Neutral Citation Number: [2020] EWHC 1233 (Fam)

Case No: ZC19C00356

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Insert Court Address

Date: 15/05/2020

Before:

The Honourable Mr Justice Williams

- -

Between:

A Local Authority	**Applicant**
- and –	
The Mother	
Father 1	
Father 2	
The Children	**Respondents**
-and-	
The Maternal Grandmother	
The Paternal Grandmother	**Interveners**

(Covid-19 - Fair Hearing - Adjournment)

Mr William Tyler QC and Mr Tim Parker (instructed by **the Local Authority Legal Dept**) for the **Local Authority**
Ms Elizabeth Isaacs QC and Mr Mark Rawcliffe (instructed by **Dawson Cornwell**) for the **Mother**
Mr Mark Twomey QC and Ms Siobhan Kelly (instructed by **TV Edwards) for Father 1**
Ms Trisan Hyatt (instructed by Faradays Solicitors) for Father 2
Ms Tina Cook QC and Ms Joy Brereton (instructed by **Powell Spencer and Partners) for the Paternal Grandmother**
Mr Cyrus Larizadeh QC and Ms Lucy Cheetham (instructed by **Goodman Ray) for the Maternal Grandmother**
Mr Darren Howe QC and Ms Sally Stone (instructed by **Creighton and Partners) for the Children**

Hearing dates: 12th May 2020

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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.

.....

MR JUSTICE WILLIAMS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 16.30PM on 15th May 2020.

Mr Justice Williams:

1. On 6 April 2019, a young girl who I shall refer to as K, died in hospital. She was born in 2016 and so was only three years of age when she died. A special post-mortem and toxicology tests indicated that her death was consistent with cocaine ingestion. Her death has led to both a police investigation by the Metropolitan police and care proceedings commenced by the Local Authority in respect of K's 4 siblings. Three of them have been in foster care since May 2019, and the fourth who was born during the proceedings has been in foster care since birth. In July 2019 the case was listed before me for fact finding commencing on 21 April 2020. This judgment addresses the question of whether the fact-finding hearing should continue either remotely or semi-remotely or whether the case should now be adjourned until an in-person hearing of pre-Covid 19 format can take place; possibly in September or possibly later. Expert evidence from seven witnesses has been heard remotely. No party seeks that police or social work witnesses give oral evidence. The only evidence remaining is the oral evidence of the mother, the father, the paternal grandmother and possibly the maternal grandmother.

2. The local authority is represented by Mr Tyler QC and Mr Parker, the mother by Ms Isaacs QC and Mr Rawcliffe, the father by Mr Twomey QC and Ms Kelly, the father of the oldest child by Ms Hyatt, the paternal grandmother by Ms Cook QC and Ms Brereton, the maternal grandmother by Mr Larizadeh QC and Ms Cheetham and the children by Mr Howe QC and Ms Stone.

3. At the commencement of the case the Threshold Criteria relied upon by the local authority contained in broad terms the following elements

    i) that K died as a consequence of cardiac necrosis caused by the deliberate administration or accidental ingestion of cocaine by or whilst in the care of

        a) her mother, the first respondent, and or

        b) her father, the second respondent, and or

        c) her paternal grandmother, and or

        d) her maternal grandmother

    ii) that one or more of those four individuals alternatively failed to protect her from the administration or accidental ingestion of cocaine

    iii) that the children were exposed to emotional abuse as a result of domestic violence perpetrated by the father upon the mother.

4. At a pre-trial review on 3 April 2020 all parties agreed that the case should continue to be listed and should be heard remotely. I authorised the use of Zoom as I considered there was a pressing business need to use that platform. At that point

    i) the mother was agreeable to the hearing proceeding remotely

    ii) the position statement for the father and his submissions made no reference to his having a medical condition which required him to shield or self-isolate or

otherwise take additional precautions but did request assistance with hardware to enable better participation in a remote hearing.

iii) The paternal grandmother was experiencing symptoms similar to Covid 19 but wished the hearing to continue and her team were exploring her capability to participate remotely given her laptop had been seized by the police

iv) the maternal grandmother wished to continue albeit she would only be able to participate by phoning into the hearing as she did not have the hardware necessary to participate in an audio-visual manner.

I should emphasise that this was in the very early days of the court, the legal profession and litigants' experience of the delivery of justice remotely. Arrangements had been made for the trial bundle (comprising some 7 ½ thousand pages of material) to be provided digitally by Caselines.

5. On 21 April 2020 the first day of the hearing but nominally set aside for judicial reading a short case management hearing took place. The positions of the parties were in summary terms as follows

i) Mother:

M has a laptop and suitable internet connection enabling her to participate and join in the fact-finding hearing remotely as required. It is M's wish to attend as much of the hearing as possible. She doesn't wish to delay the case.

However, in light of the growing experience of advocates in remote hearings and in light of the most recent guidance by MacDonald J in respect of the Remote Family Court (version 4), the proposal set out in the position statement on behalf of the paternal grandmother is endorsed, namely that at the conclusion of the expert evidence the advocates should be permitted to take stock address the court further as to the efficacy of the hearing proceeding remotely thereafter. At this stage the position on behalf of M in respect of whether it is appropriate or fair for the lay and professional (non-expert) parties to give evidence remotely is reserved; however, her legal team intend to review her instructions about lay and professional (non-expert) evidence at the conclusion of the expert evidence.

ii) Father:

The real issue would be whether the evidence of the main respondents should be taken directly in court and it was likely to be the fathers position that it should be.

iii) Local Authority

We note that no party is suggesting that the hearing cannot fairly begin as planned, but that it would be sensible to review matters at the conclusion of the expert and/or expert and professional evidence.

iv) Maternal Grandmother

She wanted the hearing to be completed as quickly as possible and wished to give evidence by Zoom telephone

6. I agreed at that stage to proceed with the expert evidence and then to review the position. In the course of the hearing of the seven experts over the seven days from 23rd April to 1st May the position in relation to evidence from police (including as to the chain of custody of what had been latterly described as a urine sample) and social work witnesses simplified itself as no party required any of the witnesses to give oral evidence. Thus by 1 May we had reached the close of the oral evidence save for the mother, the father and the grandmothers. In conjunction with the parties legal teams I had agreed that following the completion of the expert evidence I would allow the parties time to reflect upon that evidence before determining whether and if so how much further the case could proceed.

7. The seven expert witnesses gave their evidence remotely including Dr Cirimele from Strasbourg with the occasional assistance of an interpreter in England. Much of the oral evidence confirmed or expanded upon the contents of the written reports and the joint experts' agreement. Some of it was complex either scientifically or medically. It was challenging for the legal professionals to grapple with, although no more so than it would have been had it been delivered face to face. However, for the parties attending remotely from their homes and without the ability to have immediate interchanges with their lawyers to enable them to follow and understand the evidence, I am told and I have no difficulty in accepting, that it was much harder for them. Whilst it may not be essential for them to understand and assimilate all of the technical medical or scientific evidence it is essential that they are able to understand the nature of the evidence and its consequences. This also would be the same whether it were in person or remote but the ability to ask questions or to have difficult concepts explained in simple language face to face is much harder to achieve remotely. It is also the experience of those who have participated in the remote hearing process that it seems to be more tiring than a face to face hearing. Occasional failures of Wi-Fi bandwidth also placed some obstacles in the path of all involved albeit overall the remote hearing worked well technically and in particular the E-bundling system and the ability to share screens meant that the documents were easier to follow than would have been the case in a face to face hearing. At the commencement of the hearing I had invited each of the teams to notify me if their clients or lawyers were experiencing difficulties in participating as fully as they wished. In the main, technical issues did not prevent the parties participating as they had intended albeit the difficulties in discussing the evidence face to face became clear as the case progressed. Far harder for the parties was the distressing nature of the evidence being given particularly from the medical experts and I was informed that at various times the parties had elected to leave the hearing. Again, had this been face to face experience suggests that would have been the case in any event.

