Neutral Citation Number: [2020] EWCA Civ 848

Case No: B4/2020/0862

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT COVENTRY
HH Judge Watson
CV20C00041

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 July 2020

Before :

LORD JUSTICE FLAUX
and
LORD JUSTICE BAKER

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF GC (A CHILD) (WITHDRAWAL OF CARE PROCEEDINGS)

Between :

GC (by her children's guardian)	**Appellant**
- and -	
A COUNTY COUNCIL (1)	**Respondent**
A MOTHER (2)	
A FATHER (3)	

- -
- -

Dorian Day (instructed by **Willsons Solicitors**) for the **Appellant**
Jonathan Sampson QC (instructed by **Local Authority Legal Services**) for the **First Respondent**
Matthew Brookes-Baker (instructed by **Rotherham and Co**) for the **Second Respondent**
The Third Respondent was not represented at the hearing

Hearing date: 24 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10:30 on Friday 3 July 2020.

LORD JUSTICE BAKER:

1. This is an appeal by a children's guardian appointed to represent a child, G, in care proceedings against the decision by HH Judge Watson at a case management hearing to grant the local authority permission to withdraw the proceedings.

2. At the conclusion of the hearing of the appeal, we indicated that we would allow the appeal. We set aside the order and made case management directions to enable the fact-finding hearing, previously listed in July 2020, to go ahead as originally planned. This judgment sets out the reasons for our decision.

Background and evidence

3. The background can be summarised briefly. G was born in April 2019. Her mother is aged 18, her father 21. At the time of the events leading to the proceedings, G and her mother had been living with the maternal grandparents, and the father living at a different address, although shortly before the incident the mother had obtained a rented flat at which the father would occasionally stay overnight.

4. The family's evidence was that on 2 January 2020, G was in the care of her mother and maternal grandmother until the early evening and thereafter was looked after by the grandmother overnight and during the morning of 3 January. According to the maternal grandmother, it was in the early afternoon on that day she noticed a swelling on G's head. She took her to the pharmacist, and then to the GP, and finally to hospital where they were joined by the parents. Medical examination of G's head revealed that she had a small displaced oblique fracture of the right parietal bone with a 5mm subgaleal haematoma overlying the fracture site. At that stage, none of the adult family members could provide an explanation for the injuries and in the absence of such an explanation the treating doctors concluded that the injuries had been inflicted non-accidentally.

5. The local authority started proceedings and obtained first an emergency protection order and then an interim care order on the basis of a care plan under which the mother and G reside at a mother and baby foster placement where, six months on, they are still living. A fact-finding hearing was listed for four days in July 2020. The findings sought by the local authority in its "threshold" document included "that the mother and/or the father are unable or unwilling to account for this injury and they are either responsible for causing this injury to G and/or know who was responsible for causing this injury and are withholding this information, thus failing to protect G whilst in their care or the care of another".

6. In the course of the police and social services investigations, the adult family members were asked if they were aware of any incident which could explain the injuries. The mother reported that G had fallen off a bed on 12 December 2019 and that, on another date shortly after Christmas, she had fallen onto a toy truck.

7. Two expert medical witnesses were instructed to provide opinions for the purposes of the proceedings – Dr Dawn Saunders, consultant neuroradiologist, and Dr George Rylance, a retired consultant paediatrician frequently instructed as an expert witness in cases of suspected child abuse. The experts were agreed that the injuries probably occurred at the same time. Dr Saunders advised on the basis of the CT scan performed

in hospital on 4 January that the fracture was sustained in the period of ten days prior to the scan. Dr Rylance's opinion as to timing was more precise. As it was an important element in the judge's decision under review in this appeal, I shall set it out in full:

> "The time to swelling becoming apparent is usually within an hour or two …. Nevertheless, the development of a haematoma on the head may sometimes take some hours and can occur very uncommonly more than 24 hours after impact but hardly ever after more than 48 hours…. The development of a haematoma the size of that recorded in G would be expected to be relatively rapid and be within a small number of hours and not exceptional as in more than 24 hours. This time at which the haematoma was first seen in G may not be a reliable indicator of the time when causative impact occurred. The haematoma was measured on imaging to be approximately 5mm depth which may not have been easily visible on cursory inspection. There was a changeover of carer responsibility that complicates timing: mother and her mother during the afternoon and early evening period of 02.01.20 — swelling not seen; maternal grandmother alone 02.01.20 evening to afternoon 03.01.20 period — swelling seen at the end of this period. There was no described accident during these periods …. As most haematomas reach their final swelling size within a few hours and almost all within 24 hours, a causative impact according to carer reports would seemingly have occurred in the period of 24 hours up to 03.01.20 afternoon, most probably on 03.01.20. The exception to this reasoning would be if the haematoma slowly accumulated which is uncommon, or if it were borderline size in terms of person recognition even by the same person on different occasions or that person in constant caring contact."

