Neutral Citation Number: [2021] EWCA Civ 1451

Case No: B4/2021/1291

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT HERTFORD
HHJ McPhee
WD20C00420

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 October 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ELISABETH LAING

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H-W (Children: Proportionality)

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Kate Grieve and **Lara Izzard-Hobbs** (instructed by **Bastian Lloyd Morris Solicitors**) (all acting pro bono) for the **Appellant Mother**
Sharan Bhachu (instructed by **Hertfordshire County Council**) for the **Respondent Local Authority**
Baldip Singh (instructed by **Philcox Gray Solicitors**) for the **2nd Respondent Father**
The **3rd Respondent Father** appeared in person
Emily Beer (instructed by **Crane & Staples Solicitors**) for the **4th Respondent Father**
Amanda Meusz (instructed by **David Barney & Co Solicitors**) for the **Respondent Children by their Children's Guardian**

Hearing date : 23 September 2021

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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 at 10:30am on Thursday, 7 October 2021.

Lord Justice Peter Jackson:

Introduction

1. This is an appeal by a mother (M) from care orders with a plan for the removal of three children into foster care. The family is complex. M has six children, A (21, a boy), and five girls: B (18), C (13), D (10), E (8) and F (1½). The proceedings concern the four younger children and the care orders now under appeal were made in relation to C, D, and E. At the same time, the Judge, His Honour Judge McPhee, made an interim order in relation to F that was intended to lead either to her being placed in the care of B after a special guardianship assessment lasting 12 weeks, or to her being placed in a foster-to-adopt placement, with family contact ending by the end of the year. Because no conclusion has yet been reached about that, this appeal does not formally include F, but its outcome will inevitably affect decisions about her. Since the Judge's orders were made on 26 July 2021, all four children have remained at home.

2. The father of C and D is F1, whose relationship with M lasted between 2007 and 2011. The father of E is F2, who had a sexually abusive relationship with M over a period of years, starting when she was a young teenager; they later resumed their relationship between 2011 and 2012. The father of F is F3, who has lived with M since 2014, having previously been the partner of M's mother. He has a son (G, 13), who lived in the family home between 2016 and 2018.

The background

3. The Local Authority has been involved with this family throughout M's life, prominent themes being sexual abuse and home conditions that were at times grossly neglectful. As a child, M spent much of her time in the care system and at that time there were concerns about her relationship with F2. A was born in 2000 when M was aged 16, and B in 2003, when she was 19. Neither of their fathers played any lasting role. C was born in 2008, D in 2010 and E in 2013.

4. The troubles experienced by M as a child soon emerged in the lives of her own children. By 2005, A had been placed on the Child Protection Register under the category of 'neglect' and, after escalating difficulties with his behaviour, he left the family home in 2012. He spent some time in a boarding school and was then placed in foster care. Also in 2012, C complained of being sexually abused by step-siblings at her father's home, and by A at home. Other sexual complaints were made against A by a half-sister, by B, and by G. The Local Authority's concerns further intensified with the return of F2 into M's life and in November 2012 it issued proceedings. The children remained at home under an agreement that F2 was not to be allowed to have contact with them, but in June 2013, shortly after the birth of E, he was found concealed in the home and the Local Authority applied for the children's removal. This was refused by His Honour Judge Wright, who found that greater harm would be caused by interim removal. He then conducted a two week fact-finding hearing and gave a very substantial judgment in October 2013, in which he found that the children were at risk of neglect and that a number of the allegations about A's sexual behaviour were proved. He also found that F2 had groomed M as a child and that he was a sexual risk to the children. The Local Authority maintained its plan for the removal of the four children who remained at home, but this was not supported by their Children's Guardian, while F2 sought an order placing E with him. In March 2014, Judge Wright gave a welfare

judgment in which he made a residence order to M in relation to B, C, D and E, with a supervision order and an injunction against F2, which remains in effect. In A's case a care order was made. Contact arrangements for the fathers and for A were put in place. While the supervision order lasted, F2's monthly contact with E was professionally supervised, but after that it was supervised by M for about five years until early 2020, when professional supervision recommenced.

5. In 2016, the Local Authority took proceedings in relation to F3's six children, who were living with their mother, except for G, then aged 9, who was by then living with F3 and M. The matter came before His Honour Judge Wilding at a lengthy hearing in late 2016. The Local Authority sought the removal of G into foster care; this was opposed by his Children's Guardian. M and F3 gave evidence that A would always be supervised if he were to attend family gatherings in future. Judge Wilding was impressed by their evidence and found that G was doing well in their care. He made an order for G to live with F2 subject to a supervision order. However, the placement did not last. In July 2018, G moved into foster care and in January 2019, Judge Wilding made an order that he return to his mother. In doing so, he attached no blame to F3 or M for the breakdown of the placement with them.

6. Returning to B, C, D and E, it will be recalled that following Judge Wright's order in 2014 they were subject to a supervision order. Between 2015 and 2016, the Local Authority's involvement lapsed, but in 2016/17 a family assessment was carried out, and in April 2018, the children were again made subject to Child Protection plans for 'neglect', with each child having her own particular problems. In January 2019, an application by F1 for C and D to live with him was dismissed. In March 2019, the Local Authority stepped the matter down to Child in Need plans and on 28 October 2019 the case was closed to social services on the basis that the family had made considerable progress and that the children were happy. At the time M was expecting F, who was born in the late Spring of 2020.

7. Such a compressed account of the background to the current proceedings does not reflect the sheer volume of information that has been available to social services and the court across decades. It can be seen that at the most general level there were longstanding concerns related to neglect and sexual abuse, but that these had apparently receded by the end of 2019, with signs that M was maturing, and F3 was seen as a stabilising influence. Meantime, A was living away from home and his contact with the other children was supervised by M and F2, while F2's contact with E was similarly being supervised by M. At all events, M and F3 had up to this point succeeded in fending off attempts by the Local Authority and the other fathers to remove the children from their care.

The present proceedings

8. The Local Authority issued these proceedings on 31 March 2020. Earlier that day it had sought the removal of C, D and E under an emergency protection order without notice to the parents. B, who was by then aged 16 and living with other family members, is not subject to the proceedings, though she has been very much involved in them. The removal application, which was supported by the newly-appointed Children's Guardian, was refused by Her Honour Judge Mellanby, who gave directions in the care proceedings and made a non-molestation order against A, which among other things prevents him from coming to the family home. In May 2020, that order

was extended by Judge McPhee until the end of the proceedings, so it remains in effect. Following her birth, F was joined to the proceedings. The court made interim supervision orders in relation to all four children, which continued until the final hearing.

9. The Judge conducted two substantial hearings. The first, lasting for some nine days, was a fact-finding hearing, leading to a judgment on 10 December 2020. The second, which took six days, ended with a judgment given on 26 July 2021 and with the orders now under appeal.

10. In his first judgment, the Judge made findings about the events leading to the issuing of the proceedings. These mainly occurred in November 2019, within a very short time of the case being closed to social services. The Judge found that at the beginning of that month A, then aged 20, had been attacked and was unable to remain in his own flat. M had allowed him to stay at the family home for about two weeks, during which time he sexually assaulted E, then 6, when he was briefly left unsupervised on the first floor landing. The assault, which A denied in evidence, was confirmed by E and witnessed by B, who had also been upstairs while the parents were downstairs, distracted by caring for an injured dog. After the assault, M had allowed A to remain in the property overnight and did not report what had happened to social services for three days.

