Neutral Citation Number: [2021] EWFC B32

IN THE FAMILY COURT SITTING AT SWINDON CASE NUMBER SN20C00029

BETWEEN:

WILTSHIRE COUNCIL

Applicant

AND

M

First Respondent

AND

F

Second Respondent

AND

THE CHILDREN
(By their Children's Guardian, Ms Sandra Bryant)

Third Respondents

WRITTEN JUDGMENT OF HIS HONOUR JUDGE EDWARD HESS

DATED 4th JUNE 2021

This judgment was delivered in private. The judge has given leave for judgment to be published, but only in this form.

All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

1. This written judgment follows:-

   (i) a hearing before me on 26th, 27th and 28th April 2021;

   (ii) my written judgment delivered by email to the parties on 6th May 2021;

(iii) a hearing on 25th May 2021 during which written oral and written representations were made as to what should happen now in the light of my written judgment of 6th May 2021; and

(iv) some further written submissions, in particular on the issue of how wide any further investigation might have to be if the case was pursued further.

2. All the above arose out of care proceedings brought by Wiltshire Council (to whom I shall refer as "the local authority") in which the headline issue has been the possible sexual abuse of R (now aged 4). The care proceedings relate to R and her older brother, namely N (now aged 6).

3. The representation has continued as before, save that Ms Helen Khan (Counsel) represented the mother at the hearing on 4th June 2021 in Mr Grime's absence.

4. I invite any reader of this judgment to read paragraphs 5 to 29 of my written judgment of 6th May 2021 to understand how the case has reached its current position.

5. In paragraph 73 of my written judgment of 6th May 2021 I reached the following conclusions:-

"It is, in my view, a proper interpretation of Mr Greenhouse's final considered view of the existing medical evidence that:-

(i) On a balance of probabilities R had Gonorhheal infection both in her eye and in her vulva.

(ii) It is not possible on the medical evidence to identify on a balance of probabilities which area of infection came first; but whichever did come first, it is likely that R self-inoculated to cause the other by eye-finger-genital or genital-finger-eye self-inoculation.

(iii) If the eye infection came first then the timing of the source of the infection can be placed as up to 7 days (possibly 14 days) prior to the symptoms emerging.

(iv) If the vulval infection came first then the timing of the source of infection is much wider, possibly 6 to 9 months, possibly a year or possibly even longer before the emergence of symptoms.

(v) It is possible that R was sexually abused by somebody causing the Gonorrheal infection in her vulva which she self-inoculated in her eye or in her eye which she self-inoculated in her vulva. It is possible that R acquired the infection in her eye from an eye-finger-eye self-inoculation from another child in her nursery and then in her vulva by an eye-finger-genital self-inoculation. It is not possible on the medical evidence

currently available to identify on a balance of probabilities which of these causes is more likely.

(vi) *In an ideal world a proper investigation would and should have been contemporaneously carried out into whether or not the three other children in the nursery who had eye infections in January/February 2020 had Gonorrheal eye infections, and the results of this may have changed the equation, but this was unlikely to have been possible when these circumstances eventually emerged and certainly is not possible now.*

....

I am able to derive from his evidence the conclusions I have set out above. Overall I am satisfied of his expertise and reliability and I am satisfied that I can and should attach substantial weight to his conclusions".

6. Having reached these conclusions about the medical evidence, in anticipation that the local authority would re-pursue their application for permission to withdraw the proceedings, I expressed some provisional views as to what should happen next with these proceedings. My anticipation was indeed correct and the local authority have decided to re-pursue their application for permission to withdraw the proceedings. As before, the application is supported by both parents. As before, the application is opposed by the guardian, notwithstanding the provisional views I expressed. I must therefore now formally deal with the application.

7. The law I must apply in dealing with this application is to be found in the judgment of Baker LJ in *GC v A County Council & Ors* [2020] EWCA Civ 848 [2020] 4 WLR 92 and in the judgment of McFarlane J (as he then was) in *Oxfordshire County Council v DP, RS & BS* [2005] EWHC 1593, which can be summarised as follows:-

(i) Under Family Procedure Rules 2010, rule 29.4(2) a local authority may only withdraw an application for a care order with the permission of the court.

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

(iii) Applications to withdraw care proceedings will fall into two categories. In the first, the local authority will be unable to satisfy the threshold criteria for making a care or supervision order under s.31(2) of the Act. In such

cases, the application must succeed. But for cases to fall into this first category, the inability to satisfy the criteria must, in the words of Cobb J in *Re J, A, M and X (Children)*, be "obvious".

