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IN THE FAMILY COURT
On appeal from District Judge Parker

Before:

HIS HONOUR JUDGE MORADIFAR

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 J (A Child: Residential assessment)

Aidan Vine QC (instructed by Joint Legal Team) on behalf of the local authority

John Vater QC and Dr Emma Gatland (instructed by Clifton Ingram LLP) on behalf of the first respondent mother.

Jonathan Sampson QC (instructed by Careys Law Limited) on behalf of the second respondent father

Jasbinder Dail (Rowberry Morris Solicitors) on behalf of the child through her Guardian Naomi Baker

Date of the hearing:

9 April 2021

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His Honour Judge Moradifar:

Introduction

1. This is an appeal by the local authority against the case management decision of District Judge Parker ("the Judge") dated 22 March 2021 when pursuant to s 38(6) of the Children Act (1989) ("The Act") he directed that the parents and the subject child ("L") should undergo a residential assessment at Symbol UK ("Symbol"). The application for permission to appeal and the appeal are made against the background that I have summarised below. The local authority relies on six grounds of appeal that are expressed as follows:

> *"1. The residential assessment at Symbol was an assessment of the parents, and their amenability to further assessment with adjustments to their learning styles – its focus was not assessment of the child and it fell outside the scope of s.38(6) of the Children Act 1989*
>
> *2. The Court did not consider whether the residential assessment at Symbol was necessary to assist resolve the proceedings justly – as required s.38(7A) of the Children Act 1989*
>
> *3. The residential assessment at Symbol did not satisfy the requirement of s.38(7A) of the Children Act 1989 that it be necessary to assist resolve the proceedings justly*
>
> *4. The Court did not have regard to its ability to direct a further parenting assessment of the parents without requiring residential assessment of the child*
>
> *5. The Court did not undertake a sufficient weighing exercise of the statutory factors to be considered under s.38(7B) of the Children Act 1989 – it appeared to regard the availability of the residential assessment at Symbol, and the potential for it to foreclose early if it was not working, to be the determining criteria*

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> 6. *The Court did not have sufficient regard to the likely impact of the residential assessment on the welfare of the child, including the impact if the residential assessment failed"*

2. The parents oppose the application by submitting that the appeal has no merit. The Judge was entitled to order a residential assessment and in the circumstances of this case was entirely correct to do so. His decision is not one that can or should be interfered with by the appellate court. The guardian submits that she has accepted the decision of the judge and does not support the local authority on grounds one and four. However, she maintains her position that was argued before the judge, by questioning the necessity of such an assessment.

The law

3. Part 30 of the Family Procedure Rules (2010) ("FPR") regulate the appeal process. It is common ground that the judge's decision was a case management decision and that any notice of appeal must be filed within seven days of judgment being handed down. The applicant must first have permission to appeal the decision and Part 30.3(7) provides that;

> *"Permission to appeal may be given only where –*
>
> *(a) The court considers that the appeal would have a real prospect of success; or*
>
> *(b) There is some other compelling reason why the appeal should be heard."*

The test for granting of permission to appeal was expressed by Brooke LJ in *Tanfern Limited v Cameron MacDonald [2000] 1 WLR 1311* in the following terms;

> *"permission to appeal will only given where the court considers that an appeal would have a real prospect of success or that there is some other completing reason why*

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> *the appeal should be heard (CPR 52.3(6)). Lord Woolf MR has explained that the use of the word "real" means that the prospect of success must be realistic rather than fanciful [see Swaine v Hamilton The times, 4 November 1999, Court of Appeal (Civil Division) Transcript No 1732 of 1999]".*

For avoidance of any doubt, the above test applies to family cases (see *Re R (a Child: Possible Perpetrator) [2019] EWCA Civ 895).* The court any only consider the appeal once permission has been granted. When granting permission to appeal, such a permission may be on limited grounds or subject to conditions [Civil Procedure Rules (1998) 252.6(2)].

