



Neutral Citation Number: [2023] EWHC 1083 (Fam)

Case No: RG23C50021

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Before :

**HHJ MORADIFAR**  
**(SITTING AS A JUDGE OF THE HIGH COURT)**

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In the matter of;

Re H  
(A Child: s. 38(6) Assessment)

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Mr Edward Kirkwood (instructed by the Joint Legal Team) on behalf of the local  
authority  
Miss Alice Thornton (instructed by Child law Partnership) on behalf of the mother  
Mr Alex Forbes (instructed by Griffiths Robertson) on behalf of the father  
Miss Jasbinder Dail of Rowberry Morris Solicitors for the child through her guardian  
Miss Samantha Clark

Hearing dates: 25 April 2023  
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**Judgment Approved by the court**  
**for handing down**

## **HHJ MORADIFAR:**

### Introduction

1. H is a little girl who will soon be eleven weeks old. She was born preterm and suffered with symptoms of withdrawal from Morphine, Methadone, Cocaine and Mirtazapine. Regrettably, her parents are long term drug users and in 2018 her sibling was made the subject of care and placement orders. Since her discharge from hospital, H has lived in foster care under an interim care order. H's parents continue to have regular contact with her and with the support of her father, the mother invites the court to direct that H should join them in a residential placement for the family to be assessed.
2. The proposed residential assessment centre is Phoenix Futures. This is a specialist centre that provides an invaluable service for adults with drug and alcohol dependency. Its work is highly regarded and permits children to safely join their parents during their residence within its facilities. Whilst recognising the skilled and specialist intervention that Phoenix Futures provides, the local authority opposes the mother's application on three fundamental grounds which may be summarised as follows:
  - a. This is not an assessment of H and its main purpose is rehabilitative intervention to address the parents' addiction,
  - b. The residential setting does not comply with the terms of the Care Standards Act (2000), and
  - c. It is contrary to H's welfare, where the proposed assessment will take six months before any community based assessment can commence. The local authority asserts that realistically, the court will not be furnished with a final report for at least nine to twelve months.
3. H's guardian supports the placement and joins the parents in their detailed submissions in support of the mother's application and in response to the points raised by the local authority. Phoenix Futures has not accepted my invitation to formally intervene in these proceedings but has submitted a helpful skeleton argument which I have carefully considered. In summary it states that the proposed assessment comes within the ambit of the statutory requirements for this to be an assessment of H and its current registration meets all legal requirements.

### Issues

4. Therefore, the issues before me, may be summarised in the following order;
  - a. Does the proposed assessment fall within the remit of s.38(6) of the Children Act (1989) (the ‘Act’), if so
  - b. Does it comply with the registration requirements of the Care Standards Act (2000), and
  - c. Is it in H’s best interest that she should be assessed at Phoenix Futures?

#### The Law

5. The relevant statutory provisions are set out in s.s 38(6) and (7) of the Children Act (1989). In summary, under the provisions of the former subsection, where the court has made a child the subject of an interim care or supervision order, the court may direct the medical, psychiatric examination, or direct other assessments of the child. Under the latter provisions, such a direction may prohibit such an examination. Furthermore, when directing such an examination or assessment of the child, the court must be satisfied that this is “*necessary to assist the court to resolve the proceedings justly*”. When exercising its jurisdiction, the court must have regard to all of the factors that are set out in s. 38(7B)
6. The application of these provisions is now long settled under the guidance of the House of Lords in *Re C (a minor) (interim care order: residential assessment)* [1996] 4 All ER 871, [1997] AC 489 and later in *Re G (a minor) (interim care order: residential assessment)* [2006] 1 All ER 706. These are well known authorities that I do not intend to cite in detail. However, I observe that they remain determinative of the interpretation and application of the above mentioned statutory provisions. In the second case, when giving her leading judgment, Baroness Hale of Richmond concluded at paragraph 69;

*“In short, what is directed under s 38(6) must clearly be an examination or assessment of the child, including where appropriate her relationship with her parents, the risk that her parents may present to her, and the ways in which those risks may be avoided or managed, all with a view to enabling the court to make the decisions which it has to make under the Act with the minimum delay. Any services which are provided for the child and his family must be ancillary to that end. They must not be an end in themselves. In this case, the judge was clearly entitled to reach the conclusion that any further in-patient treatment ... had gone beyond what fell within his powers to order under s 38(6).”*

More recently, in *Re Y (A Child): S38(6) Assessment* [2018] EWCA Civ 992 the Court of Appeal has considered a proposed assessment involving Phoenix Futures when Jackson LJ gave a leading judgment in which he allowed the appeal after finding that the proposed assessment fell outside the remit of s. 38(6). I will consider this in more detail later in this judgment.

