Neutral Citation Number: [2019] EWCA Civ 704

Case No: B4/2018/3134

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT NORTHAMPTON
HHJ Wicks
NN18C0138

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17th April 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE FLOYD
and
LORD JUSTICE PETER JACKSON

- -

H-L (Children: Summary Dismissal of Care Proceedings)

- -

Hannah Markham QC and Clare Meredith (instructed by **LGSS Law Limited**) for the **Appellant Local Authority**
Hannah Mettam (instructed by **Morgan & Wiseman Solicitors**) for the **Respondent Mother**
Aidan Vine QC and Kit Firbank (instructed by **Family Law Group**) for the **Respondent Father Mr L**

and by written submissions only

Michelle Christie (instructed by **Woodfines Solicitors**) for the **Respondent Father Mr H**
Matthew Brookes-Baker (instructed by **Sally Wilcock & Co Solicitors**) for the **Respondent Children through their Children's Guardian**
Robert Pettitt (instructed by **Bastian Lloyd Morris Solicitors**) for the **Intervener Ms E**

Hearing date: 11 April 2019

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Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. A two-year-old child is examined by a hospital paediatrician. She is found to have about 20 bruises, including groups of bruises on the face, neck and arms that are in the doctor's opinion highly likely to have been caused by forceful grabbing by an adult. There are three people who could be responsible: the mother, the father, and a non-family carer. The local authority is immediately informed and it begins child protection inquiries. The police also investigate. All three adults deny causing any injury. Plans need to be made for the child and for her six-year-old half-sister. The mother and the two fathers have different views about where the children should be placed.

2. A scenario of this kind would be familiar to any social services department and to any family court. Both agencies are given wide and flexible powers, mainly under the Children Act 1989, that they are under a duty to use to protect children and promote their welfare, while at the same time being fair to adults. Both agencies will recognise that a child that has suffered transient injuries may be more seriously injured over time and that other children in the household may face similar risks. They will also recognise that delay and inefficiency will work against the interests of the children and may well be harmful to them. Accordingly, on these facts the local authority will undertake a swift assessment and, on it becoming clear that the source of the risk has not been established, will take steps to ensure that proper plans can be made for the children. This requires an adjudication on responsibility for the injuries, something that can only be done by the court. The local authority will therefore issue proceedings to allow the court to reach a factual conclusion and to make any orders that may then be necessary. The court process should in all normal circumstances (and there is nothing particularly abnormal about these) be completed within the statutory period of 26 weeks, allowing the children and their family to move on with their lives on the basis of sound plans, built on the best possible understanding of what went wrong and how it might be avoided in future. That understanding is not only needed for the sake of these children, but also for the sake of any other children for whom the parents may in future be responsible.

3. Unfortunately, that is not what happened in the present case. Neither of the key agencies acted correctly. The local authority secured alternative arrangements for the children without having any legal standing for doing so, and it then delayed for three months in issuing proceedings, which it then pursued in what the court rightly described as a shambolic manner. For its part, the court departed from established case management practice and authority before striking out the proceedings in week 15 without conducting any investigation whatever into how the child came by her injuries. In doing so, it accepted and adopted a legal argument born of a profound misunderstanding of the basic statutory regime governing proceedings of this kind. During the lifetime of the proceedings the court did not make any statutory orders to govern the arrangements for the children, even to the extent of making the interim supervision orders requested by the local authority, being the least level of protection that the situation required.

4. The net result is that almost a year has passed since the child went to hospital without there being the smallest increase in our understanding of how she was injured. In the meantime, the children's lives have continued on the basis of arrangements brokered (until the proceedings were dismissed) by the local authority without legal authority or (since the proceedings were dismissed) by the parents themselves. The process has been unproductive and substantial amounts of public money have been wasted on legal costs, along with the depletion of scarce professional time. The process has also been hard for the children, who have been separated from their main carer and from each other, and for the parents, who have been bewildered by the actions of the agencies. If there is any silver lining it is that they have to some extent become united in their bewilderment, so that their relationship with each other may be better now than it was before the events arose. It can at least be said that this case may be unprecedented, in that neither this court nor counsel appearing before it are aware of a previous instance, reported or not, of care proceedings being dismissed at an interim procedural stage against the opposition of the local authority and the Children's Guardian.

