Case Number: ME11/2018

IN THE FAMILY COURT SITTING AT BROMLEY

Thursday 18.10.18

BEFORE:

HER HONOUR JUDGE LAZARUS

BETWEEN:

MR & MRS Z

Applicant

-and-

KENT COUNTY COUNCIL

MS Y

MR Q & MS R

And X, by his CHILDREN'S GUARDIAN

Respondents

- **Mr George Butler,** counsel instructed on behalf of Mr and Mrs Z by Mrs Sally Barter at Kingsfords Solicitors
- **Ms Yasmeen Jamil,** counsel instructed on behalf of the local authority, Kent County Council
- **Mr Max Konarek,** solicitor instructed on behalf of Y, via her litigation friend the Official Solicitor by Boys & Maughan Solicitors
- **Ms Sandria Murkin,** counsel instructed on behalf of Mr Q and Ms R by Miss Lauren Baker at Atkins Hope Solicitors
- **Ms Mary Robertson**, counsel instructed for X's Children's Guardian by Mr Ryan Booth at Davis Simmonds and Donaghey Solicitors

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JUDGMENT

SUMMARY

1. "*I likened it to arriving at the scene of a car crash, and wondered what one could do about it. This situation should never have arisen. It's caused huge tension, including within any recommendation, and I've tried to keep X at the centre of it.*" This evidence from the independent social worker effectively summarises the key issues in this case.

2. There are two core strands in this case. Firstly, the conduct of the proceedings in 2017 that led to care and placement orders on X, and secondly X's maternal grandparents' subsequent application to revoke the placement order and be granted Special Guardianship orders.
3. So firstly, the 2017 proceedings resulted in care and placement orders granted in December 2017, with the plan being for X to remain with Q and R (his current carers) and the Local Authority supported them as his prospective adopters.
4. The 2017 proceedings began after a referral was made by the midwifery team when X's mother Y was pregnant. There was a brief pre-proceedings process and then an EPO was granted shortly after X's birth and he was placed in foster care. An ICO followed as soon as care proceedings were issued by the Local Authority.
5. During those proceedings Y's capacity was seriously in doubt but never assessed nor findings made nor litigation friend appointed. She was in and out of psychiatric units, never attended court and her engagement with her solicitor was limited and she did not engage with any assessment of her capacity. The final orders made in December 2017 were purportedly made with Y's 'consent' following brief discussions. She has now been assessed in these proceedings to lack capacity to litigate and is represented through her litigation friend, the Official Solicitor.
6. X's maternal grandmother Mrs Z was neither aware nor informed of X's birth, nor of the 2017 proceedings, until she discovered X's existence 4 days after those final orders were made, on Christmas Eve 2017, and about 3 weeks after X had been placed with Q and R in a foster-to-adopt placement.
7. The local authority, the Social Worker, the Children's Guardian, and the Independent Social Worker all acknowledge that had she and her husband put themselves forward in those proceedings and been assessed it is highly likely that they would have received a positive assessment as X's proposed Special Guardians.
8. This was indeed a situation that should never have arisen, on a number of fronts. It represents a wide-ranging composite set of failings on the part of the local authority, its social work child protection and adult mental health teams, the legal representatives of all the parties, the Children's Guardian and the court.
9. Y should have had her capacity determined by the court. The OS would in all likelihood have been appointed to act on her behalf. A different course would have then been taken in relation to case management.
10. The maternal grandparents should have been informed, if possible prior to proceedings starting, and assessed. And so it is unlikely to the point of impossibility that those final orders would have been made, and at the very least Mr and Mrs Z's position would have been included in any consideration of X's case.
11. One cannot be absolutely certain, but it is almost impossible to imagine that Special Guardianship Orders would not have been granted to Mr and Mrs Z if they were the sole

alternative option proposed, and X would then have been placed with them either from birth if assessed early enough, or from foster care in late 2017 and not with Q and R. At the very least they would have had an opportunity to have their role in X's life considered in the course of the care proceedings. And on any analysis, a placement order with all its implications for birth family members' rights and limited scope for revocation, should not have been made on the basis of Y's purported consent.

12. It is clear that the European Convention on Human Rights Articles 6 (access to justice) and 8 (respect for family life) were rights engaged in those 2017 proceedings. It is also clear that statutory provisions, guidance and case law designed to protect, respect, address and determine any interference with those rights in a proportionate way, were not adequately applied or followed. I do not comment as to the implications of those breaches of those parties' rights, beyond the factors relevant to the applications before me, and those issues may be for another forum.
13. Secondly, Mrs Z now applies to revoke that placement order made in 2017 and for Special Guardianship Orders to be granted to her and her husband. They are understandably extremely unhappy and resentful about these failings that have placed them in a disadvantaged position. This rightly-named car crash has thus unnecessarily pitched Mr and Mrs Z against Q and R, and caused immense stress, anguish, resentment, tension and distrust between all the adults.
14. Mr and Mrs Z have been positively assessed by the Independent Social Worker in almost all respects, but the Independent Social Worker does not recommend that X moves to their care due to his overall needs and characteristics, including the emotional impact on him of another change in carers.
15. Q and R are supported by the local authority and the Children's Guardian, and have also applied to be granted Special Guardianship Orders for X. Q and R are not blood relatives of X, but Ms R is the paternal aunt of X's half-siblings T and U aged 7 and 8, making her X's step-aunt, and those siblings live nearby with their paternal grandmother, his step-grandmother Mrs S.
16. All three siblings see their mother Y from time to time despite her difficulties, due to the good relationship she has maintained with Q, R and S. Y has also been seeing X by attending occasional or about fortnightly at visits that X has had at the Z's home.
17. So, keeping X and his welfare at the centre of it, him and his welfare being my paramount concern: he is a little boy of 15 months who has bonded and settled very well with Q and R who have provided a loving home where he has thrived; he sees his siblings frequently due to their proximity and their overnight visits at Q and R's home and he has excellent relationships with them; he has shown unusually marked anxiety and distress on separation from Q and R and difficulty settling on visits with Mr and Mrs Z, albeit that he does usually settle after a time; and shows relief and relaxation on returning to Q and R's care.
18. Notwithstanding the unfair situation which should never have arisen for Mr and Mrs Z, in conducting the balancing exercise I have carried out in this judgment, I have come to the difficult conclusion that X should remain with Q and R under Special Guardianship Orders, in conjunction with a Family Assistance Order, and a Child Arrangements Order to support the mother's, maternal grandparents' and wider maternal family's contact with X.
19. This decision is not a criticism of Mr and Mrs Z, but a recognition that on balance his current carers are better placed to meet his overall needs.

20. It will be essential that mediation and family therapy is provided as advised by the Independent Social Worker and supported by the Children's Guardian, due to the painful dynamic leading to loss of trust and resentment that arose from the avoidable failings of the 2017 proceedings. However, this was not initially promised by the local authority under their Child in Need plan, and it was simply proposing that a newly allocated social worker should 'mediate' in this complex and extremely sensitive situation, and that the provision of therapy would be reviewed. This, given the evidence I have heard, was a wholly inadequate response to the consequences of their failure to properly involve the maternal grandparents in the 2017 proceedings and to properly ensure that Y's lack of capacity was addressed in those proceedings, and clearly may have consequences for the local authority in terms of any future steps the parties may wish to take against it.
21. However, after earnestly requesting the local authority to consider the position, I am heartened to learn that it has been prepared to modify its position as follows: "*The Local Authority will source appropriate mediation and family therapy. The local authority recognises that all family members must have confidence in the resources identified. If necessary, the local authority will fund such services.*" It will remain to be seen how well the local authority meets this vital commitment.

ISSUES, PROCESS & EVIDENCE

22. I am positively urged on behalf of X to consider the 2017 proceedings and make appropriate observations, as being of positive help in this case given its consequential impact. I consider I must look at what happened then and where it has left the parties due to the implications for the applications currently before me.
23. The first half of this judgment will deal with those 2017 proceedings:
    - the need to clarify if a party has protected status due to lack of capacity;
    - the implications where a party who through lack of engagement does not make themselves available for a capacity assessment;
    - dealing with 'consent' to a placement order;
    - and issues relating to investigating the wider family.
24. A proportionate approach has been taken in relation to the evidence from the 2017 proceedings given that the focus of this case is ultimately on the welfare decision in relation to X now, and given that the parties are largely in agreement as to the composite failings of those proceedings.
25. I have not considered it necessary or proportionate bearing in mind the overriding objective to obtain transcripts of hearings or the full set of social work documentation. I have sufficient documents and information to enable me to understand and address the key issues, and derive observations. Those include: a chronology prepared by Y's solicitor including emails and the Position Statement prepared on her behalf for the final hearing; certain emails between the parties' legal representatives; a key case recording made by the Social Worker; the directions and orders made; and a letter from Thanet Mental Health Team setting out Y's mental health history. I have also heard the Social Worker's and Children's Guardian's evidence.

26. The second half of this judgment will evaluate X's welfare in the context of two competing and realistic proposals that X should live with Mr and Mrs Z or with Q and R under Special Guardianship Orders. It should go without saying that X is blessed to have so many loving adults with so many good qualities concerned with his welfare and offering to care for him. I urge them not to let the unfortunate history and bitterness surrounding the circumstances of this case take hold or get in the way of improving all their future relationships and their abilities to work together for X's welfare. I commend them all for having begun to move on and let go of some of those more difficult feelings. I urge them to remember the recommendations of the Independent Social Worker and the Children's Guardian, and to take up the services that the Local Authority have committed to offering.
27. I have read the statements and reports filed in these proceedings. I have seen a short and charming video clip of X peacefully enjoying a few minutes of play-time with Mr and Mrs Z in their home. I have seen a family tree drawn up by Mrs Z showing her heritage and the breadth of her extended family. I have heard oral evidence from: Mrs Z, Ms Duff the Social Worker, Ms Wetherall the Independent Social Worker, Q and R, and the Children's Guardian.
28. Q and R were sworn and gave evidence together, in a process known colloquially as 'hot-tubbing'. This was proposed by me and agreed to by all parties as a sensible and effective time-saving device, and I consider that in the process I gained a good impression of each of them and of them together as a couple.
29. I did not hear evidence from Mr Z. He did not attend court on any day of these proceedings, due to suffering from a respiratory infection and in relation to which I have seen a doctor's certificate. I have read a statement produced by him in the course of this hearing confirming his whole-hearted support of Mrs Z's application and his wish to be considered as a SG for X.
30. I have been greatly assisted by the detailed position statements, submissions documents, chronologies and notes on the law provided by the parties' advocates. I single out for the court's particular gratitude firstly Mr Butler, acting for Mr and Mrs Z, who stepped in to an extremely tense and complex case only the day before this hearing began and provided excellent representation for his clients and significant assistance to the court, and secondly Ms Robertson acting for the Children's Guardian whom I asked to provide a note for the court on the law applicable to capacity and consent.

BACKGROUND

31. X's father is unknown.
32. Y is a 30 year old woman with a longstanding diagnosis of borderline or emotionally unstable personality disorder. She also has a significant problem with alcoholism. Although she has never had a cognitive assessment, her mother Mrs Z believes Y may also be cognitively impaired. This does not appear surprising in the light of the capacity assessment conducted in these proceedings. Y has not appeared before me as she is currently an in-patient at M Hospital following a recent deterioration in her mental state, but she has been represented by her solicitor instructed by the OS.
33. Y has two older children, T and U who are in the care of their paternal grandmother Mrs S under Special Guardianship Orders that were granted in private family proceedings undertaken in 2011-12.

34. Professor Fox, consultant psychiatrist, carried out a detailed capacity assessment in these proceedings dated 12.4.18 and highlighted Y's difficulties. She did not understand the role of barristers or solicitors or sufficiently understand the case to give instructions consistently. She said she had difficulty following evidence and would often agree with people and do what she was told. She answered 'don't know' frequently and Professor Fox considered this was primarily due to her psychological distress and difficulty expressing opinions. She is distractible and easily agitated. She experiences voices that prevent her responding. He concluded she has a severe personality disorder with psychotic symptoms that requires very lengthy intervention to improve, plus control of her alcohol intake and review of her medication.
35. Y was brought up by her father K from the age of 2, due to the rupture of her parents' relationship. Her relationship with Mrs Z her mother has at times been close and supportive, but at other times has been more distant and difficult. During 2017 there was a significant hiatus in their relationship as Y withdrew from her mother's attention, despite Mrs Z making efforts by trying to visit her flat. One supposition to explain this is a combination of mental ill health and a wish to conceal her pregnancy.
36. Mrs Z has not had a close relationship with Mrs S, T and U since those children were placed there 7 years ago. She has, by her own admission, visited at most a very few times per year and found it hard to spend more time there due to a difference in approach to parenting styles that she perceived. The number of times is disputed by Q and R, but in effect it does not matter as Mrs Z acknowledges that she felt she had to largely withdraw and was uncomfortable doing more. Mrs Z lives about 3 to 4 miles from T and U.
37. Mrs Z has had 4 children of her own, Y being her oldest, and then 3 sons with Mr Z; ZZ being her youngest son and now aged 12. He has participated in some contact visits with X.
38. Q and R have been a couple for about 15 years and suffered the sorrow of being unable to have a child together. Mrs Z is perhaps understandably suspicious that this has fuelled their desire to 'keep' X.
39. T and U's father, Ms R's brother, was Y's partner for some 8 years and suffered mental ill health, resulting in T and U being placed with Mrs S. Q and R live only a few minutes away from T, U and Mrs S in the same community. They have T and U to stay with them regularly for alternate weekends from Fridays to Sunday or Monday morning. They have also encouraged Y to be in touch whenever she can for support or to see X, and facilitate this on an ad hoc basis and did so as recently as two weeks ago. They have also kept in touch with Y's father K, X's maternal grandfather, and are in a position to promote that relationship for X.

