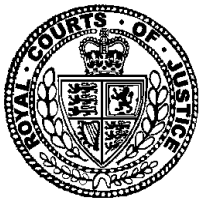

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Neutral Citation Number: [2021] EWHC 2813 (Fam)

Case No: LN21C00105

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2021

Before :

MRS JUSTICE LIEVEN

- -

Between :

LINCOLNSHIRE COUNTY COUNCIL

Applicant

and

CB

First Respondent

and

DE

Second Respondent

and

A, B & C
(Children, by their Guardian)

Third Respondents

and

FG

Fourth Respondent

- -
- -

Ms Judy Claxton (instructed by **Lincolnshire County Council**) for the **Applicant**
Ms Margot Elliott (instructed by **Pepperells**) for the **First Respondent**
Ms Alison Hunt (instructed by **Bridge McFarland**) for the **Second Respondent**

Ms Vickie Hodges (instructed by **Tallents Solicitors**) for the **Third Respondents**
Mr Anthony Parrish (of **Jones Myers Solicitors**) for the **Fourth Respondent**

Hearing dates: **4 October 2021**

- -

Approved Judgment

.....

MRS JUSTICE LIEVEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment 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.

Mrs Justice Lieven DBE :

1. This judgment concerns a case management decision in care proceedings brought by Lincolnshire County Council ('the LA'). The proceedings relate to three children, A (a girl aged 10 and a half); B (a boy aged five and a half) and C (a boy aged 3). I am issuing a reasoned judgment and having it put on Bailli as an analysis of the factors that play into a case management decision at the current time.

2. The Mother is CB and was represented before me by Ms Elliott. The Father of A and C is DE and was represented by Ms Hunt. The Father of B is FG, who does not have parental responsibility for B, but whose role has been confirmed by DNA testing, and he is represented by Mr Parrish. The LA was represented by Ms Claxton.

3. The Mother and DE were the parents of XE, who died on 22 January 2021. XE was 11 years old when he died. On 26 January the Mother gave consent for the children to be accommodated under s.20 with their Grandmother in Wales. The LA applied for care orders in respect of the children on 3 February 2021 and an Interim Care Order was made on 18 February 2021. There have been a number of hearings in this matter, partly in respect of case management issues including disclosure; two in respect of arrangements concerning XE's funeral and two principally concerned with where the children would live during proceedings and contact arrangements.

4. The LA's threshold findings go well beyond the particular facts of XE's death and extend to drug use by the parents, emotional harm and failing to meet the children's needs.

5. The main issue before the Court today was whether I should list this matter for a 5 day composite final hearing covering whatever fact finding was needed and welfare issues as the LA and the Children's Guardian suggested; or whether I list it for a 20 day fact finding hearing, albeit with the possibility that that time estimate might well reduce closer to the hearing.

The background

6. XE had cerebral palsy, could not walk, move, hold his body weight and was non-verbal. The family has a long history of social services involvement from 2011-18. Concerns have centred on physical harm, lack of supervision, domestic abuse, and neglect.

7. The Mother and DE did not live together, but DE regularly came around to help with the children. At about 10pm on 22 January 2021 A was heard screaming outside the Mother's house, saying "my Dad's killed my brother". An ambulance was called and by the time the police and ambulance service arrived, XE was lying on the floor of the hallway with blood and water coming from his mouth. His hair was damp and his skin wrinkled.

8. There is no dispute that XE died from drowning in the bath. He was pronounced dead when he arrived at hospital. DE was arrested for murder. He gave a no comment interview but has given a detailed statement in these proceedings. He says that he put XE in the bath at 7.30pm to clean him because he had soiled himself. DE says that he turned the taps off and then went into the kitchen and told the Mother that XE was in the bath. DE then went out to deliver some "cookies" for the Mother.

9. The Mother says DE told her that he had put XE in bed. She denies that she turned on the taps in the bath. The Mother was arrested for manslaughter. Both parents were arrested for the supply of Class B drugs (cannabis). A was in and out of the house during the course of the evening, playing with friends, but witnessed the life saving efforts. She has told the police that she would regularly be responsible for supervising XE in the bath, including checking the water levels and turning the taps off.

10. It is apparent from this account that there are only two areas of factual dispute between the parents: what precisely DE said to the Mother in the kitchen before he went out, and who left the taps on. The police have now decided not to charge either parent with murder or manslaughter, but a decision has not yet been made as to whether they will be charged with drug related offences.

11. The children were originally placed with the Maternal Grandmother and her family in Wales. However, that placement broke down and the children were moved to live with foster carers in Rotherham. The children are doing reasonably well in that placement. Both older children are receiving support from a school-based counsellor.