5. In referring above to established case management practice, I mean in particular Part 12 of the Family Procedure Rules 2010, Chapter 3 of which contains special provisions about public law proceedings. Part 12 is supplemented by the Guide to Case Management contained in Practice Direction 12A, which itself incorporates the Public Law Outline. This is not the occasion for a full survey of those provisions, but two points are of relevance to this appeal:

   (1) The provisions are a self-contained code designed to assist the parties and the court to deal with care proceedings justly and efficiently. Part 12 is a specific application to care cases of Part 1 (the Overriding Objective) and Part 4 (General Case Management Powers) and contains detailed provisions reflecting the spirit of those earlier parts of the Rules. Part 12 is therefore likely to contain all the powers that the court needs, making it unlikely that recourse to the more general procedural provisions will be necessary; at all events, in a case to which Part 12 applies the earlier provisions do not represent an alternative procedural regime.

   (2) Part 12 and the Public Law Outline are the most recent in a series of initiatives designed to achieve good, timely outcomes in care cases. They set out stages to the process, list matters to be considered at main hearings, promote judicial continuity and set timescales. The aim is to cut down on superfluous hearings, while maintaining some flexibility. So, r.12.25(1) provides for just one Case Management Hearing with sub-rule (2) permitting a further Case Management Hearing only where it is necessary. By sub-rule (4) the Issues Resolution Hearing can itself be a final hearing where it is possible for all the issues to be resolved. Extensions of time are closely controlled by section 32 of the Act, which specifically states that extensions are not to be granted routinely and are to be seen as requiring specific justification; this is reflected in r.12.26A. Seen overall, the system encourages and empowers strategic thinking within a standardised framework, indeed, it requires it. It is a deliberate move away from *ad hoc* case management under which cases often developed organically and without structure. It places very considerable demands on all participants, but that is what Parliament has required for the benefit of the children and

> families concerned; moreover, experience shows that non-compliance usually causes even greater difficulties.

6. In referring above to case management authority, I particularly have in mind the decision of this court in *Re S-W (Children)* [2015] EWCA Civ 27; [2015] 1 WLR 4099. That was a case in which a judge had without warning made final care orders at a first case management hearing. The court, consisting of Sir James Munby P, Lewison LJ and King LJ, allowed the appeal on the basis that this premature disposal was unfair and contrary to the interests of the children. Giving the leading judgment, King LJ (at [24] onwards) thoroughly surveyed the Family Justice Reforms and the Public Law Outline. At [39], she cited the earlier decision of this court in *Re B* [1994] 2 FLR 1, a contact case, concerning the circumstances in which orders can be made without a full hearing. Having done so, King LJ said this at [40]:

> "… it may be exceptionally that, if all parties consent, or there is otherwise a clear case for it, then a court will make final orders at a CMH but, unless the decision goes by concession or consent, it will only be exceptionally, in unusual circumstances and on rare occasions, that this can ever be appropriate."

In the following paragraph, she added

> " i) Where there remains any significant issue as to threshold, assessment, further assessment or placement, it will not be appropriate to dispose of the case at CMH.
>
> ii) It can never be appropriate to dispose of the case where the children's guardian has not at least had an opportunity of seeing the child or children in question and to prepare to a case analysis in which he/she considers the section 31A care plan of the local authority."

7. In his concurring judgment, Sir James Munby, said this at [61]:

> "Quite apart from the fact that such a ruthlessly truncated process as the judge adopted here was fundamentally unprincipled and unfair, it also prevented both the children's guardian and the court doing what the law demanded of them in terms of complying with the requirements of the Children Act 1989 and PD12A."

8. *Re S-W* was the mirror image of the present case, in that it involved the summary granting rather than the summary dismissal of the local authority's application, but the guidance given in that case applies equally to both situations.

9. Another decision that was drawn to the attention of the judge by the local authority was *Re K* [2018] EWCA Civ 2044. In that case a judge had dismissed an application for a care order at a final hearing and made a private law order that the child should live with her mother as he found that the threshold had not been made out. Proceedings had

been issued at birth on the basis of likely harm and the child had spent time in a mother and baby foster placement. The mother had done reasonably well but given her troubled history was assessed negatively as a sole carer. The appeal was allowed on the basis that the judge had not asked the right question – was the threshold satisfied at the date proceedings were issued? – and instead became side-tracked by the mother's performance in the foster placement. He had entangled questions of threshold and welfare which are two separate exercises, one preceding the other.

10. In terms of case management authority, I finally refer (but only for reasons that will become apparent) to the earlier decision of this court (Thorpe and Munby LJJ) in *Re C (Children)* [2012] EWCA Civ 1489. That was a private law case in which the judge had effectively stopped the proceedings having heard the applicant because he took the view that the application would inevitably fail and that there was no purpose in continuing. In giving the leading judgment, Munby LJ said at [18]:

> "It is pre-eminently a matter for the trial judge in a case of this sort to determine the form of procedure which will best meet the welfare needs of the children."

