Neutral Citation Number: [2023] EWCA Civ 59

Case No: CA-2022-001828

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WOLVERHAMPTON
HH Judge Lopez
WV2100104

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 February 2023

Before :

LORD JUSTICE BAKER
LORD JUSTICE WARBY
and
LADY JUSTICE FALK

- -

H (PARENTS WITH LEARNING DIFFICULTIES: RISK OF HARM)

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- -

Lorraine Cavanagh KC and Kathryn Anslow (instructed by **Clarkes Solicitors**) for the **Appellants**
Stefano Nuvoloni KC and Louise Higgins (instructed by **Local Authority Solicitor**) for the **First Respondent**
Kirsty Gallacher (instructed by **Talbots**) for the **child by her Children's Guardian** (written submissions only)

Hearing date : 6 December 2022

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Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 2 February 2023.

LORD JUSTICE BAKER :

Introduction and background

1. This is an appeal against care and placement orders made in respect of a child, referred to in this judgment as "H", who is now aged 22 months.

2. H's parents both have cognitive difficulties. Her mother has a diagnosed learning disability. Her father has difficulties but does not meet the criteria for a learning disability.

3. H has three much older brothers, whom I shall call "D" (now aged 23), "E" (19), and "F" (16), and a sister, "G" (13). All four have cognitive impairments.

4. The local authority has been heavily involved with the family since 2011. D, then twelve years old, with the cognitive function of a child half his age, was alleged to have inappropriately touched a five-year-old girl. With the parents' agreement, D moved into local authority care. Since that time, he has largely lived away from the family home and now lives in supported accommodation. All four children were made subject to child protection plans until 2013 when they were reclassified as children in need.

5. Over the next few years, there were a number of referrals to the local authority's children services raising concerns about the children, in particular their relationship with associates of the family, allegations of aggressive and sexualised behaviour on the part of E and F, and violence allegedly shown by D towards E. In September 2018, E, F and G were again made subject to child protection plans on the basis of risk of sexual harm, and the parents signed a working agreement under which the children were not to have unsupervised contact with D, and G was not to be left alone with any of her brothers.

6. In February 2019, the local authority started care proceedings in respect of D, E and F. At that stage, E appeared to be beyond parental control and the local authority was worried that the children were still spending time with D and adults known to present risks to children. In a series of therapeutic sessions, G made allegations about E and F. She said that they were "mean", that they hit, punched and kicked her, that they went into her bedroom when she did not want them to, that they showed her their genitals in the woods and that she felt unsafe when her parents were not at home. She indicated with visual aids that E and F had touched her genitals. On 28 March 2019, G was made subject of an interim care order and she was placed in foster care.

7. On 10 July 2019, E dragged his mother from the bath to the landing and sexually assaulted her. On 12 July, E was made subject of an interim care order and a secure accommodation order. On 18 May 2020, all parties agreed that E was beyond parental control and on that basis he was made subject of a full care order.

8. On 11 February 2021, final care orders were made in respect of F and G. The care plans approved were for F to remain at home in his parents' care and for G to stay in long-term foster care. It is important for the purpose of this appeal to note that findings in relation to G's allegations about E and F were not sought by the local authority and

HHJ Lopez rejected an application by G's guardian to invite the local authority to seek such findings.

9. Meanwhile, the mother was pregnant again. A prebirth assessment concluded that she had the capacity to meet basic care needs but there were concerns about her ability to understand risk and to provide stimulation to a growing child. A Care Act assessment concluded that the mother was independent in all daily activities and did not meet the eligibility criteria for services from Adult Social Care.

10. On 19 March 2021, the mother gave birth to H, the subject of this appeal. Three days later, the local authority issued care proceedings in respect of the baby. On 24 March 2021 at a hearing before a district judge, she was made subject to an interim care order but remained at home with her parents under a working agreement. The case was allocated to HH Judge Lopez.

11. Over the following year, seven further interim hearings took place before the judge at which a succession of directions were given. During this time there were continuing reports of aggressive behaviour by F who was still living at home. But H was seen as developing well with age-appropriate behaviours. There were no concerns about the mother's basic childcare and professionals observed emotional warmth and affection between mother and baby.

12. On 13 June 2022, fifteen months after the start of the care proceedings concerning H, a final hearing took place. The hearing continued for eleven days until 5 July, after which judgment was reserved and handed down on 8 September. Under the order made following judgment, the judge made care and placement orders and refused the mother's application for permission to appeal. He directed that any application for permission to appeal be made by 4pm on 15 September and granted a stay of execution of the removal of H from her parents' care until this Court had determined the mother's application for permission.

13. On 15 September, the parents filed a notice of appeal to this Court. On 21 November 2022, I granted permission to appeal and extended the stay until the determination of the appeal. Thus, at this point H remains with her parents at home where she has lived all her life.

The judgment

14. The judgment is the longest I can recall encountering in care proceedings. It extends over 138 single-spaced pages, 335 paragraphs and 85,000 words. Paragraphs 1 to 8 contain an introduction, the details of the parties, and the basis on which the local authority asserted that the threshold criteria under s.31 of the Children Act 1989 were satisfied. Paragraphs 8 to 49 contain what is described as a summary of the essential background of the case. In paragraphs 50 to 81 the judge sets out the law, including extensive quotation from 17 reported judgments and citation of a number of other authorities. Paragraphs 82 to 267, headed "The Evidence", include what amounts to almost a verbatim account, or at least a very full record, of the evidence. This begins with a summary of the written evidence about the earlier care proceedings concerning E, F and G, in which, as the judge acknowledged, the local authority had not sought, nor the court made, any findings on the allegations, including the allegations made by G against her brothers. The judge then sets out the evidence of 17 witnesses, of whom

14 had given oral evidence, including several social workers and family support workers employed by the local authority, Mr Roger Hutchinson, a consultant psychologist who had carried out assessments of the parents during the earlier proceedings concerning the other children but had not been instructed to reassess them for the present proceedings, Dr Gabrielle Gregory, another psychologist who had carried out assessments of the parents in the current proceedings, Ms Bridie Steventon, an independent social worker who had undertaken a PAMS assessment of the parents, the mother, the father and the guardian. This is by far the largest section of the judgment and includes lengthy quotations from the written and oral evidence. Paragraphs 268 to 333 contain the judge's analysis of the evidence and his reasoning, and the judgment concludes with the judge recording his ultimate decision.

