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

Neutral Citation Number: [2023] EWFC 60 (B)
Case No: ZE23C50115

IN THE EAST LONDON FAMILY COURT

11, Westferry Circus,
LONDON,
E14 4HD

Date: 19 April 2023

Before :

HER HONOUR JUDGE MADELEINE REARDON

- -

Between :

The London Borough of Newham **Applicant**

- and -

Respondents

The mother
The father
V, a child, by his children's guardian

- -
- -

The names of the advocates have been omitted for the reasons given in paragraph 4.

Hearing dates: 23 and 24 March 2023

- -

JUDGMENT

HER HONOUR JUDGE MADELEINE REARDON :

1. On Friday 24 March 2023 I made an interim care order ("ICO") in proceedings concerning a newborn baby, "V", born earlier in the week. I gave an oral judgment setting out my reasons for doing so.

2. The purpose of this further, written judgment is to highlight some fundamental errors made in the preparation and presentation of this case. The principles that should have been applied are, or should be, well known. My intention in publishing this judgment is not to add anything to what is already well established, but simply to draw attention to it.

3. Unfortunately this is not the only case that has been before me recently in which a previous judgment given by the court has been completely ignored. For example it is not unusual, following a fact-finding hearing, to see the local authority repeat in its final evidence allegations which were not found proved. The present case was simply a particularly striking example of the problem.

4. I have taken the highly unusual step of anonymising not only the parties involved in these proceedings but also the advocates. All were instructed at short notice for this hearing, and none had had any prior involvement with the family. In those circumstances it would be unfair to single them out for criticism.

<u>The relevant law</u>

5. There is nothing disputed or ambiguous about the law, so I can set it out briefly.

6. Disputed facts in civil proceedings are proved on the balance of probabilities. In *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35 Lord Hoffman said:

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

7. As the Court of Appeal observed *in Re W-A (Children: Foreign Conviction)* [2022] EWCA Civ 1118, it is commonplace for a court in public law proceedings to admit into evidence relevant findings made in previous proceedings involving the same parties. Not only is such a finding admissible, but it is evidence with presumptive weight; otherwise, as Peter Jackson LJ observed, "there would be no purpose in admitting it. It would be meaningless to treat it as 'just another piece of evidence'."

8. It is of crucial importance in public law proceedings that the local authority's presentation of its case is accurate. In *Re W (A Child) (Adoption: Delay)* [2017] EWHC 829, [2017] FLR 1628 a local authority had included within its final care plan the words, "the local authority considers [the

father] is likely to have caused physical harm to [the children]". In fact, at an earlier hearing the District Judge had dismissed one of the local authority's two allegations of physical harm, and the other was not pursued. Nevertheless, the allegation of physical harm persisted within the local authority's corporate memory and was later presented as fact to prospective adopters and to the father's employer, with the result that he lost his job. The then President of the Family Division, Sir James Munby, was highly critical of the local authority's "cavalier approach to the facts and disregard for precision."

<u>The procedural context</u>

9. V's parents are "M" and "F". They are a couple. They have two older children, "W" (4) and "X" (2). W and X were the subject of lengthy public law proceedings, brought by a different local authority, LB Tower Hamlets. During those proceedings it was determined that M lacked capacity to conduct the litigation, and she was represented by the Official Solicitor.

10. A final hearing in W and X's proceedings took place in March 2021. On M's behalf the Official Solicitor put up strong opposition to the local authority's case. The local authority was put to proof on the s31 threshold criteria, which the Official Solicitor did not accept were met. The expert evidence on which the local authority sought to rely, an assessment carried out by the London Infant and Family Team ("LIFT"), was robustly challenged.

11. The final hearing lasted for 13 days, partly because of the range of issues that needed to be determined and partly because it was necessary to take the evidence at a slow pace in order to ensure M's effective participation.

12. I gave judgment at the end of the hearing, on 19 March 2021. My judgment ran to 39 pages. In it I set out the findings I made on the disputed issues of fact and my conclusions about the evidence. I found some of the local authority's threshold allegations proved, but not others. I accepted some of the parents' criticisms of the LIFT assessment, but not all. Overall I found that the conclusions of that assessment were sound. I determined that neither parent would be able to care for the children, together or separately, and that unless there was a family member available to care for them (which at that stage was a possibility, but no more) this was a case where nothing else other than adoption would do.

