Case No: ME19C0119

Neutral Citation Number: **[2022] EWHC 2793 (Fam)**

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL
Date:06/05/2022

Before:

MR JUSTICE WILLIAMS

- -

Between:

A LOCAL AUTHORITY	**Applicant**
- and -	
(1) Mother	**Respondents**
(2) Father	
(3) A	
(BY HIS CHILDREN'S GUARDIAN)	
(4) B	
(BY HER CHILDREN'S GUARDIAN)	
(5) C	
(BY HIS CHILDREN'S GUARDIAN)	
(6) D	
(BY HER CHILDREN'S GUARDIAN)	

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Richard Anelay QC and Andrea Watts (instructed by **Local Authority Solicitor**) for the **Applicant**
Frank Feehan QC and Stephen Chippeck (instructed by **Patrick Lawrence Partnership**) for the **First Respondent**
Professor Jo Delahunty QC and Dorothea Gartland (instructed by Boys & Maughan) for the Second Respondent
Penny Howe QC and Corinne Iten (instructed by Fraser Hollands Solicitors) for the Third to Sixth Respondents

Hearing dates: 3 – 4 May 2022

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JUDGMENT

Approved Judgment

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.

....

This judgment was delivered in private. The judge has not given leave for this version of the judgment to be published (irrespective of what is contained in the judgment) or 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.

....

Mr Justice Williams:

1. This application asks the Court to re-open a fact-finding judgment made by HHJ Backhouse on 14 December 2018. This judgment considers Stage 1 of the three-stage test identified by the Court of Appeal in ***Re E (Children: Reopening Findings of Fact)*** [2019] EWCA Civ 1447, namely whether the Court will permit any reconsideration of the earlier findings.

Background

2. On 14 December 2018 HHJ Backhouse gave judgment on the local authority's application for a care order in respect of three children: A, a boy then aged 2 years 9 months; B, a girl then aged 23 months; and C, a boy then aged 11 months. The local authority issued proceedings on 3 May 2018 after C was found to have suffered subdural and retinal haemorrhages ("SDH/RH") which were considered to be likely inflicted injuries. The judgment was given at the conclusion of a nine-day fact finding hearing at which the principal findings sought included:

    i) One of the parents caused the injuries by shaking him with excessive force;

    ii) Failure to seek timely medical attention;

    iii) Inadequate feeding of C, leading to faltering growth;

    iv) Neglect; and

    v) Substance abuse (cannabis and cocaine) on the part of the father.

3. The parents denied the main allegations, although the father admitted to cannabis misuse.

4. HHJ Backhouse found that the injuries to C were inflicted injuries but could not determine which of the parents had inflicted them (the pool of perpetrator finding). She rejected the parents' case that the injuries had been inadvertently caused by bumping C down the stairs of their flat in a buggy or by a toy being thrown by another child. She was unable to determine who had caused the injuries and so both parents were in the pool of possible perpetrators. She did not conclude that either knew what the other had done and was covering up.

5. As a consequence of the findings, care and placement orders were made in respect of the three children. A and B have been placed with prospective adopters since 5 September 2019. C was placed with his prospective adopters in the summer of 2019 following the fact-finding judgment. The care proceedings concerning the older three children concluded with care and placement orders made by HHJ Backhouse on 12 June 2019. The parents had a further child, D in late 2019. Following her birth, she was placed in a foster to adopt placement. Care proceedings in relation to D commenced that day. All the children are, according to the Guardian, doing well in their placements.

6. An application to re-open the fact-finding judgment of HHJ Backhouse dated 14 December 2018 was first made by the mother on 13 October 2020 [B97-108]. That application was dismissed by HHJ Cove on 3 November 2020 [B140/§5], on the basis

that neither the report of Dr Mann nor the Communicourt assessment undertaken at court on 16 November 2018 had recommended that an intermediary was required.

7. Although no fresh application was made, in a skeleton argument submitted in the proceedings relating to D on 17 June 2021 the mother argued that she should be allowed to challenge the findings made by HHJ Backhouse in the context of the final hearing in respect of D. On 28 June 2021, HHJ Cove adjourned the final hearing to allow the parties to obtain transcripts of the evidence given at the hearing before HHJ Backhouse and she consolidated the application for a care order in respect of D with the adoption applications concerning the three older children.

8. For reasons which I shall not go into it has taken nearly 10 months to reach the point of a hearing of the application. Self-evidently during this period, all involved have been treading water, and neither the adoption applications in respect of the older children or the care proceedings in respect of D have been able to progress to a conclusion. Although no formal application has been issued by the mother nor by the father, the proceedings have been timetabled on the basis that there are live applications by both to set aside the findings.

Summary of Conclusions

9. Ultimately, I have concluded that the mother and father's application to relitigate the finding of fact in relation to C's SDH/RH within the proceedings relating to D should be allowed. In the event of a change in the outcome, whether that is in relation to the causation of the SDH/RH or, if inflicted, the identity of the perpetrator, that will be relevant to whether the threshold has been reached and the outcome in relation to D, and would also amount to a change of circumstances in relation to the parents' application for leave to oppose the adoption of the older children.

10. Although I have only granted the mother and father's 'application' in relation to the 'fair hearing' issues raised, the effect of that, it seems to me, is to require a rehearing of the case in relation to both parents and causation.

11. My decision in relation to each of the parents 'applications' and my brief reasons are as follows:

    i) The mother's application based on the absence of an intermediary at the fact-finding and non-compliance with the Ground Rules at the fact-finding hearing is dismissed in so far as it relates to the intermediary element, but is allowed in respect of the non-compliance with the Ground Rules. In respect of the intermediary, HHJ Cove dismissed each of the parents' applications on 3 November 2020 when it was apparently contended that the report of Sarah Smith of Communicourt justified the reopening of the fact-finding. That was not appealed, and I do not consider it proper to re-take that decision. However, the transcripts of the expert and the mother's evidence have subsequently become available, and they establish that there was significant non-compliance with the Ground Rules, particularly around breaks during the expert evidence and the mother's evidence, such that I consider that their contents and the arguments based around what the transcript demonstrates justifies the conclusion that the hearing was not overall a fair one.

ii) The mother's application based on the argument that there was inadequate consideration of the medical evidence, that the expert evidence that bumping down the stairs was a near impossible explanation for the SDH/RH was unjustified, given expert evidence given in the ***R v Henderson*** appeals and in ***Sutton v Gray and Others (No 1)***. The possibility that the SDH/RH might be a result of rebleeding of earlier birth-related SDH/RH is dismissed. I do not consider that either the material which derives from Dr Anslow's opinions or the submissions of counsel on medical matters (including relating to birth-related injuries and the possibilities of re-bleeds) as to the potential relevance of alternative explanations either amount to fresh evidence or that, if they could be so regarded, they provide solid grounds for believing that the conclusion that the SDH/RH was an inflicted injury requires revisiting.

iii) The father's application to reopen the findings based on the criticisms of the medical evidence, as outlined above, is dismissed for the same reasons.

iv) The father's application to reopen the findings based on the failure to fully implement the Ground Rules identified on the basis of the evidence as to vulnerability, then before the court and based on the fresh evidence of Dr Radcliffe and Lucy Turner, is allowed. The transcript of the evidence shows the Ground Rules relating to breaks were not sufficiently implemented. Other issues relating to the hearing of the parents' evidence including their not being present for each other's evidence, the absence of consideration of the impact of the father's cognitive difficulties on his credibility in the judgment and the significant impact that the judge's evaluation of his credibility had on the decision support both the occurrence of a procedural irregularity and an arguably material impact on the fairness of the process. The expert report of Dr Radcliffe and intermediary report of Lucy Turner (not of Communicourt) amount to fresh evidence which was not available, is credible and which, if it had been available to HHJ Backhouse would have been likely to have had an important influence on the conduct of the hearing. Had it been available it is likely that the father (and the mother) would have had the assistance of an intermediary. What the ultimate impact of that would have been is indeterminable and for the purposes of an application to reopen based on fairness of process grounds it is not a requirement to demonstrate solid grounds for believing that the outcome will be different. As it happens it is clear from the judgment that HHJ Backhouse considered that the quality of the father's evidence was poor and had deteriorated over the course of the hearing; whether that was because of an absence of credibility of his evidence *per se*, or whether it was as a result of his vulnerability and the ineffectiveness or absence of appropriate Ground Rules is not determinable now. The mother and father's credibility will fall for consideration in a re-hearing at which their participation will be supported by an intermediary and (I hope and expect) the implementation of appropriate participation directions.