15. I hesitate to criticise this experienced judge after the enormous effort he expended and the commendable diligence he showed in producing his judgment. I also bear in mind the axiom about pots and kettles. On any view, however, this judgment is far too long.

16. The law reports contain many lengthy judgments in care proceedings, but invariably they have involved issues about whether the threshold criteria were satisfied which necessitated analysis of complex and disputed evidence, often detailed medical evidence. It should be noted, however, that the parents in this case conceded that the threshold criteria under s.31 were satisfied. The issue for the court was therefore what order to make in the light of that concession. Once it is established that the threshold is crossed, there may be complex and finely-balanced issues about the appropriate order, and the judge will have to conduct the holistic balancing exercise of analysing the advantages and disadvantages of the realistic options – see *Re H-W (Children)* [2022] UKSC 17. But this latter exercise can generally be completed reasonably succinctly.

17. In those circumstances, a recitation of the evidence extending to in excess of 60,000 words is manifestly excessive. I note with some alarm the judge's observation towards the end of his judgment (paragraph 332) that the court had "not referred to every aspect or detail of the evidence" but instead "focused on the principal evidence and the reasons for making its findings and decisions". With respect to the judge, his recitation of the evidence extends far beyond that.

18. This Court has repeatedly emphasised the measured expectations of a judge when giving the reasons for his decision. A frequently cited example is the judgment of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at paragraph 115:

> "[The judge] should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted."

19. More recently, in the context of care and placement applications, Peter Jackson LJ in *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ 407 at paragraph 59 gave this advice:

> "Judgments reflect the thinking of the individual judge and there is no room for dogma, but in my view a good judgment will in its own way, at some point and as concisely as possible:
>
> (1) state the background facts
>
> (2) identify the issue(s) that must be decided
>
> (3) articulate the legal test(s) that must be applied
>
> (4) note the key features of the written and oral evidence, bearing in mind that a judgment is not a summing-up in which every possibly relevant piece of evidence must be mentioned
>
> (5) record each party's core case on the issues
>
> (6) make findings of fact about any disputed matters that are significant for the decision
>
> (7) evaluate the evidence as a whole, making clear why more or less weight is to be given to key features relied on by the parties
>
> (8) give the court's decision, explaining why one outcome has been selected in preference to other possible outcomes."

20. In the same passage, Peter Jackson LJ stressed the need for every judgment to have a structure. In that respect, the judge in the present case complied with the guidance. His judgment has a commendably clear structure. But its content is overwhelming.

21. In *Re N-S* [2017] EWCA Civ 1121, McFarlane LJ (as he then was) observed at paragraph 30:

> "Not only is the presentation of adequate reasoning of immediate importance to the adult parties in the proceedings (in particular the party who has failed to persuade the judge to follow an alternative course), it is also likely to be important for those professionals and other judges who may have to rely upon and implement the decision in due course and it may be a source of valuable information and insight for the child and his or her carers in the years ahead."

In that case, McFarlane LJ was concerned with a judgment with inadequate reasoning. But the points he makes apply equally to a judgment of excessive length. There is a risk that a professional who, for whatever reason, has to read the judgment will find it difficult to identify important information if it is buried in a long judgment. In the

present case, it is inconceivable that these parents, with their acknowledged difficulties, would be able to read the whole judgment, and even with assistance they may struggle to understand what is said. If H were to read it when she is older, it would be a long and difficult process for her to gain any insight into the judge's reasons for the crucial decisions about her care.

22. More pertinently to this appeal, there is a danger that a judge who has failed to filter the evidence, and simply recited it verbatim in his judgment, may lose his own way when he comes to conduct his final analysis. It may be more difficult for the judge to stand back, identify the critical features and apply the level of scrutiny of the evidence that is required.

23. The agreed threshold set out at paragraph 7 was substantially in these terms:

> "(a) The family has been known to the local authority since May 2011 due to concerns that the older children, D, E, F and G were at risk of sexual harm. The older children have been subject to child protection plans and E, F and G are all subject to care orders.
> (b) During the course of the previous proceedings, there was a psychological assessment of the family by Roger Hutchinson dated 11 August 2020. That assessment concluded:
> i. The parents have not demonstrated consistent emotional attunement and responsivity to the children's needs, as a result of which, they have experienced emotional and psychological neglect.
> ii. The parents have exposed their children to a number of Adverse Childhood Experiences (ACE), including neglectful parenting from a mother with an intellectual disability and a father with cognitive deficits.
> iii. The older siblings have witnessed domestic disputes between the parents, and appropriate modesty, social and moral boundaries have not been consistently applied in the home.
> iv. The parents have demonstrated that they are unable to deliver parenting that is consistent, predictable and reliable.
> v. The parents are currently unable to deliver the behavioural and modesty boundaries that are necessary to protect their children from identified risks in their familial home or in the wider community (e.g. potential child sexual exploitation).
> vi. The parents are unable to provide safe, consistent and good enough parenting that does not expose their children to further parental neglect or potential abuse when in their care.
> vii. G displays behaviours that are suggestive of an impairment in her psychological wellbeing resulting from her experiences whilst living with her parents.
> (c) The parents accepted in proceedings concluding on 15 May 2020 that E was beyond parental control.
> (d) The parents accepted in the proceedings concluding on 11 February 2021:
> i. The parents have continued to allow (or have been unable to prevent) contact between the children and those adults whom they have been told may pose a risk to their children, thereby exposing them to a risk of further harm….

ii. The family are socially isolated. Members of the community do not interact with them and the children are sometimes targeted when they go into the community …."

24. The judge started his analysis at paragraph 268 by reminding himself again of some key legal principles – the burden and standard of proof, the principle that "a child should be raised by their parents or members of the extended family if it is safe and in the child's best interest to do so", and that a placement order is a draconian order which should only be made if the court concludes that "only adoption will do". He accepted that H loves and is loved by both of her parents and that her mother is her primary attachment figure. Having summarised the evidence set out in detail earlier in the judgment about the parents' learning difficulties, he stated that:

> "for the avoidance of doubt, the court wishes to make it clear at the outset that the fact that a parent is said to have a 'disability' of whatever type or extent does not mean that they are unable to care for their children …. The question for the court is whether any parents, whatever their difficulties may be, is *(sic)* capable of providing 'good enough' care to their child with, if necessary, appropriate and reasonable support."