8. On the afternoon of 1 May Prof Bu'lock, the paediatric cardiologist, completed her evidence. We then considered some of the potential ramifications of the totality of the expert evidence. A number of issues had emerged more clearly from the scientific and medical evidence and which had a potential impact on the approach that the parties and the court might take to the issue of whether to continue or whether to adjourn. Most importantly these were

i) the issue of deliberate administration of an overdose level of cocaine to K was not supported,

ii) the ingestion of cocaine on more than one occasion (save in trace amounts by living in a contaminated environment) was not supported

iii) the window within which K may have ingested cocaine had narrowed to a likely window of after nursery on 3rd April through to the visit to the GP at about 6 PM on 4 April, with a possibly most likely window of after nursery on the third April through to about 9 AM on 4 April,

iv) the most likely causes of death were either an unknown cause or cocaine ingestion leading to cardiac necrosis and subsequent heart failure.

v) The presence of cocaine in the hair strand samples of the maternal grandmother and on items at her property was most likely as a result of contamination and she had played no role in caring for K within the likely window.

9. The local authority indicated, with some support from the Guardian, that they would review the way in which the threshold was put in the light of the expert evidence and would consider whether the maternal grandmother should remain on the list of possible perpetrators. Counsel for the mother and father in particular wished to have time to discuss with their clients and within their respective teams the nature of the evidence that had been given and in particular that of Prof Bu'lock. They also wished then to be able to consider any amended threshold which might emerge from the local authority on Monday, 4 May. As then framed, the threshold alleged the possible deliberate and repeated administration of cocaine to K which as Ms Isaacs described it was tantamount to an allegation of murder. I therefore agreed to adjourn until 2 PM on Tuesday, 5 May in order to allow the parties to digest the expert evidence and to consider their response to the amended threshold and thus to finalise their positions in relation to whether the case could or should proceed and if so how evidence could be heard.

10. On Monday, 4 May the local authority filed an amended threshold. This contained a very significant change in the nature of the allegations. The local authority replaced the allegation that cocaine had been administered or negligently ingested with an allegation that cocaine was ingested whilst in the care of and due to the culpable actions or neglect of either the mother, the father or the paternal grandmother. Alternatively, they culpably failed to protect her from the same. Thus, although still an extremely serious allegation with potential criminal ramifications it was significantly less serious than before.

11. The local authority invited me to continue with the hearing and to complete the fact-finding. As an alternative they submitted that the hearing should continue including hearing evidence from the parties so as to enable progress to be made in assessing the parties and in particular the mother with a view to listing a further hearing which would be a 'rolled up' hearing incorporating the remaining issues of fact and the welfare decisions. The local authority submitted that the court could properly continue to hear evidence from the parties in respect of the circumstances in which K had (as the local authority alleged) ingested cocaine between the 3 and 4 April. That, the local authority submitted, did not involve any significant dispute of fact as between the mother, the father and the paternal grandmother. They could be heard remotely or in a hybrid hearing where the party giving evidence attended in person before me together with

their advocate and an advocate or more than one advocate to cross examine them. In respect of the allegations of the father having subjected the mother to domestic abuse, the father being a drug dealer and the consumption of cocaine by the paternal grandmother these involved very different accounts by the parties where credibility would be important but which were not central to the process of assessing the mother and which could await a return to more normal conditions when a face to face hearing could take place. Mr Tyler was prepared to undertake his cross examination remotely rather than attending in person and considered that justice could be achieved in this way.

12. The Guardian also submitted that the fact-finding exercise should conclude as soon as possible to enable assessments to commence. In particular the Guardian was concerned that the children had been in foster care for over 11 months and that if they were to return to the mother's care it should be decided upon as soon as possible. The Guardian considered that the children were all suffering harm as a result of the delay in the proceedings to date. For the youngest child, she has been cared for by a foster carer since her birth. The Guardian as a fallback position considered that the issues of domestic abuse, drug dealing, and whether the cocaine that K had ingested had been negligently left available by the mother, father or paternal grandmother could be deferred to a later rolled up hearing. Thus, the court could determine whether K had died as a result of cocaine induced cardiac necrosis but not the precise circumstances or level of culpability which led to it. An assessment could take place in those circumstances if the mother, father and paternal grandmother accepted that K had ingested cocaine, that the cocaine had caused damage to her heart and that the heart damage caused her death. Alternatively, an assessment could be done on an either/or basis but this would be unsatisfactory. The Guardian accepted that recent decisions of the Court of Appeal and High Court prescribed that in-person hearings require exceptional circumstances if they are to take place during lockdown. The Guardian submitted that this case was exceptional and that appropriate arrangements could be made for an in-person hearing to take place whilst observing the requirements for social distancing. Each of the children had particular needs for an early resolution. All had good relationships with their mother in particular and the oldest child wished to return to her care having now been in foster care for 11 months. An indeterminate period of adjournment of several months was not acceptable. Arrangements could be made for legal representatives to attend either remotely or in person in a manner which was fair to the parties and to the children and would enable a fair hearing to take place.

13. On behalf of the mother it was submitted that further time was needed to take instructions and to provide a considered response to the threshold. Given the technical nature of the discussions, and the technical issues arising from taking instructions by Zoom, Ms Isaacs asked for an adjournment of at least two clear working days. However, her ultimate position was that

    i) the seriousness of the issues involved even after the amendments to the threshold were such that a fair hearing could only take place for the mother if she were able to attend court in person with the judge able to see her give evidence. The same held good for the testing of the evidence of the father and paternal grandmother. The mother wished to see her legal team face-to-face prior to giving evidence and such was essential in order to do justice to her case. Although the mother had a laptop and suitable internet connection this was no

substitute for face-to-face conference and evidence giving. She also wished to have the support of her legal team during the process of giving evidence.

ii) The mother wished the father's evidence as to domestic abuse, drug use and what happened to K on 4 April to be tested with the father in court with her present.

iii) The mother did not believe a fair hearing could take place unless her leading counsel was also able to attend a hearing in person. Ms Isaacs, being in a category required to shield until 30 June (as per current government advice) could therefore not attend a hearing within the next two months. The mother could not contemplate attending court without Ms Isaacs.

iv) the mother had had contact with the maternal grandmother who has been told by her GP that she has Covid - 19 (albeit has not tested for it) and thus is required to self-isolate for 14 days. The mother believed that the contact took place on 1 May and so she could not attend a hearing in person until at the earliest 15 May

v) it was proposed that the matter be adjourned part heard to the first available date after 30 June.

14. On behalf of the father Mr Twomey said that the father was not currently prepared to leave his home to attend court. He suffers from asthma and so was shielding himself. It was said that he was in the category of individuals who were considered to be clinically extremely vulnerable. On enquiring further, it has emerged that the father had not received the letter from his GP stating that he was in a high-risk category but rather this was a view he had taken himself. It was accepted that he was living in a house with his mother who herself believed she had suffered from Covid-19. Thus, for safety reasons he was not prepared to attend court and did not consider that a fair assessment of his evidence could take place by anything other than a face to face hearing. Similarly, he considered that a fair evaluation of the mother's evidence could not take place unless she attended in person. He considered that as the risks continued to abate (assuming no significant change in direction) that he would feel safe to attend court by the end of June. His ability to understand the evidence and give instructions had been hampered by difficulties with his own technology, his dyslexia and the inability to participate in the usual supportive and interactive process with his legal team. It was considered essential for him to meet with his legal team face to face before he gave evidence. It was submitted that a trial which did not take the usual face-to-face format and which was not preceded by a face to face conference could not be a fair one.