<u>THE 2017 PROCEEDINGS</u>

40. THE LAW - CAPACITY, PRESUMPTION OF CAPACITY, & DETERMINING PROTECTED PARTY STATUS
    a) This issue is governed primarily by the Family Procedure Rules 2010 Part 15 and Practice Directions 15A and 15B, and by the Mental Capacity Act 2005. Additionally, there is guidance provided by the Department for Children, Schools and Families' publication "The Children Act 1989 Guidance and Regulations", and in April 2010 the Family Justice

Council published guidance for proceedings and pre-proceedings called "Parents who Lack Capacity to Conduct Public Law Proceedings".

b) The latter Family Justice Council guidance applied at the time of the 2017 proceedings, however it should be noted that a helpful, comprehensive and updated version was published in April 2018 and can be found here: https://www.judiciary.uk/wp-content/uploads/2018/04/capacity-to-litigate-in-proceedings-involving-children-april-2018.pdf .

c) Under section 1(2) of the Mental Capacity Act "*A person must be assumed to have capacity unless it is established that he lacks capacity*". This is more generally known as the 'Presumption of Capacity'. My underlining points out a critical, and often misunderstood, element of this provision.[1]

d) Sections 2 and 3 set out the factors to be considered in determining whether or not someone lacks capacity, and are not directly in issue here. However, section 2(4) provides: "*In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities*."

e) It is well established and follows from the wording of those provisions:
   - the Presumption is an important starting point;
   - however information may raise a question whether a person lacks capacity and so lead that Presumption to be questioned;
   - such a question is to be decided on the balance of probabilities by reference to the relevant factors in sections 2 and 3;
   - it is therefore a matter of fact to be determined on evidence by the court;
   - the Presumption is thus rebuttable, and may be rebutted if lack of capacity is established by that determination.

f) The philosophy and purpose behind this Presumption is not a matter for detailed explanation in this judgment, but one significant intention is to prevent inaccurately assuming lack of capacity in apparently vulnerable individuals without it being properly established on evidence. It is emphatically not there to obviate an examination of such an issue. Nor can it have been Parliament's intention to place a vulnerable person in danger of their lack of capacity being overlooked at the expense of their rights by a slack reliance on this Presumption, and as is made clear in the law I refer to below.

g) The Family Procedure Rules at Rule 15 provides:

> *15(2): A protected party must have a litigation friend to conduct proceedings on that party's behalf.*
>
> *15(3)(1)A person may not without the permission of the court take any step in proceedings except –*
>
> *a. Filing an application form; or*
> *b. Applying for the appointment of a litigation friend under rule 15.6*

[1] Any underlining within quoted text is my emphasis.

until the protected party has a litigation friend.

(2) If during proceedings a party lacks capacity (within the meaning of the 2005 Act [i.e. the Mental Capacity Act]*) to continue to conduct proceedings, no party may take any step in proceedings without the permission of the court until the protected party has a litigation friend.*

(3) Any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise.

And the notes to Rule 15 in the Family Court Practice 2018 make it plain that this is a matter to be determined as a matter of fact by the judge, and that it will be "*necessary for the proceedings to be stayed until the issue is resolved*".

h) Practice Direction 15B supplements the rule as follows:

Litigation Capacity

1.1 The court will investigate as soon as possible any issue as to whether an adult party or intended party to family proceedings lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings. An adult who lacks capacity to conduct the proceedings is a protected party and must have a litigation friend to conduct the proceedings on his or her behalf. …

1.2 Any issue as to the capacity of an adult to conduct the proceedings must be determined before the court gives any directions relevant to that adult's role in the proceedings. Where a party has a solicitor, it is the solicitor who is likely to first identify that the party may lack litigation capacity. Expert evidence as to whether a party lacks such capacity is likely to be necessary for the court to make a determination relating to the party's capacity to conduct proceedings. However, there are some cases where the court may consider that evidence from a treating clinician such as a treating psychiatrist is all the evidence of lack of litigation capacity which may be necessary. There may also be cases where it will be clear that a party does not have litigation capacity such as where the party is in a coma, minimally conscious or in a persistent vegetative state. In those cases the court may well consider that a letter from a treating doctor confirming the party's condition is sufficient evidence of lack of litigation capacity and not need a report from an expert.

1.3 If at any time during the proceedings there is reason to believe that a party may lack capacity to conduct the proceedings, then the court must be notified and directions sought to ensure that this issue is investigated without delay. The presumption of capacity should not be forgotten. For example, where a person has an identified difficulty such as a learning disability or a mental illness, that difficulty should not automatically lead to an investigation about that party's capacity to litigate. Where a party has a solicitor, the starting point is whether that solicitor has concerns about the party's capacity to litigate.

Instruction of an expert where an adult is a protected party

2.1. Where there is concern that a party or intended party may lack capacity to conduct the proceedings, that party's representative must take the lead in any instruction of an expert for the purpose of assessment of the party's capacity to conduct the proceedings. ….

i) The Department for Children, Schools and Families' publication "The Children Act 1989 Guidance and Regulations" contains this in Annex 1 (Public Law Outline) of Volume 1 (Court Orders):

Adults who may be protected parties

7.1 The court will investigate as soon as possible any issue as to whether an adult party or intended party to the proceedings lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings. An adult who lacks capacity to conduct the proceedings is a protected party and must have a representative (a litigation friend, next friend or guardian ad litem) to conduct the proceedings on his or her behalf.

7.2 Any issue as to the capacity of an adult to conduct the proceedings must be determined before the court gives any directions relevant to that adult's role within the proceedings.

7.4 If at any time during the proceedings, there is reason to believe that a party may lack capacity to conduct the proceedings, then the court must be notified and directions sought to ensure that this issue is investigated without delay.

j) The Family Justice Council guidance for proceedings and pre-proceedings "Parents who Lack Capacity to Conduct Public Law Proceedings" assisted as follows:

7. Good Local Authority practice would include

7.1 Jointly agreed referral and assessment procedures between Children's Social Care Services and Adult Learning Disability teams/Mental Health Services….

7.3 An enquiry of mental health services to ascertain whether a lay advocate is already working with the parent.. If so, it would be proper to enquire also whether any "expression of views" has been made and whether this document deals with the issues of who should be the individual's litigation friend if they lack capacity or their views as to who should care for their child if such a situation arose

7.4 Otherwise a lay advocate specializing in learning difficulties/mental health issues should be provided to support the parent during meetings such as child protection conferences, Family Group Conferences and with legal representatives….

7.6 The speedy referral of a parent for legal advice about their litigation capacity as well as the case as a whole.

20. Once instructed, if there is doubt as to capacity to conduct proceedings, the legal representative of a party is under a duty to draw it to the attention of the Court. See para 47 Wall LJ's judgment in the Nottingham case [RP v Nott CC & Another [2008] EWCA Civ

462]: "Both the relevant rules of Court and the leading case of Masterman-v-Lister (2003) 3 All ER 192 make it clear that once either counsel or (the solicitor) had formed the view that ... (the protected party)... might not be able to give them proper instructions, and might be a person under a disability, it was their professional duty to have the question resolved as quickly as possible".

22. It is the responsibility of the parent's solicitor to obtain an opinion on litigation capacity. There may be occasions when it is appropriate to seek an opinion from a treating clinician. Otherwise, an appropriately qualified independent expert must be identified. …

28. If there is credible reason to suggest that a party may have regained capacity then it may be necessary for a further assessment to be conducted. The litigation friend or the protected party should seek urgent directions for the obtaining of further expert advice. In some cases it may be appropriate to ask an expert instructed during the course of the case to conduct that review depending on the nature of their primary instructions. If the party's capacity to conduct the proceedings is regained then the litigation friend/guardian ad litem should immediately apply for his or her discharge so that the party can resume personal conduct of the proceedings. The court should give priority to such an application.

(NB – this guidance has since been expanded and updated, and the link to the 2018 version is in paragraph 40 above.)

k) Medical evidence is "*almost certainly*" required for the purposes of establishing lack of capacity. In *Masterman-Lister v Brutton and Co (Nos 1 and 2)* [2003] 1 WLR 1511 at paragraph 17H Kennedy LJ said: "*even where the issue does not seem to be contentious, a district judge who is responsible for case management will almost certainly require the assistance of a medical report before being able to be satisfied that incapacity exists*".

l) But what should be done if there is no expert evidence available?
In *Carmarthenshire County Council v Peter Lewis* [2010]EWCA Civ 1567 Rimer LJ was considering an application for permission to appeal against a decision in which the first instance judge had made an order that "*unless the applicant allowed an examination of himself by a particular specialist by a specified date, he was to be debarred from defending the claim*". The purpose of the proposed examination was to assess capacity. In that case, the applicant did not allow the examination, and at the final hearing, the first instance judge determined the claim against him without further consideration of the issue of capacity. On appeal, Rimer LJ said this:

> "*In my view the problem raised by this case is as to how, once the court is possessed of information raising a question as to the capacity of the litigant to conduct the litigation, it should satisfy itself as to whether the litigant does in fact have sufficient capacity. I cannot think that the court can ordinarily, by its own impression of the litigant, safely form its own view on that. Nor am I impressed that the solution is the making of an "unless" order of the type that Judge Thomas made. The concern that I have about this case is that an order may have been made against*

a party who was in fact a "protected party" without a litigation friend having been appointed for him".

m) In *Baker Tilly (A Firm) v Mira Makar* [2013] EWHC 759 (QB) the Respondent refused to co-operate in an assessment of her capacity. The Master hearing the case at first instance made his own assessment, based on the information available to him, that the Respondent lacked capacity. On appeal to the High Court, Sir Raymond Jack noted the dictum of Rimer J (above) that the court cannot ordinarily, by its own impression of the litigant, safely form its own view of capacity. But he also noted that "*In most cases where a question of capacity has arisen the person whose capacity is in question has co-operated with the court and the court has been provided with the assistance of appropriate medical experts*" and that "*counsel has not found any case where the court has had to resolve a situation as has arisen here where the litigant has refused to co-operate in an assessment of their capacity*" (paragraph 8). In the case then before him, having taken into account further information not available to the Master, he came to the opposite conclusion as to capacity. But it is noteworthy that there is no suggestion that the Master should not have attempted the exercise, or could have properly left the issue of capacity unresolved.

n) In *Re D (Children)* [2015] EWCA Civ 745 the issue before the appeal court was whether the court at first instance had failed properly to determine whether or not the mother had litigation capacity at the time proceedings were heard.
King LJ said this at paragraph 30: "*Evidence from a suitably qualified person will be necessary as to the diagnosis* [cf. section 2(1) Mental Capacity Act]. *This will usually be someone with medical qualifications. …*".
And at paragraph 56:

> "*This case does however perhaps provide a cautionary tale and a reminder that issues of capacity are of fundamental importance. The rules providing for the identification of a person who lacks capacity, reflect society's proper understanding of the impact on both parent and child of the making of an order which will separate them permanently. It is therefore essential that the evidence which informs the issue of capacity complies with the test found in the MCA 2005 and that any conflict of evidence is brought to the attention of the court and resolved prior to the case progressing further. It is in order to avoid this course causing delay that the Public Law Outline anticipates issues of capacity being raised and dealt with in the early stages of the proceedings*."

In that case the Court of Appeal described the steps that had been taken at first instance to establish capacity as a "*serious procedural irregularity*" but declined to order a fresh capacity assessment and a retrial on the basis that the mother was not adversely affected and no practical difference was made to the hearing or outcome as a consequence. The court validated the proceedings retrospectively.

o) There therefore remain, to some extent, tensions between the dicta in the Court of Appeal cases referred to above, and arising between:

- on the one hand the absolute necessity to determine an issue of capacity, as a matter of fact, with the assistance of expert or other medical opinion, and as a matter of urgency;
- and on the other hand, the possible absence of an expert or other medical opinion through the parent's non-engagement, refusal to attend assessments, or due to a failure to provide information by the relevant medical sources.

p) There does not appear to be a clear and authoritative decision that provides guidance with direct reference to this problem. It cannot have been intended that proceedings should be hamstrung and in stasis by an inability to determine this issue in the absence of co-operation with medical assessment or availability of medical evidence.

q) However, the key may be in the words '*ordinarily*' and '*almost*' in the Carmarthenshire and Masterman cases, and the word '*likely*' in PD15B paragraph 1.2 which appear to give some leeway.

r) Paragraph 44 of the updated 2018 Family Justice Council guidance states: "*A parent may decline professional assessment. In those circumstances, it will be for the court to determine the issue on the best evidence it has available.*"

s) This may enable courts faced with this challenge where there is no expert or medical assessment evidence to meet the absolute requirement that capacity issues **must** be fully addressed and determined, and to do so by reaching appropriate pragmatic evidence-based decisions, while ensuring that both the overriding objective and the protected party's rights are fully in mind.

t) Such a determination could be based on a careful review of the other relevant material that may be available, such as a report from a clinician who knows the party's condition well enough to report without interviewing the party (if available and appropriate), other medical records, accounts of family members, accounts of the social worker or other agency workers who may be supporting the parent, and occasionally direct evidence from a parent.[2]

u) Any such finding made without expert assessment evidence that leads to a declaration of protected party status due to lack of litigation capacity could always be reviewed upon expert evidence being obtained to suggest that the finding was incorrect, and by ensuring that the question of assessment is regularly revisited with the protected party by their litigation friend, their solicitor and the court. Such a review and correction is anyway the case where a party has regained capacity and the issue is addressed with the benefit of an updating expert opinion.

v) What can be derived as following from the above statutory provisions, guidance and case law as clearly impermissible or inappropriate, and would likely lead to a failure to apply the required procedural approach and lead to breaches of that party's Article 6 and 8 ECHR rights? :
- failure to grasp the nettle fully and early,

[2] A memorable example before me was of a parent who refused expert assessment of their capacity, and who gave a detailed description in court of deluded beliefs as to the messages being sent to them by the children as to the children's wishes and feelings, which this parent believed emanated somehow from a toy and a picture seen in a window of a house that had nothing to do with the children, but where the parent believed they lived, again based on delusional beliefs.

- ignoring information or evidence that a party may lack capacity,
- purporting to 'adopt' the Presumption of Capacity in circumstances where capacity has been questioned,
- making directions addressing the capacity issue, but discharging them or failing to comply with them and thereby leaving the issue inadequately addressed,
- failing to obtain evidence (expert or otherwise) relevant to capacity,
- use of 'unless' orders,
- similarly, using personal service or 'warning notices' on that party,
- relying on non-engagement by that party either with assessments or the proceedings,
- proceeding with any substantive directions, let alone making final orders, in the absence of adequate enquiry and proper determination of the capacity issue,
- treating a party as having provided consent to any step, let alone a grave and possibly irrevocable final step, where capacity has been questioned but the issue not determined.

41. THE LAW - CONSENTING TO PLACEMENT ORDER

a) A placement order is a highly significant step for a child and that child's family. It gives the Local Authority the power to place the child for adoption with potential adopters, and in sharing parental responsibility for the child with the parents and potential adopters the Local Authority may limit the exercise of parental responsibility by them. It paves the way for an application to adopt the child, whereby the child would then become legally the adopters' child and all legal links to the birth family would be severed. There are significant hurdles in seeking to revoke a placement order or challenge an adoption application, and so the granting of a placement order is a serious interference with the Article 8 rights to respect for family life of all those affected by that order, hence the need to consider the welfare of the child throughout its life by reference to the adoption welfare checklist set out at section 1(4) Adoption and Children Act 2002, which includes reference to the child's relationships as follows:
1(4) The court or adoption agency must have regard to the following matters (among others)— …
(f) the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—
(i) the likelihood of any such relationship continuing and the value to the child of its doing so,
(ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
(iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

b) Consent is covered by Section 52 Adoption and Children Act 2002:

(1)The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that—
(a)the parent or guardian cannot be found or is incapable of giving consent, or
(b)the welfare of the child requires the consent to be dispensed with.

(2)The following provisions apply to references in this Chapter to any parent or guardian of a child giving or withdrawing—
(a)consent to the placement of a child for adoption, or
(b)consent to the making of an adoption order (including a future adoption order).