11. The Judge accepted B's account of the assault on E. He found that M and F2 had failed to protect the children from sexual abuse and the risk of sexual abuse, and had delayed in reporting the assault. He described the significance of these events in this way:

> "Within the household were two adults responsible for the care of the children, and whilst F3 treated the children as children of the family the parental responsibility for the children lay with M. Whilst there was straightforward evidence of co-parenting I concluded that the lead in respect of the children came from M, and understandably so.
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> What is plain and clear is that M loves all her children and wants to protect them from harm, provide a good childhood to them, ensure their education and provide for their needs. That M loves all her children, and equally, provided her with a dilemma to which she was not herself equal or in conjunction with F3. I was struck by how upset she had become, even having to turn off her video feed, when A, her son was seen on the screen, the first time that she would have seen him for some time. It is no criticism to say that that showed me how much this mother remains engaged with her son. Therein lay the dilemma for her when A fell into difficulty and trouble notwithstanding the fact that significant resources were put in by the Local Authority to assist A with his life… Sadly, A's vulnerability was noted and preyed upon by criminal elements in the community so that his accommodation was overtaken by drug users, he was attacked, his premises left insecure to the extent that the police reasonably became concerned for his safety with threats to his life having been made and those of his mother and unborn child. It is at this stage that I

find that M became overwhelmed by the needs of A. It is plain and clear that A needed protection, he remained very vulnerable in the community and he had no accommodation available to him after about 1 November 2019.

I find that by 4 November 2019 this mother in seeking to protect A took him back into her home, in the knowledge that he posed a significant risk of sexual harm to her daughters. She allowed herself to push that concern to the back of her mind, falsely persuaded herself that she and F3 could supervise a regime that would allow A to remain in their home whilst protecting the girls from the risk of sexual harm that both knew A posed to the girls. I do find that by 5 November 2019 the mother had told the leaving care worker that A was back home. I do find that it was the intention of the mother that he stay there for a brief period of time whilst his premises were made secure. No real effort was made to secure his premises until eventually he left on 19 November 2019. What had started out as a short stay grew and grew and the risk grew with each day that A remained in the home. The level of supervision that this mother knew that A required by her imposition of her rules was not tenable for such a lengthy stay. From A's perspective temptation was no doubt in his path each day. The mother failed to turn to the Local Authority for help and assistance in the knowledge that the path she had taken of allowing A into the home would not be ratified by children's services on the part of her four girls. She sought by mentioning A was staying at her home to the leaving care worker on 5 November 2019, to lay the groundwork for protecting her decision. I do find that when the police had first suggested that A returned to her care that she had expressed her reservations to police but nonetheless went on to accept A back into her home. For a period of approximately two weeks the mother allowed herself to be persuaded that all was well, no doubt pushing to the back of her mind what she well knew about the risk that A posed to the girls, a risk of sexual harm. The decision to allow A to sleep in B's room, was of course convenient because space was at a premium but failed to consider the risk of harm, and sexual harm, that A posed to B. It may be that B was older but she remained in need of proper protection from such a clear risk of sexual harm and the decision was one for the adults to take. The decision to extend the stay was a risk that this mother was prepared to take to protect A whilst leaving the girls at risk of sexual harm from him within their home. This was not a risk that they were exposed to until their mother took the decision to allow A to stay initially for a few days and then for two weeks. Even when A had perpetrated the assault upon E which was sexually motivated on 18 November 2019 the mother allowed A to remain in the home that same night, whilst expressing the belief that what E and B had told her was true. If no other aspect shows it, that aspect shows how the mother was prepared to place

> A's needs above the needs of her girls who once more were left at risk of significant harm from A.
>
> Thereafter the position of the mother, in my judgement, takes a turn for the worse. The mother fails to notify the authorities of the predicament, is discussing with B if she should tell the police and/or the social services. For her own reasons now, even though A went back to his own premises on 19 November 2019, I find it took until 21 November for the mother to start to disclose, initially to the leaving care team the harm which she believed A had perpetrated, allegations made by both B and E against A. It is plain and clear that the mother took that time because she was aware of the potential consequences of her decision-making upon her family."

12. After the assault on E, the police became involved and B, C, D and E were interviewed, as was A, but no further action was taken. The Local Authority held an Initial Child Protection Conference on 9 January 2020 and decided not to issue proceedings. The application that was issued at the end of March followed statements made by E to a student social worker and to her headteacher on 16 March 2020, suggesting more extensive abuse by A during the time he was in the house and since.

13. The lengthy fact-finding hearing was entirely concerned with the risks posed by A. The Judge's findings concerned the assault on E in November 2019 and, for reasons that he gave in detail, he declined to make the wider findings against A that had led to the proceedings being taken in March 2020. He was not asked to make findings of neglect, and any risks that might be posed by F2 did not feature in the fact-finding process.

14. The matter then continued to a welfare hearing in July 2021, where the position of the parties was as follows. The Local Authority's care plan was for the removal of C, D and E to separate foster homes, with contact with the parents six times a year, and monthly sibling contact, and for the removal for adoption of F, who had been well cared for by her parents since birth. The Children's Guardian supported the plan for the older children, but in F's case she recommended that a special guardianship assessment of B be carried out. For their part, M and F3 were prepared to agree to any order that allowed the children to remain at home, but in the alternative they supported the assessment of B as special guardian for F. F1 took no part in the proceedings other than to seek continuing contact with C and D. F2 again asked that E should come to live with him, failing which he would not oppose her being placed in foster care, but, as the Judge put it, he did not seek to push his case particularly far.

15. Oral evidence was given by ten witnesses: four social workers, a family support worker, a consultant child and adolescent psychiatrist (Dr Judith Freedman), M and F3, F2, and the Children's Guardian.

16. The main social work evidence, referred to in more detail, below, was given by the social worker and her team manager. Their opinion was that, while the parents were engaged with the Local Authority, neither really accepted the risk that A posed, even now, and neither is able to manage that risk. The parents' practical care of F had been good and they had worked with health professionals in relation to a serious birth condition that she had had.

17. A family support worker who had worked with the family from February to April 2021 gave evidence of a positive response from M and F3 and spoke well of their treatment of F. Two other social workers gave evidence relating to F2.

18. Dr Freedman's written report of 16 June 2021 ran to 200 pages. Her instructions had been to undertake a full psychiatric assessment of the family, to include an assessment of the parents, of A, and of C, D and E. She was also asked to advise on contact between A and the other children. She was not specifically asked to report in relation to F.

19. Dr Freedman interviewed the family members, except for B, to whom she spoke later, and the key professionals. She made these important overarching comments on the family:

> "Assessing this large extended family is a challenge, which I have tried to address by providing first an overview of the family as a whole and then answering the specific instructions. I view this assessment as a work in progress, in the sense that my report will need to be put together with parenting assessments of M and F3 for important decisions regarding the future of the three girls to be made…
>
> At the end of reading 1324 pages of documents, including five substantial Judgments and many assessments, and medical records (not including the still to be read medical records for F2), and conducting 26 hours of interviews with eight family members (unfortunately not including B), I am left with questions and conclusions that do not readily fall into the specific categories that are raised below.
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> I have questioned how it has happened that the same matters have come before the Local Authority repeatedly about this extended family, but definitive changes have not been made. I was particularly interested in the balancing exercise that the Children's Guardian undertook in the 2014/15 proceedings, in which she tried to balance the risks to the children against removal versus the risks of them suffering more harm if they remained in their mother's care. She came down on the side of believing that the children would suffer more from removal, which the Local Authority have advocated more than once over the years.
>
> I found myself considering this question myself. On the one hand it becomes increasingly apparent over the years of Judgments and assessments that matters in the family have not changed greatly. The presentation of the children and the state of the home are described as just adequate. The children struggle in their education. Boundaries are broken. Sexual abuse emerges repeatedly as a risk.