4. In *Re H-L (Expert Evidence: test for permission) [2013] EWCA Civ 655* the Court of Appeal set out the approach of the appellate court to case management decisions in the following terms;

> *"In Re TG* [(care Proceedings: case management, expert Evidence) [2013] EWCA Civ 5] *I encouraged case management judges to apply appropriately vigorous and robust case management in family cases; I emphasised the very limited grounds upon which this court – indeed, I should add, any appellate court – can properly interfere with case management decisions; and I sought to reassure judges by pointing out how this court has recently re-emphasised the importance of supporting first-instance judges who make robust but fair case management decisions. I take the opportunity to reiterate these important messages".*

In *Re TG*, Hedley J further observed;

> *"84. Although judges must comply with the Rules, case management remains an art. The judge should have the 'feel' of the case; apparently similar cases may require different evidence, for example as to whether a psychological assessment of one of these particular parents is required or whether expert psychiatric evidence over placement of one*

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> *of these particular children is necessary. Again there will be cases where further evidence is allowed almost as an act of mercy; I have allowed a second opinion on the papers where the evidence has hitherto spoken with one voice against inadequate (rather than culpable) parents who are facing permanent loss of all their children. Such cases will be rare but every experienced judge has met them and they should be free to exercise such discretion.*
>
> *85. This distinctive feature of this judge's appraisal of the needs of this case is of course the key justification for appellate courts taking a very limited role.*
>
> *From Piglowska onwards there has been a recognition, variously (and more elegantly) expressed, that the judge has a feel for the case and for what is required for that case to be fairly and proportionately tried and that appellate interference should be restricted to those circumstances described by the President in paragraph [35] above. Case management judges should know that, absent palpable error of this sort, they are expected to use intellect, imagination and judgment to procure the expeditious and fair hearing of the cases entrusted to them. If a decision surprises others, it must be assessed in the specific context of that case."*

This approach is further observed by Henderson LJ in *Simou v Salliss [2017] EWCA Civ 312* where he stated as follows:

> *"The decision whether or not to adjourn a trial is one of case management. As such, it is common ground that it would be inappropriate for an appellate court to reverse or*

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> *otherwise interfere with it, unless it was "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree": see Global Torch Ltd v Apex Global Management Ltd (No.2) [2014] UKSC 64, [2014] 1 WLR 4495, at 4500 per Lord Neuberger, approving the test stated by Lewison LJ in Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743 at [51]."*

5. The statutory framework as set out in s38 of the Act governs 'interim orders'. S38(6) provides that;

> *"Where the court makes an interim care order, or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child; but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment."*

6. Later the Children and Families Act (2014) (by Ss 12, 13 and schedule 2) provided for amendments to this section that set out the statutory test and the relevant factors that must be taken into account. These are set out in Ss 38(7A) and (7B) that provide;

> *"(7A) A direction under subsection (6) to the effect that there is to be a medical or psychiatric examination or other assessment of the child may be given only if the court is of the opinion that the examination or other assessment is necessary to assist the court to resolve the proceedings justly.*

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> *"(7B) When deciding whether to give a direction under subsection (6) to that effect the court is to have regard in particular to—*
>
> *(a) any impact which any examination or other assessment would be likely to have on the welfare of the child, and any other impact which giving the direction would be likely to have on the welfare of the child,*
>
> *(b) the issues with which the examination or other assessment would assist the court,*
>
> *(c) the questions which the examination or other assessment would enable the court to answer,*
>
> *(d) the evidence otherwise available,*
>
> *(e) the impact which the direction would be likely to have on the timetable, duration and conduct of the proceedings,*
>
> *(f) the cost of the examination or other assessment, and*
>
> *(g) any matters prescribed by Family Procedure Rules."*

7. In *Re G [2005] UKHL 68, [2006] 1 FLR 601 (HL)* Baroness Hale observed [66 and 69] that;

> *" It may be necessary to observe the parents looking after the child at close quarters for a short period in order to assess the quality of the child's attachment to the parents, the degree to which the parents have bonded with the child, the current parenting skills of the parents and their capacity to learn and develop..."*
>
> And
>
> *"In short, what is directed under section 38(6) must clearly be an examination or assessment of the child, including where appropriate her relationship with her parents, the risk that her parents may present to her, and the ways in which those risks may be avoided or managed, all with a view to enabling the court to make the decisions which it has to*

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> *make under the 1989 Act with the minimum of delay. Any services which are provided for the child and his family must be ancillary to that end. They must not be an end in themselves."*

8. More recently in *Re Y (a child: s.38(6) assessment) [2018] EWCA Civ 992*, Jackson LJ provided a most helpful guidance as follows:

