Neutral Citation Number: [2023] EWCA Civ 1241

Case No: CA-2023-001597

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WATFORD
HH Judge Richard Clarke
WD22C50066

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 October 2023

Before :

LORD JUSTICE COULSON
LORD JUSTICE BAKER
and
LADY JUSTICE FALK

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EY (FACT-FINDING HEARING)

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Gregor Ferguson (instructed by **Local Authority Solicitor**) for the **Appellant**
Nicholas Elcombe (instructed by **Norton Peskett**) for the **First Respondent**
Amy Stout (instructed by **Crane and Staples**) for the **Second Respondent**
Rob Wilkinson (instructed by **Hepburn Delaney**) for the **Third Respondent by their children's guardian**

Hearing date : 5 September 2023

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Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 27 October 2023.

LORD JUSTICE BAKER :

1. These care proceedings concern a young person now aged 14, whom I shall refer to as "E". E was born a girl and given a girl's name but now identifies as non-binary and has chosen to be known by another name that reflects that status. E's preferred pronoun is "they/them".

2. On 10 August 2023, at the conclusion of the final hearing of the local authority's application that E should be made subject to a care order, the judge found that the threshold criteria for making orders under s.31(2) of the Children Act 1989 were not satisfied and dismissed the application. The local authority filed a notice of appeal against this decision. On 16 August, King LJ granted permission to appeal and stayed the execution of the order pending determination of the appeal, with the consequence that the interim care order granted at an earlier stage in the proceedings remains in force. The hearing of the appeal took place on 5 September 2023. The local authority's appeal was supported by E's mother and by the children's guardian, but opposed by E's father. At the end of the appeal hearing, judgment was reserved.

Background

3. E has an older sister, hereafter referred to as "S", who turned 18 in the course of these proceedings. E and their family have had a long involvement with social services dating back to before E's birth, arising initially because of concerns about the mother's mental health and parenting skills. The parents separated shortly before E was born, with S remaining in the care of her mother and having contact with her father. In 2009, when E was a few months old, an allegation was made that S had been sexually abused by her father. He was arrested and a s.47 investigation was undertaken. Professionals became concerned that S's allegations had been prompted by her mother and the police inquiry concluded with no further action. The children were placed under a child protection plan under the category of neglect. A few weeks later, S moved to live with her father, followed later in the year by E.

4. Thereafter the children remained with their father and had occasional contact with their mother. In the following years, there were several referrals to children's services arising out of concerns that they were being neglected. In 2017, the number of referrals increased, with particular concern being expressed about the number of visitors to the home, including some described as vulnerable young people. An allegation was made, though later retracted, that a 15-year-old girl had been raped in the property by an older male visitor. Other allegations included that the children had shared a bed with another older male, had observed adults having sex in the home, and had been permitted to spend the night with their boyfriends. In December 2017, the children were placed under a child protection plan under the category of sexual abuse. After further work with the family, the plan was stepped down to a Child in Need plan and in June 2019 the local authority closed the case.

5. In 2020, further referrals were made which led the local authority to undertake a further child and family assessment which concluded that safeguarding concerns were not substantiated.

6. In November 2021, the children's youth club reported that S had alleged that E had been slapped by their father while shopping in Asda. When spoken to by a social

worker, E corroborated this allegation, and made a number of further allegations about their father's treatment of them. The local authority carried out a further assessment which concluded that the children were not at risk of physical abuse, but recommended a referral to an adolescent support service.

7. In the course of 2022, there were a series of further referrals including a number about sexualised statements made by E. These included a statement to their youth worker ("what would you say if I told you I shagged my Dad?"), and statements in the presence of their teacher (referring to hand sanitiser on their hand as "Daddy's cum" and making rubbing motions saying "I do this to my sister and want to do it to my girlfriend"). In June 2022, the local authority convened an Initial Child Protection Conference which decided that S and E should again be made subject to a child protection plan under the category of sexual abuse. Following the conference, the father was arrested on suspicion of sexual activity with a child and released under investigation with bail conditions to have no contact with S or E unless agreed by children's services. The two children were then placed under a police protection order. On 28 June 2022, the father agreed that they should be accommodated by the local authority under s.20 of the Children Act 1989 and they moved into foster care. On 7 August 2022, the local authority filed an application for care orders.

8. At the first case management hearing on 6 September, E was made subject to an interim care order. In view of her age, S remained accommodated under s.20. Prior to the hearing, the local authority had filed a schedule setting out the findings it sought in support of its case that the threshold criteria for making an order under s.31 of the Children Act 1989 were satisfied. The local authority were directed to file a number of identified statements and other documents. At a further case management hearing on 17 October before HH Judge McPhee, the parties applied for and were granted permission to instruct a clinical psychologist, Dr Omar Timberlake, to provide a global family psychological assessment of E and their father. Further directions were given, including for disclosure of documents relating to the family held by another local authority for the area where they had previously lived; disclosure by the police of relevant documents from their investigation; and narrative statements from the parents in response to evidence served by the local authority. A further case management hearing was fixed for the following month to consider inter alia "the local authority's case and the evidence it seeks to call, including proposed witnesses and any application for a child or young person to give evidence."

9. In November 2022, the police closed their investigation taking no further action. On 22 November, a further case management hearing took place, again before Judge McPhee. The local authority was directed to file an amended threshold document by 25 November and the father to file a response by 23 December. The mother indicated that she did not dispute that the threshold criteria were satisfied. No application was made for E or S to give evidence. Further directions were given leading to an issues resolution hearing on 17 February 2023. On 20 January 2023, Dr Timberlake submitted his report. At the hearing in February, further directions were given leading to a final hearing in June, including an extension of time for the father to respond to the local authority's threshold document and for the preparation of a composite schedule setting out each party's case on the proposed threshold findings. On 23 March, Dr Timberlake submitted a supplemental report in response to questions posed by the parties.

10. The final hearing took place before HH Judge Richard Clarke over three days from 5 to 7 June. In circumstances later described by the judge in his judgment (see below), the local authority filed an amended threshold document. Only three witnesses gave oral evidence - the current social worker allocated to the family, the father, and the children's guardian. At the conclusion of the hearing, judgment was reserved. A draft judgment was sent to the parties on 20 July. No application was made by any party for clarification of the judgment. On 10 August, as stated above, the final judgment was handed down dismissing the proceedings.

Dr Timberlake's report

11. A central issue in the appeal involves the judge's treatment of Dr Timberlake's report. It is therefore helpful to summarise that report before considering the judgment. Regrettably, in view of the central importance of this issue to the outcome of the appeal, extensive citation from the report is unavoidable.

12. We were not provided with a copy of the letter of instruction, but at paragraph 2 of his report Dr Timberlake set out the questions he had been asked. They were as follows:

> "The Father
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> (1) Please provide a psychological profile of [the father]. Please confirm the main features of his personality, including strengths and weaknesses.
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> (2) Are there any features in [his] general personality profile which might impact upon his capacity to form and maintain relationships, both personal and professional? If so, in what way?
>
> (3) Are there any features in [his] general personality profile which might impact upon his ability and capacity to parent? If so, in what way?
>
> (4) What insight does [the father] have into his children's needs and is he able to meet them and if not, what intervention is recommended and the likelihood of it being successful within E's timescales?
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> (5) If you have not already done so could you please comment upon the capacity and motivation of [the father] to acknowledge and comprehend concerns about his parenting and to make and sustain any necessary improvements, if any are considered necessary.
>
> (6) Please provide your recommendations for any therapy, treatment and support that the father may need including identifying any appropriate resources, and, if possible, likely timescales for the completion of any therapy or treatment or periods of sustained support.

(7) In your opinion does the father have the capacity and the ability to provide for E's care and welfare needs throughout their minority? If so, what support if any, would you recommend in order that such placement succeeds in meeting their needs? In your opinion, what are the timescales for intervention work.

E

(8) Please assess and comment upon E's emotional, social, educational and developmental needs, as appropriate.

(9) From a psychological perspective, has E suffered any harm as a result of their experiences whilst in the care of their father, or as a direct result of the care provided by him?

