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Judgment: approved by the Court for handing down (subject to editorial corrections)*	**Delivered: 14/03/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

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Between:

A HEALTH AND SOCIAL CARE TRUST

Applicant;

-and-

A MOTHER

-and-

A FATHER

Respondents.

And between:

A GRANDMOTHER

Applicant;

-and-

A MOTHER

-and-

A FATHER

Respondents.

IN THE MATTER OF AB, BB, CB, and DB
(CHILDREN AGED 12½ YEARS, 10 YEARS, 8½ YEARS and 1½ YEARS)

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Mr E Cleland BL (instructed by the Directorate of Legal Services) for the Health and Social Care Trust
Mr M Bready BL (instructed by Stephen Tumelty solicitor) for the Mother

Ms M Smyth QC with Mr C Gervin BL (instructed by Jim Rafferty & Co solicitors) for the Father
Ms S Simpson QC with Ms A McHugh BL (instructed by Jim Rafferty & Co solicitors) for the Grandmother
Ms C Steele BL (instructed by Conn & Fenton solicitors) for the Guardian ad Litem representing the interests of the children

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McFARLAND J

Introduction

[1] This judgment deals with three appeals from decisions made by Her Honour Judge Bagnall ("Judge Bagnall") in the Family Care Centre on 4 November 2021. The Father appeals against a care order in respect of AB, BB, and CB with care plans of long-term foster care and against a care order in respect of DB with a twin track care plan of kinship foster care or adoption. The Grandmother appeals against a dismissal of her residence order application in respect of AB, BB, and CB. The Mother supports the various appeals, but they are opposed by the Trust and by the guardian ad litem ("the GAL"). The Grandmother is the paternal grandmother. The maternal grandmother had a brief engagement with the proceedings. References to the Grandmother relate to the paternal grandmother.

[2] I have retained the ciphers adopted by Judge Bagnall and have anonymised this judgment to protect the identity of each of the children. Nothing can be published without the leave of the court that will identify any of the children.

Background

[3] On 10 January 2020 by agreement the three eldest children (AB, BB and CB), who are all girls, were placed in the care of the Trust under a voluntary arrangement. Later that month the Trust applied for care orders. The case proceeded on a 'no order' basis, although it was transferred to the Family Care Centre on 5 August 2020.

[4] On 18 September 2020 a male child, DB was born and on 23 September 2020 care proceedings relating to him were then issued and consolidated with the other application. On the 23 November 2020 interim care orders were made in respect of all four children.

[5] On the 7 January 2021 both the maternal grandmother and the Grandmother were granted leave to issue residence order applications.

[6] On 1 July 2021 Judge Bagnall, by agreement of all the parties, dealt with the maternal grandmother's application for a residence order and it was dismissed. The Trust and GAL were not technically parties to the maternal grandmother's private law application but agreed and acquiesced in it being heard first. Judge Bagnall then dealt with the Trust's care order applications and made certain findings of threshold.

Judge Bagnall also determined that, as a result of the threshold findings, the children had either suffered significant harm in the care of their parents, or were likely to suffer significant harm if they remained in the care of the parents. These rulings were not particularly controversial, were firmly based on the evidence available, and they have not been appealed. The Grandmother was not represented and did not take part in the hearings on 1 July 2020.

[7] On the 4 November 2021 Judge Bagnall dismissed the Grandmother's application for a residence order in respect of the three older children, and then went on to consider the Trust's applications for care orders in respect of all four children which were granted. Although Judge Bagnall followed a similar sequence as that on 1 July 2021, this sequencing was not with the agreement of the parents or the Grandmother.

[8] The care plans for the children were approved by Judge Bagnall. They were separate long-term foster placements for each of the three girls, AB, BB, and CB with suitable contact arrangements with their parents, each other, and the wider family. The care plan for DB, the youngest child, was a twin-track plan of long-term placement away from his parents in either a kinship placement with a maternal aunt and her husband or adoption. At that stage assessment of the kinship placement was ongoing. Again suitable contact arrangements with the parents, his sisters and other family members were put in place.