> *"…*
>
> *11. Section 38(6) was twice considered by the House of Lords. Since then, subsections (7A) and (7B) have been added by amendment, but the two decisions remain determinative of the interpretation of sub-section (6).*
>
> *12. The first decision is Re C (Interim Care Order: Residential Assessment) [1997] 1 FLR 1. In that case the issue concerned the breadth of section 38(6), and in particular whether it covered only an assessment of the child or, on a wider interpretation, an assessment of the child with the parent. The House of Lords favoured the latter interpretation: see Lord Browne-Wilkinson at [6-7]. At the end of paragraph 7, he stated:*
>
> > *"But to come within section 38(6) the proposed assessment must, in my opinion be an assessment of the child. The main focus must be on the child."*
>
> *He then considered the situation in that case and continued:*
>
> > *"What was to be assessed was the mother's capacity for beneficial response to the psychotherapeutic treatment that she was to receive. Such an assessment, no matter how valuable the information might be for the purposes of the eventual final care order decision could not, in my opinion, be brought within section 38(6)."*
>
> *13. The second decision is Re G (Interim Care Order: Residential Assessment) [2005] UKHL 68, [2006] 1 FLR 601. There Lord Scott said at [14]:*

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> *"It seems to me clear that the main purpose of the proposed programme was therapy for the mother in order to give her the opportunity of change so as to become a safe and acceptable carer... This purpose in my opinion does not come within section 38(6), notwithstanding that the results of the programme would be valuable and influential in enabling the court to decide whether a care order ... should be made and that if the purpose were to be achieved, it would very greatly benefit the [child]."*

14. *Baroness Hale summarised matters at [64-71]. At paragraph 64 she said this:*

> *"The purpose of these provisions is, therefore, not only to enable the court to obtain the information it needs but also to enable the court to control the information gathering activities of others. But the emphasis is always on obtaining the information. This is clear from the use of the words "examination" and "other assessment." If the framers of the 1989 Act had meant the court to be in charge, not only of the examination and assessment of the child, but also of the medical or psychiatric treatment to be provided for her, let alone for her parents, it would have said so. Instead, it deliberately left that in the hands of the local authority."*

At paragraph 66:

> *"I appreciate, of course, that it is not always possible to draw a hard and fast line between information-gathering and service-providing. Some information can only be gathered through the provision of services. It may be necessary to observe the parents looking after the child at close quarters for a short period in order to assess the quality of the child's attachment to the parents, the degree to which the parents have bonded with the child, the current parenting skills of the parents and their capacity to learn and develop..."*

At paragraph 69:

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> *"In short, what is directed under section 38(6) must clearly be an examination or assessment of the child, including where appropriate her relationship with her parents, the risk that her parents may present to her, and the ways in which those risks may be avoided or managed, all with a view to enabling the court to make the decisions which it has to make under the 1989 Act with the minimum of delay. Any services which are provided for the child and his family must be ancillary to that end. They must not be an end in themselves."*
>
> *And finally, at paragraph 71:*
>
> *"Further or other assessments should only be commissioned if they can bring something important to the case which neither the local authority nor the guardian is able to bring."*
>
> *15. The approach taken in these two cases remains authoritative, with only the substitution of the word "necessary" for the word "important" in the last citation."*

9. I am most grateful to all counsel for their helpful and detailed submissions. In the course of those submissions I have been referred to other authorities that are not detailed in this part of my judgment. Having set out the fundamental legal principles, I will further consider the relevant legal principles and authorities later in this judgment.

Background

10. The mother has six older children. The four eldest children are placed within the family and the youngest two have been placed for adoption. The last court proceedings concluded in 2018. The father has four older children who live away from his care. The mother and father commenced their relationship in December 2019. L is their first child together and she is five months old.

11. The local authority's concerns about the mother include neglect, substance misuse, domestic abuse, mental health issues and ASD that impacts on her parenting. Its concerns about the father include mental

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health difficulties, antisocial behaviour and a late diagnosis of ADHD that impacts on his functioning. On 24 July 2020 the local authority very properly began engaging the parents in the Public Law Outline process and during the pre-proceedings phase undertook a PAMs parenting assessment of each of the parents and reported on 15 October 2020. Additionally, the mother underwent a psychological assessment that was undertaken by Dr Bamford who reported on 16 September 2020.

