Case Number [redacted]

IN THE [redacted] FAMILY COURT

B E T W E E N:

X COUNCIL Applicants

and

A MOTHER First Respondent

and

A FATHER Second Respondent

and

EFG Third Respondent
(By the children's guardian, Sonja Zurian)

This judgment was delivered in private. The judge has given leave for his judgment to be published in the redacted and anonymised form herewith.

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WRITTEN JUDGMENT OF HIS HONOUR JUDGE EDWARD HESS

(Delivered to the parties by email on 4th July 2019)

Introduction

1. I have before me an application brought by X Council, to whom I shall refer in this judgment as "the local authority".

2. I have heard the application over seven days on 17th, 18th, 19th, 20th, 21st, 24th, 26th June 2019, the latter date being devoted to the production of written submissions.

3. The application relates to one child: EFG (d.o.b. [redacted] 2018, now aged approximately 10 months), to whom I shall refer in this judgment as "E-F".

4. The Respondents are

   (i) LG (d.o.b. [redacted], now aged 29), to whom I shall refer in this judgment as "the mother";

   (ii) RG (d.o.b. [redacted], now aged 27), to whom I shall refer in this judgment as "the father"; and

   (iii) E-F himself.

5. The representation before me has been as follows:-

   (i) the local authority was represented by Ms Tanya Zabihi (Counsel);

   (ii) the mother was represented by Mr Damian Garrido (Leading Counsel) and Ms Dianne Martin (Counsel);

   (iii) the father was represented by Ms Jane Crowley (Leading Counsel) and Ms Alice Darian (Counsel); and

   (iv) E-F was represented by Ms Alison Lippman (Solicitor).

   I want to thank all the advocates for their considerable assistance in this case. All worked assiduously hard and with great skill and sensitivity. As is so often the case in this area of law, the court is fortunate to be presented with first class representation in these difficult cases which have so much at stake for the parties.

6. E-F took part in these proceedings via the children's guardian, Ms Sonja Zurian, a CAFCASS guardian.

7. It may be helpful for any reader of this judgment for me to mention at this stage that:-

   (i) the "maternal grandmother" is FM (d.o.b. [redacted] – now aged 47) and her husband of 24 years TM (d.o.b. [redacted] – now aged 48); and

   (ii) the father's sister is MG (d.o.b. [redacted] – now aged 29).

   These people have not (so far anyway) been parties to this litigation, but have featured in the events in ways I shall describe below.

8. In considering this application I have considered a bundle which contains a very large amount of material, which I have had in the form of an electronic bundle and which can perhaps be summarised (non-exhaustively) as follows:-

(i) Various material from the local authority, including a final schedule of findings sought and various responses to it.

(ii) A collection of applications and orders in these proceedings.

(iii) Material from [redacted], the local authority allocated social worker, consisting of:-

(a) statements dated 15th October 2018 and 23rd May 2019 (the latter accompanied by care plans and care plan analyses by him also dated 23rd May 2019); and

(b) a parenting assessment of the mother and the father dated 20th May 2019.

(iv) A statement dated 5th February 2019 from [redacted], local authority social worker;

(v) Material relating to the assessment of FM and TM and of MG, produced by [redacted], both local authority social workers.

(vi) Extensive medical evidence, including material from:-

(a) Dr Jayaratnam Jayamohan, Consultant Paediatric Neurosurgeon, as a jointly instructed expert;

(b) Professor Stavros Stivaros, Consultant Paediatric Neuroradiologist, as a jointly instructed expert;

(c) Dr P.H.T. Cartlidge, Consultant Paediatrician, as a jointly instructed expert;

(d) Dr UW, Consultant Paediatrician, as a treating doctor at the Q Hospital;

(e) Dr BJ, Consultant Paediatrician, as a treating doctor at the Q Hospital;

(f) Dr Katharine Halliday, Consultant Paediatric Radiologist, as a jointly instructed expert;

(g) Dr Russell Keenan, Consultant Paediatric Haematologist, as a jointly instructed expert;

(h) Ms CL, Specialist Community Public Health Nurse, in her treating capacity; and

(i) Ms RH, Clinical Nurse Specialist in Neonatal Surgery, in her treating capacity.

(vii) Statements from the mother dated 9th November 2018, 21st November 2018, 11th December 2018, 15th March 2019 and 11th June 2019.

(viii) Statements from the father dated 9th November 2018, 19th March 2019 and 14th June 2019.

(ix) From Ms Zurian, a CAFCASS case analysis document dated 11th June 2019 and a position statement dated 7th November 2018.

(x) Extensive disclosure from X Police.

(xi) Extensive disclosure of hospital records, both from P and Q hospitals.

(xii) Various miscellaneous documentation disclosed by the local authority.

(xiii) Extensive collections of text and What's App messages between the mother and the father.

9. I have also heard oral evidence, subjected to cross-examination, from:-

(i) Dr Jayaratnam Jayamohan;

(ii) Professor Stavros Stivaros;

(iii) Dr P.H.T. Cartlidge;

(iv) Dr UW, a paediatrician from Q hospital;

(v) Ms RH;

(vi) Dr Katharine Halliday;

(vii) The allocated social worker;

(viii) A further social worker;

(ix) The assessing social worker;

(x) FM;

(xi) TM;

(xii) Dr BJ, a paediatrician from Q hospital;

(xiii) the mother;

(xiv) the father; and

(xv) the child's guardian.

10. Since the conclusion of the live evidence I have had the benefit of full written submissions from all the advocates, submitted to me by email on 26th and 27th June 2019. I am delivering this judgment on 4th July 2019, having had the opportunity to consider all the representations made and to reflect on all the evidence received.

Background Circumstances

11. The circumstances leading up this hearing can be summarised as follows:-

(i) The mother's background can be summarised as follows:-

(a) She is aged 29 and comes from a [redacted] background. Her parents separated when she was very young, and her father has a "*longstanding police history as a domestic abuse perpetrator*", but she recalls a largely happy childhood in the care of her mother and step-father, who (on current information) present as a stable and law-abiding couple.

[redacted]Her teenage years were, however, very troubled. Between July 2004 (when she was aged 14) and August 2012 (when she was aged 22) she committed numerous offences of dishonesty [redacted]

(b) [redacted] and at age 15 was admitted to a residential unit in V for assessment and treatment for her [redacted], from which she absconded. After this she abandoned her education course and "*fell in with the wrong crowd*".

(c) The period of imprisonment in 2012 appears, up to a point anyway, to have been a trigger for her beginning to turn her life around. She achieved some educational qualifications, but had problems with depression and anxiety and for a time was prescribed with Mirtazipine; though she learned how to "*keep it at bay*" and was able to give up the medication.

(d) Prior to her relationship with the father, she had another relationship with a man whom she considered to be abusive to her and the relationship broke down.

(ii) The father's background can be summarised as follows:-

(a) He is aged 27, was also brought up in the sole care of his mother, his parents having separated when he was very young.

(b) He has a very difficult relationship with his father to this day and they are currently not on speaking terms.

(c) His childhood included moments of anger and, [redacted] and he was excluded from school in year 9 for assaulting a teacher. He achieved some basic educational qualifications, and did do some work, but his life was troubled.

(d) He drifted into a Class A drug dealing network and in due course served 18 months out of a 39 month prison sentence for supplying Cocaine to others in 2013, being released from prison in 2015. He says that he used cannabis himself as a 'stress management strategy'.

(e) He had a child (AB – d.o.b. [redacted], now aged 7), but his relationship with A's mother quickly broke down (though he has contact to this day).

(f) On leaving prison he had symptoms of anxiety, panic and depression and was prescribed Mirtazapine. He stopped taking this medication by his own decision in 2017.

(iii) The mother and the father commenced a relationship in 2015, shortly after the father's release from prison. They married in 2017. Until recently they lived together in a home in Q rented in the mother's sole name.

(iv) There is a live question as to whether the relationship involved domestic violence, and the extent of that, and I shall return to this in due course.