15. The paternal grandmother wished to proceed. She had been provided with a tablet to enable her to participate in the hearing. Although she had found the expert evidence difficult to follow at times due to its content and more importantly its subject matter of K's death she had also experienced some technological difficulties. In addition, she has a hearing difficulty which has added to the anxiety and her ability to participate. Her legal team have been speaking to her on an almost daily basis seeking to give her an overview relating to the evidence. The process of delivering that message and taking instructions has been difficult given technological issues and the complex nature of the material under discussion. The paternal grandmother considers it is essential that she gives evidence in person to the court and that she is able to engage face-to-face with her legal team in advance and to be supported throughout the process. She would also

wish to be able to liaise directly with her legal team when the mother and father are giving their evidence. Subject to confirmation of safe arrangements the paternal grandmother and her legal team were prepared to attend at the RC J to enable her to give evidence and to be present whilst the mother and father gave evidence.

16. The maternal grandmother supported her daughter's application for an adjournment. The withdrawal of allegations against her in the threshold left her as a potential witness. She believed that they saw each other on 27 April and so the 14-day isolation period expired on 11 May. However she supports the level of distress that her daughter is experiencing and believes that the combined effect of the strain of these proceedings together with her worries about her own health and her worries about the maternal grandmother's immediate and future health (I believe she has a terminal condition) meant that it was not fair to proceed.

17. Having heard submissions on 5 May and also having regard to the fact that the next three-week review of the Covid - 19 restrictions was due to be announced on Sunday, 10 May and that the mother, the father and the paternal grandmother wished for time to reflect on the amended threshold and to review the impact of the expert evidence I adjourned the decision on the continuation of the case until Tuesday, 12 May. At that point it appeared possible that the mother may be able to give evidence in person at some point after the 11th or 15th of May (if clarity was achieved as to when she saw her mother), though whether this should in principle happen remained opposed by the mother on the grounds of her right to a fair hearing. I listed the case for mention and I made provision for an advocates' meeting to take place on 11 May.

18. The announcement made on Sunday, 10 May and the subsequent 50-page guidance issued on Monday, 11 May did not bring much greater clarity to the position that the parties and the court faced. Within the guidance there was a tacit recognition that for those in the clinically extremely vulnerable category it was likely that they would be required to shield beyond 30 June. However, the relaxation of the restrictions to encourage the resumption of work supported the possibility of more flexibility in terms of in-person hearings; subject of course to appropriate risk assessments and the implementation of proper safety measures.

19. On Monday, 11 May Ms Isaacs informed me that the mother had felt obliged to assist the maternal grandmother with her medical equipment on 8 May because the grandmother could not work the equipment and the mother was the only person available to assist her and thus had been exposed again potentially to Covid - 19. It seems that the maternal grandmother first exhibited some symptoms on or about 23 April and was attended by paramedics on 27 April and subsequently diagnosed by her GP with Covid 19 at some point shortly thereafter. That diagnosis by the GP was made over the phone. Thus, the mother's attendance both in late April or early May and again on 8 May was either within or perilously close to the 14 days within which the maternal grandmother should not have had contact with any other individual. I accepted that this meant that the mother ought to self-isolate for 14 days from 8 May which precluded her attending in person if I resumed the hearing this week and next.

20. I was able to liaise with HMCTS facilities and IT staff to put in place the technology and safety structures and protocols which would have enabled a Covid 19 safe hearing to take place in two courts in the RCJ at the earliest from the 15th of May. I had also made enquiries as to my availability which showed I would be unable to accommodate

a hearing between the first of July and the beginning of vacation and that the earliest dates for a resumed hearing would be the fortnight commencing 28th September or the fortnight commencing 7th December.

21. Prior to resumption of this hearing or in the course of it the mother, the father and the paternal grandmother all responded to the effect of the expert evidence and the redrafted threshold. All accepted that K had ingested cocaine at some point which had caused cardiac necrosis which led to her death. However the parties all made clear that the circumstances in which she had come to ingest that cocaine remained very much in issue together with the very significant issues between the lay parties that had emerged from their witness statements.

22. Today the parties resumed their submissions in the light of the slightly altered landscape. It emerged from the advocates' meeting that some if not all of the parties contemplated an attended hearing taking place in the last week of June. By then the mother would be able to attend in person. However, the mother did not support such a proposal as Ms Isaacs would still not be able to attend in person. This opened up a new possibility and on making enquiries it appeared it might be possible for me to commence the hearing on 24 June. However, I was unable to give any guarantee but it looked a real prospect.

23. The local authority adopted a flexible approach to the continuation of the hearing this week and next or an adjournment to June if that could be accommodated. The local authority strongly resisted an adjournment to September given the implications for the children remaining in foster care and the lack of progress that could be made in assessments. Having regard to the indications that I had expressed on 5 May they accepted that it would be very difficult to delineate matters of evidence which were less contentious and might proceed by remote hearing or a hybrid hearing and that in reality all factual matters relating to the mother, the father and the paternal grandmother should be heard together. The local authority was prepared to adopt a flexible approach to its presence in court to cross examine. Were the court to list the matter in June it appeared realistic to expect that the final welfare hearing could take place with the benefit of any psychological assessment at the end of September.

24. The Guardian's preferred option was to resume the hearing now and to hear evidence from the mother remotely and from the father and the paternal grandmother in person if that was what they wished. The Guardian was concerned that the mother's visit to the maternal grandmother had deprived the mother of the possibility of attending court in person within a resumed hearing and did not consider that the children's need for an early resolution should be derailed by the mother's choice to assist the maternal grandmother rather than to find some alternative means of assisting with her medical equipment. Mr Howe identified the case as an exceptional case which could properly proceed in a hybrid hearing rather than awaiting the resumption of normal service. He emphasised the need to show adaptability and that fair hearings could be provided by various means other than traditional. He observed that Mrs Justice Lieven had proceeded remotely where the issues were of the utmost seriousness. As a default he urged the court to proceed in June and said that in normal circumstances the absence of a party's leading counsel would not require the court to adjourn for three months where that counsel could either attend remotely and where junior counsel was in attendance. He also raised the Guardian's concern that the court would be faced with a similar situation in June given the uncertainties relating to the recovery from Covid 19.

25. Ms Isaacs emphasised in robust terms as to the mandatory nature of the mother's article 6 right to a fair hearing and reminded me of the guidance and the judgments of the Court of Appeal and the President which emphasised the need to provide a fair hearing; a right not compromised or pared back by Covid 19. She drew attention to the parts of the guidance which indicated that the starting point was that remote hearings were unlikely to be appropriate in welfare cases or cases where parents were to be called. She emphasised the seriousness of the issues involved and the importance of the mother's oral evidence in relation to her drug use and her knowledge of the father's handling of drugs within the house and the mother's challenge to the evidence of the father in terms of domestic abuse. She emphasised their relevance to welfare issues moving forward. This was not, she said a hopeless case, but one where the outcome for her client was very much a live issue. She also emphasised the wide ranging nature of the benefits to the mother of having leading counsel present at the court hearing, such encompassing the psychological support for the mother, the forensic benefits of the mother and leading counsel being present in court together and the advantages in adducing and testing evidence. She cautioned against too optimistic an approach to the benefits of remote hearings; what might be appropriate with experts would not necessarily work with lay parties. She emphasised the mother's article 8 rights which would be infringed if a fair hearing was not delivered with the consequence of the termination or attenuation of her relationship with her children and likewise the impact on the children's article 8 rights as well. Ms Isaacs submitted that a delay of three months was not a significant delay when balanced against the benefits to the mother and the court process of providing a hearing at which the mother's leading counsel would be present in person. Although she could not guarantee her presence, she said that the drift appeared to be towards a relaxation of restrictions and that by September it would not be an unrealistic hope or indeed expectation that she would be in a position to attend. Her client's decision to assist the maternal grandmother was born out of concern, humanity and necessity, and not any desire to avoid giving evidence. She emphasised that the mother was as keen as anyone to reach a conclusion to these proceedings but not at the expense of a fair process.