12. The precise nature of the rehearing and the extent to which the medical evidence itself is relitigated is not determined in this judgment as I do not consider it to be properly determinable given the absence of any information as to whether the experts are all still available to give evidence as experts and the timescales for them if they are. I refuse the mother's application for the instruction of fresh experts as I do not consider it

necessary to enable me to determine these proceedings justly. To the extent that medical evidence is relitigated, it will be done on the basis of the current expert evidence, either based on the transcripts and existing reports or supplemented by oral evidence if that is possible and proportionate in terms of the timeframes.

13. Although I have set out my reasoning more fully later in this judgment, I have not been able to consider it in greater depth or at greater length or to explore broader issues relating to the circumstances in which applications to reopen findings of fact might arise because the time estimate of two days was almost entirely consumed with reading and hearing submissions. For reasons that I have not been able to examine, the time estimate which the application was given when it was listed previously was reduced from three days to two days and thus this judgment has felt the squeeze which that resulted in. However, having had the benefit of extensive oral submissions, extensive reading and subsequently a fair amount of thinking time I am satisfied that the conclusions I have reached are the proper ones but it has not been possible due to the constraints of time to explain in writing in glorious technicolour all of the arguments laid before me, all of the jurisprudence which bears on the application and the full process of reasoning by which I have come to accept or reject the parties respective arguments. I have considered reserving my judgment for a lengthier period of time in order to provide a more detailed judgment, but in reality, given the other commitments I have this term it would not be possible to undertake that process before the Whitsun vacation and I do not consider that the further delay that would result in to be justified given the length of time these children, the parties and others affected (including the proposed adopters) have already been waiting for progress on this front.

14. A further directions hearing at which we will consider Stage 2 and 3 will be required.

The Parties' Positions

15. I have had the benefit of detailed Skeleton Arguments and Position Statements on behalf of the parties, all of whom were represented by advocates who did not appear at the hearing before HHJ Backhouse. I have also had the benefit of hearing concise submissions on behalf of them during the course of the hearing. The following I hope captures the essential points made in support of their respective positions. Both the parents and indeed the Guardian emphasise the very serious consequences of the adverse finding in terms of the impact upon the family, including the separation of the sibling group and the more than lifelong consequences for the siblings and their descendants of a decision to adopt.

16. The Mother

Expert evidence

i) The mother has always denied the shaking allegation and there were no other findings of culpable ill-treatment or neglect, and so the pool of perpetrator finding is of a vanishing rarity.

ii) The consequences of the finding are the adoption of the children. Setting aside the initial finding would clearly result in a change of circumstances in relation to D. Whilst a pool of perpetrator finding does not establish threshold on its own it is a relevant factor.

iii) A pool of perpetrator finding in family proceedings can be disproved in later proceedings if the court permits the issue to be re-litigated as there is no *res judicata* but the approach has been identified as being justified where there is good reason to think that the findings require revisiting. The category of cases where re-opening an issue may be allowed is not closed. Although the cases on the subject tend to focus on fresh evidence in the sense of new expert or factual evidence this should not always be required. It is open to the court to permit the re-opening where other circumstances, including poor legal representation or the failure to explore issues properly calls the reliability of the finding or the fairness of the process into question. The court should not be deterred by a 'flood gates' argument; if cases occur where the circumstances (broadly construed) justify re-litigating an issue, the fact that publication of that fact may lead to other applications to re-open should be regarded as a positive.

iv) The medical evidence was that C sustained bilateral sub-acute/chronic subdural haematomas with hyperdensity within the left subdural. These were said to be consistent with more acute bleeding. There was said to be a widening of the cerebral sutures in the anterior fontanelle. The judge concluded that these injuries were not consistent with a low-level domestic accident.

v) Mother's evidence was that she had to bump C down four flights of steps in the buggy every time she took him out of her flat. Prof Stivaros (consultant neuroradiologist) concluded such a mechanism could not cause the necessary acceleration/deceleration mechanism and that nowhere in the world literature had this type of injury been recorded from this mechanism. He said the suggested explanation is so unlikely as to be close to impossible

vi) In ***R v Henderson*** [2010] EWCA Crim 1269, Moses LJ at §100 said that Dr Anslow's expert opinion in relation to the causation of injuries similar to C's was that the possibility of a bumpy buggy ride "might indeed account for what happened". In the later first instance case Hogg J Sutton v Gray and Others (No 1) [2012] EWHC 2604 (Fam); [2013] 1 FLR 833 accepted that the injuries were consistent with a bumpy buggy ride. This leads to a powerful challenge to the conclusion that such a mechanism was close to impossible; particularly where it was a daily occurrence. This opposing point of view was not explored with the experts and was not identified by them; many counsel would be aware of the point.

vii) Furthermore, the judge accepted that birth-related subdural bleeding resolves within 4 to 6 weeks of birth, but literature suggests birth-related bleeding may lead to susceptibility to further intracranial bleeding, with less than abusive force. Some first instance decisions (***Re B*** and ***Re S***) support the conclusion that birth-related subdurals can survive and create vulnerability beyond 4 to 6 weeks, particularly as the child was only 2 months old (in fact as Ms Delahunty later and properly pointed out he was 4 months old at the time of admission). These challenges were not put to the neuroradiologist or the neurosurgeon which ought to have been; this being an area which any counsel familiar with head injury cases would be aware of. The experts should have given an explanation of whether this was or was not a possible explanation for the SDH/RH. Nor was the possibility that the mother and fathers account, of 'gently bumping' down

the stairs, may have minimised the nature of the event which occurred on a daily basis.

viii) The evidence of the fluid collection which may have comprised old blood with membranes seen by 3 May and newer blood could support re-bleeding and this does not appear to have been considered.

ix) Although judgment was delayed for seven days to enable coagulation testing to be undertaken, genetic testing was not and EDS type III or 4/connective tissue disorders were not considered as required by the RCPC H child protection handbook.

x) Overreliance on one expert who the others defer to can properly form the basis of an application to reopen; in ***W v Oldham MBC*** [2005] EWCA Civ 1247.

Intermediary issues

xi) Although already determined by HHJ Cove, in what appears to have been a very attenuated hearing at which the mother's counsel was not present, the court always retains a residual discretion to revisit important decisions in relation to the welfare of children. In ***A v A Local Authority, Sub Nom "Re S"*** [2022] EWCA Civ 8 the Court of Appeal dealt with a case in which at first the assessments of the parent in question held that no specific assistance was required but which was overtaken by a later assessment making clear that such was essential for proper participation and the Court of Appeal set aside the initial decision. The mother maintains that if the subsequent assessment is clearly more reliable then that will form a proper foundation for a challenge to the initial decision or process.

xii) The current position is that the mother has been assessed as requiring intermediary assistance, and so it is most unlikely that she did not require it only 18 months previously. Whilst not every breach of the requirements in relation to vulnerable witnesses will lead to a reopening a significant failure or series of failures will do so.

xiii) It is plain that the assessment of the parents by Dr Mann was not thorough and was poorly recorded and poorly executed when compared with the very thorough and well-reasoned report of Sarah Smith of Communicourt, herself an accredited psychologist with specific expertise in communication difficulties (see E209-E242). The intermediary assessments conducted at court in 2018 are not even recorded and it is highly unlikely that they were as thorough or perceptive as Ms Smith's 40-page report.

xiv) The court has accepted that she needs assistance, therefore it cannot be said that she was appropriately refused it at the fact-finding hearing. The question for the court is at least partly answered: there was a failure in the process here. That failure in process led to a failure of participation and an unfair hearing. This is demonstrated by a number of factors which go to central elements of HHJ Backhouse's evaluation of the evidence.

xv) The Communicourt assessment did not identify the need for an intermediary but gave advice in relation to various matters; the need for explanation of unfamiliar lengthy or complex words to the mother and father; avoiding questions presented as statement; the use of simple language; the need for hourly breaks or possibly more during the mother's own evidence. These were not complied with:

a) During the mother's evidence. She had only one break apart from the lunchtime adjournment.

b) There were frequent references to complex words and phrases which were not explained, in particular in relation to the pool of perpetrators (M119 lines 2 and 7), which may have led the mother not to understand that a failure to give evidence against the father could take them both down leading to the loss of the children.

c) In addition, Ms Smith advises that the mother should have intermediary assistance in the preparation of the case and there are examples in the transcript where the mother appears not to have told her representative some significant details.

xvi) In the light of the overriding objective of the FPR 2010 for the court to make just decisions in relation to the cases before it, it is submitted that taken together with Part 3A of the FPR 2010 and the right to a fair hearing under Article 6 of the ECHR, this court must review the question of whether the mother was in fact able to participate in the previous proceedings adequately.