#### Analysis and conclusion

7. In 2018 each of the parents presented very differently. Their engagement with the professionals and the support that was offered was poor. The threshold findings of the court at the time when their older child was made the subject of care and placement orders, are very concerning. However, the more recent evidence demonstrates a significant change in the parents' attitude to professionals and their engagement with support. Each of the parents has demonstrated a high degree of commitment to treating their addiction and most importantly to H. Although H does not currently reside with them, they have maintained high levels of contact with her. There can be no doubt that the parents should be properly assessed as to their capacity to care for H for the rest of her life and how the family may be supported to achieve this end.
8. The National Specialist Family Service ('NSFS') comes under the general umbrella of Phoenix Futures which is a charity for the treatment of drug and alcohol dependency. NSFS holds a dual registration, firstly with the Care Quality Commission ('CQC') that relates to its drug and alcohol treatment, and secondly with Ofsted which concerns the provision of childcare and nursery facilities. NSFS can accommodate families whilst the adult members of the family undergo treatment. It further provides parenting and family development support whilst the family reside within its facilities. There are other additional provisions such as the onsite nursery, including observations by qualified nursery staff and weekly visits by a health Visitor. The information that is gathered will be shared with the allocated social work team and may inform any parenting assessment of the parents. NSFS does not undertake a parenting assessment. Furthermore, NSFS specifically caters for families and to be a parent is one of the key eligibility criteria. Phoenix Futures has over twenty years of experience in this field and continues to work with many local authorities throughout England and Wales. I am aware that more recently it has extended its services to include Scotland.

9. Having taken the lead on the arguments in support of the application for a placement at NSFS, with familiar care and skill, Mr Forbes relies on the observations of Lord Scott of Foscotte (paragraphs 6 and 7), and Baroness Hale of Richmond (paragraphs 65 and 69) in *Re G* (above). He identifies the correct question to be asked is ‘what is the purpose of the assessment and not what is the main purpose of Phoenix Futures?’ Mr Forbes properly accepts that for this assessment to fall within the provisions of s. 38(6), any intervention and treatment of the parents must be ancillary to the main purpose of assessing H. I entirely agree with these submissions.
10. The argument is developed by identifying that a drug dependency is not per se a bar to parenting and the issue is its impact on parenting (see *Re B (Care Proceedings: Appeal)* [2013] 2 FLR 1075 and *Re A (Application for Care and Placement Orders: Local Authority Failings)* [2016] 1 FLR 1). Therefore, he submits that to properly answer the fundamental question about the purpose of any assessment, one must turn to the terms of any instructions and the questions that Phoenix Futures are required to answer. To illustrate the point, he proposes that the questions in any letter of instructions may be termed as follow:

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- a. *Please undertake an assessment of the parents’ ability to care for H.*
- b. *Based on your observations, what is the actual impact of their drug misuse on the care that they provide to H?*
- c. *What risks do the parents’ drug misuse present to H?*
- d. *How can these risks be reduced or managed?*
- e. *In particular, what steps would need to be taken to reduce the level of the parents’ drug misuse to a level that would enable them to provide adequate care for their daughter in the community?”*

11. Therefore, he argues that if the questions are asked within the parameters that are set in *Re G*, the court can readily conclude that the main focus of the proposed assessment is H. This approach would not fall foul of the decision of the Court of Appeal in *Re Y (A CHILD) (SECTION 38(6) ASSESSMENT)* [2018] EWCA Civ 992 as it is distinguished from the present case in circumstances where, with the

exception of question 4, the remaining six questions that were asked in the letter of instructions in that case fell outside of the parameters identified in *Re G* and the court's conclusions in *Re Y* were inevitable.

12. *Re Y* concerned an assessment in Phoenix Futures which was permitted by the first instance Judge after a careful analysis of the law and the available expert evidence in those proceedings. On appeal, Jackson LJ observed that there are two questions to be asked,

“ ...

1. *Is this a proposal for an assessment that falls within the terms of s. 38(6)?*
2. *If so, is the assessment necessary to assist the court to resolve the proceedings justly, as required by s. 38(7A), having regard to the matters in s. 38(7B)?”*

His lordship concluded that the proposed assessment did not fall within the terms of s. 38(6) as the focus of the assessment was not the child and allowed the appeal. There are clear similarities in *Re Y* and the instant case. However, I also note that the recent information provided by Phoenix Futures in these proceedings and the steps it has taken to address some of the points raised in *Re Y*, a case in which it made no representations to the appellate court.

13. In this case, Phoenix Futures has provided a response to an invitation by Mr Forbes for its comments on his proposed draft questions. In an email dated 25 April 2023, adopting the same letters for the proposed questions, it states;

“ ...

