Neutral Citation Number: [2019] EWHC 1751 (Fam)

Case No: ZC18C00825

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2019

Before :

MRS JUSTICE LIEVEN DBE

- -

Between :

ROYAL BOROUGH OF GREENWICH **Applicant**

- and –

1. DC

2. DT

3. DAS
(Through his Children's Guardian Clea Barry) **Respondents**

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- -

Frank Feehan QC & Sam Wallace (instructed by Royal Borough of Greenwich) for the **Applicant**
Andrew Bagchi QC & Mary Hughes (instructed by **H E Thomas Solicitors**) for the **First Respondent**
The **Second Respondent** did not attend and was not represented.
Dorothea Gartland (instructed by Creighton and Partners Solicitors Ltd.) for the **Third Respondent**

Hearing dates: 18th June 2019 -28th June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE LIEVEN DBE

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

MRS JUSTICE LIEVEN DBE:

1. This case concerns DAS, a boy under the age of 1. There are two applications made by the LA; for a care order and for a placement order. I heard this case over 10 days and considered both findings of fact and welfare. The background to this case is that the parents' first child, ST, died at the age of 12 weeks, from what all parties accept were non- accidental injuries. The Father was charged with manslaughter, and acquitted at the Old Bailey in November 2018.

2. The First Respondent is DAS's mother (the Mother). She was represented by Mr Bagchi QC and Ms Hughes. The LA was represented by Mr Feehan QC and Mr Wallace. DAS was represented by the children's guardian, Ms Barry and Ms Gartland of counsel.

3. The Second Respondent is the Father, both of DAS and of the previous child, ST. He was represented by Powell and Co solicitors, who attended earlier interlocutory hearings at which the Father was represented by leading counsel. The Father has attended none of the hearings in this matter. He has failed to comply with directions to file a response to the LA's Schedule of Findings and to file a statement. It was not possible to effect personal service on the Father, but I directed that he should be served via a pharmacy where he was known to attend each week. I also directed that a letter be written to him explaining that if he did not attend then the hearing could go ahead without him, and that the court may make adverse findings in his absence. The Father signed for the letter and contacted his solicitor on 3 June 2019 saying that he would not be engaging in the proceedings.

4. In those circumstances I am satisfied that the Father has had a full opportunity to participate in the hearing, and that every reasonable effort has been made to allow him to give evidence. I am therefore confident that his article 6 and article 8 rights under the European Convention of Human Rights have been fully protected.

5. In terms of evidence from the parents, I have heard evidence from the Mother. She had indicated that she would attend and give evidence, and I made orders that she attend, but despite this she did not come to court on a number of occasions. In these

circumstances I decided it was appropriate to issue a warrant for her arrest. She was brought to court and gave evidence. Although forced to come to court by the arrest, she was a reasonably willing and open witness once she did give evidence.

6. The Father did not give oral evidence and produced no statement for this hearing, nor did he respond to the Schedule of Findings. However, he did give evidence at the criminal trial at the Old Bailey, when he was charged with manslaughter of DAS's sister, ST. I have a transcript of that evidence, including cross examination. I also have statements that the Father made to the police. In these circumstances I decided it was neither necessary nor proportionate to have him arrested and brought to court. No party submitted I should do so.

Background

ST

7. The background to these applications relates to the death of DAS's sister, ST in November 2016. ST was born in August 2016 at 37 weeks gestation. She had a normal birth with no history of birth related injury and no neonatal concerns. She was discharged from hospital into the care of the Mother.

8. At the time of the birth the Mother was having an on-off relationship with the Father, but they were not living together. The Father was named on ST's birth certificate. Both parents say that the Father came to the Mother's flat each day to help with ST, and that he would stay overnight a couple of times a week.

9. The Father is also believed to be the father of another child, HT, who is of very similar age to ST. HT's mother, JS, gave statements to the police, which I have read. I attempted to have JS arrested in order that she be brought to this court to give evidence, but the police failed to arrest her, and I discharged the warrant on the last day of the hearing. As will become apparent JS had important information about events around the time of ST's death. At the time of ST's death JS was living very close to the Mother, and the Father was also spending a considerable amount of time with her and HT. He spent the night before the death with JS.

10. The Father was and remains a heroin addict. It was clear from the Mother's evidence in court, that his behaviour was significantly influenced by the consequences of his

addiction. I had written statements in the criminal proceedings from various family members on both sides, that after ST was born the Father actively sought to keep other family members away.

11. On 2 November 2016 both parents attended the local NHS Health Centre for ST to have her first vaccinations. She was seen and examined by a GP and no concerns were noted. This was the only time ST was seen by the GP after her birth.

12. On the night of 3 November 2018, the Father spent time with the Mother during the day, and spent the night at JS's address. There were a series of text messages and phone calls from the Mother to the Father asking him to come and help with ST. At appendix one I have set out an agreed detailed chronology of events on 3 and 4 November 2018. I will summarise in the judgment only the key events. At 22:18pm the Mother sent the Father a message saying *"TG Baby pls don't fall asleep there I'm so tired plz baby??xxx"*

13. Between 01:20am and 12:57pm on 4 November 2016, the Mother called the Father on 55 separate occasions (49 of which were unanswered) and during the same timeframe she sent him 24 text messages. It is apparent from the content of the messages that she was becoming increasingly desperate for the Father to come to her address and assist her in caring for ST. the Mother's oral evidence was that she only sent these messages to "guilt trip" the Father into coming round, and that ST was a baby who rarely cried, and had not been awake during the night of 3/4 November.

14. There is a text at 12.54pm where the Father says that he had just woken up and he was coming soon. CCTV shows that the Father arrived at the flat at 1.09pm, i.e. less than 20 minutes later. They were together at the flat until 2.29pm when the video shows the Mother leaving. The precise sequence of events of what occurred both before the Mother left, and afterwards, is important for the findings of fact sought and I will return to this below. There is some inconsistency between the version of events given by the Father at different times.

15. At around 14.30pm a neighbour, GT recalls hearing loud music coming from the flat and also said in her statement to the police that she heard a male voice shouting. GT gave oral evidence in the criminal trial and in this court.

16. CCTV shows the Mother leaving at 14.29. Just after 14.30 the Mother sent the Father a text saying *'Sorry if you tried to call me. My reception went but back now, LOL. Don't know why it keeps going. What you get now.'*

17. At 14:47pm, the Mother sent a further text message to the Father as follows: *"Yeah I'm okay baby. Thanks. Hope you are too. Just on bus on way to Woolwich. Hopefully don't take too long. Love you lots."*

18. At 3.07pm the Father phoned JS and two minutes later CCTV shows him leaving the flat with ST in a baby carrier. At 15.12pm he had a short conversation with a neighbour, FG.