8. In a supplemental report, Dr Rylance added:

> "The maternal grandmother was I understand in a position to observe G during part of the afternoon of 02.01.20, the evening (perhaps night) of 02.01.20, and a number of hours in the morning and afternoon of 03.01.20. In that time, a swelling was not noted by the maternal grandmother. The possibilities to account for this were:
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> - The haematoma could have been slowly accumulating – it was never very deep at 5-6mm to be not recognisable until a 'threshold size' had been reached. That slow accumulation is unusual for a sub-galeal haematoma but does occur.
>
> - It could have been recognisable, noted and ignored.
>
> - It could have - what I consider most likely - occurred on 03.01.20 because that sequence/scenario is the by far the most common for a haematoma of this type."

9. According to Dr Rylance, the mechanism for the injuries would have been "impact against a relatively hard and unyielding object". Dr Saunders expressed the opinion that the fall onto the toy truck was not a plausible cause of the injuries and the fall from the bed on 12 December was outside the radiological timeframe and a "very

unlikely cause". Dr Rylance advised that only 1% of falls of babies from a height of 90 to 100 cm resulted in a skull fracture and concluded in his first report that

> "the lack of explanation of an accidental impact causing a fracture in the 24 hours prior to recognition of the scalp haematoma makes it more likely than not this 'joint but single injury' was caused non-accidentally".

10. Following the experts' first reports, the grandparents told a social worker about a further incident said to have occurred on the late morning of 3 January when G had fallen while pushing a baby walker and hit the side of her head on a wooden play table. They also said that they had mentioned this incident to a triage nurse at hospital. They filed a further statement in the proceedings describing the incident in more detail.

11. Their accounts were shown to the experts. Dr Rylance commented:

> "If G had hit her head on the edge of the table (e.g. height 300m approx.) or against a hard object connected to it from a standing position (e.g. head at 700m) as understood by pushing a 'walker', the fall (not vertical) could generate a terminal velocity at impact that may be enough to cause a skull fracture, and along with it, a haematoma. The likely hard object impacting surface would increase the likelihood of a resultant fracture a little. A small cross-sectional area of the impacting site, like an edge or small protrusion, would be likely to further increase the possibility of fracture. However, in each of the latter scenarios (edge or protrusion), a bruise that was linear or of impact site shape, may have been expected."

He concluded that the incident described by the grandparents was "a plausible cause". Dr Saunders' opinion was as follows:

> "I cannot say that the fall described onto the wooden play table is a likely cause of G's injuries. However, based on this evidence and the fact that the soft tissue swelling was noticed a few hours later, I cannot exclude it as a remotely possible cause of the fracture."

12. Subsequently, in an experts' meeting on 10 June, Dr Saunders added that the fall onto the table described by the grandparents was "highly unlikely but not impossible" as a cause of the injuries. Dr Rylance made a number of observations about the proposition, concluding that he could not exclude it as the cause.

13. The next case management hearing was listed on 12 June, two days after the experts' meeting. On the day before the hearing, the local authority informed the parties that they intended to apply for permission to withdraw the application for a care order. At the hearing, the application was supported by the parents but opposed by the guardian. After hearing argument, the judge delivered a judgment in which she granted the application. The guardian applied for permission to appeal the decision, which the judge refused.

14. On 15 June, the solicitor for the child filed a notice of appeal to this court. On 18 June, Peter Jackson LJ granted permission to appeal and listed the hearing before us

in the following week. Meanwhile, the parties had arranged for the 4-day fixture listed in July to be retained in the event that the appeal succeeded.

15. Prior to the grant of permission to appeal, the local authority, along with the parents, had filed a response to the application opposing the granting of permission. Two days before the appeal hearing, however, the local authority, now represented by leading counsel, indicated that they no longer opposed the appeal. At the hearing before us, therefore, the guardian's appeal, presented by Mr Dorian Day, was supported by Mr Jonathan Sampson QC on behalf of the local authority, and opposed by Mr Matthew Brookes-Baker for the mother. The father's legal representatives did not attend the hearing but filed a short position statement also opposing the appeal.