13. The Official Solicitor and the father appealed my decision. Permission to appeal was refused by the Court of Appeal.

14. The ultimate outcome of those proceedings was that W and X were placed with a relative overseas under special guardianship orders.

15. I did not publish my March 2021 judgment at the time but intend to publish it, in anonymised form, together with this judgment, so that the points I make now can be better understood.

16. During the course of the previous proceedings, M and F moved from Tower Hamlets to Newham. When LB Newham became aware of M's third pregnancy, in early 2023, it requested the files from Tower Hamlets. The initial social work statement prepared in V's proceedings, unsurprisingly, relies heavily on information from the previous proceedings relating to W and X. Four of the eight threshold findings sought relate to the previous proceedings.

What happened in this case

17. The application for an interim care order was issued on Wednesday 22 March 2023 and referred to me. I listed it for a hearing before me the following day. The proceedings were allocated to me because I had dealt with the two older children of the family. I observe at this stage that if I had not been sitting last week, the interim care order application would have been heard by any full or part time judge sitting at East London Family Court.

18. I read the initial social work statement and the local authority's interim threshold document on the day the proceedings were issued. It was immediately obvious that they presented a misleading impression of the history.

19. I therefore sent a message through the Family Public Law portal and East London's listing team to request that the local authority include in the bundle for the ICO hearing a copy of all judgments given in the previous proceedings. It appears that the papers provided to Newham by Tower Hamlets were incomplete and did not include, in particular, the March 2021 judgment. The only documents from the previous proceedings that were included in the bundle were the bundle index and the LIFT assessment.

20. The initial social work statement purported to summarise the evidence before the court in the previous proceedings. The following table compares some of the assertions contained in the social work statement filed in these proceedings to the finding in my judgment.

Social work statement	**Page**	**Judgment**	**Para**
When pregnant with W, M 'declined to work with adult and children social care and she failed to attend multiple appointments'	5	The local authority did not provide the support that M needed and was entitled to as a parent with a learning disability. There was a lack of integrated planning and a failure to follow relevant guidance.	54-57
When pregnant with X, M 'inconsistently engaged with antenatal services'	5	Overall M engaged well with ante-natal care during her pregnancy with X	174(b)
When in hospital in August 2019 M shouted and screamed at the social worker, tied a scarf around her neck and threatened to kill herself.	6	M's distress in hospital was not relevant to the threshold criteria. Her presentation on this occasion needs to be seen in the context of her learning disability and this incident is balanced by other evidence which shows that M has the ability to control her emotions.	174(e)
On [three dates in 2020] M made allegations of rape and sexual assault against F. [The statement includes several paragraphs setting out the detail of the sexual abuse allegations and speculating on the implications for	6-7	I did not find the allegations of sexual abuse proved. I made other findings about the parental relationship which are not mentioned in the social work statement.	167, 173

the parental relationship.]			
M has a ‘moderate to severe’ learning disability and is reported not to be able to identify if water is hot or cold.	7	This was a hearsay report which I specifically found to be unreliable: formal assessments indicated ‘that M has a much higher level of ability to care for herself than that report would suggest.’	72
M had an infection when she gave birth to W which ‘the midwife was concerned… could have been chlamydia’. M refused testing.	8	I did not make this finding. I specifically found that M’s actions in this respect did not put W at risk.	174(d)

21. Shortly before the hearing on Thursday 23 March 2023 was due to start I received four position statements, one from each party. None of them referred to my judgment of March 2021. Passages in F’s position statement, under the heading “Previous Care Proceedings”, read:

> “[F] did not have a proper assessment with regard to his ability to care or his parenting skills. These have never been tested.
> […]
> The court did not have sufficient evidence before it to rule out [F] as a parent who could care for the children… and therefore a further independent and proper assessment is necessary, which must be based on established or at least properly investigated facts…
> […]
> In these proceedings the LA have relied on the LIFT assessment in the previous proceeding which the father argued then was fundamentally flawed, in that it relied on unsubstantiated facts which were not fully investigated.”