25. He then identified three "realistic" options for H's future care – placement with her parents, long-term fostering or adoption, reminding himself of the requirement, established by the case law cited earlier in the judgment, to carry out a global evaluation of H's welfare taking into account all of the negatives and positives of each option.

26. The judge then summarised the conclusions of the professional witnesses. Of Ms Steventon's PAMS assessment, he said:

> "Ms Steventon's evidence was clear, namely (i) the parents' inability to meet H's changing needs as she develops; (ii) her concerns about the parents' inability to protect H from "*risky individuals"* – those known to the parents and those within the community; (iii) the risk of H being exposed to hostility within the family home emanating from F and his controlling behaviour; and (iv) the parents' lack of insight, despite extensive work being done with them over a prolonged period, led her to the conclusion that the parents cannot provide safe and adequate care for H as she grow and develops."

He summarised the opinion of H's current key social worker that, while the mother had provided good basic care for H, the parents would on a balance of probabilities be unable to provide safe and adequate care for her as she grows and develops. He summarised the opinion of Dr Gregory that:

> "additional teaching, training or guidance for the parents and the time to take the same on board would not result in them being able to provide safe, adequate and constant care as she grows and develops such that the adverse childhood experiences suffered by her older siblings whilst in the care of the parents are not experienced by H."

The judge added that he accepted and adopted the evidence of these three witnesses.

27. The judge then turned to the opinion of Mr Hutchinson. Like the other professional witness, it was his view that the older children had "experienced adverse childhood experiences" in their parents' care. The judge continued:

> "As to whether H should remain in the care of her parents, Mr Hutchinson indicated that may be possible if the Local Authority were [to] provide, both now and into the long term, a high level of support and continued teaching, training and guidance to reinforce that which is required of them in order to provide H with safe, consistent and adequate parenting as she grows from being a relatively undemanding infant into a more demanding toddler, child and adolescent."

He added, however, that Ms Steventon, Dr Gregory, the social worker and guardian were all of the view that the level of support suggested by Mr Hutchinson would be "far in excess of that which would be in H's welfare best interests", would "subject the family, but H in particular, to a significant degree of intervention in their family life that would amount to '*substituted*' or '*corporate*' parenting" not just for the short term but for many years to come" and "was far in excess of anything that the Local Authority could be reasonably expected to provide".

Summarising the guardian's evidence, the judge recorded that she had shared the views of others and expressed concern about the parents' inability to protect H from "risky individuals" and the risk of H being exposed to F's behaviour.

28. Next, the judge set out the advantages and disadvantages of the three options, starting with remaining in her parents' care. He stated:

> "The Court accepts without hesitation the benefit to H of being able to live with and be raised by her parents if they are able to provide her with a safe, sure and stable home and are able to meet all of her needs, both physical and emotional, both now and in the future as she grows and develops."

He acknowledged that H was loved by her parents, siblings and extended family, had lived with her parents since birth, that her primary attachment was with her mother, and that she had been well cared for up to now and had a sense of her family identity. On the other hand, he concluded that:

> "The parents have, no doubt in view of the mother's significant cognitive difficulties and the father's cognitive limitations, been unable to provide adequate care for their four older children as they grew and developed, leading to adverse childhood experiences for D, E, F and G. There is a plethora of evidence to indicate that the parents do not have the ability to change so as to provide adequate care for a child, such as H as she develops and becomes more independent, active and challenging."

He returned to the point about the level of support that they would require, noting the consensus of opinion among the professional witnesses (excluding Mr Hutchinson) that:

> "for H to remain in the care of her parents there would have to be a very significant level of involvement by the Local Authority throughout her minority which would amount to "*substituted*" or "*corporate*" parenting – that is parenting in which a significant part thereof is undertaken not by the family but by the professionals involved in the case. It was the view of the Local Authority, Ms Steventon, Dr Gregory and the Guardian that such a high level of intervention in the long term, over the next 16 ½ years, is not reasonable, sustainable or in H's welfare best interests. Significant Local Authority involvement with the family since 2002 – some 20 years, has not prevented the adverse childhood experiences which D, E, F and G endured. The Court accepts that adoption is also a significant intervention in the family life of H and her birth family. However, once the child has been placed and settled with prospective adopters the need for continued and intrusive involvement of care professionals in that "*family*" would cease, or at least be dramatically reduced as compared to that required by the birth family, thus enabling the child and her "*new family*" to dispense with the need for "*substituted*" parenting."

29. The judge then turned to the risk of harm. He reiterated that there had been no findings on any allegation of sexual abuse and that the court "has not, therefore, dealt with the same as if the allegations were proven fact". He continued:

> "300. However, the parents' views, as set out in their written evidence and during the course of their oral evidence to the Court, upon whether D, E and / or F may pose a sexual risk to H are important and relevant factors to be taken into account by the Court. When the parents were questioned during the course of this hearing about whether D posed a sexual risk to H they both accepted that there was a possibility that he did, albeit they stressed they believed the risk to be small. As to F, both parents accepted there was a possibility that he had sexually abused G and that there was a possibility that he posed a sexual risk to H. The parents were more ready to accept the same given E's inappropriate sexual behaviour towards his mother in July 2019, which the mother accepted had occurred. The parents indicated that they would never allow E to have unsupervised "*contact*" with H, and, therefore, in their view the risk was removed. The mother and father both accepted that there was a possibility that F had sexually abused G and, therefore, that he posed a sexual risk to H. The parents indicated that they had never allowed F to be unsupervised with H and would ensure her safety by not allowing F to have any unsupervised "*contact*" if H remained in their care. The difficulty

> of ensuring that H, as she develops from an infant into an older and much more independent child, has no unsupervised "*contact*" with F who lives in the same household and is beyond his mother's control and management, will become increasingly problematic, if not impossible, for the parents.
>
> 301. Every parent should be alert to the risk of sexual harm to the children in their care and, therefore, make appropriate decisions so as to ensure that their children are keep safe from such a risk. In addition, every parent should, being aware of the risk, prepare any child in their care to keep themselves safe from such risks. Despite the absence of findings that D and / or E and / or F were involved in sexually inappropriate behaviour, in the case of E and F with their sister G, the parents, albeit belatedly during the course of their oral evidence, acknowledged the possibility that the same occurred and that, therefore, D, E and F pose a sexual risk to H. If the parents have reached that view, as they told the Court that they had, the Court is entitled to take into account their views and conclusions as to do otherwise would lead to a whole artificial position. However, the views of the parents on the point are but one small part of the totality of the evidence."