[9] The Grandmother's appeal against the dismissal of her residence order application in respect of the three girls was on two principle grounds. Firstly, Judge Bagnall should not have heard the residence order application before the care planning hearing. This had resulted in her adopting a linear approach as opposed to a holistic approach. Secondly, Judge Bagnall refused to grant leave for an independent parenting assessment of the Grandmother, particularly in light of the Trust's failure to carry out a full kinship assessment.

[10] The Father's appeal against the making of the care orders in respect of the three girls was on one ground, namely that Judge Bagnall erred in refusing the Grandmother's application.

[11] The father's appeal against the making of the care order in respect of the boy was again on one principle ground, namely that the care plan lacked sufficient detail concerning the care planning. A further, subsidiary ground, was the inadequacy of any planning for the transition from foster care to kinship care.

Appeals from the Family Care Centre

[12] The law is very well established in relation to how an appellate court should deal with an appeal from a lower court. There is a wide discretion vested in the lower court and decisions should not be interfered with unless they are plainly wrong. Waite J in *Re CB* [1993] 1 FLR 920 at 924d stated that:

> "No appeal can be entertained against any decision they make…unless such decision can be demonstrated to have been made under a mistake of law, or in disregard of principle, or under a misapprehension of fact, or to have involved taking into account irrelevant matters, or omitting from account matters which ought to have been considered, or to have been plainly wrong."

This approach has been steadfastly followed in this jurisdiction for many years (see *e.g. McG v McC* [2002] NIFam 10, *SH v RD* [2013] NICA 44 and *ML v MO* [2020] NIFam 25.)

Father's appeal in respect of DB

[13] The main thrust of the appeal is that the care plan was insufficiently choate at the time of the hearing in November 2021. It was a twin-track plan with kinship foster care or adoption but with the kinship placement (purportedly) progressing, the Father argues that the matter should have continued under interim care orders so that the kinship assessment could be brought to a conclusion and then, if successful, the child could be placed with the aunt, and if unsuccessful, a single track care plan of adoption would require a full options analysis in accordance with the 'nothing else will do' rubric following *Re B* [2013] UKSC 33.

[14] The basic approach to care planning was set out in the speech of Lord Nicholls in *Re S; Re W* [2002] UKHL 10 at paragraphs [92] – [100]. This approach has stood the test of time and is still relevant today. It is a useful exercise to re-state the principles so I propose to quote extensively but selectively from this portion of the speech:

> "[92] When a [Trust] formulates a care plan in connection with an application for a care order, there are bound to be uncertainties. Even the basic shape of the future life of the child may be far from clear … Once a final care order is made, the resolution of the uncertainties will be a matter for the [Trust], not the court.
>
> [93] In terms of legal principle one type of uncertainty is straightforward. This is the case where the uncertainty needs to be resolved before the court can decide whether it is in the best interests of the child to make a care order at all …
>
> [94] More difficult, as a matter of legal principle, are cases where it is obvious that a care order is in the best interests of the child but the immediate way ahead thereafter is unsatisfactorily obscure …

[95] In this context there are sometimes uncertainties whose nature is such that they are suitable for immediate resolution, in whole or in part, by the court in the course of disposing of the care order application. The uncertainty may be of such a character that it can, and should, be resolved so far as possible before the court proceeds to make the care order. Then, a limited period of 'planned and purposeful' delay can readily be justified as the sensible and practical way to deal with an existing problem.

[96] …

[97] Frequently the case is on the other side of this somewhat imprecise line. Frequently the uncertainties involved in a care plan will have to be worked out after a care order has been made and while the plan is being implemented …

[98] These are all instances of cases where important issues of uncertainty were known to exist before a care order was made. Quite apart from known uncertainties, an element of future uncertainty is necessarily inherent in the very nature of a care plan. The best laid plans 'gang aft a-gley.' These are matters for decision by the [Trust], if and when they arise. A local authority must always respond appropriately to changes, of varying degrees of predictability, which from time to time are bound to occur after a care order has been made and while the care plan is being implemented. No care plan can ever be regarded as set in stone.

