

IN THE FAMILY COURT

Date: 14 November 2019

Before:

HIS HONOUR JUDGE MORADIFAR

Sitting as a Judge of the High Court of Justice

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

In the matter of:

Re W (No.1)

(Preliminary Issue: Scope of the Hearing)

Damian Garrido QC and Sara Granshaw instructed on behalf of the Local Authority.

Kate Branigan QC and Amanda Meusz instructed by Ridley and Hall Solicitors on behalf of the mother.

Penny Howe QC and Simon Miller instructed by Clifton Ingram LLP on behalf of the father.

Roma Whelan and Pervin Jagutpal instructed by the Head Partnership Solicitors on behalf of the child.

Date of the hearing:

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HHJ Moradifar

Sitting as a Judge of the High Court of Justice

This Judgment was delivered in private. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must

ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

His Honour Judge Moradifar:

Introduction

1. H is the subject of applications for public law orders by the local authority. She will be seventeen years old in January 2020. She was adopted by the first and second respondents (the “parents”) when she was two years old. The parents’ eldest child A tragically died in 2018 when she took her own life. During these proceedings, the mother has given birth to their third child R who was born in the summer of 2019.
2. H has presented with complex behavioural difficulties and has suffered several changes in her placement since being accommodated by the local authority. More recently she appears to have settled into her current placement and is making plans for her future. During these proceedings she has been the subject of comprehensive independent expert assessments by the team at the Great Ormond Street Hospital (“GOSH”) and latterly Dr Knight-Jones Consultant Paediatrician. The expert evidence highlights several difficulties that H suffers with and attribute some of those to the parenting that she has received in the care of the parents.
3. The case is listed before me for a fact find and final hearing with a time estimate of fifteen days commencing 25 November 2019. The local authority seeks several findings against the parents that are in the short form are set out in the following terms;

***“The following threshold schedule should be read in conjunction with the separate document entitled Final Schedule of Threshold Findings (cross-referenced to the evidence) for all evidential citations relied upon.*”**

1. *Both parents were overly preoccupied with the state of H's health and over-medicalised any behavioural difficulties. Their pursuit of a medical diagnosis to explain their perception of her presentation resulted in H being subjected to numerous assessments and investigations (despite normal medical results), causing her emotional harm by:*
 - (a) *Undermining her sense of self and self-esteem*
 - (b) *Contributing to a high level of anxiety in relation to assessments, impacting on her ability to access learning environments in which some assessment was likely.*

2. *The parents misled professionals in their pursuit of a medical diagnosis (FASD) for H by:*
 - (a) *Suggesting that the local authority and/or foster carer had reported that H's birth mother abused alcohol during pregnancy;*
 - (b) *Exaggerating H's level of need/difficulties.*

3. *The parents made numerous allegations/complaints against professionals and were highly critical of them if they did not agree with their views or were challenged by them. This undermined or risked undermining the provision of services (health, education or local authority) for H and that, in turn, affected her trust in other people and the capacity of adults to support her in a harmonious way.*

4. *The parents were excessively controlling in relation to all aspects of H's welfare; for example, by:*
 - (a) *Attempting to control information about H, including to/between professionals and attempting to control the course of assessments;*
 - (b) *Their excessive/incessant communications with professionals;*
 - (c) *Restricting H's access to professionals and not engaging in assessments;*
 - (d) *Attending H's medical appointments without/instead of her;*