(v) Not long after the marriage the mother became pregnant and gave birth to E-F. He was born prematurely in the P Hospital at 31 weeks gestation. He required a stoma soon after birth because of an intestinal perforation (although this problem has now been corrected) and he was kept in hospital while he recovered from this and was transferred to the Q Hospital.

(vi) E-F was discharged from Q hospital into the care of the parents on 19th September 2018. A routine neonatal surgical review was fixed for 9th October 2018 at the P Hospital.

(vii) There were concerns in late September / early October 2018 about E-F's lack of weight gain in which Nurse RH was involved.

(viii) At 6.18 pm on 3rd October 2018 E-F was taken by the mother to the Q Hospital Emergency Department after "*a possible episode of stopping breathing*". He was normal on examination and discharged home, it being noted that the routine examination would be following shortly anyway.

(ix) At approximately 1.00 p.m. on 9th October 2018 the mother took E-F to the P Hospital for the routine follow up appointment. She was initially seen by the junior nurse, [redacted], and then, at about 1.55 p.m., she saw the paediatric surgical nurse, RH, who observed a bruise/mark on E-F's face (which, it is common ground, was first pointed out by the mother, who said she had first noticed it in the early evening of 7th October 2018). On further investigation, Nurse RH observed another mark on E-F's left thigh/buttock, which she thought at the time was a bruise, but was later diagnosed as being Mongolian blue spot. She followed the local safeguarding protocol and decided to refer E-F to the safeguarding team in the Q Hospital.

(x) At about 7.00 p.m. on 9th October 2018 E-F arrived under medical supervision at the Q Hospital, with a view to safeguarding work being carried out. He was kept in hospital overnight and further investigations were to be carried out on 10th October 2018. Social work staff (Nikki Pearce overnight and Mr Martin Newman from 9.00 a.m. onwards until mid-afternoon) were deployed to oversee the mother through the night and for the next day. Overnight and into the morning of 10th October 2018 E-F presented as a well baby. He is reported as having had a "*settled night*" and there were no alarming features observed on the 9.55 a.m. ward round on 10th October 2018 and he fed well that morning and was "*alert and active*".

(xi) At approximately 12.30 p.m. on 10th October 2018 E-F had an ophthalmology assessment. Prior to the assessment E-F received some dilating eye drops and was "*uncomplaining*". In the course of this assessment (which showed normal retinas) concerns arose that E-F's hands and his mouth *"intermittently looked blue*". There then followed a significant deterioration in E-F's presentation with multiple apnoeas (i.e. temporary cessations of breathing). Dr W was sufficiently concerned about E-F first to send him to theatre for intubation and stabilisation and then later in the day to transfer him to the P Paediatric Intensive Care Unit, where he remained until 15th October 2018.

(xii) In the course of the days between 10th and 15th October 2018 (and subsequently) CT and MRI scans and a full skeletal survey revealed significant serious brain and limb fracture injuries. Dr W considered that the totality of these symptoms was indicative of non-accidental injury. I shall discuss in detail below the nature of these injuries and who may have been responsible for them, how and when. The overall view of Dr UW, the Paediatric Consultant with responsibility for child safeguarding issues at Q Hospital was, however, that *"the bone injuries would be most consistent with non-accidental injury*". The overall view of Dr AR Consultant Paediatric Neurologist at P Hospital, was that the most likely explanation for the brain injuries was "*inflicted injury*". The local authority, of course, became involved. There was, for a while, a real fear that E-F might not survive the brain injuries. This fear turned out to be unjustified; but there

remains to this day a real fear that he will be significantly disabled in terms of cognitive functioning by his injuries.

(xiii) The local authority duly issued care proceedings on 16th October 2018. On 23rd October 2018 I made an Interim Care Order, authorising removal of E-F to foster care. He remains in foster care to this day.

(xiv) I have case managed the application since the outset of the proceedings. I made the case management decision to conduct a combined fact-finding and welfare hearing in this case. In doing this I agreed with and followed the thinking of Ryder LJ in *Re S* [2014] EWCA Civ 25, when he said:-

"the case raises yet again issues of case management relating to split hearings which ought to be addressed given that the social care context was missing from the consideration of the pool of perpetrators and from any consideration of factors that may have caused secondary facts to be found from which an inference of primary fact could have been made…It is by no means clear why it was thought appropriate to have a 'split hearing' where discrete facts are severed off from their welfare context. Unless the basis for such a decision is reasoned so that the inevitable delay is justified it will be wrong in principle in public law children proceedings. Even where it is asserted that delay will not be occasioned, the use of split hearings must be confined to those cases where there is a stark or discrete issue to be determined and an early conclusion on that issue will enable the substantive determination (i.e. whether a statutory order is necessary) to be made more expeditiously. The reasons for this are obvious: to remove consideration by the court of the background and contextual circumstances including factors that are relevant to the credibility of witnesses, the reliability of evidence and the section 1(3) CA 1989 welfare factors such as capability and risk, deprives the court of the very material (i.e. secondary facts) upon which findings as to primary fact and social welfare context are often based and tends to undermine the safety of the findings thereby made. It may also adversely impinge on the subsequent welfare and proportionality evaluations by the court as circumstances change and memories fade of the detail and nuances of the evidence that was given weeks or months before…It ought to be recollected that split hearings became fashionable as a means of expediting the most simple cases where there was only one factual issue to be decided and where the threshold for jurisdiction in section 31 CA 1989 would not be satisfied if a finding could not be made thereby concluding the proceedings…Over time, they also came to be used for the most complex medical causation cases where death or very serious medical issues had arisen and where an accurate medical diagnosis was integral to the future care of the child concerned. For almost all other cases, the procedure is inappropriate. The oft repeated but erroneous justification for them that a split hearing enables a social care assessment to be undertaken is simply poor social work and forensic practice. The justification comes from an era before the present Rules and Practice Directions came into force and can safely be discounted in public law children proceedings save in the most exceptional case…Social work

assessments are not contingent on facts being identified and found to the civil standard…Social work assessments are based upon their own professional methodology like any other form of professional risk assessment. In care cases, an appropriate social work assessment and a Cafcass analysis should be undertaken at the earliest possible opportunity to identify relevant background circumstances and context. In so far as it is necessary to express a risk formulation as a precursor to an analysis or a recommendation to the court, that can be done by basing the same on each of the alternative factual scenarios that the court is being asked to consider".

(xv) Accordingly I have conducted a combined fact-finding and welfare hearing. It does not, of course, follow from this that I must make final orders at this hearing. Here, as is often the case, some fact-finding outcomes may present a justification for further assessment and some may present a justification for a final disposal; but this case provides a good example of a situation where, in the way anticipated by Ryder LJ, the welfare assessments provide information which may be of assistance in the fact-finding part of the case and it would have been unhelpful for the court to be deprived of that information.

(xvi) I want to say that, as part of my case management of the hearing, I have fairly loosely imposed time limitations on cross-examination in this hearing; but overall I am satisfied that all parties have had more than adequate time both to present their own case and to answer those of the others and that this has been a fair hearing within the meaning of Article 6, ECHR.

Threshold

12. The first formal matter I have to decide in this judgment is whether or not the threshold criteria under Children Act 1989, section 31 are made out and, if so, on the basis of what facts. Accordingly I remind myself that this assessment must be made as of the date that the local authority intervened and first took protective measures, in this case 16th October 2018. I remind myself that section 31 reads:-

"(2) A court may only make a care order or a supervision order if it is satisfied –

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to – the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him;

(9) In this section -

…

'harm' means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-

treatment of another;
'development' means physical, intellectual, emotional, social or behavioural development;
'health' means physical or mental health; and
'ill-treatment' includes sexual abuse and forms of ill-treatment which are not physical."