(3)Any consent given by the mother to the making of an adoption order is ineffective if it is given less than six weeks after the child's birth.
…
(5)"Consent" means consent given unconditionally and with full understanding of what is involved; but a person may consent to adoption without knowing the identity of the persons in whose favour the order will be made.
…
(7)Consent under section 19 or 20 must be given in the form prescribed by rules, and the rules may prescribe forms in which a person giving consent under any other provision of this Part may do so (if he wishes).
…

c) Section 19 Adoption and Children Act 2002 covers parental consent to placement. However, subsection 19(3) provides that the consensual route cannot apply where an application for a care order has been made and not determined or is applied for after the consent is given. In that case the Local Authority must apply under section 22 for a placement order. What is also notable is that a parent's consent under section 19 is subject to section 52, and so would need to be given unconditionally and with full understanding.
d) Any consent that might be given under section 19 to placement is then governed by the Family Procedure Rules 2010 under Part 14 and Rules 16.30, 16,32 and Practice Direction 16A Part 5, where a Reporting Officer must be appointed to carefully review the giving of that consent and is given unconditionally and with full understanding.
e) So while section 19 is not applicable here, it is important to note the provisions of section 52, and the important safeguards contained within section 19 and the ancillary Rules and Practice Direction, which show the care that it is necessary to take to safeguard the circumstances in which consent is given to such a significant and potentially irrevocable step.
f) It follows that in this case, it was necessary to either formally dispense with Y's consent under section 52(1)(b) which required a full consideration of the welfare checklist factors under section 1 Adoption and Children Act 2002. Such an exercise should have covered X's relationships with his wider maternal family.
g) Or if the case were to proceed on the basis of Y having given consent to the placement application, it was necessary to consider whether it was given unconditionally and with full understanding pursuant to section 52(5), and with an eye to the careful provisions of

the legislation and guidance relating to consent to placement. Any question about Y's capacity should have been fatal to proceeding on the basis of a full understanding underpinning that consent.

h) In practice, on the vanishingly rare occasions when a parent in care proceedings is prepared to offer consent to placement for adoption, careful steps are generally directed to ensure that the consent is properly made. A statement is filed, and the Children's Guardian is often directed to investigate the circumstances; or if the consent is offered at the door of the court, careful steps are taken not to rush the process and time is taken at court or via a brief adjournment to ensure that appropriate enquiries are made with the consenting parent to ensure that it is properly given, unconditionally and with **full** understanding of what is involved.

42. THE LAW - INVESTIGATION OF FAMILY MEMBERS

a) In the case of *Re R [2014] EWCA Civ 1625* the former President Sir James Munby stated: *"The Public Law Outline* [Public Law Outline FPR 2010, PD12A] *stresses the vital importance of such potential carers being identified and assessed, at the latest, as soon as possible after the proceedings have begun",* albeit *"not requiring every stone to be uncovered".*

b) *Re R* provided clarification of the principles underlying the reminders as to good practice set out in *Re BS [2013]* EWCA Civ 1146 and the need to pay particular heed to the factors in the relevant welfare checklist in order to approach such applications through the prism of the child's welfare interests. Those cases provided appropriate reminders of the extreme interference with Article 8 rights that these applications represent, of the rigour and exceptionality required by *Re B [2013]* UKSC 33 to interfere so drastically with those rights, and of the principles applicable from *Y v UK [2012]* 55 EHRR 33 emphasising the need to preserve personal relations and 'rebuild' families.

c) In order to comply with what has become known as the '*Re BS* checklist', namely the properly evidenced and reasoned analysis in care and adoption proceedings by the local authority witnesses which should include illustrating the pros and cons of the realistic options, the Local Authority's evidence must first identify those realistic options, and must then place particular emphasis on considering the factors in the relevant welfare checklist.

d) The factors set out in the welfare checklist in section 1(4) Adoption and Children Act 1989 must be considered on an application for a placement order and to dispense with a parent's consent under section 52, and specifically at section 1(4)(f) requires consideration of the welfare of the child throughout their life in regard to the child's relationship with other family members, their ability to meet the child's needs, and their views and wishes and feelings regarding the child.

e) Relevant duties of the Local Authority are set out in the Children Act 1989, at section 17 in particular, that:
(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
(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 those children's needs.

f) And at section 22C:
(1)This section applies where a local authority are looking after a child ("C"). …
(5)If the local authority are unable to make arrangements under subsection (2), they must place C in the placement which is, in their opinion, the most appropriate placement available.
(6)In subsection (5) " placement " means—
(a) placement with an individual who is a relative, friend or other person connected with C and who is also a local authority foster parent;…

g) The Public Law Outline and the 2014 DOE Guidance "Court Proceedings and pre-proceedings for Local Authorities" Chapter 2 paragraph 3 supports those statutory provisions: "*Where a child cannot remain living with his or her parents, the Local Authority should identify and prioritise suitable family and friends placements, if appropriate. Where possible, this identification should take place before care proceedings are issued, as to avoid the need for proceedings",* and *"the Local Authority should continue to explore potential family placements, to clarify the realistic options available for the child".*

h) In order to make sure that families are engaged at the earliest stage of proceedings Local Authorities have adopted a number of practices to assess the support available within the family network where a child is at risk of care proceedings, foster care or adoption. Best practice should be informed by the Public Law Outline and the pre-proceedings checklist.

i) The following summary is from the Department of Education document: Family and Friends Care: Statutory Guidance for Local Authorities at paragraph 3.17:
"*In relation to care proceedings, the Public Law Outline requires authorities to demonstrate that they have considered family members and friends as potential carers at each stage of the decision making process. The local authority will need to disclose information about discussions with relevant family and friends at the pre-proceedings stage. Statutory guidance in relation to court orders emphasises that consideration of potential alternative carers should always be fully explored before making an application under section 31 of the 1989 Act, provided that this does not jeopardise the child's safety and welfare*."

j) Best practice includes the use of the Family Group Conference process. This is specifically addressed in the Public Law Outline guidance. It states at Chapter 2 paragraph 24: "*Enabling wider family members to contribute to decision making where there are child protection or welfare concerns, including where a child cannot remain safely with birth parents, is an important part of pre-proceedings planning. Wider family meetings, such as family group conferences are an important means of involving the family early so that they can provide support to enable the child to remain at home or look at alternative permanence options for the child. Local authorities should consider referring the family to a family group conference service if they believe there is a possibility the child may not be able to remain with their parents, or in any event before a*

child becomes looked after, unless this would be a risk to the child.", and at Chapter 2 paragraph 8: *"addressed in the Public Law Outline Guidance: "If, in the course of early work with a family, capacity issues become apparent, the local authority should consider whether any additional support should be provided to the parents, including a possible referral to adult learning disability services."*

k) Kent has its own Family Group Conference Service. The procedure document states: "*In Kent, it is mandatory for ALL families where a child(ren) has been assessed by their Social Worker as being likely to come into the Public Care System, to be given the chance to plan for the child(ren) by means of a Family Group Conference. It is not obligatory for the family to have a Family Group Conference but they must be given the opportunity to consider having one, having first discussed the merits of doing so with a Family Group Conference Coordinator.*", and
"You might also consider making a referral to comply with Public Law Outline (Public Law Outline) Guidance. Mandatory referral criteria for CSWT teams remains 'all children assessed as likely to come into the Public Care System', or as part of the Family Drugs and Alcohol programme."
And:
"The philosophy underpinning Family Group Conferencing is that:
** Children and young people are paramount to the Family Group Conference process;*
** <u>The family network is central to the Family Group Conference process</u>;*
** Family Group Conference is family led decision making in partnership with formal systems;*
** Family Group Conference is a safe, respectful and effective environment for all participants;*
** Private family time is a vital element to Family Group Conference process;*
** Families have the right to be involved in decisions that affect their children and that as long as the plan is safe for the child(ren) it should be fully resourced."*

l) It is hard to see how the 'family network' would have such an opportunity or be able to exercise the right to be involved in family led decisions, unless there were some consultation within that family network.

m) The Family Group Conference framework used in Surrey suggests that legal advice should be sought in a situation where consent to contacting family members for an Family Group Conference is refused.

n) Indeed if effect is to be given to the principles set out above, accepting that the parties' human rights are engaged, there should be a balance struck between the right of the child to be raised by its family and the right of a parent not to have wider family contacted. It is also clear that the Children Act 1989 Sections 17 and 22C, Section 1 ACA 2002, the Public Law Outline guidance, ECHR Article 6 and 8 require the Local Authority to look at any parental objections, weigh these against the child's right to be raised within their own family and set out clearly its reason why no further family assessment is necessary if that is the conclusion it reaches, and that this should be shared with the court on issue of proceedings. It is likely that legal advice should be sought in carrying out that exercise.

o) I acknowledge that there may be good reasons on occasions for other family members not being approached, but these need to be understood rather than glossed over. And, while there is case law relating to certain extreme examples where the question of who should be contacted about or made parties to family proceedings has been considered, there does not appear to be authoritative guidance on the type of circumstances as arose here in relation to Family Group Conferences.

p) Here, given the concerns over Y's capacity the Local Authority should at least have been alert to consider very carefully her failure to put forward any relative. Reliance on her exercise of parental responsibility cannot sit together with the Local Authority's own concerns about her capacity, without further careful enquiry.

q) Further exploration of the issue with Y, and/or via a Family Group Conference exercise would have seemed appropriate. If not before the issue of proceedings when no child was yet born, with his own Article 8 family life rights, but at the least directions and approval for such steps should have been raised with the court.

r) This was particularly the case where the Local Authority itself had developed a Family Group Conference plan in relation to T and U in 2011, where other relatives including Mr and Mrs Z were named as overnight/contingency carers (albeit Mr and Mrs Z's names did not form part of that final 2012 SG plan), and where it was clear that the paternal relatives caring for T and U were not directly related to X whose father remains unknown but is not T and U's father.

s) The legal and best practice framework and local policies set out above are a small summary of a much wider range of authorities, statutory provisions and guidance. In combination, the following principles can be derived:
   - Unless a child's welfare requires it a child's interests are best promoted by living with their family.
   - Interference with the living arrangements for children by a Local Authority must pass a threshold. If there is insufficient evidence to establish that a child is suffering or is likely to suffer significant harm the court, at a Local Authority's invitation, cannot interfere with a child's living arrangements.
   - Where it becomes clear to a Local Authority that a child is at risk of suffering significant harm there is a duty under section 17 Children Act 1989 to provide services to a child to try to allow them to live within their family.
   - When public law proceedings are contemplated and removal of the child from their primary carer is a realistic possibility the Local Authority should identify at the earliest opportunity if there are wider family and friends who may be able to care for the child, for example from their own records.
   - A referral to a Family Group Conference should if possible be made when proceedings are contemplated. One of the purposes of the Family Group Conference is to identify if there are wider family members who can offer support or care for the child.
   - Where capacity is an issue the Local Authority should consider if an advocate is necessary to assist a parent.

- If a Family Group Conference referral is refused legal advice should be sought. Any parental objection to wider family members being assessed or involved in proceedings requires scrutiny.
- Identifying alternative carers for a child should if possible take place during the pre-proceedings process under the Public Law Outline, failing which it should be raised with the court once proceedings are issued.
- Once in proceedings the Local Authority still has a duty to continue identifying wider family members who may be assessed to care for the child. This is part of the duties required of Local Authorities to promote the child's welfare.
- A child's right to respect for private and family life may include the right to know wider family members who have not been part of the proceedings and may not have met the child.
- When adoption is being considered the Local Authority has a duty to ascertain the wishes and feelings of relatives regarding the child and the plan for adoption.

CHRONOLOGY OF THE 2017 PROCEEDINGS

12 March 17	Midwife referral – Y pregnant and severe mental health issues, saying she cannot care for baby. Local Authority carries out Child & Family assessment.
17 May 17	Initial Child Protection Case Conference
15 June 17, although contains 'Continuation and Update' to Nov 17	Thanet Mental Health Team CPN letter to KCC Specialist Child Services (Local Authority): History of Y's mental health, including diagnosis of Emotionally Unstable Personality Disorder, and mental and behavioural disorder due to harmful use of alcohol; (at an unclear date (Aug/Sept 17) cognitive testing is mentioned '*to ascertain if underlying condition Autism*' and '*capacity assessment asked for to ensure Y has her needs addressed prior to court dates*'; again at an unclear date (Nov 17) '*testing for cognitive function, IQ level to ascertain if underlying condition. Furthermore a capacity assessment has been arranged*.')
23 June 17	Pre-proceedings meeting, solicitor's note: Y and solicitor attend. Y's mental health and capacity, and ongoing support from the mental health team with appointments is discussed. Y says unable to put forward alternative carers, and so Local Authority suggests that although a referral could be made there would be no point in a Family Group Conference.
26 June 17	Family Group Conference referral opened and then closed as no family/friends were put forward by Y.
20 July 17	X is born. Y's solicitor emails Local Authority x 4 regarding concerns about Y's capacity and her inability to agree to the Local Authority accommodating X under section 20 Children Act due to her lack of capacity. Emergency Protection Order granted. Y's capacity raised during that hearing.
27 July 17	Email from Y's solicitor: "*I do have concerns regarding capacity*"
28 July 17	Recorder Royall grants Interim Care Order and CMO:

	It is the parties' intention that the mother's solicitors will file an application pursuant to Part 25 for the instruction of a psychiatrist to undertake a capacity and psychiatric assessment of the mother; but this assessment not being able to take place until 6 weeks post-partum i.e. after 31st August 2017.
14 August 17	Email from Local Authority to Y's solicitor: Social Worker had attended Y's home after reports of water flooding flat below. Y was home but not answering, and could be heard laughing, screaming, shouting. Local Authority keen to assess Y given capacity issues but Y won't engage.
16 August 17	DJ Batey CMO: *Para 3: Y has until 24 Aug to confirm if she supports applications for capacity, cognitive and psychiatric assessment and that she will attend: if not, court will adopt presumption of capacity.* *Para 6: If Y has failed to comply with para 3, Y's sols shall inform the court and parties forthwith requesting urgent FCMH by 25 August 17* *Para 8: Y's sols to file and serve capacity assessment by 15 Sept* *Para 9: Y's sols to file and serve cognitive assessment by 22 Sept* *Para 10: Y's sols to file and serve psychiatric assessment by 29 Sept* *Para 11: If Y lacks capacity the OS is invited to act as litigation friend*
25 August 17	Case note of Social Worker visit to Y: Terrible home conditions. Y's presentation extremely concerning, not engaging, staring at floor, wild look in eyes. Social Worker felt threatened and left. She called Val Jenkins from the mental health team to request an urgent visit
4 Sept 17	Local Authority case summary sets out Social Worker visits to Y's home and attaches case note of above visit on 25 August 17. HHJ Scarratt CMO: *Upon the court being informed that Y has not engaged with the assessments directed on 16 August, that she has not attended contact since the beginning of August 2017, and that she has not provided her solicitors with updated instructions; and upon the Local Authority informing the court and parties [that the plan for adoption was progressing to the Agency Decision Maker]; and upon timetabling to an Issues Resolution Hearing on 2.11.17 which may be used as an early final hearing, notwithstanding Y's absence from court if she fails to attend;* *Para 17(1): personal service of this order by Local Authority on Y* *Para 17(4): the assessments directed on 16.8.17 to be carried out in respect of Y are hereby discharged* *Para 17(5): In the event that Y re-engages with these proceedings or provides instructions to her Solicitor, the Solicitor for Y shall forthwith seek to restore this matter to Court for an urgent Directions hearing on notice to all parties*