Yet, on the other hand, it is difficult to imagine how C, D, and E would manage separation from their mother much less how M would manage separation from them. And this conundrum also will impact on F, who I have not been asked to include in this assessment.

I link this to a question about what it is that makes it so difficult to develop a concise picture of what is happening in this extended family. The Judgments are dense and lengthy. The assessments repeat information at length. All of it seems important, and yet, not really much changes over time.

I do not purport to have answers to these questions, but I think it important to raise them.

I found as I proceeded through the interviews and reading the documents that some features emerged that seem significant to me. The first is the sheer number of people involved. M herself reports approximately 11 half-siblings. The six children, including A and B, have, by my count, 19 half-siblings from their five fathers' other relationships. F2's children are not only half-siblings to E, but also are cousins to all the children.

Second, it is apparent that several members of the family have learning difficulties and/or psychological difficulties, which also affect their ability to take on board findings and other information.

Third, as the ARC report showed, many of the family members have suffered developmental trauma, and this, too, takes a toll on their ability to attend to new information.

In addition, I found all the family members I interviewed to be skilful at deflecting. I think that this is a key aspect of their presentation. It means that important issues are not discussed directly. Although much is said, even more is left out. Sometimes, information is left out through outright avoidance or control; D is particularly masterful at controlling, whereas E is more likely to control what happens in the interview by hiding under the table and becoming distressed. Other times, information is left out through avowed lack of memory; F2 was particularly inclined to say that he just could not remember.

A considerable aspect of the deflection, which possibly becomes actual distortion, was what was found or not found that I took to turning back to the Judgments repeatedly, checking them to remind myself what the findings actually were. This shows how difficult it is to stand by the truth in the presence of this distorting process…

> In summary, as a family group, they are large to the extent that it is difficult to keep track of the various members. They deflect and distort key information. Their ability to take on board the findings is further compromised by learning difficulties for some of them. Sexual impropriety, as victims and as perpetrators, runs through the family."

20. Dr Freeman then made these assessments of the adults:

> "[M's] ability to parent is, in my view, uncertain. Her limitations will not change. She is likely to continue to cling closely to her children, who are dependent on her and struggle to achieve independence, but love and want to be with her. Her ability to provide a higher level of parenting is non-existent. She is likely to continue as she is, with the only possibility for improvement being the increased stability that F3 seems to have brought to the family. I think it likely that her ability to recognise and protect her daughters from sexual harm is unlikely to change, as this is a major blind spot for her."

> "[F3]… presents as a man who is committed to his children and has brought increased stability to the family. He is not without his short-comings, which include his poor judgment in getting together with M after being with her mother, and also his questionable protection of G, when he was living with the family."

> "F2 maintains a keen interest in E, and she appreciates his attention to her. However, emotional instability, as well as his history of seducing M over the course of several years, would make it impossible for him to become her primary, caregiving parent."

21. As part of her assessments of the children, which are detailed, Dr Freedman advised that it is only safe for A to have contact with his sisters that is closely supervised by professionals. In her report, she made no recommendation about the placement of the children and, as I have said, she was not directly asked to advise about F.

22. On 18 June, the children's social worker completed a sibling assessment that recommended separate placements for all four children. On 28 June, she filed a negative parenting assessment of M and F3, that included these observations:

> "It is important to highlight that M and F3 have worked well with the Local Authority during this assessment; they made sure to attend every session, taking care to rearrange those they could not attend and gave thought to their answers and the conversations that took place. M and F3 remained in contact with the Social Worker during the assessment to explain if they needed things moving or rearranging. They remained actively involved, even during very emotionally challenging discussions…

The Local Authority considers that [the children] will also need an environment that supports them to explore their experiences and family's experiences and therefore agrees with Dr Freedman that it is uncertain that M and F3 could provide this. This is linked to M and F3's limited understanding of the concerns and limited acceptance of the facts that were found at the most recent Fact Finding Hearing in December 2020.

The Local Authority is also very concerned that there has been a significant decline in C and E's presentation at school over the past 3 years. Both C and E were reported to be academically able students, keen to learn and thoroughly enjoy school. However, now, they both present considerably differently. C has had periods of being unable to attend school at all, stating that their anxiety prevents them getting ready in the mornings or feeling able to cope. C has also stated that they find coping difficult during the school day, although they do not always feel able to confide in school staff. E too is unable to access learning; she is entirely emotionally dysregulated and is falling further and further below age-related expectations. E's school have sought specialist support and are in the process of seeking an Education Health and Care plan due to her emotional and social needs.

The Local Authority is deeply concerned that although C, D and E need psychotherapy, as recommended by Dr Freedman to come to terms with their experiences and the abuse they have suffered, they will not be able to access this, nor be supported to engage as fully as possible whilst in the care of M and F3 due to the observed block that the children have when talking to a professional…

C, D, E and F have experienced significant, protracted neglect and significant harm in the form of physical and sexual abuse throughout their lives. M and F3 have been involved in numerous referrals to the Local Authority over the lives of the children, however they have been wholly unable to discuss at any depth their involvement and the impact of their behaviour on the children. The Local Authority wonder whether this is due to a lack of understanding about a parent-child relationship and how it can be impacted as children grow, or whether it is an unwillingness in M and F3 to acknowledge that they need to change. Dr Freedman notes that M has a significant blind-spot in relation to the threat A poses to the children, however the Local Authority wonder whether this goes further and questions M's capacity to change.

Positively, M and F3 appear to have maintained the family rules since implementing them earlier this year and this appears to have helped the children manage their behaviour more regularly at home. M has supported D to move school and obtain an Education Health Care Plan (EHCP) and is working with E's

> school to get an EHCP too. However, there continue to be concerns regarding the impact of the children's experiences on their behaviour and development as C, D and E are currently unable to meet their educational potential, which is a considerable decline in their presentation since the beginning of this current period of intervention and support...
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> In order to care for the children, M and F3 would need to engage in the following:
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> - Developing a greater understanding of children's emotional needs and how this affects behaviour;
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> - Psychoeducation regarding the impact of trauma and developmental trauma on children's emotions, mental health and behaviour development;
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> - Training in therapeutic parenting and Non-Violent Resistance or similar strategies to ensure they develop skills to attune to the children emotionally and respond without using shouting or physical violence when the children "act out";
>
> - To encourage the children to talk to professionals, by modelling this and demonstrating this to the children.
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> However, for the above to be successful M and F3 need to be able to accept the concerns held by professionals and to acknowledge that the children have experienced significant trauma linked to the care provided to them by M and F3.
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> The Local Authority notes that similar support has already been provided via the numerous parenting courses, ARC support and various interventions with the family over the past 20 years, yet M and more recently F3 have been unable to develop adequate skills to ensure the children's safety. Due to this, the support that would be required to keep [the children] safe in M and F3's care is so high that it would be impossible to provide.
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> When considering all of the above and balancing the risk of harm, the Local Authority conclude that M and F3 are unable to care for the children for the remainder of their minority."