26. On behalf of the father Mr Twomey opposed the resumption of the hearing this week and next. Although his client had attempted to ascertain from his GP whether he should properly be characterised as falling in the clinically extremely vulnerable group he had been unable to make contact with his GP despite extensive efforts. He remained concerned that his asthma rendered him vulnerable to an in-person hearing whilst Covid 19 remained at large. He also emphasised the limitations that the father faced in accessing remote technology given his undiagnosed (I think) dyslexia and the importance to the father of being able to give evidence in person which was problematic in a resumed hearing. Mr Twomey also frankly drew my attention to the fact that a resumed hearing would place him in professional difficulties next week in relation to a seven-day remote hearing where he was instructed on behalf of a local authority in a serious non-accidental head injury case. The father accepted that the process to date had been fair but that the giving of evidence from the lay parties was a different matter and a fair hearing could not be provided in circumstances where the mother could not be cross examined in person. The father accepted the mother's arguments in respect of the fair hearing issues connected with the presence or absence of her leading counsel. Mr Twomey submitted that the court should not conduct what would effectively be an experiment given the parties' article 6 rights particularly when the propose arrangement would be a previously unexplored landscape.

27. On behalf of the oldest child's father, Ms Hyatt did not advocate strongly in favour of any particular option although observed that a September hearing was the safest in terms of fair hearing issues.

28. Ms Cook on behalf of the paternal grandmother reiterated her client's desire for an early resolution and her willingness to attend court in person with her legal team in order to resume this hearing.

29. Mr Larizadeh updated me on his client's health and whilst accepting that she was no longer the subject of threshold findings sought by the local authority she would continue to play a role as a witness and she continued to support her daughter's position.

The court's approach to the hearing of evidence in the current circumstances

30. In a letter from the Lord Chief Justice, Master of the Rolls and President of the Family Division to judges on 9 April 2020, rather than giving formal guidance, a number of parameters were suggested to assist a court in deciding whether or not to conduct a remote hearing. The following three factors were identified as being of particular relevance to Family cases:

> "e. Where the parents oppose the LA plan but the only witnesses to be called are the SW & CG, and the factual issues are limited, it could be conducted remotely;
> f. Where only the expert medical witnesses are to be called to give evidence, it could be conducted remotely;
> g. In all other cases where the parents and/or other lay witnesses etc are to be called, the case is unlikely to be suitable for remote hearing."

31. In addition, in guidance that the President of the Family Division issued on 27 March it was said:

> "Can I stress, however, that we must not lose sight of our primary purpose as a Family Justice system, which is to enable courts to deal with cases justly, having regard to the welfare issues involved [FPR 2010, r 1.1 'the overriding objective'], part of which is to ensure that parties are 'on an equal footing' [FPR 2010, r 1.2]. In pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process."

32. The first reported case dealing with the approach to take in deciding whether to proceed with a hearing in a complex Family Court case is Re P (A Child Remote Hearing) 2020 EWFC 32. In that case the President was considering a case involving a 7 year old child whose mother was alleged to have caused harm to the child by fabricated or induced illness (FII). It had been set down for a 15 day hearing. The child had been under an interim care order for 11 months. Initially all parties had accepted the need for remote hearing in the light of the advice produced by MacDonald J on remote hearings.

> *8. I have been assisted by counsel at the hearing this afternoon, who have explained that at the hearing on 3 April all parties, and the judge, effectively accepted that this*

hearing would now have to go ahead and be conducted remotely. I was told that all parties and the court had been influenced by the publication, shortly before 3 April, of advice produced by Mr Justice MacDonald on the conduct of remote hearings which gave an account [at paragraph 2.2.1] of a number of remote hearings that had been successfully accomplished in the early days following the lockdown. It would seem that those involved in this case read that advice as indicating that all hearings must now proceed as remote hearings and, I was told, the discussion during the hearing was about how the remote hearing would be conducted and not whether it should be heard remotely. If that was the understanding of MacDonald J's document, it was a misunderstanding. MacDonald J's document is firmly aimed at the mechanics of the process; it does not offer guidance, let alone give direction, on the wholly different issue of whether any particular hearing should, or should not, be conducted remotely. Establishing that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way.

33. The President then set out the arrangements that had been made for the Mother to engage with the hearing. She was alone at home and it was intended that internet access would be arranged. It is of some relevance that her leading counsel had only been relatively recently instructed. At [11] the President referred to the national situation and said;

> *"It is a type of hearing which, certainly at first blush, seemed to be well outside the categories of hearing which could be contemplated as being appropriate for remote hearings before the Family Court. I make that observation in the narrow context of this being an allegation of FII. That category of case is a particular form of child abuse which requires exquisite sensitivity and skill on the part of the court."*

34. The position of the parties in Re P was that the local authority and the Guardian wished to proceed, in particular because of the impact of further delay on the child. The Father supported that position. The Mother's counsel argued that the case must be adjourned. She did that largely on the basis that the Mother was not well enough to proceed. Given the nature of the case this was obviously a particularly problematic situation. The President at [20] referred to the possibility in some cases of the parent going to another place such as local authority offices to give evidence. However, this was not an option given that the Mother believed she had Covid 19.

35. The President then referred to the letter (set out above) and the Guidance and said;

24 The decision whether to hold a remote hearing in a contested case involving the welfare of a child is a particularly difficult one for a court to resolve. A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other. The need to maintain a hearing in order to avoid delay and to resolve issues for a child in order for her life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a thorough, forensically sound, fair, just and proportionate manner. The decision to proceed or not may not turn on the category of case or seriousness of the decision, but upon other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these

early days, the experience of the judge or magistrates in remote working. It is because no two cases may be the same that the decision on remote hearings has been left to the individual judge in each case, rather than making it the subject of binding national guidance.

25 Turning to the particular case now before the court, although I am extremely aware of and sensitive to the position of this young girl and the negative impact that a decision to adjourn will have on her wellbeing and the potential for it to cause her emotional harm, I am very clear that this hearing has to be adjourned. I make the decision also being aware of the impact that this will have professionally on all of those who have had this fixture booked in their professional diaries for a long time and who are now ready for the hearing to take place. That cannot be a factor that weighs very significantly in the decision-making process but it is one of which I am aware.

26 The reason for having the very clear view that I have is that it simply seems to me impossible to contemplate a final hearing of this nature, where at issue are a whole series of allegations of factitious illness, being conducted remotely. The judge who undertakes such a hearing may well be able to cope with the cross-examination and the assimilation of the detailed evidence from the e-bundle and from the process of witnesses appearing over Skype, but that is only part of the judicial function. The more important part, as I have indicated, is for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court. It also assumes that the person's link with the court hearing is maintained at all times and that they choose to have their video camera on. It seems to me that to contemplate a remote hearing of issues such as this is wholly out-with any process which gives the judge a proper basis upon which to make a full judgment. I do not consider that a remote hearing for a final hearing of this sort would allow effective participation for the parent and effective engagement either by the parent with the court or, as I have indicated, the court with the parent. I also consider that there is a significant risk that the process as a whole would not be fair.

27 The observations that I have made in the preceding paragraph apply equally to the options for dividing the hearing process up that have been helpfully suggested by Mr Taylor as, with each option, the judge would not have the opportunity to engage fully with the parent during the whole of the hearing as would be the case in a courtroom.

