Neutral Citation Number: [2024] EWHC 344 (Fam)

Case No: WV21C00104

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2024

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE MOTHER
THE FATHER

Applicants

and

SHROPSHIRE COUNCIL

First Respondent

and

H
(a child, acting by her Children's Guardian)

Second Respondent

and

F

Intervener

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- -

Ms Kathryn Anslow (instructed by **Wace Morgan Solicitors and Clarkes Law**) for the **Applicants**
Ms Elizabeth McGrath KC and Ms Louise Higgins (instructed by **Shropshire Council**) for the **First Respondent**
Ms Kirsty Gallacher (instructed by **Talbots Law**) for the **Second Respondent**
Mr Dorian Day and Mr Andrew Duncan (instructed by **the Official Solicitor**) for the **Intervener**

Hearing dates: **30 January – 2 February 2024**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Lieven DBE :

1. This case concerns a girl, H, now aged 2 years and 10 months. The Local Authority ("LA") issued proceedings in respect of H at birth, but H has remained in the care of her parents since birth. The issue in the case is whether the risk of her remaining with her parents is such that removal is now proportionate.

2. The LA were represented by Elizabeth McGrath KC and Louise Higgins, the Mother and the Father were represented by Kathryn Anslow, the Children's Guardian was represented by Kirsty Gallacher, and the Intervenor (F, through the Official Solicitor) was represented by Dorian Day and Andrew Duncan.

3. This case follows on from the decision of the Court of Appeal in *Re H (Parents with Learning Difficulties: Risk of Harm)* [2023] EWCA Civ 59. This judgment follows the same scheme of initials as that judgment.

4. This judgment is divided into two parts. The first part deals with findings of fact in respect of an incident that occurred in or around October 2023. The second part concerns H's best interests. On Day Two of the hearing I gave a ruling in respect of the facts found, but reserved my reasons. The reasons are set out below. For the second part, much of the family background is relevant, which I set out in detail from [50] below.

Fact finding

5. The Mother has a learning disability and the Father has learning difficulties. This has significant implications for their care of the children, and for the evidence that they gave. H has four older siblings, D a male aged 25, E a male aged 20, F a male aged 17 and G a girl aged 14. For the purposes of the case before me, E and G are largely out of the picture. By the time H was born D, E and G were all in placements away from the family home, and Care Orders had been made in respect of E and G. F was made the subject of a care order on 11 February 2021 and remained at home at the time of the incident. He has lived away from home since 7 November 2023, when the allegations were made to the police.

6. On 8 September 2022, having heard evidence over 11 days in June/July, HHJ Lopez made care and placement orders in respect of H. He granted a temporary stay pending an appeal by the parents which was heard on 6 December 2022.

7. The Court of Appeal, in a judgment handed down on 2 February 2023, set aside the care and placement orders and remitted the case for re-hearing: a key finding was that HHJ Lopez had failed to carry out a sufficiently rigorous scrutiny of what package of support for the parents could be put in place, considering their cognitive difficulties, and in the Mother's case a diagnosed learning disability.

8. On 24 July 2023 this court made H the subject of a Care Order at home under placement with parent regulations. This order was made with the agreement of all the parties, and there was no substantive hearing of any of the issues that had been considered by HHJ Lopez. A Safety Plan was drawn up, by which the parents agreed that one of them would be present when F and H were together, and that F's interactions with H would be carefully monitored. A list of rules identified other

adults deemed to pose a risk of harm to H, and placed limitations on their contact with H. These included D, E, and maternal uncles ND and SD.

9. The LA committed to a package of support, encompassing work with the Lucy Faithfull Foundation and with Tracey Carboni from Resolutions. The package of support was as recommended and approved by Dr Roger Hutchinson, whom the LA again instructed to participate, this time in an advisory capacity.

10. On 6 November 2023 MC (girlfriend of maternal uncle SD) telephoned Children's Services and spoke to Ms S of the Children's Disability Team. Over the course of 3 conversations with Ms S, MC claimed to have seen F inappropriately touching H. She also relayed a conversation she claimed to have had with the Maternal Grandmother ("MGM") in which the MGM had told her that she had also witnessed F inappropriately touching H.

11. F was arrested on 6 November and agreed not to return to the family home. He is currently on bail and living in semi-supported accommodation. In interview he gave 'no comment' responses when asked about the alleged offence. A SARC medical was attempted on 6 November but aborted due to H's distress.

12. On 9 November 2023 the LA gave notice to the parents of their intention to remove H. The parents then sought injunctive relief to prevent removal and discharge of the Care Order.

13. On 6 December the court made interim orders to preserve the status quo for H until the January 2024 hearing. A Schedule of Agreement between the parents and the LA set out the arrangements for H, including a prohibition on contact between H and F. Visits, announced and unannounced, have been carried out daily since 6 December. There is no doubt that this has placed a very heavy burden on the LA.

The issues

14. The fact finding part of the case concerns the allegations made by MC about F's interaction with H and D in the MGM's bedroom. There were other matters of concern to the LA, but I was not asked to make any findings about them, although they featured in the evidence.

15. I heard evidence as to the factual allegations from MC, SD, the MGM, the Mother and, after I gave my ruling, from the Father. I note that all of these witnesses are significantly challenged individuals with various vulnerabilities. This meant distinguishing truth from lies and deliberate untruths from problems with memory and cognition, was extremely challenging.

16. I had already ruled on 15 January 2024 at a *Re W* hearing (*Re W* [2010] Civ 57) that it would not be proportionate to hear evidence from F. F has severe learning difficulties and was represented in these proceedings by the Official Solicitor. It was the view of all parties that his oral evidence was unlikely to be of assistance. He had made a short written statement denying the allegation. The evidence at the *Re W* hearing was that F was likely to find the process of giving evidence very traumatic.

