Neutral Citation Number: [2021] EWCA Civ 1019

Case No: B4/2021/0901

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
SITTING AT NEWCASTLE-UPON -TYNE
RECORDER I ATHERTON
NE19C00915

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2021

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE BAKER
and
LORD JUSTICE NUGEE

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Re R (A Child)

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- -

Mr N Stonor QC and Mr P Goodings (instructed by **Durham County Council**) for the **Appellant Local Authority**
Ms D Shield (instructed by **Paul Dodds Law**) for the **First Respondent Mother**
Mr T Donnelly (instructed by **Richard Reed Solicitors**) for the **Second Respondent Guardian**

Hearing date : 29th June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am 9th July 2021.

Lord Justice Moylan:

1. Durham County Council appeals from an order made in care proceedings by Recorder Atherton ("the judge") on 12 April 2021. The proceedings concern a child, A, who is now aged approximately 18 months.

2. The order was made at the final hearing but it was not a final order in that it gave directions for further documents to be filed including a position statement from the Local Authority setting out "their response to the judgment and clarification of their position". Although it was not a final order, in his judgment the judge effectively determined the care proceedings by rejecting the Local Authority's care plan for adoption and concluding that A "should be restored to her mother's care".

3. This is reflected in the order which contained the following recital:

> "UPON the Court not making any order, and instead inviting the Parties to consider their position in light of the Judgment. That Judgment providing as follows:
>
> (1) The child shall be rehabilitated to Mother
>
> (2) The threshold for the making of s.31 Care Order is conceded. Counsel for the (Local Authority) and (the mother) agree to provide appropriate wording.
>
> (3) The Local Authority shall provide an as yet undefined package of support, but along the lines of that recommended by the (Guardian) in evidence.
>
> (4) The Court invited parties to consider what Public Law Order the rehabilitation should be under."

4. At the hearing of this appeal, the Local Authority was represented by Mr Stonor QC (who did not appear below) and Mr Goodings; the mother by Ms Shield; and the Guardian by Mr Donnelly (who did not appear below). The identity of the child's father is not known.

5. The Local Authority's case on this appeal was that the judge misdirected himself as to the law; that the judgment contains "a wholly inadequate welfare evaluation"; and that his decision was wrong for a number of reasons including in respect of his approach to the evidence. The appeal was opposed by both the mother and the Guardian, their respective cases being set out in comprehensive written submissions. However, as the hearing of the appeal progressed, it became clear, as realistically accepted by Ms Shield on behalf of the mother and Mr Donnelly on behalf of the Guardian, that the judgment was difficult to sustain. Their acknowledgement of this was focused on the issues of: (a) whether the judge had decided that A should be rehabilitated to the care of her mother without having undertaken a proper welfare evaluation in his judgment; and (b) whether his decision, in particular to "reject" adoption, was, in any event, unsustainable because the "package of support" which he determined would be required if A was to live with her mother was, as referred

to in the recital, "undefined" and because it was not known what support would be available.

6. At the conclusion of the hearing, we informed the parties of our decision, namely that the appeal would be allowed and the proceedings remitted for a rehearing. These are my reasons for agreeing with that decision. I should add that Mr Stonor tentatively raised whether this court might be able to determine the substantive proceedings. In my view, we are clearly not in a position properly to do so. This is not a decision which can be made on the evidence available to us as it requires full oral evidence from all the relevant parties and witnesses including the mother whose evidence clearly impressed the judge.

Background

7. I only propose to set out a brief summary of the background to provide some context for the care proceedings and the judge's decision.

8. The mother is aged 31. She has seven older children who were the subject of care proceedings which concluded in November 2019. I deal with those proceedings further below. The same Guardian was involved in both those and the current proceedings.

9. Following A's birth, care proceedings were commenced in respect of her. At the first hearing, which took place when A was three days old, the mother agreed to A being accommodated by the Local Authority (under section 20 of the Children Act 1989: "the 1989 Act"). A has been living with foster carers since then with the mother having contact.

10. Care proceedings had been commenced in respect of the mother's older children in 2018. Judgment was given in those proceedings by District Judge Thomas on 31 October 2019. At that date, the children were aged between 11 and 2 and had been in foster care since November 2018. Final orders were made on 4 November 2019. Care orders were made in respect of each of the five older children (on the basis that they would remain in foster care). Care and placement orders were made in respect of the youngest two children. The District Judge's judgment was obviously important for the purposes of the current proceedings in particular because it dealt with and made findings in respect of the mother and her parenting abilities.