The law

16. Under rule 29.4(2) of the Family Procedure Rules 2010, a local authority may only withdraw an application for a care order with the permission of the court. This requirement has been in force (in an earlier incarnation in the Family Proceedings Rules 1991 now repealed) since the implementation of the Children Act 1989. We were only referred to one case in which the provision has been considered by this Court, in the early days of the Act – *London Borough of Southwark v B* [1993] 2 FLR 559 in which at page 573 Waite LJ set out the following approach:

> "The paramount consideration for any court dealing with [an application to withdraw care proceedings] is accordingly the question whether the withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned. It is not to be assumed, when determining that question, that every child who is made the subject of care proceedings derives an automatic advantage from having them continued. There is no advantage to any child in being maintained as the subject of proceedings that have become redundant in purpose or ineffective in result. It is a matter of looking at each case to see whether there is some solid advantage to the child to be derived from continuing the proceedings."

This approach is consistent with s.1(5) of the Act, which provides that:

> "where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all."

17. Since then, the provision has been considered by judges of the Family Division in a number of cases at first instance, in particular in *A County Council v DP and others* [2005] EWHC 1593 (Fam) (McFarlane J, as he then was), *Redbridge London Borough Council v B and C and A* [2011] EWHC 517 (Fam) (Hedley J), *Re J, A, M and X (Children)* [2014] EWHC 4648 (Fam) (Cobb J), and *A Local Authority v X, Y and Z (Permission to Withdraw)* [2017] EWHC 3741 (Fam) (MacDonald J). The latter three cases were decided following the implementation of the Family Procedure Rules 2010 which, unlike their predecessors, include the overriding objective in rule 1.1.

18. For my part, I would endorse the approach evolved in these first instance decisions, which can be summarised as follows.

19. As identified by Hedley J in the ***Redbridge*** case, applications to withdraw care proceedings will fall into two categories. In the first, the local authority will be unable to satisfy the threshold criteria for making a care or supervision order under s.31(2) of the Act. In such cases, the application must succeed. But for cases to fall into this first category, the inability to satisfy the criteria must, in the words of Cobb J in ***Re J, A, M and X (Children)***, be "obvious".

20. In the second category, there will be cases where on the evidence it is possible for the local authority to satisfy the threshold criteria. In those circumstances, an application to withdraw the proceedings must be determined by considering (1) whether withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned, and (2) the overriding objective under the Family Procedure Rules. The relevant factors will include those identified by McFarlane J in ***A County Council v DP*** which, having regard to the paramountcy of the child's welfare and the overriding objective in the FPR, can be restated in these terms:

    (a) the necessity of the investigation and the relevance of the potential result to the future care plans for the child;

    (b) the obligation to deal with cases justly;

    (c) whether the hearing would be proportionate to the nature, importance and complexity of the issues;

    (d) the prospects of a fair trial of the issues and the impact of any fact-finding process on other parties;

    (e) the time the investigation would take and the likely cost to public funds.

The judgment

21. In the approved note of judgment, it is recorded that the judge observed that both Dr Saunders and Dr Rylance

> "agreed that the likelihood was that both the fracture and the hematoma occurred during one incident and that they agreed the 24 hour window. That had a significant impact because during that time frame the child was being cared for by [maternal grandparents] who were more experienced, safe and mature carers for G. The case was not straightforward because the causation of the injury was unclear. There were no other features in this case that indicated that this was a non-accidental injury. Save for a lack of explanation."

22. The judge then set out the grandparents' account of the fall onto the table and continued (according to the approved note of judgment):

> "the parents were not looking after G during the period when this incident. On balance of probability the experts - a plausible explanation has been put forward by the grandparents as to how G sustained the injury."

There follow these paragraphs in the approved note of judgment:

> "Local authority have insufficient evidence to cross the threshold for the LA to continue with the advocation of their application. The current state of the evidence to suggest that the court should revisit this evidence by testing out the evidence of the lay parties – put on the court an impossible evidential burden – the court will not be in a better position than it is at the present time.
>
> Parents are entitled to see the evidence put against them. They have met that case, there is no further evidence to meet. To expect them to go into the witness box is to reverse the burden of proof is contrary to the whole ethos of the stat of s.31 of CA."

23. Having referred to *A Local Authority v DP*, the judge concluded that:

> "the evidential burden remains the same. It is not necessary, proportionate to pursue a fact find".