2 Oct 17	Y admitted under section 136 Mental Health Act, then discharged
6 Oct 17	Email from Local Authority to Y's solicitor: first information that paternal aunt is proposing to adopt X. Agency Decision Maker meeting due on 11 Oct 17.
8 Oct 17	Y admitted under section 136 Mental Health Act, then discharged
17 Oct 17	Y's solicitor unable to discover whether Y is in M hospital
20 Oct 17	Y admitted following Mental Health Act assessment and remains in L hospital as informal (voluntarily, not sectioned) patient until date between 7 and 22 Nov 17.
2 Nov 17	HHJ Scarratt CMO: *Preamble: The mother has not engaged with these proceedings or the assessments directed on 16 Aug 17* *Y has failed to identify any family members to be assessed as alternative long-term carers* *Upon the court being informed that Y has not engaged since the last hearing and that she is currently in L Hospital as an informal patient and that she has not provided her solicitor with updated instructions* *Upon the Local Authority confirming that the final care plan for X is adoption and that if Y does not attend at the next hearing the Local Authority will invite the court to make final orders in the mother's absence* *Upon Y's solicitor indicating he shall endeavour to meet with the Y at L Hospital in order to obtain updating instructions* *Para (7): Permission is granted to Y's solicitors to obtain from Y's treating clinician a certificate of capacity…* *Para (8): In the event that Y's certificate of capacity shows a lack of capacity there is permission to disclose the papers in the case to the Official Solicitor and the Official Solicitor shall be invited to act on behalf of the Y* *NOTICE TO THE RESPONDENT MOTHER: THE LOCAL AUTHORITY FINAL CARE PLAN MAY BE ONE OF ADOPTION. THE COURT WILL CONSIDER MAKING FINAL CARE AND PLACEMENT ORDERS AT THE NEXT HEARING AND WILL PROCEED IN YOUR ABSENCE IF YOU FAIL TO ATTEND COURT OR PROVIDE INSTRUCTIONS TO YOUR SOLICITOR.*
6 Nov 17	Y's solicitor visits her in hospital: Y feels much better since hospitalised and taking medication. Unable to care for X. Happy for proposed placement with Q and R so long as she gets contact and to join contact she has with T and U. She is unable to propose other carers as she has not been in touch with her mother Mrs Z for some time as they have fallen out. Declines to engage with court ordered assessments as 'no point'. Aspects of adoption plan and orders explained. Email sent by Y's solicitor to request capacity assessment from treating clinician – never answered.
?7-22 Nov 17	Y discharged from hospital

23 Nov 17	Y attends solicitor's office to leave a message that she wants contact with X. Local Authority confirms personal service of last two orders on Y, as directed.
29 Nov 17	Social Worker visits Y who appears well and engages with the Social Worker. Social Worker discusses adoption panel with Y who expresses gratitude to Q and R and agrees with Local Authority's plan, and confirms she cannot care for X herself. This information is included in Social Worker's final evidence.
6 Dec 17	Y assisted by mental health team to telephone solicitor to obtain Social Worker's number, and confirms she wants contact with Y and that she told the Social Worker that the Local Authority's plans seem inevitable and she agreed with them.
11 Dec 17	X is placed with Q and R in a foster-to-adopt placement.
20 Dec 17	Y not present (and had not attended any hearing) Position Statement prepared on Y's behalf: Y's position summarised as per telephone call of 6 Dec 17; no formal statement from Y as she did not commit to come to solicitor's office; the question of service of the placement application on mother was raised; and "*In the circumstances, the court will need to decide whether Y has had sufficient notice of the Local Authority's plans and in the circumstances, whether her consent for any adoption should be dispensed with*." HHJ Scarratt Final Care and Placement Order: *PARTIES POSITIONS: Y consents to the making of Final Care and Placement Orders for X. Y would wish to have contact with X following his adoption.* *IDENTIFICATION OF PERSONS TO BE ASSESSED AS POTENTIAL CARERS* *Y has failed to identify any family members to be assessed as alternative long term carers.* *EVIDENCE* *And Upon Y not being in attendance at Court, but having instructed her legal representative that she consents to the making of Care and Placement Orders* *And Upon the court commending Y for the difficult decision that she has made and recognizing that in doing so, she has prioritized X's best interests.* *ORDERS* *Para 17(1): X is hereby placed in the care of the Local Authority* *Para 17(2): There shall be a Placement Order in respect of X in favour of the Local Authority*
24 Dec 17	Mrs Z visits Mrs S, T and U, and first meets and learns about X's existence and the concluded care and placement proceedings
28 Dec 17	Mrs Z contacts the local authority to inform that she wishes to care for her grandson X.
16 Jan 18	Mrs Z applies to revoke the placement order.

OBSERVATIONS ON THE 2017 PROCEEDINGS

43. One might say: where to start? My comment is not flippant, but I find myself echoing the Independent Social Worker's feelings that I have set out at the start of this judgment: this is a car crash that should never have happened, on so many levels.
44. It does not assist to conduct a naming and finger-pointing exercise where there has been a wide collective set of errors, and named criticisms would appear trite in the circumstances where almost every step or omission in relation to the key issues of capacity and involving the maternal grandparents was fundamentally flawed by comparison with what should have occurred here if the statutes, rules and guidance had been followed.
45. Instead I will note the following on the positive side, before turning to what ought to have happened, and then highlighting some major errors, traps and temptations that should have been avoided.

46. <u>On the positive side</u>:
    I. There was an appropriate midwifery referral, alerting to Y's mental health difficulties.
    II. Y's capacity was raised at the pre-proceedings meeting, and support via advocacy and mental health team was considered and sought by the local authority, albeit with no or little result;
    III. Y's solicitor and the Local Authority raised questions of her capacity at the outset of the proceedings and variously at points through the case, albeit to little effect;
    IV. Y's solicitor correctly identified that Y could not consent to section 20 accommodation of X by the Local Authority as she appeared to lack capacity to do so, and therefore an Emergency Protection Order was made shortly after his birth;
    V. Directions were made for capacity, cognitive and psychiatric assessments at an early stage, albeit none were obtained;
    VI. A direction was made requiring Y's solicitor to return the matter to court urgently for further directions if Y re-engaged (albeit that this was after other directions critical to capacity were discharged, and was not complied with in any event);
    VII. Contact was made with the family caring for X's half-siblings on their paternal side, leading to identification of a placement for X within that kinship group;
    VIII. In the final position statement prepared on her behalf Y's solicitor acknowledged Y's position of being unable to care for X and of '*being happy with*' the Local Authority's plan for adoption, but raised the question of the court needing to decide "*in the circumstances, whether her consent for any adoption should be dispensed with*"; thereby in effect alerting the court that they were not in a position to put forward her position as formal consent (albeit this was not an adequate approach in terms of the question of her capacity overall, and her 'position' was misunderstood and mis-stated on the face of the order as proper consent);
    IX. Both the Social Worker and the Children's Guardian acknowledge that, looking back with hindsight, they can see that more and different steps should have been taken, and that they now understand how they should have acted differently;
    X. The Social Worker conceded that enquiries should have been made of the wider maternal family and specifically Mrs Z, that she should not have taken it as read that this had been adequately covered by her predecessor and that Y had exercised her parental responsibility to exclude her mother, that a Family Group Conference

should have taken place, and extra care should have been taken on these issues where Y's capacity was questioned, and that Y's capacity issues should have been fully pursued and addressed;

XI. The Children's Guardian conceded that there were '*hugely regrettable*' features in the previous proceedings, and she had now learnt to look more inquisitively at the wider family network, and not become focussed on the single solution that was found, that Y's capacity issues should have been properly addressed despite the challenge of her non-engagement, and she too considers that this situation should never have arisen;

XII. The Local Authority still asserts that it attempted to identify alternative family carers for X, but considered it was stymied at the stage of Y expressing a wish for her mother not to be contacted. It now accepts that position in relation to Y's exercise of her parental responsibility was inappropriate, and that her vulnerability should have highlighted the need to look further. The Local Authority concedes that '*in hindsight, opportunities to pursue wider family members during the care proceedings were missed*', and that as to Y's capacity '*a more rigorous approach and actions befitted the facts*'. Overall the Local Authority accepts that this case presents the opportunity for a number of learning points.

47. <u>What should have happened here</u>:

I) At the pre-proceedings stage and ongoing, Y should have been supported by a mental health advocate, and the Social Worker's referral to the adult mental health team should have resulted in both support for Y and professional support for X's Social Worker from that team.

II) If possible a capacity assessment and cognitive assessment should have been fitted in to the pre-proceedings process in order to inform the local authority and the court and permit a litigation friend to be appointed almost immediately upon issue of the care proceedings.

III) If necessary, advice should have been taken about the impact of Y's refusal to propose her mother, and that advice should have identified the correct course of making fuller enquiries of the maternal family members.

IV) If not possible before X's birth, the question of informing the maternal family, and specifically Mrs Z, alerting wider family members to X's birth, the care proceedings and plans and the need for a Family Group Conference should have been raised as soon as possible with the court.

V) A Family Group Conference referral should have been made and an Family Group Conference undertaken.

VI) Wider invitations should have been made to attend the Family Group Conference to the relatives involved in X's half-siblings care: Mrs S and her family, including possibly Q and R.

VII) Assessments of any wider family members putting themselves forward should have been undertaken in order to identify realistic options.

VIII) This may even have precluded X having to go into foster care at all as he may have been able to have been placed with a family member such as Mrs Z from the outset.

IX) To avoid delay if no assessment had been done prior to proceedings starting, and given the capacity concerns, an application for expert capacity assessment should have been made right at the outset of the care proceedings so that relevant directions were made immediately at the first hearing, even if the expert considered that they may have to wait until 6 weeks after delivery to carry out their assessment.

X) No further substantive directions should have been made until that capacity issue was determined and a litigation friend appointed, unless absolutely necessary and limited to essential steps with permission specifically granted by the court to take that step prior to determination of the capacity question.

XI) If Y failed to co-operate with a capacity assessment the matter should have been brought back to court for urgent directions to consider any alternative sources of evidence relevant to her capacity, and seek appropriate directions.

XII) Creative efforts could have been considered to time an expert assessor's appointment before or after some other event that Y was likely to attend, such as a contact session or some other advocate-supported appointment such as in relation to benefits or similar.

XIII) Directions could have been made to obtain discharge summaries or treating consultant's letters to her GP, or to obtain an assessment from her current treating consultant or GP, or similar, and which directions should have been mandatory and not permissive, and followed up with urgency.

XIV) Any failure by the court to adequately deal with the issue of Y's capacity should have prompted any party by their legal representative (and especially Y's solicitor) to raise the matter with a detailed skeleton argument referring to the relevant law.

XV) The court should have determined the capacity issue as early as possible in the proceedings and appointed the OS as Y's litigation friend. (Given Professor Fox's assessment this year, and the accounts of Y's presentation in the summer of 2017, I consider it highly likely that a finding and declaration that Y lacked litigation capacity would have been made.)

XVI) A further directions hearing should have been listed as soon as possible thereafter while giving enough time for the OS to provide instructions on further case management, and to seek variation or discharge of any directions made prior to the OS's appointment. If it had not already been dealt with, this may have led to the question of potential placement with maternal family members being raised.

XVII) The case would have then proceeded through case management and issue resolution hearings, and if not resolved beforehand then reached a final hearing with Mr and Mrs Z fully involved and Y represented by a litigation friend.

XVIII) When assessing Q and R as prospective adopters, or if planning for an adoptive placement, the preparation for that application should have led the Local Authority to look more widely at X's maternal family at that stage if it had not been considered previously.

XIX) If the case had reached final hearing with the Local Authority applying for a placement order, and where the OS did not formally consent on Y's behalf to such an order, the Adoption and Children Act welfare checklist should have been applied in considering whether or not to dispense with Y's consent under section 52(1).

XX) In the event that Y was said to be consenting to a placement order, the question of her capacity to do so should have been properly settled, and the court should have satisfied itself under section 52(5) that her consent was given unconditionally and with full understanding.

48. Errors, traps and temptations that should have been avoided:

I) Relying on Y's purported exercise of parental responsibility in saying that she did not propose the maternal grandmother as a potential carer. In particular where she was thought to lack capacity, this is not a step that somehow relieves or prevents the Local Authority from considering what steps needed to be taken to meet its duties to consider other family members.

II) Believing the Presumption of Capacity replaces or obviates the need for the court to **determine** the issue of litigation capacity on evidence as a matter of fact, or entitles the parties or the court to ignore a capacity problem, particularly where there were worrying recent accounts of Y being significantly unwell. It is simply a rebuttable assumption and a starting point. Any suggestion that capacity is in issue should lead to the opposite approach, namely to take steps that would enable the court to determine whether the assumption remains in place or lack of capacity is established.

III) Ignoring glaring evidence or information suggestive of lack of capacity. This is an abrogation of responsibility to acknowledge the implications of such information, albeit it is easier to shut an eye to it in order to avoid its inconvenient effects on the case, particularly where a case outcome appears obvious or a solution is readily to hand.

IV) Relying on Y's non-engagement or non-attendance at hearings, or employing 'unless' orders as a basis for progressing the case and discharging directions critical to the question of her capacity. A vulnerable person who may be a protected party due to lack of capacity may well find it difficult or impossible to engage or attend without the appropriate support or identification of her status and appointment of a litigation friend. This compounds a breach of her Article 6 rights.

V) Personal service and warning 'Notice' – these steps make no sense in law or natural justice if Y lacked capacity, and simply seem to lack common sense. What might such steps or notices actually mean to a vulnerable person who lacks litigation capacity?

VI) Discharging directions critical to the determination of the capacity issue, and not complying or following up on non-compliance with those directions. This is case management failure with direct consequences for the procedural propriety of the case.

VII) Making permissive directions to obtain the treating clinician's certificate of capacity, rather than mandatory and time-limited directions.

VIII) Treating Y's wishes and feelings obtained by the Social Worker and over the telephone with her solicitor as a capacitous decision consenting to very grave and complex and potentially irrevocable orders, compliant with section 52(5). Her diagnosis of emotionally unstable personality disorder and alcohol dependence were well known. Directions had been made that she should be subject to capacity,

cognitive and psychiatric assessment, but had not resulted in any assessments nor other medical information being provided. There was no adequate information before the court to assist with any question of her abilities or suggestibility or understanding.

