



Neutral Citation Number: [2023] EWFC 7

Case No: WH21C00033

IN THE FAMILY COURT
SITTING AT LIVERPOOL

Liverpool Civil and Family Justice Centre
35 Vernon Street
Liverpool
L2 2BX

Date: 23/01/2023

Before:

THE HONOURABLE MR JUSTICE MACDONALD

Between:

A Local Authority
- and -

Applicant

L
-and-

First
Respondent

C
-and-

Second
Respondent

N
(A Child by his Children's Guardian)

Third
Respondent

Mr Patrick Gilmore (instructed by the Local Authority) for the Applicant
Mr Karl Rowley KC and Ms Ginny Whiteley (instructed by Atkinson Ritson Solicitors) for
the First Respondent

Mr Michael Jones (instructed by CFL) for the Second Respondent
Mr Sonny Flood (instructed by Bendles Solicitors) for the Third Respondent

Hearing dates: 16 January 2023

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter the question before the court is whether a psychological assessment of the First Respondent mother, L, is necessary in order for the court to determine these proceedings under Part IV of the Children Act 1989 justly. On her behalf, Mr Karl Rowley of King's Counsel and Ms Ginny Whiteley of counsel argue that it is. The mother's application for permission to instruct a psychologist is supported by the father, C, represented by Mr Michael Jones of counsel. The application is opposed by the applicant local authority, represented by Mr Patrick Gilmore of counsel. The application is also opposed on behalf of the child who is the subject of these proceedings, N, represented by Mr Sonny Flood of counsel through her Children's Guardian.
2. In considering this application, I have had the benefit of a core bundle of documents and evidence in the substantive proceedings. I have also had the benefit of written and oral submissions from leading and junior counsel.

BACKGROUND

3. Whilst the background to this matter can be stated shortly for the purposes of dealing with the case management application that is before the court, such brevity cannot diminish the tragic nature of the circumstances that have given rise to these care proceedings.
4. The subject child of these proceedings, N, was born in February 2020. Subsequent to his birth, the parents had another child, A, born in May 2021. A died in October 2021. The father currently stands charged with his murder. The father's trial for murder is due to commence later this year. These proceedings are listed for a further case management hearing immediately following the conclusion of the murder trial. These proceedings have already been considerably delayed for the reasons set out by the President in his judgment *Re G (Child Post-Mortem Report: Delays)* [2022] EWFC 55.
5. With respect to the death of A, the local authority asserts that A died as a result of a traumatic head injury consequent upon a shake and potentially with an impact against a soft surface. The local authority further points to the fact that A had five fractures to his ribs and, in addition, suffered a further rib fracture some 6 to 12 weeks prior to his death, together with a prior intercranial bleed. Neither parent has given an account that would explain these injuries. The post-mortem investigations of A reach consistent conclusions, namely that A was most likely subjected to a significant shaking injury, with or without impact against a soft surface.
6. As noted by the President in *Re G (Child Post-Mortem Report: Delays)*, this is not a single issue case. Rather, there is also a range of evidence pre-dating A's death that, if accepted by the court, would be sufficient to establish the threshold criteria pursuant to s.31(2) of the Children Act 1989. Within this context, the police's investigation into the death of A has encompassed not only the events concerning his death but also neglect of both children in circumstances where they are said to have been left

without food for prolonged periods of time and otherwise unattended in the context of parental drug use.

7. In the foregoing circumstances, in addition to the murder of A, the father has been charged with the neglect of both children. The mother has been charged with causing or allowing the death of A and the neglect of both children. The father is remanded into custody and the mother is on bail.
8. Having regard to the issues in this case, the court gave permission for the instruction of an ISW to undertake an assessment of the parents. Her report, dated 13 November 2022, is now before the court. That assessment was completed under the ParentAssess Framework, which has been developed for parents who have a learning disability and additional needs. It is based on the DOH Assessment Framework of 2000. In her report, the ISW relates that, ideally, a cognitive assessment should be undertaken prior to an assessment of this nature in order to tailor the assessment to their level of need. However, the ISW details the steps she deployed to account for the fact that not such cognitive assessment has been undertaken in this case:
 - i) Used simple language and avoided the use of jargon;
 - ii) Asked the mother and father to explain their understanding of what had been discussed;
 - iii) Ensured that there were regular breaks;
 - iv) Did not exceed two and half hours for an assessment sessions (to include breaks);
 - v) Ended sessions when either the mother or the father was believed to be struggling with concentration or becoming distressed;
 - vi) Offered a range of pictorial resources.
9. The mother and her family were known to Children's Services from May 2001. The local authority asserts that the mother suffered emotional harm and neglect whilst living with her mother and her mother's partner (including heroin use by her mother and her partner by way of injection in front of the mother). As a result of this, the mother and her siblings moved to live with their maternal grandmother, who was granted a special guardianship order in 2013. The mother left that home following an argument in late 2015 and went to live with her father, who at that time is said to have been a recovering drug user. The mother reported that to the ISW that her father's partner was verbally abusive towards her. Thereafter, the mother moved to live with her paternal grandmother in March 2016. She also received verbal abuse from her maternal grandmother's partner whilst placed there.
10. Within this context, the ISW notes that the mother experienced during her childhood neglect and exposure to parental drug use and domestic violence, including the mother being beaten by her mother's partner, and considerable instability during her childhood arising out of house moves and also police raids. She had no positive role models. Whilst she was pregnant with A, the mother's father died following an alleged assault. The ISW reports that his death has had a profound effect on the

mother's emotional and mental health. The mother also reported to the ISW that she was the victim of domestic abuse in an earlier relationship. The ISW concludes that the mother does not recognise what a healthy relationship should be.