I have to say that I do not regard that decision as being of assistance in the present case, and I note that Sir James Munby, a member of the court in both *Re C* and *Re S-W*, took a very different approach in the later case, no doubt because it concerned child protection and state intervention within a formal framework.

11. Lastly, during the course of these proceedings there was (because of the delay in issuing the application) much discussion of the leading authority on the 'relevant date' for assessing the threshold conditions. The correct approach to this issue was settled in the early years of the Children Act by the House of Lords in *Re M (A Minor)(Care Orders: Threshold Conditions)* [1994] 3 WLR 558, in which Lord Mackay, with whom the other members of the court agreed, stated:

> "I would conclude that the natural construction of the conditions in section 31(2) is that where, at the time the application is to be disposed of, there are in place arrangements for the protection of the child by the local authority on an interim basis which protection has been continuously in place for some time, the relevant date with respect to which the court must be satisfied is the date at which the local authority initiated the procedure for protection under the Act from which these arrangements followed. If after a local authority had initiated protective arrangements the need for these had terminated, because the child's welfare had been satisfactorily provided for otherwise, in any subsequent proceedings, it would not be possible to found jurisdiction on the situation at the time of initiation of these arrangements. It is permissible only to look back from the date of disposal to the date of initiation of protection as a result of which local authority arrangements had been continuously in place thereafter to the date of disposal. It has to be borne in mind that this in no way precludes the court from taking account at

> the date of the hearing of all relevant circumstances. The conditions in subsection (2) are in the nature of conditions conferring jurisdiction upon the court to consider whether or not a care order or supervision order should be made. Conditions of that kind would in my view normally have to be satisfied at the date on which the order was first applied for. It would in my opinion be odd if the jurisdiction of the court to make an order depended on how long the court took before it finally disposed of the case. A local authority cannot apply for a care order unless at the date of the application the child is suffering or is likely to suffer significant harm. Once the local authority has grounds for making an application, the court has jurisdiction to grant that application. If between the date of the application and the date of the judgment of the court, circumstances arise which make a care order unnecessary or undesirable, the local authority can withdraw its application for a care order or the court can refuse to make a care order."

Lord Slynn stated that Parliament cannot have intended that if a child is removed by a local authority from a situation in which the child is suffering harm, the local authority loses the capacity to ask for a care order; Lord Nolan similarly observed that:

> "Parliament cannot have intended that temporary measures taken to protect the child from immediate harm should prevent the court from regarding the child as one who is suffering, or who is likely to suffer, significant harm within the meaning of section 31(2)(a), and should thus disqualify the court from making a more permanent order under the section. The focal point of the inquiry must be the situation which resulted in the temporary measures being taken, and which has led to the application for a care or supervision order."

12. With that introduction, I turn to the circumstances of the present case.

The background

13. I shall call the two children Lara (now aged 7) and Nina (now aged 3). Their mother, Ms D, had a volatile 7-year relationship with Mr H, the father of Lara. It ended in animosity, but after a time Lara began to have regular contact with her father. Ms D then began a 4-year relationship with Mr L, the father of Nina. That relationship too was marred by domestic violence. The local authority became briefly involved in January 2017 through the Early Help scheme. Concern was felt about the mother suffering from depression and about Mr L's use of physical chastisement. The couple separated in the summer of 2017, when Nina was only 18 months old; after that she would spend alternative weekends with her father. So it can be seen that up to this point in time, although the children had not had a very stable family situation and each of the parents may have had shortcomings, there were no major child protection issues.

14. That changed in May 2018. Nina, then 2 years 3 months old, stayed overnight with her father on Sunday 13 May. On the Monday morning, he returned her to her mother, who placed her with a family friend, Ms E, between about 9.00 am and 3.30 pm. After the mother collected Nina, she says that she saw marks on her body. She took her to the GP, from where she was referred to hospital. The bruises were noted. Blood tests were normal. A child protection medical examination was carried out by a consultant paediatrician, Dr A. In her report dated 24 May, she gave the opinion that it was highly likely that the bruising was non-accidental.

15. At the time of Nina's admission to hospital, the local authority was told of the care arrangements that had existed over the previous days and of the medical opinion. On 14 May it insisted that the children move to their respective fathers' care, seemingly overlooking the fact that Nina had been in her father's care during a period when her injuries may have been sustained. The mother reluctantly complied; she now says that she had no idea that the local authority was not entitled to insist. The girls did not see their mother for two weeks or each other for eight weeks. After that, supervised contact occurred. Lara returned to her mother in December 2018, the proceedings having ended. Nina remains with her father, Mr L, with limited contact with her mother and with Lara.