17. The Father

Serious procedural unfairness

i) The critical issue in this type of application is whether the trial process has been fair. The father does not have to establish that there are solid grounds for believing that a rehearing will result in a different finding. The court should not speculate or seek to fill gaps as to whether the outcome would have been the same were the full suite of participation directions put in place.

ii) The right to a fair hearing is absolute. The vulnerable witness provisions are designed to ensure a fair hearing for vulnerable people. A failure to comply with them to any material extent will render the hearing unfair.

iii) The provisions of Part 3A and PD3AA of the FPR were in force at the time of the hearing. It is submitted that:

a) Proper participation directions were not made because no participation directions applied at all prior to the commencement of the hearing (the duty exists throughout the proceedings), and for the hearing itself inadequate participation directions were put in place and in particular an intermediary was not appointed.

b) In any event, the participation directions that were made at the Ground Rules Hearing were not implemented. It was recognised that the father was vulnerable, hence the court authorised an 'at the door of court' intermediary assessment. That was in any event deficient (no record exists of it but undertaking it in that context was inadequate) in that it did not identify the need for, as a minimum, the use of an intermediary during the evidence.

iv) The effect of this case demonstrates: *"A wholesale failure to apply the Part 3 procedure to a vulnerable witness must, in my mind, make it highly likely that the resulting trial will be judged to have been unfair."* Re N (A Child) [2019] EWCA Civ 1997

v) The evidence of Dr Radcliffe and Ms Turner amounts to fresh evidence *of the impact of the F's limitations in understanding, reading and functioning* which means the court can conclude that the father was prejudiced in his participation. All parties agreed to the fresh cognitive assessment and to the intermediary assessment. No party has sought to challenge the outcome of the assessment by Ms Turner. Ms Turner's updating assessment identifies in particular the difficulties the father has with concentrating over longer periods. Those needs are innate – they have not developed since Dr Mann assessed him or the Communicourt door of court assessment.

vi) Dr Mann's 2018 assessment is deficient in the detail it provides about the assessment process, the basis of the assessment (much being self-report) the range of issues considered as relevant to cognitive functioning and the possible causes of the WAIS test results. No intermediary was recommended which must be flawed given what is now known.

vii) The order of 16 November 2018 ruled out the need for an intermediary and identified 5 Ground Rules:

"Unfamiliar, lengthy or complex words need to be explained in simple terms to the mother;

Unfamiliar and complex words need to be explained to the father;

Avoid questions presented as statements;

All advocates need to use simple language in court;

The mother and father will need hourly breaks and possibly more during the expert evidence and her (sic as presumably also 'his') own evidence;"

The judgment briefly refers to the Ground Rules but the role of Part 3A FPR 2010 is not referred to in the judgment or the note of law, and the impact of the cognitive functioning does not feature in the judge's evaluation of the evidence. Although the judgment says the Ground Rules were applied, analysis of the transcript shows they were not. Neither the judge nor the advocates appear to have used the Advocate's Toolkit to guide their approaches. Where the court

does not appoint an intermediary, the onus on the courts to ensure implementation of the Ground Rules is even more pronounced.

viii) The transcript shows:

a) Expert evidence from Professor Stivaros was given over an uninterrupted period of 1 hour 15 minutes during which complex terminology was used and it was not suggested there be a break or for clarification of complex terms. When he dealt with the 'buggy bumping' explanation and said the child would have been protected in the buggy, no further clarification was sought from the mother or put to him.

b) Expert evidence from Dr Ward appears to have been given over a period of up to two and a half hours with no breaks.

c) Evidence from Mr Richards, the neurosurgeon, and Dr Morrison, the consultant ophthalmologist, was taken on the same day; Mr Richards by telephone and immediately following his evidence Mr Morrison gave evidence. No break to discuss the evidence otherwise was implemented. The language used by both experts was complex and dense.

The effect of this is that at the conclusion of the local authority's evidence the parents had not been afforded an adequate opportunity to know what the case was, to reflect upon it, and consider how they should approach the case. By the time they took the stand both had become ill and were unable to listen to the evidence of the other. No application to adjourn was made.

ix) The father gave evidence and there was only one 10-minute lunch break. In oral submissions a further break was identified by counsel and on Day 2 there was no break. The process of taking his evidence was deficient including what he was asked in chief. He was robustly cross-examined but no one explored other possible mechanisms with him including the grand-parents evidence about C hitting his head on the stairs. The need for a break with the father is particularly pronounced when one has regard to his desire to get things over; see one of Dr Radcliffe's conclusions on the father's main area of difficulty. Rather than identifying this and carefully accommodating it, the father at times was rushed through his evidence to the extent that the judge concluded in her judgment that his evidence *became more and more untruthful as he went on until towards the end, he seemed to be saying, the first thing that came into his head".* This supports the contention that inadequate Ground Rules or compliance with them undermined his evidence. The local authority relied on their inconsistencies in support of their case and the judge said: *"However, I did not get the sense from their evidence that they both knew what had happened and were seeking to cover up the truth. Rather, they seemed to be flailing around, trying to defend themselves from the criticism they were receiving of all aspects of their parenting and home lives."*. This also supports the conclusion that the Ground Rules did not enable the parents to give evidence fairly.

x) Following the fact-finding hearing further representations were made to the court about the need that the parents had for an intermediary, including in an

order of 24 April 2019, but this was not pursued and they appear to have been unassisted at the welfare hearing.

xi) At the welfare hearing the judge noted the psychologist seemed to have failed to appreciate the mother was in the pool of perpetrators and the Guardian had failed to undertake their task properly. Given the failings of the professionals the very least that the parents might have expected was to be able to present their own case with the support of an intermediary in its preparation and in its delivery.

xii) The reports of Dr Radcliffe and Ms Turner make clear the limitations in the father's cognitive functioning and the need for an intermediary, and the consequences for the father in terms of his limited understanding in the absence of those measures. Counsel is no substitute. Dr Radcliffe considers that an intermediary should support the father throughout the proceedings, including giving evidence. Ms Turner identifies the need for others to take responsibility for ensuring that measures are implemented and the inadequacy of relying on the father to take responsibility for, for instance, asking for breaks or making clear he has not understood something. The overall impact of the current reports is to call into question the father's ability to give full instructions to his legal team in 2018/19 in respect of matters arising from the expert evidence.

Failures in handling of medical evidence and other explanations for the injuries

xiii) The transcripts show multiple failures in the exploration of the expert evidence, in respect of challenges or putting the parents' case. No challenge was put to Professor Stivaros' assertion that the buggy bumping was not an explanation as the child's head would have been protected in the buggy; there was insufficient exploration of the issue of the timing of the injury, particularly given the child was visible to professionals; and the parents' explanation was wholly inadequately explored, it being the subject of only one or two brief questions. Nor is there any exploration of other possibly unintentional events which could have caused the injury. The grandparents noted that they understood the child's head had been banged on the stairs as he was being carried up or down them.

xiv) The transcripts show very limited cross examination of the experts on the mechanism (i.e. M41), which is apologetic, and the issue of birth related SDH/RH and the possibility of re-bleeds was not looked at.

xv) Overall, the entirety of the trial process was infected by the failure to put in place adequate participation directions.

xvi) Although rehearing the facts will cause further delay the consequences for the parents and the children are more than lifelong. It is also important to establish for C what happened to him. The parents remain a couple and would be able to resume care of their children if the SDH/RH were not inflicted injuries.

xvii) The father can establish that the threshold for reopening these facts is based on more than mere speculation and hope but that there are solid grounds for believing that the earlier findings require revisiting.

18. Local Authority

i) The local authority accepts that the correctness of the finding is of fundamental importance to the adoption of the three older children and in relation to D and that the case engages the most serious issues in relation to children.

Cause of injury and challenge to medical evidence

ii) The local authority maintained that the medical evidence justifies the conclusion that on the balance of probabilities, C suffered a head injury as a result of having been shaken. The judgement of HHJ Backhouse on the cause of the injury is not wrong and the mother and father have not identified anything which amounts to "*evidence*" which undermines the evidence of the experts or the reliability of the judge's conclusions. The parents have not identified any solid grounds for believing that a rehearing will result in a different finding.

iii) The medical evidence from four eminent experts, both in writing and orally, clearly supported the conclusion that the SDH/RH was the result of a shaking injury.

iv) The two possible causes put forward by the parents were comprehensively addressed and rejected by the experts. Professor Stivaros did say it "*is so unlikely as to be close to impossible*". Mr Richards said it was not a reasonable explanation, and although he could not be 100% certain a shaking injury was the likeliest cause of the head injury. Mr Morrison said bumping down the stairs was not a plausible mechanism for the type of retinal haemorrhages seen. Dr Ward did not consider that bumping down the stairs would cause the necessary forces.

v) The reliance by the parents on what Dr Anslow said in the ***Henderson*** appeals is misplaced as that addressed re-bleeds and was identified in the context of criminal process where the standard of proof is different.

vi) The written reports and the evidence show that the issues of birth-related subdural haemorrhages and retinal haemorrhages, and rebleeds were considered by the experts and by the court (H63/7, H84, H159-168, H111).