(10) Please assess the nature of E's relationship and attachment with [their father].

(11) Please comment on the likely explanation for/aetiology of E's problems/difficulties, if any.

(12) Please specifically consider E's identity needs and comment upon whether [the father] is able to meet these. What support, if any, does E or the father require in this regard?

(13) Please provide a prognosis and assessment of risk for E if the difficulties you identify, if any, are not addressed.

(14) What help or support does E need? Who can provide this support? Can you identify a supportive role for their parents or extended family members and what that might be?"

13. In the executive summary at the start of his report, Dr Timberlake summarised his findings in these terms:

- "Concerns were raised regarding [the father's] ability to think about and consider the experiences and perspectives of the children. Additionally, concerns were raised regarding his management and regulation of his own emotions.

- Concerns were highlighted over the experiences of E whilst in the care of [the father] and that they were subjected to considerable harm. It was also concluded that given the lack of insight into these concerns, there would be considerable risk if E were to be placed in [the care of the father].

> - E was identified to be experiencing anxiety, low mood, and difficulties around understanding their own identity. Recommendations were made regarding support that E could access."

14. Dr Timberlake listed the documents with which he had been provided and made some brief comments on what he described as the "salient points" from the papers. He listed the interviews he had undertaken as part of his investigation – a telephone conversation with E's foster carers, two meetings with the father at his solicitor's office, a meeting with E at school, and a meeting with E and S at the foster carer's home. He then summarised his interviews of the father, which had covered a wide range of issues including his family background, educational and employment history, relationships, and other aspects of his life. Dr Timberlake observed that the father would

> "at times be avoidant of my questions, particularly when considering the concerns of the local authority and the reports of the disclosures made by the children. This would involve long answers that did not respond to the question. He often minimised or denied all of the concerns raised and struggled in understanding any of the concerns."

With regard to E's non-binary status, the father told Dr Timberlake that he continued to call E by the name they were given at birth, saying that people who call E by the name they have assumed were "enforcing a habit – feeding a misguided habit to a young girl".

15. Dr Timberlake then set out his interview and assessment of E. He described how they were well presented and able to answer his questions. He noted, however, that "when asked questions regarding father and home life, E would be able to engage but this was limited and they would eventually act out certain challenging behaviours to distract from the discussion." During the interview, E described their uncertainty around their gender. They acknowledged that their father would hit them sometimes. Within the section of his report dealing with E's assessment, Dr Timberlake recorded observations made by the father, by S and by E's foster carers. He reported that S had said that she didn't mind E living their father, "so long as she [S's word] doesn't get hurt", adding that "dad would sometimes hit E" and that this would depend upon what they had done, his mood, and "if we had disturbed him from his device" (meaning his computer or games console). S said that she did not have any concerns about their father sexually abusing E and that it was likely that E had been misinterpreted – "she sometimes says things in the wrong way". There had been a time when S had been concerned about people coming and going, but that had now stopped.

16. Dr Timberlake then set out his responses to the questions posed in his instructions. The following responses are of particular relevance to this appeal.

17. In response to the request to provide a psychological profile of the father, identifying the main features of his personality, including strengths and weaknesses, Dr Timberlake reported:

> "7.03. Regarding his personality, I was of the view that [the father] struggled with understanding boundaries and this was

> evident when reviewing with him the concerns raised by professionals. He struggled with being able to hold in mind other perspectives around the relationships he had made with the various people who were visiting the family home and where there had been safeguarding concerns raised. He appeared to find it hard to understand how his actions may have been viewed by others and appeared unable to think about the experiences of the children. [The father] would frequently respond with "you have to ask them", not seeming to have a view himself as to how they might feel or how they would have experienced things that were happening in the home. This was a limitation for [the father] and appears to also extend to his own insight into understanding his own psychological and emotional experiences….
>
> 7.04 In the assessment, [the father] discussed that he does not have any difficulties with his emotional management and regulation. However, the information provided highlights reports of concerns around [the father] losing control, using physical chastisement, coming across aggressive and intimidating. I was of the view that [he] was not open about this with me in the assessment, and it is likely that this is an area of difficulty for him, being able to manage and regulate his own emotions."

18. In response to the question whether there were any features in the father's general personality profile which might impact upon his ability and capacity to parent, Dr Timberlake said:

> "7.11 [The father's] difficulties in managing and regulating his own emotions appears to have significantly impacted upon the children. Both S and E highlighted reported being physically hit by [him] and that this was largely dependent upon his mood and what stress he was under at the time. This is concerning as this has caused harm to the children, damaged their relationship with their father and the trust they have that they can feel safe in his care, but also reflects a sense of unpredictability as his mood is dependent upon stressors in the moment.
>
> 7.12 Alongside this, [the father] has demonstrated difficulties in understanding the experiences and perspectives of the children and this will have an impact on his ability to meet their psychological and emotional needs as a parent. In particular, this impacts on E who is experiencing changes due to puberty, relational difficulties at school, and ongoing confusion around [their] own gender identity. This difficulty in being able to think about the experiences, and perspective of the children impact on their sense of feeling contained and understood and in [the father] meeting their needs."

19. In response to the question as to the insight the father had into the children's needs, whether he was able to meet those needs and, if not, what intervention was

recommended and whether it would be successful in E's timescales, Dr Timberlake said:

> "7.14 [The father's] insight into the children's needs is low. He appears to have provided limited parental supervision, resulting in the children spending unsafe time in the community at late times in the evenings. Both children reported being able to leave the family home, spending much time out in the community and partly due to fears around returning [home] and facing [him]. In the interviews, the father struggled in being able to consider the children's perspectives and this will require professional intervention to support him going forward."

Dr Timberlake identified various types of work which the father could undertake, including a course run by the local authority on reflective parenting and interventions, such a dialectical behavioural therapy, to address difficulties in managing and regulating his emotions. He added, however, that:

> "[his] insight into his own difficulties and lack of honesty in the assessment, mean that there is likely to be limited motivation to engage in the recommended work and thus not to meet within E's timescales."

20. This led Dr Timberlake to the following response to the question as whether the father has the capacity to provide for E's care and welfare needs throughout their minority:

> "7.21 I am of the view that should E be returned to [their father's] care, they would be at further risk of harm and not have their full needs met. [The father] has struggled with providing appropriate boundaries in the family home, this has resulted in E being exposed to harm. This includes witnessing inappropriate adult material, adult sexual behaviour, E engaging in alcohol use, and a lack of parental supervision resulting in unsafe time in the community at late hours. E has been subject to physical chastisement and has experienced an unpredictable caregiver that results in physical harm. Additionally, E is experiencing a complicated period of [their] adolescence and will require adult support to think about and consider [their] own experiences. The father has demonstrated difficulty in being able to hold in mind, think about, and prioritise Es own psychological and emotional needs."

21. Turning to the questions specifically about E, Dr Timberlake responded to the request to assess and comment upon E's emotional, social, educational and developmental needs in these terms:

> "7.24 From the assessment, I was of the view that E presents as having attachment-related difficulties. This is reflected in their understanding of boundaries and keeping themselves safe. E discusses a sense of pseudo maturity, acting street wise and has reported incidences of placing themselves in unsafe

> situations such as, staying out late in the community, and associating with adults and other young people involved in anti-social behaviour. E's understanding of what their own needs are is limited and this essentially resulted in just a view of needing a roof and meals provided for them and I was of the view that this reflected their own experiences throughout much of their childhood. They were able to have some insight into the unsafe and inappropriate home conditions regarding the frequent attendance of other young people and adults to the family home but presented as able to 'take care of herself'. Additionally, E experiences anxiety, low mood, difficulties with their own anger, and moderately elevated behavioural difficulties as revealed in interview and their self-report outcome measures. They have difficulties in forming friendships and appear confused about how to interact with others and E's current sense of identity appears to be a complicated experience for them, likely affected by their adverse childhood experiences, including [their] limited relationship with [their] mother."

