

**IMPORTANT NOTICE**

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Neutral Citation: [2024] EWFC 286 (B)

Case No. LS23C50063

IN THE FAMILY COURT AT LEEDS

IN THE MATTER OF: HK and BK

BEFORE:

HIS HONOUR JUDGE HAYES KC

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Between:

CALDERDALE MBC

Applicant

and

NK

First Respondent

and

FK

Second Respondent

HK and BK

THE CHILDREN (BY THEIR CHILDREN'S GUARDIAN)

Third & Fourth Respondents

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**JUDGMENT**  
**23 SEPTEMBER 2024**

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**LOUISE McCALLUM**, Counsel, for the Applicant Local Authority.

**SARA ANNING**, Counsel, for the 1<sup>st</sup> Respondent Mother.

**CLARE GARNHAM**, Counsel, for the 2<sup>nd</sup> Respondent Father.

**MARTIN TODD**, Counsel, for 3<sup>rd</sup> and 4<sup>th</sup> Respondents by their Children's Guardian.

**Judgment Contents**

<b>Topic</b>	<b>Paragraphs</b>
Introduction	1-11
The Section 31 Threshold / Fact-Finding Judgment	12-23
Events after the Fact-Finding Judgment	24-59
Welfare/Outcome – The Law	60-80
Analysis and Conclusions	81-169

**HIS HONOUR JUDGE HAYES KC:****Introduction**

1. These public law proceedings brought by Calderdale Metropolitan District Council (“the LA”) concern two children, HK (aged 7) and BK (aged 1 year 11 months).
2. The parents are NK (“the Mother”) and FK (“the Father”).
3. The Children’s Guardian appointed in these proceedings is Saida Ghafoor. She became involved shortly after my fact-finding judgment, replacing the previous Children’s Guardian.
4. The parties are represented as follows:
  - (a) The LA is represented by Louise McCallum. The solicitor with conduct is Rachel Muirhead. The key social worker is Hannah Buckley.
  - (b) The Mother is represented by Sara Anning of Counsel, instructed by Robert Scott, Solicitor.
  - (c) The Father is represented by Clare Garnham of Counsel, instructed by Amanda Palfreman, Solicitor.
  - (d) The children by their Children’s Guardian are represented by Martin Todd of Counsel, instructed by June Kelly, Solicitor.
5. This Judgment is given at the conclusion of a final hearing addressing welfare issues concerning the two children.
6. The LA seeks a final Care Order in respect of both children. The proposed Care Plan for HK is long-term foster care. The proposed Care Plan for BK is to place him for adoption. The LA therefore also applies for a Placement Order in respect of BK.
7. The Mother’s primary position is to oppose these plans and seek the return of the boys to her care. If the Court disagrees, her secondary position is to support HK remaining in foster care under a final Care Order. However, she contends that the Court should delay making any final decision for BK until his current foster carer (“FC”) has been assessed as a long-term foster carer for him. If that assessment proves positive, the Mother would then seek to argue at a future hearing that long-term foster care rather than adoption is in BK’s best interests. She also raises issues as to the frequency of her contact with the boys. If a Placement Order is made in respect of BK, the Mother contends that it should be accompanied by an order under section 26 of the Adoption and Children Act 2002 providing for direct contact between BK and HK.
8. The Father supports the Mother in the position she puts forwards. For reasons I shall explain in more detail below, he accepts that he cannot advance a case that he cares for either child. If the LA’s Care Plans are approved, he does not challenge the LA’s

proposals (as amended orally during the final hearing and since committed to writing) in relation to the frequency of his contact with the boys.

9. The Children's Guardian supports the LA's Care Plans and the orders sought by the LA. She has made observations as to how the transition plan for reducing parental contact should be put into effect which differ somewhat to the LA's Care Plans coming into this hearing (but since revised). She joins with the LA in opposing the Mother's case that the final decision for BK should be delayed. Also, in line with the evidence all professionals who gave evidence, she recognises the importance of promoting an ongoing sibling relationship between BK and HK, but she does not recommend a section 26 order providing for direct contact between them. Put another way (applying section 1(6) of the Adoption and Children 2002) she does not consider that making such an order would be better for BK than not doing so.
10. At the final hearing addressing these welfare issues, the Court heard oral evidence over five days (2 to 6 September 2024) from the following witnesses (in this order):
  - (a) Naomi Shann, independent social worker;
  - (b) Kathryn Adams, Advanced Practitioner at One Adoption West Yorkshire;
  - (c) Hannah Buckley, allocated social worker;
  - (d) NK, the Mother;
  - (e) FK, the Father;
  - (f) Saida Ghafoor, the Children's Guardian.
11. On 6 September 2024, following the conclusion of the evidence of the Children's Guardian, I allowed time for the advocates to prepare written submissions. Ms Anning had already prepared her document by that date, and all other advocates met my deadline of 13 September 2024. I am grateful to all advocates for the submissions that have been prepared addressing the range of issues I must determine. I reserved my Judgment and fixed a hand-down date of 23 September 2024. This is that Judgment.

### **The Section 31 Threshold / The Fact-Finding Judgment**

12. Today's Judgment addressing welfare issues should be read in conjunction with my detailed fact-finding Judgment handed down in writing on 20 November 2023. It is essential reading for anyone who needs a full understanding of the background and the findings I made in satisfaction of the threshold criteria in section 31(2) of the Children Act 1989.
13. The wide range of evidence and reasons for my findings can only be fully understood by reading the whole of that Judgment. However, the findings are distilled in a schedule at the end of the Judgment (and also on my order dated 20 November 2023) which reads as follows:

"BK's Injuries

[1] On 16 January 2023 BK, then 12 weeks of age, was taken to the Accident and Emergency Department of Calderdale Royal Hospital on the advice of the health visitor. BK presented with macrocephaly (an enlarged head) and pallor due to anaemia. He was admitted to hospital requiring a blood transfusion that evening, to treat very severe anaemia. On 17 and 18 January 2023 aspiration and then surgical drainage of subdural collections was required due to raised intracranial pressure. Investigations revealed:

- (a) Large collections of haemorrhagic subdural effusions on both sides of his head;
- (b) Subarachnoid haemorrhages;
- (c) Thrombosed bridging veins;
- (d) A healing fracture of the posterior aspect of his left 3rd rib.

[2] These injuries caused BK significant harm, pain and distress.

#### Timing

[3] The intracranial injuries at 1(a) to 1(c), were inflicted as follows:

- (i) In an event on or prior to 11 November 2022; and
- (ii) In a further event on or prior to 9 January 2023.

[4] The rib fracture at 1(d) was sustained in the approximate period 8 December 2022 to 5 January 2023.

#### Causation

[5] The injuries at 1(a) to (c), resulting in severe anaemia, were sustained due to abusive head trauma. BK was shaken on no less two occasions following his birth, a mechanism involving repetitive acceleration and deceleration forces being applied to his head.

[6] The rib fracture at 1(d) was caused by severe excessive squeezing compressive force applied to the chest or by a direct blow or impact at the fracture site.

[7] The level of force used to inflict all of the injuries was clearly excessive.

#### Perpetrator

[8] The injuries detailed above at paragraph 1 were caused by the Father.

#### Further conduct by the Father and failure to protect by the Mother

*[9] The Father:*

- (a) Was impatient with HK, shouted angrily at him and on occasions smacked him;*
- (b) Persistently spoke about HK in derogatory, negative and abusive terms, in messages;*
- (c) Roughly handled BK, including forcibly pushing/pulling his head down using both his hands, causing BK to cry and scream;*
- (d) Was intolerant of BK's crying and feeding demands and spoke disparagingly of him in messages to the Mother, including referring to him as a 'twat', a 'turd', 'cunt', a 'fucking lunatic' and speculating about the possibility of him being adopted;*
- (e) Sent the Mother a message on 1 November 2022 referring to BK needing 'a slap.'*
- (f) Experienced difficulties in caring for and settling BK, even when he had sole care for limited periods.*

*[10] The Mother:*

- (a) Was aware of the matters in paragraph 9 above;*
- (b) Has failed to be open and honest with the Court in her account of family life and has greater knowledge of the Father's ill-treatment of BK than she is prepared to say;*
- (c) Failed to protect BK from the Father by leaving him in his sole care.*

*Emotional impact upon HK*

*[11] HK has suffered significant emotional harm as a consequence of witnessing his father's angry behaviour towards BK, including shouting at BK when he cried, forcibly pushing/pulling BK's head down and putting a hand over his mouth.*

*[12] The Father exhibited anger and frustration towards HK, causing him significant emotional harm and a likelihood of such harm.*

*Failure to seek medical attention*

*[13] The parents unreasonably failed to secure appropriate medical attention for BK on 11 November 2022. The parents each knew that BK's presentation, including persistent crying and sickness, required medical attention. The Father actively discouraged the Mother from taking BK to see a doctor. The Mother deferred, ringing the health visitor on 11 November but then failing to give an accurate account of his presentation.*

*[14] By 9 January 2023, the unusual size and shape of BK's head was obvious and he was markedly pale. The parents discussed the large size of his head. The Mother and Father unreasonably failed to seek medical attention before being directed to do so by the health visitor on 16 January 2023.*

*[15] The Father knew at the time that his actions (set out in paragraphs 5 to 8 above) had caused or were likely to have caused BK serious physical harm and he unreasonably failed to seek immediate medical attention.*

*Findings relevant to welfare:*

*[16] The Mother was struggling emotionally following BK's birth, was expressing difficulties in coping, frustration with BK's crying and feeding patterns and she, like the Father, referred to BK in dismissive terms within messages.*

*[17] The Father has not been open and honest with the police, professionals or the Court about the difficulties in the relationship with the Mother or the difficulties he faced in managing BK”.*

14. There are certain key passages within my fact-finding judgment which are particularly relevant to the welfare issues that I must now decide. One striking feature of the fact-finding hearing was the emergence of a large volume of messages that passed between the parents. The full picture only came to light through forensic analysis of their mobile phones. For reasons I shall explain later, there is now an issue at this welfare hearing as to whether both parents have taken the step of deliberately deleting their phone data to sabotage more recent forensic analysis and, if they have, why they have done so. The background context and Court analysis within the fact-finding judgment is therefore important to understand.
15. At paragraph 153 of that earlier judgment, I noted that, as the judge, I was in the unique position of being able to survey the wide canvas of evidence before the Court at the hearing. At para 154 I stated:

*“[154] I can compare the positive descriptions of family life given by the parents during police interviews with the different picture that emerges from the messages found on their mobile phones. Those messages reveal that both parents were under stress and linked this directly to the demands of parenting both BK and HK. The derogatory language used about both children pervades the phone messages, particularly those of the Father. On repeated occasions, his messages reveal his feelings of frustration and anger towards the children. Descriptions of how BK was at certain times beg the question why no medical attention was sought for him when he was manifestly unwell. The parents' messages reveal that BK was very unwell by 11 November 2022. The Mother thought that he should see a doctor. Clearly he needed to. Yet the Father actively dissuaded the Mother*

*from taking that step. This, as I shall explain, is a highly significant part of the overall factual matrix. Internet searches made by both parents add to the picture of his symptoms at various times. Photographs taken by the parents on 9 to 11 January 2023 show BK's abnormal head shape (by then like an inverted pyramid) and how ill he looked in the week leading up to his hospital admission. The description of BK when he was seen at home by the health visitor on the 16 January 2023 is telling. She was very worried about him. Yet the parents had not sought medical attention for him until her intervention. Following his admission, BK needed emergency medical treatment including a blood transfusion and surgical drainage of fluid to relieve intracranial pressure. I must address why it was that BK got to such a state without either of his parents seeking out medical help sooner".*

16. At paragraph 199, I found that the WhatsApp (and other) messages between the parents were "highly revealing" as:

*"They provide a clear insight into the lives of BK and HK. Were it not for the forensic analysis of the parents' phones, I find it unlikely that a true picture would have emerged from the accounts of the parents themselves".*

17. My analysis then followed (at paragraphs 200 to 207 of the fact-finding judgment) setting out what happened to BK in the early weeks of his life, leading to the first act of abusive head trauma by the Father. The messages between the parents formed a key part of that analysis:

*"[200] It is disconcerting to read the Father's message on 1 November 2022 that "stupid boy needs a slap". I find that, in context, he was referring to BK who was crying at the time. It was followed by the Mother's message that she hated the crying and found it "so upsetting". The Father responded that it was "annoying more than anything". BK was only 1 week old. Already, the Father was writing about BK in such negative and worrying terms.*

*[201] In messages in the following days, the Father referred to BK as a "twat" and HK as "an absolute turd". The Mother said that BK would have to wait for a feed as his "demands are stupid". The Father spoke of BK "going loopy" and the Mother replied she was "fed up with it". Messages that followed referred to BK screaming, the Mother feeling down, things getting on top of her and she did not have the energy to do anything. She said that she had had enough and was exhausted. She spoke about regretting having BK. In messages on 8 November 2022, the Father described BK (twice) as "a dick".*

*[202] On 9 November 2022, the messages show that BK was repeatedly being sick. The Father's response was to describe BK as "a turd". The Mother referred to BK "going mental recently". On 10 November the Mother messaged*



*the Father that she about how sick she was of BK “sicking up”, adding that it was “loads”.*

