MISS RECORDER HENLEY

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.

Before:

MISS RECORDER HENLEY

IN THE FAMILY COURT AT NEWCASTLE UPON TYNE

CASE No.NE17C00365/ NE172/18

BETWEEN:

LA

Applicant

-and-

M

First Respondent

-and-

F

Second Respondent

-and-

R
(A Child by his Children's Guardian ALLISON RUDDICK)

Third Respondent

JUDGMENT

Representation

Applicant – Miss Upton (Counsel)
Respondent Mother – Mr Thornton (Counsel)
Respondent Father – Mr Jackson (Counsel)
Respondent Child – Mr O'Sullivan (Counsel)

Introduction

1. The Court is concerned with R a little boy (born December 2016) now aged 2 years 7 months. R is the subject of an Interim Care Order and has been placed in foster care for over two years.

2. The Applicant local authority, LA, through its agent X applied for a Care Order in respect of R on 31st May 2017 and a Placement Order on 25th April 2018. During the course of this final hearing the local authority has changed its care plan from one of adoption to one of rehabilitation to the care of the Mother under a Care Order. Accordingly its application for a Placement Order is not now being pursued, and leave is sought for it to be withdrawn.

3. During the course of this final hearing, on 17th July 2019 the local authority issued an application for an order pursuant to s.34(4) Children Act 1989 for permission to refuse contact between the child and the Father.

4. The Mother (M) is M, (born June 1991) now aged 28 years old.

5. The Father is F (born May 1991) aged 28 years old. R's parents do not present as a couple. F has been represented throughout these proceedings but has not engaged with them or given instructions to those representing him since June 2018. At that stage the care plan was one of adoption and he was aware of that plan.

6. The child is represented by his Children's Guardian, Allison Ruddick.

7. These proceedings were issued on 31st May 2017, the 26-week timetable for this case expired as long ago as 29th November 2017. The proceedings have been significantly delayed. These delays have been caused in part as a consequence of the litigation failure of the local authority and in particular, failures in its care planning procedures which resulted in an abandoned final hearing that commenced in December 2018 but did not conclude that month due to lack of Court time and then when it resumed on a part heard basis in February 2019 the LA accepted that its adoption plan had not been approved by the Agency Decision Maker.

8. This matter comes before me for final hearing with a time estimate of 5 days, commencing on Monday 15th July 2019. When the hearing was listed by the District Judge who abandoned the earlier final hearing it was intended that this would be a complete re hearing, however, in May 2019 I directed transcripts of all of the evidence that she had heard and the advocates with conduct of this hearing (different trial counsel to those who had conduct before) have agreed that that evidence does not need to be repeated and reliance can be placed on those transcripts. I hand down judgment in writing today, Tuesday 23rd July 2019.

Background

9. Local authority involvement with the family dates back several years as a consequence of the Mother's relationships, which have featured domestic abuse.

10. The Mother has an older child, L, who was made the subject of a Special Guardianship Order in favour of the Maternal Grandmother following private law proceedings. L's placement in her care arose as a consequence of domestic abuse

between the Mother and L's father and the Mother's inability or unwillingness to protect L from exposure to that abusive relationship.

11. The Mother subsequently formed a further domestically abusive relationship with F and R was born of that relationship.

12. These proceedings were issued against a background of R being exposed to parental domestic abuse, posing a risk of significant physical and emotional harm to him.

13. Protective measures were taken in respect of R on 24th April 2017 when he was placed in the care of the Maternal Great Grandmother. This followed the Mother's indication that she would be unwilling to proceed to support a prosecution of the Father for offences of domestic abuse against her and as a consequence of the Mother permitting the Father to have contact with the child at a time when she had agreed with the local authority's safety plan that he was only to have supervised contact with the child, without her being present.