16. The local authority held a legal planning meeting on 28 May, when it was advised that the threshold for court proceedings was crossed. On 7 June an Initial Child Protection Conference took place and the children became subject of child protection plans. On 22 June the local authority held a legal gateway meeting at which it was decided to take the matter to court. On 9 July the social worker completed her statement. On 12 July an 'intent to issue' meeting was held. Despite that, it took the local authority until 23 August 2018 to issue care proceedings, seeking interim supervision orders in the short term and an expeditious fact-finding process.

17. A further consequence of the local authority's delay in issuing was that the parents were not fully legally represented during the period of the delay. Nor did the children have a Guardian to represent them or monitor their situation. Also, the mother in particular was distressed at the children's removal from her care, but was not given a forum in which she could readily challenge it. In the meantime, Lara told her school in July about arguments at her father's home. With the approval of the local authority, she was briefly placed with an aunt, but she soon returned to her father's care, he having in the meantime separated from his partner and their new-born baby.

The proceedings

18. There were no fewer than eight hearings: 14 September, 19 September, 1 October, 10 October, 16 October, 30 October/1 November, 23 November and 7 December. The first was conducted by a district judge and the remainder by the allocated judge, HHJ Wicks. This court has seen transcripts of the last five hearings.

19. Before coming to the individual issues, it must be observed that the sheer number of hearings became an issue in itself. At the five transcribed hearings, the local authority was represented by three different counsel, and the same is true of the Guardian. The position of Ms E, who had become an intervener, was particularly difficult. She was not entitled to legal aid and could not afford to be represented at this number of hearings, and accordingly she was represented at some but not others. A review of the

transcripts shows that a range of topics were repeatedly discussed with little progress being made and with new representatives making fresh interventions that, far from focusing the case, made it more diffuse. In the meantime, there was no continuity of social worker, there having been three since the children were removed from their mother. The parents say that their experience of attending hearings was that they never knew what the local authority would ask for next, or how the court would respond.

20. On 19 September, the judge authorised a paediatric overview, but no doctor had been identified and when one was, he could not report until the end of January 2019. However, at the hearing on 23 November the judge said that he suspected that the paediatric overview that he had ordered would not assist in determining the perpetrator of the injuries.

21. On 16 October, the judge understandably raised concern as to the current placements of the children, especially Nina, given that Mr L might have caused her injuries. Yet, although the only party opposing the making of an interim supervision order was Mr H, the judge did not make such an order.

22. Other issues that flowed backwards and forwards related to whether or not the parents should be tested for drugs, what contact the mother should be having, and whether or not there should be a split hearing. On the last matter, on 16 October, the judge directed that there should be a fact-finding hearing with a time estimate of 5 - 7 days on the first open date after 1 March 2019. No good reason was given for this ostensibly simple case, which in reality revolved around one issue, being forward-listed to a date outside the statutory time limit. There is no doubt that the judge and the Guardian were expressing constant concern about the performance of the local authority, to the point that the judge directed the attendance of a senior manager at one hearing, but it should have been clear that the practical remedy was to move to an early hearing to identify, if possible, the perpetrator of Nina's injuries.

23. One issue that did not seem to be contentious was the question of the threshold. The parties and the court proceeded at the outset on the basis that it had obviously been crossed, at least for the purposes of any interim orders, on the basis of likelihood of harm to both children arising from Nina's injuries; indeed on two occasions the voluminous court orders included recordings to that effect. To take one example, the position statement on behalf of Mr L for the very first hearing on 14 September, stated: *"Interim Threshold is clearly crossed in this case, an ISO with a Child Arrangement Order is rightly considered by the Local Authority as commensurate orders…"* However, that apparent consensus was disturbed at the hearing on 1 November, by which time the proceedings had been on foot for ten weeks. To understand how this arose, it is necessary to trace the way in which the local authority had pleaded the threshold. At the outset, it pinned its case on the injuries to Nina and alleged that either the mother or Ms E was responsible. Then, on 22 October, it alleged that Mr L (with whom Nina was of course living) might also be responsible. Finally, on 15 November, it widened the threshold by alleging past domestic violence involving mother and both fathers, and by Mr H in his latest relationship, misuse of drugs by the mother and Mr L, physical chastisement of Nina by Mr L, and so on.