11. The father was also known to Children's Services during his childhood and was made the subject of a Child Protection Plan in September 1998 under the category of physical abuse and in August 2000 under the category of neglect as a consequence of his mother's emotional and mental health following the death of his 14 year old brother. The father reported being neglected and physically abused by his own father. The ISW report further records that the father was groomed and sexually abused for several years by a male who had befriended the family and who gave the father drugs. That male was subsequently convicted and sentenced to 10 years imprisonment. Within this context, the ISW concludes that the father has been systematically abused and neglected by those who should have kept him safe and this has had a significant impact on his emotional and mental health and his ability to make and maintain relationships.
12. The ISW concludes that the impact on them of these experiences have affected the emotional and mental health of the parents and their coping mechanisms. With respect to the mother, the ISW states that the neglect and trauma of her childhood has impacted on her parenting capacity in the absence of positive parental role models. She considers that the mother would benefit from therapeutic assistance to explore her life experience and address the loss she has suffered. With respect to the father, the ISW considers that his childhood experiences led to feelings of insecurity and low self-esteem and self-worth and that the father does not have the necessary skills to make and maintain relationships. Both parents reported to the ISW that their emotional and mental health can become unstable, but neither is accessing professional support.
13. At the time A was recovered by paramedics in October 2021, it was noted that there was drug paraphernalia in the family home. There had been an anonymous referral in September 2020 that alleged that the father was using Class A drugs in the presence of N and that he was also driving with N in the car to collect the drugs. No further action was taken on this referral. The ISW stated that both parents reported drug use by them at the time of A's death. The mother states she has used opiates, Pregabalin and cannabis. The father states that he used cannabis and Tramadol. Whilst both parents were adamant with the ISW that the children were not exposed to their substance misuse, with respect to the evidence of drug use, the ISW records as follows in her report at [22]:

“ Hair strand testing was completed on [N]'s hair, from a sample obtained in November 2021 and the results indicate that he had been in contact with codeine, dihydrocodeine, cocaine, cannabinoids, pregabalin, mirtazapine, gabapentin, and venlafaxine and that all of these substances were also found in either or both of his parent's hair strand tests from a similar time period. There was also evidence of amitriptyline, nortriptyline, fluoxetine, and carbamazepine were also found to be present in [N]'s hair strand tests but not in either of his parent's hair.”
14. The ISW further relates in her report that whilst both parents have referred themselves for support in respect of their drug use, they have not fully engaged in this, beyond

accepting prescriptions for methadone. The key worker for the mother has reported that she has missed several appointments. As at the date of the ISW assessment, neither parent had completed any drug screening since May 2022, the ISW reporting that the mother had repeatedly claimed to have been unable to provide a urine sample to be tested. The mother's GP records record that the mother continued to misuse illicit drugs in late 2022, with an attendance on 3 November 2022 confirming daily use of cannabis. The mother did not attend for a drug screening the following day. The mother's GP records further recorded on 28 January 2022 that liver function tests suggested a diagnosis of alcohol-related liver disease.

15. In her report, the ISW refers to electronic evidence indicating prolonged periods of time when the children have gone without food, evidence of the children being left in a distressed state without any parental intervention and the children being left unsupervised in the home address. The ISW report further records that the parents did not attend all health appointments and they also did not have an established routine which would have prioritised the children's needs above their own.
16. Within the foregoing context, the ISW draws the following conclusions in her report:
 - i) It is not possible to recommend that N is placed in the care of the other parent if one parent is found to have caused the injuries leading to the death of A by reason of the fact that it asserted that there was more than one incident during which the injuries were caused to A and therefore knowledge is required as to the alternate parent's culpability, failure to recognise the risks and to take preventative steps to safeguard the children.
 - ii) Both the mother and father experience vulnerabilities with their emotional and mental health due to the adverse childhood experiences and the trauma and loss that they have experienced. Neither parent has accessed support in this respect. The neglect, physical abuse, and parental substance misuse experienced by the mother during her childhood and was removed from the care of her mother due to the extent has a significant impact on her emotional and mental health, her coping mechanisms, her ability to form relationships and trust others, and her ability to recognise risk and take preventative and protective steps.
 - iii) Due to their own emotional and mental health difficulties, coupled with their substance misuse, the mother and father struggle to provide consistent parenting. There are multiple issues that adversely impact on the mother and father's parental functioning, including their history, the trauma, their emotional and mental health, their substance misuse, their previous relationships and their joint ability to manage risk. In this context, the ISW identifies significant deficits in the ability of the mother and the father to manage risk, the ability to think ahead, and in respect of their decision making skills and their management of stress. There are significant deficits in the ability of each parent to manage routine, diet and protection. The ISW further concludes that neither understands what the foundations of a healthy relationship should include.

