

IN THE FAMILY COURT AT NOTTINGHAM

60 Canal Street
Nottingham
NG1 7EJ

BEFORE:

HIS HONOUR JUDGE LEA

BETWEEN:

A LOCAL AUTHORITY

APPLICANT

- and -

THE MOTHER

RESPONDENT 1

THE FATHER

RESPONDENT 2

**R, S AND T
(CHILDREN VIA THEIR GUARDIAN)**

RESPONDENT 3

Legal Representation

Mr Cleary (of counsel) on behalf of the Applicant
Mr Veitch (of counsel) on behalf of the Mother
Mr Wells (of counsel) on behalf of Father
Ms Bloomfield (solicitor) on behalf of the Children's Guardian

JUDGMENT

Judgment date: 22 October 2018

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

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His Honour Judge Lea:

1. There is listed before me a public law care case in which I am asked to make findings of fact, primarily into allegations of familial sexual abuse. These fall into two parts, first facts sought by the Local Authority, and secondly facts sought by the Mother against the father, primarily of rape and of coercive sexual intercourse with family members. The Mother's schedule is dated 10 September 2018.
2. I identify the parties involved thus. There are three children who are the subject of the proceedings, currently in Local Authority foster care under interim orders. R is now 15, S is now 13 years of age and T is now 11 years of age. The Mother is the mother of all three children. She is nearly 35 years of age. Her husband is the father of the two younger children, S and T. The father of R does not have parental responsibility for his son and he plays no part in these proceedings.
3. The proceedings were issued on 23 March of this year. The 26 week timetable expired on 12 September. A fact finding hearing into the Local Authority allegations of sexual abuse was listed to be heard over seven days, commencing on 2 August. There was no schedule of allegations being made by the Mother against the Father at that stage. Delays have been occasioned, largely because of difficulties obtaining police disclosure during an ongoing investigation into the allegations, and on 5 July I vacated the August hearing and re-fixed the case to be heard commencing on 15 October.
4. The decision of the Supreme Court in *Re W* [2010] UKSC 12 reminds us of the need to strike a balance between the Article 6 requirements of fairness, which normally entails the opportunity to challenge evidence, and the Article 8 rights to respect for private and family life of all involved. There is no longer a presumption, or even a starting point, against children giving evidence. In broad terms the Court has to balance the advantages that will be brought to the determination of the truth and the damage that the giving of evidence by the children may cause to their welfare.
5. I take into account the more recent Court of Appeal decision in *Re E (A Child)* [2016] EWCA Civ 473, I also remind myself of the guidelines produced by the working party of the Family Justice Council chaired by Lord Justice Thorpe.
6. The Court is striving to decide whether the allegations made by R and S are truthful. When seen in that context the position adopted by the Father in this case is somewhat unattractive. He denies the allegations against him. He accepts however that, the allegations having been made, his relationship with his children is effectively brought to an end and he therefore no longer seeks to care for them and he does not seek contact with them. It has been asserted, on behalf of the Father, that findings against him are therefore not needed, albeit it is conceded that the ascertainment of the truth is generally important for children.
7. The Father's position statement, dated 28 August, summarises his position thus:

"The Father is aware of the allegations against him in the Local Authority final threshold. All of the allegations are denied. The Father does not wish to attend hearings in these proceedings, he does not wish to give evidence. The potential implications of that position are understood."

8. I have enquired of Mr Wells, counsel for the Father, what if any challenge he would propose to the evidence of S if she were to be called to give evidence. He accepts that there could be no Old Bailey style challenge, suggesting that S is lying. Questioning should be in accordance with the guidelines and consistent with that part of the guidelines dealing with the examination of children. He would seek to test the evidence.
9. Of course, the Father's non-attendance also means that he is not in a position whereby the Court can assess his denials of the Mother's allegations of rape, marital violence, coercive conduct, or violence towards the children. It would of course be open to the Mother to issue a witness summons so that he could be here to deal with the Mother's allegations put to him. As I understand it, the Mother is not intending to do so. The Father is of course a compellable witness.
10. It is now Monday, 22 October, and I have spent several days hearing submissions on preliminary issues, including an application to further adjourn the proceedings and an application under *Re W* for the children to give evidence. In order to deal with the applications we have viewed in Court the two video recorded interviews given by S, the two video recorded interviews given by R and a video recorded interview of T into allegations he has made of serious sexual assault upon him whilst he has been in Local Authority foster care.
11. The allegations which the Local Authority seek to prove can be summarised as follows. S was sexually assaulted by the Father on several occasions. This involved kissing, touching her vagina, digital penetration of her vagina, some of which was filmed. Encouraging her to take photographs of her naked breasts and ultimately vaginal rape of her on a number of occasions. It is asserted that the Mother was told my S of some of this activity and did nothing about it. It is alleged that the Mother forced R to sexual activity with her involving the penetration of both her vagina and her anus by R. She also fellated him on an occasion.
12. These are of course particularly grave allegations, given that R is a very vulnerable child. He has global developmental delay, limited mobility and requires help with his personal care. His difficulties are evident from his ABE interview which could not have been conducted without the considerable assistance of the intermediary
13. T was not interviewed by the police in respect of the allegations made by R and S of familial sexual abuse. He has made no disclosure that he was ever abused or was aware of the abuse alleged by his siblings. It is however alleged by the Local Authority that he witnessed some of the abuse. Thus, the Local Authority seek findings. Finding 20 that T was at times present during some of the occasions when it is alleged that the Mother forced R to have vaginal and/or anal sexual intercourse with her and on 22 that T was also present when the Mother fellated R. On behalf of the Mother Mr Veitch has made a number of applications, any one of which, if granted, would require the fact-finding hearing to be vacated. I shall deal with each in turn. Firstly, it is submitted that there should be a further ABE interview conducted with T to assist the Court in deciding whether the Local Authority is correct in its assertion that T was present, on occasions, when abuse took place. It is submitted that any finding made by the Court, particularly in relation to the contested allegations in respect of the Mother's alleged rape of R would be unsafe in the absence of any evidence from T.