14. The Mother has a history of poor mental health and binge drinking which exacerbates the same. It had been understood that she suffered from depression until, following involvement with the Crisis Team, she was diagnosed with a Personality Disorder in 2018, during the course of these proceedings. That diagnosis was not made by Dr Mosher, a psychologist instructed as a single joint expert to assess the Mother in these proceedings who considered the Mother to be "psychologically normative" when he assessed her in 2017. HHJ Hudson refused permission for him to be called to give live evidence when she reviewed this case in July 2018. I refused to permit an addendum report from him when the issue was raised on behalf of the Mother in May 2019. No formal application was made for further psychological or psychiatric assessment in these proceedings by any of the parties. I did not consider that an update from him was necessary,

particularly given that his assessment was so different to the assessment of those involved with the Mother in a treating capacity.

15. The Father has an extensive history of criminal offending and drug misuse.

16. The Mother has a history of misusing cocaine and of criminal offending.

Litigation history

17. These proceedings were issued on 31st May 2017. The Court granted an interim care order removing of R from the care of the family and placing him in local authority foster care on 1st June 2017. He has remained in local authority foster care since that time, under the auspices of an interim care order. Sadly R experienced three changes of foster care placement within the first week of his accommodation as a looked after child.

18. This matter was originally allocated to lay justices in the Family Proceedings Court. That Court approved the instruction of Dr Mosher to undertake a psychological assessment of the Mother. The timetable was then extended to permit time for him to respond to written questions. The matter then came before a Deputy District Judge in February 2018 who listed further hearings before the District Bench.

19. The timetable was further extended due to the lack of Court time available to list a final hearing.

20. My first involvement in the case took place on 13th May 2019 when I heard a case management hearing. At that stage the local authority had invited the Court to direct a statement from HL, a looked after child, on the basis that it sought to rely on allegations she had made to her social worker against the Mother. The LA indicated that HL might not wish to make a statement or give evidence in these

proceedings but that it had taken a statement from HL's social worker AD who had set out a contemporaneous account of what HL had said to her. The Mother made clear that she put the LA to strict proof in respect of these matters and would require HL to give evidence. At that hearing it had been understood that the Guardian continued to support the local authority's applications for care and placement orders. During my exchanges with counsel I highlighted that a Re W hearing may need to be listed in respect of HL giving evidence and I raised the evidential difficulties that the LA may face if HL refused to give a statement. I directed that a statement be filed from HL, at the request of the LA and indicated that if HL refused to give a statement the LA needed to consider whether it was necessary and proportionate to pursue findings based on what she said. I was also invited to direct statements from a range of professionals who, it was said, could give corroborative hearsay evidence of HL's allegations and would demonstrate that she had been consistent in her account. I listed an IRH on 20th June 2019 before me and made clear that I would consider these issues further at that hearing. I directed that the LA take a decision about whether it sought findings based upon what HL said within 14 days and that it file a schedule of findings sought by 24th May 2019. Regrettably that schedule of findings was filed late and is dated 24th June 2019.

21. On 20th June 2019, trial counsel for the LA attended the IRH and confirmed that she had drafted findings based upon what HL had alleged, that HL had refused to give a statement and that the LA was not proposing to call HL as a witness. The LA also accepted that none of the professionals who it had thought could give corroborative hearsay accounts were willing or able to do so. Again, the Mother indicated that she required HL to give evidence and put the LA to strict proof. The Guardian's position was understood to be supportive of the LA's applications for care and placement orders. I was not invited to list the matter for a Re W hearing by any of the parties. I repeated my observations about the evidential difficulties that the LA faced without producing direct evidence from HL. I was informed that the LA would again reconsider whether it pursued findings based

upon what she said. I directed that an Advocates Meeting take place the week prior to the final hearing and that an agreed note of that meeting be sent to me.

22. Upon receipt of that note it was apparent that the LA maintained its position that it sought findings based on HL's allegations but was not intending to produce HL to give evidence or take a statement from her. I received the bundle of papers for this hearing on the Friday before it commenced (the last working day before it started) and within that bundle read for the first time that CG had not reached a recommendation in respect of the care plan and instead wanted to hear all of the evidence before reaching a conclusion. A central issue being whether HL's allegations were true.