- iv) The mother and the father require support in *all* areas of their daily living skills but need to prioritise their emotional and mental health and their substance misuse before they can address those other areas of concern.
 - v) Neither the mother or the father have been open and honest about their previous or current levels of substance misuse and are not engaging with the support being provided for their substance misuse. The ISW recommends that hair strand testing is undertaken to confirm the exact level of usage.
 - vi) Although they are able to recognise what needs to change, the mother and father do not appear to have the motivation and commitment to accessing support. They need to seek support in addressing their vulnerabilities in order for there to be any progress in relation to their ability to meet their daily living skills.
 - vii) The engagement with professionals that the mother and the father do have is superficial when it involves them accessing support to address the vulnerabilities in their lives. They have failed to consistently engage with services to address this and whilst they recognise that these are areas of concern, they do not have the motivation or commitment to engage with support to address them.
 - viii) Neither the mother or the father has the capacity to learn and change at this time and, due to their individual vulnerabilities, neither the mother or the father has the individual capacity to address the current identified gaps in the other parents parenting capacity.
 - ix) The mother and the father continue to pose a high risk of harm to N now and in the long term whilst they are not accessing support.
17. The ISW concludes that the mother and the father would benefit from undergoing a parenting course, which addresses areas such as basic child development, routine, boundaries, strategies to manage any behavioural challenges, and exploring local support networks. During the course of her report, the ISW also comments at a number of points that she considers that there would be benefit in a psychological report being obtained on the parents. As I have noted, it is only now the mother who pursues permission for such an expert report. It is important to be clear how the ISW articulates this recommendation in her report (emphasis added):

“I am of the view that they would both *benefit from therapeutic input to explore their life experiences* to date and to address their feelings of loss that they have as a consequence of their fractured family relationships and the adults in their lives failing to prioritise their needs.”

And

“I am of the view that a psychological assessment of [the mother] and [the father] would *further inform* about the impact that their adverse childhood experiences have had upon their emotional and mental health and their decision making and ability to manage risk and protect N.”

And

“Both [the mother] and [the father] experienced abuse and trauma during their childhoods which has impacted on their current daily living skills and self-care skills. I am of the view that these experiences are areas which need to be *explored* through a psychological assessment which could then *identify the appropriate support* for them both.”

And

“I am of the view that both [the mother] and [the father] are overwhelmed at this time and therefore they are unable to consistently access support due to the impact of their adverse childhood and adult experiences and this leads them to being vulnerable to ongoing substance misuse. I believe that a psychological assessment would assist in *directing them* in identifying the most appropriate type of intervention to *support them in addressing their vulnerabilities*.”

And

“I am of the view that although [the mother] and [the father] appear to have made some progress in understanding and managing their emotional and mental health needs that they would benefit from support which focuses on their life experiences to date and their responses to this. I believe that a psychological assessment would explore the impact of [the mother] and [the father’s] life experiences on their behaviour, their decision making and explore whether they have the capacity to meet and prioritise N’s needs in light of their own experiences of neglect and abuse in their childhoods. The fact that the *right therapeutic intervention* has not been identified means that their individual underlying issues continue to cause them psychological distress and they are not aware of what therapeutic intervention is most appropriate to try to support them in addressing the trauma which they have experienced and which is still impacting on their current functioning.”

18. Within this context, the mother now makes an application under Part 25 of the FPR 2010 for permission to instruct an expert psychologist to prepare a psychological assessment of the mother. The application is made expressly on the basis that the ISW has recommended such an assessment, the application form in particular citing the foregoing passage from the report of the ISW (again, emphasis added):

“I am of the view that psychological assessment of [the mother] and [the father] would *further inform* about the impact of their adverse childhood experiences have had upon their emotional and mental health and their decision making and ability to manage risk and protect N.”

19. The application form for permission to instruct the expert was not accompanied by the questions it was proposed would be asked of the psychologist. However, in their Skeleton Argument, Mr Rowley and Ms Whiteley list the following matters that the evidence of the psychologist “would relate to”:

- i) A cognitive assessment of the mother;
 - ii) The psychological formulation in respect of the mother;
 - iii) The impact of childhood experiences and trauma upon the mother;
 - iv) The nature of the mother's relationship with the father and her vulnerability to the exploitation of power imbalance;
 - v) The mother's substance misuse;
 - vi) Any risk of harm to a child in mother's care from a psychological perspective;
 - vii) What support, therapy or other intervention the mother may require in order to address any issues arising from the foregoing points; and
 - viii) The mother's psychological capacity to change, and the timescale for the same.
20. Through Mr Rowley and Ms Whiteley, the mother submits that a psychological assessment is necessary to resolve the proceedings justly within the meaning of Children and Families Act 2014 s. 13(6). They contend that a psychological report is necessary to assist the court to resolve these proceedings because:
- i) An expert psychological assessment will (a) enable the court to identify and understand the origins of the mother's difficulties, and (b) advise the court how they can be addressed and within what period.
 - ii) Without an expert psychological assessment the court will not know whether and to what extent the mother is able to access support, whether any support they do access is appropriate and whether such support will act to mitigate the mother's difficulties sufficient to enable her to care for N with support and over what timescale, which answers can only come from an expert psychological assessment. In this regard, Mr Rowley and Ms Whiteley remind the court of the observation of Lord Neuberger in *Re B (A Child) (Care Proceedings: Threshold Criteria)* UKSC 33 that "before making an adoption order in such a case the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support".
 - iii) A psychological assessment aimed at understanding the genesis of the mother's difficulties and the correct support for the mother will act to increase the number of realistic welfare options for the court to consider in a case in which there are no other family carers available and, therefore, in which adoption must be a real possibility absent the parents being able to care for N. In this respect, the court should be mindful of the words of Sir James Munby P in *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5 at [31] that "The judge will also need to be sensitive to the forensic context. The argument for an expert in a care case where permanent removal is threatened may be significantly stronger than in a case where the stakes are not so high."

- iv) The mother is making efforts to engage with her drug use. Whilst she tested positive for cannabis in December 2022 and there has been no drug screening since that point, and she accepts the negative outcome of a liver function test (which she ascribes to early alcohol use) she continues on methadone. In addition, she has engaged with ‘Liaisons & Diversions’ on work to cope with anxiety and depression and has had a referral for bereavement counselling.
21. During the course of their submissions, Mr Rowley and Ms Whiteley conceded that were the court in a position to hear the matter *today*, the court *would* have sufficient evidence on which to base its decision. Mr Rowley and Ms Whiteley submit however, that the date of the final hearing of this matter means there is a further period of time in which to undertake an expert psychological assessment without adversely impacting on the timetable of the proceedings. Within this context, Mr Rowley and Ms Whiteley submit that an expert psychological assessment will allow the mother to set out her best case, which cannot be drawn from the evidence currently before the court.
22. As I have noted, on behalf of the father, Mr Jones supported the submission made by Mr Rowley and Ms Whiteley on behalf of the mother. Mr Jones submits that the strongest matter pointing to an expert psychological assessment of the mother being necessary in this case is the need to ensure that the court has before it each of the realistic options for the care of N. Absent such an assessment, Mr Jones submits that the court will not know what support and therapy the mother will require in order to parent N nor the timescales in which such intervention could be effective.
23. The application is opposed by both the local authority and the Children’s Guardian, each contending that the criterion of necessity is not met in this case with respect to an expert psychological report on the mother.
24. On behalf of the local authority, Mr Gilmore submits that the court has before it a plethora of detailed assessment evidence in respect of the mother, including a highly detailed and closely reasoned assessment from the ISW. Having regard to the extent of the ISW’s assessment, and the parenting deficits identified therein, Mr Gilmore submits that an expert psychological assessment is not required to make clear to the court the origin of the mother’s difficulties, her current position as a vulnerable care leaver who suffers from depression and anxiety and who requires support, with which she must be committed to engaging, in order to address her parenting deficits, all of which is laid out in plain terms in the ISW assessment. Mr Gilmore submits that within the context of the support that the ISW identifies needs to be accessed prior to the mother being able to make the necessary changes, support to address her substance misuse and a parenting course which addresses areas such as basic child development, routine, boundaries, strategies to manage any behavioural challenges, and exploring local support networks, an expert psychological assessment is likewise not required to identify what support is required to now being to address the deficits in the mother’s parenting.
25. On behalf of the Children’s Guardian, Mr Flood submits that it is plain from the report of the ISW that her recommendation for psychological assessment is targeted at identifying appropriate therapeutic input and support for the mother, rather than filling evidential lacunae in respect of the mother’s parenting ability. In that latter context, in so far as an expert psychological report might identify therapeutic input that might

improve the mother's parenting capacity, Mr Flood submits that the court must have an eye on the realistic position regarding the extent of change that is required from the mother and the timescales available for that change having regard to the needs of N, particularly where the ISW has concluded that the mother does not at present have the capacity to change. Within the foregoing context, having regard to the extensive and in depth nature of the assessment of the ISW, Mr Flood submits that, whilst possibly helpful for the *mother*, an expert psychological assessment in this case is not necessary for the *court*.

THE LAW

26. Expert evidence constitutes an exception to the very long established general rule that only evidence of fact may be adduced (see *Adams v Canon* (1621) Ley's K. B. Rep. 68). Such expert evidence is admissible in family proceedings pursuant to s.3 of the Civil Evidence Act 1972.
27. The Children and Families Act 2014 s. 13 now controls the use of expert evidence in proceedings relating to children. Section 13 of the 2014 Act is in the following terms:

“13 Control of expert evidence, and of assessments, in children proceedings

(1) A person may not without the permission of the court instruct a person to provide expert evidence for use in children proceedings.

(2) Where in contravention of subsection (1) a person is instructed to provide expert evidence, evidence resulting from the instructions is inadmissible in children proceedings unless the court rules that it is admissible.