24. Also at the hearing on 1 November, discussion started about the 'relevant date' for proving the threshold. The local authority had asserted that this was the date of the issue of proceedings, but counsel then vacillated by telling the judge that the relevant

date was 14 May before returning to the pleaded case. For their part, counsel acting for Mr H and for the Guardian submitted that if the relevant date was 14 May, it was arguable that the threshold was not met since the children had been placed by the local authority with people with parental responsibility. This issue was taken up by the judge who, no doubt exasperated by the local authority's approach, said: *"I cannot think of any better way of expediting proceedings than the court concludes that threshold is not crossed and the application is dismissed."* There then followed this exchange between the judge and counsel for the Guardian:

> JUDGE: … If 14 May is not the relevant date and the relevant date is the date on which the proceedings were issued, how does the Local Authority prove that on that date, either of the children were at risk of significant harm?
>
> COUNSEL: … If the relevant date is the date of the issue of proceedings, then in my submission, the likelihood of significant harm for Lara flows from the risks that are posed by mother being within the pool of perpetrators.
>
> JUDGE: At the time the proceedings were issued, Lara was in the care of her father... so, how could she be at any risk of significant harm?… I am intrigued, because this is a point that has never really been developed before… But it is a point that might actually be fatal to the local authority's case.

25. The judge said there was a real question mark in his mind as to whether or not the local authority could possibly succeed, and something to be said for the court determining the issue on "a quasi-summary basis". He therefore listed this issue and others for legal argument on 23 November and directed skeleton arguments to be filed. This led to the parties filing over 60 pages of legal submissions on this and other issues, something that I consider to be completely inimical to the scheme of the legislation. This whole sequence of events shows that the court had strayed from its mission, which was to seek to discover how a small child had received worrying injuries.

26. At the hearing on 23 November, Mr L (who, it will be recalled, had conceded in September that the interim threshold was obviously crossed) was represented by leading counsel, Mr Vine QC. It was by now common ground that the relevant date was the date of the issue of proceedings, avoiding any need to consider complex arguments about whether protective measures had been put in place in May that might have complied with the criteria set in *Re M* (above). I set out the core of Mr Vine's argument, in fairness to the judge, because it is the argument he went on to accept:

> "24. While the Local Authority now correctly identifies the 'relevant date' in their revised threshold document as being 23 August 2018, the date of issue of the application for care orders, it is <u>not</u> able to establish that the section 31 (2) threshold conditions were satisfied at that time *unless* it can establish Mr L as a possible perpetrator of Nina's injuries… This is because, as at the relevant date, (a) Nina was *already* in his care, (b) the child protection plan was being complied with, in particular, the mother's contact (certainly in relation to Nina) was being

> supervised, and (c) there was no need for a care or supervision order.
>
> 25. If that is correct, there is no statutory basis for these public law proceedings, and if mother seeks to resume care of the children or unsupervised contact in a departure from the child protection plans, her remedy (absent judicial review) is to apply for child arrangements orders under s. 1 *(sic)*. In that event, there would still be a role both for (a) fact-finding in respect of Nina's injuries, and (b) Local Authority welfare evidence by way of a section 7 welfare report, but that does not mean that these proceedings should proceed on a flawed footing."

27. At the hearing, there were lengthy exchanges between the judge and counsel then acting for the local authority. They included these:

> "JUDGE:… I mean, the wording of the relevant provision of Section 31 is in the present tense, so it means that the court looks at 23 August and asks itself the question, is the child at risk of suffering significant harm as at that date, or has the child suffered significant harm as at that date.
>
> COUNSEL: Well, we know in respect of Nina, that is right. She has suffered –
>
> JUDGE: Well no, because she had suffered significant harm arguably back in May… and by the time you issued your proceedings, she has… effectively from the point of view of the Local Authority at that time been removed from the source of that danger, has she not.… I have a real conceptual difficulty at the moment with understanding how one can say as at 23 August 2018 the children were at risk of significant harm. I make no bones about it. I have had that difficulty right from when this case first came before me."

And later:

> "JUDGE: … So, does it come down to this then… or am I oversimplifying it, that the risk of harm as at 23 August, in fact stems from the fact that Nina is living with someone you now say was responsible for or may have been responsible for her injuries in May?
>
> COUNSEL: Yes … Firstly, because of course you're not just considering this father. Of course, section 31(2)(b) relates to 'a' parent… the mother is also in the pool of perpetrators –
>
> JUDGE: But as at 23 August the child is not living with the mother… So the child cannot be at risk of suffering significant harm from anything attributable to the mother."