[99] Despite all the inevitable uncertainties, when deciding whether to make a care order the court should normally have before it a care plan which is sufficiently firm and particularised for all concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future …

[100] Cases vary so widely that it is impossible to be more precise about the test to be applied by a court when deciding whether to continue interim relief rather than proceed to make a care order. It would be foolish to attempt to be more precise. One further general point may be noted. When postponing a decision on whether to make a care order a court will need to have in mind the general statutory principle that any delay in determining

> issues relating to a child's upbringing is likely to prejudice the child's welfare: [Article 3(2) of the Children (NI) Order]."

[15] At the time of the hearing there was clear evidence that because of significant issues relating to the parents it was inconceivable that DB could be rehabilitated back into the care of either parent. The core care plan was therefore long-term placement away from the parents. There were only two viable and realistic options for the child, namely the kinship placement with the maternal aunt that was being assessed at the time or a 'stranger' placement. No other kinship placement was being suggested for DB. The Grandmother had not put herself forward as a carer for DB. Given DB's age and circumstances the Trust's analysis favoured adoption, rather than fostering.

[16] Judge Bagnall's ruling on her analysis is brief, but it is clear that she had before her, and had considered, the various reports, and in particular the reports of the Trust and the GAL in which an options analysis had been carried out. The only uncertainty in the care plan was kinship placement or adoption. It was an uncertainty, but not one that required to be worked out by Judge Bagnall. If the kinship assessment was successful then DB would be placed in foster care with his aunt, if not, then he would be considered for adoption. To use the words of Lord Nicholls, it was sufficiently firm and particularised and there was a reasonably clear picture of the likely way ahead. As there was an uncertainty concerning whether the kinship placement was viable, there was no need to plan for a transition into a kinship placement. This was a purely speculative scenario and well within the capability of the Trust to manage as part of the care planning should the eventuality arise.

[17] A further delay would have lacked purpose. There was no need for the court or GAL to maintain an interest in the case, and any planning could be dealt with under the looked after child (or 'LAC') process.

[18] The care plan was sufficiently choate and it could not be argued that Judge Bagnall was plainly wrong it making the order.

[19] By way of postscript, it is noted that after Judge Bagnall's order, the maternal aunt indicated that she did not want to be considered as a kinship carer, thus, effectively, turning this twin-track care plan into a single-track. Waite J dealt with the issues raised by fresh evidence post-order in *Re CB* at 924f:

> "If the … decision appears to be unassailable on the material that was before [the court] at the time, the High Court will look at such evidence to see whether [the] decision has been invalidated by subsequent developments. If the … decision is found to be wrong in the light of the material before them at the time, the appeal will normally be allowed on that ground alone …

> The new evidence would still, however, be relevant on the question whether the matter should be remitted … for rehearing or dealt with by the High Court judge in exercise of his powers…"

[20] This new evidence has no bearing on the appeal, save as to copper-fasten the correctness of the approach adopted by Judge Bagnall. The appeal is therefore dismissed.

Grandmother's appeal and Father's appeal in respect of AB, BB, and CB

[21] I will deal with these appeals together. In fact, the Father's appeal is dependent entirely on the Grandmother's appeal and does not raise any additional ground.

[22] The Grandmother's main ground of the appeal is that Judge Bagnall approached the matter of the long-term future of the three girls in a linear, rather than a holistic, manner.

[23] Before considering the merits of the appeal it must be noted that Judge Bagnall had inherited a situation of the Grandmother (and her maternal counterpart) having been granted leave to bring a residence order application. The Grandmother's application was to enable her to make a private law application against the parents. The Trust and GAL were not parties to that application. Neither parent opposed the application, so the application itself served little purpose, when the issue of the children's residence was going to be dealt with in the care order proceedings brought by the Trust and with the GAL as a party. As the Grandmother was not a party to the care order proceedings Judge Bagnall was always going to have to deal with the two applications separately even though the outcomes were inextricably linked and mutually exclusive.

[24] The law in relation to the granting of leave to non-parents is well established. Article 10(9) of the Children (NI) Order 1995 provides:

> "Where the person applying for leave to make an application for an Article 8 order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to—
>
> (a) the nature of the proposed application for the Article 8 order;
>
> (b) the applicant's connection with the child;
>
> (c) any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it; and

(d) where the child is being looked after by an authority—

(i) the authority's plans for the child's future; and

(ii) the wishes and feelings of the child's parents."