12. L was born in early November and on 6 November 2020 the local authority applied for a care order with a plan that L be separated from her parents and placed in a 'foster to adopt' placement whilst there were further assessments of the father and alternative carers. After a two-day contested hearing, the judge did not approve the local authority's care plan and invited it to further consider alternative placement options. L was placed with her mother in a mother and baby foster placement. Within a week or so, the local authority made a further application to remove L from the mother's care. This care plan was not supported by the guardian who identified a possible 'gap' in the evidence as the assessments in the previous proceedings had not been tailored to the mother's autism. Later, in November Dr Bamford reported her findings following her psychological assessment of the father and at about the same time the results of the Hair Strand Testing of the father revealed chronic excessive alcohol consumption.

13. L remained in the care of the mother in the mother and baby foster placement. Sadly, in January 2021, the foster carers gave notice that they wished to end the placement. The local authority sought to place L in a foster to adopt placement pending further assessments of the parents. L's social worker was concerned about the mother's ability to safely care for L in the community. The local authority conducted a wide search of residential settings within which the parents could be further assessed. Symbol was one such place and requested further information and an opportunity to undertake a viability assessment. On 13 January 2021, the court gave permission to the local authority to share the court papers with Symbol and other residential assessment units for an initial assessment to be undertaken.

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14. The local authority's care plan for separation of L from the mother was approved by the court on 2 February 2021. This was to be a holding position pending the determination of any application for a residential assessment. L has since continued to live with the same foster carers who may wish to be her long-term carers. Concerns about the mother's ability to safely care for L in the community was further stated by L's Health Visitor.

15. By early March, the father's further hair strand testing revealed no significant markers for alcohol consumption in the preceding six weeks. After conducting its initial assessment, Symbol concluded that neither parent had *"undergone any parenting assessment, in respect of* [L], *which utilises full and accurate information concerning their learning styles, abilities and deficits".* In the meantime, the local authority had commissioned an updating parenting assessment which concluded that neither parent is able to provide adequate care for L.

16. Despite Symbol maintaining its position as confirmed in its second report, the conclusions of the updating parenting assessment proved to be the turning point in this matter. The local authority no longer identified any need for any further assessments and based on the available evidence concluded that the only realistic option for L's future placement was adoption. On 9 March 2021 the mother made an application pursuant to s38(6) of the Act for a residential assessment of both parents and L at Symbol. Thus, the stage was set for a contested hearing before the judge to consider this application. The application was opposed by the local authority and the Guardian.

The hearing

17. In preparation for this hearing, each of the parties had filed and served a position statement. Notably, at paragraph 9 of its position statement, the local authority raised a possible challenge to the court's jurisdiction to accede to the mother's application. The parties position statements were supplemented by oral submissions before the judge. These are further considered below.

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18. Given the urgency of this appeal, it has not been possible to obtain an approved transcript of the hearing or the judge's judgment. However, the parties have made their submissions on an agreed note of the hearing. The agreed note is relatively detailed and clearly sets out the oral submissions made by each party to supplement their respective written documents. It is common ground that the issues about the ambit of the assessment failing within s38(6) and the court's jurisdiction to grant the mother's application was not canvassed beyond that which was stated in the local authority's position statement. The note also records that the judge *"asked for submissions in respect of s38(7B) and submissions were made in respect of each part of that section."*. The judge then gave a short judgment that is noted as follows:

> "*Asked to decide on an application made by the Mother for a residential assessment. Supported by Father, opposed by LA and CG.* [L] *was in a foster placement from birth until 02.02.21 when the placement broke down. LA explored residential placement but none were available. Supported by the CG at the time. Interim separation was approved in February and* [L] *has since been placed with her half-sibling...* [L] *is doing well. Mother and Father argue that the current evidence is insufficient in the context of a care plan of adoption. Proposed residential unit is Symbol where the parents will reside for two weeks before being joined by* [L]*. Assessment would last for 8 weeks and cost £45k. LA and CG not in agreement. Won't provide sufficiently useful evidence; position already clear. High cost and unnecessary delay for* [L]*. IRH is scheduled for April and will mean that the case will extend beyond 26 weeks. M's proposal will mean that it will cause delay of approximately 3 months:*