(3) A person may not without the permission of the court cause a child to be medically or psychiatrically examined or otherwise assessed for the purposes of the provision of expert evidence in children proceedings.

(4) Where in contravention of subsection (3) a child is medically or psychiatrically examined or otherwise assessed, evidence resulting from the examination or other assessment is inadmissible in children proceedings unless the court rules that it is admissible.

(5) In children proceedings, a person may not without the permission of the court put expert evidence (in any form) before the court.

(6) The court may give permission as mentioned in subsection (1), (3) or (5) only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly.

(7) When deciding whether to give permission as mentioned in subsection (1), (3) or (5) the court is to have regard in particular to—

- (a) any impact which giving permission would be likely to have on the welfare of the children concerned, including in the case of permission as mentioned in subsection (3) any impact which any examination or other assessment would be likely to have on the welfare of the child who would be examined or otherwise assessed,
 - (b) the issues to which the expert evidence would relate,
 - (c) the questions which the court would require the expert to answer,
 - (d) what other expert evidence is available (whether obtained before or after the start of proceedings),
 - (e) whether evidence could be given by another person on the matters on which the expert would give evidence,
 - (f) the impact which giving permission would be likely to have on the timetable for, and duration and conduct of, the proceedings,
 - (g) the cost of the expert evidence, and
 - (h) any matters prescribed by Family Procedure Rules.
- (8) References in this section to providing expert evidence, or to putting expert evidence before a court, do not include references to—
- (a) the provision or giving of evidence—
 - (i) by a person who is a member of the staff of a local authority or of an authorised applicant,
 - (ii) in proceedings to which the authority or authorised applicant is a party, and
 - (iii) in the course of the person’s work for the authority or authorised applicant,
 - (b) the provision or giving of evidence—
 - (i) by a person within a description prescribed for the purposes of subsection (1) of section 94 of the Adoption and Children Act 2002 (suitability for adoption etc.), and
 - (ii) about the matters mentioned in that subsection,
 - (c) the provision or giving of evidence by an officer of the Children and Family Court Advisory and Support Service when acting in that capacity, or
 - (d) the provision or giving of evidence by a Welsh family proceedings officer (as defined by section 35(4) of the Children Act 2004) when acting in that capacity.”

28. Given the requirement in s 13(7)(h) of the 2014 Act to have regard in particular to any matters prescribed by Family Procedure Rules FPR 2010, in deciding whether to give permission for expert evidence pursuant to s.13(6) of the Act, the court will also have regard to the Overriding Objective in FPR 2010 r.1.
29. In the context of children proceedings therefore, an expert report will only be permitted by the court where such a report is “necessary” to resolve the proceedings justly. The assessment of the necessity for the instruction of an expert is very much a matter for the trial judge (see *Re H-L (A Child)* [2013] EWCA Civ 539 at [28]). A number of authorities assist in calibrating for the court what is meant by the word “necessary” in s. 13(6) of the 2014 Act.
30. In *R v Turner* [1975] QB 834 at 841, cited with approval by the Supreme Court in *Kennedy v Cordia* (considered below), Lawton LJ observed that “If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.” In *Re P (Placement Orders: Parental Consent)* [2008] 2 FLR 625 at [120], the Court of Appeal noted (in the rather different context of examining the test for dispensing with parental agreement to the making of a placement order under s 52(1)(b) of the Adoption and Children Act 2002) that, in the Strasbourg jurisprudence, the word “necessary” has a meaning lying somewhere between “indispensable” on the one hand and “useful”, “reasonable” or “desirable” on the other. Citing *Re P (Placement Orders: Parental Consent)*, in *Re H-L (A Child)*, Sir James Munby P observed as follows in the context of the then pending change to the wording of FPR 2010 r. 25.1, due to be implemented with effect from 31 January 2013, changing the test from “reasonably required to resolve the proceedings” to broadly the test contained in s.13(6) of the 2014 Act, namely “necessary to assist the court to resolve the proceedings”:

“The short answer is that “necessary” means necessary. It is, after all, an ordinary English word. It is a familiar expression nowadays in family law, not least because of the central role it plays, for example, in Article 8 of the European Convention and the wider Strasbourg jurisprudence. If elaboration is required, what precisely does it mean? That was a question considered, albeit in a rather different context, in *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625, paras [120], [125]. This court said it “has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand”, having “the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable”. In my judgment, that is the meaning, the connotation, the word necessary has in rule 25.1.”