19. At 15.26 pm the Father and JS arrived at the GR Health Centre. On arrival ST was unresponsive and she had stopped breathing. She was transferred to Queen Elizabeth Hospital and then to Kings College Hospital where she was declared dead on 10 November 2016.

20. The Father was interviewed under caution on 5 November and provided an account to the police. He provided no comment interviews to the police on 16 and 17 November. The Mother gave statements to the police on 4th, 16th and 22 November. She was interviewed under caution on 2 March 2017. She has also provided a signed statement dated 26 June 2019 to this court.

21. The Father was charged with manslaughter. There were bail conditions that he and the Mother were not to meet. The criminal trial took place in November 2017. The Mother was not called to give evidence, but the Father did give evidence and was cross examined. The Father was acquitted of manslaughter. The defence advanced at the trial was that the jury could not be sure that it was the Father and not the Mother who killed ST. It was not argued at the criminal trial that the injuries could have been accidental, nor was it suggested that any third party could have caused the injuries.

22. In the criminal investigation expert opinions were sought from the following medical experts Dr Nat Cary (Consultant Forensic Pathologist); Professor David Charles Mangham (Consultant Histopathologist); Dr J H McCarthy (Consultant Ophthalmic Pathologist); Professor Thomas Jacques, Consultant Paediatric Neuropathologist.

23. The post-mortem findings show that on 4 November 2016, ST sustained a hypoxic/ ischaemic brain injury leading to complete brain death. It was this injury that resulted in ST's death on 10th November 2016.

24. The findings of Professor Mangham show that on 4th November 2016, ST also sustained multiple rib fractures. Dr Mangham's findings also identify healing rib fractures likely to have occurred several weeks prior to ST's death.

25. The findings of Dr McCarthy show that on 4th November 2016, ST also sustained extensive retinal haemorrhages in both the right and left eyes. Dr McCarthy's findings also suggest that there was likely to have been an earlier episode of retinal haemorrhaging in the weeks before ST's death.

26. The local authority asserts that the injuries sustained by ST on 4th November 2016, which brought about her death on 10th November 2016, were inflicted injuries caused as a result of ST being forcibly squeezed and shaken with considerable and excessive force.

27. The local authority also asserts that there was an earlier episode of inflicted injury in the weeks before ST's death, which also involved ST being forcibly squeezed and shaken.

28. Only the mother and the Father had the care of ST in the days leading up to her death. The local authority identifies the Mother and Father as being in the pool of perpetrators responsible for causing ST's injuries. The mother does not dispute that the injuries which caused ST's death were inflicted injuries but she denies having caused them.

DAS

29. DAS was born in mid January 2019 and therefore was conceived at a time when the Father's bail conditions provided that he should not contact the Mother. On 7 August 2018 the Mother was with the Father when he sustained a gunshot wound having been shot by an unknown attacker.

30. The Mother only presented for ante natal care in the third trimester of her pregnancy. The LA suggest that she was attempting to conceal her pregnancy. Following his birth, DAS showed mild to moderate signs of drug withdrawal and urine toxicology from him and the Mother showed that she had been using cocaine (including crack cocaine) and opiates (including heroin) during the pregnancy.

31. On 21 January 2019 HHJ Brasse made an interim care order authorizing DAS's removal from the care of his Mother and placement in foster care. Hair strand test of the Mother took place in January, Test results covering the period from the beginning of July 2018 until the beginning of January 2019 provide a month by month analysis and show a positive result for cocaine (including crack cocaine) throughout the period tested. Opiates including heroin were also detected throughout. The amount of cocaine detected was in the high range compared to other samples analysed at the laboratory. The results for heroin were in the medium range.

32. The Mother has not complied with subsequent directions to provide further hair strand test results and is understood that she has failed to attend two scheduled appointments for further hair samples to be taken. The parents were warned that failure to attend drugs tests would lead to the court being invited to draw adverse inferences.

33. The Mother has been having contact with DAS since he was born. The Mother has been inconsistent in her attendance at contact, only attending 15 out of a possible 40 sessions of contact since 4th February 2019. The frequency of contact was reduced to twice per week on 9th April 2019. Since that time, The Mother has missed 7 out of a possible 12 sessions of contact. The status of the Mother's relationship with the Father is uncertain, and although the Mother reports that the relationship is at an end, the local authority received a report from the maternal aunt PD on 22nd May 2019 that the Father had been seen outside the mother's address. The mother continues to be in significant rent arrears and faces eviction from her home.

34. The Father has failed to engage with the local authority altogether during these proceedings. He also has a history of substance misuse and has not submitted to hair stand testing in these proceedings to ascertain whether he is currently abusing illicit drugs. He has a history poor mental health and housing instability. He has a forensic history which includes offences involving violence and recently sustained a gunshot wound whilst out in the company the mother.

The Law

35. The LA seeks a care order pursuant to s.31 of the Children Act 1989 and a placement order pursuant to s.22 of the Adoption and Children Act 2002.

36. The analysis set out below is largely based on an agreed note between counsel. I am very grateful to them for having prepared and agreed this. They have adopted much of the summary from that set out by Baker J in ***Re EB [2013] EWHC 968 (Fam),*** although there are minor additions to his analysis to address particular issues in this case.

37. The starting point is s.31(2) of the Children Act 1989, and the test that a care order can only be made if the child is suffering, or is likely to suffer, significant harm and that it is attributable to the care likely to be given by the parent, not being that of a reasonable parent. In considering a placement order under s.22 Adoption and Children Act 2002 I have to take into account the factors in s.1 of that Act and the child's lifelong interests.