23. On 9 July, Dr Freedman responded to these assessments in these terms:

> "The Local Authority have considered their assessments together with mine, and they have reached a conclusion that the four girls should be removed from the care of their mother and F3. The Local Authority's assessments found that safeguarding of the children in the family is inadequate and that the girls are not being supported and encouraged to achieve to their

> potentials. In this context, it is not surprising that the Local Authority are seeking removal of the children.
>
> In proposing separate placements, the Local Authority are responding to the diverse needs of the children. I think it likely that C, in particular, will struggle with being separated from her family. It might help for her to have a higher level of contact with her mother and with B than her younger siblings will have."

When giving evidence, she confirmed that she positively supported the care plans.

24. The Guardian's evidence in relation to C, D and E mirrored that of the social workers. As the Judge recorded:

> "128. She told me that things were unlikely to change for the mother as she does believe she has a blind spot in respect of A. She told me that there were a lot of strengths in her parenting to the extent of looking after F's needs in the middle of the pandemic and these proceedings. Her capacity to protect from sexual harm where she is aware of the risk, she feels she does not have the psychological resilience to undertake the necessary work, or to put that into practice. The mother had undertaken an assessment with Dr T and had asked for advice from professionals and engaged with a number of agencies. She acknowledged those efforts that the mother had made to make improvements to her parenting relationship. But she still considers that the mother has not acknowledged the concerns of the Local Authority prior to undertaking that work."

At the same time, the Guardian was unable to recommend adoption for F without a special guardianship assessment of B being undertaken. She made this recommendation even though B had only recently turned 18 and was suffering from depression, anxiety and possible PTSD, matters that had led the Local Authority to a negative viability assessment.

25. Before the hearing, C wrote a courteous and sensitive letter to the Judge, explaining why she opposed removal and felt that it would be better for her and her sisters to remain at home.

The Judgment under appeal

26. The extempore judgment runs to 35 pages of transcript. The Judge summarised the history, as found by Judge Wright, Judge Wilding, and himself. Before doing so, he said this:

> "10. I want to deal briefly with the history of the case. Ordinarily the history of the case can be found contained in the judgment provided for the fact-finding hearing, and there is, to an extent, a history attached to that fact-finding judgment that I gave in December of last year. But the allegations were discrete and specific in respect of the fact-finding allegation. Yet now they

> are rather more wide ranging for the girls. F joined these proceedings shortly after her birth…, and so as I say now there are four girls to consider in respect of the final outcome at the final analysis."

27. He recorded and assessed the evidence of the ten witnesses, directed himself in law, and set out the parties' positions. He addressed matters in the welfare checklist before giving his decisions. He found the social workers to be balanced witnesses with close knowledge of the family, whose views were unshaken under questioning, and he described the Guardian as providing a clear and articulate view in respect of the inability of F3 and M to continue to provide safe care for all of the children. He said that he was greatly assisted by the evidence of Dr Freedman. He dealt with her treatment of one aspect of F3's history, which he described as an error:

> "69 Dr Freedman's difficulty was that she did not acknowledge the difference in law between a fact being proved and, if it was not proved, the binary nature of it not having happened. I have taken that into account in assessing the evidence of Dr Freedman. I have to say that the evidence of Dr Freedman in all other respects was clear and certain. She was wholly unshaken during the course of cross-examination. She has come to a clear opinion and a clear view that she was able to share with the court and she had a clear knowledge of the evidence that had led her to those conclusions."

28. The Judge gave his overall assessment of M:

> "89… I have to say that I was impressed with this mother who found herself in court, under pressure, with the spotlight on her, and able to give me a very good pen picture of her children, that showed me not only that she knew her children and understood her children, but that she had a deep love and emotional connection with all of her children.
>
> 90. It coincides really with what all of the children say, which is of course that they do not want to leave the care of their mother. They want to remain at home and in the care of their mother because clearly there is a relationship between them that is a good and positive relationship in some ways. Although in other ways perhaps not so much."

29. However, he had these reservations:

> "101. There were one or two areas in her examination which caused me concern. This reliance upon the fact that she had not understood the judgment of 2013 of HHJ Peter Wright about sexual abuse of B and G by A, her by F2, and her repeating that as a justification for what happened in November 2019. I simply do not accept that evidence from the mother. The mother can, from time to time, tell untruths. There are many reasons why people may tell untruths within these proceedings, but my view

> of her telling this untruth there was to seek to lessen the impact of her decision in 2019, notwithstanding the fact that she purports to acknowledge that decision and acknowledge the findings that I made in 2020."
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> "106 The mother of course in my view, and F3 also in my view, made the situation much worse by their delay in notifying the authorities properly of the abuse that they knew had happened because the mother said she believed the account that E had given to her. They left it an unforgivable three days to notify the parties, although he did leave the next day. I found in December 2020 that the mother even asked B to house A in her bedroom for that additional night that he stayed over, showing I think a total lack of understanding of the nature and extent of the harm that was perpetrated. Yet in these proceedings she tells me that E at school has been "20 times" worse at school since that harm was perpetrated upon her."
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> "108. But I equally find that the decision of the mother in 2017 to take E to the holiday camp with F2 was fraught with as much difficulty and risk of harm."
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> "110. [It] was in many ways as bad a decision as letting A into her home in November 2019. Fortunately, as far as we know, the consequences of taking E on holiday at Butlin's with F2 in 2017 were not as bad… But the mother could not have failed to know that the father would have posed the same degree of harm to E that he had posed to her. She took a chance because she felt that she was supervising. The same chance that she took and F3 took in November 2019 because they thought they were supervising A.
>
> 111. It clearly shows that whatever protective behaviour work they had undertaken prior to that, that protective behaviour work was not working for E in particular, because E was at significant risk of harm in 2017 and was at significant risk of harm, and was significantly harmed, in November 2019."

30. The reference to the Butlin's holiday arose from evidence given by M and F2 for the first time at the hearing:

> "98. She described to me an incident when she went to Butlin's in 2017 with F2 and E. She went on that holiday to try and give E some time with herself and her father, making things as normal as she could, in her mind, for E. The result of that was, I think, she wished that she had not taken E to see F2 because he was difficult from time to time, and I think she had had quite a time of it in Butlin's in 2017 for a week with F2 and E. But he had promised her that he would behave so she had gone for E's benefit and she would not now do it again, and she was not still in a relationship at that time with F2.

> 99. She acknowledged that they shared the same property for that week away. But she had felt that she could manage it well but she found it really hard. She told me:
>
> > "F2 has always been supervised seeing E once a month because of the risk he poses to young girls and children."
>
> She thought that he had posed a risk and that is why she had gone on that holiday to Butlin's and why she had supervised it. But she acknowledged that it was not a good idea to do that at all. She said that they had separate rooms but acknowledged that there was a risk, that they had to share a bathroom for instance. But she did not see that at the time, she told me:
>
> > "It was his outbursts and the way that he was talking to E, but not sexual allegations that had caused problems within the week.""

31. The Judge gave this assessment of F3:

> "86… I found F3 to be without a side to him. He seemed to be remembering the evidence that he provided to me. He seemed to be giving me a straightforward and honest account of that which he now felt. His position had, to an extent, moved since his final statement in that he was now expressing himself clear and certain that he knew and understood what had gone wrong in November 2019 and he expressed his certainty that that would not happen again."
>
> "146. I accept and acknowledge that these are parents who love their children dearly. The relationship that F3 has with the girls, C, D and E, who are not his children, is a good father and family relationship, I acknowledge."