Intermediary issues

vii) It is acknowledged that a wholesale failure to apply the Part 3A procedure to a vulnerable witness makes it highly likely that the resulting trial will be judged to have been unfair: ***Re N (A Child)*** [2019] EWCA Civ 1997

viii) However, it does not follow that a partial failure to comply with those provisions will invariably lead to a successful appeal. On appeal, the question is whether there is a serious procedural irregularity which renders the decision unjust.

ix) In this case there is no specific finding against either parent. And unlike ***Re S*** it cannot be said that the judge's assessment of their credibility was central to the outcome. Thus, the impact of Ground Rules or their non-compliance does not

lead to the conclusion that the parents' evidence was materially affected or that the judge's evaluation of it was impacted by this.

x) There are aspects of the process which are unusual; the parents did not hear each other's evidence because they chose to leave court. Although this may have been due to illness.

xi) However, overall both parents have had a fair opportunity to put forward their case. Their explanations were explored during the expert evidence and were given in their oral evidence. Examination of the transcripts shows that the parents' criticism of the use of complex language is misplaced (M3). In fact, straightforward and understandable terms are used (see also M6).

xii) In subsequent assessments the parents have made observations which suggest that they did understand the medical evidence, either directly or through others.

xiii) The court undertook an appropriate process in relation to the potential vulnerability of the mother and father. Cognitive assessments were undertaken, and provision was made for an intermediary assessment which resulted in Ground Rules being identified, albeit an intermediary was not recommended either by the psychologist or the Communicourt intermediary. The court will need to consider how the difference between the reports obtained in 2018 and 2021 is reconciled. The local authority did not object to the further cognitive assessment of the father or the intermediary assessments. The court may need to approach the new reports on the basis of whether they raise a sufficient concern about the 2018 reports to justify re-opening.

xiv) The transcripts demonstrate that breaks were taken, that simplified language was used, that the judge sought to slow the father down, that the mother was reminded she could ask for breaks and had a card to do so, and that overall the parents were given a fair opportunity to participate and to understand the case.

xv) Overall, the local authority maintained that neither in relation to the medical issues nor to the intermediary/Ground Rules issues have the parents satisfied the necessary threshold to warrant reopening the proceedings. The process was sufficiently compliant with FPR Part 3A and PD 3AA, and the parents have not adduced evidence or other material which establishes solid reasons for believing that the conclusions as to the cause of injury and perpetrator need re-visiting.

19. <u>The Guardian</u>

i) Neither the current Guardian nor the current legal team were instructed during the fact-finding. They are thus less well-placed to assist the court than might be the case.

ii) In relation to an application to reopen a previous finding of fact, based on substantive issues the authorities are clear that evidence must be identified which creates solid grounds for believing that the earlier findings require revisiting. It is insufficient to assert, as the mother does, generalised deficiencies in the conduct of the earlier hearing.

iii) However, in relation to an application to reopen findings based on the failure to make proper provision for a vulnerable party the test identified in the authorities requires the court to look at all of the circumstances of the case to determine whether the trial was fair. This does not require the court to consider only principally the likely outcome of a rehearing. It does not follow automatically that a failure to comply with the provisions of Part 3A FPR 2010 will automatically lead to a successful appeal, but rather the court must consider whether they amount to a serious procedural irregularity which renders the decision unjust. In these sorts of cases, a serious procedural irregularity in participation of a party may, without much more, lead to the decision being unjust, although in some cases a flawed assessment of a party's evidence may be negated by other supporting evidence, such that the decision should not be interfered with.

iv) Factors in favour of reopening the fact-finding include

a) A reputable psychologist, Dr Radcliffe, whose report was authorised by the court has made different recommendations to those made by Dr Mann.

b) Two separate intermediaries have now fully assessed the mother and father and recommended they need intermediary assistance. The report of Ms Turner is detailed and rigorous.

c) These reports probably amount to fresh evidence properly defined.

d) There is force in the argument that Ground Rules which were identified were not adhered to consistently. The need for breaks is simple to articulate and implement; flexibility in its application can be contemplated, but only where it does not compromise the needs of the vulnerable person and where this has been actively considered and reviewed. There is little evidence in the transcripts of this having occurred.

e) Criticism of Dr Mann or of the approach taken by the parents' counsel is not endorsed or encouraged by the Guardian.

f) Absent the finding that either the mother or father shook C the removal of the children was unlikely. The finding is pivotal. The seriousness of the stakes could not be clearer.

g) The recommendation that the mother required an intermediary in the preparation of her case undermines the conduct of the hearing and the argument that the parents had a fair opportunity to put forward alternative explanations.

h) The circumstances of this case fall into the category where fair process issues do not require the court to be satisfied that the outcome of a rehearing would be different.

i) A compelling factor is the children's need to grow to understand their history and how they came to be removed from their parents' care. Any findings need to be soundly based and the children should know the truth.

v) Factors against reopening

a) Delay. It is now four years since the index event and the children have been waiting for certainty. Although the children are to some extent shielded, there is an ongoing cost in further delay.

b) The children have been placed with adoptive parents and they have begun the process of developing reciprocal attachments. The children's carers are living in limbo and with the additional anxiety of what will happen. This has an impact on the children as well.

c) The passage of time since C sustained his injuries means that the memories of the parents and others will have faded, and the reliability of evidence now is likely to have diminished compared to the position in 2018.

d) The medical experts were clear in their evidence as to causation, and none of the matters raised by the parents are likely to affect this. The submissions of leading counsel as to the likely relevance of birth-related SDH/RH and the possibility of re-bleeds are contradicted by the experience of the Guardian's leading counsel of such cases.

e) The principal policy of finality of litigation is important and deserves respect, although greater flexibility may be justified in children's cases.

f) The backlogs in the family justice system are extensive and allocating further court time to this case is to be balanced against the more general needs of the system.

vi) The Guardian is not clear what further delay would be engendered by a rehearing. The Guardian does not support the instruction of fresh experts.

vii) If the court is satisfied that there have been shortfalls in the fairness of the process, it is difficult to see how that can be cured by the assumption that they were immaterial to the outcome. The court should not speculate or fill in gaps. The Guardian is concerned that the fairness of the proceedings was undermined and that a rehearing may be justified.

The Legal Framework

20. I have been greatly assisted by the written documents provided by the parties and the bundle of authorities, and by their focused submissions on the aspect of the test which was relevant in these circumstances. In relation to the bundle of authorities, it is unfortunate that some of the cases were not the authorised reports and thus did not contain head notes, summaries of arguments or lists of authorities considered and I can only reiterate to all concerned, as many others have before me, the importance of

complying with the Practice Direction on citation of authorities and using the most authoritative, officially reported version of a case.

21. The slightly unusual dimension on the effect of this case was that the issue of the vulnerability of the parties had been raised prior to the fact-finding hearing and indeed the court had grappled with those and made what on the face of it appeared to be proper directions in relation to the obtaining of a cognitive assessment and later an intermediary assessment. Those resulted in some Ground Rules being identified in the order of 16 November 2018, which were to be applied during the fact-finding hearing. In her judgment, HHJ Backhouse states explicitly that those Ground Rules were applied during the hearing. Thus, the court in this case is not confronted with a situation where a hearing had been conducted in ignorance of the possible vulnerability of a party, but rather where a vulnerability has been identified and apparently addressed.

22. That raises the question of how the court should approach the application to reopen the resulting findings of fact. The mother and father approached the application on the basis that the later assessments were of better quality than the earlier assessments and that the asserted deficiencies in those earlier assessments should lead the court to conclude that the hearing was vitiated as a consequence. Given that neither the psychologist's report of Dr Radcliffe, or the intermediary assessment of Ms Smith or Ms Turner purported to critique the earlier assessments and given that there was no suggestion that either the experts or the intermediaries should be called so that the court could examine which was the more reliable, it did not seem to me that it was possible to approach the case on the basis that I should now prefer the later assessments and conclude that the arrangements made on the basis of the earlier assessments were thereby demonstrated to be inadequate. I ultimately reach the conclusion that the later assessments should be regarded as fresh evidence and a ***Ladd v Marshall***-type approach be adopted where one looks at whether they could have been available earlier, whether they are credible, and whether had they been available they would have been likely to have had an impact not on the ultimate outcome of the hearing, but on the decision-making in relation to Ground Rules.