38. In determining the issues at a fact finding hearing the court must apply the following principles.

The standard and burden of proof

39. Firstly, the burden of proof lies with the local authority. It is the local authority that brings these proceedings and identifies the findings it invites the court to make. Therefore, the burden of proving the allegations rests with them *throughout.*

40. Secondly, the standard of proof is the balance of probabilities (***Re B [2008] UKHL 35***). See Baroness Hale at para 702013 :

> *"…the standard of proof in finding the facts necessary to establish the threshold under s31(2) or the welfare considerations in s1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken in to account, where relevant, in deciding where the truth lies."*

41. The House of Lords addressed the question of quality of evidence in the case of ***R (D) v Life Sentence Review Commissioners*** **[2008] UKHL 33**, in particular paras 23 – 29 of that report. It is clear that where there is a serious allegation, while the standard of proof remains the same, the quality of the evidence will need to be greater in order to meet it. Quoted with approval in *Re D* is the following passage from ***R (N) v Mental Health Review Tribunal (Northern Region)*** **[2006] QB 468**:

> *"Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities." [Emphasis is in the original judgment].*

42. In the present case the allegations are of the utmost seriousness. I also bear closely in mind when testing the evidence and reaching my conclusions that the Father was acquitted of manslaughter in the criminal trial.

43. Baroness Hale further considered the standard of proof in ***Re S-B*** [2010] 1 FLR 1161 at para 19:

> *"[19] Article 6 of the European Convention requires that: 'In the determination of his civil rights and obligations, … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'*
>
> *The court subjects the evidence of the local authority to critical scrutiny, finds what the facts are, makes predictions based upon the facts, and balances a range of considerations in deciding what will be best for the child. We should no more expect every case which a local authority brings to court to result in an order than we should expect every prosecution brought by the CPS to result in a*

> *conviction. The standard of proof may be different, but the roles of the social workers and the prosecutors are similar. They bring to court those cases where there is a good case to answer. It is for the court to decide whether the case is made out. If every child protection case were to result in an order, it would mean either that local authorities were not bringing enough cases to court or that the courts were not subjecting those cases to a sufficiently rigorous scrutiny."*

Identification of a perpetrator or pool of perpetrators

44. In ***Re S-B*** (above) Baroness Hale also gives authoritative guidance on the proper approach to the identification of a perpetrator or pool of possible perpetrators in cases of inflicted injury;

> *"[40] .... [If] the judge cannot identify a perpetrator or perpetrators, it is still important to identify the pool of possible perpetrators. Sometimes this will be necessary in order to fulfil the "attributability criterion. If the harm has been caused by someone outside the home or family, for example at school or in hospital or by a stranger, then it is not attributable to the parental care unless it would have been reasonable to expect a parent to have prevented it. Sometimes it will be desirable for the same reasons as those given above. It will help to identify the real risks to the child and the steps needed to protect him. It will help the professionals in working with the family. And it will be of value to the child in the long run.*
>
> *[41] In North Yorkshire County Council v SA [2003] EWCA Civ 839 [2003] 2 FLR 849, the child had suffered non-accidental injury on two occasions. Four people had looked after the child during the relevant time for the more recent injury and a large number of people might have been responsible for the older injury. The Court of Appeal held that the judge had been wrong to apply a "no possibility" test when identifying the pool of possible perpetrators. This was far too wide. Dame Elizabeth Butler-Sloss P, at para 26, preferred a test of "likelihood or real possibility".*
>
> *[42] Ms Susan Grocott QC, for the local authority, has suggested that this is where confusion has crept in, because in Re H this test was adopted in relation to the prediction of the likelihood of future harm for the purpose of the threshold criteria. It was not intended as a test for identification of possible perpetrators.*
>
> *[43] That may well be so but there are real advantages in adopting this approach. The cases are littered with references to a "finding of exculpation" or to "ruling out" a particular person as responsible for the harm suffered. This is, as the President indicated, to set the bar too high. It suggested that parents or other carers are expected to prove their innocence beyond reasonable doubt. If the evidence is not such as to establish responsibility on the balance of probabilities it should nevertheless be such as to establish whether there is a real*

> *possibility that a particular person was involved. When looking at how best to protect the child and provide for his future, the judge will have to consider the strength of that possibility as part of the overall circumstances of the case."*

45. The line of authorities in relation to identification of a perpetrator was also given recent consideration by the Court of Appeal in ***Re B (Uncertain Perpetrator)*** **[2019] EWCA Civ 575** in which Jackson LJ analyses the relevant case law in the context of the competing rights and interest at play;

> *"[46] Drawing matters together, it can be seen that the concept of a pool of perpetrators seeks to strike a fair balance between the rights of the individual, including those of the child, and the importance of child protection. It is a means of satisfying the attributable threshold condition that only arises where the court is satisfied that there has been significant harm arising from (in shorthand) ill-treatment and where the only 'unknown' is which of a number of persons is responsible. So, to state the obvious, the concept of the pool does not arise at all in the normal run of cases where the relevant allegation can be proved to the civil standard against an individual or individuals in the normal way. Nor does it arise where only one person could possibly be responsible. In that event, the allegation is either proved or it is not. There is no room for a finding of fact on the basis of 'real possibility', still less on the basis of suspicion. There is no such thing as a pool of one."*

46. At Paragraph 48 Jackson LJ observes;

> *"[48] The concept of the pool of perpetrators should therefore, as was said in Lancashire, encroach only to the minimum extent necessary upon the general principles underpinning s.31(2). Centrally, it does not alter the general rule on the burden of proof. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown. This is why it is always misleading to refer to 'exclusion from the pool': see Re S-B at [43]. Approaching matters in that way risks, as Baroness Hale said, reversing the burden of proof."*

47. At Paragraph 49, in a restatement of the existing case law, Jackson LJ suggests the following three-staged process of analysis;

> *"[49] The court should first consider whether there is a 'list' of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so: Re D (Children) [2009 EWCA Civ 472 at [12]. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in*

> *respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is should A or B or C be placed into 'pool'."*

The evidence

48. Findings of fact in these cases must be based on evidence. See Munby LJ in ***Re A (Fact-finding: disputed findings)*** [2011] 1 FLR 1817:

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

49. When considering cases of suspected child abuse the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. See Dame Elizabeth Butler-Sloss P in ***Re T*** [2004] EWCA Civ 558, [2004] 2 FLR 838 at 33:

> 1. *"Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."*

50. In this case there is a "wide canvas" of evidence that must be taken into account. That wider canvas would include the home circumstances of the parents; the evidence as to the stability of their relationship; their known communications and so on.

51. Following on from the above, whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. The roles of the court and the expert are distinct. It is the *court* that is in the position to weigh up expert evidence against *all* the other evidence and the court can depart from it if the other evidence makes such departure justifiable (see, e.g., ***A County Council & K, D, & L*** [2005] 1 FLR 851 per Charles J).