Fact-finding Law

13. In considering the significance of these injuries in the context of care proceedings, and in the context of an analysis as to whether the injuries are accidental or non-accidental, I remind myself of another part of the judgment of Ryder LJ in *Re S* [2014] EWCA Civ 25:-

> *"The term 'non-accidental injury' may be a term of art used by clinicians as a shorthand and I make no criticism of its use but it is a 'catch-all' for everything that is not an accident. It is also a tautology: the true distinction is between an accident which is unexpected and unintentional and an injury which involves an element of wrong. That element of wrong may involve a lack of care and / or an intent of a greater or lesser degree that may amount to negligence, recklessness or deliberate infliction. While an analysis of that kind may be helpful to distinguish deliberate infliction from, say, negligence, it is unnecessary in any consideration of whether the threshold criteria are satisfied because what the statute requires is something different namely, findings of fact that at least satisfy the significant harm, attributability and objective standard of care elements of section 31(2)."*

14. For me to decide whether or not the above test is made out I need to make some specific determinations of a fact-finding nature. Accordingly, it is important for me to remind myself of the case law relevant to fact-finding. The law is helpfully summarised by Baker J (as he then was) in *Re IB and EB* [2014] EWHC 369 (Fam), including the following extracts from his judgment:-

"81. The law to be applied in care proceedings concerning allegations of child abuse is well-established.

82. The burden of proof rests on the local authority. It is the local authority that brings these proceedings and identifies the findings that they invite the court to make. Therefore, the burden of proving the allegations rests with them and to that extent the fact-finding component of care proceedings remains essentially adversarial.

83. Secondly, as conclusively established by the House of Lords in Re B [2008] *UKHL* 35*, the standard of proof is the balance of probabilities. If the local authority proves on the balance of probabilities that the injuries sustained by I and E were inflicted non-accidentally by one of her parents, this court will treat that fact as established*

and all future decisions concerning the children's future will be based on that finding. Equally, if the local authority fails to prove that the injuries sustained by I and E were inflicted non-accidentally by one of her parents, this court will disregard the allegation completely.

84. In this case, I have also had in mind that, in assessing whether or not a fact is proved to have been more probable than not,

> *"Common-sense, not law, requires that in deciding this question, regard should be had to whatever extent is appropriate to inherent probabilities," (per Lord Hoffman in* Re B *at paragraph 15)*

85. Third, findings of fact in these cases must be based on evidence. The court must be careful to avoid speculation, particularly in situations where there is a gap in the evidence. As Munby LJ (as he then was) observed in Re A (A Child) (Fact-finding Hearing: Speculation) [2011] EWCA Civ. 12*,*

> *"It is an elementary proposition that findings of fact must be based on evidence, including inferences that can be properly drawn from the evidence and not on suspicion or speculation."*

86. Fourth, when considering cases of suspected child abuse, the court "invariably surveys a wide canvas," per Dame Elizabeth Butler-Sloss, P, in *Re U, Re B (Se*rious Injury: Standard of Proof) *[2004] EWCA Civ. 567, and must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. As Dame Elizabeth observed in Re T* [2004] EWCA Civ.558*,*

> *"Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and exercise an overview of the totality of the evidence in order to come to the conclusion of whether the case put forward by the local authority has been made out to the appropriate standard of proof."*

87. Fifth, amongst the evidence received in this case, as is invariably the case in proceedings involving allegations of non-accidental head injury, is expert medical evidence from a variety of specialists. Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. In A *County Council v K D & L [2005] EWHC 144 (Fam) at paragraphs 39 and 44, Charles J observed,*

> *"It is important to remember (1) that the roles of the court and the expert are distinct and (2) it is the court that is in the position to weigh up the expert evidence against its findings on the other evidence. The judge must always remember that he or she is the person who makes the final decision."*

88. Sixth, in assessing the expert evidence I bear in mind that cases involving a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bringing their own expertise to bear on the problem, the court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others (see observations of Eleanor King J in Re S *[2009] EWHC 2115 Fam).*

89. Seventh, the evidence of the parents and any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them (see Re W and another (Non-accidental injury) [2003] FCR 346)

90. Eighth, it is common for witnesses in these cases to tell lies in the course of the investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear and distress, and the fact that a witness has lied about some matters does not mean that he or she has lied about everything (see R v Lucas [1981] QB 720)."

91. Ninth, as observed by Dame Elizabeth Butler-Sloss P in Re U, Re B*, supra*

"The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research would throw a light into corners that are at present dark."

92. This principle, inter alia, was drawn from the decision of the Court of Appeal in the criminal case of R v Cannings [2004] EWCA 1 Crim. Linked to it is the important point, emphasised in recent case law, of taking into account, to the extent that it is appropriate in any case, the possibility of the unknown cause. The possibility was articulated by Moses LJ in R v Henderson-Butler and Oyediran [2010] EWCA Crim. 126, and in the family jurisdiction by Hedley J in Re R (Care Proceedings: Causation) *[2011] EWHC 1715 (Fam):*

"there has to be factored into every case which concerns a discrete aetiology giving rise to significant harm, a consideration as to whether the cause is unknown. That affects neither the burden nor the standard of proof. It is simply a factor to be taken into account in deciding whether the causation advanced by the one shouldering the burden of proof is established on the balance of probabilities."

Later in the judgment at paragraph at paragraph 19 Mr Justice Hedley added this observation: "In my judgment a conclusion of unknown aetiology in respect of an infant represents neither a provision of professional nor forensic failure. It simply recognises that we still have much to learn and it also recognises that it is dangerous and wrong to infer non-accidental injury merely from the absence of any other understood mechanism. Maybe it simply represents a general acknowledgement that we are fearfully and wonderfully made."

93. Finally, when seeking to identify the perpetrators of non-accidental injuries the test of whether a particular person is in the pool of possible perpetrators is whether there is a likelihood or a real possibility that he or she was the perpetrator (see North Yorkshire County Council v SA *[2003] 2 FLR 849. In order to make a finding that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injury to be identified both in the public interest and in the interest of the child, although where it is impossible for a judge to find on the balance of probabilities, for example that Parent A rather than Parent B caused the injury, then neither can be excluded from the pool and the judge should not strain to do so (see Re D (Children) [2009] 2 FLR 668, Re SB (Children) [2010] 1 FLR*

1161).”

15. To this very comprehensive analysis, I want only to add these thoughts, which may be pertinent and helpful in the present case:-

(i) In *Lancashire County Council v the Children* [2014] EWHC 3 (Fam) Peter Jackson J, as he then was, commented:-

“To these matters, I would only add that in cases where repeated accounts are given of events surrounding injury and death, the court must think carefully about the significance or otherwise of any reported discrepancies. They may arise for a number of reasons. One possibility is of course that they are lies designed to hide culpability. Another is that they are lies told for other reasons. Further possibilities include faulty recollection or confusion at times of stress or when the importance of accuracy is not fully appreciated, or there may be inaccuracy or mistake in the record-keeping or recollection of the person hearing and relaying the account. The possible effects of delay and repeated questioning upon memory should also be considered, as should the effect on one person of hearing accounts given by others. As memory fades, a desire to iron out wrinkles may not be unnatural – a process that might inelegantly be described as "story-creep" may occur without any necessary inference of bad faith.”

(ii) In *Re B* [2019] EWCA Civ 575 Peter Jackson LJ commented:-

“The concept of the pool of perpetrators … does not alter the general rule on the burden of proof. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown. This is why it is always misleading to refer to ‘exclusion from the pool’: see Re S-B (Children) [2009] UKSC 17 @ [43]. Approaching matters in that way risks, as Baroness Hale said, reversing the burden of proof. To guard against that risk…The court should first consider whether there is a ‘list’ of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so: Re D (Children) [2009] EWCA Civ 472 at [12]. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is should A or B or C be placed into the ‘pool’…Likewise, it can be seen that the concept of a pool of perpetrators as a permissible means of satisfying the threshold was forged in cases concerning individuals who were ‘carers’. In Lancashire, the condition was interpreted to include non-parent carers. It was somewhat widened in North Yorkshire at [26] to include ‘people with access to the child’ who might have caused injury. If that was an extension, it was a principled one. But at all events, the extension does not stretch to “anyone who had even a fleeting contact with the child in

circumstances where there was the opportunity to cause injuries": North Yorkshire at [25]. Nor does it extend to harm caused by someone outside the home or family unless it would have been reasonable to expect a parent to have prevented it: S-B at [40]."