28 Given the wealth of factual detail that is to be placed before the court in relation to this mother's actions over the last three or four years, for her to have a full real-time ability to instruct her legal team throughout the hearing, not just by a phone call at the end of each witness's evidence, seems to me to be a prerequisite for her to be able to take an effective part in a fair process at the trial of issues such as this.

29 For those shortly stated basic reasons, I consider that a trial of this nature is simply not one that can be contemplated for remote hearing during the present crisis. It follows that, irrespective of the mother's agreement or opposition to a remote hearing, I would hold that this hearing cannot properly or fairly be conducted without

her physical presence before a judge in a courtroom. Now that the mother is in fact opposing the remote hearing, the case for abandoning the fixture is all the stronger.

36. The Court of Appeal has now delivered two judgments relating to Family Court cases being heard remotely, Re A (Children) (Remote Hearing : Care and Placement Orders) [2020] EWCA Civ 583 and Re B (Children) (Remote Hearing: Care and Placement Orders) 2020 EWCA Civ 584.

37. In Re A the Court of Appeal (the President, Peter Jackson LJ and Nicola Davies LJ) said at [3];

3. Against that background we wish to stress the following cardinal points with the utmost emphasis:

i) The decision whether to conduct a remote hearing, and the means by which each individual case may be heard, are a matter for the judge or magistrate who is to conduct the hearing. It is a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. An appeal is only likely to succeed where a particular decision falls outside the range of reasonable ways of proceeding that were open to the court and is, therefore, held to be wrong.

ii) Guidance or indications issued by the senior judiciary as to those cases which might, or might not, be suitable for a remote hearing are no more than that, namely guidance or illustrations aimed at supporting the judge or magistrates in deciding whether or not to conduct a remote hearing in a particular case
.
iii) The temporary nature of any guidance, indications or even court decisions on the issue of remote hearings should always be remembered. This will become all the more apparent once the present restrictions on movement start to be gradually relaxed. From week to week the experience of the courts and the profession is developing, so that what might, or might not, have been considered appropriate at one time may come to be seen as inappropriate at a later date, or vice versa. For example, it is the common experience of many judges that remote hearings take longer to set up and undertake than normal face-to-face hearings; consequently, courts are now listing fewer cases each day than was the case some weeks ago. On the other hand, some court buildings remain fully open and have been set up for safe, socially isolated, hearings and it may now be possible to consider that a case may be heard safely in those courts when that was not the case in the early days of 'lockdown'.

38. *At [8], [9]and [10] the Court of Appeal said;*

"It follows, applying the principles set out above and the guidance that has been given, that:

i) Final hearings in contested Public Law care or placement for adoption applications are not hearings which are as a category deemed to be suitable for remote hearing; it is, however, possible that a particular final care or placement for adoption case may be heard remotely;

ii) The task of determining whether or not a particular remote hearing should take place is one for the judge or magistrate to whom the case has been allocated, but regard should be had to the above principles and guidance, as amplified below;

iii) The requirement for 'exceptional circumstances' applies to live, attended hearings while the current 'lockdown' continues.

9. The factors that are likely to influence the decision on whether to proceed with a remote hearing will vary from case to case, court to court and judge to judge. We consider that they will include:

i) The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?
ii) Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties;
iii) Whether the parties are legally represented;
iv) The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters;
v) Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;
vi) The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;
vii) The scope and scale of the proposed hearing. How long is the hearing expected to last?
viii) The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;
ix) The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;
x) Any safe (in terms of potential COVID 19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates.

10. It follows from all that we have said above that our judgment on this appeal should be seen as being limited to the determination of the individual case to which it relates. Each case is different and must be determined in the light of its own specific mixture of factors. The import of the decision in this case, in which we have held that the appeal must be allowed against a judge's decision to conduct a remote hearing of proceedings which include applications for placement for adoption orders, is that, on the facts of this case, the judge's decision was wrong. As will be seen, one important and potentially determinative factor was the ability of the father, as a result of his personality, intellect and diagnosis of dyslexia, to engage sufficiently in the process to render the hearing fair. Such a factor will, almost by definition, be case-specific. Another element, and one that is likely to be important in every case, is the age of the children and the degree of urgency that applies to the particular decision before the

court. The impact of this factor on the decision whether to hold a remote hearing will, as with all others, vary from child to child and from case to case.

39. Most recently Mrs Justice Lieven has given judgment in A Local Authority -v-M and F [2020] EWHC 1086 (Fam) in which she decided to hear the parties and other lay witnesses entirely remotely in a care case concerning how a young baby who had suffered very extensive injuries had died and whether the mother or father was responsible. As in this case the medical cause of the death of the child appears to have been in issue as well as the possible perpetrator if non-accidental injury was established. In that she said

"[23] One important factor in a decision whether to proceed, particularly in a fact finding case, is the question of whether the judge will be in a less good position to judge whether or not the witnesses are telling the truth if the case is conducted remotely. This was clearly an issue of particular concern to the President in Re P at [26] where he refers to the benefits of seeing the witness in court. The issue of the weight that a judge should give to the demeanour of witnesses is an intensely complex one and has been the subject of considerable judicial debate. ....

40. She referred to observations made by Leggatt LJ in R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department 2018 EWCA Civ 1391, the concluding paragraph of which reads

'*41. No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.*

41. She went on to record.

[24] Mr Goodwin and Mr Verdan also referred me to the fact that it is by now fairly common in Family and Criminal courts for lay witnesses of fact to give evidence remotely by video link where those witnesses are considered to be vulnerable. The procedure for doing so is dealt with extensively in PD3AA. It therefore must follow that the giving of evidence in this way does not undermine the fairness of the process either for the individuals concerned or other parties. I do however inject a note of caution here. If it were a case that a vulnerable witness were likely to be subject to complex cross examination, perhaps with references to a large number of documents, it is highly likely that they would have the assistance of an intermediary to assist them in managing the process. Therefore, the fact that evidence is given remotely is not itself sufficient to necessarily protect that witness.

[25] There is also a balance to be struck. One of the reasons that vulnerable witnesses often give evidence remotely is to protect them from the stresses of the courtroom. It may therefore be that a compromise is made for that category of witness, in order to balance fair process with the interest of the individual. However, as Mr Goodwin argued, it may also be the case that the vulnerable witness is more likely to give truthful and complete evidence if allowed to give it remotely, rather than in the witness box. So the benefit is not simply to the witness, but also potentially to the judicial process.

42. I should observe that the advantages of physical attendance of a party at court are not confined to the perceived, but perhaps in reality limited, advantage to the judge of being able to look the witness in the eye and assess their demeanour and thus credibility. In common with the views expressed by Leggatt LJ and the distinguished judges he referred to, it seems to me that the credibility of a witness and the truthfulness of their account in the vast majority of cases is reliant principally upon the evaluation of the content of their evidence rather than the evaluation of their demeanour. That is not to say there may not be rare cases where demeanour may be of some importance, particularly where there is no or little contemporaneous or other evidence which bears upon their account. In the 21st-century where most individuals leave digital fingerprints in the form of messages, photographs, emails, call records and suchlike it is now a rare case where a judge is left without any contemporaneous evidence from the witness himself. Most witnesses will now have recorded their evidence in written or recorded form on one or more occasions prior to giving it in court. In many cases there will be evidence from other sources whether they be the authorities or individuals who may be able to draw on digital or other records. Thus, the evaluation of the credibility of a witness' account will usually take place against a backdrop where consistency can be judged against earlier accounts, against contemporaneous evidence and against the evidence of others. It is also now well recognised that memory is a fallible instrument. Thus in judging demeanour how does one distinguish between the confident liar, the confident but genuinely mistaken witness and the confident truth teller or alternatively the hesitant and anxious truth teller, the hesitant and anxious but genuinely mistaken witness and the hesitant and anxious liar?