17. The only other witness to the alleged event was D. D also has learning difficulties. He had told the police that nothing happened, but again I do not consider his evidence would have given much, if any, further assistance. No party requested for him to be called to give evidence.

The evidence

18. The evidence changed significantly during the course of the hearing. I will set out the evolution of the evidence, rather than recounting what each individual witness said separately.

19. MC originally told the police, and put in her witness statement, that the incident between F and H had taken place on Tuesday 24 October. She, the Mother, H, SD, F and D had all been at the MGM's house. SD lives with his mother, the MGM. MC had (until the falling out after she spoke to the police on 6 November) usually gone round at the weekends.

20. She said that she and the MGM were in the front room of the house. D, F and H were in the MGM's bedroom, which is a small room adjoining the front room. SD was in the kitchen and the Mother had gone out to the kitchen with SD. MC said that she had been sitting on a settee which looked into the bedroom. She saw H jumping on the bed and singing. She then saw F, who was on the bed push H onto the bed and pull off her t-shirt and put his hand down her leggings. He then pulled down D's trousers. MC said she called for the Mother who came back into the front room from the kitchen.

21. The account I have just given is rather more coherent and structured than MC's account, and certainly than her oral evidence. She was not very clear about the precise sequence of events, or precisely where H and F were in the bedroom when these events took place.

22. None of the witnesses could be pinned down about dates or even days of the week. In my judgement this was not because they were deliberately lying, but rather their cognitive challenges meant pinning down dates was very hard.

23. However, the original evidence of all the other family members was that this incident did not happen. To a considerable degree they focused on the date and stated that the incident could not have happened because SD and MC were on holiday on 24 October. Ms McGrath suggests that the focus on the date, rather than the underlying allegations, was a deliberate choice, and indeed something of a cover-up by the other family members.

24. On the first morning of the hearing, MC changed her evidence to the incident probably having occurred on 17 October, although this also seems fairly unlikely given the days of the week. However, the dispute about the date became largely if not wholly irrelevant in the light of SD and then the Mother's change of evidence at the hearing.

25. The Mother and SD had originally said that none of this had happened and the Mother said in her statement that the first she knew about the allegations was when MC had spoken to the police on 6 November. However, SD said in his oral evidence that MC had said when they were all in the front room that she had seen F pulling off H's T

shirt and pulling down D's trousers. He accepted that he and the Mother were not in the room at the time, and that because of the position of the MGM's chair she could not have seen what was happening in the bedroom.

26. The Mother in her oral evidence then also accepted that MC had immediately alleged as SD had said. The Mother had originally said that she had never left F and H alone, and had not suggested that she knew MC had made any allegations until some time later. In oral evidence the Mother said she was in the kitchen just for a few seconds whilst she washed the cups. SD suggested it was longer. I am inclined to believe SD on this point, given that the Mother was desperate to suggest that she had kept active supervision over H for the vast majority of the time. It is difficult to overstate in a written judgment, the difficulties the Mother had giving evidence.

27. None of the witnesses came close to being reliable, and there is no external third party or documentary evidence that helps me to discern what happened in the MGM's house that day. MC has been largely consistent in her account of what happened. She has varied wildly on the date, but ultimately that does not matter, and in my view does not alone undermine the credibility of her account.

28. However, MC does have a long history of making complaints, Mr Day said 27 over many years. One of the unhelpful elements of this case is that there have been vast numbers of complaints, allegations, police investigations and reports concerning many members of the immediate and extended family. There are numerous references to matters that would go to physical and sexual risk concerning F and indeed D. MC has made serious allegations against other family members, but has also been accused of sexual abuse herself. However, there do not appear to be any relevant convictions against any of the family members, and no Family Court findings of fact.

29. SD, who has been MC's partner for 19 years, and remains with her despite all the upset over her allegations, said he thought she had lied about the details of the incident and suggested that she commonly lied. This may or may not be true, but SD was himself prepared to say whatever would support the Mother.

30. MC was an angry witness, who in the first part of her evidence completely "lost it" with Ms Anslow and started shouting and threatening her. She then had a panic attack in the witness box, at which point I had to stop her evidence. She returned to give further evidence, from a separate room, the next day. She felt under attack from the Mother's family, and said she had been threatened. I have no idea if this is true or not. She also plainly had an element of antagonism towards F, in part probably because of past events and allegations. She made an allegation about him having assaulted her with a piece of wood, but it appears likely that that was in fact an accident.

31. However, before the day of the incident it appears that she had been getting on alright with F, and indeed the rest of the family. My sense is that this is a family which probably has fairly major fallouts quite regularly, and MC is a confrontational character.

32. I do not think that any of these factors leads to the conclusion that MC was necessarily lying about the fact that something had happened in the bedroom between F and H.

33. It is possible that she was motivated by anger with F about a completely separate incident, and this led her to speaking to the police on 6 November. Again, this does not necessarily mean that the allegation is untrue, particularly as it is now accepted that she raised at least part of the allegation at the time.

34. SD was another cognitively impaired witness. I had the impression that he would have said anything to support his sister, the Mother. He kept saying that nothing happened, even though he accepted that he wasn't in the sitting room at the time. However, I suspect that he was telling the truth about what MC had said when he went back into the sitting room, namely that F had taken off H's top and pulled down D's trousers. He would have had to be quite quick thinking to say that MC had spoken of seeing F taking H's top off, but not putting his hand down the leggings.

35. I place no weight on the MGM's evidence. She was absolutely loyal to the Mother, and would have said nothing to cause her problems, and she was also generally very confused. I gained no forensic assistance from her evidence.