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significant in proportion to L's age. [L] *would still be a young enough candidate for adoption if the residential assessment is negative. Fact that LA and CG have changed their position is not persuasive. Unclear as to whether they were right in February or right now. CG says that the change is due to the updated parenting assessment. That is key bit of evidence relied on by those who resist application to say there has been adequate assessment already. Much of the assessment is how Mother was with* [L] *at the foster carer's home. There is disagreement about the chances Mother had to care for* [L] *in this placement. Mother has ASD. It is clear that the relationship between Mother and foster carer was difficult. Prepared to accept that M may bear some responsibility for FC to deal with. Unclear as to how the foster carer made use of the support from the behavioural specialist. High level of support from health visitor. Mother is on the Autistic spectrum and move to Worthing soon after birth and challenge for mother. Carer's home had a lot going on, child of own and a lab puppy. Not a fair way to assess parenting capacity. No adjustments made re carer lacking in experience in ASD. I note that Jane had some support from Ms Reid, who had no direct contact with GJ as far aware. Greater than usual support from HV, incl pictorial support, not clear whether that is what is helpful to her. She visited weekly. Not sure that fills in evidential gap.*

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Symbol have provided a lengthy document and clearly had a large number of case papers, including the pre-birth and psychological assessments. Paragraphs to mention: 8.3.2 ref to Jane accepting that may not have given guidance and support needed. There is no diagnosis of Father due to the lack of medical records, but there are suggestions that Father has ADHD. Symbol are proposing to offer a significantly different parenting assessment. Beth Patterson had two sessions but the third was cancelled due to Father's tooth ache. Symbol appear to be offering something significantly different from Worthing or Ms Patterson.

SB has quoted from some of the contacts in pos statement. Re concern re interaction, 4 occasions of good interaction, talking and hugging and chatting. Eye contact improved.

CG agrees with some criticism but what tipped it for the CG was the realistic in the prospects of success and possibility of removal; difficult re-evaluate.

Accept risk to [L] *in this. Concerns about Father's MH; but a lot of unknowns. Cannot be said Father is deliberately disruptive. Unfair to say this is bound to be decided against him.*

As a trial judge, I would be uneasy to make a placement order based on the material before me. There are concerns regarding Father that need to be assessed. No reference to DV between the parents. No admission or incontrovertible evidence that he has been engaged in such violence as to preclude him from caring.

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> *Father also cannot be discounted due to the December HST result. I think this is a really difficult decision. I think it is fair to say CG alive to this given the points in her PS. I have to confess I have had different views throughout. I am always hesitant in disagreeing with the CG but by a very narrow margin, I am persuaded to grant the application for the assessment. If the work is clear that it will not be positive, the assessment will not continue for the full length. Damage to* [L] *and cost to the LA will be less if I have been unduly optimistic. Aim to persuade Symbol to admit on 29.03.21 to give LA time to decide whether to appeal. CG wants a formal LOI and a professionals meeting prior to the end of assessment so there is good planning for the family."*

The judge was asked to provide further clarification of his judgment that included consideration of the factors set out in s 36(7B). His responses as are within the bundle and should be read as part of the above quoted note of the oral judgment (collectively the "judgment").

19. Subsequently the judge was asked for permission to appeal against his decisions. He refused to grant such permission but granted a short stay pending my initial consideration of the application. I extended the period of stay pending the determination of the application for permission to appeal. I have heard submissions on both the application for permission to appeal and the appeal should permission be granted.

Analysis

20. The grounds of appeal fall into two broad categories;

    a. Jurisdiction of the judge to direct an assessment by Symbol pursuant to s38(6), and

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b. Necessity and consideration of ss 38(7A) and (7B), that include failing to consider other alternative assessment to a residential assessment.

Accordingly, I will consider the grounds of appeal under these two broad headings.

Jurisdiction:

21. In the initial report dated 8 March 2021, Symbol provide the parameters and purpose of its proposed assessment in the following terms;

> *"8.5.1 Symbol would be able to provide* [L] *and her parents with a robust parenting assessment which accommodated the adults' individual learning styles. This would be informed by the psychological assessments already undertaken and benefit the input of our in-house clinical psychologists and speech and language therapists.*
>
> *8.5.2 The 24 nature of support and assessment available within a Symbol residential assessment would allow observation of the couple's relationship and its impact on* [the father's and the mother's] *parenting.*
>
> *8.5.3 The assessment would explore the couple's current function and their responses to appropriate and consistent intervention.*
>
> *8.6.12* [The mother and the father], *to date, have not lived together or had the independent joint care of* [L]. *This is significant and would be considered within any further assessment.*
>
> *8.10.2 It is Symbol's opinion that a residential parenting assessment is likely to produce the most robust evidence on which to make decisions regarding* [L's] *future in the shortest possible timescales.*

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8.10.3 The 'standard' length of a Symbol assessment is 6 weeks, with any recommendation for an extension being made at the earliest possible time. However, should the child be seen to be negatively impacted by the assessment process we would seek to end the assessment earlier.