22. That was a repetition of F’s case, as it had been put during the hearing in March 2021. I had dealt with each of these arguments in my judgment. Paragraphs 63 to 86 dealt with the criticisms made by both parents of the LIFT assessment. Paragraphs 94 to 100 set out my overall impression of F’s evidence. Paragraphs 197 to 204 set out my conclusions about his parenting capacity. At paragraphs 75 and 76 I said:

> “75. I cannot accept that the LIFT assessment is not thorough. The multi-disciplinary approach meant that the parents’ capacity was considered from a much broader perspective than if this had been a simple parenting assessment carried out by a social worker. The report is lengthy, and is accompanied by detailed appendices setting out the work done with W, his foster carer and each of his parents […]
>
> 76. As far as the father is concerned, in my judgement he had every possible opportunity to engage fully with the assessment process, and the issues relevant to his parenting capacity were raised with him and discussed in detail over the course of the assessment.”

23. The ICO hearing was listed at the end of the day on Thursday 23 March. The position statements came in over the course of the day, when I was hearing evidence in a trial in a different case. I was unable to read them until immediately before the hearing. When the hearing commenced I raised the issue of the missing judgment. None of the advocates had seen it. When I told them

what it contained, no one sought to argue that the hearing could be effective. It was re-listed the following day.

24. Because M did not book into hospital until quite late in her pregnancy with V, LB Newham only had a few weeks to prepare this application. I recognise that this local authority was not the local authority in the care proceedings for W and X. However it clearly had sufficient time to request the files from LB Tower Hamlets, and although the March 2021 judgment was missing it must have been obvious from those papers that a judgment had been delivered. The final bundle in W and X's proceedings, which included my judgment, was and continues to be accessible on Caselines, the document management system used by a number of local authorities, and could have been made available to LB Newham at the press of a button.

25. F's solicitor in these proceedings is the same solicitor who acted for him in the previous proceedings. M changed solicitors after the March 2021 hearing but her new solicitors acted for her later in those proceedings. V's guardian was also the guardian for W and X.

26. The information contained in my March 2021 judgment was therefore available to all of the parties, or at least should have been, but was not before the court at the ICO hearing.

27. If the ICO hearing had been listed before a different Judge, as could easily have happened, there would have been no one in the courtroom (other than the parents) who actually knew what findings had and had not been made in the previous proceedings, and what view the court had taken of the expert evidence. At best, the court would have been presented with an unnecessarily conflicted and confusing picture. At worst, a decision of huge significance to V and his parents could have been taken on the basis of information that was simply wrong.

<u>What needs to happen in future</u>

28. Everyone working in the Family Justice System is aware of the pressures the courts are experiencing at present.

29. These pressures are illustrated by the fact that both ICO hearings in these proceedings were listed around the edges of the normal court sitting day: the first at 4pm on the Thursday, and the second at 1pm on the Friday. My tiredness and frustration during the first hearing perhaps meant that my tone was sharper than it needed to be, for which I apologise. Part of the reason for delivering this judgment in writing, after the end of the hearing, was to ensure that the problems set out here did not become a distraction at the second hearing on the Friday, and that the focus at that hearing remained on V and the interim arrangements for him.

30. The very clear message from the President of the Family Division, Sir Andrew McFarlane, is that the system can only function if there is a "radical recalibration of the resources, in terms of the time and the number of hearings, that can be applied to any given case. [1]" The message to "Make Every Hearing Count" was repeated in January of this year through the re-launch of the Public Law Outline[2].

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[1] 'Make Every Hearing Count': Case Management Guidance in Public Law Cihldren Cases, March 2022.

[2] https://www.judiciary.uk/courts-and-tribunals/family-law-courts/re-launch-of-the-public-law-outline-plo/

31. Every ineffective hearing has an impact on the system, by reducing the time available for other cases.

32. The unpredictable nature of family cases means that the occasional ineffective hearing is unavoidable. That makes it all the more important that professionals (both social workers and lawyers) do not compound the problem by rendering hearings ineffective through a lack of proper preparation.

33. In any case where a court has delivered judgment, particularly where findings have been made, the judgment will be the starting point for future decision-making, and therefore any account of the background set out in a social work statement or other document should take the judgment as its primary source. There is no point in trawling through old documents to put together a history when the facts have already been determined, and to do so is likely to create a confusing and misleading picture.

34. I recognise that the fact that an allegation has been made, even if it has not been found proved, may continue to be of relevance, and so there may be a need to refer to it in a subsequent document (the unproven sexual abuse allegations in this case provide a good example of such a situation, because although those allegations were not found proved, the fact that they were made was and is relevant to the nature of the parental relationship). However if that happens, the author of the document must make the status of the allegation clear.

35. As I have said, there is nothing new in any of this, and this judgment should not be cited as "guidance". The relevant principles are readily available from many, far more authoritative sources.