36. The Mother is absolutely desperate that H is not taken away, and will in effect say anything that she hopes will achieve that end. This is an extreme *Lucas* (*R v Lucas* [1981] QB 720) situation. I have no doubt, indeed it is conceded, that the Mother did not tell the truth in her original statements. But, there is a very obvious reason for that, her desire to keep H. It is plain from Ms Carboni's report that the Mother has a lot of work to do before she understands risk and is able to work more openly with the LA. The core fact is that the Mother accepts that she was not in the sitting room when MC says she saw F with H. Therefore her evidence does not help on the truth of the allegations, save that like SD she says MC only made the more limited allegation at the time.

The Law

37. The law applicable to fact finding in this case is agreed. The burden of proof is on the LA, and the standard of proof is the balance of probabilities. I have to weigh up all the evidence holistically. I must be wary of evidence from the demeanour of witnesses, and take carefully into account the vagaries of human memory, particularly where witnesses, as here, have particular vulnerabilities and challenges. I also have closely in mind the principles in *Lucas*, and the many reasons that people may lie.

Conclusions

38. I accept that there was an incident in the MGM's bedroom, where F removed H's t-shirt and then had some kind of altercation with D, which involved pulling his trousers down. I do not make any finding of "sexual harm", and I do not find, on the balance of probabilities, that F put his hand down H's leggings.

39. The only person who says she saw this incident was MC, and I accept that there are issues around MC's credibility. There are accepted to have only been two people in the sitting room at the time, and only MC could see into the bedroom. The MGM's chair did not have a line of sight to the relevant part of the bedroom. D was in the bedroom, but he has not given oral evidence, is highly likely to cleave to supporting the Mother and F, and has learning difficulties. Therefore I put very limited weight on his statement to the police that nothing happened.

40. F also told the police that nothing happened. Again I put very little weight on this evidence. It is virtually inevitable that F would deny the incident given his learning difficulties and the fact that he knew he was being accused of doing something wrong.

41. The central reason I accept that MC did see some incident, is the fact that it is now accepted that she raised it immediately with the other people in the house. Although I accept that MC is probably well capable of lying and that she has subsequently shown animosity to F, there was no particular animosity at the time of the incident. There seems to have been no reason for her maliciously to make up the allegation that day. The evidence suggests that the family were getting on reasonably well, albeit it may well be that the Mother was wary of MC given some of what had happened in the past, and MC's palpable ability to become very angry and aggressive at times.

42. It would have taken very quick thinking by MC to seize the moment and make up an allegation against F at the instant he was in the bedroom with H, and the Mother had left the room. I doubt MC is capable of such a quick response.

43. What precisely happened in the bedroom is virtually impossible to know given the challenges of F and D, and MC's unreliability as a witness. There is also the problem that the incident was probably a quick one; there were three people in a small bedroom and H was apparently bouncing on the bed singing.

44. The Mother and SD now say that MC immediately said that F had removed H's t-shirt and pulled down D's trousers. They say she did not say F had put his hand down H's trousers. Given the reluctance of the Mother and SD to say that MC had made the allegation at the time at all, I think it is unlikely that they would on the morning of the hearing have realised the significance of making a partial admission but excluding the most harmful part (of sexual harm). Ms McGrath urges me to find collusion, and that in effect the family have made up the lesser story.

45. I cannot say that it is impossible that F did put his hand down H's leggings, but the test I have to apply is for the LA to discharge the burden of proof on the balance of probabilities. In my view they have not done so. I cannot say the level of collusion that Ms McGrath suggests has not happened, but given the individuals involved and the various accounts, I do not think the LA have proved sexual harm.

46. However, this is a case which exposes the difficulties with the approach taken in the caselaw to finding facts on a binary basis and then the court (and other parties) having to proceed on the basis that something did or did not happen. What is critical to H is to protect her against risk. I fully accept that there is a risk to H from F, and that there may be a risk of sexual harm, although that is extremely difficult to assess. The binary nature of fact finding forces the court, and to some degree the LA, into a straightjacket which is both unrealistic, but also not protective of the child. Despite my finding of fact, I do accept that there is some risk of sexual harm from F.

Part Two – best interests

47. The LA wish to remove H from her parents' care on the basis that the risk to her is now effectively unmanageable. They wrote to the parents on 9 November 2023 stating that they intended to remove. The parents then made an application to discharge the Care Order. Ms Anslow, although formally pursuing the discharge

application, realistically acknowledged the difficulties with this application, and asked that I make an assessment of best interests, and the parties then be given time to consider their positions. All parties agreed, that although there may be complex issues about the scope of the Court's powers, in this judgment I should consider risk and proportionality, and not determine those legal issues.

48. In respect of the best interests analysis, the LA and the Guardian place considerable weight on the family history, and I agree that is highly relevant. A significant problem in this case is that there have been no findings of fact made, save for my determination above, and none of the events I am about to set out have ever led to a criminal conviction. Although I note that Baker LJ in *Re H* (this case) said that "risk has to be assessed on the basis of proven fact, not a mere possibility." that is not a realistic approach in a case such as this. There are parts of the Threshold, lying behind the July 2023 Care Order, which are accepted by the parents, but these are in terms of broad generalities. In order to understand the risks in the case, and to ascribe weight in the balancing exercise I have to undertake, I must have regard to the family history, despite the position that no "facts" have been proven.

49. I take the history set out below from the report of Ms Carboni. None of the parties took issue with me taking this approach and it appears to be a fair and proportionate summary of a long history.