23. On the first morning of the final hearing I saw counsel in Chambers to inform them that in light of the positions of the parties, a Re W exercise would need to take place as a preliminary issue as I would need to determine whether I would seek to compel HL to give evidence. I heard evidence from HL's social worker, AD in respect of HL's refusal to give evidence and addressing her welfare in respect of this issue. After hearing submissions from the LA, M and CG I gave a brief ruling that I would not compel HL to give evidence. I informed the parties that I would give a fuller ruling at the conclusion of the case and I give that ruling now.

Ruling in respect of HL giving evidence

24. The law in respect of children giving evidence in public law proceedings is well settled. The leading authority is Re W (Children) [2010] UKSC 12, a Supreme Court decision in which Baroness Hale gave the leading judgment. Following on from that decision the Working Party of the Family Justice Council issued Guidelines in Relation to Children Giving Evidence in Family Proceedings in December 2011, ("The Guidelines") to be used when the Court is considering the possible advantages that the child being called will bring to the determination of

the truth, as balanced against the possible damage to the child's welfare from giving evidence. There is no presumption against a child giving evidence.

25. The Guidelines set out the following list of criteria when considering applications of this nature:

"Legal considerations

8. In light of Re W, in deciding whether a child should give evidence, the court's principal objective should be achieving a fair trial.

9. With that objective the court should carry out a balancing exercise between the following primary considerations:

i) the possible advantages that the child being called will bring to the determination of truth balanced against;
ii) the possible damage to the child's welfare from giving evidence i.e. the risk of harm to the child from giving evidence; having regard to:
a. the child's wishes and feelings; in particular their willingness to give evidence; as an unwilling child should rarely if ever be obliged to give evidence;
b. the child's particular needs and abilities;
c. the issues that need to be determined;
d. the nature and gravity of the allegations;
e. the source of the allegations;
f. whether the case depends on the child's allegations alone;
g. corroborative evidence;
h. the quality and reliability of the existing evidence;
i. the quality and reliability of any ABE interview;
j. whether the child has retracted allegations;
k. the nature of any challenge a party wishes to make;
l. the age of the child; generally the older the child the better;

m. the maturity, vulnerability and understanding, capacity and competence of the child; this may be apparent from the ABE or from professionals discussions with the child;

n. the length of time since the events in question;

o. the support or lack of support the child has;

p. the quality and importance of the child's evidence;

q. the right to challenge evidence;

r. whether justice can be done without further questioning;

s. the risk of further delay;

t. the views of the guardian who is expected to have discussed the issue with the child concerned if appropriate and those with parental responsibility;

u. specific risks arising from the possibility of the child giving evidence twice in criminal or other and family proceedings taking into account that normally the family proceedings will be heard before the criminal; and

v. the serious consequences of the allegations i.e. whether the findings impact upon care and contact decisions.

10. The Court must always take into account the risk of harm which giving evidence may do to children and how to minimise that harm, although that may vary from case to case but the Court does not necessarily need expert evidence in order to assess the risk.

11. Where there are concurrent or linked criminal proceedings there should be close liaison between the respective parties and the allocated judges and ideally linked directions hearings. The Police/CPS should be informed of any proposal that a child give evidence in family proceedings and their views obtained before any such decision is made. Alternatives to child giving live evidence at a hearing

12. The Court needs to consider seriously the possibility of further questions being put to the child on an occasion distinct from the substantive hearing so as to avoid oral examination. This option would have significant advantages to the child and should be considered at the earliest opportunity and in any event before

that substantive hearing. Such further questioning should be carried out as soon as possible after the incident in question. The Court will need to take into account practical and procedural issues including:

a. giving the child the opportunity to refresh his memory;

b. the appropriate identity of the questioner;

c. matching the skills of the questioner to the communication needs of the child; d. where the questioning should take place;

e. the type and nature of the questions;

f. advance judicial approval of any questions proposed to be put to the child;

g. the need for ground rules to be discussed ahead of time by the judge, lawyers (and intermediary, if applicable) about the examination; and h. how the interview should be recorded."