14. It follows that the Court could not determine a *Re W* application in respect of T until it is known what evidence he can give or how he might do so. It is submitted that the Court cannot properly determine the veracity of the allegations made without considering whether T corroborates the account or not. This is a bold submission. There is a difference between the Court deciding on an application, under *Re W*, as to whether a child, who has already been interviewed, should be further questioned at Court and the Local Authority being required to carry out an ABE interview of a child, something that would normally be conducted by the police.
15. I am opposed to the further questioning of T. Firstly, I do not accept that a further ABE interview of T would necessarily assist the Court in determining the accuracy of the allegations. It may not do so. If T cannot remember or makes no disclosure that would plainly assist the Mother, but it would not be decisive. Those who allege that T was present and saw this could be mistaken for example. Secondly, having heard from DC Harry, I accept that considerable work had to be done with T in obtaining his confidence and building rapport before the ABE interview was conducted into events in his placement.
16. I accept the observation of the Guardian that T's presentation is extremely worrying, and I read:

"T is very quiet around professionals, particularly social workers. His foster carers have raised concerns that they found faeces in his underwear. It appears as though he's now soiling. His carers are becoming particularly concerned about his social isolation. He does not talk to the other young people in placement and they do not talk to him. He appears to have lost all confidence. He spends a lot of time singing and talking to himself in his room in an attempt to self-soothe. He continues to display sexualised behaviour. The Court is aware that he's been interviewed by the police about the incident of sexual abuse experienced in foster care and the police have confirmed that he wasn't questioned about his homelife during that ABE interview, nor did he make any disclosures about his home life. {name 5} has apparently indicated to his carers that he is relieved that the ABE interview is over."
17. The Guardian also disagrees with the submission that T needs to be interviewed and needs to have questions put to him about his homelife. The Guardian is firmly of the view that it would be extremely damaging to his emotional health to sit him in front of a video camera and question him about matters that he clearly does not wish to talk about and I agree with those observations made by the Guardian. It could not be in T's welfare interest to expose him to a further ABE interview simply to deal with a lacunae in the evidence. There is often a lack of evidence before a Court asked to make findings. The Court cannot speculate as to what the evidence might be, but it is ultimately for the Local Authority to decide what evidence should be put before the Court in order to prove its case and the Court should not compel the Local Authority to interview the child in its care, particularly when no disclosure has been made by that child.
18. Thirdly any ABE interview of T would be best carried out by DC Harry and the intermediary he has worked with and with whom T is familiar. This Court cannot insist that the police carry out such an ABE interview. If it has not been necessary by the police, for the purposes of an investigation, the police would be entitled not to conduct such an interview. Accordingly, I do not intend to adjourn this case to permit a further

ABE interview with T. The Court will have to make its findings based on the evidence which is currently available and I am conscious, both in relation to the allegations made by R and S, that the findings sought do not rely solely on their evidence, but there is other material which the Court will need to look at, particularly in relation to the messages passing between the Mother and the Father.