31. I pause to note that by the words at [125] in *Re P (Placement Orders: Parental Consent)* “the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable”, the Court of Appeal was referring to the word “requires” in s 52(1)(b) of the Adoption and Children Act 2002, rather than the word “necessary”, the court’s observations at [120] in respect of that latter word being used as an aid to the interpretation of the former. However, there have been a number of other *obiter* observations regarding the relative stringency of the test of necessity in the context of permitting expert evidence. In *Re TG (A Child)* [2013] 1 FLR 1250, which predated the decision in *Re H-L (A Child)*, the court observed that the then

anticipated test of necessity was intended to be significantly more stringent than the former test of “reasonably required”. In *J v G v Lord Chancellor and Others* [2014] 2 FLR 1218, the hurdle represented by the test of necessity for expert evidence was described as a high one. The rationale for this approach in the context of s.13 of the 2014 Act was given by Aikens LJ in *Re C (A Child)(Procedural Requirements of a Part 25 Application)* [2015] EWCA Civ 539:

“The result of a proliferation of unnecessary expert reports (in whatever type of case) is that courts are all too often swamped with materials that are either not relevant to the issues in the case or are not specifically focused on the relevant issues. Unnecessary expert reports cause delays and, inevitably, costs are increased. In family cases where public funding is often involved this had meant that taxpayers' money has sometimes been wasted. Section 13 of the Children and Families Act 2014 and Part 25 of the FPR now lay down firm statutory and procedural rules that must be applied in respect of expert evidence in family proceedings. It is the duty of all family law practitioners and the courts to learn, mark and digest these provisions and ensure that they are applied rigorously”.

32. The foregoing authorities must also now be read in light of the decision of the Supreme Court in *Kennedy v Cordia*. In that case, in stating the test for permitting skilled evidence in the context of Scottish proceedings, the Supreme Court at [44] noted that the first consideration is whether the evidence will assist the court in its task and that “when the first consideration is applied to *opinion* evidence the threshold is the necessity of such evidence” (emphasis added). Within that context, the Supreme Court went on to state as follows at [45]:

“Assisting the court: It is for the court to decide whether expert evidence is needed, when the admissibility of that evidence is challenged. In *R v Turner* [1975] QB 834, a case which concerned the admissibility of opinion evidence, which Professor Davidson cites in his textbook on Evidence (2007) at para 11.04, Lawton LJ stated at p 841:

‘If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.’

In *Wilson v Her Majesty's Advocate* 2009 JC 336, which also concerned opinion evidence, the High Court of Justiciary, in an opinion delivered by Lord Wheatley, stated the test thus (at para 58):

‘[T]he subject-matter under discussion must be necessary for the proper resolution of the dispute, and be such that a judge or jury without instruction or advice in the particular area of knowledge or experience would be unable to reach a sound conclusion without the help of a witness who had such specialised knowledge or experience.’”

33. Pursuant to s.3(3) of the Civil Evidence Act 1972, an expert witness may provide evidence on the ‘ultimate issue’ in proceedings, i.e. the matter to be decided by the court. Within this context and that provided by s.13(7)(b) of the 2014 Act, which requires the court to have regard to the issues to which the expert evidence would

relate, when determining whether an expert report is *necessary* it is important to bear carefully in mind the nature of the task with which the court is charged when determining proceedings under Part IV of the Children Act 1989.

34. The court may make an order under Part IV of the Children Act 1989 where the threshold criteria set out in s.31(2) of the 1989 Act are made out. The Children and Families Act 2014 amended s. 31 of the Children Act 1989 to provide that a court deciding whether to make a care order is required to consider the permanence provisions of the care plan for the subject child but is *not* required to consider the remainder of the care plan save as to contact, which is itself a required consideration pursuant to s. 34(11) of the 1989 Act. Section 31(3B) defines the permanence provisions of the care plan as:

- i) Such of the plan's provisions setting out the long-term plan for the upbringing of the child concerned as provide for:
 - a) the child to live with any parent of the child's or with any other member of, or any friend of, the child's family;
 - b) adoption;
 - c) long-term care not within sub-paragraph (a) or (b);
- ii) Such of the plan's provisions as set out:
 - a) the impact on the child concerned of any harm that he or she suffered or was likely to suffer;
 - b) the current and future needs of the child (including needs arising out of that impact);
 - c) the way in which the long-term plan for the upbringing of the child would meet those current and future needs

35. By virtue of s.1(1) of the Children Act 1989, in considering whether to make an order under Part IV of the Act, the child's welfare is the court's paramount consideration. By virtue of s.1(4)(b) of the 1989 Act, in considering whether to make an order, the court must also have particular regard to the factors set out in s.1(3) of the 1989 Act, namely the ascertainable wishes and feelings of the child, considered in light of their age and understanding; the physical, emotional and education needs of the child; the likely effect on the child of any change of circumstances; the child's age, sex, background and any other characteristic that the court considers relevant; any harm the child has suffered or is at risk of suffering; the capability of each of the parents; and the range of powers available to the court under the Children Act 1989. Pursuant to s.1(2) of the 1989 Act, the court must further have regard to the general principle that delay is ordinarily prejudicial to the welfare of the child. Where the care plan is one of adoption, in *Re C (Appeal from Care and Placement Orders)* [2013] EWCA Civ 1257, McFarlane LJ (as he then was) held as follows

“[29] ... I would question the wisdom, when making a care order in the middle of the process of evaluating the ultimate question of whether or not a placement for adoption order is to be made, of “approving a care plan for

adoption” by reference only to the CA 1989, s 1 welfare provisions... It is... a practice which may inadvertently lead the court away from engaging with a proper, holistic evaluation of the central welfare question and, where placement for adoption is an issue, doing so within the structure of the ACA 2002, s 1 rather than the CA 1989, s 1. Any judge, who is aware that (either at the current hearing or at a hearing shortly thereafter) he or she is going to be considering whether or not to make a placement for adoption order, would be wise only to approve a care plan for adoption where such plan seems likely to meet the welfare requirements of ACA 2002, s 1 and s 52.”