*[203] On 11 November 2022, the Mother said that BK was being sick all the time and not feeding. What followed, I find was a highly significant exchange of messages ... What stands out is the strong resistance by the Father to the suggestion that BK should be seen by a doctor. When the Mother wrote that BK kept throwing up his whole bottle, that she did not know what to do, that BK was not feeding and it was worse since the previous day, the Father’s response was, “I’m not an expert am I, look it up”. That set the tone for the messages from him that followed. He did not offer to help, and he showed no concern for how BK was. When the Mother then asked whether he thought that BK needed to see a doctor, just to “see how he goes”, the Father’s reply was resolute: “No he doesn’t need a doctor at all ... not doing that shit again”. The messages continued, with the Mother saying she had had enough, BK would not settle and he kept bawling. When she sent the message, “Sorry this isn’t normal” it is clear how worried she was. Yet the Father stood his ground, with the blunt response: “He isn’t going to a doctor”. The Mother persisted in expressing her worries about how BK was. She said again that it wasn’t normal, it had been constant since that morning and, “Crying all day isn’t normal behaviour is it ... and throwing up milk”. The response of the Father was to suggest that they will “get rid”. When the Mother asked what he meant, he replied, “adoption” adding, “saves hassle”. The Mother again said that something was not right with BK, “this isn’t him”. Later she added that she could not have BK like this as something was upsetting him and that it broke her heart. This led the Father to respond, “Fine take him to the docs. Remember the trouble we had last time you did that”. The Mother replied, “Coz he had bruises”. The Father wrote, “Do what you want”. The Mother asked if he was angry. His reply was that she was “overreacting”.*

*[204] BK was not taken to see a doctor, even though it emerged during oral evidence that the GP surgery is directly opposite their home. The Mother did speak to the health visitor but the information that she provided ... fell a long way short of an accurate description of how seriously unwell BK was at that time, based on the content of the messages now available to the Court. Notably, the Father made internet searches in the evening, “baby kicking and flailing arms” and “baby arching back and crying”. In oral evidence, the Father said he could not recall making those searches. I find that he did so because that was what BK was doing. The following day, the Father messaged his sister that the previous night BK had got worked up and was “sweating and everything”, adding that it was “quite scary”.*

*[205] Dr Birch [the jointly instructed consultant paediatrician] was taken to these descriptions of BK in her oral evidence. Her view was that this was very*

*concerning, it was likely that BK was injured and in pain, and that medical attention should have been sought for him.*

*[206] I accept Dr Birch's evidence. I find that BK plainly did need to see a doctor. He was extremely unwell. The Mother repeatedly messaged the Father with details of why she was so worried about how BK was. These were not trivial worries. BK had a range of significant symptoms. The Mother was not "overreacting" as the Father was to tell her both harshly and wrongly. Rather, he was actively seeking to prevent BK receiving the medical care he so clearly needed. The question is, why?*

*[207] The Father's messages provide the answer. It is striking that he did not express any concern about how BK was during the lengthy exchanges on 11 November 2022 that I have quoted. Rather, his main focus was on discouraging the Mother from taking BK to see a doctor. When the Father wrote, "Not doing that shit again" and later, "Remember the trouble we had last time", I find that he was referring back to the medical and social services investigation in 2017 when HK sustained bruising aged 4 months. The reason why that earlier experience weighed on his mind was because he knew the real reason why BK was so unwell. I find that it was because the Father had shaken BK. The Father did not want BK to be seen by a doctor because his symptoms were so concerning that they would be likely to trigger tests and investigations into what was causing them. A caring parent, who had done nothing wrong but was concerned about how BK was, would have wanted that to happen and for BK to receive medical oversight and care. But this was the last thing that the Father wanted. His priority was to thwart anyone finding out what was causing BK to be so unwell. To achieve this, he had to avoid BK being taken to see a doctor. Hence the blunt and uncompromising manner in which he resisted the Mother's suggestion that BK should be. Her instincts that BK should be seen by a doctor were right. But she failed to act on them, and the Father got his way. In so doing, he avoided detection (then) of BK's intracranial injuries. The cost to BK was that, for a period in excess of 2 months, he developed progressively enlarging subdural collections which were only discovered when he was admitted to hospital in a very serious condition on 16 January 2023".*

18. I observed at paragraph 212 of my fact-finding judgment that much of what HK had described of his own experiences and those of BK in the care of their parents was borne out by the messages that passed between the parents. In my analysis of the account given by HK to the police in an Achieving Best Evidence (ABE) interview, I said this at paragraph 220:

*"[220] During the video interview, HK's concern for the wellbeing his baby brother is both natural and touching. This reinforces my conclusion that HK was telling the truth about his father's behaviour. I find that HK was recounting and*

*re-living what he had seen happen to BK. It was imprinted on HK's mind because he had seen and heard something frightening which he knew was not right. The Father acted angrily and in a way that was highly inappropriate when he pushed BK's head down. The Father also reacted angrily to BK crying by putting his hand over BK's mouth whilst at the same time saying, "Shut your mouth". That too was highly inappropriate. I find that he did this to quell the noise of BK's crying because he was annoyed by it. For HK to have witnessed these actions (as I find he did) was emotionally harmful to him. Having viewed the video, I am left in no doubt that HK was both shocked and upset by how his father handled BK and worried about the harmful impact on BK. I find that HK spoke freely and in some detail about what had happened to BK because he wanted people to know what he had seen. He did not like it and he knew that it was harmful to BK".*

19. I then proceeded to analyse the question whether the Mother was aware of the abusive handling of BK that HK described. I found that she was for the reasons given at paragraphs 222 to 223. Referring to HK's video interview, I stated:

*"[222] I am satisfied that HK ... gave detailed free narrative accounts about his mother being present and aware of his father pushing/pulling BK's head down in a forceful manner. The Mother's reaction and the words that she spoke are all integral to HK's overall description of what took place. The details flowed freely from HK. In particular:*

- (a) Having described and gestured the Father pulling BK's head down, HK stated that BK then "cries all over the place" and, "Mummy tells off Daddy for doing that or, like, 'Don't do that, Daddy.' And, and I say that too, to Daddy, be-because I don't want him to get damaged and, and, and that's why he's gone to the hospital cos he got a bit damaged, I think".*
- (b) When HK spoke (again with gestures) about his father saying to BK, "Shut your mouth" because he was annoyed by his crying, and then pulling his head down and putting his hand over his mouth, he added "... and when Mummy's in the kitchen she goes, "Stop doing that." Mummy said. Mummy says, "Stop doing that." When the Officer asked, "Stop doing what?", HK replied, "Stop, stop pulling BK's head, it will damage him".*
- (c) When the Officer asked, "You know when Daddy's done what you told me with BK's head ... How did it stop?" HK again volunteered the presence of the Mother in his reply. He said that his mummy "lullabied" BK and his daddy was "sad". Asked how BK was, HK said, "he just screams and screams and screams". Asked what happened with BK and mummy, HK replied, "I don't know" but then he said, "They just calm down and*

*sometimes my mummy gets angry with my... with my daddy”, adding, “... sometimes both of us get angry ... with daddy for pulling BK’s head down. Sometimes we both get angry”. He spoke about the Father having “an upset face, a sad face”. Asked what face the Mother had, HK replied, “It was still angry and I was angry too still”.*

20. In the following paragraph, I addressed the Mother’s denial that she was present as HK recounted. I stated:

*“[223] ... She asserts that she would not have tolerated it had she witnessed the Father handling BK in such an obviously harmful way. HK has said that she was angry with the Father when it happened and made that clear to him. I must assess her claim that, were HK’s account true, she would have taken other steps to protect BK. I do so by looking at the full picture that is before me. The Mother did not take BK to see a doctor on 11 November 2022 when he clearly needed to see one. She knew of the Father’s disparaging and angry messages about BK and the stresses he was under. She sought no medical attention for BK even when he was obviously very unwell in the week leading up to 16 January 2023 (analysed further below). In circumstances where she knows that there is a clear body of medical evidence that BK has suffered serious injuries likely to have been inflicted, namely a rib fracture and intracranial injuries, and she knows of the detailed accounts by HK about angry abusive handling of BK by his father, she has remained to this day in a relationship with him. Looked at in that context, her failure to act protectively for BK at the time is entirely in keeping with this wider picture”.*

21. At paragraph 224, I made clear that I was satisfied that the whole of the evidence led to the conclusion, on the balance of probabilities, that all of BK’s injuries were perpetrated by his father. At paragraph 225 I stated:

*“[225] I include the rib fracture that was inflicted some time between 8 December 2022 and 5 January 2023. I find that that injury was inflicted on BK by his father in another act when he became angry and exerted excessive force to BK’s rib either through excessive compressive force or by a direct blow or impact to the rib. I reject the Father’s oral evidence that when, on the afternoon of 12 December 2022, he searched the internet for “skeletal structure”, he was doing so for the purposes of artwork. Similarly, I am not satisfied that the Mother has told the truth about the internet searches she made on 6 January 2023 with search terms such as “baby’s bones”, “newborn baby bone structure”, “baby skeleton X-ray”, “real baby skeleton” and “lump in middle of chest baby”. In her 1<sup>st</sup> police interview on 17 January 2023, the Mother denied making any Google searches relating to health issues for BK, claiming that any searches of that nature would have been in relation to her college work. That was plainly untrue. In her 2<sup>nd</sup> police interview on 10 March 2023, the Mother was asked*

*specifically about these internet search terms. She replied that she had seen a lump in the centre of BK's chest when changing him and she was checking what it was. She continued to deny any link with BK's injuries, a position that she maintained in oral evidence. I find that it is no coincidence that such internet searches were made by each of the parents at the beginning and just after the end of the radiological timeframe for BK's rib fracture. I find that both parents are keeping back the true reason for these searches. As with HK's account, this is yet further evidence that the Mother was more aware of the Father's ill-treatment of BK than she is prepared to say".*

22. At paragraphs 235 to 240, I addressed the condition of BK in the period leading up to his hospital admission in mid-January 2023:

*"[235] [Dr Birch] was ... taken to a sequence of images of BK taken on 9, 10 and 11 January 2023. Dr Birch stated that, in each of them, BK (then 11 weeks old) looked very unwell. She described him as looking "very very ill" on the photograph taken on 9 January 2023. This was a full week before the health visitor attended the home on 16 January 2023. Dr Birch's view was that BK should have been taken to hospital by his parents on 9 January 2023. He was obviously ill and needed medical attention. When referred to the photograph dated 11 January 2023 ... Dr Birch again said that BK looked very unwell. He was pale, his eyes were abnormal and his head had the abnormal (inverted pyramid) shape. She remarked that such a combination of features would have been "very alarming for a parent", yet no medical attention was sought for BK.*

*[236] I accept this evidence. The photographs of BK indeed make for alarming viewing and there can be no question that he should have been taken to a doctor by the parents. I add that this conclusion is not just based upon the photographic evidence. Once more, it is reinforced by the parents' own descriptions of how BK was in this period in the phone messages that passed between them.*

*[237] The stresses that existed in the parental relationship in December 2022 and January 2023 are exposed by their messages. They exchanged insults and argued with each other. On 6 January 2023, the Father stated that BK was being "very very slow" with his bottle, adding, "he's hardly touched bottle – he keeps kicking off so he can starve – cunt". The aggression and hostility towards BK in that message is shocking to read. So too is the Father's message referring to HK the following day: "HK is a cunt who gets away with everything, sick of it all". The Mother also made her internet searches (analysed at paragraph 225 above) on this date.*

*[238] I have quoted at length ... the messages that then passed between the parents on 9 January 2023. The Father stated that BK was falling asleep on him and would not touch his bottle. He later said of BK, "Twat ... went fucking*

*mental when he threw up”. When the Mother said that she was “worried now” and that “BK aint been right”, the Father’s reply was, “Why? He’s just being a cunt”. Yet BK clearly was very ill. The Father’s next message referred to BK having eyes puffed up like he’d had no sleep. He then referred to BK having been sick again and “can’t put him down its ridiculous”. When the Mother expressed her worry about BK being sick, adding “I worry so much”, the Father was then dismissive, replying, “You worry too much, it’s annoying”. The Mother said, “I do as he’s tiny” to which the Father replied, “He’s fine”. For the Father to suggest that the Mother was worrying unduly and to assert that BK was “fine” was wholly contradicted by how BK in fact was. BK was anything but fine. The messages show that he continued to have problems feeding and he was repeatedly sick. When these messages are combined with the photographs and Dr Birch’s expert evidence about what they show, there is no doubt that BK was very unwell and urgently needed medical attention.*

*[239] The Father, when pressed in cross-examination why he had not taken BK to a doctor at that time, replied that BK had been seen by a doctor. By that, he was referring to the GP visit on 20 December 2022. I note in the submissions on behalf of the Father that it is asserted ... that “the GP saw BK a matter of days before his admission to hospital”. That is not correct. The gap in time between 20 December 2022 and 16 January 2023 was 27 days. The Father’s attempt in oral evidence to excuse why BK was not taken to see a doctor prior to 16 January 2023 rang hollow. The condition that BK was in by 9 January 2023 was very different to how he was when the GP saw him on 20 December 2022. He had an obviously large and abnormal shaped head (as the photographs show). He was seriously unwell.*

*[240] When the Mother expressed concerns about BK in messages exchanged on 9 January 2023 (“worried now” ... “BK aint been right”), the Father responded in a blunt, uncaring and verbally aggressive manner (“he’s just being a cunt”) and suggested, quite wrongly, that the Mother was being “annoying” when expressing such worries. The Father behaved then in much the same way as he did on 11 November 2022. I find that he did so for the same reason. He knew that BK had once again fallen victim to abusive head trauma at his hands and that was why he was so unwell. As before, BK was not taken to a doctor as he should have been”.*

23. Everything I have said in those passages is the context for what I said in paragraph 242, the final paragraph of my fact-finding judgment:

*“[242] It is a final and deeply troubling aspect of this case that it was not until 16 January 2023 that medical attention was sought for BK. It is suggested on the Father’s behalf that the fact that he allowed the health visitor into the home on that date shows that he had nothing to hide. I cannot accept this. The health*