26. HL is a 17 year old looked after child who is related to the Mother. She is not a subject child of these proceedings and is neither a party nor an intervener in this litigation. HL has no known cognitive difficulties and is considered to have the capacity to give evidence and to understand an oath. She alleges that she has attended parties with the Mother at which both she and the Mother have consumed illicit drugs and alcohol and makes allegations that the Mother continues to lead a lifestyle that is incompatible with the safe care of R. She gave a detailed account in respect of these issues to her social worker AD, in February 2019 and March 2019. AD has provided two witness statements together with her contemporaneous notes setting out the substance of these allegations. HL's allegations are about recent events. She has never sought to retract or change her account. These allegations were first drawn to the attention of HL's social worker by HL's Mother. At the time that HL made these allegations she was living with her paternal aunt, AL. This arrangement had taken place following the breakdown of HL's foster care placement. As a consequence of HL's allegations she was removed from the care of her aunt and placed in local authority supported accommodation where she remains to date. HL seeks to return to her aunt's care and has regular contact with her. The local authority does not support HL

returning to the care of her aunt. At the time that I determined this issue there was no evidence before the Court from AL or from HL's mother.

27. The parties' positions in respect of this issue can be briefly stated. The local authority does not seek to call or adduce direct evidence from HL in support of its case on grounds that it would be inimical to her welfare. The Children's Guardian also does not seek to persuade the Court to compel her to give evidence, accepting the opinion of AD that it would be contrary to her welfare interests to be required to do so. On behalf of the Mother, Mr Thornton submits that HL must be produced to give evidence to enable him to effectively challenge her account in the interests of justice. The Father has given no instructions in respect of this issue.

28. During the course of submissions, the LA, M and CG all agreed that HL's allegations were a "pivotal" issue which was "of central importance" to the case. This has crystallised as a consequence of the Guardian's recently adopted position. If HL's allegations are determined to be true, the Guardian would support the local authority's applications. If the Court is unable to make findings based upon HL's allegations, then the Guardian would support a rehabilitation of the child to the care of the Mother. On behalf of the Mother, Mr Thornton concedes that if the Court makes findings against the Mother based on HL's allegations then that would seriously compromise his ability to successfully argue that the child should be returned to her care, but without those findings there is scant recent evidence that would support an adoption plan.

29. In so far as the possible advantages of HL being required to give evidence to the determination of the truth is concerned, HL has not given direct evidence in any form to the Court. Her account is contained within the evidence of AD, her social worker. Requiring HL to give evidence would potentially strengthen the local authority's case in that it would no longer be reliant on hearsay evidence. It would provide the Court with the best available evidence. It would also enable

the Court to directly assess HL's credibility and reliability as a witness. The lack of an ABE interview means that the Court is unable to conduct such an assessment based upon a video recording of HL. The Mother seeks to challenge HL directly, ideally by way of live oral cross examination although there would be an option for the Court to set ground rules around this, for example by requiring written questions to be put which could be responded to in writing or in a video recorded interview. Permitting the Mother to challenge HL's account directly would meet her Article 6 ECHR Right to a Fair Trial, which requires the proceedings to be fair and this usually entails an opportunity to challenge evidence presented by the other side.

30. In weighing these advantages against the possible damage to the child's welfare from giving evidence i.e. the risk of harm to the child from giving evidence, I recognise that HL is a non subject child who is 17 years of age and therefore at the upper age limit for an application of this nature. I also bear in mind that she is not a victim of abuse alleged to be perpetrated by the Mother in the sense of a physical or sexual assault and so the content of her allegations themselves cannot be said to be traumatic for her to recount. There has been no criminal investigation into her allegations and therefore there is no prospect of her having to give evidence about these matters in other proceedings, nor has evidence already been taken from her in any form.

31. Central to my determination is the undisputed position that HL is unwilling to give evidence. Her position is an absolute and unwavering one. She has refused to give evidence in any form, including in writing. I accept that her refusal is not a complete barrier to her being required to give evidence but both The Guidelines and Re W make clear that an unwilling child should rarely, if ever, be obliged to give evidence. When AD asked HL whether she would be prepared to give evidence, she had mentioned only two ways that she could do so – by written statement or by video link. Those are however, two of the most 'benign' options she could be given – she was offered the opportunity to simply give a written

account and was (rightly or wrongly) given an assurance that she could do so without needing to attend Court. She refused to even do that.