22. In response to the question whether, from a psychological perspective, E had suffered any harm as a result of their experiences whilst in their father's care, or as a direct result of the care provided by him, Dr Timberlake said:

> "7.30 From the information provided to me, E appears to have suffered harm whilst in the care of their father. This has included witnessing inappropriate adult material, adult sexual behaviour, E engaging in alcohol use, and a lack of parental supervision resulting in unsafe time in the community at late hours. E has been subject to physical chastisement and has experienced an unpredictable caregiver that results in physical harm."

23. In response to the request to assess E's relationship and attachment with their father, Dr Timberlake wrote:

> "7.32 From the assessment, E discussed some minimal emotional bond towards their father. E's protectiveness towards their father appeared centred on the benefits of the 'arrangement' that living with him would provide. They described this as the freedom that they would be able to have, living in their familiar local area, and being able to do their own thing. This was worrying as E did not express concern for [their father] or express any emotional, psychological, or social needs that [they] depend on or [have] come to have in their relationship with [him]. E expressed concerns around father mainly spending his time on the computer and not having much interest in them or their sister S and this was also an area of anxiety for both children in recognising that father's gaming played a significant role in his reactions to them and mood."

24. Asked to comment on the likely explanation for or aetiology of E's problems and difficulties, Dr Timberlake responded:

> "7.34 E has experienced a lack of sensitive caregiving in much of their earlier life. From the information provided to me, E's experiences in the home appear chaotic, with limited boundaries, father playing a role in the children's social relationships that raises concerns and has caused difficulties for the children. This includes spending money on S's friends causing emotional distress for S but also presenting a father figure to both children who does not understand or prioritise their needs and the risks of such lack of boundaries. Within the family home, there has been an incident of reported sexual abuse which raises concerns around the lack of boundaries and the risks that [the father] failed to recognise and address, from having multiple young people and adults in the family home, and on occasion, according to the children's reports, who were intoxicated. E has been subject to physical chastisement that has often been confusing for them, not knowing why they are being treated in this way and reflecting the unpredictable responses of [the father] that will have been frightening and anxiety provoking for them.
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> 7.35 E has not had much contact with their mother, and this will have had an impact on their own sense of identity growing up. [The father's] assessment identified difficulties in thinking about the needs of the children and their own perspectives and experiences. This will likely have meant that E did not receive much support or sense of containment around how to make sense of [their] confusing and difficult feelings. There is also the possibility of the impact of E being exposed to various young people who have challenging behaviour and their own psychological and emotional needs from a young age."

25. In response to the request to consider E's identity needs and whether the father had the capacity to meet them, Dr Timberlake said:

> "7.37 …. [The father's] assessment identified a limitation in thinking about and understanding the needs of the children and their own psychological and emotional experiences. This has limited his ability to think about E's needs and to be able to consider and reflect on how they experience themselves. Going forward, E will need a safe placement with a sensitive caregiver who can take into consideration the impact of earlier experiences on their presentation, given the lack of boundaries, parental supervision, routine, and physical chastisement. Any future caregiver for E will need to take into consideration the challenges of attempting to develop an attachment with E as they have experienced difficulties in their attachment to their parents."

26. Finally, in response to the request to provide a prognosis and assessment of risk to E if the difficulties identified were not addressed, Dr Timberlake said:

> "7.40 E is at risk in the community, which reflects their earlier lack of boundaries and parental supervision in their life. This can result in being exploited, engaging in anti-social behaviour, and seeking identity and connection with others who have emotional, social, and behavioural difficulties. If E is placed in the care of [their father], there is the likelihood that they will again experience that level of neglect, regarding safety, and their emotional needs along with being exposed to harm as documented in the information provided to me. This would impact on [their] education and wellbeing going forward."

The judgment

27. The judge started by summarising the family history, the issues, the parties' positions and the applicable legal principles. He observed that throughout the hearing, he had sought to ensure that the parties' Article 6 rights were met. He then set out the basis on which the local authority had originally asserted that the threshold criteria for making a care order under s.31 were satisfied. He went through the history of the proceedings, focusing on the directions as to threshold. He recorded that during exchanges at the start of the hearing he had asked the local authority whether the threshold document complied with principles set out in case law. Counsel for the authority had replied that they were not seeking to prove that things said by E (for example, about having sex with their father) were true but rather that the fact that they said them was evidence that they had been exposed to inappropriate sexual behaviour. Following these preliminary exchanges, the local authority had amended its threshold document.

28. The judge then turned to the evidence, saying that the fact that he did not mention something in his decision did not mean that it had not been fully considered. He identified a number of sources of written evidence and expert reports:

    (1) A statement from EB, who had been the allocated social worker at various points between 2020 and 2022. She referred to a number of earlier allegations, including allegations of neglect and E's assertion that they had watched pornography on the father's computer when they were 11. She identified a total of 11 assessments of the family carried out between 2010 and 2022. EB described the father's parenting style as cold and harsh, not showing affection towards the children for fear of being accused of "something". EB said that "it has been established that S and E meet many of their own care needs themselves" and she did not believe the father was able to meet their emotional needs.

    (2) A statement from a worker at E's youth club, who had heard E say in May 2022 "what would you say if I told you I shagged my dad?" and had also reported an allegation by S that the father had slapped E in Asda.

    (3) A statement from SA, pastoral head of year and safeguarding lead at E's school, who reported the statements made by E when using the sanitiser, concerns about E's appearance and head lice, and reports by other pupils that E had said they had been hit by their father.

    (4) Two statements from the father, in which he denied harming the children or exposing them to the risk of sexual harm; accepted that an incident had occurred in

Asda when he had been concerned that E would be accused of theft, and stated that he supported E's gender identity while accepting that he had called E by their birth name through force of habit.

(5) A statement from the current allocated social worker, DL. She reported that both children had been upset at the recommendation that E should not return home. She described E's wish to return home as being led primarily by their wish to resume their social life. She said that E was "consistent with professionals regarding their experiences of physical harm". She described the father as lacking insight and criticised his ability to accept and support E's gender identity.

(6) A parenting assessment carried out by DL. In the assessment, DL recorded that the father accepted that E had seen a video of him in intimate circumstances with a woman on his home computer. She referred to longstanding worries about poor home conditions, E's presentation, missed health appointments, lack of boundaries, the father spending his time gaming instead of looking after the children, the children being required to carry out chores, and the father stating that he had not had physical contact with the children because of a fear of further allegations. The judge recorded DL's conclusion that the father had "undoubtedly exposed E and S to significant aspects of sexual harm" and that she did "not feel confident that [he] has the skills to enable E's future safety and wellbeing and would remain significantly concerned should they return to the family home and the primary care of their father".

(7) A cognitive assessment of the father which concluded that he had no cognitive difficulties.

(8) Dr Timberlake's reports.

(9) The guardian's initial and final analyses.

29. The judge listed a number of other local authority documents that had been referred to during the evidence (child and family assessments and child protection conference minutes) and documents disclosed by the police, including what was called a "pre-assessment" of E dated 27 June 2022. This consisted of notes of a conversation between two police officers and E to determine whether they should be formally interviewed under the Achieving Best Evidence procedure. In the event, no formal ABE interview was conducted.

30. The judge moved on to summarise the oral evidence given by the three witnesses who were called – DL, the father and the guardian. He then summarised closing submissions. He recorded that the local authority had accepted that the majority of the threshold findings sought by the local authority relied on statements by the children, that the ABE guidelines about interviewing children had not been followed during the pre-assessment interview, and that some aspects of the threshold were "historical". It had been submitted by the local authority, however, that, if the court found that E had access to inappropriate material and had been exposed to adult sexual behaviour, it was entitled to come to the conclusion, in accordance with Dr Timberlake's report, that E had suffered significant harm. On behalf of the father, it had been submitted that S, now aged 18, could have been called as a witness and the local authority had failed to explain why they had not obtained a statement from her. Whilst the court was entitled to rely

on hearsay evidence, no or no significant weight could be attached to the evidence of the children's statements in this case. In support of that contention, the father's counsel had drawn attention to evidence that E had told lies, and had also relied on deficiencies in the conduct of their pre-assessment interview and a wider failure by professionals to record the context in which the statements had been made by E. On behalf of the guardian, it had been submitted that, whilst there had been fluctuations in the allegations of physical abuse, there were multiple instances of the children saying that they had been hit. The pattern of allegations about inappropriate conduct in the house, and E's sexualised language, was evidence of a lack of boundaries. The court was entitled to conclude on the totality of the evidence that there was an ongoing risk that E would suffer significant harm if they were returned to their father's care.