IX) Her position was erroneously described as 'consent' and named as such in the order, when it was not put forward as formal consent in the Position Statement prepared on her behalf, and the exercise of considering whether her consent should be dispensed with by undertaking a welfare-based consideration of the checklist factors was not done, despite her solicitor flagging it up.

X) As the Social Worker and Children's Guardian acknowledged, the parties became caught up in the 'excitement' of having found a solution for X's placement that avoided stranger adoption, and so lost sight of wider issues that had been overlooked.

XI) The temptations of a precipitate approach, naturally abetted by the lure of completing a case within the required 26 weeks time-limit, and by the existence of 'a solution' for X which tempts professionals and the court not to address the harder, wider or longer questions which might cause any delay, leading everyone to push ahead to final orders despite serious procedural irregularities.

XII) No party, representative nor the court spotted or voiced or prevented or corrected the series of avoidable errors around failing to address a key issue which had riddled the case from the outset, and the case was allowed to progress and ultimately extremely serious final orders were made on the back of those serious procedural irregularities. This collective shared failure seems something akin to group-thinking or peer pressure or a gross shared example of confirmation bias.

<u>THE CURRENT APPLICATIONS</u>

49. THE LAW - REVOCATION OF PLACEMENT ORDER, DISCHARGE OF CARE ORDER, & CHILDREN ACT ORDERS

a) Permission was granted to Mrs Z to apply to revoke the placement order pursuant to section 24 Adoption and Children Act 2002 at the first hearing of Mrs Z's application on 23 February 2018. Whether to discharge the placement order is a question to which the welfare checklist applies under section 1 of the Adoption and Children Act, and the principle that X's welfare throughout his life is the court's paramount concern.

b) No party opposes the revocation of the placement order, and the Children's Guardian goes so far in her submissions to assert that the Placement Order can now plainly be seen to be wrong. The local authority supports the revocation of the placement order that was granted to it, and I am encouraged by all parties to make Special Guardianship Orders, either to Mr and Mrs Z or to Q and R, in conjunction with other Children Act orders. The OS is neutral in terms of the position on behalf of Y as to which parties are granted Special Guardianship Orders.

c) Under section 91(5)(a) Children Act 1989 the granting of a Special Guardianship Order will result in the discharge of the care order. In considering whether to grant a Special Guardianship Order the court must consider the welfare checklist factors

set out under section 1 Children Act 1989 and treat X's welfare as its paramount concern, and the court must make no order unless it is in X's interests to do so.

d) Under an application to discharge a care order pursuant to section 39, the principles are whether there has been a material change in circumstances and whether Y's welfare requires discharge (*Re X [2014]* EWFC B217), also by reference to the factors set out under section 1.

e) I am also invited to make a Family Assistance Order for 12 months under section 16 Children Act 1989, naming X and both pairs of potential Special Guardians: Mr and Mrs Z and Q and R. Although Y may not be named as she cannot give consent, it is clear from the Child Arrangements Orders that I am also invited to make, that she will inevitably be closely involved in the process of advice, assistance and befriending that is required of the Local Authority under a Family Assistance Order. I am also invited to make a direction requiring the parties to provide up to date addresses and permit access to X under section 16(3), and to require the Local Authority to report to the court after a 6 month period on the progress of the Child Arrangements Orders under section 16(6).

f) In relation to any findings: the standard of proof is the civil standard i.e. the simple balance of probabilities; and where I describe events or make findings, I have applied the balance of probabilities, the burden of proof being on the party seeking the finding. In making any findings I have considered all the evidence and submissions, even if every potentially relevant factor may not be specifically cited.

50. THE LAW – NATURAL FAMILY, WELFARE & THE BALANCING EXERCISE

a) Of great assistance in summarising the relevant law is the recent judgment of Lord Justice Peter Jackson in *A (A Child) 2018* EWCA Civ 2240, where the court was considering an appeal against the placement of a child under an Special Guardianship Order with a foster carer in this country with whom he had an established relationship and active contact with family members here, which had been made instead of an Special Guardianship Order with an otherwise suitable family placement in Ghana, his country of origin. (While the summary below is concisely relevant, it is worth noting that his Lordship expressly emphasised that the appeal, while successfully leading to a rehearing, did not indicate any particular outcome in terms of the final balancing exercise and was simply addressing the first instance judge's reasoning.)

b) ***"The welfare checklist***

14. At the risk of stating the obvious, where a court is considering whether to make an order such as a Special Guardianship Order it "shall have regard in particular" to the matters that appear at s.1(3) Children Act 1989. The provision is therefore obligatory, flexible and open-ended, providing the decision-maker with a workbench and tools with which to devise a proper welfare outcome.

15. The welfare checklist can be helpful in several ways. In the first place, paying attention to it tends to ensure that all important considerations are taken into account. As Baroness Hale put it in Re G (Children) [2006] *UKHL 2305 at [40]:*

"My Lords, it is of course the case that any experienced family judge is well aware of the contents of the statutory checklist and can be assumed to have had regard to it, whether or not this is spelled out in a judgment. However, in any difficult or finely

balanced case, as this undoubtedly was, it is a great help to address each of the factors in the list, along with any others which may be relevant, so as to ensure that no particular feature of the case is given more weight than it should properly bear…."

16. Next, its neutral content is a reminder that the assessment of welfare is not driven by presumptions. As McFarlane LJ said in **Re W (A Child)** ***[2016] EWCA Civ 793*** *at [71]:*

"The repeated reference to a 'right' for a child to be brought up by his or her natural family, or the assumption that there is a presumption to that effect, needs to be firmly and clearly laid to rest. No such 'right' or presumption exists. The only 'right' is for the arrangements for the child to be determined by affording paramount consideration to her welfare throughout her life (in an adoption case) in a manner which is proportionate and compatible with the need to respect any ECHR Art 8 rights which are engaged."

17. Then, the open-ended nature of the checklist allows the court to take account of other matters that may bear upon the individual decision. For example, although the present case is not concerned with adoption, the lifelong significance of the decision might reasonably prompt the court to have regard to the matters appearing in the checklist in the Adoption and Children Act 2002 at s.1(4)(f).

18. Lastly, the substantive nature of the entire process was described by Sir James Munby P in **Re F (Children)** ***[2016] EWCA Civ 546*** *at [22]:*

"Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law."

What is instead called for is real analysis that descends into as much detail as the decision demands. As McFarlane LJ said in Re G (A Child) [2013] *EWCA Civ 793 at [71]:*

"What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options."

Proportionality

19. Art. 8 of the European Convention on Human Rights of course provides that:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

20. Orders of the present kind are made in accordance with law and with the legitimate aim of promoting the welfare of the child. The additional question that is addressed by the proportionality evaluation is whether the proposed interference is necessary in the first place and if so whether it goes any further than it must to achieve its purpose. In **CM v Blackburn with Darwen BC** ***[2014] EWCA 1479****, Ryder LJ put it this way at [36]:*

"The whole purpose of a proportionality evaluation is to respect the rights that are engaged and cross check the welfare evaluation i.e. the decision is not just whether A is better than B, it is also whether A can be justified as an interference with the rights of those involved. That is of critical importance to the way in which evidence is collated and presented and the way in which the court analyses and evaluates it."

21. In every case heard in the Family Court, the children and (with occasional exceptions) the adults will hold rights under Art. 8(1). Where there are competing outcomes, the choice of one outcome over another will commonly entail some degree of interference with those rights. It is well-established under European and domestic law that where there is a conflict between the welfare of the child and the rights of an adult, the child's interests will predominate. What is necessary in the individual case is to identify the nature of rights that are engaged and the extent of the proposed interference. This cross-check prevents the choice of an unnecessary interference or one that is disproportionate to the problem.

22. The importance of identifying the actual rights that are engaged is illustrated by the facts of the present case. Without deciding the matter, it would seem that David has 'family life' with his foster carer, qualified by the fact that she has been a professional carer providing a neutral, holding placement. He also has important family life rights with his parents, grandmother and siblings. As to the H's, they are the only viable placement within his birth family, but he has never met them, and he might therefore be said to have a right to private life in their regard with the potential for it to develop into family life if he was placed with them. It is therefore important to identify not only what rights are engaged but also their short, medium and long-term significance, before going on to consider the justification for any proposed interference. This exercise is of particular importance when the choice is between a placement with relatives and a placement outside the family, certainly where the decision is finely balanced."

c) The reference to section 1(4)(f) Adoption and Children Act 2002 at paragraph 17 in the above quotation is to the same part of the section that I have quoted above at paragraph 41(a), relating to the examination of the child's relationships.

d) In Mr Butler's submissions on Mrs Z's behalf, I have additionally had my attention drawn to the extended analyses in the judgments of Baroness Hale in *Re G [2006]*, and of Lord Justice McFarlane in *Re W (A Child) [2016],* which both emphasise the important contribution natural family membership may make with regard to a child's emotional needs, but also that there is no presumptive 'right' that results in family connections trumping other relevant factors or any presumption as to a pecking order applying to birth family placements over wider kinship or other placements. I have also been reminded of the important role that the courts and Parliament have recognised that grandparents play in children's lives, in terms of their identities and family history, and sources of love and support.

e) The local authority identified the case of *Re B [2009]* UKSC 5 which involved a private law dispute between a father and a maternal grandmother, where the Supreme Court re-emphasised the essential importance of the child's welfare to the court's determination,

and additionally noted that the lower court had properly given significant weight to the child's likely destabilisation if moved from grandmother to father.

f) On behalf of Q and R, I was referred to the judgment of the former President Sir James Munby in *Re B (sibling relationship – placement for adoption) [2018]* EWCA Civ 20. That appeal judgment approved the decision of the lower court in which the judge had rightly recognised the reality that prospective adopters offered the child a placement with a full sibling and weighed that as a factor when considering the pros and cons of that option as against a potential placement with relatives in the extended paternal family. While this is not exactly on point here, as Q and R are no longer proposing to adopt, nor do they have X's half-siblings living with them, I acknowledge the point that I must consider as a factor that X will have ongoing, frequent, regular, easy, and straightforward relationships with his half-siblings in Mrs S's household nearby and when they come to stay with Q and R.

51. IMPACT OF THE 2017 PROCEEDINGS
52. While it may feel natural to want to consider redressing the avoidable wrongs suffered by the family members as a result of the handling of the 2017 proceedings, and perhaps to do so by salving Mr and Mrs Z's understandable anguish and indignation by trying to put them back into the position they would have had in relation to X, that is of course not the law applicable here. Redress or reparation is not the remit of this court.
53. I fully recognise that they have had to bring this application after final orders were made, in order to have their role in X's life properly considered, and have had stolen from them the opportunity to do so at a much earlier stage and before final care and placement orders were made.
54. But I am solely concerned with X's welfare interests now; and one aspect of those interests is the impact wrought by these consequences of the earlier proceedings on key welfare factors in this case.
55. As far as X is concerned, he did not forge a straightforward early relationship with his maternal grandmother and her husband as he might have done, and instead has settled and bonded with Q and R and developed close relationships with T and U whom he has become used to seeing easily and often.
56. Mr and Mrs Z have been left with understandably powerful feelings of unfairness, distrust, frustration, resentment, loss and betrayal.
57. Q and R have had to face the prospect of losing the care of X whom they had devoted themselves to, with consequent feelings of fear, tension, resentment and anxiety.
58. Both sets of adults have been pitched into an adversarial situation that should not have arisen, with an inevitable deterioration in their relationships, and which was also further poorly handled by the Local Authority at the outset of these proceedings.
59. As was aptly described by the Independent Social Worker, 'the genie is out of the bottle', and there is no way of stuffing those painful feelings back in. It was for that reason that she recommended as essential a programme of mediation that would have to be conducted skilfully and sensitively to assist all the significant adults in X's life, for his benefit, to manage and move on from this regrettable, complex and sensitive situation. She additionally recommended family therapy aimed at assisting all the adults to manage themselves in relation to X's marked sensitivities, in particular in response to his anxieties and behaviours

around separation and arrangements for contact, in order that these are mitigated and lessened as much as possible by enabling them together to support him as well as possible in forging positive relationships. The Children's Guardian firmly supported these recommendations, and I am extremely glad to see that the Local Authority has improved its plan to confirm it will ensure that these services are provided to this family, and to provide it from a source that this family will believe it can trust.

60. THE COURSE OF THESE PROCEEDINGS
61. These proceedings began poorly. The relationships between the local authority and Q and R on the one side, and Mr and Mrs Z on the other were bad for the reasons I have mentioned. Mr and Mrs Z believed that their role and existence had not been bothered with by the Local Authority and had been hidden by Q, R and S. They considered that their existence should have been raised during the course of Q and R's assessment in autumn 2017 at the least. The Independent Social Worker found this aspect of the case to be unsatisfactory and the position of Q and R surprising. It is perhaps less surprising in the context of their perception of Mr and Mrs Z as choosing less involvement with T, U and Y, without perhaps understanding Mrs Z's difficult position.
62. Mr and Mrs Z also considered that, being X's birth family, and the placement of X being so recent with Q and R, that the Local Authority should have jumped at the chance of promptly assessing them and transferring his care to them as a matter of urgency. It does not appear to me that the Local Authority's reasons for not doing this were properly and fairly explained to them.
63. The Local Authority set up what were called 'contact meetings' at which Mrs Z and Q and R attended in January and February 2018. These appear to have been handled without adequate care, explanation and preparation, and ended up being occasions when strong feelings were voiced, particularly by Mrs Z. I consider that this was entirely understandable in the circumstances. I remain unclear as to why the Local Authority wanted to arrange this particular platform. They were called contact meetings, but involved effectively pitting Mrs Z against the Local Authority and Q and R.
64. There was an unwarrantedly negative approach by the Local Authority towards the Zs throughout this period. The Social Worker reluctantly conceded that during those contact meetings in January and February 2018 various negative and hostile comments were made to Mrs Z by a member of the Local Authority adoption team that suggested the Local Authority's attitude was one of resenting the intervention of the Z's as an unnecessary spanner in the works and that the Local Authority had obtained court approval for the adoptive placement of X with Q and R. This was further evidenced by the severity by which the Local Authority judged and described Mrs Z's position and more outspoken comments. The Social Worker, again reluctantly, also conceded that the minutes of those meetings did not contain those comments nor the hurt and negative responses of Ms R towards Mrs Z. So I must conclude that they are therefore one-sided documents coloured against Mrs Z and examples of the Local Authority's skewed approach in attempting to shore up the decision of the earlier proceedings and avoid its consequences by criticising Mrs Z.
65. I find that these were unhelpful meetings, more designed to attempt a dissuasion of Mrs Z from her course of challenging the placement with Q and R, than to assist in the

development of X's relationships with the maternal family and to openly explore the options for him.