8.12.1 It is Symbol's opinion that [the mother and father], *together or separately, have not had access to a full and fair assessment of their capacity to parent* [L].

8.13.1 Whilst there are a number of factors which mitigate against [the mother and the father] *being able to safeguard and care adequately for* [L] *in the long term it is Symbol's opinion that this has not been robustly assessed and that these parents require an opportunity for such an assessment, tailored to their individual communication and learning styles in order for this question to be responded to.*

9.7 There are a number of factors, in addition to their learning needs, likely to impact on the potential of [the mother and the father] *to provide an adequate level of parenting to* [L]. *These factors include their histories of social service involvement with their previous children, the parents' histories of involvement in criminal activity, allegations of physical assault against his own children made against* [the father], *the parents' mental health and the parents not having lived together to date. These areas would all be explored within a full Symbol parenting assessment.*

9.10 Symbol would be able to provide [L] *and her parents with a robust parenting assessment which accommodated the adults' individual learning styles. This would be informed by the psychological assessments already undertaken and benefit the input of our in-house clinical psychologists and speech and language therapists.*

9.11 The assessment would explore the couple's current function and their responses to appropriate and consistent intervention.

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> *9.12 Given that* [L] *is currently placed in foster care and that the parents have not previously lived together Symbol would recommend that the parents undertake 2 weeks of assessment whilst* [L] *remains in her current placement. During this time the assessment would focus on the parents' relationship and their insight into, and responsibility for, the Local Authority's concerns. Subject to positive indicators during this period of assessment* [L] *would join her parents at the assessment centre for the remainder of the assessment.*
>
> *9.22 At the outset of the assessment,* [the mother and the father] *would receive one to one support and supervision of their care of* [L]. *This high level of direct supervision of care will only be reduced when it is assessed as being safe to do so and will be done so in a gradual manner. In line with Symbol's policy the baby will need to sleep separate to the parents in the supervised nursery (for all day and night sleeps) at the outset of the assessment and will only be moved into the parents' bedroom once this is considered a safe and appropriate step and with agreement of the baby's social worker. It is helpful if parents are made aware of this information prior to commencing their placement at Symbol to aid the transition."*

This was supplemented by an addendum report in which Symbol further state;

> *"1.4 Following receipt of this latest document Symbol does not wish to change the recommendation made in our report, dated, 8th March 2021; whilst we acknowledge that previous assessments have been undertaken in respect of these parents any full assessment undertaken by Symbol would be undertaken through different methodology, rather than focusing on different areas. Specifically, a full Symbol parenting assessment would:*
> *• Be undertaken residentially, enabling*
> *o The parents' relationship to be observed 24/7*
> *o The parents' focus on* [L] *to be observed 24/7 (with both parents present).*
> *o The provision of very consistent support and intervention*

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> *• Be undertaken by staff with extensive experience in working with parents with ASD, including in supporting parents who have, as part of this condition, difficulties in demonstrating emotional connection with, and empathy for, their child.*
> *• Provide an opportunity to build trusting relationships between staff and the parents which would facilitate the parents in accepting feedback which appears difficult for them, at least partially, as a result of low self esteem.*
>
> *1.5 We have addressed our concerns and reservations regarding any necessary delay and disruption for* [L] *by proposing that she does not leave her current placement and join her parents residentially unless there are positive indicators from the first two week period of the assessment."*

22. The appellant's challenge to the judge's decision under this heading rests upon two fundamental pillars. Firstly, that the judge failed to consider this point at all and secondly that the remit of the proposed assessment does not fall within the scope of s38(6), particularly the first two weeks of an assessment that is undertaken in the absence of the child. There can be no doubt that the issue of jurisdiction was raised by the appellant in its position statement for the hearing which addresses this issue as follows;