Counsel for the local authority unavailingly pressed her case. She stressed that a dismissal of the proceedings would mean that there would be no determination of the issues. The judge, probably inspired by Mr Vine's submissions, said that the matter could be dealt with in private law proceedings between the parents, to which counsel responded that this would lead to the *"farcical"* result that the local authority would then be asked to provide a section 37 report and *"we are then back where we are now."*

Further exchanges included (in telescoped form):

> JUDGE: … What you have done is… you have taken some steps, as the Local Authority thought, to protect children and then 3 months later, [you] issue proceedings and are now trying to argue that that the three-month delay is really immaterial…
>
> COUNSEL … But it cannot be right surely just because we didn't issue on 14 May that then we should have not gone on to issue with, as I say, the injuries unexplained to this child… And in looking at the risk of harm, one looks at the risk of harm presented by either of these parents, not both parents… one has to consider the risk looking backwards. That includes the injuries. It also then considers the risks going forwards, beyond those injuries, in as much as how it is that the parents are then preventing that risk of harm for that child going forward.… It's a live risk that was still present then on 23 August. Whilst the child wasn't in the mother's care at that time, there is still the risk of significant harm because she was part of the pool of the unexplained injuries. It cannot be right that the court says, just because therefore the risk isn't there because the child is not with the mother therefore threshold is not met."

28. Mr Vine then pursued his written submissions to the effect that the threshold could not be established in Nina's case, unless there was a real possibility of Mr L being responsible for the bruising. He relied on the case of *Re C* (above). He submitted:

> "You can decide the case summarily. You don't need to wait until the evidence has been tested if the propositions are not capable of being established, and you can exclude an issue."

29. Counsel for the mother and for Mr H echoed Mr Vine's submissions. Counsel for the Guardian expressed concern about the children's position and distinguished the case of *Re C*, but did not squarely confront the legal issue of the threshold. By contrast, the Guardian's submissions on the appeal crisply note that the proceedings had been dismissed without the Guardian filing an interim analysis, without the evidence of the paediatrician and without consideration of the risks that might be posed by the mother, regardless of the position of the fathers.

The Judge's decision

30. In a reserved judgement given on 7 December, the judge dismissed the proceedings, and with them the direction for the paediatric report. He also amended the orders dated 10 October and 16 October "pursuant to the slip rule" by removing recordings that the

court had found the s.38 interim threshold had been crossed and substituting recordings that the threshold had remained in dispute.

31. The judge described the case as "deeply troubling". He expressed his concern about the local authority's approach to the proceedings. He confirmed that he had kept the welfare of the girls in the forefront of his mind. They had gone from being with their mother and each other to being separated and living with their respective fathers and seeing their mother only for contact. He continued:

> "11. … I am acutely aware that whatever decision I make today will not immediately improve their position and that, inevitably, there may be further delay before final decisions are made about their future."

32. The judge then directed himself on the law, starting with section 31, and then considering the decision in *Re M* in some detail. He next quoted most of Part 1 and all of Rule 4.1(3) of the Family Procedure Rules, saying that:

> "17. I have read those provisions out in full because they serve to emphasise in my judgement, the very broad case management powers that the court has and the obligation on the court to manage cases actively and, indeed, robustly."

33. Next, the judge cited at length from the judgment of King LJ in *Re S-W*. He then said this:

> "19. I accept the general proposition identified in that case, that robustness in case management cannot trump fairness. In this case, however, the parties have had ample notice of the issues to be determined and have prepared accordingly and have had a proper opportunity to present their arguments. I make these further observations about the *Re S-W* case.
>
> 20. First of all, the Court of Appeal did not in that case, consider, nor were they referred to, the courts general case management powers under Part 4, and nor do they expressly consider the provisions of Part 1 of the Family Procedure Rules, other than the requirement to deal with the case justly.
>
> 21. Secondly, they did not have cited to them the case of *Re C [2012] EWCA Civ 1489.* These were private law proceedings, although it seems to me that the principles articulated in them are just as much applicable with appropriate modifications to public law proceedings. …"

The judge then cited extensively from the judgement of Munby LJ in *Re C* before continuing:

> "22. I do not go so far as to suggest that the decision in *Re S-W* was made per incuriam but it does seem to me that it was a

> decision that was made without reference to a relevant authority."

He also referred to the requirement for the local authority to prove its threshold case with focused evidence, and cited extensively from *Re A* [2015] EWFC 11.

34. The judge began his analysis of the case before him by stating that it was now common ground that the relevant date for determining whether the threshold was crossed is 23 August 2018, the date on which the proceedings were issued. He continued:

> "25. … Thus, the primary issue in this case… may be put simply thus: on the Local Authority's threshold document, as it is now pleaded, is the threshold for making orders under Section 31 crossed? If the answer to the question is 'no', then these proceedings must be dismissed. It seems to me that this is not necessarily an issue that requires oral evidence. Indeed, the court could safely proceed on the assumption that the Local Authority is able to prove each of the factual issues set out in its threshold statement. The question then is whether those allegations, if proved, can or should lead to a conclusion that, at the relevant date, the children were suffering, or were at risk of suffering significant harm and that the harm, or the risk of it, were attributable to the care of the parents, and that is one that again seems to me is capable of being dealt with on submissions.
>
> 26. Furthermore, it seems to me to be entirely proportionate to deal with the issue in this way, given the volume of family work in this court, as in many other courts, and the consequent significant pressure on the court lists. This case may otherwise take many months to resolve and, if at the end of those proceedings, the Local Authority cannot prove its case, those would have been wasted months for the children."