11. The Local Authority had advanced a broad range of allegations in those proceedings including serious incidents of domestic abuse (including involving weapons) since 2009 and chronic extensive neglect of the children. The latter included four occasions between July and November 2018 when the mother was unaware that one or more of the children had got out of the home. On three of these, one of the children (then aged three) had been found on his own up to a mile away from the family home. On the fourth occasion, two of the children (then aged 10 and 8) were found on their own, only wearing T-shirts, about 2.5 miles from the home; they had been out for about three hours.

12. For the purposes of those proceedings, the judge heard evidence from a number of professionals including an independent social worker and a consultant clinical psychologist, who also gave written evidence in the current proceedings. In his

judgment, the judge set out that "all four professionals … share the same view, namely that neither parent can safely care for these children in any combination, even with additional support".

13. The judge found that the mother had deliberately concealed the fact that she was pregnant with A. For this and other reasons, the judge found that:

> "(the mother) is incapable of working with professionals in an open and honest way, now or in the future, and the lessons she appears to have taken from her various courses have not been heeded. I therefore find that there has been a high degree of disguised compliance and M has learnt very little from the courses she has attended."

Later in his judgment, the District Judge repeated that "there is no evidence (the mother) has learned any lessons or that her suggested changes are anything other than disguised compliance" adding that there was also "no evidence that her alleged changes have any degree of sustainability".

14. District Judge Thomas made the following findings in respect of the mother:

> "1) Mother cannot sustain the sufficient change necessary to ensure the welfare of the children.
>
> 2) Mother will not be open and honest with professionals.
>
> 3) Despite being advised by, and having support of, professionals about how to ensure the safety of the children, mother failed to utilise this support and follow this advice.
>
> 4) Mother minimised the Local Authority's concerns about the care of the children.
>
> 5) Mother deflects her culpability for the children's suffering or being likely to suffer significant harm whilst in the care of mother and father onto third parties.
>
> 6) Mother deliberately concealed her pregnancy from the professionals.
>
> 7) There has been a high degree of disguised compliance by mother and she has learnt very little from the courses she has attended.
>
> 8) During cross-examination by the counsel for the CG, Mother conceded that the following issues were all welfare issues for the children;
>
> a) Seeing adults fighting.
>
> b) The more the fighting the greater the impact.

c) Adults fighting would impact on their trust in adults.

d) Adults fighting would impact on their relationship with each other.

e) Adults fighting would affect the trust they had in each other.

f) Those issues are likely to have a long-term affect.

g) Children being exposed to the growing and use of drugs.

h) Children living in inadequate housing.

i) Children wearing dirty and ill-fitting clothes.

j) Children not attending school.

k) Children missing medical appointments.

l) Children not wearing their glasses.

m) Children not having sufficient food.

n) Children not being supervised.

o) The children who ran away could have been seriously hurt.

p) Children hitting, spitting, and biting each other.

q) The lack of boundaries.

r) Being in foster care twice.

s) Children taking on adult roles."

15. Those findings formed part of the, ultimately, agreed threshold which also included the history of domestic abuse and the incidents when the children had left the home and had been found by strangers up to a mile away, alone and only partly clothed.

Proceedings Below

16. Care proceedings were commenced in December 2019. The final hearing took place in April 2021. The only proposed care options were care and placement orders or A being cared for by her mother.

17. The judge heard oral evidence from a number of witnesses including the mother, the allocated social worker, an independent social worker and the Guardian. He also had a written report from the consultant clinical psychologist who, as referred to above, had given evidence in the previous proceedings.

18. At the conclusion of the hearing, the judge gave an ex tempore judgment. This was followed by the Local Authority submitting a request for clarification of a number of points. The judge included his answers in the approved transcript of the judgment.

19. I set out only a summary of some (I emphasise) of the written evidence. I have focused principally on aspects of the evidence relied on by the Local Authority in support of its care plan. This is to provide the background to my decision, as explained below, that the judge failed properly to carry out the required balancing evaluation when making his decision. I emphasise that this is only a summary, and only deals with the written evidence, because I would not want the mother to think that I have overlooked that this is a partial summary and there is other evidence which she can rely on in support of her case and in opposition to that advanced by the Local Authority. The latter includes the evidence of the Guardian and her own oral evidence which, as referred to above, was clearly a significant factor in the judge's determination.