It is often said by counsel for applicants that this is a 'low bar' for entry, but this misstates the nature of the discretion vested in a judge considering the question of leave. When dealing with this type of application, I would regard the judgment of Black LJ in *Re B* [2012] EWCA Civ 737 at [34] – [52] as essential reading. This sets out the development of the jurisprudence relating to this provision and gives guidance as to how a judge should exercise his or her discretion. At [39] Black LJ states:

> "It can be seen that [Article] 10(9) does not contain anything in the nature of a test by which an application should be judged, nor even criteria which must be satisfied before leave can be given, nor is anything of the kind to be derived from the rest of [Article] 10. Neither does the subsection circumscribe the factors that can be taken into account in determining the leave application; it leaves the court to take into account all the material features of the case and merely highlights certain matters which are of particular relevance."

[25] Commenting on Thorpe LJ's well known statement in *Re J* [2003] 1 FLR 114 that that judges should be careful not to dismiss the possibility of a child being cared for by grandparents "without full inquiry", Black LJ at [51] said that:

> "I do not think, therefore, that what Thorpe LJ said should properly be interpreted as a requirement that any grandparent who wishes to put forward proposals should be joined as a party to existing care proceedings or given leave to issue [an Article] 8 application or still less permitted to air their case at a full hearing on evidence. Sometimes some or all of these things will be appropriate, sometimes none and it is for the judge to weigh the various factors and decide what the proper order is in the individual case."

[26] Before leaving this matter, it is also worthwhile considering the observations of Sumner J in *Re W* [2004] EWHC 3342 at [33]. Where a person has no independent or separate point of view or was putting forward an interest identical to another person who is already a party to proceedings, then it would be unlikely that the

court would grant leave. In this case the Grandmother before, during and now on appeal, has presented an interest identical to that of her son and both have been represented by the same solicitors throughout.

[27] Judges should always be alert to the tendency towards proliferation of parties in cases of this type, which in turn adds to complexity and delay as well as inflating legal costs.

[28] I will now move on to consider the merits of the Grandmother's appeal. The issue is whether Judge Bagnall approached this case from a linear or a holistic point of view, and if so, did that prevent her from making a proper evaluation of the proportionality of the proposed interference in the family lives of the parties.

[29] The danger of the linear as opposed to the holistic approach has been highlighted in a number of recent cases. As a starting point one should consider the judgment of McFarlane LJ in *Re G* [2013] EWCA Civ 965 at [49] and [50]:

> "[49] In most child care cases a choice will fall to be made between two or more options. The judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option.
>
> [50] The linear approach, in my view, is not apt where the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare."

[30] Reference to options does not mean any option, but is strictly confined to realistic options. In this case Judge Bagnall only had two realistic options for these children – being cared for by the Grandmother or being cared for in their separate foster placements. Munby P in *Re R* [2014] EWCA Civ 1625 was dealing with the position were adoption was an option. This does not apply in the case of these girls, but the same principles apply to the approach that he set out at [62]:

> "In many, indeed probably in most, cases there will be only a relatively small number of realistic options. Occasionally, though probably only in comparatively rare cases, there will be only one realistic option. In that event, of course, there will be no need for the more elaborate

> processes demanded by [the case law]. The task for the court in such a case will simply be to satisfy itself that the one realistic option is indeed in the child's best interests and that the parent's consent can properly be dispensed with …"

[31] The key matter for consideration is not whether or not Judge Bagnall used a linear or a holistic approach, but rather did she carry out a proper evaluation of the realistic options. In some cases use of the linear approach would prevent, or severely restrict, a proper evaluation, in other cases it would make little difference. Ultimately it is the duty of any first instance judge when considering a care planning decision to determine what is in the best interests of the child or children (with emphasis on the Article 3(3) welfare checklist). Should that result in an interference in the child's, a parent's or grandparent's (or any other relevant person's) right to respect for their private and family life, and invariably an order taking a child into care will interfere with such a right, then the judge must consider whether the interference by the making of the order is both necessary for a legitimate aim and proportionate to that aim (see Keegan LCJ in *Re M* [2022] NICA 7 at [16]).