- (e) *Highly controlling/micro-managing H's environment at home and school;*
- (f) *Repeatedly asking professionals to amend their reports to achieve a diagnosis/objective they were pursuing.*
5. *The parents have struggled to show warmth and affection consistently to H and have lacked emotional attunement to and insight into H needs; for example, by subjecting her to an overly structured, micro-managed and at times punitive environment at home and school (due to her parents' specific instructions) and in their approach with H towards her sibling's death. The parents' problematic relationship with H, her mother's fixed view of H's capabilities and subsequent restrictions she has placed on H being supported to develop independence has also resulted in H suffering emotional harm."*
4. H does not wish to return to the care of the parents. The parents have accepted this. H and her parents maintain contact which latterly has included R. The local authority plans for H to remain in care until she attains majority. This is supported by H, her guardian and her parents. The parents accept that threshold pursuant to s 31(2) of the Children Act (1989) is crossed in that at the relevant time H was beyond parental control. Such an acceptance by the parents falls significantly short of what the local authority seeks to prove as summarised above.
5. The parents invite me to revisit the remit of the final hearing. They each assert that the pursuit of the allegations by the local authority is unnecessary and disproportionate in the circumstances of this case. They argue that even if the local authority proves every allegation on the detailed schedule, it will make little difference to the care plan for H and the outcome of the case. The investigations of the allegations will inevitably come at a significant cost to public resources and will place enormous stress on a family that is already at breaking point with stress. In the event that I decline their invitation, I am further invited to narrow the remit of the findings to that which is necessary which on their case must exclude any findings about the circumstances of A's tragic death.

6. H is capacious and unites with her guardian in so far as she can in supporting her parents' joint invitation to the court. H wants the proceedings to be concluded as soon as possible. Her guardian sees no necessity or merit in the prosecution of the local authority's allegations. The local authority argues strongly that the carefully drafted and considered schedule of allegations must be investigated given the long and complex history of this case. Such findings as are made together with those that are not, will inform the welfare decisions and future planning for H. The findings are also important in other context such as H's Special Education Needs Tribunal Appeal proceedings and any possible future applications in respect of H such as those in the Court of Protection. Importantly, the court's findings will better inform H about the circumstances that has led her into the care system and the professionals who will be working with her in the future. The local authority states that given the resources already devoted to these proceedings, this court is best placed to consider these issues.

Issues

7. The issues before me may be summarised as follows;

Should the court proceed to trial

- a. as currently listed? or
- b. in the premise that threshold pursuant to s31(2) of the said Act is crossed, should the local authority be barred from pursuing the findings as set out in its schedule? or
- c. with the local authority being limited in the scope of the findings it may seek? and/or
- d. with a bar on the pursuit of allegations in respect of the circumstances leading to A's death.

The law

8. The General Case Management Powers of the court are set out in Part 4 of the Family Procedure Rules 2010. Rule 4.1. (3) provides that;

“Except where these rules provide otherwise, the court may-

- (a) direct that part of any proceedings be dealt with as separate proceedings;*
- (b) direct a separate hearing of any issue;*
- (c) decide the order in which issues are to be heard;*
- (d) exclude an issue from consideration;*
- (e) take any other steps or make any other order for the purposes of managing the case and furthering the overriding objective.”*

The overriding objective is set out in Part I of the said rules and provide that;

“1.1 The overriding objective

(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.”

(2) Dealing with a case justly includes, so far as is practicable—

- (a) ensuring that it is dealt with expeditiously and fairly;*
- (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;*
- (c) ensuring that the parties are on an equal footing;*
- (d) saving expense; and*
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.*

1.2. Application by the court of the overriding objective

The court must seek to give effect to the overriding objective when it—

(a) exercises any power given to it by these rules; or (b) interprets any rule.

1.3 Duty of the parties

The parties are required to help the court to further the overriding objective.

1.4 Court's duty to manage cases

(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes—

(a) setting timetables or otherwise controlling the progress of the case;

(b) identifying at an early stage—

(i) the issues; and

...

(c) deciding promptly—

(i) which issues need full investigation and hearing and which do not; and

(ii) the procedure to be followed in the case;

(d) deciding the order in which issues are to be resolved;

(e) controlling the use of expert evidence;

(f) encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

(g) helping the parties to settle the whole or part of the case;

(h) encouraging the parties to co-operate with each other in the conduct of proceedings;

(i) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(j) dealing with as many aspects of the case as it can on the same occasion;

(k) dealing with the case without the parties needing to attend court;

(l) *Making use of technology;*

(m) *giving directions to ensure that the case proceeds quickly and efficiently.”*

9. Before the court can make any final public law orders, it must be satisfied that the ‘threshold’ pursuant to s31(2) of the said Act is satisfied. It is the duty of the court to satisfy itself of the factual basis as to how threshold is crossed and in doing so the court must apply the overriding objective as set out above. This remains to be a continuing positive duty on the court even in circumstances of parental concession to the threshold or agreement between the parties that threshold is crossed (see Re G (A Minor) (care Order; Threshold Conditions) [1995] Fam 16, Oxfordshire CCC v DP, RS & BS [2005] EWHC 1593 (Fam) and Re T (Care order) [2009] EWCA Civ 121).