However, he found F3 to be culpable for allowing A into the home, For example:

> "166. My view of the parents is this. That F3 is very much led by the decision-making process of the mother. He was questioned by his own lawyer as to whether he would make some of the decisions but came back to the fact that, "Actually no." They have a discussion but it is really M who takes the decision in respect of the family. I determined that he did connive in the decision-making process in that he did not stand firm, that he did not take action in the knowledge that A had sexually assaulted his own son at a much earlier time."

32. The Judge's legal self-direction made reference to the provisions of the Children Act 1989 and to a number of familiar authorities about the need for any order to be proportionate. He reminded himself that in the case of the older girls he was able to make, amongst other things, a care order or a supervision order. He rightly had regard to the obligation under Article 8 ECHR to keep the family together unless separation is

necessary and proportionate in the best interests of the child. To do this, he had to consider the benefit and disadvantages of each available option. As to F, he had to be satisfied that nothing other than adoption would do in her case. No complaint is, or could be, made about these self-directions.

33. The Judge summarised the competing contentions in this way:

> "143. So the proposals of the parties are that F3 and M seek to have the children remain in their care and they are satisfied that they can be a sufficiently protective measure to prevent again any further harm, particularly future sexual harm caused by A, because they simply will not let him pass the threshold. That is their case. They maintain that the girls will be devastated by the removal from the care of their mother, with whom have always lived, and will not settle in foster care and it will not promote their interests. Actually, they say the girls are all improving at school and so in the circumstances this is exactly the wrong time to seek to remove the children from their care."

> "147… The Local Authority is simple in its assertion; the parents have failed to protect the children before. That failure of the parents - and here I refer to F3 and M only …to protect the four children living in their care at home on 18 November by allowing A to have stayed there from 11 November onwards. By failing to notify the Local Authority of the extent of the harm perpetrated upon E, and the other children by A on that occasion, shows that those parents are not able and do not understand how they got themselves in that position and allowed A to do just that.

> 148. They are supported in that view by the clear evidence of the one expert in the case and indeed the Children's Guardian. They assert that the Guardian is wrong to suggest that there should be a further assessment of B for the reasons that I earlier found, and they seek a Final Placement Order in respect of E within these proceedings."

34. The substance of the Judge's decision about the older girls is to be found between paragraphs 151 and 176, from which I extract and label these passages:

> *(Wishes and feelings)*

> "151… They are of an age where they are able to express their wishes and feelings. Their ability to understand all of the issues in the case, of course, is limited by their age and also by the various difficulties that each of them have, which are enunciated and outlined in the evidence. But their wishes and feelings are expressed clearly and forcibly that they wish to remain in the care of their mother. C's description of the view that the Local Authority have of removing her to foster care is that, "It is just dumb.""

(Needs)

"152. Their physical, emotional and educational needs are various because their emotional needs are very different… All of the children need to be in an environment where they have carers who are attuned to their emotional difficulties, who will understand the outbursts that the children make from time to time, and in particularly in the early days of foster care, and who have the skills and abilities to deal with those emotional needs there and then… Clearly they have many different and pressing needs with respect to their physical, emotional and educational development."

"155. So the view of the Local Authority is, and the view of the Guardian is, and the views of the social workers are, and the view of Dr Freedman is, that they need better than ordinary parenting. Reparative parenting that is able to deal with their emotional and educational needs in a way that which neither M or F3, or indeed F2, could achieve."

(Change)

"156. The likely effect upon them of a change in circumstances has been a significant factor in this case. The contention of the parents' lawyers is that to move the children… to foster care will be to irreparably harm them. None of the children want that. None of the children will understand that. Each of them will react to that. Some of them may react with their feet and run away from foster care…

157. The likely effect, the parents say, is nothing short of destructive for the girls. They point out the fact that nothing has been done with the girls to set them up for this massive change. The girls do not know that they are to be moved to separate foster placements if they are to move to foster placements, although some of them will of course suspect what is going to happen at the conclusion of these proceedings. But there will be a huge disruption to their living arrangements, a huge loss to them of their failure to live within their family, and it may be that there will be some short to medium term significant effect upon their ability to settle within their new foster placement.

158. There is always a risk in foster placements of a breakdown of the foster placement if a child is so disruptive that they simply cannot settle. Of course the Local Authority plan is that they would seek to support those foster placements and in the event there are other foster placements available upon breakdown. But one needs to seek to avoid for the children as far as possible that kind of effect, which has been described within the proceedings as a domino effect where one foster placement quickly collapses upon the collapse of the preceding foster placement."

(Identity)

"159. Their age, sex, background and other characteristics are that they are young girls who have come from a difficult background. They have been in proceedings for a large number of years, either themselves or with their mother or father, involved in proceedings. There has been sexual abuse within their family, where relationships within their family have been strained. Where their characteristics are that they love being at home, they love being in the care of their mother, but where their background has not allowed them to develop to their full potential. Each of them having suffered from some degree of developmental trauma and D having suffered from some neuro-developmental delay."

(Harm)

"160. So the harm that they have suffered is plain and clear for all to see in the evidence that is before me. Each of the children were in the home at the time when E was sexually abused by her brother, he having been allowed into the home by F3 and M at a time when they knew he was a risk and a serious risk of sexual harm to each one of them. Each of them had to live through that incident and E is, of course, living through the suffering. But so is C living through the suffering in understanding what happened to their younger sister. Perhaps it impacts slightly less upon D because D is rather consumed in her own world, which perhaps does not always have the same access to reality as the other girls have.

161. So the harm is plain and clear. They have lived in a home environment in which in their younger years was somewhat neglectful for them, and which has turned into a home which has been unsafe for them because of the decisions of M and F3, showing an inability to provide a home that is safe from A and safe from sexual abuse."

(Parental capacity)

"162. The last issue is to look at the ability of each of the parents and their capability of meeting their needs, and the capability of B in meeting the needs of F. She puts herself forward as a carer for her.

163. I am afraid that I come to the conclusion that I acknowledge the clear evidence from Dr Freedman. Dr Freedman's evidence was challenged in one or two areas, and for good reason I acknowledge, that there are certain aspects of her evidence that I would not weigh in the balance when I come to my conclusion. But the clarity of the evidence of Dr Freedman about the risk of harm to the children, about the neglect of the parents, in

> assessing and taking action in respect of that harm, in the view of Dr Freedman the likelihood is that that harm could be occasioned to the children again if they remained in the care of F3 and M. That behaviour may be repeated and that there is no comfort or protection of the children in knowing that that would not be repeated.
>
> 164. That is the view of the social workers in the case, and it is plainly and clearly the view of the Children's Guardian.
>
> 165. So I have come to the conclusion that the parents are not capable of providing for the safe needs of C, D, E of F. Those children were each placed at risk of significant sexual harm. E suffered significant sexual harm. I cannot be satisfied that the parents have learned sufficiently, or understand or have the capability of learning and understanding, in the case of M, how to avoid that situation in the future. This was a decision that the parents took in conjunction with the other."
>
> "168. I also weigh in the balance the mothers' decision-making process in 2017 to take E on a holiday with F2, a man who she has acknowledged is a man who sexually harmed her as a child, at a time when also she was supposed to be only providing supervised contact between F2 and E.
>
> 169. So I determine that for those reasons it would not be safe any longer for the children to remain in the care of F3 and M."