31. Under the heading "Discussion and Findings of Fact on Significant Disputed Matters", the judge then identified a number of problems with the local authority case. He pointed out that it had been recognised at an early stage ("it was clear from Day 1") that there "significant issues about threshold", adding that "the father was entitled to know the case he was facing. It was unsatisfactory that threshold was continuing to change right up until the start of the evidence". He cited rule 22.2(1) of the Family Procedure Rules:

> "The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved
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> (a) at the final hearing, by their oral evidence, and
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> (b) at any other hearing, by their evidence in writing."

He also cited paragraph 4.3 of Practice Direction 22A:

> "An affidavit/statement must indicate
>
> (a) which of the statements in it are made from the maker's own knowledge and which are matters of information and belief; and
>
> (b) the source for any matters of information and belief."

The judge identified other problems. The fact that there was no direct evidence from either S or E meant that evaluating the reliability of their statements was "a paper-based assessment". The pre-assessment interview had been conducted "in significant breach of ABE guidelines". Leading questions had been asked repeatedly, the record of the interview was not comprehensive, and there had been no note of E's demeanour. Other conversations with the children had been summarised in documents, with "blanket explanations of the sources of information". Notes of meetings were often summarised. In some instances, multiple references to documents relied on in the threshold schedule emanated from a single source or discussion and were repeated in summaries, "creating an echo chamber and appearing to give it greater weight than it deserves." There were differing accounts, for example about the Asda incident, with E and S giving inconsistent information.

32. At paragraph 75 of the judgment, the judge identified what he considered to be another omission in the local authority's case:

> "The local authority have not obtained any evidence from the school on information the children had been given on safe behaviours or sex education. The court was therefore without any context to the sexual statements being made by E. This is with a background of 48% of children aged 11 to 16 having viewed pornography in the Ofsted report and the guardian accepting that young people being interested in porn is quite common."

33. The judge pointed out allegations which had been included in the first version of the threshold document but omitted from the final version, including that the children had witnessed grooming of young girls in the house and that the father had allowed adult male friends to share a bed with them. He continued:

> "81. The local authority accepted, on Day 1, that it was not seeking to prove the background allegations. Having said they were not seeking to prove the allegations, both DL and the guardian gave evidence that the pattern was concerning.
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> 82. The parenting assessment appeared to approach matters on the basis it was for father to prove the children were safe with him. This reverses the burden of proof. It was also reliant upon the background facts, a large portion of which the local authority did not pursue, being true.
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> 83. As the local authority changed its threshold, the final threshold ended up in stark contrast to the basis on which the local authority had proceeded initially. DL was continuing to refer to the pattern of concerns. In evidence DL was asked about whether E may have been making statements to shock. Her response emphasised that was why it was so important to look at the pattern, including the pattern of sexual abuse. If the pattern is the fundamental building block of the local authority case and the local authority are not seeking to prove the allegations that form the pattern, there is no pattern to rely on. The law remains binary. Either something is regarded as having happened or not. If it is not proven to the civil standard of proof it is treated as never having happened. There is no room for suspicion or retaining the possibility it might have happened.
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> 84. DL came across as a hard-working social worker who had reached the conclusion the children required protection. Her opinion appeared to differ from previous social workers. She was reluctant to accept historic concerns had been resolved, referring simply to the fact there had been no further reported concerns. She regarded E's information as true, despite the fact the local authority were not pursuing findings because they did not regard parts of their (singular) information as true."

34. Turning to Dr Timberlake's report, the judge observed that he had been asked to provide a psychological opinion on the father and E. In doing so, he ought to have complied

with the requirement to provide alternative views depending on whether contested facts were or were not proved, adding "it is not the role of the expert to investigate or provide evidence on disputed facts". He continued (at paragraph 93):

> "It was Dr Timberlake's role to identify psychological harm suffered by E and identify possible causes. However, while identifying attachment issues, Dr Timberlake appears to have proceeded on the basis all allegations/concerns were true."

Then at paragraphs 96-7, the judge criticised Dr Timberlake in these terms:

> "96. The opinion of Dr Timberlake was based on the evidence the local authority was putting forward. In his report he accepted father had spent money on S's friends. He accepted E had been the subject of physical chastisement. He accepted there had been a lack of boundaries and parental supervision in E's life. The court would have been better assisted by Dr Timberlake setting out any psychological issues E has and providing information on possible causes.
>
> 97. The court takes into account, as part of the overall canvas, the psychological issues identified by Dr Timberlake in respect of father. However, whether father has been open and honest and lacks insight is dependent on the local authority proving the background facts."

The judge recited the occasions between 2018 and January 2022 when the local authority had carried out assessments following referrals and concluded either that the claims were unsubstantiated or that the circumstances did not warrant further involvement. He observed: "All of this undermines the Local Authority case that threshold was met on the relevant date."

35. At paragraph 99, the judge then set out his findings by reference to the local authority's final threshold document:

> "1. The father failed to protect E from witnessing inappropriate sexual behaviour and having access to pornography thereby causing [them]emotional harm.
>
> a. In 2017, the second respondent father allowed young vulnerable people (aged from 12 to 21 and known to social services), including two 18 year old females who were subject to an investigation of Child Sexual Exploitation (CSE) to stay at his home whilst E was also living there with their sister S. This included a fifteen year old girl staying at the father's home alleging on 15.07.2017 that she had been raped by an 18 year old boy who was also staying at the home. The impact of living in this environment caused E to suffer emotional harm.
>
> Findings: the court accepts concerns were raised in 2017 and that an allegation of rape was made by a child who is not party to

these proceedings. The rape allegation was later withdrawn and any concerns, which are not accepted by the father, were addressed by the father at the time. The father accepts children would come to the house, as part of the family involvement in the local youth centre. He also accepts some would stay over. The fact of the investigation cannot prove the concerns without more. The evidence was of a 17 year-old at the property, not two 18 year-olds. The fact of an allegation of rape is unable, without more, to prove inappropriate sexual behaviour. The court finds the father allowed young people to stay at his home, at least one of whom was vulnerable. This fact is historic.

b. In 2017 E (aged 8 at the time) made highly concerning statements to DL, evidencing that they had been exposed to inappropriate sexual behaviour. These statements included:

i E said that their boyfriend and S's boyfriend are allowed to stay over. E said their boyfriend stays in [their] bed and he can touch them where he likes.

ii. E said that they had stayed with [a male friend of the father], with S, and they slept in his bed with him, and [the father] was not there.

iii. E witnessed NM, a vulnerable young adult who was 17 at the time who stayed at the property, have sex with her boyfriend when [the father] was not at home.

Findings: The court finds E made statements (i) and (ii), but accepts the local authority position that they do not say the statements were true. Father accepts NM stayed at his property and the children may have walked in on her having sex with her boyfriend. The court makes that finding. This fact is historic.

c. During a youth work session on 17.05.2022 E stated to the youth worker 'What would you say if I told you I shagged my Dad,"

Findings: The court finds that E made that statement.

d. On 13.05.2022 E had hand sanitizer on their hand and referred to it as 'Daddy's Cum," and made rubbing motions and said "I do this to my sister and want to do this to my girlfriend,".

Findings: the court finds this was stated to the teacher. It is consistent with other comments attributed to E. The court finds these comments were made by E.

e. E has seen porn on their father's computer when they were in year 7.

Findings: Father accepts E saw the sex tape. He also accepted that he did not monitor the children's internet use. The court notes this was when E was aged around 11 (no specific date being given). The fact is historic.

2. The father has subjected E to physical and emotional abuse, in particular:

a. E was hit by [the father] with an open hand in Asda.