10. In this context, the undertaking of the court’s duty and the exercise of its discretion was the subject of guidance in A County Council v DP, RS, BS (by the Children’s Guardian) [2005] EWHC 1593 (Fam) when McFarlane J (as he then was) by reference to five previous authorities, at paragraph 24 of his judgment summarised the factors that the court must consider as follows;

(a) *The interest of the child (which is relevant but not paramount);*

(b) *The time that the investigations will take;*

(c) *The likely cost to the public funds;*

(d) *The evidential result;*

(e) *The necessity or otherwise of the investigation;*

(f) *The relevance of the potential result of the investigation to the future care plans for the child;*

(g) The impact of any finding process upon the other parties;

(h) The prospects of a fair trial on the issue;

(i) The justice of the case.

11. Finally, I must ensure that the parents' and H's rights to a private and family life and to a fair trial pursuant to Articles 8 and 6 respectively of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) are observed and protected. There can be no interference with those rights unless such an interference is in pursuance of a legitimate aim, necessary, proportionate and in accordance with the law.

Analysis

12. I am most grateful to the parties for their comprehensive skeleton arguments and submissions. H will soon be seventeen years old and has expressed her view that she wishes for these proceedings to conclude as soon as possible. It is agreed that her interest will be best served by being made the subject of a care order and that her educational needs must be addressed as soon as possible. I note that there is currently a dispute between the parents and the local authority regarding the latter and it is the subject of further determination by the appropriate Special Educational Needs Tribunal. Whilst H's interest is not determinative of my decision and nor is my paramount consideration, I must consider the issues at this hearing in the context of her age and understanding. There is an inherent danger of conflict for H by 'writing' or 'rewriting' the narrative of her life and how she has come to be at this point. H will have her own memories and she has made this clear to several professionals, including how she perceives her experience when living with her parents. She is most likely to discuss her memories in a therapeutic setting. This concern must be balanced against the "evidential result" of such threshold findings that may provide an important narrative for H and the professionals working with her.

13. The local authority's schedule is comprehensive and by its nature covers many years going back to 2005. The five headings are further sub divided

and each subheading has several examples that run to twenty-one pages. In making this observation, I am not making any criticism of the local authority. This case has a substantial history and the local authority has been entirely justified in investigating the case in such a detailed fashion. The matter is currently listed for a final hearing with a time estimate of fifteen days. There is some concern that if the local authority pursues all the allegations against the parents, the time estimate of this hearing is likely to be extended which will in turn lead to an inevitable delay in the final resolution of the case. The current listing if effective, comes at a substantial cost to the public purse that includes counsel's time, court time, other professionals such as the social worker, the guardian and experts in the case. Those costs to public funds will be further exacerbated if additional court time is required. This must be considered in the context of the substantial sums and effort that have already been expended on investigating the concerns to date.

14. There is further concern about the volume of ongoing disclosure that has yet to be completed, read and analysed. It is against this background that it is submitted on behalf of the parents that their respective rights to a fair trial is in serious jeopardy. The parents have submitted that during the last seven days, they have had to marshal thousands of pages of disclosure, that although containing duplications, has required enormous efforts on the part of their legal team. The task is far from complete, there is yet more to come and the final hearing fast approaching. Thus, it is argued that the justice of the case requires the court's intervention to cease or at least contain the local authority's pursuit of the detailed allegations. I note that the parents have each recently instructed leading counsel but have been represented by experienced junior counsel throughout these proceedings. In the mother's case, she has the benefit of continuity of representation at every hearing.