*visitor was plainly very worried about BK's appearance and how he presented. Knowing what is now known (from the parents' messages), BK had been seriously ill for at least a week before then. He was only taken to hospital because the health visitor (having spoken to her supervisor) said that he needed to. On his admission, he needed emergency medical treatment including a blood transfusion to treat his severe anaemia and aspiration and then surgical drainage of his subdural fluid to relieve the pressure on his brain. It was a significant failure of parenting by both parents that BK was in such a serious state of ill health before any medical help was sought. Their false claims to the police in interview, suggesting that there was nothing of any real concern about BK before then, must be viewed in that context. That it took the words of BK's older brother HK, backed up by the content of the parents' own messages, to reveal what was really happening in the family home shows the level of dishonesty that both parents sought to resort to in an attempt to present a false picture. This Judgment sets the record straight and provides the factual basis for future planning and welfare decision making for both children".*

### **Events after the Fact-Finding Judgment**

24. Following the hand-down of the Judgment, both parents filed and served statements setting out their position.
25. The Father's statement dated 24 November 2023 included the following:

*"[1] I have read the Judgment of the Court carefully and respect the decision of the Court, however I cannot admit something I have not done. I accept that BK sustained the injuries described by the Court, but I am not responsible for those injuries, I have never hurt BK.*

*[2] I understand that the Judge has read and listened carefully to all the evidence and made the findings set out in the Judgment.*

*[3] I accept I have shouted at HK and smacked him in the past but not angrily. I accept that I have spoken about HK and BK in derogatory terms in messages. I deeply regret that I did this.*

*[4] I accept on reflection that I experienced difficulties in caring for and settling BK, and at times was frustrated with HK.*

*[5] In hindsight I accept that we should have taken BK to the Doctors on 11 November 2022, but at the time I genuinely believed that he didn't need a doctor. I was not trying to cover anything up by not taking him to the doctors.*

*[6] I also accept that we should have taken him to see a doctor by 9 January.*

*[7] I accept that I was not completely honest to the police, professionals or the Court about the difficulties in caring for the children. This was not a conscious decision. I didn't want to admit that things were as difficult as they actually were.*

*[8] I am aware that I will not be considered to care for the children alone or with [the Mother] given the findings of the Court. In those circumstances I want [the Mother] to care for the children. We have agreed to separate and I will move out of our home. The only place I can go and still be able to pay the mortgage is my father's. The Local Authority has found a foster placement for HK and have wanted to move him from his Grandparents for some time. [The Mother] and I have discussed this together and with my father and have agreed to this. We have both spoken to the social worker about it separately. I understand that the local authority will move HK in a planned way, with proper introductions and once he has moved, I will move into my father's home and [the Mother] will remain in the family home".*

26. The Father added that he loves the children and:

*"... if I can't care for them then I will do whatever is necessary to give them the best chance of returning to the care of [the Mother]"*.

He added that he was not giving up on the children but:

*"I will take a step back for now"*.

27. A statement by the Mother dated 27 November 2023 then followed in which she stated:

*"I have taken, what for me has been a very difficult decision, to end my relationship with [the Father]. I have always hoped that there might be some way in which the children could be safely reunited with both their parents but I fully accept that that is not possible. My priority is my children"*.

28. The Mother referred also to the plan for HK to move from the home of the paternal grandparents into a foster placement and that the Father would move into his parents' home *"as soon as HK moves out"*.

29. In relation to the Court's findings, the Mother stated that she accepted them in their entirety with two exceptions (the paragraph numbers she cites being those in the schedule quoted at paragraph 13 above):

*"(a) I was not aware of [the Father's] conduct as described at 9c of the Judgment i.e. "roughly handled BK, including possibly pushing/pulling his head*



*down using both of his hands, causing BK to cry and scream;" Therefore I accept finding 10a save for finding 9c.*

*(b) Secondly, with regards to finding 10b I do believe that I have done my best to be open and honest with the Court. I do however accept that at the time and on a day to day basis I thought things were alright but looking back they clearly were not. I appreciate I may be expected to reflect further on what happened whilst BK was living with us and I will do so".*

30. HK moved from the home of the paternal grandparents into foster care on 7 December 2023. The Father, however, did not then move into the paternal grandparents' home until 9 days later on 16 December 2023. In oral evidence, the Mother accepted under cross-examination that she should have asked him to leave straight away. She could give no explanation why she had not. When the Father was asked about this same topic, he said that the paternal grandparents needed time to prepare HK's vacated room before he could move there. Prior to him moving, the Mother drove the Father to contact with HK on 15 December 2023.
31. At a Looked After Child review meeting on Monday 8 January 2024, the Independent Reviewing Officer ("IRO") asked the Mother about her relationship and contact with the Father. The Mother replied that she had not spoken to the Father since Christmas. In oral evidence the Mother accepted that she had said this to the IRO. It is now known that this was untrue.
32. On the same date, the Mother attended contact with HK and asked him what game he would like the Father to bring when he attended contact. HK replied, "Pizza Party". The Father then brought that game to contact on Wednesday 10 January. In oral evidence, the Mother said that she arranged for the game to be passed to the Father via the paternal grandfather. She denied that she had done this herself.
33. On Tuesday 30 January 2024, the Mother sent a text message to the contact worker saying that she had forgotten to mention at contact the day before that it was the Father's birthday on Saturday (3 February). She stated, "*I wasn't sure if boys wanted to sort out a card? He only sees them on a weds so would be the only time their dad could get a card*".
34. The Mother's oral evidence was that she had made the requests in relation to the game and the birthday card thinking about the interests of the boys, not the Father, and she denied that this was evidence of continuing feelings for or an ongoing relationship with the Father.
35. However, professionals at that time were increasingly suspicious that they were not being told the truth.

36. On Wednesday 31 January 2024, Hannah Buckley observed some of the Father's contact. The contact session was from about 3.20 to 4.50pm. Afterwards, Ms Buckley went to her car to drive the short distance to the Mother's home. The Father was walking away in the opposite direction, but she noticed that on several occasions he turned round and looked at her car. This was also noted by the contact worker who remarked about it to Ms Buckley the next day. The Father's behaviour stood out as unusual. Ms Buckley suspected he was waiting for her to drive off so he could then go and see the Mother at the family home.
37. Ms Buckley then attended the home, arriving at around 5pm. It was an unannounced visit. The Mother presented as flustered, saying she had to go upstairs to turn off her computer as she had been doing training for work. She came back downstairs a few minutes later. Ms Buckley then thought she heard a knock at the door. She told the Mother who went to the door. Ms Buckley could not hear any conversation, but the Mother shouted to her, "It's next door". Ms Buckley did not see or hear the Father during that visit, but the Mother throughout appeared uneasy and on edge. Ms Buckley wondered if the parents had been planning to meet up after contact, although she did not challenge the Mother at the time about this. In oral evidence, both parents denied that this was the case. The Mother said that it was a neighbour at the door with a parcel. The Father denied any plan to meet and said he did not go to the home. Both parents also denied that there was any significance that the Father called the Mother at 5.30pm that day, a call lasting 56 seconds (see paragraph 57 (iv) below).
38. Ms Shann held five assessment sessions with the Mother on 12 and 22 January and 2, 5 and 8 February 2024. Ms Shann observed that when the Mother referred to plans to decorate the home she used "we" not "I" as she spoke. She was defensive of the Father. Ms Shann also noted a significant number of items belonging to the Father in the home, including computer equipment in the study room. Ms Shann spoke frankly to the Mother at the penultimate session. Ms Shann told her that she was worried that the Mother was continuing a relationship with the Father and that she needed to be really honest, even if that meant acknowledging things she had not said before. The Mother's response was that the relationship was over, save for a couple of telephone calls with the Father about financial matters.
39. On Friday 8 March 2024, the LA made an application to the Court seeking an urgent Court hearing. One reason for this was to re-timetable the proceedings to assess the maternal grandparents. I need not say anything in detail about that aspect of the case, save to note that it has been made clear subsequently that the maternal grandparents foresee any future role for them being limited to offering for the Mother and children to come and live with them, and providing general help and support only. Their role would not go beyond that. They would not be monitoring or supervising the Mother's care, nor taking on any primary care role of their own. However, the second reason for the LA's application seeking an urgent hearing has far more significance. The LA sought permission to instruct Evidence Matters (who had conducted the detailed

forensic analysis of the parents' devices at the fact-finding stage) to undertake a forensic analysis of the Mother's mobile phone. The application was accompanied by a statement by Ms Buckley referring to the matters set out above.

40. During this final hearing, the Solicitors for each parent have clarified at my request when it was their respective clients were notified of this development. At 11.41am on Friday 8 March 2024, the Mother's Solicitor emailed her that the application and social work statement had been received. At 11.53am an incomplete copy of the statement (alternate pages only) was emailed to the Mother. But then a full copy of the statement followed at 12.25pm. At 10.29am on Monday 11 March 2024, the Mother's Solicitor emailed her to tell her that the matter had been listed the following day. At 10.58am on that same Monday, the Father's Solicitor emailed him the application and the social work statement. The Father informed his Solicitor that he would not be able to attend the hearing as he could not get time off work.
41. The hearing came before the Court at 2pm on Tuesday 12 March 2024. The Mother attended but the Father did not. Both were represented. I granted the LA's application for forensic analysis. Paragraph 10 of my order reads:

*“Permission is given to the Local Authority to instruct Evidence Matters to conduct a digital forensic analysis of the mobile phone of the mother. The purpose of the examination is to identify any communication between the mother and father and whether any such evidence supports or contradicts the parents' case that they ended their relationship on 20 November 2023 and the father moved out the home on 16 December 2023”.*

The order proceeds to set out ancillary directions including that the date range for the analysis shall be from 15 November 2023 to the date the phone was provided to Evidence Matters, and a report filing date of 22 March 2024.

42. At no time during that hearing did the Mother state that she had experienced any problem with loss of data from her phone that would impact on the forensic analysis directed by the Court.
43. On 25 March 2024, Evidence Matters emailed the LA to highlight that the Mother's mobile phone had been factory reset and *“There is nothing native on the device before 11th March 2024.”*
44. Evidence Matters were asked whether the phone had been deliberately wiped before it was sent to them, and whether this is that what a factory reset does. Evidence Matters replied by email:

*“Yes, it's either been deliberately wiped prior to sending it or it's a new (old) handset for that party and only been in use since 11<sup>th</sup> March 2024”.*

45. In a Report dated 26 March 2024, Evidence Matters stated:

*“It should be noted that very limited material has been recovered from the device. Review of the text messages, images and calls show that there are no artefacts available prior to 11<sup>th</sup> March 2024. This may indicate that device has been factory reset.”*

46. Evidence Matters found no calls logged prior to 11 March 2024. None of the recovered calls were made to or received from either of the numbers that may be associated with the Father. There were no messages prior to 11 March 2024.

47. Evidence Matters stated that the route was open to seek to obtain evidence of communication (but not the content of communication) through Court-directed disclosure of call data records from the network providers.

48. The LA sought a further Court hearing and the matter came back before me on 9 April 2024. The Court was updated about the suggestion that there had been a factory reset and that no relevant data was recoverable from the Mother phone prior to 11 March 2024. I made orders for disclosure of data from both parents’ network providers (although some of those orders required further amendment thereafter in an attempt to achieve that objective). I gave permission to further instruct Evidence Matters to analyse any such data when received. I also made an order in the following terms:

*“The Mother and Father shall by 4pm on 16 April 2024 each file and serve statements addressing:*

- a) What if any communication there has been between them since 15 November 2023.*
- b) On what occasions they have met up in person.*
- c) Whether (in the case of the Mother) her phone was reset by herself or another.*
- d) If the Mother accepts she reset the phone, why she did so.*
- e) If the Mother does not accept this, what explanation she offers for the absence of data on the phone pre 11 March 2024”.*

49. In the Father’s statement dated 15 April 2024, he stated that he had lived in the same house as the Mother until 16 December 2023. She also drove him to contact on 15 December 2023. After he left the home, there had been no occasions when he saw her in person until he attended Court on 9 April 2024. The Father said that, *“there have been a few calls and texts regarding money, the house and initial moving details”*. Addressing his mobile phone, the Father said this at paragraph 7 of that statement:

*“I thought I had everything on my phone but seemingly when I deleted [the Mother’s] number, I deleted all our messages and calls to get a clean slate, not thinking it would suddenly become relevant. This is entirely my fault and I know it doesn’t help”.*

50. In the Mother’s statement dated 16 April 2024, she stated that she and the Father had remained living under the same roof at the family home until 16 December 2023. After that date, she had had no face-to-face communication with the Father and only “a few exchanges of texts and short calls regarding bills and ‘unjoining’ universal credit”. In relation to her mobile phone, she stated:

*“I deny resetting my phone and do not believe it was or can have been reset by anyone else”*

*“I am unable to offer any explanation other than that I have updated the Apple software on my phone”.*

51. The Mother’s claim that the lack of data on her phone was the result of an update was put to Evidence Matters. They responded:

*“Simply updating the phone would not delete everything. Most manufacturers push through regular software updates, typically set to run overnight, and these do not affect user content. The updates may affect the user experience, in that they update application functions and displays, but it would not wipe the data. There would be widespread uproar if manufacturer updates deleted the content of a user’s phone.”*

52. The matter came back before the Court on 18 April 2024. That hearing was listed mainly to address changes in the position taken by the maternal grandparents and the knock-on effect on the timetable. But it also presented the Court with another opportunity to address what was being said about the loss of phone data. The Mother’s position was recited on the order of that date, namely that, *“her loss of data is attributable to a phone update and that this occurred a few days prior to the hearing on 12th March 2024”.*

53. Going into that hearing, the Father’s position in relation to his own phone was as set out in his statement dated 15 April 2024 (quoted at paragraph 49 above). I raised the question whether there should be forensic analysis of his phone also. At my suggestion, his device was handed to his Solicitor. The LA made an oral application for the phone to be analysed and I granted that application. The Father then revised his instructions to his legal team, which they duly informed the Court about. His new account was that he had factory reset his phone and he believed that he had done so

prior to the original application of the LA (relating to the Mother's phone) and prior to the hearing on 12 March 2024. That changed position was recited on the order.