35. Later, the Judge returned to the consequences of placing the children in foster care. He acknowledged the risks of foster care breakdown in the light of the likely "uproar and commotion" on the girls' part, but he again referred to the possibility of alternative foster placements if there was a breakdown, to what he saw as the systemic benefits of being in Local Authority care, and to the fact that, unlike adoption, foster care would allow for family contact. He ended:

> "176. I have carefully considered the Local Authority s.31A plan for a placement in foster care under a Care Order. It seems to me necessary so as to allow the children to be cared for in foster care and for the Local Authority to share parental responsibility with their parents and determine the extent to which their parents can exercise their parental responsibility. It is the only way, I think, of stopping the difficulties that the children have suffered in the care of their mother and in the care of one or more of their fathers throughout their lives, and I have concluded that each would continue to suffer if they remained in that care."

36. The parties agree that these findings effectively ruled out the parents as future carers, not only for the older girls, but also for F. In her case, the Judge nevertheless decided on balance to defer (as he put it) to the Guardian's opinion, which meant leaving F at

home with her parents under an interim care order to await an expected final hearing in four or five months' time after the special guardianship assessment of B.

37. I have summarised the judgment at some length in an attempt to do justice to the evident care taken by the Judge and to bring out the balanced nature of his assessments.

The appeal

38. M, supported by F3, sought permission to appeal, and on 30 July I granted a stay. On 12 August, King LJ gave permission to appeal. The two broad grounds of appeal that have emerged can be summarised in this way:

> 1. The court fell into error by relying on the flawed analysis of Dr Freedman as to the risk of harm to the extent it did, and was consequently wrong to rely on the evidence of the social workers and Children's Guardian that placed so much weight upon it.
>
> 2. The court did not properly consider the current risks to the children and its orders are disproportionate to the risks the children currently face.

When making our orders, both King LJ and I identified the real substance of the appeal as falling under the second ground.

39. As to ground 1, it was argued, particularly by Ms Emily Beer on behalf of F3, that Dr Freedman's assessment of risk was permeated by a number of unproven, and in some case mistaken, facts. That, she contended, offends the distinction drawn by the law between facts and concerns. I can immediately say that there is nothing in this argument. In the administration of justice, the court acts only on proven facts, but it is not entitled to insist on other professional disciplines taking the same approach. A psychiatric assessment may be based on information of all kinds, and not merely on matters that are more probably true than not. Provided there is clarity about what the position is, the court is able to make its own assessment of the weight that can be given to the opinion. That is what the Judge did in cautioning himself about the limited aspects of Dr Freedman's advice that were based on error or contentious information. There is nothing unusual about that and this ground of appeal can in my view be set to one side.

40. In relation to the question of proportionality, Ms Kate Grieve (appearing pro bono along with Ms Lara Izzard-Hobbs and their instructing solicitor) accepts that the Judge directed himself appropriately, and she acknowledges the high hurdle facing an appellant from an evaluative decision of this kind, as expressed in *Re B (A Minor)(Adoption: Natural Parent)* [2001] UKHL 70, [2002] 1 WLR 258 by Lord Nicholls at [19]:

> "Cases relating to the welfare of children tend to be towards the edge of the spectrum where an appellate court is particularly reluctant to interfere with the judge's decision."

However, she argues that in this case, the Judge did not truly evaluate the harm that the children might suffer and did not properly balance up the positives and negatives of removal.

41. The supporting submissions of Ms Beer took the argument further. She referred to this court's decision in *Re F (A Child - Placement Order - Proportionality)* [2018] EWCA Civ 2761, in which I suggested that in assessing the risk of future harm, the court should consider: the *type* of harm that may arise; the *likelihood* of it arising; the severity of the *consequences* if it arose; and what *risk reduction or mitigation* steps can be taken. Having reached its conclusion about those matters, the court should make a *comparison* of the welfare advantages and disadvantages of each course of action and finally step back and check that any interference with rights arising from its proposed decision is *necessary and proportionate*. In summary: in a case that turns on risk of harm, does the risk justify the remedy?

42. In answer to questions from the court, both Ms Grieve and Ms Beer submitted that the judgment showed that the type of harm with which the Judge was concerned was sexual abuse and that he squarely identified the risk as coming from A: see paragraphs 160-161, cited above, and paragraph 46, in which Dr Freedman, whose evidence was accepted, is recorded as saying that the risk from F2 may be manageable. In practice, they submit, the risk from F2 had been managed by supervision of his contact with E. In assessing the likelihood of future harm, the Judge limited himself to saying that it could or may arise: see paragraph 163, cited above. He should have noted that the serious incident involving A and E was the only time when any of the children had come to sexual harm since 2014. In particular, there had been no evidence of any further breach of the rules and the injunction against A was proving effective. Nor did the Judge address the protective possibilities of a supervision order in circumstances where the family had been cooperative during the course of the proceedings.

43. In further submissions, Ms Beer argued that the Judge's decision could only be justified by his assessment of risk. The case was not about reparative parenting, which in the context of this case would amount to social engineering. She further argues that individualised consideration was not given to the different situations of each child (in particular that of C) and that the care plan for the separation of each child would be particularly burdensome, with each of them worrying about the other, and about their parents and baby sister. Finally, while the Judge correctly directed himself as to the comparative evaluation and proportionality, he did not meaningfully carry out these processes in practice.

44. The appeal is opposed by the Local Authority and the Children's Guardian. On behalf of the Local Authority, Ms Sharan Bhachu explained that in the case of F, the assessment of B as a carer was due to be filed on 18 October. In F's case, the quality of the parents' practical care is not the issue and the Local Authority's case rests on the risk of sexual harm. She acknowledged that an order removing older children on grounds of risk, while leaving a younger one at home for a significant period of time, is extremely unusual, though it is fair to note that this was not the Local Authority's preferred plan. In relation to the harm to the children, the Judge described the allegations as being "rather more wide ranging" (see paragraph 10 of his judgment, above), and this includes what might be described as the fall-out for all of the children from the 2019 incident.

45. Ms Bhachu accepted that the Judge did not explicitly compare the advantages and disadvantages of each of the options, but the professional witnesses, whose evidence he accepted, had done so. The fundamental point was that the Judge based his overall assessment on the finding that the parents lacked insight and that their inability to learn meant that the necessary protective work could not be carried out. He had rejected the mother's claim not to have understood Judge Wright's decision, and found that the 2017 holiday showed her lack of understanding. At the same time Ms Bhachu accepted that the holiday had not been the subject of previous reliance or criticism by professionals, indeed they had not known about it until M and F2 described it. Further, she accepted that the non-molestation order against A could be extended indefinitely beyond the end of the proceedings.

46. F2 represented himself at the hearings before the Judge and made short written submissions to us. In contrast to his previous position, these support M's appeal. He states that the main risk to the children comes from himself and A. He himself has had safe supervised contact for eight years, which must count for something. He is critical of aspects of Dr Freedman's assessment. His daughter E is terrified of being taken into foster care. A took an opportunity to assault her, but M and F3 would not let that happen again. They can parent all the children with the right long-term help, but the Local Authority has not given that.

47. For the Children's Guardian, Ms Amanda Meusz supported the arguments of the Local Authority. She asserted that the Judge did consider whether the risk to the children could be mitigated, though she was unable to point to a passage in the judgment that reflects this. She accepted that the children had not been removed on an interim basis and that there had been no repetition of the events of November 2019, but noted that the family has been under the spotlight of the proceedings during this period.

48. As to what should be done if the appeal were to succeed, the Local Authority argued that the matter should be reheard. Ms Bhachu submitted that the risks were too great for supervision orders, and that care orders with the children remaining at home were unrealistic, though she accepted that that outcome would be open to the court. Ms Grieve, for M, argued that there should be a final decision, not a rehearing. Ms Meusz expressed the Guardian's preference for supervision orders over a rehearing, on the basis that the children require finality. The uncertainty is causing stress to all family members and delays the moment when the children can start to receive therapy. A one-year supervision order could be extended to three years if necessary, and a decision about that should be taken after nine months.