Findings: an incident happened in Asda. The court cannot be satisfied the father struck E deliberately. The allegation is not proven.

b. E has been hit by the father on numerous occasions.

Findings: … The allegations [in the police pre-assessment report and the previous social worker's statement] are unspecific and contradicted within the evidence, without any physical evidence in support. The allegation is not proven.

c. E is repeatedly shouted at and sworn at by [the father].

Findings: … Father accepts some shouting in the home. The court is satisfied the father would shout at the children. There is no detail of any swearing and this aspect of the allegation is not proven. The court accepts the father shouted on more than one occasion, but not that it was repeatedly.

3. E has suffered from physical and emotional neglect whilst in the care of their father. In particular:

a. E has to undertake most of the household chores

Findings: The children were asked to do chores, and they complained about this. This is a normal part of parenting and preparing the children for independent in later life. The court does not find that the children were required to undertake most of the household chores.

b. [The father] is so preoccupied by his gaming on his computer that he fails to meet E's needs, leaving them to fend for themselves.

Findings: Diablo III was released in 2012. Father accepts in early days he would play for extended periods. He also accepted gaming through the night. The sole source of evidence on this issue is the children, who made the allegation to EB. The court does not find that the father was pre-occupied with gaming to the extent he failed to meet E's needs at any relevant time.

c. The father threatened E that he would throw them into care.

> Findings: Father accepted a discussion about the risk E may be placed into care. That concern turned into reality. The court finds that it was not a threat and it was reasonable to discuss the risk of care at the time.
>
> d. E has said that they just want to be adopted.
>
> Findings: This is proven.
>
> e. The father is never affectionate to E.
>
> Findings: The evidence is inconsistent, with E accepting they would have movie nights and Father would provide some affection. DL criticised the father for not initiating the affection, while accepting it would occur. The allegation is not proven.
>
> f. The house is unclean, smelling of urine and E has unwashed underwear.
>
> Findings: This was not a concern at the relevant time and no finding is made."

36. The judge then expressed his conclusions on whether the local authority had established the threshold criteria in the following paragraphs:

> "100. The court considered not making any findings on allegations prior to 2021. It reminds itself that it is not enough that something happened in the past which caused the child to suffer harm of the relevant kind if, before the hearing, the child has ceased to suffer such harm. However, the court also reminds itself that often the best indicator of future behaviour is past behaviour. The court was therefore satisfied it was appropriate, when keeping in mind father's Article 6 rights, to make the limited historic findings it does.
>
> 101. It is open to the court to make findings which were not pursued in the threshold, and to find threshold made out on that basis. However, it is important that it is fair to the parties to do so. Having considered the shifting sands of the local authority case the court is not satisfied it is appropriate to make findings outside those sought by the local authority.
>
> 102. Having made the findings it does the court must then turn to consider whether threshold is made out under s31 of the Children Act 1989. The court is not applying a standard of perfect parenting. Just because E accessed porn and father's sex tape in the past does not mean it will happen again or that a child being curious about such matters is inappropriate. E accepted behaviour issues in the home and there was evidence shouting was not limited to father, although his actions may have set the example for the children. It is clear E is a troubled child with

> identity and relationship issues. Any findings must be linked to significant harm, otherwise threshold is not made out. Dr Timberlake failed to prove that link. The local authority suggest the court should accept the logic leap without further, but given the limited nature of the findings made the court is unable to make that leap.
>
> 103. The court makes no findings that E was suffering, or likely to suffer, significant harm in father's care attributable to his care not being what it would be reasonable to expect a parent to give. The court therefore dismisses the application."

The appeal

37. The local authority initially relied on seven grounds of appeal.

(1) The judge fell into error by misconstruing the unchallenged report of Dr Timberlake, and thereby failed to give it sufficient weight in consideration of threshold.

(2) In considering whether the respondent father failed to protect E from witnessing inappropriate sexual behaviour and having access to pornography, the judge fell into error by failing to evaluate the facts as pleaded as a whole and in the round as to whether or not E had suffered significant emotional harm.

(3) In considering whether the father had hit E in Asda, the judge fell into error by failing to take into consideration the inconsistent accounts as provided by the respondent father, as well as what both E and S had said to professionals, in particular to Dr Timberlake and the guardian.

(4) In considering whether E suffered significant emotional harm as a result of the father shouting and swearing at them, the judge failed to take into account the hearsay evidence of E and S in its entirety.

(5) In considering whether E suffered significant emotional harm due to the father never being affectionate with them, the judge failed to take into account the hearsay evidence of E and S in its entirety, as well as the evidence of the father in his police interview, who informed the police that he had not touched either child since he was accused of sexually assaulting S, save for the odd cuddle.

(6) The judge fell into error by indicating that the court could have made findings beyond threshold as pleaded, yet did not identify what they may have been.

(7) The judge fell into error by minimising the hearsay evidence of S and E when no party required either of them to give live evidence.

After the grant of permission to appeal the local authority sought to add two further grounds:

(8) The judge fell into error by not considering the evidence in its entirety, including the hearsay evidence of E and S, in finding that threshold was not met in relation to the father's alleged excessive preoccupation of gaming on his computer.

(9) The judge fell into error in failing to consider the context within which E said "I just want to be adopted".

At the start of the hearing, we granted permission to add these additional grounds.

38. To a very considerable extent, these grounds seek to challenge the judge's assessment of the evidence. It is important to bear in mind the limited powers of this Court in these circumstances, summarised by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at paragraphs 114-115 and in *Volpi and another v Volpi* [2022] EWCA Civ 464 at paragraph 2. An appellate court must not interfere with findings of fact by trial judges, including the evaluation of those facts and the inferences to be drawn from them, unless compelled to do so. An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it. This approach is followed by this Court hearing family appeals just as it is in other appeals in civil cases: *Re T (Fact-Finding: Second Appeal)* [2023] EWCA Civ 475. It follows that the appellant faced a formidable task in seeking to persuade this Court to allow an appeal on the grounds (as asserted in grounds 3, 4, 5, 7, 8 and 9) that the judge erred by "failing to take into account" parts of the evidence.

39. For that reason, I focus attention on the other grounds of appeal – 1, 2, and 6. On those grounds, we received the following submissions from the local authority, supported by the guardian, in favour of the appeal and from the father opposing it. Counsel for the mother also supported the appeal but made no additional substantive submissions.

Ground 1 – the judge's treatment of Dr Timberlake's evidence

40. On behalf of the local authority, it was submitted by Mr Gregor Ferguson, first, that as Dr Timberlake was not required to give evidence, the views expressed in his report were therefore unchallenged. Those opinions formed an important part of the evidence in support of the local authority case. Although there was no reference to the report in the final threshold document, it was clear that the local authority relied on it to support the findings it was seeking. Secondly, it was submitted that, given Dr Timberlake had interviewed E, S, the father and the foster carers, the judge had erred in concluding that his opinion was based simply on the local authority proving the factual matters alleged in the threshold document. Thirdly, it was submitted that the judge erred in concluding that Dr Timberlake had failed to establish a link between the findings and significant harm. Dr Timberlake had clearly demonstrated that E was likely to suffer significant harm if returned to their father and his opinion in respect of that was as much based on his assessment of the individuals he interviewed as on the local authority records and other documents provided with his instructions.

41. On behalf of the children's guardian supporting the appeal, it was submitted by Mr Rob Wilkinson that the judge misunderstood the scope of Dr Timberlake's instructions. The terms of Dr Timberlake's assessment, which were agreed by the parties and approved by the court at an earlier case management hearing, went beyond simply providing a psychological opinion of the father and E. The terms extended to consideration of the father's insight and capacity to care for E and to an assessment of risk should they be returned to his care. In order to comply with his instructions, Dr Timberlake had been

entitled to explore key factual issues in his interviews and he had relied on the information obtained from those interviews in reaching his conclusions.