54. I made a direction for the Father to provide a statement giving more details about this, and why he had not mentioned the factory reset in his statement dated 15 April 2024. In a statement dated 26 April 2024, the Father stated that he was unable to give an exact date when he reset his phone, but it was around 10 March 2024. He said he had done this approximately two to four times since obtaining his phone. He said he did so to have a "clean slate" as he did not wish for constant reminders of the Mother. He added:

*"The fact that I didn't mention that I had factory reset my phone, was not a deliberate omission from my statement. I did say I had deleted [the Mother's] number and all our messages and calls to get a clean slate. I accept that I didn't word it specifically as a reset, for which I apologise".*

55. Evidence Matters responded to further questions in relation to the issue of 'factory reset' in a report dated 23 April 2024:

*"A factory reset is a multi-step process, which will permanently delete all data from the device. This process requires the user to enter passcodes at various stages and will ensure the user is aware that their data will not be recoverable once complete. Following a factory reset, the device can either be set up as new or restored from a backup file".*

56. Evidence Matters produced a Report dated 28 April 2024 analysing the data received from the Mother's mobile phone provider. Despite the absence of data on the device itself:

*"... the call data records show that this handset was in use from 15th November through to 13th March 2024 and one thousand three hundred and twelve (1,312) messages and call logs should have been recoverable from the iPhone 14 handset. This suggests that user action has deleted these records from the handset prior to submission."*

57. The calls that took place between the parents have been set out in table format. They show that:

- (a) There were numerous calls between them in the period 15 November 2023 to 8 March 2024;
- (b) They continued to be in frequent telephone after 16 December 2023;
- (c) The only time when there was any notable gap between the telephone calls was in the last week of December/early January when there were only 2 calls (on Boxing Day and 30 December 2023);
- (d) At all other times, there were numerous calls, sometimes multiple times per day. There were times when there were gaps of a few days between the calls, but the overall pattern is of the parents in regular communication with one another;

- (e) The duration of these calls varied between short calls of less than a minute to calls of a longer duration up to 15 minutes;
- (f) The calls link to some of the dates set out above. In particular:
  - i. On 5 January 2024, between 12.30pm and 5.30pm there were 5 separate calls totalling 20 minutes.
  - ii. On 8 January 2024, when the Mother told the IRO that she had not spoken to the Father since Christmas, she had in fact done so in the above (and other) calls. She had also attempted to call him that morning, and he called and spoke to her that afternoon.
  - iii. The Mother told Ms Shann that she “*has absolutely no communication with [the Father] (except about financial matters)*”. This is contradicted by the volume of calls there were. These included calls between the parents on three of the five dates when Ms Shann held assessment sessions with the Mother (12 January 2024 at 5.01pm (9 minutes 2 seconds), 22 January 2024 at 12.34pm (8 minutes 7 seconds) and 8 February 2024 at 5.17pm (4 minutes 23 seconds)).
  - iv. On the afternoon of 31 January 2024 when Ms Buckley made the unannounced visit to the Mother’s home and she appeared “on edge” (see paragraph 37 above), there was a call from the Father to the Mother at 5.30pm (56 seconds).
  - v. Between 5 and 7 March 2024, there were series of calls between the parents at a time when the Mother was in a location where the maternal grandparents live. On 7 March 2024, there was a call at 10.42am (2 minutes 21 seconds) and a long call at 12.36pm (15 minutes).
  - vi. On 8 March 2024, this pattern of frequent and sometime lengthy calls ceased at 1.35pm that day. This was shortly after the Mother had been notified by her Solicitor of the LA’s application for forensic analysis of her phone and sent the statement of Ms Buckley setting out the matters which founded that application.

58. At an Issues Resolution Hearing on 15 August 2024, I was told the Mother maintained her position that the loss of data on her phone was the result of a phone update. I gave permission for further questions to be put to Evidence Matters about this. In response, Evidence Matters stated that they are not aware of any verified incident where factory reset of a mobile phone has occurred, without user input, for example during a system update. They reaffirmed that:

*“... a factory reset is a user enabled multi-step process that erases all live and deleted user data from the device. During the reset process, the user is prompted to enter their PIN/password/authorisation multiple times and informed that all data will be erased and will be unrecoverable.”*

As to whether a factory reset is possible without the user taking deliberate action to reset the phone, the response was:

*“As stated, the factory reset of an IOS device is a specific and intentional process, requiring multiple levels of user authorisation”.*

59. I have set out the above evidence in some detail because, as I explain in the welfare analysis below, the Mother’s openness and honesty (or lack of it) about her relationship and ongoing communication with the Father is key to the issue of risk and planning for the children’s safety and wellbeing going forwards. I refer to and analyse the professional evidence on that issue during my welfare analysis.

### **Welfare/Outcome – The Law**

60. At the welfare/outcome stage, when considering what, if any, order to make, section 1 of the Children Act 1989 (“CA 1989”) provides that the welfare of the child is the Court’s paramount consideration. I must have particular regard to the welfare checklist in section 1(3) of the Act, namely, the ascertainable wishes and feelings of the child considered in the light of the child’s age and understanding; the child’s physical, educational and emotional needs; the likely effect on the child of any change of circumstances; the child’s age, sex, background and other relevant characteristics; any harm which the child has suffered, or is at risk of suffering; how capable each of the parents, or any other relevant person, is of meeting the child’s needs; and the range of powers available to the Court within the proceedings.
61. As to the LA’s application for a Placement Order in respect of BK, the relevant statutory provisions are found in the Adoption and Children Act 2002 (“ACA 2002”). Applying section 1 of the ACA 2002, the paramount consideration of the Court must be the welfare of the child throughout his life and, in considering that question, the Court must have regard to the checklist of factors in section 1(4) of the ACA 2002. In many respects, the adoption welfare checklist mirrors that within the CA 1989, which I have already set out. However, the enhanced checklist within the adoption legislation adds two particular factors. Section 1(4)(c) refers to the likely effect on the child *throughout the child’s life* of having ceased to be a member of the original family and becoming an adopted person. Section 1(4)(f) refers to the relationship which the child has with relatives, with any prospective adopters with whom the child is placed and with any other relevant person; including the likelihood of any such relationship continuing and the value to the child of its doing so; the ability and willingness of the relatives or any other such person to provide the child with a secure environment in which the child can develop and otherwise meet the child’s needs; and the wishes and feelings of any of the child’s relatives or any other such person regarding the child.
62. By section 21(3) of the ACA 2002, the Court may only make a Placement Order if the Court is satisfied that the parents holding parental responsibility have consented or



that their consent should be dispensed with. By section 52 of the ACA 2002, the Court can only dispense with the consent of the parents if it is satisfied that the welfare of the child requires their consent to be dispensed with. “Requires” in this context has the meaning of the imperative.

63. These statutory tests are complemented and reinforced by some key principles which derive from the case law. The case law is clear that, wherever possible, children should be brought up by their natural parents and, if not, by other members of the extended family. In Re B (A Child) [2013] UKSC 33, the Supreme Court emphasised this approach in all public law children cases. In reaching my decision, I have taken into account that the child’s welfare is my paramount consideration and also the need to make the least interventionist order possible. The Article 8 rights of the child and the parents are engaged. Any order I make must be in accordance with the law, necessary for the child’s protection and must be proportionate.
64. To place a child for adoption (as proposed for BK in this case) is on any view a highly significant decision with life-long consequences. In Re B, the Supreme Court explained in detail the need to recognise this and to scrutinise with upmost care what it is that is being proposed. The approach to be taken was expressed in various ways, best encapsulated by the phrase “where nothing else will do” to meet the child’s future welfare.
65. I must also keep firmly in mind the well-known and often quoted ruling by the Court of Appeal in Re B-S (Children) [2013] EWCA Civ 1146 [2014] 1 FLR 1035. That case and other authorities which predate and postdate it emphasise the importance of addressing my mind to the realistic options for the child by weighing up the advantages and disadvantages of each and taking into account the assistance and support which the authorities or others could offer.
66. By applying a rigorous holistic analysis of the realistic options and applying these principles within the case law, the Court must then reach a conclusion. This will mean that, in some cases, the conclusion is reached that the child’s welfare does require placement for adoption. As Sir James Munby P observed in Re R (A Child) (Adoption: Judicial Approach) [2014] EWCA Civ 1625 [2015] 1 WLR 3273 at paragraph 44:

*“Where adoption is in the child’s best interests, local authorities must not shy away from seeking, nor Courts from making, care orders with a plan for adoption, placement orders and adoption orders. The fact is that there are occasions where nothing but adoption will do, and it is essential in such cases*

*that a child's welfare should not be compromised by keeping them within their family at all costs".*

67. The differences between long term foster care and adoption feature in a number of reported cases.

68. In *Re V (Long Term Foster Care or Adoption)* [2014] 1 FLR 1009, Black LJ (as she then was), whilst noting that each case was to be considered on the evidence in that case, made the following observations at paragraph 96:

*"(i) Adoption makes the child a permanent part of the adoptive family to which he or she fully belongs. To the child it is likely, therefore, to 'feel' different from fostering. Adoptions do of course fail but the commitment of the adoptive family is of a different nature to that of a local authority foster carer whose circumstances may change, however devoted he or she is, and who is free to determine the caring arrangement.*

*(ii) Whereas the parents may apply for the discharge of a Care Order with a view to getting the child back to live with them, once an Adoption Order is made it is made for all time.*

*(iii) Contact in the adoption context is also a different matter from contact in the context of a fostering arrangement. Where a child is in the care of a local authority the starting point is that the authority is obliged to allow the child reasonable contact with his parents (section 34(1) of the Children Act 1989). The contact position can of course be regulated by alternative orders under section 34 but the situation still contrasts markedly with that of an adoptive child. There are open adoptions where the child sees his or her natural parents, but I think it would be fair to say that such arrangements tend not to be seen where the adoptive parents are not in full agreement. Once the Adoption Order has been made the natural parents normally need leave before they can apply for contact.*

*(iv) Routine life is different for the adopted child in that once he or she is adopted the local authority have no further role in his or her life (no local authority medicals, no local authority reviews, no need to consult the social worker over school trips abroad, for example)."*

69. In the more recent case of *Re D-S* (addressed further at paragraphs 71 to 74 below), Peter Jackson LJ cited the above passage but noted in relation to sub-para (iii) that the case was decided in July 2013. In April 2014, section 51A was added to the ACA 2002, giving the Court the power to make a contact order in respect of an adopted child, and the modern position must be viewed in that light.

70. In *Re LRP* [2013] EWHC 3974 (Fam), Pauffley J referred to a report that suggested that long term foster care would be a “means by which permanency can be achieved”; and that “a long term foster home can offer ... commitment, security and stability within a new family...”. She stated at paragraph 39:

*“I profoundly disagree with those contentions. Long term foster care is an extraordinarily precarious legal framework for any child, particularly one as young as LRP. Foster placements, long or short term, do not provide legal security. They can and often do come to an end. Children in long term care may find themselves moved from one home to another sometimes for seemingly inexplicable reasons. Long term foster parents are not expected to be fully committed to a child in the same way as adoptive parents. Most importantly of all in the current context, a long term foster child does not have the same and enduring sense of belonging within a family as does a child who has been adopted. There is no way in which a long term foster child can count on the permanency, predictability and enduring quality of his placement as can a child who has been adopted.”*

71. The recent case of *D-S (A Child: Adoption or Fostering)* [2024] EWCA Civ 948 concerned an 11-month-old child (C) with two older half-siblings (K and J) who were in long-term foster care. The Court of Appeal allowed an appeal against a refusal by the first instance judge to make a Placement Order for child C. The Court of Appeal proceeded to make a Placement Order.