50. The family has been known to Childrens Services since 2002, quite shortly after D's birth. Between 2002 and 2007 there were seven initial assessments, and a considerable amount of support was offered. The Mother engaged well but struggled to manage the children's behaviour. There is report at that stage of the Father not engaging. The children were put on Child Protection Plans because of the risk of sexual harm after an allegation that D (then aged 12) had inappropriately touched a 5 year old girl. They were stepped down to Child in Need plans.

51. In April 2016 staff at F's primary school raised concerns about F displaying sexualised and inappropriate behaviour to members of staff. From September 2016 there were increasing concerns about E being out of control. From then on there is plentiful evidence of E being aggressive, running away and putting himself at risk of significant harm. There were alleged to have been incidents where the Father was violent to E. Ms Carboni's summary seems to suggest that there were a number of occasions where E had been violent, or at least bullying to D.

52. Although the background relating to E is relevant because of the parents' inability to handle the situation, E himself now seems to be out of the picture.

53. In respect of F, there was an allegation by MC in July 2017 that he had attempted to inappropriately touch her. In April 2018 there was a report that F had requested sex from an 11 year old girl and offered to pay.

54. In September 2018 there were very serious allegations about potential sexual abuse of G by her brothers, or possibly the Mother's brother, ND. It is extremely difficult, if not impossible, to understand quite what was being alleged happened, and who the alleged perpetrators were. D, F and G were made the subject of Child Protection Plans on the grounds of risk of sexual harm. The agreement that the parents signed said that the children would have no unsupervised contact with D or ND and G would not be

left alone with her brothers. There was what appears to be clear evidence that that agreement was breached in November 2018.

55. In November 2018 F's school reported that he had looked underneath the toilet door at another pupil. There were then a number of therapeutic sessions with the children, including F about sexualised behaviours.

56. In early 2019 there were concerns, again, about the Father's failure to engage and failure to support the work that was being done with the family.

57. Between February and April 2019 G underwent six sessions with a social worker. G said she felt unsafe when her parents went out and she was left with her brothers. The note included:

> *"3.16 I asked [G] if she could draw what was OK / not OK and during this exercise [G] drew a picture of 3 stick children. I asked [G] to put xxx on parts of her body her brothers hurt and made her scared. She drew xxx on the areas of the body where she was touched, indicating her genital area and explained what was happening in the picture also using the 'bendy family figures' to show the inappropriate touch was [F] and [E] and that she was being touched in her genital area. Initially [G] stated, 'no one hurts me'. [G] used the drawing of the stick figures to put an x on the genital areas of her brothers and she stated, 'they show me their willies in the woods.' When I asked if she had told anyone she initially said, 'yes mum' and then changed it to 'no one'. ... [G] stated, 'they hurt me all the time, hit and kick me'."*

58. There were concerns in early 2019 that D and E had both been assisting a local man, ZZ, who operated an ice cream van and was considered to be a sexual risk to children. Yet again there never seems to have been any findings or convictions in respect of this man, but all have proceeded on the basis he posed a risk.

59. G was made subject of an Interim Care Order in March 2019.

60. In May 2019 the police received a phone call stating that E had sexually assaulted the Mother. The allegation was of a serious sexual assault. E was made subject of a Secure Accommodation Order in July 2019.

61. In September 2019 a child abduction warning notice was put in place because of F being in contact with YY, who was deemed to pose a sexual risk to children.

62. In May 2020 E was made subject of a final Care Order. The Court had determined that it would not make any findings of fact. In February 2021 final Care Orders were made in respect of F and G, again no findings were made. The agreed Threshold involved the parents accepting that F and G had been exposed to E's behaviour, which was beyond their control and that E posed a risk of physical and emotional harm to F and G.

63. H was born in March 2021 and an application for an Interim Care Order was made three days after her birth. By the second hearing, 5 days after H was born, the LA had changed their plan and did not seek removal from her parents' care. An Interim Care

Order was made by DJ Keyser with the plan being of H remaining at home There was a working agreement by which H was to have no unsupervised contact with D, E or F, or a number of other family members and "risky" individuals. I note that F was at this time, and up to 6 November 2023, living at home. Quite how the parents were realistically going to ensure that F had no unsupervised contact with H is in my view rather unclear. Although the parents signed the agreement, and very much wanted F and H to be at home, in practice this agreement was setting the parents, and in particular the Mother, up to fail.

64. The court appointed an independent social worker to carry out a PAMS assessment, and a psychological assessment of the parents.

65. In June and July 2021 there were a number of incidents with F being rough and out of control around H, and being aggressive to H and the MGM.

66. The reports about the Mother and H at that stage appear to be positive, but there is a concern about F's behaviour, albeit nothing suggesting sexual risk.

67. Dr Gregory, the psychologist, opined that the parents were unable to provide H with good enough parenting, in part because they minimised the risks that their sons posed. Ms Steventon, the Independent Social Worker, did not recommend that H stayed in the parents' care.

68. In October 2021 the LA decided that their plan was for adoption.

69. It is worth noting that through 2021 the parents were receiving a great deal of support from the LA. Since January 2021 F has been attending Lifeshed, a mentoring organisation, and he appears to have engaged well with this. There is nothing in the chronology since that date that suggests F posing a sexual risk to anyone. That may, of course, be wholly or in part because of the fairly close monitoring he was under.

70. The matter finally came on for final hearing on 13 June 2022, by which time H was 15 months old. The subsequent history of the litigation is set out above.

71. It is extremely important to note that all the reports on H now, and indeed throughout her life, are entirely positive. She is developing well, is meeting her developmental milestones, and is always described as a happy thriving child.