66. A viability assessment of Mrs Z was undertaken in-house in February 2018 and remained coloured by this approach, followed by a severely critical appraisal in the Social Worker's June 2018 statement of Mr and Mrs Z's case and the Independent Social Worker's first report. The Social Worker has now, properly, conceded that many of her criticisms were based on her interpretation of the pain and confusion Mrs Z was suffering and the inevitable impact the mismanagement of the earlier hearings had wrought on relationships between the adults. She regretted describing Mrs Z as 'manipulative and controlling'. She was also prepared to accept that the comments made to Mrs Z at the time were inappropriate and unhelpful. Additionally, I find that many other criticisms and doubts of Mrs Z, for example whether she would be able to manage any health or emotional difficulty that X might develop, were more founded in this skewed approach than based on any sound evidence.
67. Mrs Z is clearly an outspoken person with strong feelings and an articulate manner and a tendency to speak over others as a result. She feels passionately about her grandson, and was and still is clearly and understandably struggling with strong feelings of upset, betrayal, mistrust, resentment, anger and frustration. Having heard her give evidence, I can see that her persistent manner may not be seen as socially easy or readily likeable. However, I accept the Independent Social Worker's analysis that the Local Authority's approach to Mrs Z and their failure to empathise, their failure to understand and listen to the grievances felt by Mr and Mrs Z, and their approach of condemning and belittling Mrs Z's expression of those grievances, was regrettable and unhelpful. I consider that it will have exacerbated the understandable negative feelings of the Z's provoked by the mismanagement of the 2017 proceedings. It also, in turn, made far more difficult than necessary the relationship between Q and R on the one hand and Mr and Mrs Z on the other.
68. Those relationship difficulties have of course been the focus of concern by the Social Worker, Independent Social Worker and Children's Guardian, and I will consider them in more detail later. But I note that Mrs Z certainly claims that some of those concerns have been overtaken by an apparently improved relationship in the last few weeks with Q, R and S.
69. X's first contact visit with Mrs Z took place in early February 2018 when X was almost 7 months old and continued about fortnightly for 4 months until it moved to the home of Q and R for a few sessions before moving to the home of Mr and Mrs Z. Y has also attended most of those contacts. The reason for the move to Q and R's home was due to the persistent distress shown by X during contact on being left by Q and R and the hope that this would settle him in the Z's care more easily. I note that this was appropriately suggested and sensitively managed by Q and R, and was at first resisted by Mrs Z as too uncomfortable for her and Mr Z given the situation between the adults. However, credit must also be given to them for having nonetheless engaged with it positively, leading to moving contact on to take place in their home. Unfortunately, X's discomfort and distress has persisted, although it is not as marked and deeply persistent as it was at first, but has nonetheless continued to be a significant feature.
70. An experienced Independent Social Worker, Ms Geraldine Wetherall, was appointed to assess Mr and Mrs Z and to complete a Special Guardianship assessment. She initially concluded that X should be placed with Mr and Mrs Z as his Special Guardians. Her report

was balanced and reflected her appraisal of Mr and Mrs Z's sense of injustice and frustration as having affected the other professionals' sense that they may have appeared to lack empathy into the disruption for X. She enumerated the positive parenting skills and other advantages offered by Mr and Mrs Z. Her second report, after seeing X twice with Mr and Mrs Z, led her to change her recommendation based upon his emotional needs.

71. Q and R were the subject of a positive Special Guardianship assessment report prepared by the Social Worker in June 2018, and the ADM adoption decision was reversed. Their assessment indicated a positive caring ability, X thriving in their care, and excellent opportunities being taken to develop his relationship with his half-siblings and with Y when she could manage contact. This assessment is in addition to the pre-adoption training and assessment that was undertaken in the previous proceedings.
72. The same Children's Guardian for X as had represented him in the 2017 proceedings was appointed in these proceedings, and provided a final report and oral evidence in which she supported the position of the Local Authority, Q and R, and echoed the analysis of the Independent Social Worker.

73. THE INDEPENDENT SOCIAL WORKER'S ANALYSIS
74. I was impressed by Ms Wetherall's reporting and oral evidence, and by the rigour and care that went into her re-evaluation of her recommendation. I noted her ability to maintain sight of X's needs, and to be able to weigh each answer carefully and fairly to reflect positives alongside appropriate balancing appraisals of relevant issues. It was clear from the deep and specific insights and commentary that she provided in her reports and oral evidence that she had thoroughly understood the situation and the feelings of the parties and had developed a highly effective evaluation process and relationship with Mr and Mrs Z to facilitate her assessment. She was carefully and thoroughly questioned by the parties, and maintained and developed a helpful, consistent and insightful analysis throughout.
75. Her first report is dated 24.5.18. Ms Wetherall has some 28 years experience and it was clear from her evidence before me that she brought a highly thoughtful, careful, nuanced, perceptive, rounded and experienced approach to bear on her assessment. She was careful to acknowledge that as she had not assessed Q and R she could not comment on the comparative options for X. Her first assessment did not involve seeing Mr and Mrs Z with X, but was based on extensive interviews with the couple. Her first report was criticised for her not having observed contact and seen X's difficulties in parting from Q and R and settling with Mr and Mrs Z. Her addendum report is dated 7.9.18, and benefitted from a review of the updating documents including contact notes and her observations of contact on 25.7.18 and, at her request, a 4 hour period that X spent in Mr and Mrs Z's care in September, a few weeks before this hearing. In relation to the September contact she took into account that X was said to be teething, and had not seen the Z's for 4 weeks due to holiday periods, and had not been to Mr and Mrs Z's home where the 4 hour session took place for 5 weeks since his last visit there. In her addendum report she describes X's difficulty settling, his sensitivity to noise and the sterling efforts made by Mr and Mrs Z and ZZ to engage appropriately with X and meet his needs. He was significantly upset for some 25 minutes of the July contact, and settled better when the atmosphere quietened on her suggestion, but he continued to show upset at intervals. In September X was very distressed at separation and although he settled and slept occasionally he also intermittently showed distress and was sobbing and

clingy to Mrs Z and was often unsettled and upset by the slightest change or noise. He would then ease and fall asleep but then wake up sobbing. It was, she said "*quite distressing*". I heard evidence that confirmed he had not been unwell at the time or following either of these contact visits, and so his reactions could not be attributed to illness.

76. I also note that Ms Wetherall could not fault the Z's efforts to console, comfort, distract and otherwise meet X's needs. She noted that X was far less animated and confident in the Z's care and showed marked relief and a return to relaxed and animated behaviour when collected by Q and R: "*on being reunited he was instantly in a different emotional place… interactive, relieved, happy to see [Q]… waving… animated, not crying, clearly happier and being encouraged to wave and he showed more animation than sadly I had seen throughout that [4 hour contact]*". She described X as distressed and stressed in the Z's care. She took pains, in her report and oral evidence, to emphasise that this is not as a result of any failing on the part of the Z's – it is simply a feature of X's nature. "*X's separation anxiety however impresses as more significant than for other children, and it is notable that X is far less confident and animated during contacts than might be anticipated, had his relationship with his grandparents been established from the outset, and had he been able to cope with temporary separation from his care givers*."
77. As a result of her observations, her addendum report concluded that while the Z's in principle are capable of meeting X's needs, she was driven to include in her assessment the level of difficulty experienced by X in his relationship with the Z's, and the difficulty this would pose to him and Mrs Z in forging a closer relationship as his primary care giver. On balance, which in oral evidence she described as a very fine balance, his emotional needs, development and marked distress meant that "*Such a significant change now, would represent trauma*" and led her to favour his remaining in his current placement.
78. She said in her oral evidence that the level of "*disruption and emotional distress would be difficult to overcome*". Ms Wetherall described him as suffering "*overt separation anxiety*" and that he was a "*sensitive child*", reacting to sound, change, sudden noises, but that it was "*reassuring he was reassured by returning to his care givers*". While she felt confident that he had a good attachment with Q and R, she was less confident that he could readily transfer his attachment as she had previously proposed in her first report.
79. She considered that due to X's difficulties that there was a risk that Mr and Mrs Z might not succeed in forging a successful transfer of X's attachment to them given his challenges, and despite the fact that she was sure that they would bend over backwards to appease X and it would not be as a result of any shortcoming of theirs. She expressed concern that this risked leading to a far worse emotionally harmful development due to fundamentally disrupted attachments.
80. She did note that Mrs Z was marginally less insightful into X's experiences and the effect of disruption upon him than her husband Mr Z, and that "*Within their commitment to X, and their determination to have care of him, X's emotional relationship and security with [Q and R] is not fully acknowledged*". In that context, she commended Mrs Z for showing in her recent statement how she had learnt about attachment issues and related information, but noted in her oral evidence "*despite [that information] she does not seem to me to appreciate that level of distress – she says she will work with it and manage it – that's great in terms of commitment … but she was clear 'he would be fine' – but X does not understand she is his grandmother and he will just be bringing his feelings and the loss of relationships with the*

people he loves and he will not understand that they will come back – he has not got that security – that's the whole anxiety".

81. Ideally, she considered that it would be possible and appropriate for X's identity, heritage and relationship needs to be met by Mr and Mrs Z acting in a traditional grandparental role and that it would not be necessary for him to live with them to do so. However she found it almost impossible to engage Mrs Z with this idea, and she concluded that as Mrs Z was so driven by her commendable aim to care for X that she could not really contemplate another outcome and so could not contemplate putting herself in X's position and what painful process he would have to go through to get to that end goal.
82. She noted the complex and difficult dynamic between the adults and welcomed any improvement. She considered it to be a deeply felt and emotive issue on both sides that now required professional support. As mentioned above, Ms Wetherall was adamant as to the critical need for mediation and therapeutic support to assist the adults in improving their relationships, managing their painful experiences and meeting X's sensitive needs.

83. THE CHILDREN'S GUARDIAN
84. The Children's Guardian echoed and adopted the Independent Social Worker's opinions, concerns and analysis.
85. She acknowledged that she, like the Independent Social Worker was not an attachment expert, but she felt it was entirely appropriate given her experience and observations to confirm that X was suffering from separation anxiety and would be at risk of attachment problems if this were worsened, and that good stable attachments will ameliorate that. She emphasised that this was not a criticism of Mr and Mrs Z who would clearly do their best in trying to handle X's distress, but due to the nature of X's characteristics and relationships that they were simply not as well placed as Q and R to succeed in meeting his emotional needs and in particular his separation anxiety in this respect.
86. She pointed out that X had built up a very good relationship with his siblings, carers and his siblings' wider family, and that his relationship with his siblings was better than it would have been if he had been placed with Mr and Mrs Z, because of the constraints Mrs Z had placed around her contact with T and U over the years.
87. She expressed deep sympathy for Mrs Z, and that some of her concerns had lessened since hearing Mrs Z give her oral evidence. But she still expressed her concern at the relentless nature of Mrs Z's expressed intention to 'never give up' in her wish for him to be in her care, and that although things should have been done differently she would have hoped that Mrs Z would have been able to show more insight into X's emotional needs.
88. Overall she considered that the risks posed to X's needs were less if he remained with his current carers in terms of promoting meaningful relationships with other family members. In particular she felt concerned at the difficulty experienced by Mrs Z in being able to commit to her older grandchildren and considered that this left her concerned about her ability to promote X's wider relationships if he were in her care.
89. She was asked on behalf of Mrs Z about the risk of Mrs Z being heartbroken and therefore stepping back and withdrawing out of X's life. While she acknowledged that this was a risk, she felt reassured by Mrs Z's evidence that she does wish to maintain a relationship with X.
90. She described X as being able to have the "*best of both worlds*" if he were to stay with Q and R, because he would remain with them as his parental figures, undisrupted, but would also

benefit from Mr and Mrs Z in a grandparental role and so would still be able to access his identity and heritage through them.

91. MR & MRS Z
92. As explained, I did not see nor hear from Mr Z but have read his statement. The Independent Social Worker very fairly explained that he is a quiet, sensitive and misunderstood man, who is genuinely motivated and committed, but may find it hard to articulate some of his thoughts and feelings and may withdraw if he feels overwhelmed by other people. She found him thoughtful and reasonable and slightly more insightful into X's experiences than Mrs Z.
93. Mrs Z has filed two statements, the most recent being dated 1.10.18, and a chronology. Her recent statement is notable for its range and its expression of her depth of feeling and some of its more trenchant comments.
94. As I have mentioned above, Mrs Z is a strong personality, articulate and with strongly held and expressed views. She would not necessarily, to coin a phrase, be everyone's cup of tea. But I absolutely accept her justified anguish, frustration and sense of injustice at the events of 2017. She has persisted in the face of active criticism and discouragement, and conducted herself with dignity throughout these proceedings and during several difficult hearings.
95. I have no doubt of her deep love for X and her family, and her deep sense of the unique history and characteristics of her heritage and what she can offer X in terms of his immersion and understanding of that background.
96. I accept, where in this case no party seeks to dispute it, the Independent Social Worker's analysis that Mr and Mrs Z have, if all things had been equal, the necessary skills to have cared for X. The Social Worker and Children's Guardian have accepted that. I note that her three sons are thriving and well cared for.
97. Mrs Z has accepted that her relationship with her daughter Y was occasionally difficult and sometimes disrupted. She has had to lay down the law by refusing to permit Y to drink alcohol in her presence, and this has meant limiting meetings to mornings or curtailing them on occasions. She acknowledges that she had no contact with her daughter through 2017, and was unaware that she was expecting a baby. She explained that she attempts to be in touch with Y and offer her support, but that this depends very much on Y's willingness to engage with Mrs Z's efforts. Last year, for example, she went to Y's flat to knock on the door on several occasions but it was not answered and she could not persuade Y to be in touch with her. Overall therefore, Mrs Z's relationship with Y is sometimes present and positive, at other times it is perhaps understandably fraught and fractured. And she has no current connection with K, X's maternal grandfather, that she can promote for X.
98. Mrs Z also explained that her relationship with S had not been straightforward and that she had not spent much time with T and U over the years due to her feeling she had to withdraw from the situation. She put this down to a fundamental difference over parenting styles (S's alleged use of smacking) and that she chose to step back as they have their father and paternal grandparents there. While there is some slight dispute over the number of times she saw her older grandchildren, she nonetheless acknowledges that it was not often and at most a very few of times per year. She did not have them over to stay or visit, but would drop by at S's home. She explained that back in 2011-12 she thought that living with S was

the best place for T and U; and at the time she had her three children living with her and had less of a relationship with T and U as S had been acting as their respite carer.

99. It is also quite clear that the pitching of these two families against each other as a result of the 2017 proceedings and subsequently the institution of these proceedings, with on the one hand Mrs Z fearing she had been cut out, and on the other hand Q, R and S perceiving Mrs Z's position as a threat, unfortunately led to a great deal of ill feeling between them.

100. Mrs Z explained that relations, certainly between her and S, had improved in recent weeks and were very reasonable and amicable at the moment, which she hugely appreciated and welcomed, with Mrs Z providing help for T's 11+ preparation, and T and U having been visiting to her home. However, even though she claimed to have put this behind her, she continued to demonstrate in her oral evidence a mistrust of Q and R's approach in failing to alert her to X's existence and the care proceedings. She claimed that it was because they '*knew I would have put myself forward*' and therefore they had not acted in X's best interests. I also noted her reference to them as foster carers in her recent statement, and as "*connected carers, not family*" in her oral evidence.