15. The parents have endured these investigations and proceedings for many months. It is submitted on their behalf that the ongoing process is highly stressful for them and the prospect the long protracted final hearing daunting. It is further submitted on behalf of the father that he has now reached a point that he can no longer bring himself to read the case

papers. They also have the care of R who is entirely dependent on his parents. Whilst H's direct involvement in the process is protected, it is submitted on her behalf that she too is stressed by the ongoing investigations and court proceedings. H wants the case to conclude as soon as possible. Any consideration of future prospective proceedings is speculative. Any such proceedings would have to be dealt with on the relevant evidence and merits of the application at that time. R now lives in the jurisdiction of a different local authority that has not accepted an invitation to be represented at this hearing. I am not seized of any matters relating to R.

16. Inevitably, there is an inference of necessity and drive for certainty in the court investigating all the allegations. If all the allegations are found, it is unlikely to have a material impact on the main issues of care planning for H. Her care plan is broadly agreed. The local authority remains concerned that the parents' concession does no more than blame H, without any element of culpability by the parents or acceptance of any deficit in their parenting. This is strongly denied on behalf of the parents. This may be the subject of challenge to the parents by the local authority when the parents give their oral evidence.

17. Whilst the two concepts of threshold findings and welfare findings are not mutually exclusive and can be mutually informative, there is an important distinction between the two. Threshold findings are in law fixed at the 'relevant time'. Welfare findings are not restricted in a similar way. Welfare findings look at the past and the current circumstances. Indeed, such findings also consider the future welfare needs of the subject child. The decisions about H's welfare are for the court to make and must be made by reference to s1(3) of the Act. Those needs have been the subject of expert assessments. In the report dated 13 September 2019 GOSH state that;

"In relation to our assessment of the parents, our assessment findings indicate that while the parents have expended a vast amount of time and energy striving to get what they consider to be the best care and education provision for H they lack insight into her emotional needs and the impact of their actions. Unfortunately,

this has resulted in emotional harm being caused which has exacerbated H's difficulties. We have therefore recommended that H's contact with the parents is supervised".

And ...

"It is our opinion that information within the bundle details reports of concerning, emotionally harmful interactions between the parents and H. There are repeated recordings of the mother presenting as emotionally unavailable, cold and punitive towards H. We note Ms R's description of the firm boundaries needed to help H to feel secure and how this may be misinterpreted as emotionally harmful by others, however we are of the opinion that the firm boundaries required to assist children with insecure disorganised attachments to feel secure can be implemented with emotional attunement and warmth and should not appear cold to the onlooker" ...

"The history, as set out in the court bundle, shows that various professionals have had concerns about the mother's functioning and behaviour for some time. This is particularly in relation to the level of control she has sought to exert over H's daily living and the care provided to her, her fixed view of the limits to H's capabilities and the subsequent restrictions she has placed on H being supported to develop independence" ...

"we have found evidence in our assessment of a concerning pattern in which her parents would present her as more impaired in her functioning and health than objectively seems to have been justified. The question that arises is whether this pattern could be seen as falling within a framework of fabricated or induced illness (FII), or, more broadly, a use of medical services on the part of parents which caused harm to H due to their anxiety or excessive medicalisation of her difficulties" ...

"We are of the opinion that H's experiences to date have not afforded her with a consistent care environment that has enabled her to develop a secure attachment. We consider that her experiences within the parents' care have at times led to emotional harm" ...

“Unfortunately, despite their knowledge in these areas our assessment findings suggest that the parents are particularly limited in terms of their capacity to reflect on their own parenting and the impact that this may have had, and continues to have, on H’s development. Both Parents spoke of the need to alter their parenting style when caring for H compared to how they had parented their biological daughter, A. However, at no point did they reflect on the possibility that their behaviours and interactions may have negatively impacted on H. They presented their belief that professionals and staff at the schools and residential placements where H has been placed as failing to meet H’s needs and therefore being the contributing factors in H’s ongoing difficulties” ...