12. The children have been assessed by Dr Carcani-Rathwell, a consultant child psychiatrist. She has referred to the chronic deficits in the children's parenting and the profound emotional harm they have suffered. She also refers to the children's need for consistent high quality care given their experiences both before and after XE's death.

13. Dr Carcani-Rathwell refers to A being very emotionally vulnerable with a high risk of developing anxiety and mood or PTS disorders. A needs complex bereavement support and trauma work. She is clear that this work cannot be commenced until the children are in a long-term placement so that the carers can support the children in this work.

14. The parents argue that it is necessary for the Court to determine the precise events of the evening of XE's death and the Court should therefore order a 20 day fact finding hearing with some 20 police witnesses and 9 additional witnesses. The parents' counsel accepted that none of these witnesses could give direct evidence as to what happened to XE but argued that they could give evidence as to what the parents said in the immediate aftermath of the incident and of the parents' demeanour. Ms Elliott also argued that one of the teachers should be called to give evidence about the Mother's care of the children.

15. The parents accept that the list may be reduced closer to the hearing, but at this stage submit that the hearing should be listed for 20 days. They also submit that the LA's time estimate of 5 days is too short.

16. The LA and the Guardian submit that the primary consideration for the Court should be the children's welfare and a separate and lengthy fact finding hearing will very much delay a long term placement for the children, and therefore the necessary therapeutic input for the children. They also submit that it is unnecessary and disproportionate to hold a separate fact finding hearing and the Court should order a composite fact finding and welfare hearing. They further submit that it is unnecessary to call any witnesses as to the facts of XE's death other than the Mother and the Father.

The Law

17. This is a case management decision and as such the Court has a broad discretion. The starting point is FPR rule 1.1:

> *"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."*

18. In the recent decision of the Court of Appeal in respect of case management, *Re H-D-H (Children)* [2021] 4 WLR 106 the Court confirmed the continued applicability of the principles set out by Mr Justice McFarlane (as he then was) in *A County Council v DP* [2005] 2 FLR 1031, in particular at [24]-[25]:

> *"24. The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:*
>
> *a) The interests of the child (which are relevant but not paramount);*
>
> *b) The time that the investigation will take;*
>
> *c) The likely cost to 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 fact finding process upon the other parties;*
>
> *h) The prospects of a fair trial on the issue;*
>
> *i) The justice of the case.*
>
> *25. I am well familiar with the concept of 'necessity', arising as it does from ECHR Art 8 and, indeed, from the pre Human Rights Act 1998 case law to which I have been referred. It is rightly at the core of Mr Tolson's submissions in this case and, without overtly labouring the issue by including substantial descriptive text in this judgment, it is at the forefront of my consideration of the point. Amongst the pertinent questions are: Is*

> *there a pressing need for such a hearing? Is the proposed fact finding hearing solely, as Mr Tolson puts it, 'to seek findings against the father on criminal matters for their own sake?' Is the process, which will be costly and time consuming, with potentially serious consequences for the father if it goes against him, proportionate to any identified need?"*

19. The Court of Appeal then set out at [22] its own summary of those factors, and how they might interplay in particular cases:

> *"22. The factors identified in DP should therefore be approached flexibly in the light of the overriding objective in order to do justice efficiently in the individual case. For example:*
>
> *(i) When considering the welfare of the child, the significance to the individual child of knowing the truth can be considered, as can the effect on the child's welfare of an allegation being investigated or not.*
>
> *(ii) The likely cost to public funds can extend to the expenditure of court resources and their diversion from other cases.*
>
> *(iii) The time that the investigation will take allows the court to take account of the nature of the evidence. For example, an incident that has been recorded electronically may be swifter to prove than one that relies on contested witness evidence of circumstantial argument.*
>
> *(iv) The evidential result may relate not only to the case before the court but also to other existing or likely future cases in which a finding one way or the other is likely to be of importance. The public interest in the identification of perpetrators of child abuse can also be considered.*
>
> *(v) The relevance of the potential result of the investigation to the future care plans for the child should be in the light of the s.31(3B) obligation on the court to consider the impact of harm on the child and the way in which his or her resulting needs are to be met.*
>
> *(vi) The impact of any fact finding process upon the other parties can also take account of the opportunity costs for the local authority, even if it is the party seeking the investigation, in terms of resources and professional time that might be devoted to other children.*
>
> *(vii) The prospects of a fair trial may also encompass the advantages of a trial now over a trial at a possibly distance and unpredictable future date.*
>
> *(viii) The justice of the case gives the court the opportunity to stand back and ensure that all matters relevant to the overriding objective have been taken into account. One such matter is whether the contested allegation may be investigated within criminal proceedings. Another is the extent of any gulf between the factual basis for the court's decision with or without a fact finding hearing. The level of seriousness of the disputed allegation may inform this assessment. As I have said, the court must ask itself whether its process will do justice to the reality of the case.*