(iii) I note and adopt the following extract from Mr Garrido's submissions:-

"In Re L-W (Children) [2019] EWCA Civ 159, the mother of three children (L, R, O) appealed a decision that she had failed to protect L from physical abuse, and R and O from the risk of physical abuse, at the hands of her cohabitee (the father of R and O). At first instance, the judge had found that the failure to protect stemmed from mother permitting her cohabitee to care for the children alone when she knew or ought to have known that he was a risk: "she closed her mind to the possibility that he could have caused L's injury and continued the relationship; she was aware of his history of violence and aggression". In allowing the appeal, King LJ said: "Any Court conducting a Finding of Fact Hearing should be alert to the danger of such a serious finding [of failure to protect] becoming 'a bolt on' to the central issue of perpetration or of falling into the trap of assuming too easily that, if a person was living in the same household as the perpetrator, such a finding is almost inevitable. As Aitkens LJ observed in Re J (A Child) [2015] EWCA Civ 222, "nearly all parents will be imperfect in some way or another".

Fact-finding in this case

16. I now return to assessing the facts of this case against these legal propositions.

17. The local authority have sought to prove that E-F suffered the following injuries within the following identified timescales:-

(i) He sustained a 5mm x 5mm **bruise** to his face, on his right cheek. The medical evidence cannot date the bruise accurately, but it does not contradict the history given by the mother of the bruise being first seen on 7th October 2018.

(ii) On a date between 27th September 2018 and 11th October 2018, he suffered the following **bone fractures**:-

(a) a metaphyseal fracture of the right distal femora;

(b) a metaphyseal fracture of the left distal femora; and

(c) a metaphyseal fracture of the distal right tibia.

(iii) He sustained significant and severe **brain injuries**, which are summarised (uncontroversially) in the local authority's schedule of findings sought as:-

(a) multi-focal bleeding on the surface of the brain on both sides and within the brain tissue;

(b) subdural fluid over both cerebral hemispheres and in the posterior fossa locations in the brain;

(c) multiple subarachnoid haemorrhages;

(d) haemorrhagic diffuse axonal injury; and

(e) multiple areas of haemhorragic brain contusions associated with clefts.

The radiological evidence suggests that these injuries were caused between 30th September 2018 and 11th October 2018, more likely to be from 3rd October onwards.

18. The fact that these injuries were sustained in the suggested timescales was amply and clearly and unanimously established in the medical evidence and was not challenged by any of the parties and I have little difficulty in finding that these injuries occurred within the suggested timescales.

19. I next turn to the question of mechanism:-

(i) Dr Cartlidge has carefully examined and summarised the evidence relating to the **bruise**. He has ruled out any connective tissue or clotting/bleeding disorders. He has ruled out the possibility that the injury was self-sustained, given E-F's age at the time. Taking into account out the parents' accounts of events in the relevant period he has ruled out the possibility of a non-witnessed accident and he has also ruled out the bottle feeding mechanism suggested by the mother (on the latter I have heard some evidence as to how this suggestion arose, in particular about the conversations between the mother and Nurse H on this subject, and I have concluded that there was nothing in this to cause me to doubt Dr Cartlidge's conclusion – in any event neither parent said that they had actually used the theoretical bottle feeding mechanism which was the subject of this hypothesis). In his oral evidence he convincingly rejected the father's suggestion that the bruise could have been caused by lying on a plastic dummy. Dr Cartlidge's conclusion is that "*the bruise was caused non-accidentally…pinching or direct impact are frequent mechanisms for such a bruise*". I regard this conclusion as being compelling and reliable and I accept it.

(ii) Dr Cartlidge has summarised the medical evidence on the likely mechanism for the **bone fractures** and concluded that they were, prima facie, likely to have been caused by "*a yanking or twisting type of force on the joint (i.e. both knees and right ankle) adjacent to each*

fracture…normal infant bones are resilient and do not fracture without the application of an obviously excessive force". He concluded that it was unlikely that the bone fractures were caused by a shaking injury. He ruled out any birth-related injury. He felt that it was most unlikely that these injuries were caused by any medical activity such as inserting cannulas. He ruled out the possibility that the injury was self-sustained, given E-F age at the time. Taking into account out the parents' accounts of events in the relevant period he has ruled out the possibility of a non-witnessed accident. He considered the suggestion by the father that gentle and non-painful 'bicycling' movements of E-F's leg, said to have been recommended by Nurse RH (although she did not accept that she had made this recommendation), could have caused the injury, convincingly concluding "*the movements would only cause a yanking or twisting force on the knees and right ankle of a sufficient magnitude to cause fractures if they were undertaken using forces that were recognisably excessive and obviously liable to be painful for E-F*". He ruled out osteogenesis imperfecta, rickets, Copper or Vitamin C deficiency, osteopenia, and temporary brittle bone condition as being a cause of or having contributed to these injuries. Having ruled out all these alternatives he concluded that his prima facie theory was likely to be correct and that these injuries were inflicted non-accidentally by a yanking or twisting mechanism involving obviously excessive force. I regard this conclusion as being compelling and reliable and I accept it.

(iii) The mechanism for the **brain injuries** has been less straightforward. I have the following comments on this:-

(a) Setting aside for one moment the issue of the timing of the appearance of full symptomatology, the medical evidence is clear. The prima facie hypothesis, as summarised by Dr Cartlidge, is that the injuries described were likely to have been caused by one or more "*episodes of shaking, with or without an impact with a semi-yielding object….in shaking, a child is often grasped round the chest and shaken…shaking the child and/or hitting the child's head on a firm object leads to marked acceleration-deceleration forces*". None of the other experts significantly departed from this basic statement.

(b) In his report Dr Cartlidge ruled out any birth-related injury. He ruled out cerebral or cranial malformation, clotting/coagulation disorder, Ehlers Danlos Syndrome, glutaric aciduria, sodium levels and hypernatraemia as being causes of these injuries. He advised that the absence of retinal haemorrhages did not undermine the prima facie hypothesis.

(c) Dr Cartlidge considered the positive explanations for these injuries proffered by the parents. He concluded: "*The father recalls bouncing E-F gently whilst supporting his head with his fingers. I do not think that the described actions would generate the acceleration-deceleration forces that I perceive*

necessary to cause the intercranial injuries. In my opinion the the actions of the father as currently described did not cause the intercranial injuries." There is no expert evidence to contradict this opinion and I accept it.

(d) The substantive attack on the prima facie hypothesis comes from the fact that we know that, for the most part, E-F presented as a well baby until the collapse which occurred from about 12.30 p.m. onwards on 10th October 2018. The brain injuries described above would, in most cases, result in such a collapse soon after the event which caused them; but he had by then been in hospital, under the supervision of medical and social work staff, for about 24 hours leading up to the collapse and, at that time, he was undergoing an ophthalmic examination. These facts caused the experts to ponder mechanism in greater detail then they might normally have done. As Dr Cartlidge said to me: "*Nothing fits comfortably*". Professor Stivaros cautioned himself against "*trying to make everything tidy when it isn't*".