72. The decision, after the Court of Appeal had remitted the matter to this court, to make a Care Order at home was agreed by all parties. The Guardian's report for the making of that order included the following:

> *"12. Previously there have been significant concerns about the parents' capacity to change, their ability to protect, some non-compliance with advice and guidance, disguised compliance, a lack of insight regarding the risk to [H] and their ability to manage [F's] behaviours around [H]. This is not detracting from [the Father and the Mother's] great progress, but they will need to be mindful of the risks their older children have been exposed to, the outcomes from their children's life experiences and how their style of parenting and exposure to risk could affect [H] and their being able to care for her in the long term.*

> …
>
> *34. Whilst I support the local authority's final care plan there are support needs that have not yet been fully explored including how Dr Hutchinson's recommendations can be implemented, consideration of the work necessary to address Dr Gregory's concerns, the family engaging with the Lucy Faithfull Foundation, work needs to be completed around risk with Tracey Carboni and work supporting mother and improving her socialisation and support network.*
>
> …
>
> *36. In making my recommendations to the Court, I have considered the relevant case law including Re B-S (2013) EWCA Civ 1146 and [H's] right to be brought up by her birth family unless overriding requirements do not make this possible."*

73. The final care plan (dated 14 July 2023) was for a Care Order at home, with work to be undertaken by the parents with the Lucy Faithfull Foundation and Ms Carboni, of Resolution. The parents have completed the work with Lucy Faithfull but have only had two of the multiple sessions planned with Ms Carboni. It is that work which is intended to address the understanding and management of risk. The intention was always that the parents would need follow-up and reinforcement sessions with Lucy Faithfull.

74. The events after the making of the Care Order are to some extent outlined above in the fact finding part of the this judgment. The LA, however, also rely on what they say are a number of breaches of the working agreement, which they say show the family is unable to work with the LA. Mr Ellis' principal concern, and that emphasised by Ms McGrath in closing, is a failure to work openly and honestly with the LA. In terms of specific issues, Mr Ellis relied on the incident which was the trigger for notifying the parents that the LA intended to place H in foster care, and the report by H's nursery that when they were changing her nappy she had redness in her genital area. When this was seen, H was examined by Dr Wolska, and her report says that the findings were neutral. In other words, they might have been indicative of some form of abuse, but they might equally have been entirely benign. H at the time was still wearing nappies, and there is a report that her nappy was "full" that morning. I find it impossible to place any weight on the redness because it could so easily simply have been a small case of nappy rash. There is a danger of building a house of straws against the parents in this case.

75. The LA also place some reliance on MC having said that the MGM had told her that F had rubbed H on many other occasions, and demonstrating this with a teddy bear. The MGM denied this in evidence but, as I have said above, I place no weight on her evidence either way. She was both confused and determined to protect the Mother. MC's evidence in this regard is more difficult. I have found that she was truthful in at least part of what she said about the incident in the bedroom, largely because it is now accepted that she made an allegation against F immediately. However, by at least November, she does seem to have become motivated by some level of animosity to F.

76. I am not asked to make findings in respect of whether the MGM showed the actions on the teddy bear, or whether they are in fact true. The whole story is so nebulous, and the line of communication so forensically unsafe, that I have concluded I can place no weight on it.

77. In terms of the breaches of the agreement, it is accepted that the parents failed to prevent F from having unsupervised contact with ND. This is a rather tangential issue in my view. By the summer of 2023 the LA were concerned that F was spending time with ND and this was taking him away from the more beneficial work at LifeShed. In the LA's view, and probably with good reason, ND was a very poor influence on F. However, the working agreement was, on this point, unworkable and setting the parents up to fail. It is impossible to see how the parents could have been supervising H 24/7 and at the same time stopping F being unsupervised with ND. So that breach is accepted but tells me little about the parents' ability to protect H.

78. At the heart of this case is risk, and whether the undoubted risk to H from various male family members can be managed. Ms Anslow strongly argues that the risk to H is now much less than it was in the past, and in particular at the time the LA agreed the Care Plan. She also argued that the whole nature of the family unit, and many of the problems that existed in the past and gave rise to the grave concerns, have now changed.

79. Firstly, the chaotic and frankly out of control household in which the four older children lived, has now completely gone. None of the older children now live at home, and their ability to be at home is very severely curtailed by Care Orders and other restrictions. Therefore, the situation where the Mother could plainly not cope and control the children, and where indeed she appears to have been subject of abuse, is no longer the case. All the reports from the many social work visits is that of a calm household where H is well cared for and her needs met.

80. Secondly, in terms of contact with the boys, this is now highly regulated. E appears to have been removed entirely. D lives elsewhere and is not allowed to stay overnight, or to be unsupervised with H. The LA suspect that D does sometimes stay overnight because of a visit they made when he was there quite early in the morning. But he sometimes stays, and is allowed to stay, with a friend nearby and his being in the house was not itself a breach. I also note that the risk assessment of D appears to largely see him as a victim of potential abuse rather causing a risk. Having read the history, this may not be entirely accurate, but it is certainly the prevailing perception.

81. Thirdly, Ms Anslow relies on the fact that F now lives elsewhere and is not allowed to visit the family home. In my view this is an important point. The working agreement was always going to be very difficult for the parents given that F and H were living in the same house. It is not clear to me how the Mother was going to supervise H with F 24/7 when they were all living together. But that situation has now changed, with F living elsewhere. Although it is not possible to be certain that F does not meet with H when with the parents, a point to which I return below, it is a great deal easier for the Mother in particular to understand and stick by the rules when F is not living with her.

82. The Guardian effectively takes the same position as the LA, and says that the risk to H is unmanageable because the family have shown themselves to be unable to work openly and honestly with the LA. I fully understand this concern and will address it in

my conclusions. However, I was troubled by the fact that the Guardian, certainly in his written report, did not in my view properly weigh up the harm (or risk) to H from being placed into foster care, as against the risk of her being with her parents. He referred to H suffering "short-term" harm if she was removed from her parents' care, which in my view significantly understated that side of the balance. Further, he said virtually nothing about the problems of long term foster care for H, an issue which invariably features very heavily in Cafcass reports when arguing for a placement order rather than long term foster care.