> *"It is therefore accepted that while the main focus must be on the child, an application of this nature can include an assessment of the parent. Here, however, the mother's application does not disclose why an assessment of the child is needed at all; it is instead couched in language of determining if "the parents' individual learning needs have been taken into account when assessing their ability to parent* [L] *in the long term". This, it is respectfully submitted, is not what s38(6) is intended to address."*

23. However, the agreed notes of the hearing reveal that during the hearing this point was not pursued before the judge. It is also clear that despite the parties properly taking the opportunity to seek further clarifications from the judge, this point was not raised as a point upon

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which clarification was sought. In *Jones v MBNA International Bank Ltd [2000] EWCA Civ 314* the Court of Appeal observed that:

> *"a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are".*

24. Case management decisions such as this are often made in challenging circumstances, where the court is faced with strong competing arguments against the pressures of time and a busy list. In my judgment, the court is entitled to expect the parties to pursue their arguments with zeal and vigour. An argument that is not pursued by a party and not responded to by other parties may be treated as an argument that is abandoned. Where the argument challenges the very foundation of an application, it must be given prominence in the arguments before the court. Perhaps this point is best illustrated by the proper focus that this argument has been given in this appeal. The court may from time to time make its own enquiries about relevant arguments and these are often canvassed during exchanges with the advocates. The judge was not given such an opportunity and this must be considered against a background where only a few weeks earlier, the appellant was actively pursuing Symbol as one of the possible suitable placements for the family.

25. The dissection of an assessment process into its constituent parts, can reveal intricate and complex processes that inform the overall assessment. At times, the component parts may stand on their own and appear quite separate to the assessment as a whole. In other instances, those parts may be obviously integrated with the other parts that make up the overall assessment. In some circumstances, such a separation of parts may serve a particular purpose. However,

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at times, such an exercise can detract from the real propose of an assessment and lead to misplaced criticism of an assessment.

26. In *Re C* and *Re G* (above) the court clearly distinguished between what may be properly identified as an assessment the focus of which is the subject child from the parts that were not focussed on the child, such as the provision of therapy to the parents. In this instance, the height of the appellant's argument relates to the first two weeks of the assessment during which L will not be present. This part of the assessment must be considered as part of the whole proposed assessment that is detailed by Symbol in its two reports. Whilst the assessment as a whole will see a level of support being provided to the parents, in my judgment these do not fall within a category of services or intervention that are an *"end to themselves"* and are clearly *"ancillary"* to an assessment of L under s38(6) of the Act. The Symbol reports make it clear that L is the focus of the assessment and the initial phase is an integral part of the assessment that ensures L's safety during the assessment process and provide the required information for safely moving the assessment to its next phase. In my judgment the arguments that the proposed assessment falls outside of the provisions of s38(6) of the Act and the court has no jurisdiction to order such an assessment under this provision are without merit.

Necessity

27. In February 2021 the court sanctioned L's separation from her parents on a temporary basis pending searches for suitable alternative placements that could accommodate the family. At that stage, separation was the only option available to the court as there were no other available alternative placement. Earlier care plans for separation of L from her mother were not approved by the court and the case had proceeded on the basis that L will remain in the care of her mother pending further assessments. The parties had properly proceeded on this basis until receiving the addendum report of the parenting assessor.

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28. There is no question that the parenting assessment and the psychological assessment that were mainly initiated in 'pre-proceedings' stand as evidence within these proceedings. Furthermore, there is no doubt that Symbol is recognised as one of the specialist assessment centres that provide a robust and in-depth assessment which takes account of the parents' individual additional needs. In its reports, Symbol identified a number of deficits in the existing parenting assessments. This was clearly of particular concern for the judge who was faced with a stark choice, namely to proceed to an IRH and an inevitable contested final hearing with a plan that L is placed for adoption or to proceed with yet a further assessment with a consequential delay. Thus, bringing into sharp focus the issue of necessity.