(e) As Mr Garrido has put it in his excellent submissions:-

"*It is no surprise to have it repeated in this case that the conventional approach to the timing of a head injury is to look back from the scan to the last time that the baby was well, at or around the time of collapse. For E-F, that time is undoubtedly about noon on 10 October 2018 when he was at Q Hospital and taken for an ophthalmic examination. As Dr Cartlidge agreed in his oral evidence, had E-F not been in hospital, he would have said that it is more likely than not that trauma occurred shortly before 1.30pm on 10 October 2018, being the time when E-F became most obviously unwell. Given that this is the conventional approach, the court should be cautious, we submit reluctant, to deviate from the norm in an attempt to make an alternative, much more unlikely and controversial theory fit the facts….This is a paradigm case of having reached the limits of medical knowledge, and the proper consequence of such ignorance is not a conclusion that the parents, or either of them, must have been responsible when unsupervised between 3 and 9 October. Much more likely is an unexplained event at, and/or reaction to, the ophthalmic examination at lunchtime on 10 October. It is at this juncture that the judgment of Hedley J in Re R… bears repetition: "In my judgment a conclusion of unknown aetiology in respect of an infant represents neither a provision of professional nor forensic failure. It simply recognises that we still have much to learn and it also recognises that it is dangerous and wrong to infer non-accidental injury merely from the absence of any other understood mechanism. Maybe it simply represents a general acknowledgement that we are fearfully and wonderfully made*."

(f) As Ms Crowley put it in her powerful submissions:-

"The experts shy away from that conclusion, considering it to be unlikely. It is considered unlikely because it renders it virtually impossible that either of the parents was the perpetrator, given that they were being supervised from the time of E-F's admission as a result of child protection procedures which had been initiated because of concerns about some bruising seen on him during a routine medical check. It also raises the unpalatable possibility of an undisclosed accident, or else that it is impossible to ascertain what is the cause beyond recognising it to be of traumatic origin. That has driven Dr Cartlidge to search for an alternative hypothesis. He proposed to the other experts the idea that rather than one traumatic severe event being cause of EF's injuries, there might have been a series of less severe but similar injuries, which had a cumulative effect, resulting in his eventual collapse during the afternoon of 10.10. He acknowledged that this hypothesis itself had some irreconcilable features, but eventually, given the choice between the two possible explanations they had identified, namely, a single trauma which is likely to have occurred between the last time EF was seen to be well, and his collapse, or a series of less severe but similar traumas, they agreed that the latter was more likely. We submit that that approach is an over simplification. Having identified two possibilities, it is not then simply a matter of choosing which of the two is more likely than the other. It is possible to have two possibilities, neither or which is likely, and when that occurs, the right outcome is to conclude that the explanation is unascertainable. For reasons developed below, that should be the outcome here.

(g) I have given careful thought to the parents' submissions on this and weighed them in the context of all the evidence. In the end my task is to decide whether the prima facie hypothesis on mechanism has been established by the local authority on a balance of probabilities. I am satisfied that it has. With respect to Ms Crowley's criticism, Dr Cartlidge's analysis did not disregard the possibility of an unknown aetiology and simply select the most likely of two unlikely scenarios. For me, in his oral and written evidence, he carried out a proper analysis, by looking at all the possibilities and weighing them and advising the court on his overall view. He has considered whether anything which happened in the course of or about the time of the ophthalmic investigation on 10th October 2018 could have caused the brain injuries. He made it clear that the procedures involved in ophthalmic examination are very common and are not associated with brain injuries and could think of no reason why they could be (and the other experts who expressed a view

on this all agreed with this without hesitation). In my view Mr Garrido is wrong to assert that "*this is a paradigm case of having reached the limits of medical knowledge*". In analysing whether something could have happened at that time to cause the injuries he said: "*the following features are against such a scenario. It is not likely that the ophthalmic examination was done by one person without the assistance of others. Hence, there would need to have been collusion if this is the explanation. The bruise to the cheek would be unexplained. The metaphyseal fractures would be unexplained, unless the person / people undertaking the ophthalmic examination also inflicted these fractures".* In my view it is highly unlikely, almost inconceivable, that this combination of injuries were caused by an unknown aetiology.

(h) Ms Zahibi's very helpful submissions included the comment: *"Dr Cartlidge discounted the theory that the trauma required to cause the brain injuries occurred in hospital. In any event there is no evidence that this was even a possibility and the parents did not put this to any of the treating doctors*". I agree with this submission.

(i) Dr Cartlidge also analysed this possibility – that "*E-F sustained several episodes of inflicted head injury, each individually causing non-critical symptomatology, but cumulatively resulting in the extensive injuries*". He noted that additional features in favour of this interpretation were the events of 3rd October 2018, the inadequate weight gain between 3rd and 9th October 2018, the bruise and the metaphyseal fractures. He told me that a delayed reaction after an accumulation of inflicted traumas was "*relatively uncommon*" but not unknown. The experts discussed this at some length at their joint meeting on 22nd May 2019 and, perhaps with varying degrees of enthusiasm, they united around the proposition of serial shakes over the time period identified ("*clinically worsened from 9th into 10th and that clinical worsening has been secondary to a trauma that's occurred within the timespan…from the image*") was the likely explanation, in Dr Cartlidge's words that the *"accumulation plus the eye examination tipped him over the edge and it all came to light and ultimately the secondary effects of the injuries, the neurotransmitter releases led him being very unwell*".

(j) It was suggested by the mother that E-F may have caused his brain injuries by "*thrashing his head from side to side*" just before the ophthalmic examination on 10th October 2018. The mother's version of the facts of this was not supported by Mr Newman, who was present at the relevant time, and I prefer his version of this event than the mother's which was in my view very much exaggerated. Further, Dr Cartlidge was clear that E-

F would not have been strong enough to cause himself damage in this way and I therefore rule this out as a possible cause.

(k) Dr Cartlidge's view of the force needed to cause the brain injuries is that it would "*not be sustained during normal infant care...the force needed would be obviously excessive to a normally competent and responsible person*".

(l) Having considered all of these matters I have reached the conclusion that, on a balance of probabilities, the perpetrator has caused E-F's brain injuries by a series of episodes of shaking, with or without an impact with a semi-yielding object, with obviously excessive force leading to marked acceleration-deceleration forces.

20. It follows that the perpetrator (or perpetrators) has caused all the injuries described above in the periods described above and with the mechanisms described above. In the context of the above-described events it is likely, on a balance of probabilities, that these incidents were the result of episodes of loss of temper by the perpetrator with E-F, in all probability associated with E-F crying and the perpetrator experiencing frustration and tiredness. In this context, it is likely that the perpetrator's actions were deliberate, but reckless as to the consequences for E-F.

21. I now turn to the identification of a perpetrator or perpetrators, or a pool of possible interpreters. Following *Re B (supra)*, I shall start by first considering *"whether there is a 'list' of people who had the opportunity to cause the injury*". In the context of the present case, the answer to this question is clear and uncontroversial. The list consists of the mother and the father. Both had sole care at some point in the relevant period. There is nobody else who could credibly be said to have had the opportunity to cause the injuries and nobody has suggested otherwise.

22. Next, I need to consider the following: "*It should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so…Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is should A or B or C be placed into the 'pool'".*

23. Both the mother and the father vehemently deny that they are the perpetrator. Neither identifies any third party perpetrator and both, in each case with a notable degree of reluctance, say that since they are not responsible the other one must be. I have given careful consideration to all the evidence in the case, stepping back and assessing each piece of evidence against all the other evidence. I have listened carefully to both the mother and the father in the witness box, being examined on their written statements and on the other material in the case, including the text and What's App messages. I have looked carefully at all the evidence which might point in favour of or against my

reaching the conclusion that either the mother or the father was the perpetrator, or that they are both perpetrators or that there is a real possibility that either or both of them are perpetrators. In the end **I have reached the conclusion that I cannot identify either the mother or the father as the perpetrator, but that both of them fall within the pool of perpetrators, there being in each case a real possibility that they are the perpetrator.** In reaching this conclusion the following factors have, for me, merited particular deliberation:-

(i) The closing submissions from the local authority includes the contention: *"The local authority submits that there is a real possibility that either of these parents could have caused the injuries to E-F. There is no evidence which suggests that the father is any more likely than the mother to have injured E-F. Both had the opportunity to do so as both had sole care of E-F. It is of course accepted that the father was left on his own with E-F on at least 3 occasions when the mother went out. But then there is evidence of the mother caring for E-F during the night shift and getting stressed with him when the father was supposed to be caring for him. And the mother had sole care of E-F during the day when the father was asleep*". I agree with this submission.