43. However, the advantages of in-person attendance before the judge are not limited only to the perceived, but often overrated advantages in terms of assessing credibility. That is largely a judge oriented perspective although a party may in some circumstances feel they are better able to tell their story face-to-face in the formal setting of a court. For many though, including but not limited to vulnerable witnesses whether adults or children, the giving of evidence in a court setting in the presence of a judge and of cross-examining lawyers and perhaps in the presence of other individuals who provoke strong feelings whether of fear or otherwise can undermine their ability to give their best evidence. From a party's perspective though (as referred to by the President in Re P #28) there may very well be advantages to in-person attendance between a party and his legal team in advance of the hearing in order to ensure that clear instructions have been given and understood on the facts and on the approach. There may well be advantages to a party to in-person attendance in being able to see other witnesses give evidence and to provide immediate instructions to counsel in the middle of cross examination. There may be concomitant advantages to the judge in observing the reaction of parties' to the evidence of others (as the President identified in FII cases) and to how their legal teams are instructed to respond. The appellate court's reluctance to interfere in fact-finding decisions is not confined purely to the perceived advantage

that the judge at first instance had in assessing credibility from demeanour but rather the advantage that a first instance judge may derive from the entirety of the in court process which includes observation of the parties behaviour throughout the process but is far wider than that and takes in all that cannot be included in a judgment as the case develops from the judges' reading of the papers through to opening, hearing of evidence, closing and everything that accompanies the process.

44. Still more recently in Re Q (A Child) [2020] EWHC 1109 (Fam) the President has said,

[33] On the issue of remote hearings more generally, and the interpretation of Re P in particular, I propose to say little in this judgment. Ironically, although the case has come before me primarily because it was thought that the judge may have fallen into error in her application of Re P, it is clear that she did not do so. The decision in Re P is expressly tied to the small number of cases in which allegations of Factitious or Induced Illness ['FII'] are made. Paragraph 24 in Re P is of more general, obiter, application and the judge was correct in referring to it.

[34] At present, in accordance with the Guidance that has been issued and the decisions handed down last week in the Court of Appeal in the cases of Re A (Children) (Remote Hearing: Care and Placement Orders) [2020] EWCA Civ 583 and Re B (Children) (Remote Hearing: Interim Care Order) [2020] EWCA Civ 584, each judge or magistrate must consider the individual case before the court and determine whether or not it should proceed remotely in whole or in part. It is to be accepted that a consequence of this approach is that different courts may take a different view on similar cases and that this may inevitably give rise to some inconsistency from court to court, or even from judge to judge. The Family Justice Observatory's speedy research into remote hearings in the Family Court will inform a review of the current situation and indicate whether the present guidance needs to be revised. It is not therefore the place to add to the learning on remote hearings in this judgment. The decision in the present case should be seen as an ordinary appeal, where the issue happens to be a remote hearing, but where the appeal has turned upon a failure of process and an error in approaching the issue of welfare.

45. All of the guidance given in relation to hearing cases at this time is intended to ensure that the parties' article 6 rights to a fair hearing within a reasonable time by an independent and impartial tribunal are not infringed. The article 6 right is unqualified but what constitutes a fair hearing is not an absolute. There is no absolute rule that provides that a fair hearing can only take place if the party is able to attend court in person to give their evidence and to see and hear and respond to the evidence of other important witnesses. It is a question of fact and degree in any particular case. In addition, in cases such as this the article 6 rights of one party may be in conflict with the article 6 rights of another party. In this case the rights of the children and of the paternal grandmother and the local authority to a determination in the near future may be in competition with the rights of the mother and father to give evidence and to hear evidence in the way they consider best promotes their right to a fair hearing.

46. I also record that Ms Isaacs observed that the restrictions in place in respect of those with health issues could potentially amount to a disability within section 6 of the Equality Act 2010. A person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. At present it does not seem

immediately obvious that a person who is in the category of clinically extremely vulnerable and obliged to shield would come within that definition. However, even if that were so the court might then need to make reasonable adjustments. A reasonable adjustment would include providing an alternative means by which an individual could participate but I do not think it would require the court to adjourn the case completely until full face to face participation could be achieved.

47. I note that in A Local Authority-v-M & F all parties initially wished to complete the hearing with evidence being given remotely both expert and lay. At the beginning of the second week the father sought an adjournment on the basis that his mental state was such that he did not feel able to continue. A psychiatric report concluded that he had capacity to continue, that he suffered from low mood and anxiety on a relatively low scale which would not impede his ability to concentrate and to give evidence and that it would help him enormously to give evidence by video. Lieven J concluded that she could conduct a fair hearing remotely on those facts, notwithstanding the issues involved were at the top of the scale of seriousness.

48. Bearing all that in mind I turn to the factors which need to be considered.

<u>The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?</u>

49. The nature of the issues now to be determined has developed as a result of firstly the significant change in the way in which the threshold has been pleaded. The removal of the possibility of deliberate and/or repeated administration of cocaine has reduced the seriousness of the allegations the parents and paternal grandmother face. The acceptance of the mother, the father and the paternal grandmother that K's death was caused by ingestion of cocaine leading to cardiac necrosis and heart failure means that the issue of whether the cause of death could not be determined or arose from cocaine ingestion has been resolved. However, the role that each individual played in how cocaine came to be ingested by K is very much alive and of considerable importance. On the local authority's case, at the most serious end of the scale is all three individuals being regular cocaine users, its presence in K's home being frequent and extensive, the parties being reckless as to the children's exposure, it being knowingly dealt from the mother's home with her consent or non-objection. On the mother's case she was an infrequent user herself, told the police that she believed the father used cocaine daily and his bringing the drug occasionally into her home but not exposing the children to it and her being unable to oppose either his dealing or his more frequent use of the drug because of his intimidation and occasional violence. On the father's case, he was an occasional user, never a dealer, never violent. On the paternal grandmother's case, she was not a user, was not aware of the scale of the mother and father's drug usage or of his dealing. The mother is now the only family member seeking to resume the care of the children. If the mother's evidence established, her case rehabilitation would probably be a real option. On the other hand if the most serious findings against the mother were made, rehabilitation would look a much more uncertain prospect with the possibility of the children facing permanent separation from their family. Whilst the nature of the allegations does not involve complex evidence, they are serious allegations and important in terms of the ultimate welfare outcome. For the mother, the father, paternal grandmother and the children the article 8 rights engaged are potentially at the top end of the spectrum.

Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties;

50. The children were removed into foster care nearly a year ago and these proceedings have been underway for nearly twice the 26-week statutory timetable. Determining the facts and obtaining an assessment of the mother and reaching a final decision is thus a matter of some urgency. The Guardian emphasises the extent of the harm she considers the children are suffering by delay. Determining the facts now would enable assessments to be commissioned and a final hearing to take place in September. Regrettably with the summer vacation intervening and another urgent two-week case when vacation ends means I would not be able to timetable a final hearing until late September in any event. An adjournment to late June to determine the facts would lead to a final welfare determination in September in which assessments could be completed. Adjourning the remaining part of the fact-finding until the last week of September and the first week of October would mean that a final welfare hearing would be difficult to timetable before the end of the year and would probably have to be listed in mid-December or January when term resumed. Whilst a delay of a little over 3 ½ months is not huge given the length of time the case has taken to reach this stage, it is a very significant delay for the younger children and, in respect of the youngest, would mean that she had been in foster care for the entirety of the first year of her life. It may be that further delay after already extensive delay in fact magnifies the harm and section 1(2) Children Act 1989 emphasises that delay is prejudicial to children's welfare.