42. On behalf of the father, Ms Amy Stout submitted, first, that the report was not unchallenged. Although Dr Timberlake had not been called for cross-examination, his assessment had been challenged in closing submissions on the basis that he had incorrectly assumed that the local authority's concerns were all true. Ms Stout submitted that she had been entitled to take that course, relying on the decision of this Court in *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442, [2022] 1 WLR. In that case, Asplin LJ (with whom Nugee LJ agreed) said (at paragraph 65):

> "I can see nothing which is inherently unfair in seeking to challenge expert evidence in closing submissions. It may be a high risk strategy to choose neither to adduce contrary evidence nor to seek to cross-examine the expert but there is nothing impermissible about it…. As long as the expert's veracity is not challenged, a party may reserve its criticisms of a report until closing submissions if it chooses to do so."

43. Ms Stout further submitted that the judge was not bound to adopt Dr Timberlake's conclusions. On the contrary, he was obliged to scrutinise them in the context of the rest of the evidence. Having done so, he rejected the conclusions for three reasons: (1) that they had been based on an assumption that all of the local authority's concerns were true, contrary to the court's findings; (2) that in carrying out his own investigations on issues of fact that were in dispute, Dr Timberlake had exceeded his expertise, and (3) he had failed to demonstrate a link between the findings and significant harm or the likelihood of significant harm. Ms Stout submitted that this assessment of Dr Timberlake's evidence was within the province of the trial judge and in those circumstances this Court should decline to interfere.

Ground two – failure to consider the evidence as to sexual risk as a whole

44. Under ground two, the local authority contended that, in considering whether the respondent father failed to protect E from witnessing inappropriate sexual behaviour and having access to pornography, the judge fell into error by failing to evaluate the facts as pleaded as a whole and in the round as to whether or not E had suffered significant emotional harm. It was submitted that, although the judge had made various findings, he failed to evaluate them in their totality when considering whether or not E had suffered emotional harm. The local authority argued that the judge had minimised a number of the findings of sexual matters, including E witnessing a vulnerable 17-year-old girl having sex and seeing intimate images of the father with another woman. On behalf of the guardian supporting the appeal, it was submitted that there was nothing in the judgment to explain the reasoning for the judge's conclusion that the findings of exposure to inappropriate sexual activity or images did not amount to significant harm, or his assertion that "just because E accessed porn and father's sex tape in the past does not mean it will happen again". In relation to the findings which the judge characterised as "historic", it was submitted by both the local authority and the guardian that he failed to consider whether there was a link between those experiences and E's more recent comments and behaviour.

45. In response, it was submitted on behalf of the father that the judge had analysed the evidence in the round and as a whole. He was entitled to find that the local authority, on whom the burden of proof rested, had failed to establish a link between the "historic" findings and E having suffered or being likely to suffer significant harm. He was entitled to assess the allegations of E having access to pornography in the current social context where most parents struggle to control their children's access to such material. In assessing the recent comments made by E, the judge had been hampered by the local authority's failure to provide any evidence of the context in which they were made. Ms Stout submitted that this was a situation where the evaluation of the facts and the inferences to be drawn from them were decisions of the trial judge with which this Court should not interfere unless compelled to do so and no good reason for interference had been identified.

Ground six – findings beyond the threshold

46. Under this ground, the local authority, supported by the guardian, submitted that the judge, having acknowledged that it was open to the court to make findings beyond those sought by the local authority, erred by declining to identify what those findings could have been. It was suggested that, by taking that course, he had prioritised the Article 6 rights of the father over the paramountcy of the child's welfare. If the court had identified evidence to indicate that the child had suffered or was likely to suffer significant harm, it was incumbent on the judge to say so. The reason given by the judge for not doing so – that it was inappropriate to take that course because of the "shifting sands" of the local authority's case – was unwarranted and insufficient.

47. In response, it was submitted on behalf of the father that the local authority never invited the judge to make any additional findings over and above what was set out in their revised threshold document and had not indicated to this Court any additional findings which ought to have been made. In those circumstances, it was very hard to see how the judge could be said to make findings which he was never asked to make. Ms Stout also pointed out that, in fact, the judge had made a finding that went beyond the threshold document, on the basis of a concession by the father in oral evidence, namely the finding that E had seen intimate images of the father and another woman.

Discussion

48. I deal first with the point taken on behalf of the appellant that Dr Timberlake's assessment should be treated as unchallenged on the grounds that he was not required for cross-examination. Ms Stout is right in saying that this Court in *Griffiths v TUI (UK) Ltd* held (by a majority) that there was nothing inherently unfair in seeking to challenge expert evidence in closing submissions. The law on this point is, however, not finally settled. In his dissenting judgment, Bean LJ (at paragraph 99) said that he "profoundly disagreed" with the observations of the majority cited above. The unsuccessful appellants subsequently appealed to the Supreme Court. That appeal was heard in June of this year and judgment is awaited.

49. Fortunately, the point which divided this Court in *Griffiths v Tui* does not seem to me to be central to the present appeal. Whatever may be the obligations on a party who seeks to challenge the conclusions of an expert, the judge is not obliged to accept those conclusions. As Nugee LJ observed in *Griffiths v Tui* (at paragraph 81:

> "As a matter of basic principle it is the function of trial judges to evaluate all the evidence before them in reaching their conclusions on the factual issues. That includes deciding what weight should be given to the evidence. I see nothing in the authorities that suggests that that obligation to assess the evidence falls away if it is "uncontroverted"; uncontroverted evidence still has to be assessed to see what assistance can be derived from it, viewed in the context of the circumstances of the case as a whole. Uncontroverted evidence may be compelling, but it may not be: it may be inherently weak or unhelpful or of little weight for other reasons."

As I read Bean LJ's dissenting judgment (in particular at paragraph 94), he was not disagreeing with that proposition.

50. This echoes the well-established principle in children's cases in the family court emphasised by Charles J in *County Council v K D & L* [2005] EWHC 144 (Fam) at paragraphs 39:

> "It is important to remember (1) that the roles of the court and the expert are distinct and (2) it is the court that is in the position to weigh up the expert evidence against its findings on the other evidence."

This in turn is an aspect of the wider principle articulated by Dame Elizabeth Butler-Sloss P in *Re T (Children)* [2004] EWCA Civ 558 at paragraph 33:

> "…evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases has to have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."

51. The judge was not obliged to accept Dr Timberlake's evidence simply on the basis that he had not been required to attend for cross-examination. On the contrary, he was obliged to evaluate Dr Timberlake's opinion in the context of the totality of the evidence. This aspect of the first ground of appeal therefore fails.

52. The local authority is, however, on much stronger ground in its challenge to the way in which the judge carried out that evaluation and his reasons for rejecting the expert's opinion. I conclude that the judge fell into error in his treatment of Dr Timberlake's report, in the following respects.

53. First, I accept Mr Wilkinson's submission that the judge misunderstood the scope of Dr Timberlake's instruction. At paragraph 92, he said that Dr Timberlake had been "asked to provide a psychological opinion on both father and E". As set out above in the citation from his report, however, the terms of his instruction went much further. He was also asked, amongst other things, to identify any features in the father's general personality profile which might impact upon his ability and capacity to parent; to

express an opinion as to the insight the father had into his children's needs and whether he was able to meet those needs; to identify whether he had the capacity and motivation to acknowledge and comprehend concerns about his parenting and to make and sustain any necessary improvements, if any are considered necessary; to give his opinion as to whether the father had the capacity and the ability to provide for E's care and welfare needs throughout their minority; to assess E's emotional, social, educational and developmental needs; to say whether, from a psychological perspective, E had suffered any harm as a result of their experiences whilst in the care of their father; to assess the nature of E's relationship and attachment with their father; to identify the likely explanation for/aetiology of E's problems/difficulties, if any; to give his opinion as to whether the father was able to meet E's identity needs; and to provide a prognosis and assessment of risk for E if any difficulties they identified were not addressed.