The appeal

24. The children's guardian advances the following grounds of appeal:

(1) The judge was wrong, in both fact and law, to determine the issue of threshold criteria summarily, without the benefit of hearing and testing the primary lay and expert evidence.

(2) The judge was wrong, in both fact and law, to take a narrow interpretation of the expert evidence without considering the wider purview of the expert position.

(3) The judge was wrong to conclude that the expert evidence could not satisfy the threshold criteria in s.31 of the Children Act 1989.

(4) The judge was wrong to confine her decisions to the facts of the threshold criteria. She should have looked at the wider picture of the child's welfare.

(5) The judge failed to adequately scrutinise the child in need plan.

25. The case advanced by Mr Day before us was, in short, that the judge wrongly concluded that the case fell into the first category of cases where it was obvious that the threshold could not be crossed and failed to conduct a proper analysis of the factors relevant to the second category.

26. Initially, the local authority opposed the guardian's application for permission to appeal. In a skeleton argument filed on behalf of the authority for the full appeal hearing, however, Mr Jonathan Sampson QC, who did not appear at the hearing before the judge, conceded on behalf of the local authority that there were deficits in the judge's analysis and application of the law and for that reason no longer opposed the appeal. The local authority now accepted that the expert evidence did not indicate that the threshold *could not* be crossed. Although an explanation had been provided which the experts considered plausible or possible, their views were subject to a number of significant caveats. The fact that the probable timeframe for the injuries had narrowed to a period when the child was largely, if not wholly, in the

grandparents' care did not mean that the threshold criteria could not be satisfied. The judge had failed to consider the application to withdraw on basis of the factors identified by McFarlane J in *A County Council v DP*. Furthermore, she had failed to "cross-check" the outcome of the necessity and proportionality exercise against the best interests of the child. Had she done so, it is likely that she would have found on the facts of this case that, until the lay and expert evidence had been tested, it was neither necessary nor proportionate nor in the child's best interests to grant the local authority's application.

27. On behalf of the mother, Mr Brookes-Baker submitted that the totality of the evidence, including the expert medical opinion, established that on a balance of probabilities the child's injuries were sustained on 3 January 2020 when in the sole care of the grandparents. He accepted, however, that the medical evidence does not establish that it would be impossible for the threshold to be met. As a result, he conceded that the case falls into the second category identified in accordance with the guidance set out by McFarlane J in *A County Council v DP*. He submitted, however, that there was nothing in the judgment to suggest that the judge had concluded that the case fell into the first category. He argued that the judge carried out a proper analysis of the factors identified by McFarlane J and her conclusion that a fact-finding hearing was unnecessary in all the circumstances cannot be said to be wrong. She was entitled to place significant weight on the local authority's assessment of the evidence and the social workers' wider experience of the family and on their evidence that the parents were willing to work with the local authority by completing a parenting assessment as part of the child in need plan. She was also entitled to find that the likely result was that the threshold under s.31 would not be satisfied. This was a legitimate exercise of judicial discretion and could not be said to be wrong, even if another court may have reached a different conclusion.

Discussion and conclusion

28. I have considerable sympathy with the judge for the predicament in which she found herself. The family courts are under very great pressure, particularly in the current circumstances of the restrictions imposed as a result of the Covid-19 pandemic. Here, the judge was faced with an application filed at short notice by the local authority which, in my judgment, should not have been made. Understandably, the judge took into account the local authority's own assessment of the strength of its case.

29. I have, however, reached the clear conclusion that the judge's decision was wrong and the appeal must be allowed.

30. The expert medical evidence at the date of the hearing on 12 June 2020 can be summarised as follows.

    (1) The head injuries suffered by F were probably sustained at the same time.

    (2) The cause of the injuries was an impact against a relatively hard and unyielding object.

    (3) The injuries were probably sustained within the period of 24 hours prior to the afternoon of 3 January 2020, although, as the swelling may have been occult to a carer, they could have been sustained at an earlier time.

(4) In the absence of an account of an accidental impact sufficient to cause the fracture, it was more likely than not that the injuries were caused non-accidentally.

(5) The two explanations put forward by the mother – the fall from the bed said to have occurred on 12 December 2019 and the fall onto a toy truck in the period after Christmas – were not plausible explanations for the injuries.

(6) The maternal grandmother's account of a fall onto a table was, according to Dr Saunders, "highly unlikely but a possibility" as an explanation for the injuries and was an explanation which Dr Rylance was unable to exclude.