30. He observed that there was a wealth of evidence collected over many years that "the risk of harm to a child in the care of these parents is multi-faceted and deep-rooted", that the parenting to the older children had been "neglectful and harmful", and that the parents had been unable to establish and maintain boundaries. He observed that, during their oral evidence, it had become clear that neither parent had any understanding or insight into what had gone wrong in their care of the older children. He then referred to "numerous examples of F's behaviour posing a risk to H", reciting some occasions and concluding:

> "Sadly, if H remains in the care of her parents whilst F also remains living with them, she is likely to be exposed to a real and significant risk of (i) emotional harm as she grows and develops and becomes more aware of F's difficult and challenging behaviours; and / or (ii) physical harm as she become more active and independent and is less able to be protected from his actions, which at times even on the mother's account have been '*rough*.'"

31. Having set out the advantages and disadvantages of long-term fostering and adoption, he then, "for the avoidance of doubt", addressed the six questions which Peter Jackson LJ in *F (A Child: Placement Order: Proportionality)* [2018] EWCA Civ 2761 at paragraph 2, and again in *Re K (Children: Placement Orders)* [2020] EWCA Civ 1503, had suggested should be asked by the court when assessing risk of future harm and setting it in context, namely:

> "(1) What is the type of harm that might arise?
>
> (2) What is the likelihood of it arising?

> (3) What consequences would there be for the child if it arose?
>
> (4) What steps could be taken to reduce the likelihood of harm arising or to mitigate the effects on the child if it did?
>
> The answers are then placed alongside other factors in the welfare equation so that the court can ask itself:
>
> (5) How do the overall welfare advantages and disadvantages of the realistic options compare, one with another?
>
> (6) Ultimately, is adoption necessary and proportionate – are the risks bad enough to justify the remedy?"

32. In answering the first question, the judge observed that the risk of harm to H if she stayed with her parents, was:

> "not limited to the issue of sexual abuse but includes the parents' inability to provide her with consistent, predictable and reliable parenting".

He added that:

> "F's behaviour towards and in the presence of H has posed a significant risk of physical harm to her which will, while he lives in the same household as her, continue to pose such a risk."

He then returned to the issue of sexual risk:

> "The Court has made it clear that it has not treated the allegations that (a) D behaved sexually inappropriately towards a young girl when he was a child and / or (b) the allegations that E and/or F behaved in a sexually inappropriate manner towards their sister, G– as she alleged, as proved since the same have not been determined by a Court. As to E's sexually inappropriate behaviour towards his mother, both parents accept that the same occurred. However, the parents' current views about the other allegations made against D, E and F, is *(sic)*, the Court finds, relevant. The parents accepted during the course of their oral evidence that the incidents may have occurred and so there is a risk to H from D, E and F which they must seek to reduce by ensuring that H is never left unsupervised with her brothers. Whilst that may be possible in the short term, while H is young and completely dependent upon her parents, it is not, the Court finds, sustainable and practical in the longer terms as H develops, grows and becomes more independent."

33. The judge answered the second and third questions by reiterating the "significant adverse childhood experiences" of the older children, the "wealth of evidence" that the parents had not changed, and the consequences that they would be "increasingly unable to meet her global needs". As to the fourth question, he noted that it would be possible for the local authority to provide training and guidance, that the view of the

professionals save Mr Hutchinson was that this would not be successful so as to reduce risk, that work to date had not brought about any change, that even Mr Hutchinson accepted that in the light of their cognitive difficulties any training or guidance would have to be provided repeatedly, and that:

> "it would be necessary for the Local Authority to maintain a high level of support and intervention in the family for many years to come, which, the Court finds would constitute "*substituted*" parenting, be unsustainable and impractical in the longer term and contrary to H's welfare best interests in the longer term, particularly as she grows older and become more and more aware of the intrusive nature of the Local Authority's involvement in her life."

The judge concluded by answering the fifth and sixth questions, saying that "the overwhelming evidence is that H's life-long welfare best interests are best met by adoption" which was therefore necessary and proportionate.

The appellants' case

34. Six grounds of appeal were put forward on behalf of the parents.

(1) The judge erred in the analysis of risk in respect of allegations of sexual harm.

(2) The court was wrong in its conclusion that there has been no change within the family, or in the parenting capacity.

(3) The judge erred by failing to analyse adequately the level and nature of support the family are likely to require if caring for H, which led to an erroneous conclusion that this would amount to "substituted parenting".

(4) The judge was wrong to conclude that extensive work had been undertaken with the family and failed to adequately consider what work had in fact been undertaken.

(5) The judge erred in his analysis of risk to H from her brother F.

(6) The court in determining that a placement order was demanded in this case failed to apply a proportionate approach to the issues before him.

In submissions, Ms Lorraine Cavanagh KC leading Ms Kathryn Anslow recast the grounds in a different order, which I shall follow below.

Risk of sexual harm (ground 1)

35. Under s.31(2) of the Children Act 1989,

> "A court may only make a care order or supervision order if it is satisfied
>
> (a) that the child concerned is suffering, or is likely to suffer significant harm; and

> (b) that the harm, or likelihood of harm, is attributable to (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or (ii) the child's being beyond parental control."

36. The interpretation of these criteria is now well established having been considered by the House of Lords, and subsequently the Supreme Court in a series of cases – *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11 and *Re S-B (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17, [2010] 1 AC 678.

37. In the last-named case, Baroness Hale of Richmond, giving the judgment of the court, distilled the established principles into three propositions:

> "First, it is not enough that the court suspects that a child may have suffered significant harm or that there was a real possibility that he did. If the case is based on actual harm, the court must be satisfied on the balance of probabilities that the child was actually harmed. Second, if the case is based on the likelihood of future harm, the court must be satisfied on the balance of probabilities that the facts upon which that prediction was based did actually happen. It is not enough that they may have done so or that there was a real possibility that they did. Third, however, if the case is based on the likelihood of future harm, the court does not have to be satisfied that such harm is more likely than not to happen. It is enough that there is "a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case" (per Lord Nicholls of Birkenhead, [in *Re H*] at p 585F)."