19. There was a stage at which the Local Authority made a Part 25 application for the Court to appoint an expert to carry out an ABE interview with T. That application is no longer pursued.
20. Mr Veitch next seeks the Court under *Re Wto* require S and R to give evidence. It is agreed on all sides that if the Court ruled in his favour this case would have to be adjourned to enable an intermediary to be employed, to have a ground rules hearing and so on.
21. I deal firstly with S. The Mother largely accepts what S has said in interview against her Father. She accepts she has been subjected to repeated rapes and sexual assaults. She denies that she was aware of these events, although admits to seeing the video of S masturbating, as early as 1 June, which of itself should have caused her to act. One of the factors to consider is the child's wishes and feelings. An unwilling child should rarely, if ever, be obliged to give evidence. The social worker visited S recently and in a short statement suggests that she would be content to give evidence. The Guardian in her position statement of 16 October stated that even if S had indicated to the Guardian that she wanted to give evidence she would not be supportive of her doing so.
22. I would be very concerned if S was called to Court to give evidence in order to have her evidence challenged by the Mother and feel that this could have a very damaging effect on her emotional wellbeing. The note that S initially sent to her Mother, that is at G295, is most disturbing. The Guardian indicated that S has experienced much instability in her life in recent months. There are concerns about her emotional presentation. Most importantly however is the fact that most of her evidence is accepted and that which is not can, it seems to me, be properly dealt with by submissions and that her evidence is not the only evidence in the case given her videos seen by the Mother and the note that she wrote to her Mother.
23. It is submitted by the Local Authority that the possible damage to S's welfare has become clearer following the statement from the social worker on 18 October. Within that statement it is noted that S contemplated suicide following a meeting with the Guardian about giving evidence. Although she has recently said that she would want to give evidence. It is clear, it is submitted, that this is a damaged child whose emotional response to an issue, such as giving evidence, is liable to extreme variations and I agree with that submission and agree that the Court would be taking a wholly unnecessary risk with the welfare of S by requiring her to give evidence.
24. As to R it is immediately apparent, from viewing his ABE interviews, how difficult it would be in any sense realistically to test his evidence in a Court forum. The Guardian puts it thus:

"There would be no advantage to a determination of the truth in hearing evidence from R."

It is clear from his interview, the intermediary reports, and from the information that the Guardian has received from his carers that R relies on others to make decision that are in his best interest. He is functioning at a much lower level than his chronological years.

25. His wishes and feelings around giving evidence is only one factor which the Court needs to consider. R's carers have indicated that he does not have a clear understanding of his current situation. He is therefore unlikely to have a clear understanding of the Court process and the application made by his Mother for him to give evidence during a fact-finding hearing. It is likely he would become distressed if it was suggested to him that he was lying. Bearing in mind his learning difficulties, the Guardian has questions how meaningful a discussion, about his wishes and feelings around giving evidence, would be, and I agree with those observations, and in those circumstance would not permit cross examination at Court, or would not permit R being exposed at Court to questioning.
26. Mr Veitch next invites the Court to adjourn this hearing because of difficulties in relation to interveners. The Local Authority have made allegations against W, against X, that is the Mother's father, that they raped the Mother with the assistance of the Father. The Mother has also made allegations against Y, her cousin and Z, X's brother. Z has declined in clear terms an invitation to intervene. Y however seeks to intervene.
27. Recently the Mother was interviewed by the police in relation to allegations of rape she has made in respect of these men and others. It is not clear to me why the Mother delayed making her complaint to the police and whether she was intending to achieve some tactical advantage in relation to these proceedings. But no disclosure has been received from the police, as this is an ongoing investigation, and thus far only two of the men who have been named have been interviewed. I now am urged to adjourn this hearing to await all of this disclosure.
28. Mr Veitch poses two questions in his written submissions for the Court to determine in respect of these interveners. Firstly, are the allegations made against them relevant to the determination of the welfare stage of these proceedings, such that it is proportionate to determine them, and I would answer that question in the negative.
29. Secondly, is there sufficient evidence, against each of the interveners in tum, for the Court to deem that the Mother could discharge her burden of proof against that intervener and here I would say yes there is, where it is alleged that the Father is present.
30. Mr Cleary, for the Local Authority, notes that the Mother has failed to file any evidence in support of the two allegations that she makes against Y and it is submitted that the Mother cannot rely upon references in her police interview and a party seeking to make a serious allegation of rape should then set that out with the particulars of the allegation in a statement, with a statement of truth and a signature, and the Mother has failed to do so. So, it said that, in those circumstances, the allegation should be dismissed.
31. I would decide as follows. It would be open to the Mother in order to establish her case of coercive rape, as I have already indicated, to witness summons the Father, she has not done so. I cannot see how in these circumstances it would be right to adjourn this

hearing to obtain further evidence from police interviews which she has not put in statement form. I do not therefore in these circumstances, since I do not see that it has a relevance to the determination of the welfare stage of these proceedings to make findings against Y at this stage. I shall defer the question of whether I seek to make findings in relation to those allegations of coercive rape, where the Father was present, once I have heard the evidence in relation to that, but I do not propose, at this stage, to require Y to remain, to deal with allegations in circumstances where I am not proposing to make any findings against him.

32. So, in all the circumstances of this case I am not proposing to adjourn the matter. We still have a number of days left of this hearing and I intend to continue to hear the evidence and make such findings as I can.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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