32. Not only is HL resolutely refusing to give evidence in any form, but her social worker AD has given written and oral evidence to the Court that requiring her to give evidence would be detrimental to her welfare.

33. AD was cross-examined on the issue of HL's welfare as it relates to this issue and in respect of how HL's views about giving evidence were elicited. Her evidence was clear, helpful and unwavering. In her opinion HL is anxious about giving evidence and is in fear of reprisals from the Mother. She has been HL's allocated social worker since March 2018. During the course of her involvement HL has moved placements three times. In her opinion, HL has only recently achieved some stability in her placement and begun to trust those providing care for her. She considers that it would undermine HL's emotional wellbeing and would cause her anxiety if she were required to participate in this process in any way. She did not consider that HL's attempt to contact the Mother via Facebook the week prior to her giving evidence by way of a "friend request" contradicted HL's stated fear of reprisals nor that HL's continued contact with her aunt AU within the vicinity of an address regularly visited by the Mother undermined this stated fear, and did not change her overall opinion that HL should not be required to give evidence when these matters were put to her. She considers HL to be a vulnerable child due to her mental health difficulties and poor emotional health. I accept her opinion that requiring HL to give evidence would be detrimental to her emotional well-being and would result in a risk of causing her significant anxiety.

34. I recognise that the care plan before the Court is the most draconian that the Court could consider and that HL's allegations are central to my welfare determination. The stakes for the Mother could not be higher. If I make findings based upon what HL has said that it may well be that an adoption plan would be endorsed by the Guardian and that my own welfare analysis would result in a conclusion that

nothing but adoption will do for R. If I do not make the findings sought based upon what HL has said that it is likely that the Guardian would support the rehabilitation of R to the Mother's care and similarly I may be so persuaded that this is the right outcome. The seriousness of the allegations in respect of welfare decisions cannot therefore be overstated.

35. The Mother's case is that HL is lying. In her recent discussions with the Guardian, the Guardian reports that the Mother suggested that the allegations were made due to the malign influence of HL's mother. If that is the Mother's case then it is open to her to require HL's mother, an adult, to give evidence so that this case can be put. It is also open to the Mother to give direct evidence to contradict the allegations made against her and to call HL's aunt AL, who it is understood, refutes the veracity of some elements of HL's account. Submissions can be properly made about the lack of direct evidence from HL and the weight to be attached to AD's hearsay evidence. I have made very clear to the local authority and to the Mother that the local authority bears the burden of proving these allegations and that I will assess the weight to be attached to HL's allegations once I have considered all of the evidence as part of my evaluation of the "broad canvas". This permits the Mother to adduce direct evidence to contradict the allegations, to challenge the evidence of AD and to make submissions about the credibility and reliability of HL. I consider that this allows justice to be done. I have reiterated that I will approach these matters with considerable care.

36. The final issue that has influenced my decision to refuse to compel HL to give evidence is the potential that requiring her to give evidence could further delay the conclusion of these proceedings. HL has had no preparation for giving evidence. I was informed that she is in the locality and is in theory available but her emotional reaction to being informed of a decision that she must give evidence is unknown and cannot be properly predicted. The mechanism by which she would give evidence has not been considered and may need to be determined and further

work with HL during the course of the listing for this trial would be required to canvas her views. The availability of special measures has not been ascertained for the week of this hearing, there would need to be a ground rules hearing and practical arrangements would need to be considered and made. This issue took the whole of the first day of Court time to determine. The remainder of the week is required to hear oral evidence from the existing witnesses and there is therefore a real risk that if further Court time were required to deal with this application it would jeopardise the completion of the case this week. Given the lamentable delays that these proceedings, and most importantly that R has already endured, the potential for an adjournment of this matter or for additional Court time to be required on a part heard basis risks further delay which must be avoided if at all possible.