By reference to H’s previous diagnosis, GOSH state;

“we do not seek to overturn the diagnosis of FASD, but (i) extent of drinking in pregnancy seems unclear (ii) given that she is adopted, we do not know what genetic vulnerabilities there may have been (iii) substances such as cocaine are also believed to affect the developing brain and are believed to increase the risk of neuropsychiatric impairments although isolating the effects of a single substance is not straightforward in poly-substance misusers (iv) we also need to consider the cumulative impact of emotionally harmful parent-child interactions on H’s behaviour and the link between emotional dysregulation and her attachment insecurity.”

Dr Knight-Jones observes in his report that:

“What we have here is seeking of yet more diagnostic labels and yet more experts, which, in my opinion, went beyond the normal.

I think the answer to this question is in the paper by David, Murtagh and Glaser on FII. The picture of FII includes “the child to be recognised and treated as more ill or disabled than the child actually is. (p.111). Also “the child undergoes repeated

unnecessary examinations, investigations, procedures and treatments, often with attendance at several medical settings...The child may be deprived of food or medication...the child's daily life and functioning...Restricted normal activities. The child's psychological and health related well-being...Insecure attachment. Anxiety, confusion and preoccupation with their state of health and vulnerability.

In my opinion the seeking of further diagnoses, expert opinions and their use to justify restrictions has caused anxiety and confusion in the child, and adversely affected how she was treated in the educational setting. Being in schools for pupils with learning difficulties might have contributed to her social immaturity”.

18. The respective opinion of the experts about H's needs and future care planning are based, as they must be, on fact. The parents do not accept the expert opinions nor do they accept the factual premise of those opinions. These opinions have informed the local authority's care plan and it seeks to rely on them. The local authority has the burden of proving the relevant challenged facts. Therefore, if I accede to the parents' invitation not to conduct a fact-finding exercise in respect of the local authority's allegations, there remains an inevitability that some of those facts will have to be scrutinised before the court can rely on or reject the expert opinion. In this context necessity and proportionality are key considerations.

Conclusion

19. By reasons of the aforesaid I agree with each of the parents' and the guardian's observations that in the circumstances of this case a fact finding on the local authority's allegations to satisfy the threshold criteria is not proportionate or necessary. The local authority has been entirely justified to investigate and pursue those findings in the manner it has. In my judgment, there can be no criticism of the local authority in this regard. It is open to the local authority to challenge the parents on their concession to threshold, if indeed the premise of such concessions are in doubt or require scrutiny. The remit and the conduct of the final hearing

is one that falls under the case management duties of the court. This is an ongoing duty that requires the court to continually balance all the factors that I have set out above. In the circumstances of this case, such a balancing exercise leads me to the firm conclusion that there is no merit in the court's investigation of the threshold findings.

20. The welfare decision for H's future is one that is vested in the court. The court must make its decision on a proper evidential foundation. Notwithstanding the broad agreement on the local authority's care plan, there is no agreement about the premise and the opinion of the jointly instructed experts that inform the said care plan. Before the local authority may properly invite the court to rely on those opinions it must established the relevant disputed factual premise of the same. Without this, the court cannot make a reasoned determination of the validity and reliability of those opinions.
21. Having considered the opinion of the two jointly instructed experts, in my judgment, it would be unnecessary and disproportionate to investigate all the local authority's allegations. The detailed allegations that are set out in paragraphs four and five of the main schedule, if found, will more than adequately form and support the factual premise of the expert opinion. The allegations of 'excessive control' of H by the parents and their emotional response to her are at the centre of the GOSH opinion and recommendation. Additionally, the local authority can properly pursue the allegations in respect of how the information about A's death was treated and imparted to H by her parents as this relates to some of the emotional behaviour within the family that is identified by GOSH. Beyond this, there shall be no further consideration of any allegations relating to A. The allegations set out in paragraphs one to three are clearly important but in my judgment not necessary or proportionate to inform the final care planning for H.
22. However, the issue of H's diagnosis for FASD and ASD may be challenged by the local authority to the narrow and limited extent that it covers the formulation of the opinion of the two relevant treating clinicians. In my judgment it is important for H and the professionals working with her to be aware of any relevant medical diagnosis.

Accordingly, I will limit the scope of the findings within these proceedings to those which I have identified above.