29. In the agreed note of his judgment, the judge clearly invited submissions on the factors that are set out in s38(7B). He addressed some of the factors in his oral judgment and subsequently in his note in response to request for clarification. In that note he continued by addressing each of the relevant subheadings. I will not repeat the detail of that note, save for recording that on the issue of necessity the judge stated as follows;

> *"10 The only matter which I considered and which might be said to fall under factor (g) was whether the assessment was necessary. In my view, it was, as it would be central to the key decision which the court will eventually have to make."*

Having earlier observed,

> *"6 … I consider that the assessment would enable the court to answer, or at least significantly assist the court in answering the fundamental question which it is likely to face at the final hearing; essentially, whether "nothing else will do" save for the permanent removal; of* [L] *from her birth family."*

30. The provisions of S38(7A) and (7B) specifically refer to *"directions"* under Subsection (6). These sections must be read together as the subsection (7A) sets out the fundamental test that must be considered

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in light of the statutory checklist in subsection (7B). Whilst it is possible but wrong to address the criteria without making a determination on the fundamental test, this is not a criticism that can be made against the judge's decision. The (7A) test was clearly at the forefront of his considerations even though it is not explicitly stated to be so. He clearly expressed the difficulty in reaching his decision by identifying the issue that the court will be asked to address at the final hearing.

31. The judgment, clearly illustrates that the judge addressed all relevant parts of the checklist. I note in some respects these may be brief, but brevity does not equate to a lack of balance or consideration. The circumstances of each case may dictate or afford the opportunity for lengthy considerations by the court. The appellate court must be sensitive to the challenges that first instances judges face when considering these very difficult issues (see *F-T (A Child) [2015] EWCA Civ 880*). The judge in this case had the advantage of a detailed knowledge of the case having heard no less than three 'removal hearings'. He was acutely aware of the issues in the case and the arguments on those issues. Furthermore, the judge properly made a clear distinction between agreed facts and those that are yet to be determined. It is also clear that this was a difficult decision for the judge and he thought carefully about the competing arguments and the relevant criteria before coming to his decision *"by a narrow margin"*.

32. When addressing the issues in the case, the judge clearly has at the forefront of his considerations the impact on L and the related issues of delay. I do not find the appellant's arguments in this regard sustainable. The judge detailed his consideration in paragraph four of his note. These concerns were also the subject of submissions by the parties and it would be wrong to assume that the judge had proceeded in ignorance or with a lack of regard to the impact on L. Indeed, he undertook a balancing exercise of this against the long-term placement options that would be advocated to the court should the Symbol assessment not go ahead.

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33. At the hearing, the judge was tasked with considering the mother's application for a residential assessment that was informed by two reports from the proposed residential unit. The appellant and the guardian opposed this application by relying on a recent addendum parenting assessment and the wealth of information that was already available to the court. Indeed, one of the primary arguments in opposition to the proposed application was the absence of a need for any further assessments. Understandably, at no point, did any party raise or canvass the possibility of a community based assessment. To do so, would undermine the arguments for and against the proposed assessment. Whilst in some circumstances judges raise their own queries about alternative assessments, in this context the judge was entirely correct not to do so. The evidence before him made it clear that an alternative assessment was not likely to address the disputed deficit in the existing evidence and would add little to the evidence that was already available to the court.

Conclusion

34. By reasons of the aforesaid, I do not find the appellate has demonstrated that it has an arguable case or a real prospect of success on appeal and I must refuse its application for permission to appeal on all six grounds of appeal. These applications, especially when made in the latter stages of proceedings, are often made in challenging circumstances with strong competing arguments. Family judges are often challenged by the pressures of their list and time to provide detailed judgments as recognised by the authorities that I have referred to above. In this case, the judge was in my view correct to direct an assessment pursuant to s38(6) of the Act and the overall decision is not open to challenge.

35. I commend the local authority for taking a proactive role, as it must, in pre-proceedings. I recognise that the local authority has identified the needs of the parents and has sought to support and assess the parents in parenting L. The adequacies of the local authority's approach are yet to be determined and may be the subject of further consideration by the court. As local authorities begin to implement the Best Practice Guides of the President of the Family Division's

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Public Law Working Group, we should observe a greater focus on the multidisciplinary approach to families that will see many families diverted away from court proceedings. Furthermore, those cases that are the subject of proceedings, should begin proceedings with a robust, fresh and reliable assessment that negate the need for further assessments within proceedings.

36. May I finally take this opportunity to thank counsel for their tremendous hard work and industry. This appeal has been heard on an urgent basis and despite the incredible time pressures, I have been greatly assisted with written documents of the highest standard that have been supplemented by the most impressive oral submissions.