Test for reopening findings of fact

23. The overarching test for applications to reopen findings of fact was considered by the Court of Appeal in ***Re E (Children: Reopening Findings of Fact)*** [2019] EWCA Civ 1447. The absence of any strict rule of *res judicata* or issue estoppel was noted. In that case, Peter Jackson LJ, with whom Moylan LJ and Floyd LJ agreed, reviewed the authorities to date and concluded that:

> *"49. These decisions establish that there are three stages. First, the court considers whether it will permit any reconsideration of the earlier finding. If it is willing to do so, the second stage determines the extent of the investigations and evidence that will be considered, while the third stage is the hearing of the review itself."*

24. They identified the possible routes which could be adopted to seek to re-open findings and preferred applications to the trial court rather than to an appellate court because the trial court would generally be better placed to consider the impact of fresh evidence. That aspect in itself lends support to the contention that a pre-condition to re-opening applications is a change in the factual or evidential matrix considered by the judge.

General criticisms of the approach taken by the court or legal teams are highly unlikely to be contemplated within this.

25. Peter Jackson LJ addressed the approach of the court to appeals based on fresh evidence as follows:

> *"20. Further evidence must therefore pass through the gateway of CPR r52.21(2). When overseeing the gateway, the court seeks to give effect to the overriding objective of doing justice, and the pre-CPR decision of Ladd v Marshall [1954] 1 WLR 1489, (1954) FLR Rep 422 remains powerful persuasive authority: see Sharab v Al-Saud [2009] EWCA Civ 353, [2009] 2 Lloyd's Rep 160 and generally the discussion in the White Book 2019 (Sweet & Maxwell), at 52.21.3.*
>
> *21. Ladd v Marshall [1954] 1 WLR 1489, (1954) FLR Rep 422, at 1491 and 423–424 respectively, familiarly provides that:*
>
> > *'In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.'*
>
> *22. The durability of Ladd v Marshall shows that it encompasses most factors relevant to applications that are likely to arise in practice but as Hale LJ noted in Hertfordshire Investments Ltd v Bubb and Another [2000] EWCA Civ 3013, [2000] 1 WLR 2318, at para [37], the criteria are not rules but principles to be looked at with considerable care.*
>
> *23. It has been said that the Ladd v Marshall analysis is generally accepted as being less strictly applied in cases relating to children: Webster v Norfolk County Council and the Children (By their Children's Guardian) [2009] EWCA Civ 59, [2009] 1 FLR 1378, per Wall LJ, at para [135]. At para [138] he continued: 'The rationale for the relaxation of the rule in children's cases is explained by Waite LJ in Re S (Discharge of Care Order) [1995] 2 FLR 639, at 646, where he says:*
>
> > *"The willingness of the family jurisdiction to relax (at the appellate stage) the constraints of Ladd v Marshall upon the admission of new evidence, does not originate from laxity or benevolence but from recognition that where children are concerned there is liable to be an infinite variety of circumstances whose proper consideration in the best interests of the child is not to be trammelled by the arbitrary imposition of procedural rules. That is a policy whose sole purpose, however, is to preserve flexibility to deal with unusual circumstances. In the general run of cases the family courts (including the Court of Appeal when it is dealing with applications in the family jurisdiction) will be every bit as alert as courts in other jurisdictions to see to it that no one is allowed to litigate afresh issues that have already been determined".*

24. In Re G (A Child) [2014] EWCA Civ 1365 (unreported) 22 October 2014 (to which I have already referred) Macur LJ made this observation about Webster:

> *'[16] For myself, I doubt that this obiter dicta should be interpreted so liberally as to influence an appellate court to adopt a less rigorous investigation into the circumstances of fresh evidence in "children's cases". The overriding objective of the CPR does not incorporate the necessity to have regard to "any welfare issues involved", unlike FPR 1.1, but the principle and benefits of finality of decisions involving a child reached after due judicial process equally accords with his/her best interests as it does any other party to litigation and is not to be disturbed lightly. That said, I recognise that it will inevitably be the case that when considering outcomes concerning the welfare of children and the possible draconian consequences of decisions taken on their behalf, a court may be more readily persuaded to exercise its discretion in favour of admitting new materials in finely balanced circumstances.'*

25. A decision whether to admit further evidence on appeal will therefore be directed by the Ladd v Marshall analysis, but with a view to all relevant matters ultimately being considered. In cases involving children, the importance of welfare decisions being based on sound factual findings will inevitably be a relevant matter. Approaching matters in this way involves proper flexibility, not laxity."

26. The factors identified as relevant were:

"There are no doubt many factors to be borne in mind, among them the following.

> *(1) The court will wish to balance the underlying considerations of public policy, (a) that there is a public interest in an end to litigation – the resources of the court and everyone involved in these proceedings are already severely stretched and should not be employed in deciding the same matter twice unless there is good reason to do so; (b) that any delay in determining the outcome of the case is likely to be prejudicial to the welfare of the individual child; but (c) that the welfare of any child is unlikely to be served by relying upon determinations of fact which turn out to have been erroneous; and (d) the court's discretion, like the rules of issue estoppel, as pointed out by Lord Upjohn in Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1 AC 853, 947, "must be applied so as to work justice and not injustice".*
>
> *(2) The court may well wish to consider the importance of the previous findings in the context of the current proceedings. If they are so important that they are bound to affect the outcome one way or another, the court may be more willing to consider a rehearing than if they are of lesser or peripheral significant.*

> *(3) Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial. By this I mean something more than the mere fact that different judges might on occasions reach different conclusion upon the same evidence. No doubt we would all be reluctant to allow a matter to be relitigated on that basis alone. The court will want to know (a) whether the previous findings were the result of a full hearing in which the person concerned took part and the evidence was tested in the usual way; (b) if so, whether there is any ground upon which the accuracy of the previous finding could have been attacked at the time, and why therefore there was no appeal at the time; and (c) whether there is any new evidence or information casting doubt upon the accuracy of the original findings."*

27. Having noted that any application to re-open would need first of all to identify the legal significance of doing so, the Court of Appeal in respect of the first stage (referred to in the authorities as 'Stage 1') continued that:

> *"50. … A court faced with an application to reopen a previous finding of fact should approach matters in this way:*
>
> *(1) It should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly based welfare decisions on the other.*
>
> *(2) It should weigh up all relevant matters. These will include: the need to put scarce resources to good use; the effect of delay on the child; the importance of establishing the truth; the nature and significance of the findings themselves; and the quality and relevance of the further evidence.*
>
> *(3) 'Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial'. There must be solid grounds for believing that the earlier findings require revisiting."*

28. In ***RL v Nottinghamshire CC and Another*** [2022] EWFC 13, Mostyn J provided further guidance on the interpretation of the Stage 1 test as follows:

> *"43. It therefore seems to me that Jackson LJ's test of "there must be solid grounds for believing that the earlier findings require revisiting", ought to be interpreted comfortably with these exceptions if a divergence from the general law is to be averted. This would mean that "solid grounds" would normally only be capable of being shown in special circumstances where new evidence had emerged which entirely changes the aspect of the case and which could not with reasonable diligence have been ascertained before. Such an interpretation would also be consistent with the powerful reasoning of Waite LJ referred to above where he said that the court will in the "general run of children's cases" rigorously ensure that no-one is allowed to litigate afresh issues that have already been determined. It would also chime with the alternative rule for inquisitorial proceedings proposed by Diplock LJ referred to above."*

Reopening findings of fact based on treatment of vulnerable participants

29. I have not been taken to, nor otherwise found, any case directly on the point of how to approach an application to re-open where there has been a prior vulnerable party assessment which has led to Ground Rules which are subsequently said to have been inadequate to provide a fair hearing by reason of later assessments. Rather, the cases reported have involved situations where the vulnerability had not been identified before the hearing and/or where it has been argued that the trial has been rendered unfair by the court's treatment (whether by act or omission) of a vulnerable party or witness.

30. The two key cases, both of which were provided in the bundle of authorities, are ***N (A Child)*** [2019] EWCA Civ 1997 and the recent decision in ***S (Vulnerable Party: Fairness of Proceedings)*** [2022] EWCA Civ 8.