20. A cognitive assessment was undertaken by the psychologist in January 2020. This concluded that the mother has a full scale IQ score in the Borderline range. Her score in respect of her working memory (a measure of short-term memory) was in the extremely low range. The psychologist also provided a full psychological assessment in February 2020, some 14 months before the final hearing. This identified a number of risk factors in respect of the mother's ability to meet the needs of and to protect a child. It also concluded that the mother was "showing … symptoms of having Autistic Spectrum Disorder" and that she needed to be referred for an assessment.

21. An independent social worker completed a PAMS assessment in July 2020. The report concluded that, with some instruction, the mother might be able to meet A's basic needs. It proposed that consideration be given to a bespoke, individual teaching programme but noted that:

> "I can give no assurance that such a programme would ensure significant, sustained change, given Ms Robinson's complex difficulties, her lack of appropriate informal support and her distrust of a range of professionals who she believes have been untruthful in their dealings with her."

The report also noted that the mother had "little insight into the concerns raised (by the Local Authority) about her ability to care for A. She has a tendency to attribute past failings to others or to situations. She sees parenting primarily as meeting the child's physical needs and has much less understanding of their emotional needs in terms of security, stimulation and guidance". Finally, the report stated that, if A were returned to the mother's care, she would "need an intensive package of support".

22. The recommendation was accepted, and the mother undertook a programme of teaching with another ISW who was PAMS and DASH trained and who had experience of working with people who have or may have Autism Spectrum Disorder. His report is dated January 2021.

23. The report stated that the mother had "physically engaged" in the teaching programme and the subsequent assessment of her ability to care for A and the ISW had "noted a change in the mother's understanding throughout the assessment". However, the report concluded that there had been no real improvement in each of the areas of parenting which had been assessed by the previous ISW as requiring teaching.

24. The summary of the ISW's conclusions included that the mother's "volatility … creates a significant barrier for professionals having to support" her; that there remained "significant gaps in her parenting"; that while she was "open and honest about her learning … she is still unable to identify her many limitations and generally she (has) poor insight into other aspects of her parenting"; that there were "a significant number of areas where I believe (the mother) will require a substantial amount of professional and family intervention"; and that her mental health, and an eating disorder, impacted on her ability to provide good enough parenting. The ISW considered that there were "a number of areas where (the mother) could be supported, primarily around her health needs" but that these were "unlikely to be resolved within the child's timescales".

25. His ultimate conclusion was as follows:

> "Although (the mother) has demonstrated some skills whilst she undertook the teaching programme there is evidence that she cannot automatically relate these skills to the parenting role. There is little insight into the impact her role as parent played in the removal of her older children and therefore it is reasonable to assume that these patterns are likely to repeat with A. Placed in (the mother's) care A would require intensive input from health and education providers, whom (the mother) is unlikely to work constructively with to meet her child's needs.
>
> I would therefore be unable to support A being placed in the care of (the mother) long term."

26. The allocated social worker gave extensive evidence in support of the Local Authority's care plan and the application for a placement order. She also addressed the issue of support for the mother in a statement provided in response to a request from the Guardian. The ultimate conclusion in the statement was that the Local Authority was of the view that "the support required for A to reside in her mother's care would constitute it being a corporate parent for the entirety of A's life".

27. The Guardian set out in her written report that this "is not a single-issue case and it is one that is finely balanced". She considered that the mother could "make changes (and) has the capacity to follow a professional plan" but "would need a high level of professional support". She also considered that there were gaps in the Local Authority's evidence in respect of the provision of support which meant that she was "currently unable to agree to a Placement Order being made". She deferred making any recommendation to the court until after she had heard the oral evidence.

28. Having heard the oral evidence, and prior to giving evidence herself, the Guardian indicated that she did not support the application for a placement order. She

proposed that the hearing should be adjourned to enable the Local Authority to prepare a support plan and a rehabilitation plan. The judge did not adjourn the hearing but proceeded to hear oral evidence from the Guardian.