72. Peter Jackson LJ said this at paragraph 39(2) to (4) of his judgment:

*“[39] (2) There is no rule that very young children who cannot live at home must always be adopted. However, the advantages of adoption for C, at her age, were obvious. They did not automatically predominate, but they were a powerful consideration that had to be recognised. Unfortunately, they did not feature in the judge’s analysis. He said that C’s age weighed heavily but it is not possible to see that he actually took it into account at all in his final evaluation at paragraphs 40-42. The only reference to the benefit of “a close parental relationship” is a reference to a relationship with foster carers. In my view, even taking account of the generous latitude due to a trial judge, the failure to consider the benefits of adoption for C was a fundamental error of principle.*

*(3) The same can be said about the judge’s treatment of long-term fostering. He referred to the advantages of maintaining family ties, but not to the manifest disadvantages of a life in foster care. He mentioned LRP, and had been referred to *Re V*, but he did not respond to the guidance they contain. In particular, he said nothing to justify “the balance which C will have to hold between both*

*parents and foster carers” or explain why that was a reasonable demand to make of a child of this age. Nor did he consider the ever-present possibility that C would experience changes of foster carers between now and reaching her majority in 2041, and that she would then leave care as a member of a birth family with whom she had never been able to live.*

*(4) The judge’s analysis also leans on matters that were irrelevant to C’s case. The evidence about her health was not of a kind that could affect her chances of being adopted, and nor was the possibility that she might share the parents’ learning difficulties. Even if one took a gloomy view of these uncertainties, that could only speak in favour of C having a family of her own as soon as possible, so that her adoptive parents could advocate for her and give her the best chance of achieving her full potential.”*

73. When making a Placement Order for child C, Jackson LJ stated at paragraphs 52 and 53:

*“[52] After all that has been said above, my welfare evaluation can be quite shortly stated. The dominant feature of C’s present situation is, in my view, her particular needs at her very young age. At the heart of the matter, she needs a lifelong family where she can feel that she belongs. I agree with the professional assessment of Ms R and Mr B that this can only happen through adoption. Spending a whole childhood in foster care is absolutely not the same, even if good and permanent carers could be found. The reason why long-term fostering was not looked at more closely by the professionals was because it was obviously a very poor plan for C’s future. Even if the parents and foster parents do their best, it is an insecure plan for C’s childhood, and if she was to experience multiple placements, she would be at real risk of suffering irreparable harm.*

*[53] As already remarked, the uncertainties about C’s health and development are not of a kind that could tip the scales, and they certainly do not speak against adoption. The lifelong effect on C of leaving one family and joining another are similarly a neutral factor. There will surely be losses, but there will very likely be gains.”*

74. As to the issue of whether a section 26 contact order should be made, this is referred to at paragraph 17 and again at paragraph 56 of the judgment:

*“[17] ... We will make a placement order on the basis of the local authority’s plan, which aims for there to be some contact before and after adoption. We will not make a contact order, because that might complicate the search for adopters, which must be the priority.*

[56] ...Overall, it would not be better for us to make a contact order, in fact it might be detrimental to the greater priority of finding an adoptive family for C”.

75. It has long been established that having long-term fostering as a contingency if an adoptive placement cannot be found is a legitimate planning approach and does not preclude the LA making an application for, and the Court subsequently granting, a Placement Order. In *Re P (A Child)* [2008] EWCA Civ 535, Wall LJ stated at paragraph 137:

“... a local authority can be "satisfied that the child ought to be placed for adoption" within the meaning of section 22(1)(d) of the 2002 Act even though it recognises the reality that a search for adoptive parents may be unsuccessful and that, if it is, the alternative plan will have to be for long-term fostering. The wording, after all, is "ought to be" not "will be". That being so there can be no objection in principle to dual planning in appropriate cases”.

76. In the same case, Wall LJ addressed the changes to the law relating to contact brought into effect by the ACA 2002. An order had been made by the first instance judge under section 26 of the ACA 2002 providing for sibling contact between the two children (D and S), both of whom had been made the subject of Placement Orders. The substantive appeal (which was dismissed) was against the making of those Placement Orders. However, commenting on the contact order that had been made (and was not the subject of any appeal) Wall LJ stated at paragraph 151:

“On the facts of this case, there is a universal recognition that the relationship between D and S needs to be preserved. It is on this basis that the local authority / adoption agency is seeking the placement of the children. In our judgment, this means that the question of contact between the two children is not a matter for agreement between the local authority / adoption agency and the adopters: it is a matter which, ultimately, is for the Court. It is the Court which will have to make adoption orders or orders revoking the placement orders, and in our judgment, it is the Court which has the responsibility to make orders for contact if they are required in the interests of the two children”.

77. In any given case, if a contact order is made under section 26, it would apply up until the making of any adoption order. At the point an adoption order is made, the relevant statutory provision concerning contact would be section 51A of the ACA 2002.

78. I note for completeness what was said in the case of *Re B (A Child) (Post-Adoption Contact)* [2019] EWCA Civ 29. That case addressed the making of a s.51A contact order at the point in time an adoption order is made (rather than the making of a section 26 order at the time a Placement Order is made). However, at paragraph 62 of

his judgment, Sir Andrew McFarlane P referred to the use of a section 26 contact order in these terms:

*“A placement for adoption hearing has the potential for having an important influence upon the development of any subsequent long-term contact arrangements. As required by ACA 2002, s 27(4), the Court must consider the issue of contact and any plans for contact before making a placement for adoption order. The Court’s order may well, therefore, set the tone for future contact, but the Court must be plain that, as the law stands, whilst there may be justification in considering some form of direct contact, the ultimate decision as to what contact is to take place is for the adopters and that [it] will be ‘extremely unusual’ for the Court to impose a contrary arrangement against the wishes of adopters”.*

79. Section 1(7) of the ACA 2002 expressly refers to an order under section 26 when defining what is meant by a Court ‘coming to a decision relating to the adoption of a child’. This means that the Court must have regard to the matters in section 1 of the ACA 2002 that I have already set out above. Where (as here) the issue is whether or not a section 26 contact order should be made, I must also apply the no order principle enshrined in section 1(6) of the ACA 2002 which provides:

*“In coming to a decision relating to the adoption of a child a Court or adoption agency must always consider the whole range of powers available to it in the child’s case (whether under this Act or the Children Act 1989); and the Court must not make any order under this Act unless it considers that making the order would be better for the child than not doing so”.*

80. I note one further thing when setting out the applicable law. This judgment involves a further process of fact-finding (see, most notably, paragraphs 102 to 125 below). I previously set out the applicable legal principles in my fact-finding judgment at paragraphs 133-151. I remind myself, in particular, of what I cited at paragraphs 134-135, 138-139 and 142-143 of that judgment. I apply those legal principles in today’s judgment at any point where further findings material to welfare are made.

### **Analysis and Conclusions**

81. The first checklist item is the child’s wishes and feelings considered in light of his age and understanding. HK is only seven years old. He has an understanding why he no longer lives with his parents. Sadly, one reason for this is because of what he witnessed happening to BK. Ms Buckley’s evidence is that, more recently, HK has become more reluctant to talk about this. He will now sometimes say that he does not understand why he does not live with his parents. HK has expressed the wish to return

to his mother's care, adding that he could "*keep BK safe*". This is a particularly poignant remark by HK given his young age and also when I look back at the attempts that he made to protect BK when he saw his father mishandling him (see paragraphs 220 and 222 of the fact-finding judgment, quoted at paragraphs 18 and 19 above). HK has said that, if the Court decides that he cannot return to live with his mother, he would wish to remain with his foster carers.

82. BK, of course, is not of an age to understand this legal process or state wishes and feelings about the decision I must make.

83. As to the children's physical, emotional and education needs (and, to use the language of section 1(4)(c) of the ACA 2002 for BK, his "particular needs"), I can combine these with their age, sex, background and other relevant characteristics.

84. In seeking to inform my understanding of this part of the welfare analysis, I draw upon the evidence of the allocated social worker Ms Buckley. She was balanced and child-focused in all that she said and she clearly had a good knowledge of the needs and characteristics of both boys. This is a product of both her extensive involvement and her excellent social work skills.

85. Ms Buckley articulates very clearly how the experiences of both children have impacted on them and inform their needs going forwards. She states:

*"Not only has BK suffered and experienced significant physical and emotional harm but his elder brother, HK, has also suffered significant emotional harm. HK has lived in an environment where he has been exposed to and witness to his baby brother being physically harmed. HK has spoken openly about what he has experienced and his baby brother being "damaged", this will have been incredibly frightening and worrying for HK. HK was only six at the time that this happened. HK has understandably struggled to process the events over the last seventeen months but in addition to this, HK has been labelled as not telling the truth, he has previously stated that his grandparents have called him "a liar". Extended family members from [the Father's] side of the family have clearly voiced that they do not accept the Findings made by the Court, in particular the Findings in respect of [the Father] perpetrating BK's injuries. In addition to this, [the Mother] stated in February 2024 to the Independent Social Worker, Ms Naomi Shann that she "accepts that 90% that [the Father] has injured BK". Over the last couple of months HK has made comments about wishing he had not spoken to Social Workers about what he saw and comments resenting BK. HK has been made to feel that he tells lies and as a result this has significantly impacted upon HK's emotional wellbeing.*

*In addition to the emotional harm as a result of the harm HK has witnessed of his brother by his dad, HK has grown up living in an environment where has been exposed to his father shouting angrily at him, on occasion where he has been*

*smacked by his father and evidence of his father referring to HK using derogatory language”.*

86. Ms Buckley goes on to say:

*“HK needs to grow up in an environment where he feels safe and is not exposed to harmful and frightening behaviour. HK needs carers who can provide safe and nurturing care, carers who will listen to him and whereby he feels believed. HK needs carers to respond in a nurturing and therapeutic manner, whereby he is not referred to using derogatory language, carers who will prioritise his safety and keep him safe. HK needs carers who will provide him with a range of opportunities to promote his self-esteem and confidence in order for him to flourish and thrive throughout his childhood. HK needs to be able to enjoy being a child and not have the significant worries that he has done to date, including worries about his little brother’s safety. HK needs the opportunity to have fun and to play, he needs carers who can offer reassurance that if he does make a mistake, that is ok and not feel pressured to meet expectations beyond his years”.*

*“BK ... has experienced very traumatic early experiences which resulted in harm being inflicted upon him by his father. BK needs to grow up in an environment where he feels safe and where he is free from harm. BK needs carers who respond to his needs in a nurturing and therapeutic manner who will be able to support him sensitively to understand his early lived experiences. BK needs a carer who can keep him safe and prioritise his safety and wellbeing, including the need to access health care and services he may require as he grows and develops, as a result of his injuries. BK needs the opportunity to live and grow up in a home environment where his carer is emotionally available. BK needs carers who are able to prioritise his needs and able to make time to give him love and attention, and where adult behaviour provides him with assurance, confidence, and safety”.*

87. The most up-to-date evidence summarising BK’s health needs is within the minutes of the Shobpa meeting held on 2 August 2024:

*“BK remains under regular review with the child development centre to monitor his developmental progress. Initial assessments indicated normal development but subsequently he has been identified as having mild developmental delay in some areas though he continues to make progress in foster care. He has a normal physical examination and there are no signs of abnormal muscle tone or power in any of the four limbs. His motor skills appear age appropriate. He has recently been discharged from further physiotherapy input. He has mild plagiocephaly (a common developmental head shape resulting in flattening on one side at the*



*back) which has no clinical significance. He is not yet using any single words but does have tuneful babble including vowels and consonants.*

*He does appear to demonstrate some understanding. He does have some problems with his feeding skills. He does not appear to like some textures with foods and has a limited diet of familiar foods. He does not like fruits. He does not like to hold a spoon and does not attempt to get it into his mouth but will have his hand guided by the foster carer. He can sometimes 'shove' food into his mouth which causes him to choke. He is awaiting a feeding assessment by SALT. He will only drink out of a baby bottle. His clinical presentation is encouraging so far as there were initial concerns that he would experience significant developmental problems after his brain trauma. However, it is still not clear what progress he will make with his development in the next few years and whether his development will diverge further from his age-related peers. He will remain under paediatric review to monitor this”.*

88. Referring to the abusive head trauma that BK sustained, the minutes go on to record:

*“Adverse childhood experiences can have longstanding effects and cause disrupted neurodevelopment, social and emotional problems, mental health problems and physical health issues. It is important that BK is brought up in a loving household where he feels safe and has his developmental, emotional, and physical needs met consistently to try to reduce any impact his early experiences may have”.*

89. I agree with and factor into my welfare analysis all that is said above. I would only add that another crucial need of both children is that their parents should work openly and honestly with professionals charged with monitoring and supporting their safety and wellbeing.

90. I turn to the likely effect on each child of any change of circumstances.

91. For HK, he has experienced changes in his life that have adversely impacted on him. I have referred already to his experiences in the home which led to his removal into the care of his paternal grandparents. When BK was discharged from hospital, he was placed in foster care. This means that HK has, since mid-January 2023, lived separately not just from his parents but also his younger brother. Shortly after my fact-finding judgment, HK moved in early December 2023 to foster care, so that his father could move to live in the paternal grandparents' home. The LA's Care Plan for HK aspires that he remains with those foster carers. If that plan is approved, there will be an advantage to HK if he is able to remain with those carers. The Mother's case is that HK (and BK) should return to her care. The key question is whether that can be achieved without compromising their safety and wellbeing. I address that question below.

92. For BK, he has remained with the same foster carer (FC) since being discharged from hospital. If I approve the LA's Care Plan of placement for adoption and an adoptive placement is identified for him, that will involve a further move for BK. The adoption checklist requires that I address the likely effect on BK throughout his life of having ceased to be a member of the original family and become an adopted person. I must also address the relationship which BK has with relatives (and relevant others), the likelihood of any such relationship continuing and value to BK of it doing so. In circumstances where the parents' love for BK and their commitment to seeing him at contact has been emphasised to the Court, this has weighed heavily with me. So too has the sibling relationship between BK and HK which has been maintained so far through contact. Placing a child for adoption is a very significant step with lifelong consequences. It would sever the legal relationship between BK and his parents and HK. The advantage to BK of placement for adoption is that he would become part of the adoptive family. Adoption provides lifelong security and permanence. Given the young age of BK, it is understandable why this plan is urged upon the Court by the LA and the Children's Guardian if he cannot be returned to the care of his parents. I return later to the competing positions on what should happen for BK, both in terms of his placement and in relation to contact.
93. I turn to the next checklist factors, namely any harm which the children have suffered or are at risk of suffering and the capability of the parents, or any other relevant person, of meeting their needs. The ACA 2002 (applicable to BK) similarly requires the Court to have regard to the ability of the parents (or other relevant person) of providing BK with a secure environment in which he can develop and otherwise meet his needs.
94. The positives for the Mother have been put skilfully by Ms Anning on her behalf and she has emphasised them in submissions. She accepts (rightly) that the findings made are serious and will inevitably feed into the welfare analysis. But she also points to the more positive observations of professionals when the children were at home, and make the point that, prior to the events concerning BK, the picture does not suggest long standing harmful parenting towards HK. The Mother, to her credit, ensures that contact is an enjoyable experience for her children.
95. I have weighed these factors into the welfare balance. I have observed the Mother give evidence for a long time at both the fact-finding hearing and this welfare hearing. She has been asked a great many questions about her own behaviour, the Father and about her children. The Mother presents superficially as if willing to help those who ask her such questions. I can foresee professionals who do not have a detailed knowledge of this case (for example, therapists or course providers who do not know the history and do not challenge her account) might be drawn into her false narrative of events or even feel misplaced sympathy that the children are not living with her. The difficulty is that the Mother keeps back key information (a trait picked up by Ms Shann). Worst still, as I explain below, she has set out actively to deceive

professionals and the Court about matters fundamental to the safety and wellbeing of her children.