37. At the IRH on 20th June 2019 the Mother's then counsel raised a request for HL's care records to be disclosed so that submissions could be made about her credibility based on her behaviour and any previous complaints that she had made or untruths that she may have told. I indicated that any such application would need to be made formally, on notice and with HL as a Respondent. No such application was made. I am satisfied that the appropriate way to deal with these issues is for the Mother to be able to cross examine HL's social worker AD about HL's credibility and any known previous false complaints or lies that she has told.

Events following the ruling

38. On Tuesday 16th July 2019 the Mother produced a witness statement from AL, who attended Court prepared to give oral evidence confirming its contents. Within that statement she gave evidence in respect of a number of matters that cast doubt upon the credibility and reliability of HL as a witness of truth. I granted time to the local authority to investigate these assertions by checking its case recordings, and permitted AD time to consider the contents of the statement. Whilst that process unfolded, I heard evidence from LM, the Mother's support

worker with Gentoo Housing Association. LM had not given evidence at the earlier abandoned hearing due to ill health. At the conclusion of her oral evidence the LA requested further time to consider its position, which I granted. I stood the matter down to the following day to allow instructions to be taken. I was informed later that afternoon by email that the LA conceded that it could not discharge the burden of proof in respect of HL's allegations and as a consequence, findings based upon them were no longer pursued. The Local Authority also acknowledged that in terms of the identifiable risks to R (i.e. domestic abuse, the Mother's drug and/or alcohol misuse and poor maternal mental health) there was no recent evidence of these and therefore that the Local Authority no longer pursued a plan of adoption. This change of position had been agreed with the IRO and Agency Decision Maker, who no longer gave a mandate for the LA to pursue its application for a Placement Order.

39. Instead the LA proposed to put forward a revised final care plan providing for R to be rehabilitated to the care of Mother under the auspices of a care order.

40. I was presented with a number of factual concessions made by the Mother, which I was invited to make as findings in satisfaction of the threshold criteria and for welfare purposes. Those findings were agreed by the local authority and the local authority indicated that it did not seek to pursue any findings against the Mother above those that the Mother had conceded. The Mother accepted that the concessions she made crossed the threshold criteria for the making of final public law orders, pursuant to s.31 Children Act 1989 and were proportionate to the making of a Care Order. Those concessions are as follows:

At the time protective measures were taken on 24th April 2017:

1. The Mother did not have the care of her eldest child L who was secured in the care of MGM under an SGO. L has been known to Children's Services since 2012 as a result of significant domestic violence between M and L's Father.

2. There was significant domestic violence within the relationship between M and F, which has necessitated police intervention.

3. M was unable to protect R from F and did not accept that F posed a risk to R or her and had never followed through with complaints to the police.

4. M was unable to comply with written agreements put in place to protect her and R from F.

5. M minimised incidents of domestic violence.

6. F has a significant history of drug misuse, which has led to hospital admissions.

7. Until Easter 2017 M continued to have contact with F, up until that time she was either unwilling or unable to separate from him, despite knowing the risk he posed to her.

8. M and F were not open and honest about their relationship.

9. M has a propensity to enter into domestically violent relationships.

The Mother concedes the following findings, relevant to welfare determinations:

1. Mother tested positive for cocaine use over a six month period from April 2017 to October 2017. M was dishonest as to this use in discussions with multiple professionals and did not admit use until she declared it when her hair sample was taken.
2. M used alcohol on two occasions whilst living in refuge accommodation contrary to agreements in place
3. The Mother has a history of involving herself in relationships in which she is the victim of domestic violence, the Mother accepts a domestically abusive / violent relationship would present a risk to R if placed in her care.
4. In October 2018 M made a threat to the IRO that she would take R

5. In October 2018 M made threats to the social worker [CG] that she would "smash her [the social worker's] face in"
6. In February 2018 M self-harmed through an overdose of anti-depressant medication rendering herself drowsy. This would present an obvious risk were R to be in her care.