38. Once it is established by applying those principles that the s.31(2) threshold criteria are satisfied, the court must decide what order to make. In doing so, it must have regard to the provisions of s.1 of the Act, including the so-called "welfare checklist" in s.1(3). The checklist includes, under s.1(3)(e), "any harm which [the child] has suffered or is at risk of suffering". An identical provision is contained in the checklist in s.1(4) of the Adoption and Children Act 2002 of factors to which the court must have regard whenever coming to a decision relating to the adoption of a child, including whether to make a placement order. In *Re B*, supra, Baroness Hale, in a judgment with which the other members of the House agreed, expressly endorsed the interpretation of s.1(3)(e) of the 1989 Act advanced by Butler-Sloss LJ in *Re M and R (Minors) (Child Abuse: Evidence)* [1996] 2 FLR 195. At page 203 E to G, Butler-Sloss LJ had said:

> "[Counsel's] point was that if there is a real possibility of harm in the past, then it must follow (if nothing is done) that there is a risk of harm in the future. To our minds, however, this proposition contains a non sequitur. The fact that there might have been harm in the past does not establish the risk of harm in the future. The very highest it can be put is that what might possibly have happened in the past means that there may possibly be a risk of the same thing happening in the future.

> Section 1(3)(e), however, does not deal with what *might* possibly have happened or what future risk there *may* possibly be. It speaks in terms of what *has* happened or what *is* at risk of happening. Thus, what the court must do (when the matter is in issue) is to decide whether the evidence establishes the harm or the risk of harm.
>
> We cannot see any justification for the suggestion that the standard of proof in performing this task should be less than the preponderance of probabilities. Were such a suggestion to be adopted, it would mean in effect that instead of acting on what was established as probably the case, the court would have to act on what was only possibly the case, or even on the basis of what was probably not the case."

39. At paragraph 59 of her judgment in *Re B,* Baroness Hale explained the rationale for these principles in these terms:

> "To allow the courts to make decisions about the allocation of parental responsibility for children on the basis of unproven allegations and unsubstantiated suspicions would be to deny them their essential role in protecting both children and their families from the intervention of the state, however well intentioned that intervention may be. It is to confuse the role of the local authority, in assessing and managing risk, in planning for the child, and deciding what action to initiate, with the role of the court in deciding where the truth lies and what the legal consequences should be. I do not under-estimate the difficulty of deciding where the truth lies but that is what the courts are for."

40. On behalf of the parents on the present appeal, Ms Cavanagh submitted that the judge had gone astray in his analysis of the future risk of sexual harm to H. At the outset of his exposition of the evidence, he had recited the history of the allegations made by G against her brothers E and F, noting in doing so that there had been no findings about those allegations in the earlier proceedings. It would have been open to the local authority to seek findings about these allegations in the current proceedings but it chose not to do so. The court had no proven or admitted factual foundation upon which to base a conclusion that the older brothers pose a sexual risk to H. At its height, it remained a mere possibility. In those circumstances, it had been wrong of the judge to rely on what the parents had said about the possibility during their oral evidence. The fact that the parents accepted the possibility in their oral evidence did not elevate it to the level of risk within the meaning of s.1(3)(e). Furthermore, the judge's analysis of the risk of sexual harm by F to H failed to take into account the fact that F was about to move out of the house. Ms Cavanagh acknowledged that it was an agreed fact that the mother had been sexually assaulted by E and that this did provide an evidential foundation for a finding of risk of sexual harm to H. However, the judge failed to take into account the fact that E is now rigorously supervised by professional staff at all times when he has contact with his family and is not allowed into the home.

41. Ms Cavanagh submitted that the judge's reliance on the opinion of Ms Steventon and Dr Gregory was undermined because they had proceeded on an incorrect assumption

that there was an established risk to H from her older brothers. In her report, for example, Ms Steventon had stated that H was "a young baby whom is being exposed to those who pose a risk of sexual harm to her every day".

The level of support required – "substituted parenting" (ground 3)

42. In *Re D (A Child)(No.3)* [2016] EWFC 1, [2017] 1 FLR 237, the obligation on the state to provide such support as will enable a child to remain with her parents was identified as an aspect of the State's positive obligation under Article 8 of ECHR. In addition, there is a statutory duty under domestic law. Under s.17(1) of the Children Act,

> "It shall be the general duty of every local authority …
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to their needs."

A child of disabled parents is likely to need a range and level of services of a broader range and higher level to ensure that he or she can continue to be brought up by their family.

43. In his exposition of the law, the judge had quoted a passage from the judgment of Gillen J, as he then was, sitting in the Family Division of the High Court of Justice in Northern Ireland, in *Re G and A (Care Order: Freeing Order: Parents with a Learning Disability)* [2006] NIFam 8, cited by Sir James Munby P and set out as an appendix to his judgment in *Re D*, supra. Gillen J's observations and insights are of profound importance to any court hearing a children's case involving a parent with learning difficulties. Of particular relevance to this appeal are the following passages from paragraph 5:

> "This court fully accepts that parents with learning difficulties can often be "good enough" parents when provided with the ongoing emotional and practical support they need. The concept of "parenting with support" must underpin the way in which the courts and professionals approach wherever possible parents with learning difficulties…..
>
> "Children of parents with learning difficulties often do not enter the child protection system as the result of abuse by their parents. More regularly the prevailing concerns centre on a perceived risk of neglect, both as the result of the parents' intellectual impairments, and the impact of the social and economic deprivation commonly faced by adults with learning difficulties. It is in this context that a shift must be made from the old assumption that adults with learning difficulties could not parent to a process of questioning why appropriate levels of support are

> not provided to them so that they can parent successfully and why their children should often be taken into care. At its simplest, this means a court carefully inquiring as to what support is needed to enable parents to show whether or not they can become good enough parents rather than automatically assuming that they are destined to fail. The concept of "parenting with support" must move from the margins to the mainstream in court determination."

44. In *Re D*, the President observed:

> "The proper approach in these circumstances is that mapped out by Gillen J in *Re G and A*. The concept of "parenting with support" is crucial. As Ms Morgan and Ms Sprinz correctly submit, parents must, in principle, be supported and provided with the assistance that, because of their particular deficits, they need in order to be able to care for their child. As Ms Fottrell put it, the *positive* obligation on the State under Article 8 imposes a broad obligation on the local authority in a case such as this to provide such support as will enable the child to remain with his parents."