Conclusion

49. As the length of this judgment indicates, I have not found this an easy appeal. The conscientious decision of a judge who knows so much about a complex family is entitled to the greatest latitude on appeal, particularly where legal principles have been correctly identified and where the decision follows unanimous professional advice. Decidedly, the test is not whether we might think we would have arrived at a different conclusion had we been considering the matter for the first time; the quite different question for us is whether the Judge's conclusion was wrong: *R (Z) v Hackney London Borough Council* [2020] UKSC 40, [2020] 1 WLR at [56], [74] and [119-120]. However, and giving full weight to these important considerations, the anxiety that I felt about the outcome for these children when granting a stay of the Judge's order has

not been dispelled by the processes of hearing the appeal and of thoroughly reviewing the matter thereafter. Instead, it has led me to a measured conclusion that the Judge's decision was wrong and that it cannot stand.

50. There are two significant matters which, in combination, lead to this result. The first is that the judgment does not adequately address the fundamental issue in the case: the balance of advantage and disadvantage for the three older children of remaining at home or being removed. The second is that, if that decision is left undisturbed, it will have huge implications for F, greatly magnifying the impact of the first error. I take these matters in turn.

51. The kernel of the Judge's decision appears at paragraph 176 of the judgment, cited above, where he said that it was necessary to place the children in foster care as being

> "… the only way, I think, of stopping the difficulties that the children have suffered in the care of their mother and in the care of one or more of their fathers throughout their lives, and I have concluded that each would continue to suffer if they remained in that care."

52. I first consider what the Judge meant by "the difficulties". Even allowing for his earlier remark that the allegations at the final hearing were "rather more wide ranging" than they had been at the fact finding hearing, it is clear that he was centrally concerned with the sexual risk from A, and to a lesser extent the risk from F2, and the emotional fall-out from those risks. The parents, he said (at paragraph 161) had shown an inability to provide a home that is safe from A and safe from sexual abuse.

53. It was not in my view open to the court to remove the children on the basis of neglect, because the local authority did not seek a finding about that (paragraph 131). Further, although the Judge briefly referred (at paragraph 155) to the children's need for "better than ordinary parenting… [r]eparative parenting that is able to deal with their emotional and educational needs in a way which neither M or F3, or indeed F2, could", there is no reasoning that could justify removal on that ground. There would need to be an analysis of what reparative care would mean for these children, beyond the better parenting that can be expected from foster carers. As Hedley J has said, it is not the provenance of the State to spare children all the consequences of defective parenting. In practical terms, it was confirmed to us that the children are due to receive treatment at CAMHS, wherever they live, but that this can only begin when there has been a decision about their future placements.

54. There is no possible fault in the Judge's findings that A represents a serious sexual risk to the younger children, or that he was in effect entitled to find that there was a real possibility of repetition, and that the consequences of any repetition would be serious. But that was not an end to the matter. The next question was whether the risk could be reduced or mitigated. The Judge found that M was not sufficiently protective because of her "blind spot" in respect of A, and that F3 offered limited additional protection because he effectively deferred to M concerning her children. Those conclusions were in my view securely underpinned by the professional evidence. However, the Judge did not go on to address the fact that the combination of non-molestation orders against A and F2, and interim supervision orders to the Local Authority, had coincided with a period of 1½ years where the children had been kept safe from sexual harm, where the

parents were to a certain degree cooperative, and where there had been praise for their care of F. The Local Authority submitted to us that this might be put down to the family being "in the spotlight" of the proceedings, but the Judge made no such finding.

55. The welfare checklist of course requires the court to have regard in particular to seven factors. The last – *"the range of powers available to the court under this Act in the proceedings in question"* – risks being a poor relation to the other six, perhaps because they all relate to the individual children and parents. However in a case of this kind it is an important element of the checklist because it gives the court the occasion to conduct the proportionality cross-check by explicitly comparing what might be achieved under the different possible orders. In this case, the Judge did not assess this checklist factor, and he was not referred to *Re F*. Perhaps in consequence, the judgment does not explain why final supervision orders, which could be extended to three years if necessary, would be unequal to the task of keeping the children safe. This potentially decisive evaluation was lacking.

56. This absence of any assessment of the external protective factors is a matter of particular significance where the case for the children's removal was anything but clear-cut. These care orders were particularly strong orders, being intended to last for the rest of childhood and involving the total disintegration of a family that, for all its faults, is the only home the children know, and to which they are extremely attached. The Judge himself, when granting a seven-day stay of his order, rightly described it as "such a massive change in the lives of these three young children". He had referred to their wishes and feelings, which must be a weighty factor in C's case, and he referred (see paragraphs 143 and 157, cited above) to the parents' case that the girls would be "devastated" by removal and separation, and that the effect on them would be "destructive", but he did not seemingly place weight on those matters beyond saying that if a foster placement broke down, other placements would be available. The arguments against removal were in my view considerable, and a decision that surmounted them had to be closely argued. It is not enough to say that continued placement would not be safe, without giving careful consideration to the possible efficacy of measures that might make it safer.

57. In summary, making every allowance for the fact that this was an extempore judgment, I am driven to accept the submission that it does not contain an assessment of the welfare advantages and disadvantages of the rival plans for the children. The Judge stated a number of the relevant factors, so he clearly had them in his mind, but it is not possible to see how he balanced them out. Instead, there is a stated conclusion that the home is "unsafe" which faces the difficulties I have identified above, which prioritises the risk from A in particular above all other factors without any attempt to synthesise that factor with others.

58. The second factor in my assessment concerns F. The Judge did not explicitly rule out the parents by making what is sometimes referred to as a *North Yorkshire* finding (*North Yorkshire County Council v B* [2008] 1 FLR 1645). However, the parties agree that he has effectively done that and that, for the same reasons that relate to the older children, F will be adopted if she is not to be placed with B.

59. The matter therefore comes before us in a very unusual state. The decision that we are considering effectively covers four children, but because of the state of the underlying proceedings, the appeal only relates to three. I also cannot recall a precedent for this,

or for a situation where a court has decided that older children must be removed because of certain risks, while a much younger child who is said to face the same risks remains at home awaiting a decision. It would, I think, have been open to the parents of F to have sought to appeal from the interim care order in her case but, given the lack of an explicit decision, they are not to be criticised for not doing so until the outcome of the assessment of B is known. Indeed it is another notable feature that the court deferred to the Guardian's recommendation for a full assessment of B, despite her age, her own difficulties, and the negative viability assessment.

60. The consequence of all this is that it is impossible for us to ignore the fact that our decision may have profound consequences for F as well as for the older children. There might be thought to be some distinctions between their situations, notably F's young age and the fact that she is F3's own child. However, the Judge made no such distinction. The potential impact on F of the decision about the older children is a further reason why the existing decision must be set aside.

61. I would therefore allow the appeal and, despite the advantages of making a final decision and substituting supervision orders, as proposed by the parents and by the Guardian in that eventuality, I would remit the matter to the Family Court for further consideration alongside F's case. However, it will be seen that the other members of the court have reached a different conclusion to mine, and the appeal in relation to these three children must therefore be dismissed.

