegation that is treated as not having happened by want of proof, to an allegation that has been found to be untrue. In my judgment that distinction is an appropriate one to make, as seeking a positive finding that an allegation did not happen places an evidential burden on the Respondents, although the burden of proving its allegations rests at all times on the Local Authority.

90. When addressing the issue of 'exoneration' in AA v 25 Others, Sir Mark Hedley described, at paragraph 266, the approach to be taken as follows:

    "This matter has been considered in reported cases cited to me. I am not consciously acting differently to how the matters have been dealt with in those cases, even if I express myself individually.
    I should make it clear that the legal consequences of exoneration are no different to those where the court has simply declined to make a finding. That is clear from the binary approach adopted by the House of Lords in Re B:
    "if abuse is not proved against a named person, then it must for all purposes be treated as not having happened. Any such person is not and must not be treated as being left under a cloud of suspicion".
    For the reasons which appear in the preceding part of this judgment, that is particularly important in this case.

So, what is the test for exoneration? All parties agree that it is more than simply a finding that a specific allegation has not been proved against them. I suggested an analysis that whilst the legal burden of proof at all times remains on the local authority, a party seeking exoneration assumes an evidential burden to satisfy a court of their innocence on a balance of probabilities. No one sought to suggest that was wrong nor to argue for any particularly different approach."

91. I have been referred to no authorities addressing how this court should approach the dispute between the parties on this issue. Is a withdrawn and undetermined allegation simply to be ignored? Is it to be taken into account when surveying the broad canvass of evidence and the weight it should attract only being decided within that exercise or should the allegation be treated as untrue to enable those facing allegations to point to it as an example of dishonesty or fantasy by the children?

92. In answering the above, I am influenced by the late stage these proceedings have now reached, the denials contained in the witness statements before the court and the potential prejudice to the Respondents, and to the Court's own decision making, by adopting any approach other than the last. To do otherwise allows a Local Authority to withdraw from consideration potentially important credibility evidence. That would prejudice the fact-finding exercise and endanger the fairness of the proceedings. If the Local Authority wishes to withdraw the allegations on the grounds that they cannot be proved, to prevent the Respondents from relying on those allegations as being unreliable would be profoundly unfair.

93. If the Local Authority does not concede the allegations to be false, in my judgment, the most appropriate course of action is to continue to hear the evidence on all the sexual allegations to ensure that the court is able to consider all matters of relevance and within that exercise assess the credibility of all the sexual allegations alongside each other. On behalf of the Local Authority, Mr Thomas informed the Court that the Local Authority would continue to 'prosecute' the findings if the Court so required.

94. I accept that my decision will lead the Local Authority to review the position it had taken concerning the one allegation pleaded against the stepson. If the Local Authority choose not to cross-examine the stepson and his mother, I shall treat the content of their statements as accepted. If the Local Authority takes the view that those statements should not be accepted, it will need to reconsider its decision to withdraw those allegations.

95. During the hearing of oral submissions some advocates addressed, at my invitation, the factors that the court might take into account in determining whether it would be appropriate for any Respondent to be compelled to give evidence. Having now reached the decision that the Court will be assisted by hearing oral evidence from all of the Respondents, except Mr Brown's client, I hope that I will not need to consider making orders to require compliance. Should that be necessary, I will need to assess the reasons given for the refusal.

Any Respondent who refuses to give oral evidence faces the risk of adverse inferences being drawn. The circumstances in which the court might draw adverse inferences were considered by Baker LJ in T v J [2020] EWCA Civ and Williams J in K (Threshold: Cocaine Ingestion: Failure to Give Evidence) [2020] EWHC 2502. In the later, Williams J summarised the approach to be taken as follows:

"42. Cases from other fields such as TC Coombs v IRC [1991] 2 AC 283 and Wisniewski v. Central Manchester Health Authority [1998] PIQR P324 support a more nuanced approach. Brooke LJ said in the latter case.

From this line of authority, I derive the following principles in the context of the present case:

(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

43. I consider that the approach outlined by Brooke LJ more fully reflects the proper approach. These are inquisitorial proceedings rather than adversarial, where the welfare of the children is at stake and where the authorities on fact-finding require the court to survey all the evidence and to avoid compartmentalisation. The legislative framework allows for the admission of hearsay evidence. The approach to lies in *Lucas* requires a more measured approach. At one end of the spectrum, there will no doubt be cases where the court is satisfied that a person has deliberately refused to come to court to support their written statement and where there is no excuse or explanation. In that scenario, the court might take a bright line approach and refuse to place any weight on any of their evidence and draw inferences against them that any allegations are true. In other cases, the court will need to consider the circumstances of their failure to give evidence, any explanations offered or which present themselves and the evidence itself and the issues it goes to. Where there is compelling evidence

explaining an inability to attend full weight might be given and no inferences drawn. In between will be cases where the court might determine it is appropriate to rely on and give weight (even full weight) to some evidence but not to other evidence and to draw some but not necessarily all possible inferences."

96. Whether any adverse inferences might be drawn can, in my judgment, only be assessed at the time any refusal to give evidence occurs and with knowledge of the reasons why the witness is resistant.

97. The advocates before me have searched for case law that might provide some guidance to the Court regarding the factors it should consider if invited to compel a party to give evidence in the Family Court. I have been referred to the decision of Hale LJ at paragraph 31 of Y v K [2003] EWCA Civ 669 where the following observation is made concerning when a court might not compel a party to give oral evidence:

"although there remains a residual discretion in the court to refuse to compel a compellable witness if to do so would be a fishing exercise, speculation or oppression. This will rarely be the case in care proceedings where the parents' explanations of what has happened to their child are usually an important factor in understanding the case."

98. It is my expectation that all those Respondents able to do so will give oral evidence to assist the Court.

Postscript

99. Although I have refused the applications to dismiss the proceedings at this half-way stage, I do not criticise the Respondents for pursuing those applications. I understand, from the detailed schedules and written submissions received, why it has been submitted 'if not on the facts of this case, when?' My refusal to accede to the application provides a further example, if one was needed, of how exceptional the circumstances must be for the court to use its power to dismiss care proceedings without having heard all the evidence.

100. That is my judgment.