83. I thought Mr Owen was careful, honest and thoughtful in his oral evidence, but his written report failed to carry out a fair balancing exercise.

The Law

84. This case necessarily turns on its own facts, but the caselaw sets out a number of points to which the Court must have regard. It is not necessary at this stage to address the law on what happens if there is a fundamental disagreement between the Court and the LA about the form of the Care Plan as the parties agree that I should address risk and proportionality and then they will review the position.

85. The starting point is that the removal of a child from the care of their parents requires a high standard of evidence and justification. Ms Anslow relies on *Re DE (A child)* [2014] EWFC 6. Ms McGrath points out, correctly, that in the present case the Care Order has been made, so we are beyond the stage being considered in *Re DE*. However, I consider the basic principles set out there remain highly relevant and that was clearly in the contemplation of the Court at [49(2)]. At [35] and [49] the court said:

> *"35. While this process is being carried out, the child should remain at home under the care order, unless his safety and welfare requires that he be removed immediately. This is the appropriate test when deciding whether the child should be removed under an interim care order, pending determination of an application under s.31 of the Children Act : Re L-A (Children) [2009] EWCA Civ 822 . The same test should also apply when a local authority's decision to remove a child placed at home under a care order has led to an application by the parents to discharge the order and the court has to decide whether the child should be removed pending determination of the discharge application. As set out above, under s.33(4) of the 1989, the local authority may not exercise its powers under a care order to determine how a parent may exercise his or her parental responsibility for the child unless satisfied it is necessary to do so to safeguard or promote the child's welfare. For a local authority to remove a child in circumstances where its welfare did not require it would be manifestly unlawful and an unjustifiable interference with the family's Article 8 rights.*
>
> *…*
>
> *49. To avoid the problems that have arisen in this case, the following measures should be taken in future cases.*

(1) In every case where a care order is made on the basis of a care plan providing that a child should live at home with his or her parents, it should be a term of the care plan, and a recital in the care order, that the local authority agrees to give not less than fourteen days notice of a removal of the child, save in an emergency. I consider that fourteen days is an appropriate period, on the one hand to avoid unnecessary delay but, on the other hand, to allow the parents an opportunity to obtain legal advice.

(2) Where a care order has been granted on the basis of a care plan providing that the child should remain at home, a local authority considering changing the plan and removing the child permanently from the family must have regard to the fact that permanent placement outside the family is to be preferred only as a last resort where nothing else will do and must rigorously analyse all the realistic options, considering the arguments for and against each option. Furthermore, it must involve the parents properly in the decision-making process.

(3) In every case where a parent decides to apply to discharge a care order in circumstances where the local authority has given notice of intention to remove a child placed at home under a care order, the parent should consider whether to apply in addition for an injunction under s.8 of the HRA to prevent the local authority from removing the child pending the determination of the discharge application. If the parent decides to apply for an injunction, that application should be issued at the same time as the discharge application.

(4) When a local authority, having given notice of its intention to remove a child placed at home under a care order, is given notice of an application for discharge of the care, the local authority must consider whether the child's welfare requires his immediate removal. Furthermore, the authority must keep a written record demonstrating that it has considered this question and recording the reasons for its decision. In reaching its decision on this point, the local authority must again inter alia consult with the parents. Any removal of a child in circumstances where the child's welfare does not require immediate removal, or without proper consideration and consultation, is likely to be an unlawful interference with the Article 8 rights of the parent and child.

(5) On receipt of an application to discharge a care order, where the child has been living at home, the allocation gatekeeper at the designated family centre should check whether it is accompanied by an application under s.8 of HRA and, if not, whether the circumstances might give rise to such an application. This check is needed because, as discussed below, automatic legal aid is not at present available for such applications to discharge a care order, and it is therefore likely that such applications may be made by parents acting in person. In cases where the discharge application is accompanied by an application for an order under s.8 HRA, or the allocation gatekeeper considers that the circumstances might give rise to such an application, he or she should

> *allocate the case as soon as possible to a circuit judge for case management. Any application for an injunction in these circumstances must be listed for an early hearing.*
>
> *(6) On hearing an application for an injunction under s.8 HRA to restrain a local authority removing a child living at home under a care order pending determination of an application to discharge the care order, the court should normally grant the injunction unless the child's welfare requires his immediate removal from the family home."*

86. Mr Day has referred me to a recent decision, *Father v Middlesborough Council* [2024] EWFC Fam 15, however I cannot see that this is any more than the application of the above principles, and a welfare balance, on the facts of a particular case.

87. Ms Anslow also relies on the cases that emphasise the need for a clear and transparent process before a child is removed from their parents, including the involvement of the parents in that process. In particular she refers to *G v N County Council* [2008] EWHC 975 at [29]-[30]:

> *"29. Of those various submissions, in my view the only one that has some weight and relevance in this context is the fact that the starting point is that there is a care order, and a court has already accepted that there is a demonstrated high level of concern about a child justifying intervention at care order level. But that is not the issue in the case, in my view. The issue is the approach a local authority should take to changing the care plan under the care order and, whilst the established level of concern and background established by the care order is there, the previously proportionate plan of having a child at home, if it is to be changed, has to be changed after a proper consideration and assessment of all of the available evidence and in a way that meets the child and the mother's human rights as described in the earlier decisions.*
>
> *30. In my view, the quality of decision-making and the consequences of it in the context of a case such as this are just as important and have consequences which are just as likely to be long term as is the case under an EPO. In fact, given the existence of the emergency protection order procedure and, in contrast, the limited options available to a parent in a case such as this, the human rights considerations require that the quality of the process should be at least as high, if not higher, than in an emergency protection order case. It is not the function of this court to lay down strictures as to the sort of assessment work that should be put in place before a radical change of care plan such as this, but it does seem that some form of formal assessment, whether it is called a core assessment or otherwise which draws together all of the evidence in a considered way rather than simply at LAC meetings or other professional gatherings, and gives the parent a chance to contribute to that process, and then takes stock of all of that material in the way that a core assessment would do, is the level of intervention and planning that should be brought to bear before a change of care plan as draconian as this takes place."*