[32] But Baker LJ in *Re FL* [2020] EWCA Civ 20 at [31] emphasised that the correct approach of a judge should always be to consider substance over structure -

> "I turn next to the criticisms of the structure of the judgment. As I have said in other cases, the discipline of identifying the realistic options and summarising the advantages and disadvantages of each before making a final order is one which should be followed whenever the court is making a decision about the future of a child … A judge who fails to adopt that approach runs the risk that his decision may be challenged on the grounds that he has failed to take into account a material advantage or disadvantage of one or other of the realistic options. It does not follow, however, that a judgment in which this approach is not adopted will inevitably be overturned. This court will only allow an appeal where persuaded that the decision below was wrong or unjust because of a serious procedural or other irregularity."

[33] To this end, McFarlane LJ's apposite warning in *Re R* [2014] EWCA Civ 1625 is well placed:

> "There is, to my mind, a danger in casting a single judgment, or, indeed, the process of judicial analysis in any particular set of proceedings if spread over the course of more than one hearing, as "linear" simply because, as a matter of structure, the judge considers and then expresses a conclusion upon a particular option for the

child before moving on to consider a further option ..."

[34] As previously stated, Judge Bagnall was faced with a dilemma in having to deal with a private law application (in which all parties to the proceedings – the Grandmother, the Mother and the father - were agreed as to the outcome) and a public law application seeking to place the children into long-term foster care. Hearing the cases together raised a potential problem as the Grandmother was not a party to the public law proceedings and did not have access to certain evidence and reports. Judge Bagnall did have to decide on a sequence. When dealing with a similar application by the maternal grandmother no party took issue with the sequence adopted then. This sequence was then replicated for the Grandmother's application. There are arguments that the public law matter could have gone first as that would have allowed a consideration of both the options as part of the care planning, or that both cases could have been heard together, notwithstanding the obvious difficulties of the Grandmother being able to access potentially relevant documents. Similarly, it could be argued that Judge Bagnall having heard the Grandmother's application should have reserved her judgment on the issue until after the hearing of the public law matter, and then dealt with the consideration of both cases in a holistic way.

[35] However, I consider that criticism of Judge Bagnall's approach in dealing with the residence order application first and ruling on it before consideration of the Trust's application, is unfair. Judge Bagnall, as appears from her judgment carried out a full evaluation of the Grandmother's ability to care for her granddaughters. There is a significant proportion of the judgment dedicated to that approach with, in my view, a proper analysis of the evidence and a proper evaluation of the Grandmother as a carer for the children.

[36] The real danger in this case with the linear approach adopted by Judge Bagnall was that by rejecting the option of the children living with the Grandmother under a residence order, Judge Bagnall was ruling out the possibility of the Grandmother caring for the children under the auspices of a kinship fostering arrangement under a care order. Such an arrangement could have afforded some support for the Grandmother from social services and additional protection for the grandchildren. For example, the accommodation issue highlighted below could have been solved by the Trust under the auspices of a care order assisting in the provision of a larger home. However, that was not the only, or principle, reason for the inability of the Grandmother to care for the children. A proper evaluation of the Grandmother was carried out by Judge Bagnall and she referenced all the relevant negative features about the ability of the Grandmother to care for the children:

- A lack of insight into concerns relating to the Father ([23]);

- Her inability to protect the children from exposure to her husband when he was alive ([23]);

- Her inability to resist family pressures (24]);

- A lack of openness and honesty with social services ([25], [26] and [27]);
- Her approach to an incident of violence on 10 January 2020 ([27]);
- A lack of suitable accommodation for the Grandmother and the three children within her two-bedroomed home ([28]).

(The paragraphs mentioned refer to the paragraphs in Judge Bagnall's judgment.)