96. The findings of fact made on 20 November 2023, on any view, were serious and the risk to both children arising therefrom is clearly established. I have quoted the findings and set out key passages of my fact-finding judgment explaining the reasons for making those findings at paragraphs 13 to 23 above.
97. The Father continues to deny that he acted in the extremely harmful way as found in that judgment. He accepts that, in light of those findings, he will not be considered to care for the children alone or with the Mother. However, he maintains his innocence. From his perspective, he presents no risk to the children and there was no valid reason for separation from the mother. The fact that he holds this belief is material to my analysis of how he acted following the fact-finding judgment.
98. As to the Mother, her claim that she accepts my findings “in their entirety” is qualified by the “exceptions” she included in her response statement (see paragraph 29 above). These are noteworthy as the Mother does not accept a key part of my overall findings. I found, having regard to the detailed narrative given by HK, that the Mother had witnessed BK being forcefully mishandled by the Father by pushing/pulling BK’s head down, causing BK to cry and scream (see paragraphs 220 and 222-223 of the fact-finding judgment quoted at paragraphs 18 to 20 above). The Mother continues to maintain that what HK said about her presence when this happened was untrue. That links to my finding, which the Mother also rejects, that she has greater knowledge of the Father’s ill-treatment of BK than she is prepared to say. When making that finding, I accepted what HK had said. But it went beyond that. The finding was also founded on the evidence that the Mother made internet searches about baby’s bones etc. at the end of the time range when BK sustained his rib fracture (see paragraph 225 of the fact-finding judgment, quoted at paragraph 21 above).
99. The Mother therefore advances a case seeking the children’s return whilst continuing to maintain her own false narrative denying what she in fact knew about BK’s ill-treatment at the hands of his father. This was a significant failure to protect by her and was combined with her failure to seek medical attention for BK even when he was so clearly unwell and in desperate need of such attention.
100. As Ms Shann rightly observes at paragraphs 154, 159 and 161 of her assessment report dated 15 February 2024:

*“[154] [The] parents’ text messages describe BK in some considerable pain and distress. BK crying and being extremely unsettled should have elicited a response of empathy and concern from [the Mother]. It is a deeply worrying feature that knowing BK was so unwell, [the Mother] tolerated his pain and discomfort. She*

*describes being unaware, but rather it is apparent that she ignored BK's suffering. In terms of her parenting style [the Mother] was inconsistent and avoidant.*

*[159] It is apparent that [the Mother] was unable to reflect empathically on BK or HK's experiences and respond accordingly. She could not imagine their thoughts, fears, or distress and attempt to resolve this.*

*[161] ... [The Mother's] lack of care and attention was extremely serious. Parental disengagement is defined as a "lack of awareness of the child's ongoing experience, inattention, distraction, diminished reactivity, and, potentially, dissociation" ... This indicates high levels of concern when considering [the Mother's] future parenting capacity. Her lack of response to the children's most clearly expressed needs means that they would be at risk in her care. She is likely to lose focus on their needs for care, safety, protection, play, emotional warmth, boundaries, and stability. The potential consequences of this parental disengagement are sadly already illustrated in the injuries sustained by BK and the emotional harm caused to HK".*

101. In the parents' response statements filed shortly after the fact-finding judgment, the centrepiece of their case was that their relationship was at an end. As they saw it, this paved the way for future reunification of the boys to the Mother's sole care. The Mother sought to be assessed on that basis and the Father accepted that assessment of him should only consider the issue of his contact. However, I must address whether that is a dishonest case. If it is, that would compound their dishonesty during the fact-finding hearing. The consensus of professional view is that this would fundamentally undermine any suggestion that the safety and wellbeing of HK and BK can be entrusted to the Mother. Put simply, she could not be trusted to cooperate with any safety plan.
102. I turn to consider what happened after the parents declared their relationship was at an end.
103. It is of note that the "separation" of the parents did not take place in the way that it had been announced. The Mother said that the Father would move into the home of the paternal grandparents "*as soon as HK moves out*". In fact, he did not do so. He stayed with her in the family home for another nine days. I do not accept his explanation that that time was needed to get a bedroom ready for him. That could have happened with him living there and helping sort out the room. The Mother gave the Court no explanation why she did not ask the Father to leave immediately. If the relationship was truly over and she genuinely accepted the Court's findings about his very harmful conduct towards BK, she would have wanted this to happen. I find that she could not explain this as there was no good reason for it, save that neither of them really wanted him to leave.

104. The parents have said that telephone communication between them thereafter was confined to discussing and sorting out financial matters. I accept that there would have been some need for them to communicate in that way. However, there was no substantive dispute between them about what was to happen. It was agreed that the Father would continue to pay the mortgage and the Mother would pay the bills. The Mother has also referred to “unjoining universal credit”.
105. I do not accept that the frequency and duration of the numerous calls between them can be explained by the need to sort out financial matters. The call data was only obtained following third-party disclosure orders against the network providers. The Mother’s oral evidence was telling when she was asked for her reaction when that evidence came to light. She said that she was “horrified” at the number of calls that was revealed, adding “I did not think it would show that”. Repeatedly, during her oral evidence, the Mother maintained that she thought there had only been “a few” calls between herself and the Father. I do not accept that this is what the Mother knew or thought. It was her unconvincing attempt to feign innocence when she was caught out by what the records in fact show. I find that the Mother was “horrified” for a different reason: The true level of the ongoing telephone communication between herself and the Father was uncovered. The Father similarly spoke of “a few” calls when he gave evidence. I find that he joined with the Mother in feigning surprise at what was uncovered.
106. When the Independent Reviewing Officer asked the Mother at the LAC Review meeting on Monday 8 January 2024 about her relationship and contact with the Father, that was an important query by the person overseeing interim planning for the children. Her reply that she had not spoken to him since Christmas was clearly untrue, as the call logs demonstrate. For example, on the Friday before that meeting, they had spoken to each other during five separate telephone calls totalling 20 minutes.
107. The conduct of the Mother when she asked HK on 10 January 2024 what game he would like the Father to bring to contact must be seen in the context of what is now known. The Mother has maintained that she then arranged for the game to be passed to the Father via the paternal grandfather. However, given the level of communication taking place between them (and being deliberately concealed from professionals) I find it likely that the parents made this arrangement directly with each other. The picture that builds up is her saying one thing to professionals but doing another.
108. This observation applies also to the Mother’s account to the independent social worker Ms Shann. Ms Shann picked up on the Mother’s way of speaking, being defensive of the Father and still referring to “we” when she spoke about decorating the home. Ms Shann also noted that there were still many of the Father’s

belongings left in the home. I find that the Mother lied to Ms Shann when she told her that she had “absolutely no communication” with the Father except about financial matters, and that Ms Shann was right to be sceptical that she was being told the truth. What is now known is that on three of the five days when Ms Shann held assessment sessions with the Mother, the Mother also engaged in telephone calls with the Father, and she spoke to him on many other dates also.

109. I find that Ms Buckley was similarly justified to be worried about what was truly going on before and during her visit to the family home on 31 January 2024. I accept her account that the Father was acting suspiciously turning and looking at her car as she was driving away from the contact venue. I find that he was acting in that way to check that she was gone before heading in the direction of the family home to visit the Mother. I also accept Ms Buckley’s description of the Mother appearing flustered and on edge when she arrived unannounced at the home. I find that the reason for this is that the Mother was expecting the Father, not Ms Buckley, to be at the door. Her first act was to go back upstairs. I find that she did so to try and send a message to the Father warning him that Ms Buckley was there. When there was then a knock at the door and the Mother answered and called out (so that Ms Buckley could hear) that it was a neighbour, I find that she was likely to be warning the Father to keep away whilst simultaneously seeking to mislead Ms Buckley that the person at the door was someone else. I find that is it no coincidence that the Father called the Mother at 5.30pm that same day. I find it probable that the call took place shortly after Ms Buckley left, and that what had just happened is likely to have been referred to in that call.
110. Not long after this, Ms Shann spoke frankly to the Mother on 5 February 2024, telling her that she worried that the Mother was continuing a relationship with the Father and emphasising the need for openness and honesty. The events which followed show that this fell on deaf ears.
111. The LA applied on Friday 8 March 2024 for forensic analysis of the Mother’s phone. The accompanying statement by Ms Buckley set out in writing why the LA doubted the parents’ claim that their relationship had ended and that they only had very limited contact with each other about financial matters. The purpose of the proposed instruction of Evidence Matters was to see whether call and message data on the Mother’s phone confirmed or contradicted this.
112. I find it significant that, within an hour of the Mother receiving a full copy of Ms Buckley’s statement, all telephone communication between the parents came to a halt at 1.35pm that Friday. I find that they stopped calling one another because they knew that forensic analysis would expose that they were deceiving professionals.
113. However, simply stopping calls at that time did not resolve the problem facing both parents. They knew from what happened at the fact-finding hearing that

Evidence Matters had the forensic tools to extract call data and messages (including the contents of messages) from the phones.

114. In relation to the Father, the application for forensic analysis made on 8 March 2024 did not relate to his phone. However, he did not receive an email from his Solicitors informing him of the application until the morning of Monday 11 March 2024. His account has changed during these proceedings (see paragraphs 49 and 53-54 above). He now accepts that he reset the phone. In his statement dated 26 April 2024 he said that he was unable to give an exact date but it was around Sunday 10 March. In his oral evidence, the Father said that he did this sometime that weekend, adding that he would have not done it on a weekday as he was at work.
115. If the Father is telling the truth about *when* (as distinct from *why*) he reset his phone, this means that he did so at a time after the LA had issued its application and after the Mother had received notice of it. I find that the explanation for this is that the Mother told him about the application. It is completely implausible that, by coincidence, the Father decided to reset his phone at the very same time that forensic phone analysis was being proposed to the Court. I have weighed the fact that the LA was only (at that time) seeking forensic analysis of the Mother's phone. However, I doubt that this would have provided any reassurance to the Father. There was an obvious risk that the Court would extend this to his phone also. Alternatively, the Mother may not have picked up that it was only her phone to be analysed and therefore they were both under the belief that forensic analysis of his phone would be included in the expert instruction.
116. I turn to the claim by the Mother that she did not perform any factory reset on her phone, and the loss of all call and message data from that device must be the result of an Apple update. I have no hesitation in rejecting this for a combination of reasons.
117. I have set out the expert evidence of Evidence Matters earlier in this judgment. This has not been challenged at the final hearing. The suggestion that a routine update of the phone would cause the loss of all call and message data from the device is unsupported by that evidence. As Evidence Matters point out, if that were the case it would lead to widespread uproar. They know of no verified incident where a factory reset of a phone has occurred, without user input, for example during a system update. Evidence Matters have likewise provided clear evidence of the steps that must be taken to factory reset a phone and so delete all data, including call and message data. The process is designed to stop this happening by requiring (multiple times) confirmation by the phone user. The whole point of this is to prevent someone losing all their important data unless that is what they want to happen.
118. The Father accepts that he did factory reset his phone. He also accepts that, to do this, he had to take the very steps that Evidence Matters describe. I find that the Mother did likewise.

119. At the hearing on 12 March 2024 (when forensic analysis of the Mother's phone was directed) she did not communicate any problem to the Court with her phone which might frustrate that process. If, as she asserts, she had experienced her phone losing all her data (without her knowledge or authorisation) a few days earlier as a result of an Apple update, why did she not say so? Under cross-examination by Ms McCallum, the Mother stated that not only had the call and message data disappeared, but she also lost photographs of the boys that were taken and stored on the phone and which had not been backed up. If that were the case, the Mother, by pure coincidence, was then presented with the opportunity to see if Evidence Matters could help to recover such photographs which were of sentimental value to her. But she said nothing then about this. I find the reason for this was obvious. She had not suffered an unprecedented and unexplained loss of data. She had deliberately factory reset the phone. She could not acknowledge that then (and has persisted in her false case ever since) because she knows she did so to conceal what that data would show.
120. I have referred above to the wholly implausible coincidence that the Father just so happened to reset his phone shortly after the LA issued its application for forensic analysis. The Mother's case is equally if not even more implausible. She asks the Court to accept that she experienced a loss of data through an Apple update (despite the expert evidence refuting this) and this also just so happened to occur at the same time. This suggestion is, frankly, ludicrous.
121. I also find that the Father's statement to the Court dated 15 April 2024 contained a lie and he knew it. He claimed then that he had deleted the Mother's number from his phone and in so doing he also deleted all their messages and calls "*not thinking it would suddenly become relevant*". The Father's work means that he is knowledgeable about phones and electronic devices. When he wrote that statement, he knew that what he had done was a full reset of the phone, not some different more limited procedure. He only revealed that he had performed a factory reset when the Court (to his surprise) raised and then directed forensic analysis of his phone at the hearing that followed on 18 April 2024. He disclosed this only then because he knew that the forensic analysis would show just that (as indeed it subsequently did). I find that he did not reveal this sooner because he knew that the Mother had also factory reset her phone. He realised the implications of them *both* having done this at the same time.
122. I find that the reason why *both* parents performed a factory reset on their phones shortly after the LA issued its application is obvious. This was a joint and deliberate act of sabotage done in full knowledge of the application being made to the Court. They deleted their phone data to stop the Court and the LA and Children's Guardian discovering the large number of calls and messages that were passing between the parents. They also did so to prevent the Court and the other parties knowing the content of their messages to each other.