(ii) As the local authority has suggested, both the mother and the father had sole care for E-F at different times in the target period and thus had the opportunity to cause the injuries.

(iii) I have described above the respective backgrounds of the parents. In so far as past behaviour can be a predictor of current behaviour, and it is important not to attach too much weight to it, but it goes into the mix as a potential indicator of propensity, both the mother and the father have on their records a troubled youth and in this respect it is really quite difficult to differentiate the two of them. Both have been to prison. Both have engaged in violent and aggressive behaviour to others. As I shall develop further below, both have contributed to an atmosphere of stress and occasional violence in the relationship. Both have suffered from anxiety and depression, been prescribed Mirtazapine and stopped taking it by their own, rather than any doctor's, decision or recommendation. There is some force in Ms Crowley's submission:-

"*The mother now seeks to build up a case against the father by pointing to occasions when she says he has been physically violent or otherwise abusive to her. Her case therefore being one of propensity, as there is no direct evidence that the father has inflicted any harm upon E-F . A deeper examination of the wider evidence reveals that the mother has herself demonstrated a propensity to violence, which should not be ignored".*

(iv) Since both parents have denied being the perpetrator of E-F's injuries I have to make an assessment of the reliability of their evidence to me. I have had the benefit in this case of knowing a good deal about the background of each parent and of seeing them both cross-examined at some length by skilful advocates. My clear impression is that neither parent was a reliable and honest witness. In the mother's case her long

criminal record for past offences involving dishonesty strengthens that impression, but I place greater weight on my own contemporaneous impression, in particular the non-disclosure of some important matters, which I discuss further below. In the father's case I was very struck by his evasiveness in answering detailed questions, in particular when Counsel were trying to engage him on important details of the events in early October 2018, his not always credible answer very often being that he simply could not remember any details. Overall I am inclined to be very cautious about accepting the honesty and reliability of either of them. I do not consider that either parent gave me an honest account of what really happened in the crucial period.

(v) Ms Zabihi's closing submissions include the following observations on this subject:-

"It's difficult for the court to give greater weight to either of these parents' evidence as they clearly have both lied and/or minimised what was going on in the home during this crucial period. They both failed to provide crucial information which would have assisted the local authority and the police in the investigation shortly after the injuries occurred. Both have lied and/or minimised how E-F was during this 11 day period. Both told the police and the local authority that E-F was a calm and perfect baby when this clearly wasn't true. Both failed to disclose relevant information about how E-F was in that 11 day period which could have assisted the medical professionals with the information gathering exercise….It is absolutely clear that had the court not received the telephone records then the parents would have maintained a wholly false picture of home life and care of E-F. They would have maintained that the relationship post marriage was much better and post E-F's birth there were no problems at all. They would have continued to maintain that E-F was a well settled, contented baby who'd caused them no stress and was easy to look after. They would have deliberately misled the court. No satisfactory response was given by either of the parents as to why they failed to be honest right from the start. The mother's assertion that she was ashamed to disclosed this only serves to reinforce the concern that she was unable to prioritise E-F's safety ahead of her own needs."

Having looked carefully about how both the mother and the father presented themselves to the police and to the local authority, and indeed to the court, and then comparing that to the picture which emerged from an analysis of the text and What's App messages, I take the view that this criticism is entirely justified.

(vi) I note that in her statement dated 21st November 2018 the mother said: *"I have been married to R since 22nd July 2017 and I confirm there have never been any domestic violence incidents between us…we do not have a volatile relationship*". She said to the police on 13th October 2018 that she had a '*good relationship'* with the father before E-F came along. A similar picture emerges from what the father said to Mr Freeson in his parenting assessment, to the effect that there had been no domestic abuse since the

marriage and that "*he and the mother are each other's rock*". A similar picture also in his police interview on 13th October 2018: *"Q. Is violence ever threatened or used?*
A. No.
Q. Yeah? Any domestic violence?
A. No.
Q. No?
A. (Shakes head)
Q. Okay. So you'd describe your relationship as good then, from what you're saying?
A. Yeah.
Q. Okay. And what about the- how would you describe your relationship leading up to your son being admitted to hospital recently? Has it still been good or---
A. Yes.
Q. ---have there been issues?
A. Everything's- if anything it's been better since we've had E-F
Q. Oh right. Okay.
A. We argue less".

(vii) Yet a full reading of the text and What's App messages (which emerged fairly late in the day in these proceedings) presents a very different picture. It is perfectly clear that the relationship between the parents was volatile and at times aggressive with episodes of physical violence and injuries being sustained. It is not only the father who was aggressive, the mother frequently was as well. The picture painted by the text and What's App messages is generally troubling, both in what it tells us about the parents' relationship, and in terms of what it tells us about their misleading reporting, and also in what it tells us about the tension and stress in the home, and this continued in the period after E-F was discharged home on 19th September 2018 and covers the period until 9th October 2018, when E-F was accommodated in hospital.

(viii) Mr Freeson's report contains this statement:-

"before filing this assessment, police files containing unedited screenshots of text message communication between the parents were made available for viewing. This material amounted to several thousand pages containing tens of thousands of individual messages. Insufficient time has been available to analyse the content in full detail. However, my precursory search finds evidence of domestic violence between the couple perpetrated by R during the pregnancy (see messages of 18/06/2018 describing started as 'play fighting', 05/07/2018, 19/07/2018, 21/07/2018, 12/08/2018). There are frequent exchanges wherein L bitterly castigates R's commitment to the relationship and vitriolic language between the couple then ensues, frequently punctuated with expressions of intent to end the relationship with immediate effect".

Further, Ms Lippman's submissions include this observation:-

"In her evidence however the Guardian expressed her concerns arising from the medical evidence and her additional serious concerns arising from hearing more detail in the evidence given to the court in respect of the parent's abusive relationship. Without the voluminous mobile phone records disclosed by the police in May this year, it is submitted on behalf of the Guardian that the true situation in the home at the time E-F sustained his injuries and the longstanding instability and volatility in the parents relationship would never have been known as neither parent had been open and honest regarding this in statements to the police, statements to this court, in their parenting assessment with the social worker or in conversations with the Guardian herself. Whether this failure to accurately report the state of their relationship arose from deliberate lying, to cover up something that had happened or, as implied in evidence, because it was not perceived as abuse or because of shame and embarrassment, as the mother said, it is considered by the Guardian to amount to a serious risk to E-F of physical and emotional harm."

I agree with both of them on this. There are too many examples of this to quote in full, but the following selection gives a flavour of what was happening in the relationship of the mother and the father before and during their period of care of E-F:-

Author	**Date**	**Text or What's app message**
	2017	
Father	21st January	Funny how you think its acceptable to kick me in the head and think I'm not going to retaliate
Mother	21st January	You smashed me in the mouth giving me a fat lip…I didn't mean to kick you that hard…but that said don't give you the right to punch me in the face that hard does it. Nope…now go away
Mother	21st February	Punched me in the side of the head and bit me…rather be on my own and hurt than let a man hit me…I'm out…you keep saying sorry but it never changes (accompanied by a photograph of the mother's injuries)
Mother	30th March	I can't let you punch me like that RG n stay
Father	24th May	I'm a woman beating fat cunt
Mother	23rd September	You think your punches are light do you and ripping my skin off makes you a man does it. Touch me again and I promise it won't end well…Get off making women bleed do you (accompanied by a photograph of the mother's injuries)
Mother	15th November	You keep hitting my belly and pulling my fat (accompanied by a photograph of the mother's injuries)