52. The evidence of the parents and any other carers is of importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them (see ***Re W and another (Non-accidental injury)*** [2003] 2 FCR 346). In this case the court may have to consider the issue of parental conduct in the absence of either parent. The court is entitled to do so and may have regard to the wide canvas of the evidence including what the parents have said in other courts or other contexts to draw appropriate inferences (see ***Re X (A Child) (No 3) [2016] EWHC 2755 (Fam)***.

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

54. When assessing the credibility of the parents and other family witnesses, the court must take account of the dictum of Mostyn J in ***Lancs CC v R & W*** at para 8(xi):

> *"xi) The assessment of credibility generally involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. With every day that passes the memory becomes fainter and the imagination becomes more active. The human capacity for honestly believing something which bears no relation to what actually happened is unlimited. Therefore, contemporary documents are always of the utmost importance: Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, per Lord Pearce; A County Council v M and F [2011] EWHC 1804 (Fam) [2012] 2 FLR 939 at paras [29] and [30]."*

55. In this case there are a number of contemporaneous communications between the parents which I can use to test the oral evidence that the Mother gave to me, and the Father gave to the criminal trial.

56. Further is the case of ***Re U (Serious Injury: Standard of Proof); Re B*** [2004] 2 FLR 263. In that case Butler-Sloss P stated at para 23:

> *"[23] In the brief summary of the submissions set out above there is a broad measure of agreement as to some of the considerations emphasised by the judgment in R v Cannings that are of direct application in care proceedings. We adopt the following:*
>
> *(i)The cause of an injury or an episode that cannot be explained scientifically remains equivocal.*
>
> *(ii)Recurrence is not in itself probative.*
>
> *(iii)Particular caution is necessary in any case where the medical experts disagree, one opinion declining to exclude a reasonable possibility of natural cause.*
>
> *(iv)The court must always be on guard against the over-dogmatic expert, the expert whose reputation or amour propre is at stake, or the expert who has developed a scientific prejudice.*
>
> *(v)The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark."*

57. Finally, in the recent case of ***Re R (Children)*** **[2018] EWCA Civ 198,** Macfarlane LJ (as he then was) highlighted the important difference in approach to fact-finding in the Family Court in comparison to the criminal jurisdiction;

> *"[62] The focus and purpose of a fact-finding investigation in the context of a case concerning the future welfare of children in the Family Court are wholly different to those applicable to the prosecution by the State of an individual before a criminal court. The latter is concerned with the culpability and, if guilty, punishment for a specific criminal offence, whereas the former involves the determination facts, across a wide canvas, relating to past events in order to evaluate which of a range of options for the future care of a child best meets the requirements of his or her welfare. Similarly, where facts fall to be determined in the course of ordinary civil litigation, the purpose of the exercise, which is to establish liability, operates in a wholly different context to a fact-finding process in family proceedings. Reduced to simple basics, in both criminal and civil proceedings the ultimate outcome of the litigation will be binary, either 'guilty' or 'not guilty', or 'liable' or 'not liable'. In family proceedings, the outcome of a fact-finding hearing will normally be a narrative account of what the court has determined (on the balance of probabilities) has happened in the lives of a number of people and, often, over a significant period of time. The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will*

> *choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established."*

Mr Turner's non-participation in the final hearing: compellability and inferences to be drawn

58. The Court of Appeal confirmed in ***Y & K (Children)*** **[2003] EWCA Civ 669** that the parent of a child subject to care proceedings is a compellable witness. Per Hale LJ (as she then was);

> *"[35] We are glad, therefore, to have the opportunity today of clarifying the situation. Parents can be compelled to give evidence in care proceedings; they have no right to refuse to do so; they cannot even refuse to answer questions which might incriminate them. The position is no different in a split hearing from that in any other hearing in care proceedings. If the parents themselves do not wish to give evidence on their own behalf there is, of course, no property in a witness. They can nevertheless be called by another party if it is thought fit to do so."*

59. If a parent does not make themselves available to give oral evidence during the course of a trial the Court is entitled to draw appropriate inferences. In ***GA v LB Southwark [2003] EWHC 2011***, the respondent mother had not been willing to give oral evidence at trial. The trial judge had declined to place any weight on the mother's written evidence. On appeal, Johnson J said this at Paragraph 13:

> *"[13] This decision, simply to attach no weight to the mother's statements, was in my view wrong. The judge could, and in my view should, have gone further. As a general rule, and clearly every case will depend on its own particular facts, where a parent declines to answer questions or, as here, give evidence, the court ought usually to draw the inference that the allegations are true."*

60. I should make clear that I do not accept the entirety of this passage. It does not seem to me that where a parent does not give evidence there is any general rule or even principle that the judge should infer the allegations are true. There may be a variety of reasons why a parent does not give evidence. However, as appropriate, inferences can be drawn.

Welfare – the local authority's proposed plan of adoption

61. Per Munby P in ***Re B-S [2013] EWHC 1146***

> *"[20] Section 52(1)(b) of the 2002 Act provides, as we have seen, that the consent of a parent with capacity can be dispensed with only if the welfare of the child "requires" this. "Require" here has the Strasbourg meaning of necessary, "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable": Re P (Placement Orders: Parental Consent) [2008] EWCA Civ 535, [2008] 2 FLR 625, paras 120, 125. This is a stringent and demanding test.*
>
> *[21] Just how stringent and demanding has been spelt out very recently by the Supreme Court in In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33, [2013] 1 WLR 1911. The significance of Re B was rightly emphasised in two judgments of this court handed down on 30 July 2013: Re P (A Child) [2013] EWCA Civ 963, para 102 (Black LJ), and Re G (A Child) [2013] EWCA Civ 965, paras 29-31 (McFarlane LJ). As Black LJ put it in Re P, Re B is a forceful reminder of just what is required.*
>
> *[22] The language used in Re B is striking. Different words and phrases are used, but the message is clear. Orders contemplating non-consensual adoption – care orders with a plan for adoption, placement orders and adoption orders – are "a very extreme thing, a last resort", only to be made where "nothing else will do", where "no other course [is] possible in [the child's] interests", they are "the most extreme option", a "last resort – when all else fails", to be made "only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do": see Re B paras 74, 76, 77, 82, 104, 130, 135, 145, 198, 215."*

The medical evidence

62. The medical evidence relating to ST's death is the same as that before the criminal court. In the criminal investigation expert opinions were sought from Dr Nat Cary (consultant forensic pathologist); Professor David Mangham (consultant histopathologist); Dr J McCarthy (consultant ophthalmic pathologist) and Professor Thomas Jacques (consultant paediatric neuropathologist). I had all their written reports, the transcripts of their evidence in the criminal trial and I heard oral evidence from Dr Cary, Professor Jacques and Dr McCarthy. None of their conclusions were challenged in cross examination.