> *23. These are not always easy decisions and the factors typically do not all point the same way: most decisions will have their downsides. However, the court should be able to make its ruling quite concisely by referring to the main factors that bear on the individual case, and identifying where the balance falls and why. The reasoned case management choice of a judge who approaches the law correctly and takes all relevant factors into account will be upheld on appeal unless it has been shown that something has gone badly wrong with the balancing exercise."*

Conclusions

20. The Court's consideration starts with the welfare of the children, but this is not paramount, see ***DP*** at [24]. The inevitable consequence of ordering a lengthy fact finding hearing is that there will be considerable delay in the case and that will be severely to the detriment of the children. I accept Ms Hunt's submission that in very many public law family cases there will be an adverse impact on the children from delay, and that factor alone cannot lead to refusing a fact finding hearing. However, the importance of achieving an appropriately speedy outcome for the children remains an important consideration and that factor here is particularly weighty.

21. It is not merely that delay will mean longer without a permanent and stable placement, but also that the children, and especially A and B, will have to wait longer for the counselling to deal with the extreme trauma they have been through. This counselling cannot meaningfully commence until they are in a long term placement, whether with the Mother or elsewhere. I therefore consider that the delay to the children is a very weighty factor in this case.

22. It is apparent from ***Re H-D-H*** that the impact on court resources and on other cases is a relevant consideration when making a case management decision such as this, see [22]. The true question is whether the fact finding is truly "necessary" for the ultimate welfare decision that the Court has to make. If it is not necessary for that decision, then a fact finding hearing should not be undertaken. As the President of the Family Division set out in *The Road Ahead* (both 2020 and Addendum in 2021), in current circumstances the Family Courts do not have the resources to undertake hearings which do not meet the test of strict necessity. It is therefore essential that this test is properly applied, with appropriate scrutiny by the Court, even if the parties themselves do not argue against a fact finding hearing. The Court must be careful to ensure that there is a proportionate and effective use of court time. It is well known that the family justice system has come under very severe pressure during the Covid pandemic. Delays in the hearing of cases have become very much more lengthy and only through more rigorous case management will the delays be materially reduced.

23. The outcome in the present case is in my view clear cut. The factual dispute between the parents in relation to XE's death is a very narrow one, namely what DE said in the kitchen to the Mother and who left the taps on. Only the parents were witnesses to these two events, save possibly for A, and none of the other witnesses who the parents seek to call can give direct evidence on the matters in dispute. There is body worn camera footage and recordings of the 999 calls so the Judge will have the direct, and thus best, evidence of the Mother and DE's immediate responses at the time of the incident.

24. In any event, the demeanour of the parents, including what they said immediately after XE's death, as seen by the other witnesses, carries relatively little forensic weight. It is well known that people react in very different ways to tragic events, and whether the Mother seemed extremely distressed or relatively unconcerned will be of little assistance to a judge seeking either to determine precisely what happened to XE or the quality of the Mother's wider parenting of the children.

25. The evidence of the 20 or so other witnesses, whether police, ambulance service staff, or clinicians is therefore not necessary for the determination of facts by the Judge.

26. In respect to whether the Court orders a separate fact finding, such hearings will relatively rarely be necessary or proportionate. They necessarily build in a great deal of delay in the system and lead to a significant degree of frequently wasted resources. In a case such as this where the threshold findings sought go well beyond the area of factual dispute between the parents over what happened on the night of XE's death, I consider it unnecessary to have a separate fact finding hearing. The LA will have to consider alternative scenarios and prepare its evidence on that basis. That may involve a more complicated situation than if there was a separate fact finding hearing, but it will save a large amount of delay and duplication of effort.

27. I also do not consider that the case warrants a listing of more than 5 days. Again, I refer to the President's Guidance in *The Road Ahead*. It is essential that the Family Court uses the time available more effectively, and individual hearings take less time. In practice this means more focused cross examination, less repetition and careful scrutiny of witness templates in advance of hearings. This will put more pressure on advocates, and the Court, but that is the only way to achieve the President's intention of individual cases taking less time. If that is done in the present case, I see no reason why the hearing cannot be completed in 5 days.