- a) *We do not provide an independent assessment of a parent/s ability to provide care. Our comprehensive observations, interventions and feedback will be detailed within our progress reports, and communicated with the social worker, and these are routinely used to aid their own assessment of the parent/s ability and ongoing care plans for the child.*
- b) c) d) and e) *We are a family focused drug treatment services, supporting each member of the family and the family unit as a whole. As such these are*

*key areas that would be covered in the progress reports completed by the service and agreed discharge plans at the end of the placement. Discharge planning is completed in conjunction with the family and the involved professionals to ensure necessary referrals and recommendations are planned for when the family return to the community. We can answer questions as directed in a letter of instruction from the court as part of our progress reports and feedback to the involved professionals.”*

14. Responding with equal clarity, Mr Kirkwood submits that the court lacks jurisdiction to order an assessment under s. 38(6) of the Act when the focus of the assessment is not H but the rehabilitation of her parents. He observes that the first half of the proposed six month assessment is mainly concerned with a programme of detoxification for the parents which is likely to be very challenging for them. The length of the said programme cannot be reduced due the current high levels of methadone that the parents are prescribed. Therefore, the assessment falls foul of the parameters that are set by Baroness Hale of Richmond in *Re G* when she states:

“[68]

*These conclusions are reinforced by the Act’s emphasis on reaching decisions without delay. It cannot have been contemplated that the examination or assessment ordered under s. 38(6) would take many months to complete. It would be surprising it were to last more than two or three months at most. ...”*

15. Mr Kirkwood further submits that there is nothing in the character of the proposed assessment that puts H at the centre of the assessment. He draws an analogy with information that is provided in contact records or logs from a foster placement and how these may feed into an assessment in public law proceedings. That information cannot be characterised as an assessment. He observes that the information that may be gathered by Phoenix Futures about H amounts to no more than this and this is not an assessment of H. Therefore, he submits that there is nothing in the information that is provided about Phoenix Futures that would distinguish the present case from *Re Y*.

16. He further develops the argument by reference to Phoenix Futures' current registration with CQC and Ofsted which make no reference to any assessment of children within its facilities. Furthermore, having reflected on the terms of the Care Standards Act (2000) (s. 24(2) and s. 11) and Residential Family Centre Regulations (2002) as amended in 2013, he submits that the carefully worded responses from Phoenix Futures illustrates a fine line that separates a properly registered rehabilitation provisions and the commission of a criminal offence for not being appropriately registered as a children's home by not coming within the exceptions that are set out in the regulations. Thus, he addresses the second issue as a further reason to reject the mother's application.
17. Finally, he submits that the local authority would be profoundly concerned about H's welfare should she be placed in the residential setting when the parents will be undertaking a highly challenging detoxification programme with a proposed plan that will not see the parents caring for H in the community for at least six months and the court not having a final assessment of any description for about nine to twelve months. Such a delay would be contrary to H's welfare and an alternative robust assessment would provide the court with all the necessary information to make a final decision for H's future within or close to the statutory time limits.
18. As I have observed earlier, Phoenix Futures provides a highly specialist intervention that has and I hope will continue to benefit many individuals and families. Notwithstanding the skill and zeal with which the case has been argued on behalf of the parents, I cannot find that the proposed assessment is an assessment of H. The information that is before me clearly demonstrates that the parents will be the main focus of a rehabilitation intervention and any observations of H with her parents will provide some information that may inform other assessments. In my judgment H will not be the focus of the proposed assessment and I do not find any material change in the approach of Phoenix Futures to that which was identified by Jackson LJ in *Re Y*. Recognising the important work that Phoenix Futures undertakes, it is with a heavy heart that I conclude that the proposed assessment does not fall within the remit of s. 38(6) and accordingly dismiss the mother's application.



19. Having reached a conclusion on the first issue, I need not consider the remaining two issues in detail. However, I observe in passing that had I found the assessment to come within the remit of s 38(6), I would have been very concerned about the registration requirements under the 2000 Act and 2002 (amended) Regulations together with the possible consequences of not being appropriately registered. Furthermore, whilst the courts have a discretion to sanction purposeful delay that may include a lengthy assessment period, for example where there is a requirement for a period of residence with a would-be special guardian to undertake a full and robust assessment, in the face of such significant delay as in the instant case, the burden placed upon any party seeking a lengthy residential assessment is a heavy one to justify. Having in mind the words of Baroness Hale of Richmond, I am not persuaded that such a delay would be justified in this case particularly when there are other proportionate and expeditious means by which the necessary assessments can be undertaken.
20. There are many local authorities that place families at Phoenix Futures. Such placements are quite different to one that is to be sanctioned under s. 38(6). Whilst a placement under the said statutory regime cannot be sanctioned by the court, nothing that I have said in this judgment should be interpreted as discouraging any relevant agencies to engage with Phoenix Futures and in appropriate cases to invoke the permissible routes through which families can benefit from the important work that Phoenix Futures undertakes.
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