45. Ms Cavanagh submitted that, although the judge cited these dicta, he erred in law in accepting evidence from the local authority and the guardian that the extent of long-term support that would be required is far in excess of that which the local authority can reasonably be expected to provide. There is no blueprint of support for a disabled adult – it is needs led. In addition to its duties under the Convention, the local authority's statutory duties extended not only to the child but also to the disabled parent under s.17A of the Children Act and under s.1 and 2 of the Care Act 2014. In order to carry out a proper evaluation of the option of H remaining with her parents, the judge needed to identify precisely the package of support that might be provided by the local authority under its statutory duties. He ought also to have assessed how that care would be experienced by the child and how any adverse experiences could be mitigated. Absent this, the internal advantages or disadvantages of the placement options cannot be accurately considered, and the side-by-side comparison cannot be a fair or accurate process.

46. Ms Cavanagh cited the well-known observation of Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050:

> "50….society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done.

> 51. That is not, however, to say that the state has no role, as the 1989 Act fully demonstrates. Nevertheless, the 1989 Act, wide ranging though the court's and social services' powers may be, is to be operated in the context of the policy I have sought to describe. Its essence, in Part III of the 1989 Act, is the concept of working in partnership with families who have children in need. Only exceptionally should the state intervene with compulsive powers and then only when a court is satisfied that the significant harm criteria in section 31(2) is made out."

That passage was cited by Lord Neuberger in *Re B (A Child)* [2013] UKSC 33 who observed (at paragraph 105):

> "The assessment of [the parents'] ability to discharge their responsibilities must, of course, take into account the assistance and support which the authorities would offer. That approach is the same as that suggested by Hedley J in the passage quoted in para 67 above, and I agree with it. It means that, before making an adoption order in such a case, the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support."

Subsequently in *Re B-S (Children) (Adoption: Leave to Oppose)* [2013] EWCA Civ 1146 at paragraphs 28 to 29, Sir James Munby P cited Lord Neuberger's words and observed:

> "It is the obligation of the local authority to make the order which the court has determined is proportionate work. The local authority cannot press for a more drastic form of order, least of all press for adoption, because it is unable or unwilling to support a less interventionist form of order. Judges must be alert to the point and must be rigorous in exploring and probing local authority thinking in cases where there is any reason to suspect that resource issues may be affecting the local authority's thinking."

47. Ms Cavanagh also cited from the "Good practice guidance on working with parents with a learning disability", which was quoted by the judge in a footnote to paragraph 158 of the judgment, and was originally published in 2007 by the Department of Health and the Department for Education and Schools and most recently updated in July 2021 by the Working Together with Parents Network:

> "1.4.1 A need for long-term support does not mean that parents cannot look after their children. Some parents with learning disabilities will only need short-term support, such as help with looking after a new baby or learning about child development and childcare tasks. Others, however, will need on-going support. Most may need support at various points of their family's life cycle for two main reasons.

> First, although a parent with learning disabilities can learn how to do things, their cognitive impairment will not go away. Just as someone with a physical impairment may need personal assistance for the rest of their life so a person with learning disabilities may need assistance with daily living, particularly as new situations arise. Second, children and their needs change. A parent may have learned to look after a baby and young child and be coping well. However, as the child enters adolescence other support needs may arise.
>
> …
>
> 1.4.4. In a number of cases, courts in England have accepted the local authorities' position that the amount of long-term support needed equated in effect to 'substituted parenting', which was considered to be harmful to the welfare of the child(ren), therefore resulting in the permanent removal of the children from their parents.
>
> Where a local authority raises the issue of 'substituted parenting' it should be able to fully evidence its position, including an analysis of the weight and likelihood of the risk and the options that have been considered to address, reduce, or remove that risk.
>
> Every effort should be made to support, not supplant the parent."

48. Ms Cavanagh submitted that the exercise required by the Supreme Court's decision in *Re B* and this Court's decision in *Re B-S* was absent from the judgment in this case. She submitted that the judge's finding that the level of support which would be required to keep H in her parents' care was "far in excess of that which would be in H's welfare best interests" and "far in excess of anything that the local authority could be reasonably expected to provide" was made without any proper analysis, let alone the rigorous scrutiny required by *Re B-S.* Without undertaking a process of determining what a care plan at home would look like for H and how that would likely be experienced by her, it was not possible nor fair for the judge to conclude that the level of intervention was "not reasonable, sustainable or in H's welfare best interests". Instead of carrying out such an analysis, the judge asserted that the outcome would be "substituted" or "corporate" parenting, which he defined as meaning "parenting in which a significant part thereof is undertaken not by the family but by the professionals". But contrary to the Guidance cited above, nowhere did the local authority or the judge identify what facets of parenting would be carried out by professionals or analyse the weight and likelihood of the risk that H would be harmed by that level of support and the options that had been or might be considered to address, reduce, or remove that risk. This should have been a central feature of the analysis of the option of H remaining in her parents' care.

Mistake as to the work that had been undertaken (ground 4)

49. In his original assessments in 2020, Mr Hutchinson had advised that both parents required psychoeducational work to enable them to understand the nature of any potential sexual risks to the children. This work has not been carried out. In the current

proceedings, Mr Hutchinson and Dr Gregory agreed that the work which had been carried out would be unlikely to have made any difference. Further work proposed for the parents and for F in 2020, including a safety plan for the children at home, had also not been provided. Contrary to the principle stated by the President in paragraph 29 of *Re B-S*, the local authority had failed to provide the necessary support which may have led to a less interventionist outcome for the child.

50. Ms Cavanagh submitted that the failure to provide the correct services, education and a structured written safety plan to the family unit was a central plank of the appellants' case. As indicated by Peter Jackson LJ in *Re F (A Child: Placement Order: Proportionality)* [2018] EWCA Civ 2761, it was necessary for the lower court, when evaluating the risk of future harm arising to H, to evaluate the steps that could be taken to reduce the likelihood of the harm arising or to mitigate the effects if it did. The learned judge did not engage with this central point made on behalf of both parents in the testing of the oral evidence and in their submissions.

Proportionality (grounds 6, 2 and 5)

51. Under these grounds, it was submitted that the judge did not adequately evaluate the placement option with the parents. A number of important matters were not taken into account or adequately addressed, including:

(1) the steps which the local authority could have taken, but has not taken, to protect H from F;

(2) the fact that F, now aged 16, is starting pathway planning to semi-independent and supported living like his brother;

(3) how the fact that the parents will shortly no longer have the burden of caring for the older children will affect their capacity to care for H;

(4) the fact that, unlike her siblings, there is no sign of cognitive impairment in H who is currently meeting all developmental milestones;

(5) the importance to H of her relationships with her siblings and the impact on her of the loss of those relationships should she be placed for adoption;

(6) the impact on H, a child who has to date suffered no identified harm, of breaking the close attachment she has formed with her parents, particularly her mother, with whom she has lived all her life.