29. In her evidence, the Guardian said that she did not support the Local Authority's care plan. There were still "gaps" in the evidence principally, it appears, in that enquiries had not been made of those in the "support network" present around the mother and that further enquiries needed to be made to ascertain what support could be provided for the mother. She considered that there "could be a safety plan … to enable A to be placed in her mother's care".

30. The Guardian repeated that, in her view, it remained a finely balanced case. She also agreed that the risk of rehabilitation being attempted and breaking down "is quite significant". Therefore, there needed to be "the correct support plan in place to reduce that risk". She proposed that the Local Authority should prepare a support plan which would set out what support could be put in place to enable A to be cared for by her mother.

Judgment

31. The judge commenced his judgment by noting that it was given in accordance with the guidance given by Sir Andrew McFarlane, President of the Family Division, in *The Road Ahead,* 9 June 2021, paragraph 48 which stated:

> "In keeping with the overriding objective and the elements highlighted in paragraph 47, judges should (after canvassing the point with the parties) consider whether giving a short judgment will be sufficient and proportionate in any particular case. In a short judgment the court will not be expected to set out a detailed recital of the evidence, save for those key elements which support the court's findings and decision. There should not, however, be any reduction in the content and scope of the judge's description of their analysis and reasoning."

Given my conclusions below, I would emphasise the last sentence.

32. There was some confusion at the hearing before the judge as to the status of the threshold facts relied on by the Local Authority. In her response, the mother had not accepted much of what was alleged. The judge noted that "the threshold … clearly needs amending". Although counsel for the mother and the Local Authority considered that they would be able to "agree a threshold", none was in fact agreed prior to the conclusion of the hearing. The judge accordingly worked "on the basis" of the mother's concession, namely that the threshold criteria for the making of a care order had been crossed. This was, to put it bluntly, not satisfactory. A court should not be left in this position. Either the facts which establish the threshold must be agreed or they must be determined by the court.

33. The judge summarised the nature of the case as follows:

> "The issue that has occupied the court over the last three days can probably be summarised best as follows: can mother safely

> care for A with appropriate support for her minority? This requires analysis of whether mother can make and sustain change from the neglectful parenting that she gave to her older children. To effect and sustain change a parent must recognise the need for change. They must recognise the deficits in their earlier parenting. In mother's case, because of all that we know about her from Dr Tyler and from the PAMS assessment, it is clear that her parenting of A can only be carried out safely with appropriate support commensurate with her needs and the needs of A as A grows older."

34. The judge addressed the question of whether the mother "recognised the need for change and can … demonstrate change". He summarised the mother's previous parenting, including that her children's physical, emotional and educational needs had not been met; that they had been exposed to "domestic abuse by the two fathers … and domestic disputes with them"; and that they were not "provided with adequate or sufficient supervision" as a result of which there were "four escapes by young children who found themselves far away from the family home without the mother having realised they had escaped".

35. The judge summarised the evidence, considered some of the issues in the case and set out some of his findings. These included that the mother was an honest witness and he predicted that she would be open and honest with professionals in the future. He concluded that the mother "has real insight into the effects of domestic abuse on her children and will protect A from it". He also concluded that the changes and the support which the mother was receiving meant that: "This is a very far cry from the situation in which the mother was found by District Judge Thomas to have been parenting the other children". The judge referred to the Guardian's evidence that she had seen "a sea change in the way the mother behaves in contact between how she was in early contact to how she is now with A".

36. Before addressing the welfare checklist and without having balanced the proposed care options, the judge set out his "conclusion", namely that the mother "can with appropriate support parent A", which would "have to be intensive in the first place". There would need to be "a comprehensive plan for support around the mother from agencies drawn together by the social worker".

37. The judge explained his decision as follows:

> "35 I turn now to the welfare checklist and, first of all, to state the law. The law arising from the Supreme Court is that adoption is an order of last resort. A placement order with plan for adoption can only be made where the court is of the view that it is necessary and that nothing else will do. The court must look at all the viable options and carry out a holistic assessment of them.
>
> 36 I have looked at the plan proposed by the CG and I have considered adoption and I do not see adoption as being either the right approach or there being no alternatives. I have not seen any other viable options propounded by the local authority.