63. The evidence relating to ST's death, and that relating to pre-existing injuries was identified during the investigations following the post mortem. The post mortem showed that on 4 November 2016 ST sustained hypoxic/ischaemic brain injury leading to complete brain death leading to her death on 10 November.

64. Dr Cary's evidence was that the cause of death was head injury characterised by multi-focal thin-film subdural haemorrhages, which were characterised by retinal haemorrhages and haemorrhages across the brain and spinal cord. The changes are typical of those due to impact or movement trauma (shaking) or a combination of the two. There were also a number of posterior rib fractures typical of squeezing of the chest. He said that overall this is the sort of pattern of injuries seen when an infant is forcibly shaken, squeezed and thrown onto soft furnishings. He said in oral evidence that these were towards the higher end of a spectrum of this type of injury. He said that the severity of the findings would have led to an immediate and noticeable change in condition following this with unconsciousness being likely immediately or very shortly thereafter.

65. Dr Cary also said that it is not possible that once the head injury had occurred that ST would have been able to bottle feed. This is because the sucking and swallowing that is needed to feed would not have been possible for ST after the injuries had occurred. The evidence was that ST had had a recent milk feed, because once she got to hospital they had to aspirate milk from her stomach. This is important because it very strongly indicates that she was fed before she incurred the fatal injuries.

66. Dr Cary also explained that the head injury is likely to have resulted in immediate (or very shortly thereafter) respiratory arrest, i.e. a lack of oxygen to the brain, which then would have resulted in cardiac arrest. The known chronology is that when ST got to the Hospital her heart was still capable of being restarted by CPR. This is an indication that the cardiac arrest did not happen more than 30 minutes to one hour earlier. Dr Cary's evidence slightly varied between the criminal trial and before me, because before the criminal court he suggested that the maximum time period between cardiac arrest and the heart restarting would be 30 minutes, whereas before me he said 45-60 minutes. This points to one hour being close to 15.06 being approximately the latest time that the cardiac arrest occurred (being one hour before 16.06 when her heart was restarted).

67. Professor Mangham's findings show that ST had sustained a large number of rib fractures, on the left a total of 19 posterior rib fractures, of which 8 were re fractures; on the right 10 posterior rib fractures. The older fractures were exclusively on the left and had occurred several weeks prior to her death. The evidence was that it was not certain whether the earlier fractures had all occurred at one time. There was extensive soft tissue haemorrhage including to nerves and nerve ganglia, indicating traumatic injury to the neck, i.e. by shaking with whiplash injury.

68. Dr McCarthy had examined ST's eyes and said that there was extensive recent haemorrhage in both optic nerves, orbits and retinas. This was evidence of a traumatic injury shortly before her death. However, there was also evidence iron pigment deposition in her eyes which indicated an earlier traumatic event. It was not possible to identify when this occurred. Dr McCarthy said that there could be pigmentation from trauma at birth, but the fact that the pigmentation was only found in the left eye would make it most unusual that this had been a birth injury. The birth notes show that ST's birth had involved vacuum extraction, but Dr McCarthy was clear that he thought it was very unlikely that the earlier pigmentation was as a result of birth trauma.

69. Professor Jacques gave evidence of haemorrhaging into the brain and spinal cord. He said that the pattern of injury was associated with abusive head trauma in contrast to the pattern of injury that accidental head injury produces. He was clear in his oral evidence that the pattern of trauma was above that of normal rough handling.

The factual evidence

70. The Father's evidence before the criminal trial was that he spent the night of 3rd November at JS's flat. He received many texts from the Mother on 4th, but texted her back at 12.54 saying that he had just woken up and was coming over. He said his phone was ringing constantly but he did not answer it, and did not get all the Mother's texts. All of this has some relevance because it may indicate the frame of mind he was in when he arrived at her flat, and the pressure he was under.

71. When he arrived at the Mother's flat he said that ST was in her bouncer chair and she was asleep. The Mother asked him to give ST some milk and she made up a bottle. He scooped ST up in her blankets and changed her nappy. He then started feeding her some milk. He said she did not wake up, but she did take some milk. He had said in his police interview that the baby was sucking and had taken about five ounces of milk. He said in his oral evidence to the criminal trial that he wasn't sure if she had swallowed the milk, and some was coming out of the side of her mouth. He then put her back into her bouncer and went into the kitchen with the Mother.

72. At one point he said he saw ST sticking her arms out in front of her in her sleep and pointed this out to the Mother. He said he thought no more about this. During cross examination he said that the Mother left the kitchen for a period, something like 5-10 minutes. As far as I can gather from the transcript this was the first time that the Father had suggested that there was a period after he arrived when the Mother was somewhere else in the flat. He accepted in cross examination that he did not hear any shouting from the Mother. The implication of this piece of evidence is that there was at least an implicit suggestion that the Mother might have harmed ST at this point. Shortly after that the Mother went out.

73. The Mother texted him at 14.47 saying she was on the bus on the way to Woolwich. He texted her back at 14.57 saying "What took hour and you aint even got off Thamesmead WTF ?".

74. He said he then started tidying up around the house and put some Eminem music on, which he said was not too loud at all. He said the music went off and he heard ST making a funny noise, so he picked her up and "she just really wasn't herself". She seemed very sleepy. At this point he phoned JS, for her to come around and see ST. Call data at the trial showed that he phoned JS at 3.07pm. He told the court he thought that ST's behaviour might have been related to the vaccinations she had had the previous day. JS was collecting her older children from school, but they apparently agreed to meet in the hallway. The Father said he put ST in the car seat and took her down stairs as quickly as possible. He said that at this point she was breathing but "in sleep mode". He called her name a couple of times but she did not respond.

75. JS arrived in her car, with MT. JS said that ST did not look well and they should take her to hospital. The Father said JS had forgotten her handbag and needed money to buy petrol, so they went back to her flat and then went to the Health Centre. This is why it took over 10 minutes to get to the health centre, which is only 400m from the flat. The Father said they went there rather than to the hospital because ST had declined rapidly. He said when he got into JS's car she wasn't breathing any longer. He rocked her backwards and forwards but she didn't respond.