52. It was submitted that the overall proportionality exercise conducted by the judge was inadequate. His reasoning failed to take into account all of the factors in favour of a placement at home and failed to analyse fully some of the factors that were perceived to be disadvantages of that placement.

The respondents' submissions

53. On behalf of the local authority, Mr Stefano Nuvoloni KC leading Ms Louise Higgins submitted that the judge had clearly and demonstrably identified the risk and its likelihood, carefully considered how that risk could be mitigated, and concluded, on the evidence before him, that any such mitigation would be ineffective to avoid the risk

of significant harm. He had then conducted the appropriate welfare analysis, concluding, as he was entitled to do on the evidence, that adoption was in H's best interests both at the time of the making of the placement order and throughout her life.

54. With regard to ground 1, the judge had not fallen into error by applying an inappropriate weight to allegations that the court had not found as fact. Instead, he had made it clear that the evidence of the parents as to their own views about sexual risk posed by the older siblings was the relevant factor. In those circumstances, he was not only entitled but required to assess whether that likelihood of risk can be deflected by the parents. The parents had conceded that they were currently unable to protect their children and there was clear evidence that they would not be able to do so for H's minority without the high level of support identified. Mr Nuvoloni emphasised that the likelihood of risk of sexual harm was but one element of the agreed threshold and the parents' inability to protect against this particular risk was only part of the likelihood of significant harm and therefore only one facet with which the parents would require long term support. In oral submissions, Mr Nuvoloni submitted somewhat faintly that it would be open to this Court to carve out the conclusions as to the likelihood of sexual harm and uphold the order on the basis of other risks. For my part, I am not at all persuaded that this would be possible. The balancing exercise would have been conducted completely differently if the sexual abuse issue had been disregarded. In any event, in the absence of a respondent's notice, this was not an argument which could properly be pursued.

55. With regard to ground 3, Mr Nuvoloni pointed out that the judge's conclusions were based upon the evidence of professionals who had given evidence specifically on the issue of the support the family would require in parenting H. He was entitled to rely on that evidence, and the discussion and balancing of the evidence in the concluding section of the judgment demonstrated that there was no failure of analysis. In respect of ground 4, Mr Nuvoloni simply pointed to the extent of the opinion evidence put before the judge about the work that had been undertaken with the parents. There was no evidence upon which he could base any reasonable expectation that any work with the parents could address their inabilities to provide adequate parenting to H.

56. As for the remaining grounds, Mr Nuvoloni was content to rest his case on the judgment. He submitted that the judge had carried out a proper assessment of the advantages and disadvantages of each option, and reinforced his assessment by cross-checking it against the framework proposed by Peter Jackson LJ in *Re F*. He recognised H's needs as developing over time. It was the parents' inability, as identified by expert assessment and accepted by the court, to develop their parenting sufficiently to provide good enough parenting that was the issue. The range of unknowns in respect of F's future had to be set against the evidence that the parents *are* unable to manage his behaviours.

57. These arguments are substantially in line with those advanced in written submissions by Ms Kirsty Gallacher on behalf of the guardian. Ms Gallacher emphasised the comprehensive summary of the evidence carried out by the judge, in particular the evidence of risk, and submitted that he was entitled to rely on the consensus of opinion amongst the experts and other professional witnesses. Like Mr Nuvoloni, she contended that the judge was entitled to consider the parents' own evidence in respect of what risks may be posed by the older children and wider family. She too stressed that the risks were not confined to sexual abuse and pointed to the judge's analysis of the evidence in respect of the wider harm suffered by the older children and how he applied

that to H. The judge properly considered the parents' respective difficulties, what additional support may be required and whether that could ameliorate or minimise the risks to H. He gave himself a proper direction as to the treatment of parents with learning difficulties and adopted that approach when conducting his analysis of the evidence. He conducted a comprehensive review of the evidence, including that given by the guardian, about the support required and what the high level of intervention would mean for H. Ms Gallacher stressed that the guardian's evidence did not simply turn on the phrase 'substituted parenting'. On the contrary, the guardian had carefully considered the level of support and intervention and daily monitoring that she concluded would be required to keep H safe now and in the long term and what impact that may have on H. The judge had been entitled to conclude that for H to remain in her parents' care would require a very significant level of involvement throughout her minority, the local authority would have to undertake work repeatedly with the parents, and that the significant involvement of the local authority and all the work undertaken had not prevented the adverse childhood experiences of the older children.

Discussion

58. In my judgment, the appellants' submissions are cogent and persuasive, and the appeal should be allowed.

59. S.1(3)(e) of the Children Act and s.1(4)(e) of the Adoption and Children Act 2002 require the court to take into account any harm which the child *is* at risk of suffering, not *is possibly* at risk of suffering. As this Court in *Re M and R* made clear, in passages subsequently endorsed by the Supreme Court, before a court can take into account any harm which the child "is at risk of suffering", the risk has to be established on the basis of proven fact, not a mere possibility. Despite the very clear warnings the judge gave himself that the various allegations of sexualised behaviour and abuse between the older children had not been proved, he nevertheless proceeded on the basis that H "is at risk" of suffering sexual harm.

60. In this case, save for the incident when the mother had been assaulted by E, there was no proven fact relating to sexual abuse or sexualised behaviour. The fact that the local authority had "concerns" was insufficient to establish the risk. Thus the finding in the threshold document that the parents had accepted in the earlier proceedings concerning E, and G that they:

> "have continued to allow (or have been unable to prevent) contact between the children and those adults whom they have been told may pose a risk to their children, thereby exposing them to a risk of further harm"

was insufficient in the present proceedings to establish the risk to H under the statutory checklists. Furthermore, it is clear that the professional witnesses, on whom the judge relied heavily in reaching his decision in this case, proceeded on the basis that the local authority's concerns were sufficient to establish the risk – see for example Dr Gregory's observation quoted at paragraph 172 of the judgment:

> "the couple indicated that the children would not meet the individuals the local authority identified as risky but as they

> appear to not truly accept that risk I'm not confident that this will be maintained"

and Ms Steventon's observation quoted by the judge at paragraph 190:

> "H is having daily contact with the persons who are deemed a risk by the local authority and this increases the risk to her"

and the guardian's comment quoted at paragraph 249:

> "the parents lack insight and understanding of the concerns of the Local Authority and the risk these present [to] H."