54. Nowadays in all courts in this country the instruction of experts is much more tightly controlled by the court than in previous times. In children proceedings, the control is authorised by statute – s.13 of the Children and Families Act 2014. Under s.13(1), "a person may not without the permission of the court instruct a person to provide expert evidence for use in children proceedings." Under s.13(3), "a person may not without the permission of the court cause a child to be medically or psychiatrically examined or otherwise assessed for the purposes of the provision of expert evidence in children proceedings." Under s.13(6), "the court may give permission as mentioned in subsection (1) [or] (3) … only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly." Under s.13(7), when deciding whether to give permission, the court is required to have regard to a number of factors, including "the issues to which the expert evidence would relate" and "the questions which the court would expect the expert to answer". These statutory provisions are supported by more detailed provisions in Part 25 of the Family Procedure Rules, headed "Experts and Assessors", setting out rules and guidance about the use and instruction of experts in all family proceedings, including, with particular relevance to children's proceedings, Practice Direction 25C, headed "Children Proceedings – The Use of Single Joint Experts and the Process Leading to an Expert Being Instructed or Expert Evidence Being Put Before the Court". Of relevance to this appeal, FPR rule 25.7 stipulates what a notice of application for permission must include (including the issues to which the expert evidence is to relate) and provides under rule 25.7(3) that in children proceedings an application notice requesting the court's permission as mentioned in s.13(1) or (3) of the 2014 Act must also state the questions which the expert is to be required to answer.

55. We were not provided with a copy of the application filed for permission to instruct Dr Timberlake. The case management order made by HH Judge McPhee on 17 October 2022 does not record the specific questions to be put to the expert, but does record, under paragraph 8, that the court granted the application to instruct Dr Timberlake to undertake a global psychological assessment of E and the father and gave permission to Dr Timberlake to see E for that purpose, and further recorded that the court determined that the report of this expert was necessary to assist the court to resolve the key issues in these proceedings justly. On behalf of the guardian, Mr Wilkinson invited this Court to accept that the scope of the instruction, including the proposed questions to the expert, had been fully approved by the court. I did not understand Ms Stout for the father to disagree with this submission.

56. At the fact-finding hearing, the judge seemed to have been under the impression that Dr Timberlake had strayed beyond the terms of his instruction. I am satisfied, however, that he did no more than answer the questions agreed by the parties and approved by the court.

57. Secondly, it followed on from those wide-ranging instructions that Dr Timberlake would be required to carry out an investigation which would include inquiries relevant to the court's fact-finding exercise. Consequently, it was wrong of the judge to criticise Dr Timberlake by observing (at paragraph 92) that "it is not the role of the expert to investigate or provide evidence on disputed facts".

58. Thirdly, it is plain from the report that Dr Timberlake was basing his observations and recommendations not only on information in the papers provided to him but also – and in my view substantially – on his own interviews with the father, S and E. At paragraph 96, the judge said that "the opinion of Dr Timberlake was based on the evidence the local authority was putting forward". Insofar as he was saying that the expert's opinion was based solely on that evidence, he was mistaken. Furthermore, in limiting the weight he attached to Dr Timberlake's report on the grounds that it was based on the evidence that the local authority was putting forward, the judge seems to have overlooked that to a significant extent he himself was accepting that evidence.

59. Fourthly, whilst saying (at paragraph 97) that he took into account Dr Timberlake's assessment of the father's psychological issues, he seemingly attached little if any weight to that assessment on the grounds that "whether father has been open and honest and lacks insight is dependent on the local authority proving the background facts". Again, it should be noted that the judge ultimately found that in many respects the local authority had proved those facts. A careful reading of Dr Timberlake's report, however, demonstrates that his conclusion that the father lacked insight and understanding into E's needs was based substantially on his own conversations with the father and not wholly dependent on the local authority's case. He was careful to identify those parts of his opinion which were based on information with which he had been provided and those parts based on his own conversations and observations.

60. Finally, I am concerned about the judge's conclusion (at paragraph 102) that Dr Timberlake had failed to prove a link between the findings of fact and a finding of significant harm necessary for the threshold under s.31(2) to be crossed. As set out above (in the passages quoted of his report, notably paragraphs 7.34. 7.37 and 7.40), Dr Timberlake had carefully explained why he thought the link was established. In particular, regarding the likelihood of future harm, he concluded that, because of E's vulnerabilities and needs, attributable in part to the chaotic lifestyle and lack of supervision at home and to their exposure to inappropriate sexual behaviour as a result of the lack of boundaries in the home, coupled with their father's lack of insight and understanding, they were likely to suffer significant harm if returned to his care. The judge's dismissal of this conclusion is troubling, partly because he did not really explain why he reached that decision but also because it seems to have been substantially influenced by his erroneous view that Dr Timberlake's analysis was tainted because it was based on matters which the local authority had failed to prove.

61. Furthermore, for my part I do not understand the basis of the judge's criticism of Dr Timberlake in the last sentence of paragraph 96 ("The court would have been better assisted by Dr Timberlake setting out any psychological issues E has and providing

information on possible causes"). This seems to me to be wrong for several reasons. First, as I read the report, Dr Timberlake did address E's psychological issues and the possible causes thereof. Secondly, insofar as he went beyond those issues, he was responding faithfully and professionally to the questions in the letter of instructions which had been approved by the court. He did not exceed the scope of his instructions. Thirdly, his wider observations in response to those questions were insightful and plainly relevant to the judge's analysis and decisions.

62. For these reasons, I would allow the appeal on ground one.

63. Turning to ground two, the appellant expressed the issue in these terms – that in considering whether the respondent father failed to protect E from witnessing inappropriate sexual behaviour and having access to pornography, the judge fell into error by failing to evaluate the facts as pleaded as a whole and in the round as to whether or not E *had* suffered significant emotional harm (my emphasis). The issue for a court considering whether the threshold criteria under s.31(2) are satisfied is, however, not whether the child has suffered significant harm in the past but whether, at the relevant date (in this case, the date on which the proceedings were started), the child "is suffering, or is likely to suffer, significant harm as a result of the care given by, or likely to be given by, their parent, not being what it would be reasonable to expect a parent to give". It is clear from the judgment that the judge correctly identified this as the issue – see for example his conclusion in paragraph 103 quoted above. For my part it is clear that the appellant's challenge under ground two is therefore that, in considering whether the threshold criteria were satisfied the judge fell into error by failing to evaluate the facts as found as a whole and in the round.

64. It is conclusively established in case law that a finding that a child is suffering significant harm must be based on facts found on a balance of probabilities: *Re B* [2008] UKHL 35. It is equally well established that a likelihood of significant harm "means a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case" (*Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1995] UKHL 16, [1996] AC 536, per Lord Nicholls of Birkenhead at paragraph 69. But a conclusion that there is a real possibility that a child will suffer significant harm in future must also be based on facts established on a balance of probabilities: *Re J (Care Proceedings: Possible Perpetrators)* [2013] UKSC 9 (per Baroness Hale of Richmond at paragraphs 47 to 49) and *Re B (Care Proceedings: Appeals)* [2013] UKSC 33 (per Lord Wilson at paragraph 24).

65. In this case, the following facts relating to sexual risk were agreed or found by the judge.

(1) In 2017, the father had allowed young people to stay at the family home, at least one of whom was vulnerable.

(2) In 2017, E said that (a) their boyfriend and S's boyfriend are allowed to stay overnight; (b) their boyfriend stays in their bed and can touch them where he likes; (c) they and S had stayed overnight with a male friend of the father and slept in his bed.

(3) A vulnerable 17-year-old girl had stayed at the home and the children had walked in while she was having sex with her boyfriend.

(4) In May 2022, E said to a youth worker "what would you say if I told you I shagged my Dad?"

(5) In the same month, E had referred to hand sanitiser as "Daddy's cum".

(6) E had made rubbing motions with their hand and said "I do this to my sister and want to do this to my girlfriend".

(7) E had seen a video recording of the father engaged in sexual activity with a woman.

(8) The father failed to monitor E's access to the internet when they were 11.

(9) E had accessed pornography on the internet. (Although this was not mentioned in the judge's summary of findings at paragraph 99, it is clear from paragraph 102 that it was a finding made by the judge.)