101. At the same time she was entirely able to appropriately and generously acknowledge that X has a good bond with Q and R and that they care for him and he for them and that they have a positive relationship. She was also very positive and appreciative about their help in inviting them to have contact with X in their home, where she saw a significant improvement in contact with X as a result. She explained that she wanted them to continue as beloved godparents and for the relationships between all the siblings to continue, and I have no doubt that she sincerely means what she says.

102. Mrs Z was adamant that X could only properly benefit from his heritage by living with her and Mr Z. His very identity as part of her family defined, for her, that he would be better off in her care, and that he would naturally be better understood in his birth family.

103. She also insisted that X would develop the same sort of attachment to her and Mr Z and that '*there would not be any issues later*', whereas the placement with Q and R would be likely to break down as X realised that his birth family was there but that he was not with them. And in her oral evidence she stuck to the phrasing in her statement: "*Every one of us is anguished at the thought of X's potential fate*", and described that as meaning by that the fate of having to live outside his birth family, and she repeated this several times.

104. She also emphasised that she felt X would naturally want to be with his birth family and that she would fight for X's rights to be with his family and would pursue that for the rest of her life because she believes that would be what he wants: "*Family is everything*".

105. A surprising element of her evidence was the suggestion that she would have to share information with X when he was older if X could not move to live with them, that it was his behaviour during the contacts and in particular those observed by the Independent Social Worker that had been a pivotal factor, and that telling him these details would be the right thing to do. Mrs Z did not perceive that it would be neither necessary nor appropriate to burden X with this type of knowledge.

106.

107. Overall, I can entirely see the justification for the Independent Social Worker's very positive appraisal of Mr and Mrs Z. At the same time, I can also see the cause for her few but significant concerns. Firstly, there is an intransigent insistence in Mrs Z's approach that does not include scope for understanding X's emotional needs and the distressing and risky

impact of a move upon him. The assertion that birth family identity trumps everything risks leaving other significant issues out of consideration, and leaving relationships with significant others behind. Secondly, her concept of family is exclusive. This leads me to conclude that while Mrs Z may sincerely express her intention to include Q, R, S, T and U fully in X's life, that in fact she would find it very hard to carry it through in real actions with as much positive support, energy and commitment as would be required to sustain those 'non-family' relationships.

108. I note, and make the point, that these issues have largely arisen for Mr and Mrs Z as a result of the problems flowing from the 2017 proceedings. X would not be experiencing this type of emotional sensitivity but for the placement choices that were made within those proceedings. Mrs Z would not feel she had to be so loudly banging the drum of 'birth family' if she and her husband had been assessed and involved in those care proceedings. Adult relationships would not have been so burdened with complexity, difficulty, pain and mistrust but for the management of those care proceedings.

109. Q & R

110. I have seen their initial handwritten statement and subsequent statement and other documents filed on their behalf. I heard evidence from them together.

111. They each demonstrated straightforward natures and direct answers. I can see that they each had the capacity to feel strongly and express themselves in those terms if upset.

112. While I can see that they too have had their feelings sorely tested by these circumstances, and they too may have sounded heated and spoken in upset terms at the contact meetings at the beginning of the year, it was also clear to me from their evidence that X is at the heart of their concerns, that they keenly wish to move on to being on better terms with Mr and Mrs Z, that they have tried their best to assist with X's distress and the efforts to help him develop a relationship with the Zs, that they have succeeded in providing X with a loving home where he has thrived and feels comfortable and his needs are being met, and that they dearly love him and want to continue to care for him.

113. I note that there have been comments or, at times of more acute conflict earlier this year, criticisms from Q and R that Mrs Z has hardly seen T and U, and that they have managed to maintain more of a relationship with Y than she has. It now appears that the difference between the parties on this topic is very narrow as Mrs Z claims to have visited T and U a few more times than they believe, but accepts that she did withdraw and not see a great deal of them due to her different opinions and discomfort. I consider no purpose is served in attempting to define the exact difference between the parties in these circumstances. I also note the Independent Social Worker's wise observations on the issue of the havoc and difficulty that can be caused to family relationships where poor mental health and alcohol abuse exists and where Y is concerned. I consider that it will have been hard for Q and R to understand these issues properly from Mrs Z's perspective, and therefore easier to condemn than to understand. Q and R themselves accepted that Y's communication and availability would go in waves, and that they had not known she was pregnant either, and that she had 'taken herself off the map quite a lot". What is important now is that all appreciate the importance for all the grandchildren T, U and X to have positive relationships with Y and the Zs and wider maternal family.

114. Their evidence was that they became aware of X in about September 2017 and understood from the Social Worker that there were no other family members available for him. They put themselves forward, thinking that they could offer him a home, prevent him from being placed with strangers, and support his relationships with his half-siblings and his mother.

115. I do not doubt that they have indeed wanted to offer X all the love and care that they would have wished to give a child of their own, and in that respect I suspect that Mrs Z's feelings about them are correct, that X does to some extent provide them with the child to love and care for that they could not have themselves. It would be natural to experience some of those feelings. But I consider that those feelings naturally arose in the commendable context in which they felt they were putting themselves forward to save X from being placed with strangers and losing all family contact.

116. Mrs Z's fears are that they knowingly kept the knowledge of X's existence from her in order to keep him for themselves. I accept that they had never met Mr Z and had only met Mrs Z on a half dozen occasions over the years and did not know her address or telephone number, albeit I imagine it would have been possible to find some means of contacting them via social media or via S or Y or the Social Worker. It was fair enough for them to describe their relationship with the Z's as '*distant*', and that they thought it was properly the responsibility of the Social Worker to communicate with Mrs Z about X at that stage. I also accept their evidence that during their adoption assessment they asked if they could approach the maternal family because those relationships would be important, and they were told that they could make the choices they thought were right once they had adopted X.

117. I suspect, but can make no finding against them as there is insufficient evidence to conclude as much on the balance of probabilities, that they allowed themselves to believe that Mrs Z was simply not interested or not in the picture, and they proceeded on that basis, pursuing their ambition to care for X for both the understandably selfish and admirably altruistic reasons that I have outlined above.

118. I felt satisfied that their claims that they wanted to support X's relationships as much as possible with the maternal side of his family and wanted contact to grow in a progressive, natural way were sound assertions. They wanted the Zs to be part of the family to impart all their family knowledge, including to T and U. These views were not only given in a heartfelt and unconditional way, but have been underpinned by their actions over the last months where they have tried to assist with X's contact, including offering and welcoming Mr and Mrs Z into their home as comfortably and easily as possible at a time when relations were strained earlier this year, and inviting them to his birthday party. This has quite properly been recognised and appreciated by Mr and Mrs Z.

119. But these claims of fully recognising the importance of wider family and providing active support for those relationships is also further borne out by their actions prior to and wider than these proceedings. Q and R have also consistently offered T and U a great deal of love, care and attention over the years. They have successfully managed to maintain a good relationship with Y despite her poor mental health and have supported her to spend time with her children, and facilitated her spending time with X only a couple of weeks ago at a local café before dropping her home, and Ms R was able to describe having offered Y general

support with her own needs from time to time. They also have a sufficient relationship with K, the three children's maternal grandfather, so that he too is a presence in their lives.

120. It is clear to me that Q and R have a wide and generous concept of what 'family' can mean and that they firmly see Y as family. They expressed their worries that they had seen Mrs Z remove herself from the lives of T, U and Y, and so they feared that if X were to move to her care that he too would be removed from close relationships with other family members. They emphasised their feeling that X is part of their family and that his best chance of having good close relationships with T, U and Y is with them, and that they firmly want to welcome Mr and Mrs Z into that wider notion of family too.

121. Having heard them give evidence, and reviewed their contribution to the children in their lives, I consider that the positive SG report by the Social Worker and the positive appraisal of them by the Children's Guardian are well founded.

122. THE PARTIES' SUBMISSIONS

123. MR & MRS Z – Their primary argument is that Mrs Z is the only functional direct link to X's birth family and thus to his unique identity, birthright and background. Mrs Z adds into this the natural loyalty and familiarity she and her family would have towards X and his characteristics. In effect, that this aspect of what a birth family can uniquely offer should trump other factors. Another powerful argument that is put forward is that the past difficulties, including the failure to put the Zs forward last year and the difficult feelings that have flowed since, mean that Mrs Z is concerned that there will be trouble and difficulties in the future in Q and R supporting X's relationships with her and her family. It is also suggested that as less support and goodwill is required to maintain X's links with his half-siblings and Q, R and S, then it reduces the risks and benefits him more to move to the Zs as he is more likely to be able to keep his existing links that way, and that orders can support this arrangement. They experience a feeling of real burning injustice, and the best way of making things right and lancing the boil of these difficult feelings and understandable resentment is to permit them to care for X. Without that, and somewhat counter-intuitively, there is a real fear that this will mean Mrs Z will feel unable to cope with those feelings without stepping back from his life. Therefore Q and R should now more properly take the place of beloved god-parents. It is accepted on the Z's behalf that 'family life' exists between Q and R and X, but that while it may be a family unit, it does not offer family history or a sense of birthright and as such is not a true family placement, and this represents a loss to X now and stores up problems for the future. It is pointed out that while he does get upset he does also settle in their care, and that children can transfer their attachments, and that while it is difficult and painful, the upset that this will cause him now is outweighed by the risk of him losing his relationships with his wider maternal family and problems later down the line.

124. Q & R – Rather than pointing to the negatives, the case made on their behalf has pointed towards the positives. X is thriving and happy in their care, with excellent relationships with his half-siblings, and support for relationships with Y and K his maternal grandfather. They point to their track record of active support of these relationships. They are very concerned by X's distress at contacts and want to do whatever they can to ease and improve X's relationship with the Zs and wider maternal family, including taking up any suggestions of structured programmes of contact, reviews, therapy, other support. It was

submitted that they gave their evidence in an open, honest way with X at the forefront of their concerns and that they did not hold harmful or intransigent views but were anxious to ensure that ill-feeling be put firmly into the past, that contact should grow in a positive natural and organic way with the Zs in a 'natural granny and granddad relationship' and the maternal family to benefit X, and that they are devoted to doing the best they can for him throughout his life. It was emphasised that they are X's family, and that this is wider than mere DNA, and that they do share family relations by having direct connection with X's half-siblings.

125. Y – On behalf of X's mother the OS expressed a neutral position, but that any placement decision should be proportionate and compatible with the need to respect any Article 8 rights (per *Re W [2016]*). I note that she was grateful to Q and R within the previous proceedings, but has since expressed herself as wishing for X to move to Mrs Z's care. Clear terms to preserve Y's contact are sought, in the event that her mental health or other vulnerabilities result in the breakdown of the current positive relationships with Q and R or with Mrs Z.

126. The Local Authority – The Local Authority recognises that there are two positive assessments which must be weighed against each other and that the Zs occupy a unique position as X's biological family, but that this is simply a factor and not decisive. The Local Authority supports placement with Q and R as X's anxiety and distress is serious and significant and may never resolve and therefore moving him to new carers carries considerable risk of unmanageable and irreparable harm, and also because Q and R are in a better position to promote consistent and long term relationships between X and his half-siblings and possibly also his mother Y. Although not explicitly included in their submissions is the other half of their argument that underpins that last assertion, namely that Mrs Z's difficult and sporadic relationship with Y, her hurt and resentful attitude towards Q, R and S, and her determined or opinionated attitude, will disrupt or make far more difficult the maintenance of all those relationships for X.

127. X's Children's Guardian – It was emphasised that following *Re W* there is no family 'right' to a child's placement nor a pecking order based on birthright or immediate family. It was also argued on the Children's Guardian's behalf that it is artificial to assert that Q and R do not represent a type of 'family' placement for X, given that his half-siblings live with R's mother and that Q and R are their uncle and aunt and hence they all share a blood connection with T and U, plus Q and R have a good track record of treating Y as 'family', she having been partner to R's brother for 8 years. Positives and risks of both placements were put forward with the balance lying in favour of maintaining X's current stable placement and avoiding damaging destabilisation and loss for him given his sensitivities, and avoiding the risks of difficulties promoting and maintaining the relationships he currently has with Q, R, S, T and U given Mrs Z's somewhat rigid, perhaps understandably resentful and slightly uninsightful approach.

THE BALANCING EXERCISE, THE WELFARE CHECKLIST & PROPORTIONALITY

128. ARTICLE 8 RIGHTS

a) Clearly Article 8 rights to respect to family life are engaged for all parties to this case, and extend beyond those directly involved to relationships with extended family members.
b) It is helpful that it has been conceded on the Z's behalf that Article 8 rights are engaged in terms of the relationships between Q and R and X. This was not immediately apparent at the outset of the hearing. Mrs Z herself was insistent that this was not a 'family placement' and her recent statement dated 1.10.18 refers to X being in 'foster care' with Q and R as his 'foster carers'.
c) It is evident that X has an established family life with Q and R. The lack of a DNA link or extensive family tree does not undermine what that family life means for him at this stage. It is central to his current existence and fundamental to his current sense of belonging and being loved and his needs being met. This also extends to his relationships with S, and his half-siblings T and U. These are critically important, growing and hopefully life-long relationships for him. He is described as having delightful and excellent relationships with T and U who love him back dearly and whom he sees regularly. His relationship with his mother Y is more constrained by her own mental health issues and vulnerabilities. His relationships with Mr and Mrs Z and through them the extended maternal family are, due to X's particular characteristics, existent and in their early stages but strained and distressing for him. They do represent for him an important aspect of family life that is linked to family history, provenance, heritage and identity.
d) Y's ability to exercise her family life with X is limited by her difficulties, and reliant upon others making efforts to respect her role and assist her in meeting it. Y's father, the maternal grandfather K, is part of X's extended family life which it appears is only likely to be available via Q, R and S.
e) Mr and Mrs Z are currently experiencing limitations upon how far they can exercise their family life with X, mainly due to his sensitivities in their presence, and partly due to the circumstances that led to his placement with Q and R last year. Their sons, X's half-uncles, and the large numbers of wider maternal family, wait in the wings for opportunities to begin relationships with X and offer him an enriching experience in terms of family life, family history and a shared heritage.
f) Q and R's rights to respect to family life with X flow from their shared connection with T and U, and from their commitment to X's care shown over the past 10 months. They are not professional foster carers and no longer simply extended kinship carers approved as foster carers, but have built up a positive, close and loving bond with X as his de facto parents.

129. REALISTIC OPTIONS – The realistic options are firstly, for X to remain with Q and R, with an increasing programme of contact with Mr and Mrs Z. It is hoped that this programme would increase the time spent by X with the Zs in order to minimise his experiences of separation and would incorporate T and U's presence visiting the Zs and building up to all three grandchildren having overnight staying weekends there with a development towards natural progression of contact and occasions of further visits on appropriate occasions. Secondly, the alternative option is for X to move to Mr and Mrs Z's care following a brief transition plan to assist his move, then a short settling period before

he would be spending alternate weekends visiting overnight with Q and R when they have T and U to stay with them.