35. Next, the judge reviewed the latest edition of the local authority's threshold document. He continued:

> "29. If the proceedings had been issued at, or shortly after, Nina had been admitted to hospital, the court, it seems to me, could have little difficulty in concluding that, physically and emotionally, Nina was suffering from significant harm. By 23 August 2018, the date that these proceedings were issued, the bruises had healed and Nina, this was common ground, had suffered no further unexplained injuries. Indeed, the local authority seemed, on balance, to be perfectly content with the care given to Nina by Mr L and has never sought to remove Nina from his care. Can it be said that Nina continued to suffer significant emotional harm as at the relevant date attributable to these injuries, if they had been inflicted by either mother or Mr L?… Again, there is nothing in the material, which is now substantial and runs to the 3 lever arch files, to show that Nina

> continues to suffer significant emotional harm which is attributable to the injuries she sustained in May.…
>
> 30. The conclusion that I reach, therefore, on this aspect is that the Local Authority [*sc.*cannot] now prove its case that Nina is suffering or is at risk of suffering harm, on the basis that she is in the care of a potential perpetrator of her injuries. This is an unattractive position, especially given that she is there only at the behest of an intervention by the Local Authority. Furthermore, the Local Authority does not demonstrate at all on the material available, how it can be realistically said that there is a real possibility that Mr L is the perpetrator…"

36. The judge then reviewed the other matters in the threshold document, unrelated to Nina's injuries and concluded that they would not individually or cumulatively cross the threshold. He ended his judgement in this way:

> "42. I entirely accept that if these bruises were proved to be deliberately inflicted, that that would be significant harm, but the time for state intervention in respect of that harm was at the time that those injuries were suffered or shortly thereafter, not 3 months later, and that delay, in my judgement, is fatal to the Local Authority's case. Overall, therefore, I am driven to the conclusion that, on any view of the evidence, the Local Authority fails to establish that, as at the relevant date, the threshold for making orders under Section 31 of the 1989 Act is crossed. It follows from that that as their application is for care or supervision orders under Section 31, those proceedings must be dismissed."

37. The judge therefore based his decision on the delay in issuing the proceedings, although he also seems to have relied upon the argument that the threshold could not be crossed because Nina was said to be doing well in her father's care.

38. The local authority and the Guardian asked for permission to appeal. In doing so, counsel for the Guardian argued that it was manifestly in the children's best interests for there to be a judicial determination of who had caused the injuries. The judge agreed that this would be so if these were private law proceedings, but not in a public law case where the threshold was not crossed.

The grounds of appeal

39. The local authority's grounds of appeal can be summarised as follows:

(1) **Failure to hear evidence:** In dismissing the case the Judge failed to establish who caused the injuries that led to the separation of the children and their mother, the risk (if any) posed by the mother or by Mr L and the likelihood of harm to the children and the ability of the fathers to protect them.

(2) **Finding no evidence of harm**: The judge was factually wrong.

(3) **Relevant date**: The judge misapplied the test contained in *Re M*.

(4) **Summary dismissal**: The judge erred in summarily dismissing the application at an interim stage prior to consideration of an awaited expert report and without hearing any evidence when there were three possible perpetrators. He exceeded his case management powers and took an approach which is inappropriate in the inquisitorial sphere of care proceedings. He thus failed to have regard to the paramountcy of the children's welfare and confused an assessment of the interim position with the final assessment that would take place when full evidence was available.

(5) **Excluding Mr L**: The judge was wrong to exclude Mr L as a possible perpetrator without a proper forensic examination of the evidence and without the expert's report. He prevented himself from assessing the credibility of each witness and the totality of the evidence. He was wrong to limit his consideration of the evidence to the limited aspects of the threshold and in doing so conflated welfare and threshold issues.

(6) **Prejudgement**: The judge's comments on 23 November demonstrated that he had formed a view about the application to dismiss the case and thus he failed to consider the submissions with an open mind.

(7) **Slip rule**: the Judge was wrong to change previous orders under the slip rule.