The Mother's evidence

76. The Mother had to be arrested in order for her to come to court and give evidence. However, once she did give evidence she spoke reasonably willingly. She was completely adamant that she had never hurt ST and would never do so. She also said on a number of occasions that if she had known ST had been hurt she would have spoken out and told someone.

77. She described ST as a good baby who rarely cried. She denied that the Father had tried to isolate her from her family. She said that she had had no idea that ST had had pre-existing injuries before she died. In her written statement the only possible explanation she gave was of an occasion when she was at a friend's house and that friend's daughter had been in a room alone with ST and had picked up her blanket. Although she did not expressly say that she thought the girl had injured ST, this appeared to be the implication of what she was saying. But there is not the slightest suggestion that ST was injured at this time. When giving evidence she seemed to accept that as she was clear she had never hurt ST it must have been the Father, both on 4 November, and when the earlier injuries occurred. However, even this acceptance was made very unwillingly.

78. She accepted that the Father had sometimes shouted at her, but she denied he had ever shouted at ST. She was keen to describe him as a loving father. However, she did accept that when suffering withdrawal symptoms from heroin he became agitated.

79. In relation to the texts and messages on the night of 3/4 November, she said that ST had not been crying, and she had sent the texts just to guilt trip the Father into coming around sooner. Her evidence was that it was a normal morning. When the Father came

round she prepared ST's bottle and the Father gave it to her whilst the Mother was still in the flat. She then left to go shopping.

80. She was taken to the texts from 15.50 onwards. She accepted, after some prompting, that the Father was texting her asking her to get heroin for him, before she went to the hospital to see ST. These show the Father being desperate for her to get the drugs. Her evidence was that he was a heroin addict and that he got "rattling" if he did not get heroin. This was the state he was in from 15.50 when he first asked her to get drugs. She said that when he didn't get heroin he got "sick" and he needed it. Her evidence was that when he first came to the flat at around 1pm he was not "rattling". She accepted under cross examination by Ms Gartland that she would have been worried about leaving the baby with him if she had known he needed heroin.

81. She denied that the Father had sought to isolate her and ST from her family. She also denied that he had ever been violent to her. She was unclear as to how often she had seen him since ST's death. She said that when she got pregnant with DAS, she wanted a sibling for ST, and she denied having seen the Father on the occasion her sister said she saw them together in May 2019.

The social work evidence

82. I heard evidence from the social worker, Ms McKay. DAS was born with illegal substances in his system, due to the Mother's drug use during pregnancy. The LA have concerns, unsurprisingly, about the parenting abilities of both parents. That concerning the Father can be summarised briefly given that he is not actively disputing the making of the order, and has made it absolutely clear that he does not intend to engage with these proceedings.

83. Both parents concealed their on-going relationship to whatever degree it occurred, during the criminal proceedings. This appears, from information from the Mother's sister, to be an on-going situation whereby the parents are still seeing each other, and the Mother is still denying it.

84. The Father appears to be of no fixed abode. He has not attended contact sessions since 4/2/19.

85. Ms McKay made clear that in her opinion the Mother loves DAS and wants to care for him. However, there are a number of factors which militate strongly against this, quite apart from the circumstances of ST's death. The Mother has undergone a hair strand assessment for the period July 2018-January 2019, and this tested positive for crack cocaine and heroin use. She had declared that the last time she used heroin was in June 2018, so the evidence is clear that she was not being truthful in her information.

86. The psychiatric report from Dr Oyebode records his opinion that the Mother is suffering from a moderate recurrent depressive disorder, but there is no evidence that the Mother is suffering from a personality disorder. He recommended a period of 6 months abstinence from drug use in order to test whether she could look after a young child and that DAS should only be returned to her if she is abstinent from drug use and closely monitored.

87. A parenting assessment of the Mother was carried out, but she failed to engage meaningfully. The assessment was negative and concluded that the Mother did not have the capacity to keep DAS safe. The Mother's attendance at contact sessions has been inconsistent. She has attended 15 out of 40 possible sessions, and her attendance has become poorer in recent weeks. She has given a range of explanations for her failure to attend, and Ms McKay has stressed to her the importance of maintaining contact. She has not been reliable in informing the contact centre or the foster carer when she is not going to be attend. This is plainly not in DAS's interests.

88. The Mother was also subject to a psychological assessment by Peter Branston. I was told at the end of the hearing that Mr Branston had been struck off from the Royal College of Psychologists. His report concluded that the Mother had a roughly average IQ and operated cognitively at an age appropriate level. I did not consider his evidence critical to my findings, and therefore in the light of the fact that he has been struck off I have given his report no weight.

89. A family group conference was held on 10 May 2019, at which maternal and paternal family were invited. The Mother, maternal grandmother and aunt, and paternal aunt attended. The paternal grandmother wrote to the LA supporting DAS being in care and ultimately adopted. The members of the family who attended, other than the Mother, all felt that adoption was the best option for DAS. No wider family members were put forward as potential carers.

The Guardian's evidence

90. The Guardian has filed two reports, dated 8 February and 12 June 2019. She sets out that DAS tested positive for cocaine and heroin at birth and began to show signs of withdrawal around four days after birth. He remained in hospital for 9 days and has been living in foster care since. Happily, he now seems content and well settled and is thriving. Whatever the future may hold, at the moment he shows no health concerns. The Mother only attended for ante-natal care in the third trimester. Although DAS was born with a low weight, 2.56 kg, the doctors now think that was a consequence of the Mother's exposure to drugs, rather than that he was premature.

91. The Father has only attended contact with DAS three times, and is not putting himself forward to care for the baby. Given that he does still seem to have some, although how much is unknown, contact with the Mother, it is relevant to note that his drug addiction appears to be continuing. He was tested positive for heroin and cannabis in January 2019 and is receiving a regular methadone prescription. He has a history of self-harm. He also has a criminal record for assault and criminal damage in domestic incidents.

92. The Mother has attended contact sessions with DAS, and the Guardian says that she is generally loving and affectionate. However, although she started by attending contact regularly, her attendance has fallen off and in total she has only attended 15 out of 40 sessions. Sometimes there have been reasons given, but her engagement with professionals has been very patchy. The Guardian says that it is difficult to say whether this is a deliberate pattern of disguised compliance and evasiveness, or a consequence of chaotic lifestyle and possibly depression.

93. The Guardian expressed concern about the Mother's drug use. She has not engaged with appointments to assess her drug use with Change Grow Live. The Mother said in evidence this was because she had had a knot in her hair so could not be tested, but this does not seem a convincing explanation.