31. In ***N (A Child)*** [2019] EWCA Civ 1997, HHJ Raeside conducted a four-day fact finding hearing and made findings that some bruising was caused non-accidentally by the mother (§§3-5). Following judgment, the learned judge made directions in preparation for the welfare hearing including preparation of a full psychological assessment for mother (§8). Mother was subsequently assessed by Dr Parsons as having an IQ of 70 with "a particular weakness in terms of her verbal ability", who also "highlighted the danger of the reliability of [the mother's] evidence" (§§9-11). An Intermediary assessment subsequently concluded that the mother needed an Intermediary, but HHJ Raeside refused an application to re-open the findings of fact (§16). The Court of Appeal recorded that HHJ Raeside:

> *"24. …Dismissed a submission that, where it was subsequently discovered that a party should have been provided with special measures, the hearing should be set aside and a re-hearing directed. That, she held, was too dogmatic an approach; the test, she said, is that in Re B and Re ZZ, the court needs to have real reason to believe that doubt is cast on the accuracy of the findings made."*

32. The Court of Appeal, considering an appeal against this determination, noted that:

> *"33. Save for Re M (A child) [2012] EWCA Civ 1905 (discussed below), the reported cases that were brought to our attention concerned in each case, situations where the party seeking to reopen the findings of fact relied upon fresh evidence that went directly to the findings. In Re E itself, the mother sought to adduce fresh expert medical evidence that could potentially provide an innocent explanation for cigarette burns on her child. Another common situation is where there has been an acquittal in criminal proceedings of a party that had been held by the family court to be the perpetrator of non-accidental injuries. A third category if found where, following the fact-finding hearing, one party wishes to change the account he or she gave on paper and to the court in the fact-finding trial.*
>
> *34. In cases where a party seeks to adduce evidence that they submit will go directly to the heart of the findings, the court will consider all relevant matters highlighted at [31] above when carrying out the balancing exercise as rehearsed by Peter Jackson LJ. However, they will "above all" want to consider*

whether a rehearing is likely to result in different findings and there must be solid grounds for believing that to be the case.

35. Understandably, in the present appeal, Mr Shaw on behalf of the Local Authority, and Ms Chalk on behalf of the Guardian, placed heavy emphasis upon this. Each stated that the outcome of the case would not have different, even had the mother had the benefit of the intermediary."

33. The Court continued by recording the submissions on behalf of the mother that:

"37. ... The impact of the mother not having the assistance of an Intermediary is, Ms Porter says, that the court was unable to undertake the essential assessment of the mother as a witness. This, she says, is because the judge was deprived of the opportunity properly to consider the mother's credibility, away form concerns as to her cognitive ability, her understanding of the evidence, and the questions put to her. The mother's inability fully to engage in the proceedings meant that she was unable to have a fair hearing...."

34. The stark circumstances of ***Re M*** were noted by the Court, in which "psychological and intermediary reports were available to the court before trial, and those representing the vulnerable parent had applied for an adjournment in order for special measures, including the appointment of an intermediary to be put in place" (§38). It was further opined that "a wholesale failure to apply the Part 3 procedure to a vulnerable witness must, in my mind, make it highly likely that the resulting trial will be judged to have been unfair" (§51).

35. In concluding that the appeal should succeed and be remitted for rehearing, the learned judge stated that:

"60. In my judgment, it would go too far to say that a rehearing is inevitable in all cases where there has been a failure to identify a party as vulnerable, with the consequence that no Ground Rules have been put in place in preparation for their giving evidence and no Intermediary or other special measures provided for their assistance, but the necessity for there to be a fair trial must be at the forefront of the judge's mind. In such a case, whether there should be a retrial must depend upon all the circumstances of the case, not only, or principally, upon the likely outcome of a rehearing. ...
...
62. One knows not whether Mr Shaw is correct in his assertion that the outcome will ultimately be the same, but in the circumstances of this case, it matters not. This mother was denied the very protection which has been put in place to ensure that she, as a woman with learning difficulties, has a fair trial. The stakes could not be higher; she faces the permanent loss of her two infant children. In my judgment, the fact that the mother will have the assistance she requires for the balance of the proceedings cannot make up for the fact that she was without that help in the crucial hearing, the findings from which will form the basis for all future welfare decision in respect of these two children."

36. A similar scenario arose in ***Re S (Vulnerable Party: Fairness of Proceedings)*** [2022] EWCA Civ 8, albeit in the context of an *appeal* against findings of fact made in February 2021 by the trial judge, including against A (who was an intervenor at the trial). One ground of appeal was based on procedural irregularity in the following terms:

> *"22. ... The appellant has cognitive difficulties which were unidentified. Dr Josling [a forensic psychologist] has assessed that the appellant may be assisted by an intermediary and an appointment with Communicourt for assessment is due to take place on 18 November 2021. The court made findings against the appellant in proceedings where the appellant's cognitive issues were not considered, or adjustments made to ensure her fair participation. The findings are therefore unsafe."*

37. The Court of Appeal recorded the submission on behalf of A that they *"should have had an intermediary with her in court and that, prior to the court hearing, there should have been a Ground Rules hearing where submissions could be made as to the best way to receive her evidence"* (§27), and the local authority's opposition that no one had expressed concerns at the time and *"A was able to give detailed instructions to her solicitors and to participate fully in the hearing"* (§28).

38. After addressing the provisions in Part 3A FPR 2010 and citing *inter alia* their *"fundamental importance to the administration of family justice"* (§38), the Court of Appeal noted that: *"it does not follow, however, that a failure to comply with these provisions, whether through oversight or inadvertence, will invariably lead to a successful appeal. The question on appeal in each case will be, first, whether there has been a serious procedural or other irregularity and, secondly, if so, whether as a result the decision was unjust"* (§42).

39. The Court of Appeal subsequently concluded that:

> *"44. Nevertheless, we have reached the clear conclusion that the failure in this case to identify A's cognitive difficulties and to make appropriate participation directions to ensure that the quality of her evidence was not diminished as a result of vulnerability amounted to a serious procedural irregularity and that as a result the outcome of the hearing was unjust. Of course, conducting the hearing over nine days, the judge was in the best position to make an assessment of the demeanour and competence of the witness, albeit in less than optimal conditions via a video link. But the new material that we have now read has an obvious bearing on the demeanour and credibility of the appellant. In some cases, there will be other evidence supporting the findings so that a flawed assessment of a witness's evidence will not warrant any interference with the decision. In this case, however, the judge's assessment of A's character and plausibility of the witness were central to her ultimate findings."*

Evaluation

40. The circumstances of this case are such that the criteria identified in the authorities of needing to demonstrate that the finding has actual or potential legal significance is

unquestionably demonstrated. In respect of the three children who are already subject to care and placement orders, finding that the injury was not inflicted or a change in the identification of both parents as being in the pool of perpetrators would fundamentally alter the legal landscape. Absent an inflicted injury the threshold for state intervention might not be met and identification of one parent as the perpetrator might result in the non-perpetrator being in a position to care for all three children; either outcome might require the care and placement orders to be discharged. In respect of D the threshold which is currently based on the contention that each of the parents presents an unquantifiable risk by reason of they being in the pool of perpetrators for having inflicted serious injury on C would either evaporate if the injury was not inflicted or would focus on the perpetrating parent with the non-perpetrating parent being an obvious potential carer.

41. In ***Re E*** the Court of Appeal seems to me to make tolerably clear that applications of this nature should not be unduly constrained by procedural rules and that the most effective vehicle for determining them would be by application back to the judge who heard the original hearing rather than by appeal. Whether the application is pursued under Section 31F(6) of the Matrimonial and Family Proceedings Act 1984 or whether it is pursued as an issued application under Part 18 of the FPR 2010, or whether the court permits the application to be pursued simply by case management directions, what ultimately matters is the substance of the application. If the court is satisfied that there is substance to the application, then the court should case manage it to a determination. Perhaps self-evidently, an issued application which identifies expressly the grounds on which it is made, the fresh evidence which is relied upon or the change in circumstances will be more helpful to the court and the parties in focusing the steps which need to be taken to bring the application to a conclusion.

42. In this case, the route by which the application has reached me is not in compliance with those routes but that does not detract from the need to address the substance of it. The initial application to re-open the fact finding in respect of the older children appears to have been made by the mother within the proceedings relating to D, and was based upon there having been no intermediary appointed for her within those earlier proceedings, together with an application by the father to reopen the fact finding based on the absence of genetic testing (I'm unsure of the precise nature of this). These applications were the subject of case management orders on 20th September 2020. On 3 November 2020, HHJ Cove further adjourned the father's application to reopen and dismissed the mother's application to reopen apparently on the basis that she had had an intermediary assessment in the earlier proceedings. I was informed by Mr Feehan that this was dealt with in an abbreviated hearing with the mother being represented by her solicitor. By 6 February 2021, a geneticist's report had been obtained, which concluded there was no suggestion of a genetic propensity towards C incurring subdural haematomas or retinal haemorrhages. A final hearing of the care and placement applications in respect of D was due to occur on 28 June 2021 with a time estimate of five days. On 17 June 2021 the mother's team filed a skeleton argument drafted by Mr Storey QC and Mr Chippeck in which they submitted that because the mother denied harming C and because the findings of HHJ Backhouse that she was in the pool of perpetrators were neither technically *res judicata* nor a finding that on the balance of probabilities she had harmed a child, the threshold in relation to D would have to be established by the calling of evidence. The skeleton identified the basis of the challenge to the fact finding as being (a) the failure to consider properly the possibility of the

injuries having been caused by C being frequently bumped down the stairs in his buggy, (b) having regard to the fact the Court of Appeal and High Court had accepted expert evidence from Dr Anslow (a consultant paediatric radiologist) that a bumpy buggy ride might cause rebleeding from a birth-related subdural haemorrhage in particular when viewed against the expert evidence given that such a cause was near to impossible and (c) that the history of the case generally indicated a lack of proper enquiry. It is of course the case that in the ***Henderson*** appeals in which Dr Anslow gave evidence on behalf of the defendant, Mr Butler, that there was a dispute between Dr Anslow and Dr Stoodley. The Court of Appeal decision that the judge erred in considering a submission of no case to answer, was based more upon the ophthalmalogical evidence and they noted that it was open to the jury to reject Dr Anslow's evidence. In ***Sutton v Gray and Others***, Hogg J does appear to have accepted that a bumpy buggy ride could constitute a sufficient trauma to trigger a re-bleed and that a re-bleed could be caused by lesser force than a bleed *de novo*.