61. The judge thought it was permissible to rely on the parents' acceptance in evidence that it was possible that D and F posed a sexual risk to H. But such a concession would never obviate the need for a proven factual basis to establish a risk of future harm. In this case, the error is compounded by the fact that both parents have cognitive difficulties and, in the mother's case, a diagnosed learning disability. In those circumstances, there was even less justification for attaching any weight to their statements in evidence as to the possibility of future risk.

62. It is of course possible that the local authority might be able to prove facts which would be sufficient to establish that there is a risk of sexual harm to H. But a mere possibility is not enough. As Baroness Hale said in *Re B* at paragraph 59:

> "To allow the courts to make decisions about the allocation of parental responsibility for children on the basis of unproven allegations and unsubstantiated suspicions would be to deny them their essential role in protecting both children and their families from the intervention of the state, however well intentioned that intervention may be."

63. Mr Nuvoloni is of course right to say that the likelihood of risk of sexual harm was but one element of the agreed threshold. But it was plainly the central element. If there had been no suggestion of such a risk, it seems much less likely that the local authority would have pursued, or that the court would have approved, a plan for the removal of H from home.

64. For those reasons I would allow the appeal on ground 1.

65. As the case law makes clear, there is an obligation on a court to enquire carefully as to what support is needed to enable parents with learning difficulties to show whether or not they can become good enough parents. A local authority cannot press for a plan for adoption simply because it is unable or unwilling to support the child remaining at home. A judge must therefore be rigorous in exploring and probing the local authority's thinking in cases where it may be affected by resource issues. Support for parents with learning difficulties may have to be long-term, extending throughout the child's minority, in part because parents with cognitive difficulties, even if they understand the information they have been given, may find it difficult to retain it or to apply it as the child gets older, but also because, as the child gets older, her needs will evolve and the range and level of support and guidance required by the parents must evolve alongside.

Judges need to be wary of arguments based on the concept of "substituted parenting". They should carefully scrutinise the evidence adduced by the local authority that the level of support required by the parents would be on a scale that would be adverse to the child's welfare and should look for options for ameliorating the risk of harm that might result from the high level of support. It is all encapsulated in the simple sentence in paragraph 1.4.4 of the Guidance quoted above – "every effort should be made to support not supplant the parents".

66. In my view, although the judge recited substantial passages of the evidence, he failed to subject it to the degree of rigorous scrutiny required in these circumstances. Although he quoted the full passage from Gillen J's judgment in *Re G and A*, he regrettably failed to apply the principles derived from it. He regarded it as a relevant disadvantage that the local authority would have to maintain an (undefined) "high level of support and intervention in the family for many years to come" without seemingly taking into account that the provision of support is a recognised requirement for parents with learning difficulties. He accepted the assertions that the level of support which would be required to keep H in her parents' care was "far in excess of that which would be in H's welfare best interests" and "far in excess of anything that the local authority could be reasonably expected to provide" and that the basis of the level of support would equate with "substituted parenting" without spelling out (1) what aspects of parenting would be carried out by professionals, (2) the extent of the risk that this degree of professional intervention would result in further harm to H, or (3) the steps that could be taken to mitigate the risk. He concluded that the level of support would be "unsustainable and impracticable" without explaining why.

67. In the interests of the child, the starting point should have been, first, to identify and describe the level of support needed by the family, secondly ascertain what can and should be being done under the local authority's obligations, and thirdly to determine whether, with that in place, the child's welfare needs will be met. This involves a careful assessment of what the package would look like, how practical it is and how intrusive it would be for the child. That process was simply not carried out in this case.

68. Part of the judge's reasoning was that, despite the efforts of the professionals, the parents' capacity to meet the children's needs had not improved and there was no basis for thinking that it might improve in future. But assertions that the parents had failed to benefit or respond to attempts to support them in the past had to be considered in the light of the acknowledged failure to provide the psychoeducational and other work recommended by Mr Hutchinson in 2020. Given that omission, it cannot be said that every effort had been made to support the parents.

69. Furthermore, the judge did not sufficiently acknowledge that any assessment of the degree of support required by the parents, and the risks to H resulting from the degree of professional involvement in her life, had to be undertaken in the context of the current circumstances of the family. Many of those circumstances pointed positively to an outcome under which H could safely stay with her parents. She is now rising 2, has always lived at home, and has a close attachment to her mother. There is a professional consensus that she has been well cared for in many respects up to now. Unlike her siblings, she seems to have no cognitive impairment and is meeting her developmental milestones. F will shortly be moving to semi-independent living. After that, H will be the only child at home and thus the sole focus of her parents' care.

70. Taking these points together, I conclude that the appellant also succeeds on grounds 3, 4 and 6. The proportionality evaluation cannot stand. Despite his great industry, the judge's analysis was insufficient to entitle him to reach the conclusion required by the case law, in particular *Re B,* that nothing else but adoption will meet the welfare needs of the child.

71. For these reasons, I would allow the appeal, set aside the care and placement orders, and remit the matter to the Family Division Liaison Judge for the Midland Circuit to reallocate the proceedings to another judge as she considers appropriate. In proposing that this appeal be allowed, I emphasise that I am not intending to indicate what the ultimate outcome of these proceedings should be. It will be a matter for the next judge (1) to consider whether there should be and, if necessary, conduct a fact-finding hearing to establish the factual basis for an assessment of the likelihood of future harm and (2) on the basis of those findings, to carry out a fresh analysis of the realistic options for the child's future care.

LORD JUSTICE WARBY

72. I agree. I add some brief observations on ground one. One should always be cautious of deciding a case on the basis of concessions, particularly when they are made by vulnerable individuals. In this case the concessions on which the Judge relied were not enough to meet the threshold, even taken at their highest. The parents had conceded only that *if* the allegations of sexual touching were true then H would be at risk of harm; and that it was *possible* those allegations were true. Those concessions were not capable of establishing the necessary factual basis for a finding that there was (rather than might be) a real possibility of future harm.

LADY JUSTICE FALK

73. I agree with both judgments.