130. X'S AGE, SEX, BACKGROUND AND ANY RELEVANT CHARACTERISTICS

a) X is a little boy who is now 15 months old. He was placed as a new-born with a foster carer in late July 2017. He is described as having been a baby who was at first difficult to settle, but then did well in the foster placement once he had settled down. There was then a transition to the care of Q and R at just under 5 months of age in mid-December 2017. This is described as having been an easy and unproblematic transition over about a week, with X settling in to their care without difficulties.

b) He is described by Q and R as a thriving, happy, inquisitive, musical, attentive, smiley and lovely boy. He does not like loud noises.

c) It is clear from the analyses I have read and evidence heard that X having successfully settled with Q and R now experiences acute separation anxiety when they leave him as I have already described earlier in this judgment. It is not possible to go back and change what happened in 2017, but X having bonded with those particular adults is the upshot of those events. He also appears to be sensitive to noise and changes. His reactions are not so serious as to have necessitated any expert assessment, nor to represent an attachment disorder, but are recognisable according to the professional witnesses from whom I heard as overt and unusually marked separation anxiety. He clearly has at the same time had the capacity, however, to make warm loving relaxed and lively relationships with his primary carers Q and R, his half-siblings T and U and their grandmother S.

d) The exact provenance of his sensitivities is unknown, whether possibly due to the emotionally harmful disruption of being fostered straight from birth then leaving that foster placement for a kinship placement, or due to exposure to substance misuse in utero, or due to heritable factors from his mother Y, or simply his sensitive personality emerging, or some other source.

e) Recent evaluation suggests he may be slightly developmentally delayed. Again the source of this is unclear, as is the question of how this may affect his future development.

f) His age and dependent vulnerability make him acutely reliant upon the actions and efforts of others for all his needs to be met, as is typical of a very young child. He is also at an age when separation anxiety may be at its peak, and which period may continue on until the age of 3.

g) His full heritage is unclear as his father is unknown, but on his maternal grandmother's side he is descended from a jewish and musical heritage with a large extended family. I am unaware of the details of his heritage from his maternal grandfather K's background.

131. X's WISHES & FEELINGS – Given the above descriptions of X, and while his age precludes any express statement of his wishes and feelings, it is clear from his behaviour that certain conclusions may be drawn. While I have seen a delightful video clip of him playing calmly with toys for a few minutes in the care of Mr and Mrs Z, it is notable that as recently as early September a few weeks ago he was showing significant upset over an extended period in their care, and marked happiness and relief on being reunited with Q.

From this, I consider it appropriate to derive some idea of his wishes and feelings, namely that he experiences strong feelings of distress, loss and upset when separated from Q and R and wishes to be returned to their care where he feels relaxed and happy. I am sure, if he could express it, that he would wish to be spared anguish and upset and any emotionally harmful experiences and to be cared for without disruption by those he feels love for and familiarity with.

132. X'S NEEDS

a) The Children's Guardian accepted in her oral evidence that X needed the following:

- Carers who can meet his physical, developmental, social and emotional needs throughout his childhood.
- A positive sibling relationship with T and U.
- A positive relationship with his mother when she is well enough to see him.
- A positive relationship with his current carers.
- A positive relationship with his birth family (in this case his maternal family, and including his maternal grandfather, his paternity never having been established).
- And if possible for both sides of his family to get on as well as possible and to address and reduce the tension of these proceedings which may well not be of their making.

b) An additional need, flowing from his characteristics and behaviour, is to be spared any avoidable further significant distress that may worsen the issues underlying his separation anxiety.

133. THE EFFECT ON X

a) If X were to remain with Q and R he would experience a continuation of his status quo in the home and with the carers he has become familiar with over the last 10 months. He would undergo a monitored and supported programme of increasing contact with Mr and Mrs Z, assisted by being accompanied by his half-siblings. He would experience increased exposure to his maternal grandparents and members of his wider maternal family, leading hopefully to well supported and regular staying visits accompanied by T and U.

b) If he were moved to live with Mr and Mrs Z he would undergo a period of transition into their care and a comparatively abrupt and dramatic change in the identity of those providing his primary care and how much time he would be spending with each set of adults. In particular during the settling in period he would hardly see Q and R at all, and very little if anything of S, T and U. A programme of alternate weekend overnight visits to stay with Q, R, T and U would then start after that period, when he would be returned for those short periods to visit the environment and individuals that he is currently living with.

134. ANY HARM WHICH X HAS SUFFERED OR IS AT RISK OF SUFFERING

a) Given that Y accepts that she was drinking while pregnant, there is a risk that X has suffered some degree of developmental harm before birth.

b) X was deprived of the actual or potential for relationships with his maternal grandparents and wider maternal family during the first 5 months of his life while care and placement proceedings were deciding his future. The knock-on effects have harmed his ability to easily settle and enjoy time with his grandparents.

c) X has had to transfer attachments once already. This is likely to have been harmful to his emotional stability and security. Both the Independent Social Worker and Children's Guardian were "*very worried*" about the risks for X if he had to attempt to do so again, and that this should be avoided if possible.

d) I accept the opinion of the experienced Independent Social Worker and Children's Guardian that those risks are based upon the further stress and infliction of feelings of anxiety and loss if such a transfer is attempted to the care of Mr and Mrs Z, and would be likely to lead to traumatic emotional distress and cause a more emotionally harmful reaction in the long run which must be avoided. While they both rightly acknowledged that they were not able to offer any formal expertise on attachment disorders, they both reasonably relied upon their experience to warn against an extremely painful, distressing and destabilising experience which would risk more serious emotional problems given the level of X's sensitivity and distress currently.

e) If X stays with his current carers, there is a risk he would be harmed by difficulties in building and maintaining an appropriate contact regime and relationships with Mr and Mrs Z and the wider maternal family. He would thereby lose out on the enriched relationships, family history and identity that are available to him through Mrs Z. For the reasons set out above based upon my appraisal of the qualities that Q and R have shown, and that can be underpinned by the structure of the planned mediation in conjunction with a clear programme of contact set out in Child Arrangements Orders and assisted by an Family Assistance Order, I consider that this risk is less likely than the reverse if X were to be placed with Mr and Mrs Z.

f) If X stays with his current carers, there is a risk that Mrs Z will feel unable to bear the situation and will withdraw. It has been suggested that this would somehow justify placing X with Mr and Mrs Z. In my view it would be quite wrong to hijack a child's overall needs and placement options due to an adult's position of this sort, where such a position can and should be avoided. While this has been a hugely painful experience for the Zs, such a position would clearly not be in X's interests. Given Mrs Z's evidence that she is adamant that X should benefit from his maternal family heritage, I trust that Mrs Z will seek help if necessary if she feels herself being drawn into this position.

g) If placed with Mr and Mrs Z, X would lose the frequent easy contact with his half-siblings, and this would become reliant upon the successful management of a contact regime whereby X would stay alternate weekends with Q and R. He would also lose the daily reassurance and care of his current primary carers with whom he feels most comfortable, and his relationship with them would again be reliant on the successful management of a contact regime.

h) If placed with Mr and Mrs Z, and notwithstanding her championing of the importance of 'family', there is a risk that X's relationships with significant people who do not fall within Mrs Z's concept of family would suffer as she would be less likely to promote those relationships, for example with Y's father K the maternal grandfather.

i) If placed with Mr and Mrs Z, his grandparents become his carers and those roles become rolled up or subsumed together. He would thereby lose that separate valuable grandparental role that they can play if he is cared for by Q and R and which does not carry the burden of a carer's responsibilities.

j) There is a risk, particularly if he stays with his current carers, and based on Mrs Z's oral evidence, that he would be harmed by coming to know issues in too much detail or feeling blame and responsibility for the difficulties the family experienced at this time and the role played by his own vulnerabilities in the outcome. Mrs Z stated her plan to explain to him that his stressed behaviour during the contacts, and in particular the Independent Social Worker observed contacts, was a central issue, and that this would be the right thing to do. I sincerely hope that a more sensitive and insightful approach can be taken to explaining issues to X in due course.

k) There is a risk, wherever X is placed, of unsatisfactory, sporadic contact with Y, due to her vulnerabilities. It is suggested and I accept, that given the history, that this is slightly less likely if he remains in the care of Q and R, whose relationship with Y has been more straightforward than that of her mother Mrs Z.

l) There is a risk, wherever X is placed, of him "*becoming caught in the middle of further family disputes and ongoing tensions*" (Independent Social Worker's report), particularly given the understandable sense of injustice, anger, resentment and sorrow that has been caused for all concerned but particularly for Mr and Mrs Z. It is hoped that the planned mediation, alongside a clear programme of contact leading to generous appropriate staying contact underpinned by Child Arrangements Orders and a Family Assistance Order will help to prevent this problem. Ultimately, it is a choice for the adults to make to exercise a child-centred awareness and to work towards better relationships in order to avoid this problem.

m) Mrs Z asserts that there is a risk of placement breakdown if he remains with Q and R because either their relationship will founder or X will question why he is there and vote with his feet. I accept the professionals' analysis of this risk as unlikely, particularly if contact is supported, relationships are established and positive age-appropriate explanations are provided to X in due course.

135. RELATIONSHIPS & ABILITY/CAPABILITY OF MEETING X'S NEEDS

a) In accordance with the guidance in *Re A*, I include in my consideration the factors in s1(4)(f) Adoption and Children Act 2002. In doing so, given the wording of both welfare checklists, I also consider the respective ability/capability of those being considered.

b) In effect, the importance to X of the various relationships between him and others, the nature and value of those relationships, the ability and likelihood of maintaining them, and the views of those individuals, and their abilities of meeting his needs have been discussed and analysed in detail above in the context of my review of the evidence, the Article 8 rights engaged in this case, X's needs and aspects of possible harm X may face.

c) I disagree with Mrs Z's assertion that it is only possible to pursue and support X's relationships with his maternal family if he were to live with her and her husband. Many grandparents successfully forge loving relationships, and share and convey family history, the knowledge of their heritage and the experience of their identity without living with their grandchildren.

d) Not living with a child does not reduce one's relationship with that child to something meaningless or lacking in significant contribution to that child's needs.
e) On balance, X's relationships with those who are and have become significant to him are more likely to be supported and maintained positively if he remains in the care of Q and R.
f) And appropriate steps can be taken to assist his maternal grandparents to develop and maintain relationships with X and so that they can provide him with the opportunity to begin relationships with his wider maternal family. This can be done by an adequate programme of contact set out in Child Arrangements Orders and supported by a Family Assistance Order.
g) Transferring X's care to Mr and Mrs Z would, because of X's likely reaction to such a disruption in his existing relationships, pose an unacceptable risk of traumatic and damaging distress that would be likely to have negative consequences for X's ability to benefit from and develop close relationships in the future.
h) It follows from the analysis that I have conducted above, that, on balance, Q and R are simply better placed to meet X's needs, and in particular his emotional needs for a secure emotional environment and stable primary care relationships that will enable him to develop and therefore will support his wider needs including his heritage, identity and wider relationships.

136. INTERFERENCE & PROPORTIONALITY

a) In these proceedings I am concerned with the currently engaged rights, and not with a process of redress for breaches of rights in the 2017 proceedings.
b) While I have inevitably had to take into account the impact of those events on the parties here, I must look at the nature of the rights to respect for family life engaged at this stage in these proceedings.
c) Having identified the various rights engaged, and considered the welfare analysis, it is clear that there are competing outcomes, and that X's interests must predominate. I have also identified the proposed interference and the reasons for it.
d) In this case, Mr and Mrs Z's rights have been interfered with and do not prevail over X's. The orders made interfere to various extents with each of the parties' rights. The interference is proportionate and properly justified given the following factors in particular:
    - Mr and Mrs Z's limited ability to exercise their family life with X due to his sensitivity and his separation anxiety,
    - the significant negative impact it would have upon him and the interference with his rights if I were to order that his care should transfer to Mr and Mrs Z,
    - and that X's rights and need for knowledge of his maternal family, and his family history heritage and identity, can all be met by Mr and Mrs Z taking up a grandparental role that will not prevent them from sharing this aspect of their family life with him and bringing him into contact with members of the extended maternal family.

137. RANGE OF POWERS

a) I have considered the various orders, including revocations of orders and discharges of orders that are available to me under the Children Act 1989 and the Adoption and Children Act 2002, and including the no order principle and that orders should only be made when in a child's best interests.
b) All parties urge me to revoke the placement order. Clearly the circumstances are changed, and having considered the key elements of section 1(4) adoption welfare checklist as discussed above, it is clearly in X's welfare interests throughout his life that such an order should no longer be in place. The Local Authority does not maintain a plan for X's adoption and so maintaining a placement order would therefore be improper and would not reflect the true situation where all parties consider that a family placement under a Special Guardianship Order is appropriate. Accordingly I revoke the placement order granted in December 2017.
c) All parties urge me to grant Special Guardianship Orders. It is clearly necessary for such orders to be made in order to regulate X's contested placement within his family. Bearing in mind the welfare analysis conducted above with reference to the factors set out under section 1 Children Act 1989, it is evidently in X's welfare interests for Special Guardianship Orders to be granted to his current carers Q and R. I consider Special Guardianship Orders preferable to a 'living with' Child Arrangements Order due to X's carers having to share parental responsibility with Y, who due to her vulnerable mental health may be unavailable or unable or unwilling to take appropriate steps to do so.
d) In granting the Special Guardianship Orders, the care order made last December is automatically discharged.
e) All parties urge me to grant Child Arrangements Orders that clarify arrangements for X's contact with Y and with Mr and Mrs Z. It is clearly necessary for such orders to be made in order to support their contact in such a complex and unfortunate situation.
f) An order is required in terms of the time that Y can spend with X in the event that her vulnerabilities undermine the relationships that she has with the other adults in any way that would interfere with her contact with X.
g) Mr and Mrs Z's relationship with X requires careful management to minimise his distress, maximise the opportunities to feel more comfortable with them, and to build in T and U in such a way as to progress towards more natural overnight regular contacts.
h) I have seen agreed orders that set out those issues appropriately within recitals and the terms of Child Arrangements Orders.
i) All parties urge me to grant a Family Assistance Order. I have also considered whether a Supervision Order would be in X's interests. However, in this case, where private law orders are being made, and where it is possible to use the refining provisions under section 16 Children Act 1989 to name individuals and to require the Local Authority to report on progress of the Child Arrangements Orders to the court, I consider it is in X's best interests to require the Local Authority to advise assist and befriend this family under a section 16 Family Assistance Order for a period of 12 months rather than the somewhat blunter tool of a Supervision Order, and to require the Local Authority to report to the court 6 months into the period of the Family Assistance Order particularly upon the issue of progression of contact and the terms of the Child Arrangements Orders.

HHJ LAZARUS