94. In terms of impact on DAS the Guardian draws attention to the evidence of the Mother's very poor engagement with professionals over the last three years and very little, if any, evidence of positive progress. When cross examined the Guardian said that the Mother would need to undergo an intensive period of drug rehabilitation, probably in a residential unit, following by work in the community before she could support the Mother having care of DAS.

95. The Guardian was clear that it was in DAS's best interests to be placed for adoption.

Assessment of the Mother's evidence and findings of fact

96. When giving oral evidence the Mother appeared to be very vulnerable and younger than she really is. Although it was apparent from her oral evidence that she is intelligent, she did not have much insight into her position or her ability to care for DAS. Despite everything that has happened she remained loyal to the Father, and I do not think that she was telling me the truth on matters relating to him, such as the frequency with which he shouted at her, or the consequences of his drug use. She was in my view still seeking to minimise anything which indicated that he had harmed ST. Her acceptance that he killed ST was more on the basis that if she did not harm ST he must have done so, than any emotional acceptance of the gravity of what had happened. It was also notable that there were some parts of her evidence, such as reference to the story of the friend's daughter touching ST, or her anger at the social worker not returning her calls, when she seemed to have clear recall and focus, whereas there were other parts where she was notably vague. Two examples of the latter, are when she last saw the Father, and her drug taking.

97. I accept that she really loved ST, and loves DAS and wants to look after him. I do not accept that she was a wholly truthful witness in terms of the evidence she gave about ST, the night of 3/4 November, or the degree to which she and the Father may have

discussed what happened. I will set out my findings of fact below and explain where I did not believe the Mother's evidence.

98. I did not see the Father give evidence, I therefore have to assess the truthfulness of what he said from the written evidence and transcripts. For the reasons that I will explain below, I do not believe the Father's account of ST's death. I fully take into account the fact that he was acquitted of manslaughter after a criminal trial and cross examination, and that I have not heard oral evidence. However, the standard of proof required to be met by the LA is different from that in the criminal trial; I have read the transcript of his evidence; and I have also had the advantage of hearing the Mother's evidence, and it is therefore easier for me to determine the likely sequence of events. I take into account the approach in ***Re R (Children)*** that my task is to reach a narrative account of what happened, rather than ascribe criminal responsibility. I am also conscious that for whatever reasons the evidence as to the Father asking the Mother to buy heroin for him when ST was in hospital was not before the jury. Overall, I have a considerably fuller picture of events on 3/4 November 2016 than did the jury.

99. The starting point is the medical evidence, which shows to a high standard of probability that ST died of non-accidental injuries following being shaken/thrown. There is no dispute about this evidence, and there could be no sensible dispute. The next stage is that there are only two realistically possible perpetrators- the Father or the Mother.

100. In my view all the relevant evidence points strongly to the Father having been the perpetrator of the violence that led to ST's death. Both parents say that when the Father arrived ST was awake and that she drank milk. The Mother made up a bottle and the Father gave it to her. In my view there is no sensible doubt that she was uninjured at this time. The medical evidence is clear that she could not have sucked and swallowed the milk after she had sustained the ultimately fatal injuries. The Father's evidence at the criminal trial suggested that the Mother was out of the kitchen for up to 10 minutes, whilst ST was sleeping after her bottle, and the inference was that she could have injured the baby at this point.

101. In my view the evidence points overwhelmingly to the Father having inflicted the injuries rather than the Mother. I take into account the following factors, but not in order of importance.

102. The timing points to the injuries having been inflicted after the Mother had left (i.e. after 14.29 from the CCTV). Dr Cary explained that with injuries of this severity there would have been a limited time, up to perhaps an hour, when ST's heart could be restarted. This occurred at 16.06 at the Queen Elizabeth Hospital. Therefore, although not necessarily impossible, the medical evidence points to the injuries occurring after 14.29. The timing also fits with the phone call to JS, which was at 15.09. If, as I consider likely, the Father injured the baby a bit before 15.06, and it was then obvious that she was badly hurt, the timing suggests that the Father called JS to seek help/work out what to do.

103. Ms H gave evidence that she heard very loud music and shouting by a male voice in the flat, between 14.30 and 15.00. Ms H was a wholly believable witness, albeit she was timing her actions by her normal routine so she might have been out by a few minutes. She had no interest or axe to grind in relation to either parent. She gave her statement to police before she knew about ST's death, or any allegations against the Father. She has stuck to that story through two sets of cross examination. She was careful in her evidence, explaining why she was so clear and when she wasn't sure of an answer being careful to say that she did not know. I fully accept her evidence. I have taken account of the police evidence that when they conducted the test in the two flats, the officer in Ms H's flat could only hear the music when it was turned up so loud as to be painful in the Mother's flat. However, Ms H said she could hear shouting on more than one occasion from the adjoining flat. It is possible the windows were open; and it is also possible that the Father had a high tolerance for loud music. It was the Mother's evidence that he had a very loud shouting voice.

104. I accept Ms H's evidence. She was clear that the music and shouting occurred after 14.30, so after the Mother left. The shouting wholly fits into a narrative of the Father being alone with ST, becoming frustrated perhaps by her crying, and then shaking and possibly throwing her onto a soft surface. Mr Feehan suggested that the words used by the Father shouting were more likely to have been aimed at the Mother. I do not accept

this, firstly the words may not have been precisely those recounted by Ms H, and secondly, there is nothing inherently unlikely in the Father shouting something like "why are you doing this?" at a baby. The words people use with young children can vary enormously.

105. I also take into account the evidence as to the Father's earlier behaviour and characteristics. His mother, PT, gave evidence to the police that he was verbally abusive towards her, and although he had never hit her she was afraid he might. His sister, LT, gave a statement that he was good with her children, but that he and the Mother had been trying to keep the families apart and away from ST. The Father has a caution for domestic violence and there were a number of police call outs in relation to other potential domestic violence incidents.

106. There is no issue but that the Father was and remains a serious heroin addict. The Mother's evidence was that at the time of ST's death he became unwell and upset if he did not have a regular fix of the drug, and this was usually in the mornings. One possibility, though it is not possible to be sure, is that he did not have a fix on the morning of 4 November perhaps because he was rushing to get to the Mother's house, and that is why he was so desperate for the Mother to get him heroin in the texts from 16.30 onwards. But in any event, it is quite apparent from the text at 12.54 that he had woken late and was very stressed when he went to see the Mother and ST. He was trying to deal with two women with very small babies and the demands that necessarily followed. A highly stressed heroin addict left with a very young baby is self-evidently not a good combination.