Whether the parties are legally represented;

51. All of the parties are represented by extremely experienced leading counsel, junior counsel and solicitors. All have been able to make good use of the remote hearing technology. All will continue to be represented by the same teams whichever course I adopt. The most significant issue though is whether Ms Isaacs can be physically present at court together with the mother and the rest of the mother's legal team. Even were the mother able to attend a hearing in person next week Ms Isaacs would be unable to due to the mandatory shielding that she must follow. She would also be obliged to shield at a hearing in June and thus would only be able to participate remotely. The mother's junior counsel would be able to attend court with her; her solicitor also has to shield. Assuming the Covid -19 restrictions continue to be relaxed over the summer Ms Isaacs believes there is a realistic possibility of her no longer being subject to the mandatory-shielding and thus being able to attend the hearing in person with the mother. However, there is no guarantee that by September Ms Isaacs will be able to attend in person. If the course of the recovery from Covid 19 is rocky rather than smooth there is a risk that those in the extremely vulnerable group will continue to be obliged to shield themselves and thus Ms Isaacs might not then be available. Whilst September, taking an optimistic view, provides at least a better chance of Ms Isaacs being able to attend with the mother there is inevitably some uncertainty.

The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters;

52. All of the lay parties have so far participated remotely in the most complex part of the hearing evidentially. Away from court they have been able to spend some considerable time with their legal teams remotely as a result of the adjournments I have allowed to ensure they were able to engage appropriately with their legal teams to understand the evidence and to take decisions in the light of that evidence. It seems that the mother and the father have both been able to participate effectively by remote means. However, participating by listening to medical expert evidence and participating by giving evidence and by hearing the evidence of the other lay parties and communicating instructions is a different matter. For the paternal grandmother who has hearing difficulties remote participation is more of a challenge even with access to appropriate hardware. She has struggled to operate the remote software and has been heavily reliant on her legal team to keep her engaged within the process by daily summaries. The maternal grandmother, who will continue to play a role as a witness has not so far directly participated in the hearing but rather has relied on summaries from her legal team. She would participate at present only by audio. She currently continues to suffer with ill-health, diagnosed by her GP as Covid 19 albeit not laboratory confirmed. She will continue to have to shield as a result of being within the clinically extremely vulnerable category and so at any future hearing either now or in June would participate remotely by audio. Whether she would be able to attend in person in September remains a matter of speculation.

Whether evidence is to be heard or whether the case will proceed on the basis of submissions only;

The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence;

53. The state that we have now reached is that the only remaining evidence to be heard is that of the lay parties. All accept that the process of hearing from the expert witnesses has been effective and has delivered a fair hearing. It is becoming more common for experts to give evidence by remote means even prior to the restrictions necessitated by Covid 19. There is clearly a difference between the giving and challenging of expert evidence and the giving and challenging of lay evidence.

54. In many cases the existence of a contemporaneous digital fingerprint or other contemporaneous or corroborative documentary or other evidence might affect the importance of the oral evidence. When the court has a host of other sources of evidence against which to measure the veracity or credibility of a party's evidence the significance of the oral evidence may be reduced. Conversely where other sources of evidence are limited the importance of the oral evidence of the parties assumes a greater prominence and the court's determination of the parties' credibility in the round including their demeanour in court as well as their responses to questioning may become crucial. The mother's evidence as to her drug consumption will have to be weighed alongside the Chemtox analysis which is inconsistent with her account and the Lextox analysis which is more consistent with her account. The mothers evidence as to domestic abuse and the father's evidence in rebuttal are the central planks of the case on domestic abuse. The mother's explanation for changes or developments in the accounts she has given over time may be important. The parties' evidence as to the nature and extent to which cocaine was present in the house is of considerable importance although we also have the oldest child's account and the police evidence as

to the presence of cocaine in the family home and elsewhere. Some of the evidence is hotly contested as between the mother and the father, some as between the mother and father and the local authority, some as between the father and the local authority.

The scope and scale of the proposed hearing. How long is the hearing expected to last?

55. The remaining part of the hearing is anticipated to last 3 ½ days in terms of the evidence. Submissions will take 1 to 2 days. Judgment will be reserved and delivered within a short time thereafter. Given the track record so far it seems probable that submissions will be delivered remotely. Each of the lay parties would give evidence for a day with the maternal grandmother giving evidence for something in the region of half a day. Allowing for appropriate breaks, or other contingencies this would allow each party to give evidence for a day which all are agreed would be sufficient to enable their evidence to be given and tested.

56. Both the local authority and the Guardian are content to test the evidence by remote means rather than by their counsel attending in person at court.

The available technology; telephone or video, and if video, which platform is to be used. A telephone hearing is likely to be a less effective medium than using video;

57. The use of the Zoom application has so far permitted an effective hearing, without anything more than the occasional and minor technical glitch as bandwidths fluctuated. The vast majority of both evidence giving and the hearing of submissions has so far taken place very effectively from the court's perspective.

58. It is undoubtedly the case that the evidence of the mother and the father could be given remotely by Zoom. Screen sharing of documents has been very effective and indeed in almost every way more effective than by use of hardcopy bundles in court. The paternal grandmother however would face a very considerable struggle in giving evidence by Zoom. She has so far been unable to operate it effectively. Given her hearing difficulty audio means alone would be inadequate. Thus, she can only realistically give evidence in person unless some Covid 19 safe arrangement could be implemented somewhere other than her home with technical support being provided to her. At present that does not appear to be an available option. The maternal grandmother is unable to participate by Zoom and can only participate by audio.

The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology;

59. Although there was some mention of Luddites and steam enthusiasts being encouraged to adopt electric railways my impression of all concerned has been that the legal teams have rapidly familiarised themselves with the remote technology and have become adept at using it. Cross examination on even the most contentious aspect of the expert evidence was effective. From the perspective of the court and the lawyers I have little doubt that the remote technology would provide an effective means of the evidence being adduced and tested. My one reservation is that some of the parties have experienced bandwidth difficulties at various times which has required them either to resort to audio only participation or has required a degree of repetition. Whilst this has been manageable with the experts, I'm not sure that it would be so easily addressed were it to occur in the middle of a crucial piece of cross examination.

Any safe (in terms of potential COVID 19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates.

60. The court spent some considerable time in looking into and making arrangements for the setting up of a Covid safe court room at the Royal Courts of Justice. Undoubtedly the technology can be put in place to allow a semi-remote hearing with some parties and their lawyers attending and others remaining on Zoom.

61. Those responsible for implementing Covid 19 safe premises have spent some time in two of the RCJ Family Division court rooms ensuring that the physical arrangements in court would maintain proper social distancing requirements and that the access to and egress from the court together with court waiting areas could be configured in such a way as to comply with government guidance. A court monitor could be provided to implement the protocol as to access to presence in and egress from the court.

62. My understanding is that the processes already undertaken within the RCJ comply with current guidance.

63. Overall it seemed that the steps taken within the Royal Courts of Justice and further steps that were being taken could ensure that a safe attended hearing could be facilitated by the court. That is probably so by Friday of this week and should certainly be so by June.