31. In my judgment, looking at the written medical evidence alone as available to the judge at the case management hearing, it was not possible for the court to conclude that the test for granting permission to withdraw the proceedings was satisfied. But, of course, as this Court and others have stressed on many occasions, a judge does not look at evidence in isolation. Each piece of evidence must be considered in the context of all the other evidence. As Dame Elizabeth Butler-Sloss P observed in ***Re T*** [2004] EWCA Civ 558, [2004] 2 FLR 838 at paragraph 33:

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

32. Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. In ***A County Council v K, D & L*** [2005] EWHC 144 (Fam) at paragraphs 39 and 44, Charles J observed:

> "It is important to remember (1) that the roles of the court and the expert are distinct and (2) it is the court that is in the position to weigh up the expert evidence against its findings on the other evidence. The judge must always remember that he or she is the person who makes the final decision."

Later in the same judgment, Charles J added at paragraph 49:

> "In a case where the medical evidence is to the effect that the likely cause is non-accidental and thus human agency, a court can reach a finding on the totality of the evidence either (a) that on the balance of probability an injury has a natural cause, or is not a non-accidental injury, or (b) that a local authority has not established the existence of the threshold to the civil standard of proof … The other side of the coin is that in a case where the medical evidence is that there is nothing diagnostic of a non-accidental injury or human agency and the clinical observations of the child, although consistent with non-accidental injury or human agency, are the type asserted is more usually associated with accidental injury or infection, a court can reach a finding on the totality of the evidence that, on the balance

> of probability, there has been a non-accidental injury or human agency as asserted and the threshold is established."

33. The role of the judge is crucial. As I observed in *Re S (A Child) (Care Proceedings: Surrogacy)* [2015] EWFC 99 (at paragraph 124):

> "It cannot be over-emphasised that it is the judge, not an expert or group of experts, who has the responsibility of making the findings in family cases involving allegations of child abuse. Only the judge hears the totality of the expert evidence, including cross-examination by specialist counsel which often, as in this case, brings to the fore issues that are less apparent from the written reports. Only the judge considers all the expert evidence together, and has the opportunity to identify strands and patterns running through that evidence. And only the judge is able to consider all of the evidence – including expert medical evidence and the testimony of family members and other lay witnesses."

34. To my mind, this is a paradigm example of a case where a judge needs to hear all the evidence, to assess whether the lay witnesses' evidence is truthful, accurate and reliable, and evaluate the medical opinion evidence, tested in cross-examination, in the context of the totality of the evidence. It is simply not possible for the judge to reach a conclusion as to the cause of G's injuries on the basis of the written evidence alone.

35. The approved note of judgment records that the judge concluded that the local authority had "insufficient evidence to cross the threshold". It is clear to me that she was proceeding on the basis that the case fell into the first category of cases identified by Hedley J in the *Redbridge* case. This was in my view where the judge fell into error. It was impossible for the court to say at that stage that the threshold criteria could not be satisfied.

36. In those circumstances, the judge had to consider the factors identified by McFarlane J in *A Local Authority v DP*. Applying those factors to this case, it is clear that the fact-finding hearing must go ahead. The outcome is plainly of enormous relevance to the future care plans for the child. If the court finds that the injuries were inflicted non-accidentally, and either identifies one or other of the child's principal carers as a perpetrator, or alternatively is unable to exclude the carers from the pool of possible perpetrators, such findings will inevitably have a significant impact on the future care plans for the child. Equally, if the court concludes that the local authority has failed on a balance of probabilities to establish that the injuries were inflicted, such a finding will also impinge significantly on the child's future. Accordingly, the fact-finding hearing is necessary in the child's best interests.

37. Furthermore, in the circumstances of this case, there are no significant disadvantages of proceeding with the fact-finding hearing. The four-day listing in July has been salvaged so the conduct of a fact-finding hearing will not result in delays in making decisions about the child's future care. The costs of the hearing are not a significant factor here. There is no reason to think that the trial will not be fair. Contrary to the judge's assertion as recorded in the approved note of judgment, there is no question of a shift of the burden of proof which, as always in fact-finding hearings, remains on the local authority.

38. In short, having regard to the child's welfare as the paramount consideration, and the overriding objective in FPR r.1.1, it is plain to my mind that the fact-finding hearing should go ahead and that the local authority's application to withdraw the proceedings should have been refused. In saying that, I stress that I am not for one moment indicating any view as to the ultimate outcome of the fact-finding hearing.

39. For these reasons, I concluded that the appeal should be allowed.

FLAUX LJ

40. I agree.