107. Added to this is that in my view the texts show quite clearly that the Mother and ST had had a "bad night", and probably ST was in a difficult and crying mood. The Mother texted at 10.39 saying the baby won't stop crying. The Mother said in oral evidence that this wasn't true and she was just trying to guilt trip the Father. However, 55 attempts to contact the Father overnight and into the morning seem much more likely to indicate that the Mother was at the end of her tether because ST was unhappy, perhaps as a result of the vaccinations two days before. I think this is an example of the Mother still trying to cover up or minimise the Father's actions.

108. The fact that the Father was stressed is further shown by the text of 14.57 complaining that the Mother was still in Woolwich, when she had only been gone for 27 minutes. It may be that the Father felt he was being placed under pressure by the two mothers of his very young babies, and the "juggling" between the two was too much for him.

109. Finally, there is the issue of the missing 10-12 minutes. The Father left the flat at 15.10, as shown by the CCTV. At 15.12 he spoke to GW with no mention of an unwell baby. At 15.14 he left the block, but only arrived at the surgery at 15.29. If he genuinely suddenly found that the baby had become seriously unwell then the obvious thing to do was simply take it quickly round the corner to the surgery. The failure to do this requires some explanation. The only explanation given was that JS had gone home to get money for petrol, but (a) the surgery was only 400m away so petrol would have been unnecessary; and (b) there was no evidence they did buy petrol. It seems more likely that they spent 10 minutes deciding what to say or do in the light of ST's condition.

110. In my view all of this evidence, points very strongly to the Father having injured ST, and I so find on the balance of probabilities. I should add that I put no weight on the evidence of the Father saying "I'm sorry, I'm sorry" to ST in hospital, this could just have been what any caring father would say to a very sick young child.

111. Having made this finding, I necessarily exclude the Mother from the pool of perpetrators.

112. There is also the matter of the earlier injuries. These were very serious. They indicate that between 2-8 weeks before 4 November, ST had been shaken, such as to break 8 ribs, some of them all the way through. It is not clear whether these injuries all occurred on one occasion, or more than one. There is no evidence that this could have been done by anyone other than one of the parents. Both deny it, but both plainly had the opportunity.

113. The fact that I have found that the Father inflicted the injuries on 4 November and has then systematically denied it, is evidence of a propensity to lose his temper with ST and then shake her. I also take into account his heroin addiction; the general strain he

was under with two small babies; and the wider evidence of violence and that he lost his temper on occasion.

114. I take into account the Mother's drug taking, and the evidence of the extreme strain she was under, including the texts she sent to the Father. However, there is no evidence that she has ever been violent to anyone. Of course, many people can crack with the strain of a very young baby who is crying, particularly with sleep deprivation. But I believed her oral evidence that she would never have harmed ST, and also the degree to which she loved both babies. Applying the approach of Peter Jackson LJ, on the balance of probabilities I find the Father inflicted the earlier injuries, and it would be straining the evidence to place the Mother in the pool of perpetrators for these injuries.

115. Ms Gartland pointed me to the evidence of ST having had a bloodshot eye, but this might well have simply been a normal situation for a young baby so I put no weight upon it.

116. It is not clear the degree to which a carer would have realised that ST had been injured earlier. The evidence does not indicate she would have lost consciousness after the earlier injuries. Although doubtless she would have been in pain, and probably more inclined to cry and be unsettled, it is not necessarily the case that it would have been obvious she had been injured. Small babies can cry for no apparent reason, and have "bad" days. I therefore do not find that this was sufficiently obvious that the Mother must have realised that the Father had injured the baby.

117. I do however find that the Mother failed to protect ST. At the most basic level, leaving a tiny baby with a heroin addict, with a history of shouting and losing his temper, is in my view a failure to protect. The Mother's evidence is clear that she had full knowledge of the Father's drug addiction, and his behaviour.

118. Further the Mother's behaviour since ST's death shows that she has not acted in a way that gives any reason to believe that she could take an objective view of the Father or his conduct in the past. The risks to ST of leaving her alone where so palpable, but even now the Mother seemed to show no appreciation of this. She has lied about seeing him, and has systematically tried to minimise his actions and this appears to

follow a pattern of the Father exercising a very high level of control. In my view, she failed to protect ST in the time before her death, by leaving her with the Father, including alone with him. The fact that the Mother has absolutely denied knowing or even suspecting that the Father had injured ST, gives me no confidence that I can trust her evidence as to her or the Father's care for ST before she died.

119. In respect of DAS's welfare, I only need to be concerned with the position of the Mother. The evidence strongly suggests that she continues to consume illegal drugs. She has not had a more recent hair strand test, as requested, and she has failed to engage with professionals in terms of getting support, either for drug abuse or wider psychological issues. She did not attend for antenatal care at an appropriate stage, and appears to have tried to hide her pregnancy.

120. Further, it seemed to me in her oral evidence, that she remains either in denial, or actively supportive of the Father, despite all the evidence that he harmed ST. I can place no reliance on her ability to protect DAS from the Father, or that she will not continue to have contact with him. She seemed completely unrealistic either about her ability to look after a small baby, or the risk that the Father posed to such a baby. In those circumstances it is very strongly not in DAS's best interests to be returned to his mother's care.

121. Applying the tests in s.52 of the 2002 Act, the consent of a parent can only be dispensed with if the welfare of the child requires it. In my view it is in DAS's best interests to be placed for adoption, and for that to happen in short order; and it is necessary for DAS's welfare that his parents' consent is dispensed with. He needs a stable and loving long-term home, that can provide him with a high quality of care. It is not merely that the Mother cannot do this at the moment, but also there are no indicators that she is on the road to being able to do so in the foreseeable future. DAS cannot wait, indefinitely, for the Mother to take active steps to change her lifestyle.

122. I have considered all other options. There are no family members putting themselves forward as carers, or for special guardianship. Therefore, the break with his birth family is an inevitable outcome for DAS if the Mother cannot care for him. Long term

foster care is not a good option for a child of DAS's age, given his family situation, his young age, and his need for stability and permanence throughout his life. Adoption is plainly the best option and the tests for dispensing with parental consent are met.

123. In terms of contact, I entirely accept the Guardian's evidence that there is little benefit in letterbox contact with the Father, but a graduated end of contact with the Mother, together with the opportunity for letterbox contact, seems to be the best outcome at this stage.