> Although the social worker recently filed a statement setting out what support can be made available, that statement was not comprehensive. It did not propose a plan anything like as detailed as the guardian did in evidence. I level no criticism at the guardian for having to do so in evidence. She was in a genuinely unfortunate position of not being able to state before hearing all the evidence whether she agreed with the local authority or not and, having heard Mr Dean's evidence, mother's evidence and the social worker's evidence, she came to the view that she did not agree with the LA. She had to propound a plan and, although she is criticised by the local authority having done so in the witness box, it seems to me that she was in the position of having to do so because there was no time in between the close of the local authority case and the guardian giving evidence and so the plan is one in essence rather than in detail and, as part of my holistic assessment, I have considered that plan and I consider that that plan will best meet A's needs.
>
> 37 Therefore, having rejected adoption because I am firmly of the view - I cannot stress that enough - that something else will do i.e. this plan of the guardian's, I turn first to the welfare checklist in the Children Act 1989 rather than that in the Adoption and Children Act 2002."

38. Because the judge had already "rejected" adoption, his analysis of the welfare checklist was confined to a consideration of A being placed in the care of the mother. However, I would also note that his analysis of the risk of harm to A was confined to two matters, namely that the mother "will not work openly and honestly with social workers or with professionals" and "whether the mother can anticipate and see danger and avert danger". At the conclusion of this analysis, he said that A "should be restored to her mother's care under an appropriate plan".

39. In the request for clarification, the judge was asked to clarify why he had not applied the welfare checklist in the Adoption and Children Act 2002 ("the 2002 Act"). He acknowledged that this had been an error and proceeded to consider the matters set out in section 1(2) of the 2002 Act. In the course of doing this he said:

> "The test for adoption is one of necessity – nothing else (of the viable alternatives) will do. It is a draconian order of last resort. The alternative of a care order at home with support proposed by the CG is a viable alternative. It will only work if I am satisfied that mother recognises the need for support and can work with support. I am satisfied that mother recognises the need for support."

The judge also went on, very briefly, to "reconsider my decision to reject placement for adoption".

Determination

40. I am grateful to counsel for their succinct but comprehensive submissions. I do not propose to set them out in this judgment but I have, of course, taken them fully into account.

41. I have also taken fully into account that the judgment was ex tempore and Lord Hoffman's well-known observations in *Piglowska v Piglowski* [1999] 2 FLR 763.

42. I also accept that a judgment must be read as a whole and that, as McFarlane LJ (as he then was) said in *In re R (A Child) (Adoption: Judicial Approach)* [2015] 1 WLR 3273, at [18], what is important is "the substance of the judicial analysis, rather than its structure or form".

43. However, as McFarlane LJ also said in *Re G (Care Proceedings: Welfare Evaluation)* [2014] 1 FLR 670, at [54]:

> "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."

It is perhaps also appropriate to quote what he said in *Re F (A Child) (International Relocation Case)* [2017] 1 FLR 979:

> "[50] In the context that I have described, it is clear that a 'global, holistic evaluation' is no more than shorthand for the overall, comprehensive analysis of a child's welfare seen as a whole, having regard in particular to the circumstances set out in the relevant welfare checklist (CA 1989, s 1(3) or Adoption and Children Act 2002, s 1(4)). Such an analysis is required, by s 1(1) of the CA 1989 and/or s 1(2) of the ACA 2002 when a court determines *any* question with respect to a child's upbringing … whatever the issue before the court, the task is the same; the court must weigh up all of the relevant factors, look at the case as a whole, and determine the course that best meets the need to afford paramount consideration to the child's welfare. That is what, and that is all, that I intended to convey by the short phrase 'global, holistic evaluation'."

44. It is relevant also to refer to *Re W (Adoption: Approach to Long-Term Welfare)* [2017] 2 FLR 31. I would first note that, at [52], McFarlane LJ commended the judgment in that case because "the judge's welfare analysis is a good example of the comprehensive evaluation of the pros and cons of two competing options that is required by the modern case-law and, indeed, has always been required". In addition, he went on to address the phrase "nothing else will do":

> "[68] Since the phrase 'nothing else will do' was first coined in the context of public law orders for the protection of children by the Supreme Court in *Re B (A Child) (Care Proceedings:*