(iv) In the second category, there will be cases where on the evidence it is possible for the local authority to satisfy the threshold criteria. In those circumstances, an application to withdraw the proceedings must be determined by considering (1) whether withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned, and (2) the overriding objective under the Family Procedure Rules. The relevant factors can be stated in these terms:

(a) the necessity of the investigation and the relevance of the potential result to the future care plans for the child;
(b) the obligation to deal with cases justly;
(c) whether the hearing would be proportionate to the nature, importance and complexity of the issues;
(d) the prospects of a fair trial of the issues and the impact of any fact-finding process on other parties;
(e) the time the investigation would take and the likely cost to public funds.

8. Mr Morgan's submissions on behalf of the local authority include the following comments:-

"There does not appear, on the current state of the evidence, to be any clear basis on which to assert that R has suffered sexual harm attributable to the care of her parents…There is, in the local authority's view, also a paucity of evidence over and above the expert opinion evidence in this case, to enable the local authority to advance a clear preference for a vaginal as opposed to an ocular infection as the original source of infection. sexual mode of transmission This leaves, it is submitted, no firm evidential basis on which to prefer the option of a sexual mode of transmission over the possibility of infection of R by another child (or another adult) within the nursery. It seems to the local authority highly unlikely that evidence could now be obtained – even were the participation of the parents of the other children within the nursery within these proceedings achievable – to identify the nature of the eye infection of the other children within the nursery… The undefined time period for likely infection raises the same problems for identifying a meaningful pool of perpetrators that were originally raised by the local authority in October 2020."

9. Asked to comment specifically on the scale of the investigation and the size of the potential pool of perpetrators if the court took the view that the local authority's application to withdraw the proceedings should not be allowed, Mr Morgan has given the local authority view as follows in his note of 1st June 2021:

" The court has made findings in its judgment dated 6.5.21 that if the eye infection came first then the timing of the source of the infection can be placed as up to 7 days (possibly 14 days) prior to the symptoms emerging and in the event the primary site of R's infection was the vagina the time period for initial infection could be up to 6 or 9

months or possibly a year or more. During the course of the proceedings, prior to the court's decision in October 2020, the parties and the court proceeded on the basis that identification of those who had care or contact with R during the period prior to February 2020 should focus on the period November 2019 to February 2020 or January 2020 to February 2020. The parent's statements and timelines were also focused on the same period.

Between November 2019 to February 2020 the father identified the following as having had sole or unsupervised care of R :
(paternal grandfather and partner) over weekend 13-15.12.20,
(maternal grandmother) 20-22.12.20,
paternal aunt for a few hours on 29.12.20
(children's child-minder) on 10.1.20 (and 24.10.19) and 1.11.19.

In addition, R attended nursery 3 days per week for 22 hours per week (Mondays 09:00 -16:00, Tuesdays 09:00 - 16:00, Wednesdays 09:00 - 16:00 and Thursdays 09:00 - 12:00). The police spoke to the nursery on 20.2.20 who identified the names of staff members who "support R". The staff members names were MF, LH, EF and CM. The nursery also named HN however she did not support anyone on their own as her DBS checks had not come through. The nursery also identify two students PC and LS as working over part of the relevant period. The nursery also stated that there were other staff members in other groups who may have occasionally support R but the manager would not be able to say who or when. The staff logs disclosed by the nursery in the week commencing 4.11.19 to 2.2.20 identify 12 staff members on the work roster during this period

According to the nursery there were some children presenting with eye symptoms in the weeks prior to R's who may have been the source of the infection (most likely by finger to eye transmission) : on the 31.1.20 one child – OJC - was absent from nursery with symptoms of conjunctivitis confirmed by the GP. In the week commencing 3.2.20 two children were off with conjunctivitis. Those children would appear to be IJ who was absent on 5.2.20 with conjunctivitis and the child from the EAL family whose eye became red towards the end of 27.1.20 and was then absent from nursery until 6.2.20.

For the sake of completeness, also present and sharing the father's house with him were his house mates HR and AC, although father states "no one other than I was caring for the children". Others having contact with the children, according to the parents timeline, but not left with on a sole care basis were the friends at the fireworks on 9.11.19, mother's friend N who stayed overnight on 6.12.19, the maternal grandfather whom the mother and children stayed with over the weekend of 22-24.11.19, mother's friend K on 18.1.20. These persons obviously fall into a separate category than those listed at paragraph 4, however the possibility of these persons having some unsupervised contact time with R for example whilst another child was bathed upstairs or whilst a parent popped to the shops leaving R in the temporary care of someone would have to be considered."