66. The judge concluded that, because the local authority had abandoned some of the allegations of inappropriate conduct and were not seeking to prove the truth of some of the things which the children had said or implied had happened, there was no "pattern" on which the authority could rely to establish that the threshold was crossed. He also seemingly discounted factors which were "historic" and criticised DL for being "reluctant to accept that historic concerns had been resolved". But the fact that the local authority had decided in the past to take no further action following allegations did not preclude it from raising those matters again at a later stage in the context of subsequent developments. The local authority was entitled to rely on "historic" matters alongside more recent matters in seeking to establish a "pattern" which proved that the child was suffering and/or likely to suffer significant harm as a result of the care given and/or likely to be given to them not being what it would be reasonable to expect a parent to give to them. Faced with the evidence of the recent statements made by E, it was unsurprising that DL showed reluctance when asked to accept that the earlier allegations described as "historic" had been "resolved" and were therefore of no relevance.

67. As Butler-Sloss P said in the passage from *Re T* cited above,

> "…evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases has to have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence."

Looking at the totality of the findings in this case summarised at paragraph 65 above, they are plainly capable of establishing a pattern of E being exposed to a risk of harm as a result of the father's failure to impose appropriate boundaries. Furthermore, those findings had to be considered in the context of the rest of the evidence – in particular in this case the evidence given by Dr Timblerlake which, for the reasons set above, I have found was wrongly discounted by the judge. Had the judge conducted the necessary "overview of the totality of the evidence", there is a reasonable prospect that he would have concluded that, at the date on which the proceedings were started, E was (a) E suffering significant emotional harm and/or (b) likely to suffer significant sexual and/or emotional harm in future, as a result of the care given to them, or likely to be given to them, by their father not being what it would be reasonable to expect a parent to give.

68. In short, there were substantial flaws in the judge's evaluation, in particular his disregard of some of the findings as "historic" and his failure to evaluate the findings in the context of Dr Timberlake's analysis and conclusions. In those circumstances, I conclude that this case falls within the category of appeals where this Court is compelled to interfere with a judge's evaluation of the evidence. For these reasons, I would also allow the appeal on ground two.

69. I turn next to ground six – the assertion that, having acknowledged that it was open to him to make findings beyond those sought by the local authority, the judge erred by declining to identify what those findings could have been.

70. In general, civil litigation is conducted in this country on an adversarial basis. It is not the role of the court to dictate to the parties what the issues are. But care proceedings are not simply adversarial. They are conducted in a jurisdiction where the child's welfare is the paramount consideration whenever the court is considering any question with respect to the upbringing of the child. It is therefore a fundamental part of the scheme of the rules governing such proceedings, in the Public Law Outline in FPR PD 12A, that it is for the court to identify the key issues and to give case management directions aimed at resolving them. A judge exercising his or her case management powers is obliged to scrutinise the findings sought by the local authority. If the judge concludes that those findings are unnecessary to resolve the welfare issues in the proceedings, he or she must say so. Equally, in my view, if the judge concludes that the local authority document does not address factual issues which require resolution before decisions can be taken about how the child's welfare needs are to be met, he or she is obliged to say so.

71. It is of course much better for any such omissions to be identified at the case management hearing. Not infrequently, however, they only emerge at a late stage. In *Re G and B (Fact-Finding Hearing)* [2009] EWCA Civ 10, [2009] 1 FLR 1145 at paragraph 15, Wall LJ said:

> "a judge … is not required slavishly to adhere to a schedule of proposed findings placed before her by a local authority. To take an obvious example: care proceedings are frequently dynamic and issues emerge in the oral evidence which had not hitherto been known to exist. It would be absurd if such matters had to be ignored."

72. In exercising these powers, however, a judge is of course required to ensure that the process is fair to all parties. In particular, a party against whom findings may be made is entitled to a fair hearing, including sufficient notice of the findings which may be made and the evidence relied on in support. The practice of the local authority filing a threshold document setting out the findings it seeks and identifying the evidence relied on in support addresses that requirement of fairness, and a judge is only entitled to make findings that go beyond those sought in the document if they are within the "known parameters" of the case: *Re W (A Child)* [2016] EWCA Civ 1140; [2017] 1 WLR 2415, *Re L (Fact-finding Hearing: Fairness)* [2022] EWCA Civ 169. If a court is considering making findings that go beyond those parameters, the party against whom those findings would be made must be given fair opportunity to challenge them. As Wall LJ put it in *Re G and B (Fact-Finding Hearing)*, supra, at paragraph 16:

> "if the judge is, as it were, to go "*off piste*", and to make findings of fact which are not sought by the local authority or not contained in its Schedule, then he or she must be astute to ensure; (a) that any additional or different findings made are securely founded in the evidence; and (b) that the fairness of the fact finding process is not compromised."

73. In cases where the local authority seeks a range of findings arising over a period of time, it is not uncommon for the findings made by the court to go to some extent beyond those sought by the local authority. In this case, the judge did in fact make one finding that went beyond the local authority threshold, namely that E had seen an old "sex tape" of their father and a former girlfriend. I do not understand why this was never included in any iteration of the threshold document, but it was clearly described in the written evidence put before the judge (in particular, the local authority case note relating to the conversation with E on 12 October 2022 and DL's interview of the father during the parenting assessment). In his oral evidence, the father accepted that E had seen the images. In those circumstances, the judge was entitled to make the finding because the conditions identified by Wall LJ in *Re G and B* for making findings beyond those set out in the threshold document were plainly satisfied.

74. That was a finding within the "known parameters" of the case omitted from the local authority threshold document. Another matter within the "known parameters" of the case, but notably omitted from the threshold document, was any reference to E's identity needs and the father's capacity to meet them. In my view, however, the judge was fully entitled to refuse to go further and make other findings not contained in the threshold document. It is clear from the judgment that he was very concerned about deficiencies in the preparation, in particular about the basis on which the local authority was seeking to prove that the threshold criteria were satisfied and the quality of the evidence on which it relied. He plainly recognised that there were problems with the threshold document and with his encouragement the local authority amended it. But the final version was still deficient.

75. Usually, when this Court is asked to consider whether a judge has gone "off piste" when making findings in care proceedings, it is because he or she has made findings which the appellant says were made unfairly or were unsupported by the evidence or fell outside the "known parameters" of the case. Here, however, the local authority submitted that the judge erred in failing to identify findings which were not included in the threshold document but were supported by the evidence. It may be possible to discern findings which, although not sought by the local authority, could have been sought because they fell within the "known parameters" of the case. But I agree with Ms Stout's observation that it is very hard to see how a judge can be criticised for failing to make findings which he was never asked to make and which have still not been particularised by the local authority even on appeal. The argument that an appeal should be allowed because the judge failed to make such findings is, to my mind, hopeless.

76. For those reasons, I would dismiss ground six. But having concluded that the appeal should be allowed on grounds 1 and 2, it follows, if my Lord and my Lady agree, that there will have to be a retrial of the fact-finding hearing. In those circumstances, it is neither necessary nor appropriate to consider the remaining grounds of appeal. They all concern, to a greater or lesser extent, the attribution of weight given to aspects of the evidence. At the rehearing, the next judge will consider the evidence afresh. There is a

risk that any comments by this Court about that evidence may unintentionally influence the conduct or outcome of the rehearing. I stress that nothing said in this judgment should be read as indicating any view as to the right outcome of the proceedings.

77. I therefore propose that the matter be remitted to the Family Presiding Judge, Arbuthnot J, to reallocate to another circuit judge for a further case management hearing and then a fact-finding hearing. I anticipate that, prior to the case management hearing, the local authority will wish to consider whether there should be a further revision of the threshold document identifying precisely the findings of fact to be sought, the evidence relied on in support of those findings, and the basis on which it is said that the proposed findings establish that the threshold criteria under s.31(2) are satisfied. In considering the basis on which it asserts that the threshold criteria are satisfied, the local authority will no doubt wish to reflect again on the matters identified in Dr Timberlake's assessment. In considering the evidence to be adduced, further thought will no doubt be given as to whether S, and possibly E, should give evidence. In raising that question, I am not giving any indication as to how it should be answered.

LADY JUSTICE FALK

78. I agree.

LORD JUSTICE COULSON

79. I also agree.