43. The application to reopen was then adjourned for a three-day hearing on 27 October 2021. At some point adoption applications were also made in respect of the older children and the parents. Applications for leave to oppose adoption were also listed for consideration at the hearing on 27 October 2021. The basis of the application for leave to oppose appears to be based at least in part, if not wholly, on the contention that the setting aside of the factual findings would amount to a change of circumstances within the Adoption Act 2002. Subsequently the father's case developed as the cognitive and intermediary assessments came in and the transcripts were received. A further listing in March before HHJ Robinson was vacated and the matter was listed before me for directions in April and for determination in May.

44. Although the submissions largely presented the application to reopen on the basis of asserted deficiencies in the medical evidence and asserted deficiencies in the fairness of the hearing as distinct arguments there were aspects of the medical arguments which had their source in the way in which the parents had been engaged in the process of preparation for the hearing, listening to and giving evidence. For the purposes of this judgment, it seems to me that it is more helpful to identify the argument separately because there is a distinction in the test to be applied to the medical as opposed to the fair hearing arguments. In relation to the medical arguments the authorities support the full reopening as incorporating an evidential element which causes the court to conclude that there are solid grounds for believing that the result would be different. In relation to 'fair hearing' arguments the authorities require far less of a demonstrable causal nexus (perhaps not at all if the breach of Article 6 is sufficiently grave) between the failure of process and the outcome of the case.

45. In the course of their submissions. Mr Feehan and Professor Delahunty identified a number of points which they submitted had not been properly explored during the expert evidence heard in 2018. These included (but I do not think this is exhaustive) the following:

    i) The various alternative mechanisms for the SDH/RH

    ii) The relevance of birth related SDH/RH and the susceptibility to re-bleeding

    iii) The absence of almost all of the usually found other markers of a shaking injury such as axonal damage and retinal folding

46. Whilst I have considerable respect for the expertise of Mr Feehan and Professor Delahunty their criticisms of the non-exploration of aspects of the medical evidence, whether based on Dr Anslow's earlier evidence or otherwise, is materially different to expert evidence being put before the court from a subsequently instructed consultant paediatric neuroradiologist or other relevant expert identifying flaws in the approach of previously instructed experts or subsequent developments in medical science, which place a different perspective on evidence given earlier. Alternatively, the emergence in the medical literature of reliable material which place the evidence given in the 2018 proceedings in a different perspective, having regard to subsequent research or developments in medical science might also conceivably provide a sufficient basis for the conclusion that solid grounds for believing that a different result might be reached. However, it seems to me to be hard to say that counsel's criticism of the approach taken to the medical evidence during the initial fact finding can amount to a solid ground for believing that the result may be different. During the course of submissions on behalf of the Guardian, Ms Howe submitted that her experience of similar cases was that rebleeding was not consistent with the medical findings in this case.

47. The mother's submissions in the skeleton argument as to the effect of Dr Anslow's evidence in ***R v Henderson*** and ***Sutton v Gray and Others (No 1)*** is, it seems to me, in any event over-stated as Dr Anslow's evidence was not central to the Court of Appeal's decision in ***Henderson*** and in ***Sutton v Gray and Others (No 1)*** Hogg J identified the evidence as being potentially relevant to the occurrence of a re-bleed and the force required to cause that. Professor Stivaros says that there is nowhere in the world literature where anybody has identified multi-location, subdural bleeding as a result of a child being bumped up and down within a buggy going up and down stairs or otherwise. This does not appear to be in conflict with Dr Anslow's evidence as far as I understand it.

48. It is clear from the experts' reports that the question of the subdural haemorrhage or the retinal haemorrhage potentially being related to birth were on the expert's radar. The transcripts show that the issue of rebleeding of birth -related SDH was raised (see, for instance, M56 and M58), as was the mechanism (M60, M62), with Mr Richards by both counsel for M and F (M78,) on birth-related SDH (M79). There was more emphasis on possible clotting deficiency as the Factor 13 test had not been conducted.

49. Overall, the transcripts show that mechanisms were explored; whether they were as vigorously explored as the current legal teams might have done is not the point. I do not conclude that the transcripts demonstrate that the approach taken was outside the range of reasonable approaches which might have been taken at the time. Although we have not explored the test, which might govern the court reopening a hearing due to the performance of the lawyers, it does not seem to me that we are anywhere close to the realms at which unfairness due to inadequate legal representation is close to engaged. The references to the possibility of either subdural rebleed or retinal re-bleeds and whether a lesser degree of force might cause such bleeds and whether they were relevant considerations in this case existed. The experts in their reports all identified the issue of birth-related SDH/RH and some referred to the literature on the issue. Although no expert meeting took place, and the issue of re-bleeding was not explicitly referred to with these experts it seems more probable that they did not consider it a viable possibility rather than four experts having each independently over-looked an important

possibility which on the parents' case would have been within the range of opinions that they might have been expected to give.

50. This is not a single expert case, but a constellation case and the judgment does not support an argument that there was overreliance on one expert. Each of the experts gave their own opinion on the likely cause of the SDH/RH and the likelihood of the parents' two possible explanations.

51. Overall whilst I accept that there are aspects of the medical evidence which might have been more fully explored, I do not consider that the material which relates to Dr Anslow provides a solid ground for believing that a different result might emerge. Ultimately, Dr Anslow is one expert whose opinion in relation to a broadly similar mechanism being capable of causing a rebleeding of a birth-related subdural haemorrhage is simply that. The court in this case had the benefit of evidence from four eminent experts from different disciplines who had applied their expertise to the particular facts of this case. It does not seem to me that the nature of Dr Anslow's evidence in another case several years ago constitutes a solid ground for believing the result of a re-hearing would be different. Nor do the submissions of counsel as to their view of the importance of various aspects of medical enquiry amount to solid grounds. Nor does my reading of the transcripts of the medical evidence itself and the issues which were explored provide any basis for saying that there are solid grounds for believing that the decision as to causation should be re-opened on those grounds.

52. In relation to the fair process issues, as I have already said in the summary above I am satisfied that the outcome is different although I do not accept that all the limbs of the parents' cases are established.

53. The decision of HHJ Cove was fairly and squarely on the issue of whether Ms Smith's intermediary report demonstrated the fact-finding hearing was procedurally unfair. No transcript of the decision was available, only the order. It does not appear that that decision was the subject of any appeal, and so the current application is in essence in part an attempt to re-litigate an issue already determined with only limited further material different to that which was considered by HHJ Cove. The heart of the additional argument is that the transcript suggests the mother did not understand aspects of the questioning including the concept of the pool of perpetrators or the local authority case that if it was not the father it was her, that inadequate breaks were implemented in her evidence and during the evidence of others. Although Mr Feehan may be right that technically the court retains an unlimited discretion to reconsider applications which have already been made and determined, the circumstances in which the court will do so are limited and usually involve a material change in circumstances or fresh evidence which calls into question the reliability of the original decision. It is not open to the mother simply to re-argue the application based on the intermediary assessment. However, whether the transcripts create a different situation I shall consider.

54. The Ground Rules arising out of the intermediary assessment and perhaps to some degree the report of Dr Mann were identified in the order of 16 November 2018.

55. The transcript shows that the mother was given a card to hold up in the event that she was tired or confused; that she was taken to the central issue immediately in her evidence in chief and subjects were identified; a break was taken after examination in chief, another after 1 hour of cross-examination [M138] and perhaps 45-60 minutes

later [M153]. However, during the afternoon session, it appears to have resumed after the lunchtime adjournment and continued without a break until the mother concluded her evidence. The timings are not recorded on the transcript, but in terms of length it runs for about 50 pages compared to 55 pages for the morning session and no breaks are recorded at all. At the conclusion of questions by the Guardian the mother says in answer to the judge that she is ok to continue but at almost the same time says she just wants to go home, and the judge's questions take up about three further pages. So, it seems that the mother gave evidence for about 2 hours without a break in the afternoon. During the afternoon session the judge intervenes on limited occasions when the mother's answers are less focussed. During cross examination she was robustly examined and there were some longer and more complex questions which she appears to have had some difficulty in answering, but the overall impression of the evidence is that she managed; the judge occasionally intervened to explain a complex word on a critical issue [M119]. It was submitted that it appeared during evidence that there were some matters which had not been canvassed by the mother with her legal team and that the input of an intermediary in the preparation for the case would have addressed this, but my impression of the transcript is that any new details were not out of the range of what might usually be expected in this sort of case. HHJ Backhouse found her evidence to have been in general coherent.