10. Against this, Ms MacLynn and Ms Lavelle have advanced the guardian's position as follows:-

"The position is different now to that on 21 October 2020. A further hearing involving evidence from those in the pool of possible perpetrators would not have the sole purpose of considering whether a perpetrator could be identified but also of providing the court with 'broad canvas' evidence in terms of determining the nature of R's infections.

An attempt was made to narrow the issues in this very difficult case by hearing the medical evidence alone. That attempt was unsuccessful; the issues remain unresolved. The court has not been able to conclude that R was sexually abused, but nor has it been able to conclude that she was not. The court has found that both scenarios are just as likely as each other.

Given the exceptional seriousness of the issues in this case, the guardian remains deeply troubled that the court has only heard part of the evidence. It is highly unusual for a court to conduct a fact-finding hearing on the basis of medical evidence alone. The medical evidence has not resolved the issues in this case. Often the evidence from other sources is pivotal. This is not a non-accidental injury case, where if the injuries were caused non-accidentally, it may have been due to a momentary loss of control. If R was sexually abused, the abuse can only have been deliberate and the court will recall Mr Greenhouse's evidence as to the way in which the infection was likely to have been transmitted if it was sexual in origin.

The court's conclusions at this stage result in a highly unsatisfactory situation for both R and N. The court is reminded of the conclusions of the parenting assessments of each of the parents, which are summarised in the social worker's most recent statement; the mother at that stage was not able to consider "even the possibility" that R had been sexually abused. The father is described as "not really entertaining it as a possibility".

The court has set out a very detailed provisional view in respect of the local authority's anticipated application to withdraw its applications in the handed down judgment. The guardian's view is that this not a case where Cobb J's 'obvious' test is met and makes the following observations:

There are further inquiries that could be made in respect of the other children at R's nursery; it is possible, though unlikely, that those children could have tested positively for gonorrhoeal eye infections. Alternatively it is possible that they tested positively for an alternative type of eye infection which could rule gonorrhoea out. It is further possible that none of the children received any antibiotic eye treatment, which may mean that it was unlikely that they had gonorrhoeal infections. There does not appear to have been any attempt at contacting the parents of the children to ask. The court has expressed a view as to the circumstantial evidence regarding R's language and behaviour in this case. There has been no opportunity to explore those matters beyond what is set out on paper. The nursery were sufficiently concerned about R's behaviour that they filled in an incident repot in respect of it. Exploration in cross-examination could be illuminating. There are various areas which the guardian would have wished to explore in cross examination of the parents, for example the father's STI testing in 2019 and the timing of the mother taking R to the doctor in February 2020. The guardian would also have liked to have considered

evidence from the relevant staff at R's nursery.

In light of the issues above, the guardian cannot support an application by the local authority to withdraw its applications. It is acknowledged that continued proceedings will be stressful for the parents and may involve a further lengthy hearing. R's welfare is the court's paramount concern. The guardian's view is that R would wish the court to explore to explore every avenue to try to determine what caused her to be infected by what is normally a sexually transmitted disease.

11. Asked to comment specifically on the scale of the investigation and the size of the potential pool of perpetrators if the court took the view that the local authority's application to withdraw the proceedings should not be allowed, Ms MacLynn and Ms Lavelle have advanced the guardian's position in a written document which is a slightly trimmed version of the local authority's proposition, but doesn't seek to disguise the fact that it would still be a very wide investigation.

12. I strongly suspect that some of the trimming suggested by the guardian could be properly objected to by the parents on the basis of its absence of fairness and I think it likely that if I did refuse the local authority's application to withdraw then the scale of the investigation suggested by Mr Morgan would be the likely result. It may even be wider on the basis that the timescale would be likely to have to go back significantly earlier than November 2019.

13. Having considered all these detailed submissions I have reached the clear conclusion, which is in line with my provisional view, that I should allow the local authority's application for permission to withdraw the proceedings.

14. In reaching this conclusion I make the following particular comments on the factors identified by the authorities discussed above.

    (i) On the basis of the medical evidence alone I agree with Mr Morgan's view, expressed on behalf of the local authority, that "*There does not appear, on the current state of the evidence, to be any clear basis on which to assert that R has suffered sexual harm attributable to the care of her parents".*

    (ii) I further agree with Mr Morgan that the the potentially persuasive factor which attracted the Court of Appeal as pointing a way forward in narrowing the timescale for the act which caused the infection has been closed off by the oral evidence of Mr Greenhouse and my approval of his evidence.