123. They did this because they knew that the professionals were right to highlight the jigsaw of evidence which contradicted their claim that their relationship was over and that they were only having very limited communication with each other. They knew that forensic analysis would reveal numerous calls and messages that exposed their dishonesty about this. They knew also that the message contents would be particularly revealing.
124. In coming to these conclusions, I highlight once more what emerged at the fact-finding hearing. As my earlier fact-finding judgment makes plain:
- (a) *Both* parents had given a dishonest account to the Court about family life.
  - (b) This had only been revealed though the Court piecing together other evidence, including the medical evidence, what HK had said to the police (and others) and the contents of the parents' phone message and internet searches.
  - (c) Forensic analysis of the parents' phones was particularly revealing. The contents of their messages revealed a very different picture of family life to the one they sought to portray;
  - (d) Their dishonest evidence constituted an attempt to mislead the Court about factual matters which would be crucial to future welfare decisions about the children.
125. The parents knew this when the fact-finding judgment was delivered. Further dishonesty as the proceedings progressed could only compound the situation. Yet this is exactly what has happened. It is striking that the parents *acted together* in deliberately deleting their phone data. This is particularly significant given their joint objective was to seek to mislead professionals and the Court about their ongoing relationship and extensive communication.
126. When professionals gave evidence at the final hearing, they all expressed their position in clear terms should the Court determine that such dishonesty had persisted. Addressing the Mother's case that the children could be placed in her care whilst living with her parents and with professional monitoring and oversight, all were clear that this would not safeguard the boys or secure their welfare. Addressing the evidence that I have analysed (and now made findings about) above, Ms Shann stated that this could give no confidence that the Mother (or the Father) could be trusted to cooperate with a child safety plan or to be honest with professionals or wider family members. The parents have continued to behave in this way even with a high level of professional involvement and under the spotlight of the Court process. Ms Buckley and the Children's Guardian concur with this view. So do I.

127. Ms McCallum makes the point succinctly and persuasively in her final submissions, in a passage with which I fully agree (noting that I have now made the findings to which she refers):

*“If the Court finds ... that the Mother has been dishonest about her communications and contact with the Father and then deliberately took steps (in the face of a Court application) to erase relevant communications on her phone (likely in concert with the Father) there can no confidence as to the Mother’s ability to be open and honest with professionals about circumstances and developments in her life. ... Even when the Mother knows that she has told a lie, and knows it has been detected, she opts for a course of obstinate denial as opposed to accepting and acknowledging her dishonesty ... This is a very difficult dynamic for professionals”.*

128. It follows from my analysis above that I cannot accede to the Mother’s case that I should return the boys (or either of them) to her care. To do so in the face of the findings that I have made, both in my fact-finding judgment and now in this judgment, would be to expose them to an unacceptable risk of significant harm.

129. In relation to HK, I approve the plan of long-term foster care and the making of a final Care Order. I balance that this will involve HK being cared for other than by his parents, and that he will grow up as a looked after child within the care system. There are disadvantages to children of foster care which I address in further detail below when I consider the proposed plan for BK. There are ways of mitigating some of the more intrusive aspects of foster care, for example by holding meetings about HK away from his school and by delegating day-to-day decision making to his foster carers. The aspiration for HK is that he should remain with his current carers who are meeting his needs and with whom he is familiar and settled.

130. As to HK’s contact with his parents, the LA proposes supervised contact with the Mother once per month (i.e. 12 times per year) and supervised contact with the Father 6 times per year. The Father has not sought to challenge these proposals. The Mother, through Ms Anning, has advanced the case that once contact reduces to a fortnightly frequency, the LA should review at that stage whether the frequency of contact should stay at that level. In oral evidence, the Children’s Guardian expressed some support for that approach and also suggested the phased reduction should be over a longer period than provided for in the Care Plan. The LA has since reflected on this, and its updated Care Plan provides for a slower reduction and a review at the 7 week point when contact would be taking place at a fortnightly level. The LA still considers, however, that the contact proposed in the plan (12 per year with the Mother and 6 per year with the Father) is in HK’s best interests in circumstances where there is a need to adjust to a plan of long-term foster care.

131. I am satisfied that this revised plan is in HK's best interests and fulfils the LA's duty to promote reasonable contact. The LA has now also committed to reviewing the contact at an appropriate point in time. In such circumstances, I decline to make any order under s.34 of the CA 1989 defining contact differently to that set out in the latest plan.
132. I turn to the competing proposals for BK, starting with his long-term placement. On that issue, I must differentiate BK (for whom placement for adoption is a realistic option) from HK (where this is not the case). I concur with the submission of Mr Todd on behalf of the Children's Guardian that their positions are entirely different. For BK, I must weigh the advantages and disadvantages of placement for adoption and the alternative proposal by the Mother that I should delay my final decision with a view to BK's current foster carer potentially being approved as his long-term foster carer.
133. The issues that I must resolve for BK (both as to placement and contact) engage those parts of the enhanced welfare checklist which appear in section 1(4)(c) and (f) of the ACA 2002. I quote these at paragraph 61 above.
134. BK is not yet 2 years old. He has spent most of his life in foster care under an interim care order. His foster carer, FC, has been praised by professionals for the care she has provided. Since being placed with her, BK has experienced the protective and nurturing care that was so sadly lacking when he was with his parents.
135. Looking to the future, FC has been actively involved in discussions about BK, including any position that she might wish to take were the Court not to sanction reunification to his mother's care. At one stage, it was thought she might seek full assessment with a view to being appointed as BK's Special Guardian. But she then decided, for reasons that are personal and confidential, that she did not wish to take that course. Ms Buckley said in oral evidence that FC ultimately wants what is best for BK, and she accepts that what he needs is stability and permanence. The Children's Guardian stated that she knew the details of the change in FC's personal circumstances which influenced her current decision-making. She was satisfied that these were genuine and she spoke of FC feeling under pressure at this time.
136. FC's most recent position is that she now wishes to be assessed as a long foster carer. The first stage of that process would take about 3 months and would assess her suitability to perform that role generally. If she were approved as long-term foster carer, she could then seek further assessment to be approved as long-term match for BK. That second stage would take a further 3 months.
137. Ms Anning acknowledges on behalf of the Mother that her proposal would involve delaying any decision about BK's long-term Care Plan for a period of six months. However, she emphasises the benefits to BK of staying long-term with his

current foster carer, with whom he is familiar and settled and receiving a high quality of care. Further, long-term foster care with FC, if it can be achieved, will provide a means by which BK can retain contact with his birth family, in particular his parents and HK. These welfare advantages, she submits, outweigh any negatives which flow from the Court refusing at this time to approve a plan to place him for adoption. Therefore, she submits, I should adjourn considering the question of BK's long-term placement until the outcome of the 6-month assessment process of FC is known.

138. The LA, supported by the Children's Guardian, submits that delay cannot be in BK's best interests. They point to the length of time these proceedings have already taken to reach a final hearing. They say that the assessment of FC can take place, but that this is not a justification to delay the determination of the LA's application for a final Care Order and a Placement Order. Central to their position is that BK's overriding need is for stability and permanence and that should be achieved through adoption. It is acknowledged that there is a shortage of adoptive placements and that BK's needs are such that there will be a limited pool of potential adopters to be considered. But the professionals are steadfast in their view that this does not mean BK should be deprived of that opportunity. Nor should there be any delay. BK needs a decision now about his long-term future. He should not wait any longer.

139. In relation to the possibility of long-term foster care with his current carer FC, the position is uncertain at this time. The Court has been told that there has been a recent change to her personal circumstances. I have not been told the details of this, rightly so. At the IRH, I made clear that her wish to preserve her privacy and confidentiality should be respected and all parties accepted this. This is important in circumstances where she is not a party to the proceedings nor advancing any active case of her own. What I do know, however, is that these private personal matters weigh on her decision making. They caused her to decline to take the route of being assessed as a Special Guardian for BK. The LA points to the fact that FC has not committed to that process of assessment which might have led to BK being placed long-term in her care. At the IRH, the LA confirmed that it was prepared to fund independent legal advice to her, but she subsequently declined that offer.

140. Further, both Ms Buckley and the Children's Guardian have spoken to FC about what she believes BK needs. She is supportive of BK having the opportunity for permanence. FC is an experienced foster carer who has cared for a significant number of children. These include children whom she has fostered and then assisted in their transition to an adoptive placement.

141. The combined evidence of all professionals accords with the case law principles about the fundamental differences between adoption and long-term foster care (see paragraphs 67 to 73 above). Although long term foster care is intended to provide permanency, sadly for a significant number of children within the care system, this is not achieved. There are a range of reasons why this is so. Ms Shann

(with whom the other professional witnesses agreed) spoke of foster carers not becoming too emotionally attached to children in their care, knowing that at some point they may have to move. Being a foster carer is a “job” and a foster carer is free to decide to stop working as such. A change of placement may occur for a range of reasons. The foster carer’s circumstances may change (perhaps unexpectedly). They may retire or take on other employment, or have family or other commitments which clash with the demands and requirements of their fostering role. They may find that the demands placed on them are too great for other reasons. Foster carers may give notice at any time. In some cases, this may enable a planned transition during the notice period. But in others, this may lead to the immediate termination of the placement and urgent alternative arrangements having to be put in place without any prior planning. The latter, if it occurs, can be particularly unsettling and would be likely to cause emotional harm. Social workers will change and move on. Ms Buckley described her experience of meeting with a child who had been in foster care from a young age. The first thing that child said to her was that she was the 26<sup>th</sup> social worker the child had met and had to recount a life story to. That brought home to Ms Buckley (as it does to this Court) how different that child’s experiences were to a child placed in an adoptive home. To add to all this, there is the stigma and level of intrusion that goes with being a looked after child. How they go about their daily life is affected by rules and limits on occasions such as holidays or sleepovers. This type of thing can become important for children as they get older.

142. The professionals who advance a plan of adoption for BK clearly do not wish such experiences on him. In saying this, they are drawing on their wealth of knowledge of the care system. They are not blind to the fact that adoptive placements can and do sometimes fail. But they have weighed that against the risk that long term foster care will expose BK to very different childhood experiences for the reasons set out above. Their concern is that this would not provide him with legal and emotional security and the sense of belonging that an adoptive family provides. They are resolute in their view that this is his overriding need, given his past experiences and his young age.
143. I agree with this consensus of professional opinion. BK needs carers and a home that will offer him a sense of identity, belonging, permanence and long-term security. It is likely that adoption at this early stage in his life will give BK the opportunity to form a secure attachment to an adoptive family. I accept that, sadly, it may be the case that such a placement is not identified for BK. But this does not mean that the Court should refuse to make a Placement Order. If I were to take that course, then that opportunity would be denied to him.
144. There is nothing to stop the process of FC being assessed as a long-term foster carer and (if approved) then being assessed as a potential long-term foster carer for BK. But permanence planning for BK should not be put on hold to allow for that to

happen. Indeed, Ms Buckley was clear in her evidence that FC herself wishes for BK to have the stability and security that adoption would provide. The Children's Guardian's evidence was that FC was not asking the Court to delay making a final decision for BK and she would cooperate in arrangements sanctioned by the Court including supporting his transition to an adoptive placement if one is identified. There is an obvious welfare benefit to BK if assessment of FC helps to inform any contingency plan, should the LA be faced with having to change course in the future through lack of an identified adoptive placement. But the suggestion that I should delay making a decision for BK (as the parents invite me to) is a step too far and fails to put BK's welfare as paramount. In saying this, I have regard to the delay principle enshrined in section 1(2) of the CA 1989 and section 1(3) of the ACA 2002. The Court must have regard to the general principle that any delay in making a decision is likely to prejudice BK's welfare. The particular facts of this case reinforce this. These proceedings were issued after BK was admitted to hospital with very serious injuries at the age of 12 weeks. He is now nearly 2 years old. To further delay my decision would be prejudicial to BK. The professionals are right when they say he should not wait any further for a decision about his long-term welfare.

145. It follows from all that I have said that I am quite satisfied that the making of a final Care Order with a Care Plan to place BK for adoption is in his best interests and I make that order. It also follows that I am satisfied that the welfare of BK requires that the consent of each his parents to placement for adoption is dispensed with and I make a Placement Order.

146. In relation to BK's contact with his parents, the LA proposes that this reduces to a monthly frequency for each parent until an adoptive placement is identified. The LA proposes a farewell visit then and letterbox contact thereafter. The LA has not extended the reduction period in the way that it has for HK. I consider that BK is likely to be better able to adjust to a shorter period of transition and the contact arrangements proposed are in BK's best interests. I do not make any order under section 26 of the ACA 2002 defining contact between BK and his parents (nor has anyone submitted that I should).

147. However, the question whether I should make an order under section 26 of the ACA 2002 providing for direct sibling contact between BK and HK does require Court resolution.