Mother	7th December	You don't understand how much you upset me when you keep hurting me, hitting my head
	2018	
Mother	2nd May	I got used to being somebody's punch bag and daily insults
Mother	23rd May	You don't understand the impact you have on my bones when you hurt them….they hurt for days…most women wake up to a hug, I get a twisted nipple or a dead leg…you can actually fuck off. I'm done
Mother	18th June	You're a joke…hitting me like that. I want you out R, now start packing…If you didn't hit a pregnant woman you wouldn't be in the situation would you…now are you going to leave or am I?
Father	25th August	Little shit needs a beating
Father	7th September	You just use bullshit to make up your own fantasy FFS be real you cake cunt…you'll never be the woman I fell for…you hate me right…fuck you and fuck the time
Mother	7th September	Fuck off. I don't need your shit as well as everything else.
Father	19th September	I don't beat the shit out of you for fun
Mother	22nd September	Just lost my head with R. I can see I'll smash the Xbox up before long…I've still been waking up when I hear the baby cry
Father	25th September	I'm going to be sick with a really bad headache got him screaming in my face…then I got your bullshit on top of that…I just want to leave…you are so fucking lucky to have a man like me that…takes all this shit from you"
Mother	25th September	I'm fucked. I need sleep
Father	25th September	You pushed me L so I pushed back. Simple really.
Mother	25th September	At least you had sleep. I anit…
Mother	27th September	Find someone else to make you happy
Mother	28th September	You're a joke. Can't even leave your own game alone for half an hour to spend time with me…Go home with ya mum tomorrow cause I can't be fucked no more
Mother	29th September	See what I mean. You act like a pig.
Mother	30th September	You been talking to me like a cunt since

		you rolled out of bed at 5 this evening…I'm not a dosser for you or no one. You got legs, Use'm….bullshit…we anit never guna work…getting physical with your wife 5 weeks after what happened is funny yeah…now can you leave my home please.
Father	30th September	You are pathetic L…Go ahead I don't really care…do you want me to just leave my son on his own
Father	1st October	Feel like a proper cunt. Scratched his winkle by accident…Hello my little shit
Mother	1st October	Why start for fuck's sake R. Can we not have a normal day
Mother	3rd October	I can see he has stressed you out
Father	3rd October	Just want you to understand and not get on my case every second. Not a lot to ask
Mother	3rd October	Little shits awake….They need to sort our baby out. Cause its like having a different child. He's going to sleep for like 5/10 min then crying
Father	3rd October	Words babe. I need actions…little shit anyway. I'll leave you to it.
Mother	4th October	I want to be on my own R. You talk to me like shit….I swear if your on the Xbox rather than try to talk then that says it all…I can't stay in a relationship I'm unhappy in. Its not fair on you me or the baby
Mother	5th October	You never take on what's said just make your own shit up…I was gone just under 2 hours. I settled him before I left. You been on your Xbox with ya mates…Your losing me R. I'm giving us till Christmas if we can't fix it by then…You started on me the second I walked in the door.
Mother	5th October	Don't like the way he's panting. Are you asleep?
Mother	6th October	I'm so fucking angry…I want to go our own ways…I'm not living like that…I'm done. Seeing that and your lies is enough….We are over and you need to work out what your doing from here on
Father	6th October	I can't be fucked with this shit, L. Sick of you being up old shit for no reason….you stupid hothead always on some bullshit…Can't you see I'm sick of this shit, its everyday…what do you actually get from this for fucks sake

Mother	7th October	Why's he sideways?
Father	7th October	I put him back the same
Mother	7th October	He moved himself then the little shit…I feel like shit…Don't like the way his chest sounds
Father	7th October	LOL He is a little shit
Mother	8th October	Baby's stressed me out so much. Wish I could take it all away. I can't sleep

(ix) The mother was asked why she had not given an accurate picture of the situation. Her reply was: "*I found it embarrassing and shameful. I didn't see it as a domestically violent relationship at the time. I was being dumb. I was in love and I didn't see it for what it was….I didn't lie in my statement on purpose. I was in denial to myself until I read (the messages) back and reminded myself*." This is a situation where I should give myself a *Lucas* direction. I am, of course, cognisant from experience in this area of work that victims of violence, particularly female victims, can mislead observers for the reasons expressed and I have anxiously asked myself whether this provides an adequate explanation for the misleading presentation by the mother. In the end, on the facts of this case, I cannot lightly disregard this presentation in the way the mother asks me to do so. She is very often the aggressor in the arguments they had and I am left with the impression that the mother's dominant motive for deliberately misrepresenting the position was a wish to avoid adverse findings of fact and not any feeling of embarrassment or shame.

(x) The father was asked why he had not given an accurate picture of the situation. His reply was: "*I didn't tell anybody about what was happening in our relationship. I wasn't trying to deceive anyone, but I agree it is a form of deceit. I didn't see it as violence. The majority of times it was playful, L can get quite dramatic sometimes*".

(xi) Another aspect of this is the way in which the parents' separation has been dealt with. It has come very late in the day and in a way which seems to have a significant dose of litigation strategy attached to it, and I share the sentiments expressed in Ms Lippman's thoughtful submissions:-

"From their evidence both parents still remain reluctant to say that, though each is certain they did nothing, the injuries were definitely caused by the other. Though they both say as much in their evidence to the court and the mother in her statement of 11th June, the Guardian submits that they both remain to some extent invested in their relationship".

I bear in mind that the final pieces of evidence were not in place until the last few weeks before the hearing, and I do not entirely discount the dilemma which an innocent parent in these circumstances must face, perhaps hoping that some unexpected development in the medical evidence will clear everything away, but there has been very little in the course of this case which would have given an objective observer any real thought that this was likely to be the case here and, given the level of

toxicity in the relationship prior to 9th October 2018, it is reasonable to suggest that an innocent parent would have reacted rather differently than either the mother or the father actually did.

24. These facts having been found, plainly the threshold criteria under Children Act 1989, section 31 were passed at the requisite date.

25. I now turn to the question of disposal.

Two Developments

26. Although the hearing I have just conducted was intended to be a combined fact-finding and welfare disposal hearing, the plan to make final orders was undermined by two developments, both of which give might the court more good options for E-F and have therefore required the court to postpone the making of final orders in this case:-

    (i) First, the father's sister, MG, came forward and offered herself as a carer for E-F. She has given an explanation for the delay in coming forward and has made a good initial impression on the local authority. In the words of one of the assessing social workers, in her undated Viability Report on Ms MG:-

    "MG was being SGO assessed by Y Children's Services in respect of two unrelated children when her brother – E-F's father – spoke to her about whether she would consider caring for E-F permanently as per the above. She told me that she would have come forward much earlier in the proceedings, and dropped out of
    Y's assessment, had she been fully aware of how strong a possibility adoption might otherwise be for E-F. As it is, she updated me on 08/05/2019 regarding the Y's SGO assessment. She and the Y social worker spoke about developments in respect of E-F earlier this week. MG made it clear that her priority now was to be considered as carer for E-F over and above her friend's children… MG previously understood (indirectly via her mother) that E-F's parents anticipated fresh medical tests that would demonstrate alternative explanations for the injuries. In fact, all the medical evidence points at non-accidental causes. I asked MG if she had a view of her own. She said she could never assert with confidence that neither R nor L had been responsible. She had to accept it was a possibility even without knowing all the evidence first-hand yet. Therefore, MG's intention would be to quit her work and look after E-F full-time if he came into her care. She is financially secure, with equity in the five-bed home…On the basis of the evidence in the Local Authority's accompanying statement, the Local Authority proposes that E-F should remain in the current foster placement under a full Care Order. This will enable the Local Authority to complete a full Special Guardianship[the

Local Authority proposes that E-F should remain in the current foster placement under a full Care Order. This will enable the Local Authority to complete a full Special Guardianship] assessment of the paternal aunt MG while E-F continues to be safely cared for as a Looked After Child… I believe there is further SGO potential in paternal aunt's proposal that requires full assessment as quickly as can be progressed, particularly given the signs that adoption is likely to be the only alternative (and the need therefore to satisfy ADM that all family avenues have been explored rigorously)."

I agree that the full report on Ms MG should be carried out although under an interim care order rather than a full care order. My provisional view is that she may well be a good candidate to be carer for E-F, but I await the detailed assessment.