88. Ms Anslow points out that in this case there was apparently a Looked After Child meeting, but there are no minutes and there was no meeting with the parents to consider the situation. Although this is correct, it needs to be acknowledged that the LA had tried hard to work with the parents, and subsequent events strongly suggest that the parents would not have been open with the LA if there had been a meeting. Further, the matter did then promptly come back to Court and the LA have been very reasonable in not seeking to remove H on an interim basis. I therefore feel that criticising the LA on the grounds of process points is somewhat unfair on the facts of the case.

89. In my view, more pertinent are the authorities that discuss the issues of weighing up risk, and the honesty of parents.

90. In *Re F (Placement Order Proportionality)* [2019] 1 FLR 779 Peter Jackson LJ gave guidance on the assessment of risk and the relevance of lies:

> *"24. In these circumstances, close attention needed to be paid to the nature and extent of the risks. As foreshadowed at the start of this judgment, there must be (to borrow a phrase from a different context) an intense focus on the type of risk that is involved, how likely it is to happen, and what the likely consequences might then be. Only by carrying out this exercise is it possible to know what weight to give to the risks before setting them alongside other relevant factors. So, for example, the risk of further physical harm to a child who has been severely injured by a denying parent is likely to be a factor of predominant weight. By contrast, to borrow from the evidence in this case, where a mother who untruthfully denies drinking goes to a park at night to drink alone, leaving her baby with its grandmother, the court will view that risk with a sense of proportion.*
>
> *25. Similarly, close attention must be paid to the true significance of lies and lack of insight in the context of assessing welfare. Lies, however deplorable, are significant only to the extent that they affect the welfare of the child, and in particular to the extent that they undermine systems of protection designed to keep the child safe. However, as noted by Macur LJ in Re Y (A Child) [2013] EWCA Civ 1337 , they cannot be allowed to hijack the case. See also Sir James Munby P in Re A (A Child) [2015] EWFC 11 at [12]:*
>
> *"The second fundamentally important point is the need to link the facts relied upon by the local authority with its case on threshold, the need to demonstrate why, as the local authority asserts, facts A + B + C justify the conclusion that the child has suffered, or is at risk of suffering, significant harm of types X, Y or Z. Sometimes the linkage will be obvious, as where the facts proved establish physical harm. But the linkage may be very much less obvious where the allegation is only that the child is at risk of suffering emotional harm or, as in the present case, at risk of suffering neglect. In the present case, as we shall see, an important element of the local authority's case was that the father "lacks honesty with professionals", "minimises matters of importance" and "is immature and lacks insight of issues of importance". Maybe. But how*

> *does this feed through into a conclusion that A is at risk of neglect? The conclusion does not follow naturally from the premise. The local authority's evidence and submissions must set out the argument and explain explicitly why it is said that, in the particular case, the conclusion indeed follows from the facts."*
>
> *Although these observations about lies and lack of insight are directed to proof of the threshold, they can equally be applied to the welfare evaluation.""*

91. That was a case that bears some similarity to the present in that the parents had deliberately lied to the LA, but there was no criticism of the standard of care that they had provided to the child.

92. In *Re L (A Child) (Care Threshold Criteria)* [2007] 1FLR 2050 Hedley J considered the need to accept a broad standard of parenting, and the acceptance of the impact of differential parenting on children:

> *"50. What about the Court's approach, in the light of all that, to the issue of significant harm? In order to understand this concept and the range of harm that it's intended to encompass, it is right to begin with issues of policy. Basically it is the tradition of the United Kingdom, recognised in law, that children are best brought up within natural families. Lord Templeman, in Re: KD (a minor ward) (termination of access) [1988] 1AC806, at page 812 said this:*
>
> *"The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature."*
>
> *There are those who may regard that last sentence as controversial but undoubtedly it represents the present state of the law in determining the starting point. It follows inexorably from that, that society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and*
>
> *harm, whilst others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the State to spare children all the consequences of defective parenting. In any event, it simply could not be done."*

93. Ms McGrath refers to *Re JW* [2023] EWCA Civ 944 where the Court of Appeal warned against making Care Orders at home save in exceptional circumstances:

> *"66. The PLWG recommendations and guidance can be reduced to the following short points:*

a) a care order should not be used solely as a vehicle to achieve the provision of support and services after the conclusion of proceedings;

b) a care order on the basis that the child will be living at home should only be made when there are exceptional reasons for doing so. It should be rare in the extreme that the risks of significant harm to a child are judged to be sufficient to merit the making of a care order but, nevertheless, as risks that can be managed with the child remaining in the care of parents;

c) unless, in an exceptional case, a care order is necessary for the protection of the child, some other means of providing support and services must be used;

d) where a child is to be placed at home, the making of a supervision order to support reunification may be proportionate;

e) where a supervision order is being considered, the best practice guidance in the PLWG April 2023 report must be applied. In particular the court should require the local authority to have a Supervision Support Plan in place."