Lady Justice Elisabeth Laing:

62. Like Peter Jackson LJ and Lewison LJ, I have also found this a very difficult case. I am very grateful to the former for the lucid and balanced way in which he has set out the background, summarised the judgment, and described the issues on this appeal. I am very grateful to the latter for his exposition of the law governing appeals such as this. Like Lewison LJ, I also pay tribute to Peter Jackson LJ's knowledge of, and experience in, this field. They are infinitely greater than mine.

63. The question at the heart of this appeal is whether, and if so, in what circumstances, the state should break up a family. That is one of the most drastic steps which the state can take. It is clear from the judgment of HHJ Judge McPhee ('the Judge'), and from those of Peter Jackson LJ and of Lewison LJ, that this is a particularly difficult case, because there are powerful factors pointing in opposite directions.

64. But this is not a case in which the decision has been made hastily, or arbitrarily. Conscientious social workers have worked with this family for many years. There have been many court hearings, over many years. The incident which led to the decision under appeal was the subject of a nine-day fact-finding hearing. Its implications were then the subject of a six-day welfare hearing.

65. I understand the considerable misgivings which Peter Jackson LJ has expressed about the potential effect of this care orders in this case. As a human being, and a parent, I share them.

66. But we have a system for making and supervising decisions such as these. That system requires, first, conscientious and diligent judges in the Family Court to bring to bear all their specialist experience to cases like these. They listen to the evidence, sometimes

over many days. They make their own multi-faceted assessments of the evidence. They then have to make decisions, within a well-defined legal framework, and to explain their decisions, in cases which, I have no doubt, impose unique intellectual and emotional demands. The sheer difficulty of making and explaining a decision like this cannot be underestimated.

67. The second part of our system is the appeal. In a case like this, there is a temptation for an appellate court to wish to reflect, in its decision, its unease about, or disagreement with, the decision of the fact-finder, particularly when a case is as finely balanced as this case is. But it is precisely in the very hard cases that the appellate court must take the greatest care to resist that temptation. There is no identifiable error of law in the approach of the Judge. He has been immersed in this case for a long time. I do not think that it could be suggested that there is any aspect of this case which was not present in his mind when he delivered his ex tempore judgment, even if he has not mentioned every point expressly, or analysed the case in the same way as another judge might have done.

68. There is a range of different ways in which a judgment like this can be expressed, just as there is a range of reasonable decisions which are open to the first instance judge; even if sometimes that range is confined to a choice between two available options. The Judge had to make his own assessment of a complicated picture and then, on the basis of that assessment, to make a very difficult decision. In our system, that decision was for him to make. I found the submissions of Ms Beer, in particular, very persuasive. The judgment of Peter Jackson LJ is cogent indeed. But I cannot say that the decision of the Judge was 'wrong' (in the sense in which that word used in the test for allowing an appeal in a case like this).

69. I agree with the judgment of Lewison LJ. I would therefore dismiss this appeal.

Lord Justice Lewison:

70. Like Peter Jackson LJ, I have found this a very difficult case; and I well recognise that he has far greater experience and expertise in this kind of case than I do.

71. The judge gave himself impeccable legal self-directions at [132] to [142]. He clearly had all the relevant considerations in mind. How he applied those legal self-directions turns on his evaluation of the facts.

72. In *Re B (A Minor) (Adoption: Natural Parent)* [2002] 1 WLR 258 Lord Nicholls of Birkenhead said:

> "16. …There is no objectively certain answer on which of two or more possible courses is in the best interests of a child. In all save the most straightforward cases, there are competing factors, some pointing one way and some another. There is no means of demonstrating that one answer is clearly right and another clearly wrong. There are too many uncertainties involved in what, after all, is an attempt to peer into the future and assess the advantages and disadvantages which this or that course will or may have for the child."

73. As Peter Jackson LJ has said, we can only interfere with the judge's assessment if we are satisfied that his decision was wrong.

74. In *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 Lord Wilson JSC said at [42]:

> "The function of the family judge in a child case transcends the need to decide issues of fact; and so his (or her) advantage over the appellate court transcends the conventional advantage of the fact-finder who has seen and heard the witnesses of fact. In a child case the judge develops a face-to-face, bench-to-witness-box, acquaintanceship with each of the candidates for the care of the child. Throughout their evidence his function is to ask himself not just "is this true?" or "is this sincere?" but "what does this evidence tell me about any future parenting of the child by this witness?" and, in a public law case, when always hoping to be able to answer his question negatively, to ask "are the local authority's concerns about the future parenting of the child by this witness justified?" The function demands a high degree of wisdom on the part of the family judge; focussed training; and the allowance to him by the justice system of time to reflect and to choose the optimum expression of the reasons for his decision. But the corollary is the difficulty of mounting a successful appeal against a judge's decision about the future arrangements for a child."

75. In this case the judge made clear findings about M's parenting ability. M has had significant opportunities to change but has not done so: [45]. Although she says the right things, she does not put them into practice: [47]. This is due to M's limited emotional and intellectual intelligence: [48]. She cannot respond to something new happening: [49]. She cannot put what she has learned into practice: [79]. She claims not to have understood HHJ Wright's 2013 judgment, but the judge rejected that evidence: [101]. He found that she was not blind to the risk of letting A into the house and she was aware of the sexual risk he posed: [103], [104], [128]. F3 knew that A had sexually abused his own son, yet still let him into the house. He knew that there was a risk of real harm to the children; [104]. He also considered that M and F3 had made things worse by the delay in reporting the incident to the local authority. Thus he concluded at [107] that M and F3 knew what the harm was, took unjustifiable risks and connived with each other to achieve that.

76. In the light of his findings the judge concluded that the children's home was now unsafe because of M and F3's inability to provide a safe home: [161], [163]. They are not capable of providing for the safe needs of the children. They have not learned sufficiently or understand or have the capability of learning and understanding [165]. It would not be safe for the children to remain in the care of M and F3: [169]. The local authority's care plan was the only way of stopping the difficulties: [176].

77. Peter Jackson LJ has identified some factors which he considers the judge skated over in conducting the balancing exercise when considering proportionality. But as Lord Wilson said in *Re B* at [40]:

> "Thus an error in the balancing exercise justifies intervention only if it gives rise to a conclusion that the judge's determination was outside the generous ambit of reasonable disagreement or wrong within the meaning of the various expressions to which he had referred."

78. As I read the judgment, the judge was particularly impressed by the fact that less intrusive interventions had been in place for many years, with little sign of success. M had undertaken courses but was not able to put into practice what she had learned. Contrary to M's evidence he considered that she still had a blind spot for A.

79. Are we in a position to say that the judge's final conclusion was wrong? As Peter Jackson LJ rightly says the question is not whether we would have reached the same decision as the judge. In cases which are marginal it is, in my judgment, all the more important to trust to the wisdom and discretion of an experienced family judge, particularly one who has been immersed in the evidence, not only in relation to the welfare decision but also the prior fact-finding decision.

80. I agree that the judge's decision to leave F at home is questionable, but that is not the subject of any appeal before us.

81. Although Lord Neuberger's dissection of the concept of "wrong" in *Re B* at [93] has perhaps been overtaken by events (see *R (Z) v Hackney London Borough Council* to which Peter Jackson LJ has referred), I find myself in the uncomfortable position of reviewing a decision which I cannot say was right or wrong. In that situation Lord Neuberger considered that the appeal should be dismissed.

82. Since writing this judgment, I have had the advantage of seeing the draft judgment of Elisabeth Laing LJ. I agree with everything she says. I too would dismiss the appeal.

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