36. Within the foregoing context, in order to determine these care proceedings, the court will limit its consideration of the evidence before the court to the following issues:
- (a) whether the s 31 threshold criteria are satisfied;
 - (b) if so, consideration of the nature of the permanence provisions in the care plan;
 - (c) the arrangements for contact; and
 - (d) what order, having regard to s.1 of the Children Act 1989, should be made.
37. The process of evaluating what order, having regard to s.1 of the Children Act 1989, should be made has been described in a number of authorities following the decision in the Supreme Court in *Re B (Care Proceedings: Appeal)* [2013] 2 FLR 1075 to the effect that adoption can only occur if parents are unwilling, or are deemed by judicial process to be unable, to discharge their responsibilities towards the child and that, accordingly, the granting of a care order with a care plan of adoption is an option of last resort. In light of this decision, the Court of Appeal emphasised that the process of deciding what order, having regard to s.1 of the Children Act 1989 (and, where the care plan is one of adoption, to the Adoption and Children Act 2002 ss. 1 and 52), should be made requires a global, holistic evaluation and analysis of the child's welfare needs followed by a side by side analysis of each of the realistic options for meeting those needs in order to reach a decision as to which of those options is the most proportionate having regard to the need to afford paramount consideration to the welfare of the child (see *Re G (A Child)* [2014] 1 FLR 670).

DISCUSSION

38. Having listened carefully to the submissions in this matter, I am not satisfied that an expert psychological report is *necessary* for the court to determine these proceedings justly and I dismiss that application. My reasons for so deciding are as follows.
39. Having regard to the tightly defined issues set out above that the court is required to address when determining proceedings under Part IV of the Children Act 1989, in determining these proceedings the court will, *inter alia*, be required to analyse each of the realistic options for meeting N's needs (in this case it is likely that the realistic options before the court will be limited to care by the mother or adoption) and determine which of those options is the most proportionate having regard to the need to afford paramount consideration to N's welfare. Intrinsic to that analysis and determination will be consideration of any risk of harm presented by the mother and her capability as a parent under s.1(3)(e) and 1(3)(f) of the Children Act 1989

respectively. It is to these issues that it is said an expert psychological evidence would relate. I am not satisfied that it is *necessary* for the court to have an expert psychological report in order to determine those issues and to complete its required welfare analysis.

40. This much was realistically acknowledged, albeit in narrow terms, by Mr Rowley and Ms Whiteley with their concession during oral submissions that were the court to be in a position to determine the matter *today*, it has sufficient evidence to do so.
41. The court now has the benefit of a comprehensive and closely reasoned report from the ISW. That report sets out in clear terms the current multiple factors generating deficits in the mother's parental functioning, including her childhood history, past trauma, her emotional and mental health, her substance misuse and her previous relationships. Within this context, I am satisfied that an expert psychological assessment is not necessary to make clear to the court the origin of the mother's current difficulties and the current nature and extent of her parenting deficits consequent upon those difficulties. In particular, and by reference to the list of matters it is said by the mother an expert psychologist would be asked to address, I do not consider it necessary in this case for the court to have a *psychological* formulation in respect of the mother in order for the court to determine the matters before it. The impact of her childhood experiences and trauma are plain from the report of the ISW, as is the nature of the mother's relationship with the father and the nature and extent of her substance misuse in so far as she has disclosed it to the ISW. Likewise, the question of the risk of harm to any child in the mother's care is readily ascertainable from the ISW report and does not necessitate a "psychological perspective".
42. Nor is it necessary in my judgment for the court to have an expert psychological report in order to identify what support is required for the mother to address the deficits in the mother's parenting. The ISW also deals in detail in her report with the steps that the mother needs to take in order to address the deficits in her parenting. In this latter regard, the ISW is clear in identifying the primary elements of support that the mother currently needs to access in order to be able to begin make the necessary changes, *starting* with engaging with support to address and overcome her substance misuse and including a parenting course which addresses deficits in *basic* parenting skills. The ISW also carries out an assessment of the mother's current capacity to change, concluding in clear terms that she lacks the capacity at this time to learn and that, due to her vulnerabilities, she does not have the capacity to address the current identified gaps in the other parents parenting capacity. In this context, whilst the court will need to consider at the final hearing in this case whether there is any practical way of the authorities providing the requisite assistance and support the mother requires, it is not necessary in my judgment for the court also to have in this case an assessment from a *psychologist* dealing with the issues support, therapy or other intervention for the mother or her "psychological" capacity to change.
43. This is particularly the case where the ISW report is clear that until the mother takes the *first* step of addressing, with conviction, honesty and consistency, her drug misuse she will not be in a position to begin to address with support the other deficits in her parenting so clearly identified by the ISW. The conclusion of the ISW is in stark terms in this regard.