148. The Care Plans (in their final form) state as follows under the heading "Proposed sibling contact arrangements":

*"The sibling assessment has identified that HK and BK's needs cannot be met in the same placement due to the high level of differing needs that each child presents with. Given HK's age, the Local Authority's proposed Care Plan for HK*

*is one of long-term Foster Care. This would mean that HK would continue to have ongoing direct contact with [the Mother] and [the Father] and therefore careful consideration and thought needs to be given to contact between HK and BK. One of the essential criteria as part of the initial Family Finding will be searching for adopters who are open to considering post adoption contact. The Local Authority would propose, subject to a positive risk assessment and the views of potential Adopters that consideration is given to direct contact between HK and BK twice a year. In the event that a risk assessment concluded that direct contact was too high risk, it is proposed that there would be an exchange of short video clips twice a year on special occasions such as birthdays and Christmas and this would need to be closely monitored by HK's carers and identified adopters.*

*The Local Authority will endeavour to promote fortnightly contact between HK and BK until an adopter is identified for BK. The Local Authority will continue to closely monitor and review contact arrangements between HK and BK as this is dependent upon the needs of both children and potential impact of changes to contact upon the children's wellbeing”.*

149. The issue I must determine is whether a section 26 contact order should be made for direct contact between BK and HK. The aim of such an order (as advanced on behalf of the parents) is to cover, in particular, the period between any adoptive placement being identified and the making of any future adoption order for BK. The proposed reduced frequency of direct sibling contact post-placement, if it can be arranged, has not been challenged.
150. My decision on this issue involves weighing competing perspectives as to what is in BK's best interests. Should I make a section 26 order providing for direct sibling contact between BK and HK? Or should I make no such order, leaving it to the social workers on the ground to engage in discussions with potential adopters about how such contact might be arranged?
151. In cross-examination and written submissions, Ms Anning has advanced the case that a section 26 contact order is in BK's best interests and, she adds, also in the best interests of HK. Making such an order is *not*, however, the collective recommendation of Ms Shann, the ISW, Ms Adams, the Advanced Practitioner from One Adoption, Ms Buckley, the social worker or Ms Ghafoor, the Children's Guardian.
152. I accept that both parents love the boys. I also accept that, if the boys cannot return to the care of their mother, the parents have a natural desire that the boys should maintain ongoing direct contact with each other. As to the social work

professionals who will be charged with taking forward the Care Plans for each of the two boys, I am satisfied that they too wish to secure that outcome for BK and HK and they are motivated to try and make this happen.

153. Why, in such circumstances, is there a sharp divide between the unanimous professional view (namely that no section 26 contact order should be made) and the view being strongly advanced on behalf of the Mother (supported by the Father) that I should make such an order?
154. One explanation is their contrasting views on the primary issue of BK's long-term placement. The professionals are unanimous in their view that BK's welfare requires that he be placed for adoption. Therefore, if a section 26 order providing for direct contact between the siblings risks making the plan of adoption more difficult to achieve, or even threatens to thwart that plan altogether, it is unsurprising that all professionals do not recommend that course. Equally, it is unsurprising that the parents say otherwise. They are strongly opposed to BK being placed for adoption. Putting obstacles in the path of the LA's Care Plan does not generate in them the same worries that it does for those who are committed to securing an adoptive home for BK.
155. On behalf of the Mother, Ms Anning submits that the Court ought actively to promote sibling contact through a Court order. Her written submissions cite a wealth of material including research evidence, the report of the Public Law Working Group and a series of speeches by Sir Andrew McFarlane, President of the Family Division, emphasising the importance of promoting an ongoing relationship through contact between siblings, in circumstances where Court approved Care Plans mean that their lives have taken a different course. The core message that comes from this material is that there needs to be an enhanced awareness of this amongst professionals and the Courts, and their approach to contact must be creative and focused on making such contact happen when it is in the best interests of the child to do so. As part of that approach, the Courts have a key role not only in scrutinising with care the details of the plan for contact, but also how that practically it is to be achieved. It is here that the issue about whether an order under section 26 of the ACA 2002 should be made comes to the fore.
156. One of the points that is emphasised in the material cited by Ms Anning is that there is a need to modernise the approach to contact and this involves an adjustment to how post-adoption contact is discussed by professionals with prospective adopters. In a speech in 2023 entitled, 'Adapting Adoption to the Modern World', Sir Andrew McFarlane referred to the letter box contact model being:

*"... based upon a fear of contact with the natural family destabilising the adoptive placement, when more modern thinking indicates that maintaining some continuing relationship with the natural family can assist the child".*



He referred extensively to the work and recommendations of the Public Law Working Group addressing this issue and stated:

*“The group goes on to recommend that Courts should consider how they can use the jurisdiction to make contact orders under s 26 of ACA 2002 to set out clearly the assessed needs of the child to stay in touch with relevant members of their birth beyond the point of the placement order (where prospective adopters may or may not yet be identified), particularly in cases where it would be detrimental for the child to have contact cut off at this stage. Any such orders end when the adoption order is made, but they may set the tone for what the Court determines should happen after the adoption order.*

*It may be said that, for the Court to act in this way, might hinder the task of finding prospective adopters, who may be deterred by the idea of the child having some continuing contact with the birth family in the future, or that it may compromise the autonomy normally afforded to adopters. I do not agree that this should be an inhibiting factor in the Court making an order where that is justified. The Court’s focus is solely on the best interests of the child, not on those of potential future adopters. Where, for the reasons that I have attempted to set out in this lecture, the Court considers that there should be continuing contact up to and after adoption it should establish this by a Court order at the time of making a placement order. The contact regime will be reviewed at any subsequent adoption hearing at which the adopters can be heard”.*

157. Ms Anning also cites an article, ‘Maintaining children’s birth family relationships in adoption? A theory of change’ by Professor Elsbeth Neil published in the Family Law Journal [2024] Fam Law 575. Within that article, the following is stated (at p.580):

*“Once the child’s needs in relation to maintaining relationships have been clearly identified, in searching for adopters at the matching stage these needs must be given priority alongside other needs. It is not good enough to allow the child’s contact plans to be driven primarily by the wishes of adoptive parents, or indeed the perceived wishes of as yet unidentified adoptive parents (as happens when contact plans are scaled back lest they ‘put off’ prospective adopters). It is however vital that once adopters are identified they can have input into the exact shape of contact plans and in determining what support is needed. There is a need to consider how Courts can underline the child’s need to maintain relationships at the placement order stage, in some cases through the making of a s 26 order which will last until the adoption order is made. As the President recently argued, Courts should not be inhibited by a fear of not finding adoptive parents or compromising their autonomy:*

*‘The Court’s focus is solely on the best interests of the child, not on those of potential future adopters . . .’*

158. Ms Anning relies on these observations to challenge the evidence that this Court has heard and to advance her case that I should make a section 26 contact order notwithstanding that evidence.
159. In resolving this issue, I keep my focus solely on the best interests of BK. I have considered the material produced, but I must also have regard to the evidence before the Court and the particular facts of this case. I consider it my responsibility, having regard to that evidence, to analyse whether a section 26 contact order might hinder the task of family finding for BK. If making a section 26 contact order creates that risk, that will have an adverse impact on BK’s welfare. Factoring that in is not the Court improperly shifting its focus to the interests of potential adopters. Rather, it is the Court keeping its focus on *BK’s* best interests and putting the risk of deterring potential adopters into the holistic welfare balance for him. This is what the professionals have done in this case. It is what I also do. To say that “Courts should not be inhibited by a fear of not finding adoptive parents” is, I respectfully suggest, wrong in principle. If that risk exists, then I would be failing in my duty to BK if I did not put it in the welfare balance. If further support for this proposition is needed, it comes from paragraphs 17 and 56 of the recent Court of Appeal ruling in *Re D-S* (quoted at paragraph 74 above). The Court of Appeal clearly treated this as a material factor directly relevant to its welfare decision not to make any contact order in that case.
160. Returning to the particular facts of this case, the unanimity of professional opinion on this is not, of course, determinative. The issue whether an order should be made is self-evidently one for the Court, and I have scrutinised with care what they say and why. One question I have asked myself is whether this Court is faced with a professional consensus because they have ingrained beliefs that are out-of-date and fail to appreciate and take forth the message which runs as a thread through the material relied upon by Ms Anning on behalf of the Mother. However, having seen the professional witnesses give evidence and the balanced way in which they responded to skilled cross-examination, I am clear that this is not the case, indeed far from it. They all spoke of the benefits of the sibling relationship being maintained through ongoing direct contact. At the same time, they spoke with conviction about BK, currently aged 1 year 11 months, and what they say is his paramount welfare need now, throughout his childhood and into adulthood. Their collective view is that BK should experience family life and achieve permanence and stability through being placed for adoption. Their view that a section 26 contact order could hinder rather than help achieve that outcome for BK was rooted in securing his best interests.
161. Each witness was asked (by Ms Anning) if they had any experience of a section 26 contact order being made and whether that had an adverse impact on

family finding. None of them did so. This leads Ms Anning to submit that their view that a section 26 order will deter potential adopters is speculative rather than evidence based.

162. That point would have some merit if their evidence had been confined to their answers to that question. But it was not. In fact, what the witnesses emphasised were the realities of the family finding process. Ms Adams explained that there are only a small number of potential adopters who are prepared to consider ongoing contact, adding that at this stage there is no means of tailoring the search criteria with particular details of the case.
163. She and other witnesses spoke about the different approaches that would be taken by professionals working on the ground in the course of seeking to identify possible placements and, if so, working to achieve a placement. There would be a material difference between (i) telling potential adopters that a Court order was in place requiring sibling contact; and (ii) seeking to achieve that objective through careful and skilled social work. If the effect of a section 26 order were to deter potential adopters before any such discussions were even had, this would rule out carers who might otherwise have engaged in meaningful discussions where suitable arrangements are worked out that they find acceptable.
164. When Ms Shann gave evidence, she articulated why it is that the issue of post-adoption contact has been, and still is, a source of concern for many potential adopters. They are understandably curious about the background facts which led the Court to sanction the plan of adoption. They know that the reasons must have been very serious. Even if they are open to discussing and seeking to work out contact, what they learn about the history is likely to cause them to think very carefully about what impact direct contact will have on their family unit when the adopted child is placed in their care. It is no surprise that this weighs on their mind. Indeed, it would be surprising if it did not.
165. BK's circumstances are a striking example of this. Potential adopters would need to be told information which is likely to weigh heavily in their thinking. There would be a balance of factors pulling in different directions. On the one hand, they would learn that HK is in foster care and he and BK have enjoyed an ongoing relationship through contact. They would be told the views of professionals (shared by the parents) that both children will benefit if that sibling relationship can be maintained through direct contact. They would also be told that HK is continuing to see his parents and that the parents have not done anything to undermine his foster placement. On the other hand, potential adopters would need to know the reasons why the Court has sanctioned the plan of adoption for BK, and for HK to remain in long-term foster care. They would learn of the very serious injuries inflicted on BK by his father, the emotional harm suffered by HK, the appalling content of the messages, and the failure to protect and seek medical attention for BK. Added to this would be

the parents' dishonesty throughout this Court process, actively seeking to deceive professionals and the Court, causing a justified lack of any confidence that they would be open and honest when making plans to secure the children's safety and wellbeing. Potential adopters would be told that the parents opposed the plan to place BK for adoption.

166. I consider that potential adopters given that full picture would naturally worry whether ongoing direct sibling contact (in circumstances where HK is continuing to have direct contact with his parents) could have negative consequences as well as benefits. They would question whether it could cause any difficulties for BK or compromise the stability and security of the placement. This is not simply potential adopters having "fear of the unknown" (as Ms Anning characterises it). These would be legitimate fears based upon what they would come to learn about the children's experiences.

167. A section 26 contact order, if made, would cover two distinct periods of time. The first period would be whilst BK remains in foster care and a search for an adoptive match is undertaken. It is not in issue that direct sibling contact should continue to be arranged in that period, and therefore no section 26 order is needed to ensure this. The second period would be after any move to live with prospective adopters through to when any adoption order is made. Although Ms Anning has suggested that this might only be a short length of time, this is not necessarily so. It would depend upon when any adoption application is made and when it were determined. The question whether a section 26 contact order should be made to cover that period is more complex because it would require the prospective adopters to comply with an order which they had no say about when it was made. I can see how this may worry them. A Court order is just that; it must be complied with. That, in turn, creates the risk that they will decide that being matched as prospective adopters for BK is not something they are prepared to take forwards. A section 26 order which leads to that outcome would be against BK's best interests rather than promoting his interests. That is why the professionals urge the Court to the view that the better approach is to leave it to the social workers on the ground to discuss and seek to work out arrangements for sibling contact that the prospective adopters are agreeable to. I consider there is an advantage, not a disadvantage, to BK (and indeed HK) of approaching contact in that way.

168. My task, as prescribed by statute, is to apply section 1 of the ACA 2002. I do so having regard to the evidence before the Court. I must also apply the no order principle enshrined in section 1(6) of the ACA 2002 quoted at paragraph 79 above. This means that I must not make an order (which includes a section 26 contact order) in respect of BK unless I consider that making the order would be better for BK than not doing so. This requires me to evaluate what the effect on BK will be of making a section 26 contact order providing for ongoing direct contact with HK.

169. I accept the combined view of all professionals that making a section 26 contact order requiring face to face contact with HK risks acting as a deterrent to potential adopters putting themselves forward for BK. It cannot be in BK's best interests if this has the effect of limiting the pool of prospective adopters or, worse still, it thwarts altogether the prospect of finding an adoptive placement for BK. In reaching this conclusion, I am not questioning the importance of seeking to maintain a relationship through contact between BK and HK. Rather, I must balance the aspiration to achieve that for both boys with the welfare imperative of finding an adoptive home for BK, having regard to his welfare throughout his life. Applying section 1(6) of the ACA 2002, I do not consider that making a section 26 order for direct sibling contact would be better for BK than not doing so. I therefore decline to make such an order.

**His Honour Judge Hayes KC**

**23 September 2024**