(iii) I further agree with Mr Morgan's view in closing submissions that *"It seems to the local authority highly unlikely that evidence could now be obtained – even were the participation of the parents of the other children within the nursery within these proceedings achievable – to identify the nature of the eye infection of the other children within the nursery".* An investigation conducted in February 2020 might have produced some relevant information. An investigation conducted now would be unlikely to have this result and runs the risk of being unfair to the parents.

(iv) The circumstantial evidence (R's possibly sexualised talk/behaviour in October/November 2019 and July 2020) has, in investigation terms, probably been taken as far as it can go and, in my view, it has limited probative value in either adding to the medical evidence to support a finding that she has been sexually abused or, if she has, by whom. My view of this is the same as it was in my written judgment of 23rd October 2020 when I said: "*Whilst somebody might make full admissions in cross-examination, that is fairly unlikely in a case like this where there appear to be no circumstantial evidence pointing to any one person as a greater possibility than any other."* On this point the Court of Appeal expressed the view: "*Realistically, I would accept HHJ Hess's conclusion regarding the improbability of a confession from the witness box and see the potential limitations in the "circumstantial evidence" against the parents*", which I take to be broadly supportive of my view on this point. I think it unlikely that the oral cross-examination of witnesses on these issues would take the matter any further.

(v) In the circumstances my view is that this is a case where the local authority are likely to be unable to satisfy the threshold criteria for making a care or supervision order, i.e. that this case falls into the first category of cases identified by Baker LJ (supra). In reaching this conclusion, I am reminded of the conclusions of Sir Mark Hedley in *London Borough of Southwark v A Family* [2020] EWHC 3117 when he reflected on the facts of that case: *"The court is led to the conclusion that despite the expert evidence, sexual assault and murder by a family member simply cannot be established to the requisite standard. The big picture simply does not yield the support that would require to be established as proof in this case. I recognise that a conclusion that the court cannot explain S's death is not one that I view with any pleasure. I can of course take comfort from the fact that that very experienced forensic pathologist, Dr Cary, has found himself in that position not infrequently. As I have repeatedly said, however, my task is not to explain S's death but to consider whether in law the Local Authority are entitled to interfere in the private life of this family… It follows that I find that the Local Authority have not established the threshold criteria as required in Part IV of the Act. The only consequence of that can be, and will here be ordered to be, a dismissal of these proceedings."* The simple truth is that there are cases where the evidence does not properly allow a finding to be made to meet the Children Act 1989 threshold test.

(vi) If, contrary to this conclusion, perhaps on the basis that the present case does not meet Cobb J's '*obvious*' test, and I accordingly have to consider the factors in a category two case then my analysis now would not be dissimilar to the views that I expressed on such matters in October 2020.

(vii) Whilst it is almost always in the interests of a child to ascertain as much information about what abuse has occurred by whom and when, especially perhaps sexual abuse with its potentially long lasting psychological effects, where a trial would be unlikely to reach a meaningful conclusion on these matters, that interest should have significantly less weight attached to it than when the situation is otherwise. Even the ongoing pursuit of care proceedings can do harm to the family members and vicariously to the children concerned. Usually, this harm has to be weighed less heavily than the benefits of carrying on to get to the truth in the interests of the child; but where the ongoing investigation is unlikely to reach a meaningful conclusion then that harm can properly be given greater weight. In my view the withdrawal of the care proceedings will promote rather than conflict with the welfare of the children.

(viii) The above analysis of Mr Morgan (which I broadly accept) suggests that if the timetable were taken at its fullest there would potentially be a very large group of possible perpetrators and a very extensive investigation. The time needed to investigate all these people properly would, in my view, be disproportionately large and unwieldy. Such an exercise would be likely to tie up a disproportionately large amount of local authority, court and legal aid resources with no real likelihood of a meaningful outcome.

(ix) If, at the end of a trial, a significant number of people were left in the pool of perpetrators, it is unlikely that the actual plans the local authority currently has for ensuring the children's safety would be changed by such a finding. The current evidence suggest that it is most unlikely that a court would be able to find a small group of perpetrators or identify one perpetrator.

(x) Although the courts are loathe not to attempt to protect children by seeking to identify potential risks of future harm (see for example Lord Nicholls in *Re O and N* [2003] UKHL 18) there are some cases, and this it seems to me is one, in which it is not possible to do that in a way which is fair and meaningful.

15. I am circulating this judgment to the advocates by email at 3.30 pm on 4th June 2021 on the basis that they may share it with their respective clients and that we will convene at 4.30 pm to discuss any matters arising.

HHJ Edward Hess
Swindon Family Court
4th June 2021