> *Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, sub nom *Re B (Care Proceedings: Appeal)* [2013] 2 FLR 1075, judges in both the High Court and Court of Appeal have cautioned professionals and courts to ensure that the phrase is applied so that it is tied to the welfare of the child as described by Baroness Hale of Richmond in para [215] of her judgment:
>
> > 'We all agree that an order compulsorily severing the ties between a child and her parents can only be made if "justified by an overriding requirement pertaining to the child's best interests". In other words, the test is one of necessity. Nothing else will do.'
>
> The phrase is meaningless, and potentially dangerous, if it is applied as some free-standing, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare. Used properly, as Baroness Hale explained, the phrase 'nothing else will do' is no more, nor no less, than a useful distillation of the proportionality and necessity test as embodied in the European Convention and reflected in the need to afford paramount consideration to the welfare of the child throughout her lifetime (ACA 2002, s 1). The phrase 'nothing else will do' is not some sort of hyperlink providing a direct route to the outcome of a case so as to bypass the need to undertake a full, comprehensive welfare evaluation of all of the relevant pros and cons (see: *Re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563, sub nom *Re B-S (Adoption: Application of s 47(5))* [2014] 1 FLR 1035; *Dal Al Akan Real Estate Development Co and Another v Al Refai and Others* [2014] EWCA Civ 715, [2015] 1 WLR 135; and other cases).
>
> [69] Once the comprehensive, full welfare analysis has been undertaken of the pros and cons it is then, and only then, that the overall proportionality of any plan for adoption falls to be evaluated and the phrase 'nothing else will do' can properly be deployed. If the ultimate outcome of the case is to favour placement for adoption or the making of an adoption order it is that outcome that falls to be evaluated against the yardstick of necessity, proportionality and 'nothing else will do'."

45. As referred to by Nugee LJ during the hearing, and as accepted by Mr Stonor, a judge can inform the parties of his decision at the outset of his judgment with his reasons then being given. However, I agree with Mr Stonor's additional submission that this is not what happened in this case.

46. Simply stated, the judgment in the present case does not contain any, or any sufficiently, "comprehensive evaluation of the pros and cons of (the) two competing options" (to adopt McFarlane LJ's words from *Re W*). This is required in every case although what is sufficient will, inevitably, vary. However, in a case which was

described by the Guardian as "finely balanced", I would suggest that particular care needed to be taken to ensure that the evaluation was sufficiently comprehensive.

47. Making all due allowances for the fact that this was an ex tempore judgment, the judge did not carry out the required balancing exercise as referred to in *Re G*. As a result of his rejection of the option of adoption before he had undertaken any welfare analysis he did not analyse and weigh the positives and negatives of each option nor did he, then, compare the merits of each of the potential options. The failure to conduct this exercise properly is demonstrated by the judge's failure to apply the welfare checklist in the 2002 Act and by the fact that his analysis of the checklist in the 1989 Act was confined to placement with the mother.

48. This omission was not corrected by the judge's clarification of his ex tempore judgment. This can be seen, for example, from the fact that nowhere does the judge include in his analysis of the options the risk that the proposed rehabilitation of A with her mother might break down and the potential consequences of that for A. As referred to above, the Guardian agreed that the risk of this breaking down was "quite significant".

49. I also consider that the expression "nothing else will do" was misapplied as "a shortcut test" in the way identified by McFarlane LJ in *Re W*.

50. Finally, I am equally persuaded that the absence of any clarity as to what "package of support" would be available meant that the judge was not in a position to carry out the required balancing exercise. As the judge considered that this was necessary *if* the mother was to be able to care safely for A, he needed to know what would be available before deciding which care option would best meet A's welfare needs. I should make clear that I am not saying that this *was* an evidential "gap" as suggested by the Guardian. I am simply saying that the judge's decision as to which option would meet A's welfare needs was flawed because this was a pivotal element of his decision but there was, at best, considerable uncertainty as to what would be available. This would be relevant also to the risk that the proposed rehabilitation might break down.

Conclusion

51. For the reasons set out above, I concluded that this appeal must be allowed and the matter remitted for a rehearing. In ordering a rehearing, this court is obviously not giving any indication as to what the outcome of that rehearing should be. The order is set aside because, regrettably, the judgment did not contain the required analysis and not because the judge reached a conclusion which was not open to him. We have directed that the case should be listed as soon as possible for a case management hearing before a judge allocated by Cobb J, as Family Division Liaison Judge for the North East.

Lord Justice Baker:

52. I agree.

Lord Justice Nugee:

53. I also agree.