[37] This resulted in a conclusion to the judgment at [29] that the Grandmother did not have the capacity to "properly protect these children and she will not be able to be open and honest with the Trust". This conclusion was well supported by the evidence available to the court. In reaching that conclusion, I consider that when Judge Bagnall then went on to consider the care plan options for the children she was correct to have rejected the Grandmother as a carer for the children as a realistic option. Having heard the evidence and having come to that decision on the residence order application, I am sure that she had this in her mind when considering the second application. In any event, the evidence clearly indicated that any placement of the children into the care of the Grandmother, either under a residence order or under a care order, was not a realistic option, and following the guidance of Munby P in *Re R* the task had become a relatively simple one when deciding if a care order with a care plan of separate long-term foster placements was in each of the children's best interests. There was clear evidence that the children were thriving in their placements with strong positive evidence of the progress that each had made since they had been removed from the abusive home environment with their parents.

[38] In all the circumstances I consider that Judge Bagnall did not err in adopting the approach that she had taken and it could not be said that she was plainly wrong in adopting that approach or in reaching her final decision to make a care order.

[39] I will deal with the second appeal point in very brief form. This is based on the challenge to the decisions of an earlier judge on 20 April 2021 and of Judge Bagnall on 20 October 2021 to refuse leave to instruct an independent social work assessment of the Grandmother's parenting ability.

[40] Appellate courts will very rarely interfere with case management decisions of this type (see the judgment of Munby P in *Re TG* [2013] EWCA Civ 5). Gillen J in his often quoted judgment of *Re K and S* [2006] NIFam 18 emphasised the importance of several factors including relevance, whether it is necessary for the proper disposal of the case, the need to use experts judiciously, and the need to avoid expense and delay.

[41] Munby J in *Re H-L* [2013] EWCA Civ 655 at [3] set out what 'necessary' (albeit in the context of the English Family Proceedings Rules 2010) actually means:

> "The short answer is that 'necessary' means necessary. It is, after all, an ordinary English word. It is a familiar expression nowadays in family law, not least because of the central role it plays, for example, in Article 8 of the European Convention and the wider Strasbourg jurisprudence. If elaboration is required, what precisely does it mean? That was a question considered, albeit in a rather different context, in Re P … [2008] EWCA Civ 535 ... This court said it `has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand', having `the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable.'"

[42] In this context Judge Bagnall (and the earlier judge) were entitled to make an analysis of the available evidence before the court – the Trust's initial viability assessment in November 2020, a further kinship assessment in February 2021 and a Trust's professionals' discussion in September 2021. The last discussion took place because of the necessity to re-assess the situation after the death of the Grandmother's husband. Judge Bagnall's analysis would have taken into account the extent of the completeness and thoroughness of these assessments and the discussion.

[43] A judge should not dismiss, or relegate, opinions expressed by Trust social workers merely because they lack independence. Social workers are professionals and the standards of their profession require objective, independent and robust assessments. It is the experience of this court that such assessments are provided regularly. The judges also benefit from the expert analysis and input from guardians who invariably have a professional social work background.

[44] In this case there were sufficient assessments already carried out, and the conclusions of those assessments were well supported by the evidence available to the social workers and to the court. The change in the Grandmother's circumstances resulting from her husband's death did remove one potential risk factor, but it did not alter the fundamental flaws in her own ability to care for the children.

[45] Faced with the application on 20 October 2021, several weeks before the final hearing of the case, Judge Bagnall was operating well within the discretion vested in her to refuse the application. Granting the application would only have added to the expense and delay in the case with no realistic prospect of any additional value to the evidence already before the court. The independent social work report was not necessary in the circumstances of this case.

[46] I therefore consider that the Grandmother's appeal should be dismissed, as should the Father's appeal because it lacks any additional grounds.

[47] Passing reference has been made in the grounds of appeal to the cultural

background of this extended family as members of the Irish Travelling community. It is clear that Judge Bagnall was acutely aware of this background to the case, and specifically referred to it in her judgment. The matter was not pursued at the appeal hearing, which in my view was entirely appropriate. It is clearly a very relevant issue given the proposals for each of the children, but there is nothing to support the contention that it has not been taken into account, either by the Trust or by Judge Bagnall.

Conclusion

[48] All three appeals are dismissed. There will be no order as to costs, but there will be taxation orders for legally assisted parties. The GAL will be discharged.