Conclusion

64. Drawing all of those strands together, having regard to the Guidance and to the judgments of the Court of Appeal and of the President and balancing the competing arguments I conclude as follows.

    i) The issues on which the remaining evidence is to be given are not complex but they are of very considerable importance both to the mother, father and paternal grandmother and to the children and wider family. The outcome of the evidence may have profound implications for the possibilities of rehabilitation and thus for the family life of the children and the parties.

    ii) The absence of very much contemporary documentary evidence, digital fingerprints, or other corroborative evidence places a considerable focus on and premium on the oral evidence of the parties. Whilst it can be tested remotely, where it is of such importance and where there is the lack of other evidence against which to measure it. the giving of evidence in a court setting in the presence of the judge in my view has an advantage both to the party and to the court. This arises not only from the evidence actually given but also from the interplay between the party and their team and the dynamic that may be observed as between the parties. Thus, on the particular factors which are present in this case I consider that giving evidence in person has a material advantage over remote evidence giving. If giving evidence in person can be facilitated within a reasonable time period that should be facilitated in order to deliver a fair hearing.

    iii) I thus do not consider that it is appropriate to continue with the hearing later this week and next week. Although a safe court environment can be provided the

mother cannot participate in person as she has been exposed to a person diagnosed with Covid 19. Even were she prepared to attend court in those circumstances, I would not permit her to do so given the risks to herself and to others. The father may be reluctant to attend this week and next but he and his team could attend if I so required them. The paternal grandmother and her team can and indeed urge me to allow her to attend to give her evidence. Were I to allow the father and paternal grandmother to attend in person but to restrict the mother to giving evidence by remote means, on the facts of this case, I do not consider that I would be allowing the parties to participate on an equal footing. The mother inevitably would feel a sense of grievance that she was participating in a manner which she felt was less likely to present her evidence effectively.

iv) The mother, the father and the paternal grandmother can attend a court hearing in June. A safe court environment will then be even more sophisticated or developed for the parties, the lawyers and the court staff. All can then give their evidence in person with the advantage that brings in this case. The difficulty in June is that Ms Isaacs will not be able to attend in person. That I accept will have some impact on how the mother's case is presented. It is likely to impact on how the mother feels at court, it will mean that interactions between the mother and Ms Isaacs will not be immediate but will be filtered via Mr Rawcliffe and a remote application, and it will mean that Ms Isaacs' physical presence in court to cross examine the father and the paternal grandmother will be replaced by a remote presence: albeit on screen this may be as prominent, if not more so than being physically present. I accept that this amounts to some interference with how the mother and her legal team would choose to exercise their fair trial rights and objectively is likely to have some impact on the presentation of the mother's case; however this does not mean that a fair trial cannot be delivered. A party's subjective perception of what amounts to a fair hearing is not determinative. A fair hearing sets a minimum standard but how it is delivered is not fixed and may vary from one case to another. Some cases involve several leading counsel on each side, others proceed fairly with litigants in person on one side and leading counsel on the other. A fair hearing can be achieved in such circumstances and I am satisfied it can be achieved here.

v) Balanced against the mother's article 6 rights are the article 6 rights of the other parties to a fair trial within a reasonable time. All, including the mother have emphasised their desire for the case to be resolved as soon as possible. The agreement of a party to proceeding either remotely or in a hybrid hearing does not relieve the court of the responsibility to determine whether a fair hearing can take place any more than the opposition of a party relieves the court of that obligation. The Guardian is concerned at any delay and would prefer to have proceeded immediately from the point of view of the children and achieving a rapid resolution of the case. The paternal grandmother also sought an early resolution by continuing with this hearing. The local authority likewise. I have concluded that whilst desirable such a rapid approach would be a significant interference with the mother's rights to a fair hearing and would (along with various other obstacles) prevent a fair hearing and that would outweigh the limited delay involved in adjourning to June which would constitute a hearing within a reasonable time. There is thereafter (as between June and September) also a balance to be struck between interfering with the children's rights to a fair

hearing within a reasonable time and the mother's rights to a fair hearing within a reasonable time. Whilst the particular components engaged from each party's perspective may differ a balance still must be struck.

vi) There is no perfect solution to this clash of rights. Any solution is an imperfect solution with some interference with the rights of one or another party; primarily article 6 but also article 8 rights in particular in terms of how rapidly resolution can be achieved for the medium to long term future of the children. A delay until September will, if Ms Isaacs is then able to attend in person, ensure the fullest compliance with the mother's article 6 rights; the minimum standards will be well exceeded. However, such a delay will infringe upon the children's rights to a fair hearing within a reasonable time. I accept that a delay of 3 months is a significant one and will cause harm to the children. It is not a reasonable time to adjourn from now until September if some alternative earlier hearing can be achieved without infringing the mother's rights to an extent that outweighs the delay caused infringements of others' rights. A hearing in June will protect the children's article 6 right to a fair hearing within a reasonable time but will infringe to some degree on the mother's competing rights. However, I do not consider that the inability of Ms Isaacs to attend will prevent the mother receiving a fair hearing. The personal presence of leading counsel is one part of the framework which contributes to a fair hearing. It is a desirable part, but in my view it is not essential to the provision of a fair hearing. The combined effect of the rest of the framework; that provided by the court, that provided by the mother's representation and to an extent the representation of the other parties all play their part in making the hearing fair. Inevitably in some cases leading counsel is prevented from playing the expected role – part of junior counsel's role is to take on that role. In fact, in this case Ms Isaacs can continue to play a role and in my view (and experience in this case so far) an effective role by remote participation. Some adjustments may be necessary to allow the most effective communication within the mother's team but this on my experience to date is manageable.

vii) Having given anxious consideration to these imperfect solutions that which in my evaluation reaches the best balance is to adjourn the hearing until June to enable the mother to participate in person at that hearing albeit without the physical presence of her leading counsel. That hearing can be a fair one to the mother and to the other parties. That will then enable the facts to be determined which will lead to a final welfare hearing in September and will avoid a further 3 to 4-month delay, which acceding to the mother's submissions would inevitably require; and that assuming Ms Isaacs was then able to attend. If she was not then able to attend would the matter require further adjournment?

65. I therefore decline to resume the hearing of evidence in person from the father and the paternal grandmother and remotely from the mother this week and next. I will adjourn the case until 24 June (which appears to be highly likely to now be available but subject to final confirmation early next week) to facilitate an in person hearing which will allow all of the parties remaining to give evidence in court to me. If it transpires that I cannot facilitate that hearing, the balance seems to me to fall clearly away from seeking to press on with a hearing this week and next. In any event it could not be achieved, even were I to consider it to be potentially fair, by the time I have achieved certainty in

relation to the June hearing date. The balance then regrettably would fall in favour of a hearing in September. I will convene a further case management hearing next week after I will have achieved certainty in relation to the June hearing.

66. All of the lay parties will need to take such steps between now and the resumed hearing to put themselves in the position where they are able to attend that hearing and have prepared with their legal teams well in advance. I am prepared to work today on the basis that the mother's attendance at the maternal grandmother's home was appropriate and that the unfortunate consequence in terms of her ability to participate was overborne by her concerns for the maternal grandmother's health. A similar situation should be incapable of arising in the next few weeks as the maternal grandmother should now be at a stage where she could not infect the mother but there does not seem to be certainty in relation to re-acquisition of the virus or indeed certainty as to how long infection of another may remain a possibility. The mother and the maternal grandmother's family but also the father and the paternal grandmother need to put in place arrangements which will ensure that they cannot be exposed to someone with Covid 19 in the run up to the adjourned hearing or otherwise find themselves in a position where they cannot attend in person. Their priority must be to their children and ensuring that the uncertainty in which the children have lived since the tragedy of their sister's death is ended as a rapidly as possible. Of course, one cannot cater for all of life's uncertainties and misadventures but I expect them to do all they can within their control to put themselves in the position to progress this case. Whilst I cannot pre-determine matters the parties should understand that my decision to adjourn to allow their personal attendance at a hearing in 6 weeks' time does not mean that if they are unable to attend then that the matter will go over to September. That 'slot' will likely no longer be available and what I consider to be the correct balance of rights today will not necessarily remain the same in June.

LATER

67. I have refused Ms Isaacs' application for permission to appeal. I consider that I have applied the Covid Guidance, judgments and the approach to Article 6 and Article 8 properly and that the balancing exercise that I have conducted gives due weight to the relevant competing factors and that the outcome I have settled upon is the right one.