40. I granted permission to appeal on 14 February 2019.

Submissions

41. We have had written submissions from all parties and oral submissions from Ms Markham QC for the local authority, Mr Vine QC for Mr L, and Ms Mettam for the mother. Those parents' counsel appeared before us *pro bono* because their legal aid certificates had expired with the dismissal of the proceedings.

42. On behalf of the local authority, Ms Markham (who had no prior involvement) fully accepted the shortcomings in its performance. It had had no legal standing to insist upon arrangements for the children and it should have issued proceedings far earlier. However, the legal case put by its counsel to the judge on 23 November was a sound one, and he should not have rejected it. He made a plain error of law in relation to the requirements of section 31 and he was wrong to have used his case management powers to dismiss the case. He failed to recognise that the threshold can be met by the actions of one parent alone (here, on any view, potentially the mother). His binary view that the threshold was not met just because the children are now in supposedly safe placements simply cannot be the case. He conflated arguments about the strength of the evidence, the requirements for considering the pool of perpetrators and the issue of delay and reached a conclusion that was wrong. The case should be remitted to a different judge so that responsibility for the injuries could be determined. It is now acknowledged that this is in reality a single issue case, and the latest threshold statement will be replaced by the one filed on 22 October, which alleged that each of the three

adults might be responsible for the injuries, and no more. In the meantime, the parents have been cooperating with the local authority under the revised child protection plan.

43. On behalf of Mr L, Mr Vine stood by his legal submissions and supported the judge's decision to dismiss the proceedings on the basis that it was a factual determination that he was entitled to make. If the matter was to be remitted, it should be to Judge Wicks. His client would not oppose an interim supervision order in that event.

44. Ms Mettam emphasised the difficulty of the mother's position. She likewise did not oppose an interim supervision order, provided the matter was to be remitted on the basis of the narrower threshold statement.

45. The appeal was not supported by Mr H, the father of Lara, or by Ms E, the non-family carer. I have already referred to the position of the Guardian.

Conclusions

46. As will be apparent from what I have said above, and as we informed the parties at the end of the hearing, this appeal comprehensively succeeds. The judge erred in law by failing to recognise that the threshold for intervention was plainly crossed on the basis that at the date of the issue of proceedings both children were likely to suffer significant harm arising from the clear evidence about the very worrying injuries to Nina, for which one or other of her parents might, when the evidence was heard, be shown to have been responsible. He was in no position to prejudge that matter, and wrong to do so. It is a matter of regret that he should have been faced with such obviously fallacious legal arguments, particularly when advanced by leading counsel of Mr Vine's standing. However, those arguments were clearly exposed as fallacies by counsel then acting for the local authority, and the judge should have given them short shrift. He should have affirmed that the threshold is to be approached from the perspective of the children, not from the perspective of the parents, one of whom may have been responsible for Nina's injuries. He should have appreciated that delay in bringing proceedings, however lamentable, cannot of itself be determinative of the threshold. He should have realised that the fact that injuries are unexplained does not make them irrelevant, but rather raises an unassessed likelihood of future harm, aptly described in the local authority's submissions to the judge as *"a live risk."* Rather than seeking to cast doubt on the analysis undertaken by this court in *Re S-W*, by which he was bound and which was and remains authoritative guidance on the summary determination of public law care proceedings, he should have applied it. He should particularly have cautioned himself against terminating the proceedings when that course did not have the support of the Guardian, nor any written analysis from her. He should ultimately have seen the absurd impracticality of this unprecedented outcome, and the inappropriateness of private law proceedings as a surrogate forum for child protection. The injuries to this child cried out for investigation and the law, far from preventing it, positively demanded it.

47. For all that the judge's task was made more difficult by the inadequacies of the local authority, courts have to work with the resources available to them. The sterile outcome in this case could easily have been avoided through normal case management procedures and loyal application of well-established law. Instead, the proceedings drifted with no strategic direction and a dissipation of energy on irrelevant issues, all greatly to the disadvantage of these children. They and the adults are entitled to a judicial determination of how Nina's injuries were caused, and the directions that we

now give will ensure that this happens as soon as reasonably possible. The order of 7 December will be set aside, so that the proceedings revive. The case will be allocated to another judge, by arrangement with Keehan J as Family Division Liaison Judge, and will be listed for an early single case management hearing at which it can be decided whether or not a split hearing remains appropriate and whether the direction for a further paediatric report remains necessary. We will also make an interim supervision order, to continue until the conclusion of the proceedings.

48. In light of the above, it is unnecessary to consider the peripheral grounds of appeal concerning the use of the slip rule and alleged prejudgement.

49. These are my reasons for allowing the appeal.

Lord Justice Floyd

50. I agree.

Lord Justice Patten

51. I also agree.