56. It is clear then that the afternoon session does not seem to have complied with the breaks Ground Rule and the impression from this session is of the quality of the mother's evidence deteriorating over this session to some degree. I have considered whether this apparent failure to comply amounts to a sufficient departure from the Ground Rules on its own to warrant a conclusion that the mother's ability to participate fairly and appropriately was compromised to a degree that justifies reaching the conclusion that the non-compliance amounted to a procedural irregularity then lead to an unjust result or in alternative terms whether the non-compliance rendered the hearing of the mother's evidence materially unfair. On a fairly fine balance I do not think that this alone did. However together with the concerns over the lack of compliance with the Ground Rules about breaks in relation to the medical evidence, in particular Professor Stivaros and Mr Richards and Mr Morrison (see below) I think the overall combined effect in relation to the mother was that there was non-compliance with the identified Ground Rules which was material, and which thus affected the overall fairness of the hearing. Thus, I accept that the evidence from the transcript demonstrates sufficient additional evidence which shows that the Ground Rules identified by HHJ Backhouse were not implemented sufficiently in respect of the mother and warrant a conclusion that they alone demonstrate that the hearing was unfair to the mother. It is a relatively fine balance as the breaks alone form only part of the Ground Rules and in other respects, in the use of simple language and questions, the impression from the transcripts is one of in the main compliance. But I am conscious that the mother's cognitive assessment showed a lower level of functioning than the father's and that the intermediary report of Ms Smith contains a detailed set of recommendations based on her assessment to promote fair participation and having regard to this non-compliance with the Ground Rules clearly creates a real risk of adverse impact. The judgment of HHJ Backhouse identifies the mother as a more credible witness but not one whose evidence is sufficiently reliable to allow the judge to say, on balance, she was probably not a perpetrator. A material change in the mother's credibility arising from fuller compliance with Ground Rules clearly might make a significant difference to her. I did not hear submissions on the point that had this application been finally determined by

HHJ Cove it would have been open to her as the judge who rejected the application in 2020 to have said the combined effect of the intermediary report and the impact of the transcript was sufficient to meet the test to permit re-opening. It seems to me that the transcripts are sufficient on their own to establish the mother's case. The refusal based on the intermediary report alone could have been the subject of an appeal, but it was not.

57. In relation to the father's case what the transcripts seem to show is as follows:

i) Following the use of complex terminology more simple layman's terms are used to make it clear what is being discussed. It seems to me that the local authority is in broad terms correct that the critical parts of the expert evidence were explained in terms which were likely to be understandable to the mother and father.

ii) There was a break from 11.55 - 12.05, and from 12.59 - 13.09 and simpler language is used (head and eye bleeds not SDH/RH). But the cross-examination about the cause of the injuries takes place, it seems, after the break at 13.09 when F presumably has been giving evidence for over 2 hours and during the usual lunch break. In the afternoon my impression is that some of the questioning becomes longer and more complex, and the questioning about the time he had to blow on C's face occurs shortly before the break at 13.43. After the break the father is cross-examined by the mother's counsel and the guardian's, then no re-examination occurs, and questions are asked by the judge. The transcript runs for 28 pages but is untimed. The page count suggests this was a period of about 1 hour.

i) For the experts, Professor Stivaros gave evidence from 14.12 – 15.27 which covers 22 pages of transcript. No break is apparent during this period, which covered critical matters. During Dr Ward's evidence a break was taken at 12.30 (about 25 pages of transcript suggest probably over an hour - including a break in the connection) and it resumes and continues from about 12.40 over 22 pages which suggests the evidence finished around 13.30. Mr Richards and Mr Morrison gave evidence and there does not appear to have been a break between their evidence which covers 27 pages of transcript – probably in excess of 1 ¼ hours. It was clearly very important evidence.

58. Thus the transcripts show that the Ground Rules in relation to breaks were not consistently followed during the experts' evidence or during the parents' evidence although the non-compliance was not as extensive as the father's skeleton initially suggested. HHJ Backhouse clearly concluded that the father's evidence deteriorated over time. Whether the father's evidence deteriorated in its credibility due to the Ground Rules issue or was because of inherent lack of honesty is a matter which cannot be resolved but of course an answer may emerge if his evidence is re-heard.

59. The overall impression from the transcripts is that:

i) The Ground Rules as to breaks were not consistently adhered to in particular during the expert evidence and during the latter parts of the parents' evidence.

ii) Whilst one might not necessarily expect the parties to understand all of the medical evidence given the technicalities of some aspects of it which are a challenge for even seasoned judges and lawyers, one would expect them to have the opportunity to understand the implications of it and the implementation of breaks between experts and, indeed, during lengthy sessions of expert evidence, would enable the parties to understand the implications of it and to give instructions accordingly.

60. The judgment identifies the fact that the parents credibility impacted upon the ultimate conclusions as to the perpetrator. It is also of note that in some respects the judge identified the parties as cooperative or partially credible witnesses. There is some reason to believe that better adherence to Ground Rules, or indeed better Ground Rules might have assisted the parties in giving their evidence and might have affected the views that the judge took of them. How this might eventually play out of course cannot be known. Either the mother or father might emerge as a more or less credible witness at a rehearing and a clear perpetrator might be identified (if the cause of the injury remains inflicted injury) or both parents might remain in a pool of perpetrators with or without failure to protect findings in tandem.

61. Dr Mann and Dr Radcliffe are both experts instructed pursuant to Part 25. Ms Smith and Miss Turner both identify that they are not court-appointed experts but rather are professionals in advising on promoting the participation of vulnerable parties or witnesses. To that extent they are experts in their field, the fields of expertise that they and Drs Mann and Radcliffe operate in are different. Of course, it is not open to the mother to raise arguments about the comparison between the report of Dr Mann and Dr Radcliffe in respect of her because she has not undergone a further cognitive assessment by a court-appointed expert. Ultimately, I do not consider one can seek to draw comparisons between the evidence before the court on 2018 and now and to prefer one rather than the other. The approach must be whether the recent evidence casts doubt on the decision previously reached on ***Ladd v Marshall*** terms

62. It is unfortunate that the intermediary assessment in 2018 was apparently conducted at the door of court and that there is no record of the assessment save what flowed from it, which is recorded in the form of the Ground Rules identified in the order of 16 November 2018. Enquiries made of Communicourt subsequently have not generated any evidence as to that assessment. The fact that the later assessment of the mother was also conducted by Communicourt (the same legal entity and the courts' primary provider of intermediary assessments and services) and reached what appear to be significantly different conclusions concerns me. The fact that the intermediary assessment of the father conducted by an independent intermediary also reaches conclusions which appear to be significantly different to those reached by Communicourt in November 2018, supports the conclusion that the current reports are credible. In the absence of any evidence as to the earlier assessment it is impossible to know, and I decline to speculate, why the outcomes are different. The fact is that those reports are materially different.

63. In terms of the ***Ladd v Marshall*** approach:

i) Clearly this evidence could not have been available at the time of the hearing in late 2018. It has come into existence as a result of the further proceedings.

ii) The evidence is clearly credible, coming both from a well-known expert but also from two unrelated intermediaries.

iii) In relation to the decision as to the Ground Rules which were put in place in 2018, it seems beyond dispute that they would have been different had this evidence been available.

64. I therefore conclude that I should take the evidence of Dr Radcliffe and Ms Turner into account and plainly it supports the conclusion that the hearing in 2018 was potentially undermined by the absence of intermediaries in the preparation of the case and the conduct of the hearing.

65. For reasons which emerge both from the transcripts as to the lack of adherence to the participation directions which were identified and because of the impact of the fresh evidence, I conclude that the hearing in 2018 did not provide a fair hearing to the parents. In this case there is some material which supports the potential impact of those flaws given the particular findings of the judge as to credibility.

Conclusion

66. I therefore conclude that the parents' applications succeed on Stage 1 and that the cause of C's head injury will need to be relitigated.

67. A further directions hearing will need to be held to consider more fully the arrangements for that re-hearing, and more generally Stages 2 and 3 of the ***Re E*** process. I would intend to reserve the matter to myself unless it cannot be listed before me for an unduly long time.

68. That is my judgment.