44. Until the mother prioritises dealing with her substance misuse, the ISW is clear that she will not be in a position to address the other areas of difficulty. The evidence before the court however, is to the effect that the mother continues to use drugs and demonstrates a less than consistent engagement with the services that aim to help her cease her drug use. In the context of this unwillingness thus far to avail herself fully of support in respect of substance misuse and mental health, the mother has not begun to address the first hurdle to dealing with her parenting deficits. In these circumstances, I am satisfied that it is not necessary for the court to have an expert psychological report looking at wider issues of whether and to what extent the mother is able to access support, whether any support they do access is appropriate and whether such support will act to mitigate the mother's difficulties and over what timescale, in order to determine the proceedings justly.
45. I acknowledge that the ISW recommends an expert psychological assessment at a number of points during the course of her report. However, it is clear from those passages that the ISW sees the function of such a report as providing *further* information, rather than as being necessary to fill lacunae in the information on the mother without which a conclusion cannot be drawn. At no point does the ISW suggest that her conclusions are conditional on such a report, or that such a report will result in the need for her to revisit those conclusions. Rather, the whole tenor of her recommendation that such a report be obtained is to further inform the therapeutic and support options available to the mother *beyond* the primary element of substance abuse support that the mother *must* access and engage with in order to be able to begin make the changes necessary to place her in a position to care for N.
46. I am satisfied that the conclusion that it is not necessary in this case for the court to have the benefit of an expert psychological assessment in order to determine these proceedings justly is not altered in this case by the fact that, in circumstances where there are no other family carers available, adoption must be a real possibility absent the parents being able to care for N. I acknowledge that the arguments for an expert in a care case where permanent removal is threatened *may* be significantly stronger than in a case where the stakes are not so high. It is further the case that the overriding objective in FPR 2010 r. 1.1 requires the court to deal with the case justly, having regard to the welfare issues involved. However, the test remains whether an expert report is *necessary* to determine the proceedings justly. For the reasons I have set out above I am satisfied that the fact that adoption is a potential outcome in this case does not serve to change the conclusion of the court that in order to determine the issues in the care proceedings it is not necessary in this case to have the benefit of an expert psychological assessment.
47. In my judgment, the conclusion that it is not necessary in this case for the court to have the benefit of an expert psychological assessment in order to determine these proceedings justly is also not altered by the fact that there is time in this case to complete such an assessment ahead of the final hearing. By reference to the test set out in s. 13(6) of the Children and Families Act 2014, an expert assessment is either necessary to determine the proceedings justly or it is not. In those circumstances, where the court has concluded it is not necessary, that conclusion will not change simply because there is time to complete the assessment. To conclude otherwise would be to succumb to the tug of pragmatism (see *Rehan Malik v Governor of HM Prison Hindley (No.2)* [2022] EWHC 2684 (Admin) per Fordham J) and to fail to

apply the test of necessity with the rigor that the authorities make clear is required. In this context, the concession that were the court to hear and determine the matter *today* it has sufficient evidence to do so, amounts in fact to a concession that an expert psychological assessment is not necessary for the court to determine the case justly *per se*.

48. In their written submissions, Mr Rowley and Ms Whiteley submit that an expert psychological assessment will optimise for the court the clarity with which the mother's ability to meet N's assessed needs is articulated before it. Whilst this might indicate that such an expert assessment would be useful, or even valuable, the fact that an expert report may clarify or, to use the ISW's phrase, further inform the court on issues relevant to the court's determination does not cross the threshold of necessity that applies to applications of this nature.

CONCLUSION

49. In light of the recommendation made in the ISW report, the mother cannot be criticised for bringing this application. But the decision whether an expert report is necessary to determine the proceedings justly remains at all times that of the court. In this case, for the reasons I have given, the test in s.13(6) of the Children and Families Act 2014 is not made out and I dismiss the application for permission to instruct an expert psychologist to assess the mother.
50. In concluding, I note that in the week before this judgment is handed down, the President of the Family Division re-launched the Public Law Outline contained in FPR 2010 Part 12, as presaged in his document *The View from the President's Chambers* published in November 2022. In that document the President identified that since 2016/17 there has been a 33% rise in the number experts instructed in public law cases. There will, of course, be *some* public law cases that require an expert psychologist to evaluate a parent's functional capacity to meet the needs of their child, particularly where there are discrete issues of, for example, complex mental health presentations, difficult questions of behavioural, emotional or neuropsychological functioning, serious forensic risk or chronic substance misuse or addiction, but this will not *inevitably* be the case even where those issues exist in a case. Once again, in each case the question is one of necessity.
51. Indeed, having regard to the test in s.13(6) of the Children and Families Act 2014, I venture to suggest that the number of cases in which it can be said to be *necessary* for the court to have the assistance of an expert psychologist to determine whether or not a parent currently has the capacity to meet the child's needs and / or the support a parent would need in order to care for the child should be small in number. Both questions will, ordinarily, be well within the competencies of the social work professionals working with the family.
52. That is my judgment.