94. Ms Anslow also refers back to the principles set out in Re H at [42]:

"42. In Re D (A Child)(No.3) [2016] EWFC 1, [2017] 1 FLR 237 , the obligation on the state to provide such support as will enable a child to remain with her parents was identified as an aspect of the State's positive obligation under Article 8 of ECHR. In addition, there is a statutory duty under domestic law. Under s.17(1) of the Children Act,

"It shall be the general duty of every local authority …

(a) to safeguard and promote the welfare of children within their area who are in need; and

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

by providing a range and level of services appropriate to their needs."

A child of disabled parents is likely to need a range and level of services of a broader range and higher level to ensure that he or she can continue to be brought up by their family."

Conclusions

95. Under s.1 of the Children Act 1989, in determining whether or not to prevent the LA from removing H from her parents, pursuant to the Care Order that has already been made, the Court has to decide what is in H's welfare interests. On the facts of this case, that is a difficult balance.

96. This is a family with a highly troubled history. Although there has been no fact finding, before this hearing, there have been a number of concessions made in threshold documents, and there is a long history of concerns raised by schools, the LA and third parties. It does not seem to me that in a case such as this I can or should ignore those concerns, even though no "facts" in respect of them have been found.

97. Both parents have limited intellectual functioning. The evidence is clear that they have, and still do, struggle to appreciate the risk that is posed to H, and previously to their older children, both by their siblings and by risky adults. Their failure to consider and respond to such risks is clear from the evidence. The Mother was much more convincing in the witness box as to beginning to understand risk and why H had to be protected, than was the Father. But with both parents there is still a considerable way to go.

98. However, I do agree with Ms Anslow that the Mother has been trying hard to be protective. Both MC and the MGM referred to her going everywhere with H, and not letting her out of her sight. Of course, she did let her out of her sight during the incident in October. However, my view is that the Mother is beginning to understand risk and is capable of being protective. However, there is more work to be done in this regard.

99. It was always envisaged that the Mother would have a number of sessions with Ms Carboni and would then need further follow up with the Lucy Faithfull Foundation to have those lessons reinforced. The Mother needs to be shown simple concepts and then have regular work to make sure those concepts have remained firmly in place. In some regards the working agreement set her up to fail, because the level of supervision of H with F living in the house was probably unrealistic, and she was never going to be able to supervise F with ND. Further, considering the dynamics of this family, and the role that the Mother seems to have played in the past, it was probably unrealistic to think that she could control F. Much of the background history suggests that the Mother has been, in many respects, a victim of what was happening in the family home.

100. The principal concern of both the LA and the Guardian is the parents' failure to work "open and honestly" with them, in other words that the Mother, the Father and other family members lied about the fact that MC had made the allegations on the day of the incident. It is a very common complaint of LAs that parents have failed to be open and honest with them. It is easy to see how intensely frustrating this is for LAs, and why it makes them very nervous about risk.

101. It is however important to understand the many reasons that parents may lie when faced with concerns from Childrens Services. A parent such as the Mother, who knows that her much loved child is likely to be taken away if there are allegations of harm, and who does not have the intellectual capacity to realise that lying is likely to cause much greater problems in the long run, is likely to default to not telling the truth to the LA. This may be unacceptable and deplorable, as Peter Jackson LJ put it in *Re F*, but it is important that this factor does not become the overriding consideration and does not hijack the case.

102. There is undoubtedly a risk to H from staying at home, with brothers who may pose a sexual risk and parents who struggle to be honest with the LA.

103. However, there is also a risk if she is placed in foster care. It is not possible to predict the future. But there is a high potential that once H goes into foster care she will never return to the care of her parents. She is currently very strongly bonded to her mother. Although the current plan is twice weekly supervised contact, it is easy to see that H may become very upset at leaving her mother, and the result will be a reduction in contact so that she bonds better with the foster carer(s). Once she has been removed, it will be hard for the parents to show that they have sufficiently learnt, for H to be returned to them. The risks to H's long term emotional and psychological well being of being removed from a loving and attentive mother, with the very real possibility of her spending the rest of her childhood in local authority care, are very real.

104. At the moment H is happy and settled with her parents and is doing well developmentally. The Mother is assiduous about taking her to groups and activities and she is thriving at nursery. Everyone says what a happy little girl she is. This is a totally different scenario from the child who is suffering neglect, has inflicted injuries, or whose parents are struggling with substance abuse which is impacting on their parenting.

105. In my view the LA, and the Guardian have failed to balance the risks to H of removing her from her parents care and very possibly thereby leading to a childhood in long term foster care. As the Guardian said, the LA might make a placement application and it is possible that would be granted, although I am sure it would be very strongly resisted. But H is now of an age where she will probably remember her birth family, so none of the future possible options are risk free. It is a common mantra that long term foster care is not a good outcome, albeit in many cases there may be little or no choice.

106. But in this case there is a choice. H can remain with her parents whilst they complete the work with Ms Carboni and a more clearcut safety plan is put in place. That will have to entail F not having contact with H, save perhaps in public places or a contact centre. It will involve further work with the Mother's advocate, explaining to her the utmost importance of telling the LA what is happening, and trusting the LA and the Court. The risks cannot be eliminated, but that is the truth of many parenting situations.

107. In my view, the balance of risk and long term harm vitiates in favour of H remaining with her parents. There will have to be LA monitoring, but I do not think the level of monitoring that is happening at the moment actually achieves very much. The key will be that H is seen regularly at nursery; that there are for the moment at least weekly visits, and that there are unannounced visits. I fully appreciate the disbenefits of Care Orders at home, as explained in *Re JW*, but this is a truly exceptional case. It cannot be proportionate within Article 8(2) to remove a child from her family because there are problems with making a Care Order at home. For these reasons, in my view a Care Order at home remains the proportionate outcome.