(ii) Secondly, I heard evidence from Ms FM and Mr TM (on how they would very much like to be carers for E-F) and also evidence from Ms Elaine Ford (on the progress of her assessment of them). The local authority view had been, at the outset of the proceedings, that Ms FM and Mr TM had not adequately engaged in the assessment process to be given credence as potential carers for E-F. The local authority's view was that they were difficult about agreeing assessment dates and they failed to cooperate with the obtaining of DBS checks and references. In this I felt they had a degree of justification as Ms FM and Mr TM did not really help themselves in the course of the assessment and I don't criticise the local authority's initial view. In the words of Ms Ford's report:-

"Mr and Mrs M have voiced their love and commitment to EFG.. Despite this they have struggled to prioritise the time to complete the assessment and have been unable to provide me the contact details of any personal references…I am not able to recommend that Mr and Mrs M be granted an SGO in respect of EFG. I can confirm I have advised Mr and Mrs M of their right to seek legal advice and to challenge this assessment."

As things developed through the hearing, however, and as the failures of engagement were explored in the evidence, the local authority's position rather softened and by the end of the evidence it was agreed that it would be appropriate to complete the assessment before any final orders are made. I was and am sympathetic to the softened view. I felt that there was something in the explanation for non-cooperation and, perhaps even more importantly, I was struck by what appeared to be a genuine commitment to care for E-F by people who had a credible case for doing so. My provisional view is that, if they can cooperate with the assessment as now promised, they may well be good candidates to be carers for E-F, but I await the detailed assessment.

(iii) The local authority's final care plan had been that they would complete the assessment of Ms MG and, if that was favourable they would be likely to be recommending a Special Guardianship Order in her favour, otherwise they would make a Placement Order application. This plan will inevitably

develop as these assessments are completed.

Law on Welfare Disposal

27. I remind myself in considering the children's welfare I should keep in mind all the factors under Children Act 1989, section 1 and they are as follows.

(1) That when a court determines any question with respect to the upbringing of a child the child's welfare shall be the court's paramount consideration
(2) That in any proceedings in which any question arises the court should have regard to the general principle that delay in determining the question is likely to prejudice the welfare of a child
(3) And that in the circumstances the court should have regard in particular to the welfare checklist:
(a) The ascertainable wishes and feelings of the child concerned (Considered in the light of his age and understanding);
(b) His physical, emotional and educational needs;
(c) The likely effect on him of any change in his circumstances;
(d) His age, sex, background and any characteristics of his which the court considers relevant;
(e) Any harm which he has suffered or is at risk of suffering;
(f) How capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g). The range of powers available to the court under the Act in the proceedings in question."

28. I also need to remind myself of the provisions of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms:

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

29. In so far as I am considering the children's welfare in the context of a decision whether or not to make a Placement Order I should keep in mind all the matters of Section 1 of the Adoption and Children Act 2002; but that does not arise at this stage and is unlikely to arise if either Ms MG or Ms and Mr M receives a favourable report.

30. I also remind myself of a number of matters which are underlined in the then President's judgment in *Re B-S* (Children) [2013] EWCA Civ 1146. These can perhaps be summarised as follows:-

    (i) Intervention in the family may be appropriate, but the aim should be to reunite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child.

    (ii) The court's assessment of the parents' ability to discharge their responsibilities towards the child must take into account the assistance and support which the authorities can reasonably be expected to offer.

    (iii) It is the obligation of the local authority to make work the order which the court has determined is proportionate. The local authority cannot press for a more drastic form of order, least of all press for adoption, because it is unable or unwilling to support a less interventionist form of order. Judges must be alert to the point and must be rigorous in exploring and probing local authority thinking in cases where there is any reason to suspect that resource issues may be affecting the local authority's thinking.

    (iv) In most child care cases a choice will fall to be made between two or more options. The judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option. The linear approach ... is not apt where the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of these options best meets the duty to afford paramount consideration to the child's welfare. The judicial task is to evaluate all the options, undertaking a global, holistic and multifaceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option.

Welfare Disposal in this case

31. Because of the way this case has developed it is not possible for me to carry out a global holistic assessment of all the options in this case. In particular it is impossible on the current evidence for me to assess the options of placement with the prospective special guardians and/or placement for adoption. In the circumstances it would be wrong (and all parties agree this: see *Surrey County Council v S* [2014] EWCA Civ 601) for me to make any final care order at this stage.

32. I am satisfied that extension of the proceedings is justified within the meaning of Children Act 1989, section 32 as interpreted by the President in *Re S* [2014] EWCC B44.

33. I have considered whether I should make any final determinations on some issues at this stage.

34. The position of the local authority is set out in Ms Zabihi's closing submissions (in which she, accurately in my view, reports the position of the guardian):-

"If both parents remain in the pool, the local authority, supported by the guardian, recommend that E-F is not reunified with either parent. The options for care would then either be placement with a family member and the court will need to await the outcome of the assessments of the maternal grandparents' and MG,, or placement for adoption and the local authority will need to issue a placement application. Neither the local authority nor the guardian would support a risk assessment of the parents to see if reunification was possible. The risks are too high, the level of denial/dishonesty too great."

35. The position of the guardian (in her own words, on the factual scenario I have now found, which I believe represent the same position as that of the local authority) is as follows:-

"The Guardian considered the serious life threatening nature of the injuries incurred by E-F and the fact that there was too much uncertainty implicit in such a finding to avoid the possibility of E-F returning to the care of someone who had injured him. If this were the finding made the Guardian did not believe that E-F could be safely returned to the care of either parent. She did not recommend that the court would find it necessary in this situation to direct any further risk or psychological assessment of the parents."

36. The positions of the parents, on the factual scenario I have now found, are as follows:-

(i) The mother's position is contained in Mr Garrido's closing submissions:-

"If the court finds that there is only a real possibility that the mother was the perpetrator of any or all of E-F's injuries and therefore places her in a pool of possible perpetrators, then the court should not rule mother out without a risk assessment that takes account of her reaction to the judgment and the evidence that she has heard at this hearing. Without such an assessment, the risk is unquantified and a decision on whether reunification is in E-F's best interests would be premature and based on incomplete evidence."

(ii) The father's position is contained in Ms Crowley's closing submissions:-

> *"Whilst the father will wish to confirm his position upon receipt of the judgment and consideration of any findings made, it is submitted that in the event of an unknown perpetrator finding being made further assessment is likely to be necessary. Whilst the children's guardian was pressed at length on this issue her evidence, it is submitted, was unclear. It is submitted that the correct approach was the one initially taken by the Children's Guardian in that she expressed the view in oral evidence that there would be a duty upon those working with the family to assess the risk posed by either parent if an unknown perpetrator finding is made. At present there is not an assessment of risk even on an 'either/or' basis. Whilst a risk assessment may conclude that E-F cannot be placed with either parent, the process of assessing that risk cannot safely be bypassed."*
>
> My recollection and note of the guardian's evidence was that she would not support a risk assessment in the event of a pool finding and that Ms Crowley is incorrect in her assertion.

37. I note the expressed views of the local authority and the guardian on ruling out the parents at this stage and refusing out an application for a risk assessment. Submissions to this effect are prima facie powerful in view of the findings of fact I have made; but I have decided not to express any concluded view at this stage on these issues. In particular, if a further risk assessment on either of the parents is being pursued I would expect there to be a formal application before me at the hearing listed on 7th August 2019, where I shall consider whether obtaining such a report is necessary to assist the court to resolve the proceedings justly within the meaning of Children and Families Act 2014, section 13.

38. I hope and expect that this judgment will be made available for use within the ongoing assessments of Ms MG and Ms M and Mr M.

39. I am circulating this judgment to all the advocates on 4th July 2019 in the expectation that they will be disseminated to their respective instructing solicitors and clients as soon as is practicable.

His Honour Judge Edward Hess
[redacted] Family Court
4th July 2019