41. In light of these concessions, I invited submissions from all the parties in respect of whether the Court should hear any further evidence with a view to making factual determinations. None of the parties invited me to do so. The Guardian did not seek to put a separate case or invite me to make any additional findings.

42. I gave a brief ruling that I was satisfied that in light of the Mother's concessions, it was no longer necessary for me to hear any further factual evidence with a view to making any findings above and beyond those that were agreed. I indicated that I would give a fuller reserved ruling in respect of this issue. I give that ruling now.

<u>Ruling in respect of whether to proceed to determine any further disputed issues of fact</u>

43. I give this ruling formally because although the Guardian did not press me to make findings, her position being described as "responsive", she did reiterate that her recommendation flowed from factual determination and particularly those matters alleged by HL. In order to assist to clarify the issue I agreed to make a determination about whether I considered that further evidence should be adduced.

44. If I did proceed to hear further evidence the only witnesses I would be able to hear from would be AD, to give me a hearsay account of what HL alleged, AL to give me evidence about HL's lack of credibility as a witness and the Mother. None of the parties would seek to challenge AL' evidence. The local authority specifically

conceded that it would not be able to discharge the burden of proof in respect of those allegations in light of AL' evidence, having had time to investigate her account and cross reference her account with their records. I have reminded myself of the legal principles in respect of making findings of fact, and am grateful to Mr O'Sullivan on behalf of the child for providing me with some of the citations that I have incorporated into this judgment.

The Law in respect of Factual Determinations

45. The law to be applied when considering the issues before the court is well settled. When considering the findings sought by the local authority the court applies the following well established principles:

46. The burden of proving the facts pleaded rests with the local authority.

47. The standard to which the local authority must satisfy the court is the simple balance of probabilities. The inherent probability or improbability of an event remains a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred; **Re B [2008] UKHL 35 at [15]**. Within this context, there is no room for a finding by the court that something *might* have happened. The court may decide that it did or that it did not; **Re B [2008] UKHL 35 at [2]**.

48. Findings of fact must be based on evidence not on speculation. The decision on whether the facts in issue have been proved to the requisite standard must be based on *all* of the available evidence and should have regard to the wide context of social, emotional, ethical and moral factors; **A County Council v A Mother, A Father and X, Y and Z [2005] EWHC 31 (Fam)**.

49. In determining whether the local authority has discharged the burden upon it the court looks at what has been described as 'the broad canvas' of the evidence before it. The role of the court is to consider the evidence in its totality and to

make findings on the balance of probabilities accordingly. Within this context, the court must consider each piece of evidence in the context of all of the other evidence; **Re T [2004] 2 FLR 838 at [33]**.

50. The evidence of the parents and carers is of utmost importance and it is essential that the court forms a clear assessment of their credibility and reliability. The court is likely to place considerable reliability and weight on the evidence and impression it forms of them.

51. I also however, must bear in mind the observations of Macur LJ in **Re M (Children) [2013] EWCA Civ 1147** "It is obviously a counsel of perfection but seems to me advisable that any judge appraising witnesses in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment solely by virtue of their behaviour in the witness box and to expressly indicate that they have done so".

52. The court must always bear in mind that a witnesses may tell lies in the course of an investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear and distress. The fact that a witness has lied about some matters does not mean that he or she has lied about everything; **R v Lucas [1982] QB 720**.

53. It is also important when considering its decision as to the findings sought that the Court take into account the presence or absence of any risk factors and any protective factors, which are apparent on the evidence. In **Re BR [2015] EWFC 41** Peter Jackson J (as he then was) sets out a useful summary of those factors drawn from information from the NSPCC, the Common Assessment Framework and the Patient UK Guidance for Health Professionals.

54. Hearsay evidence is admissible in family proceedings in connection with the upbringing, maintenance or welfare of a child; The Children (Admissibility of Hearsay Evidence) Order 1993. The issue for the Court when dealing with such

evidence is the reliability, cogency and weight to be given to such evidence amongst all the admissible evidence before the court.

55. This point was considered by the Court of Appeal in **Re W (Fact Finding: Hearsay Evidence) [2013] EWCA Civ 1374 [2014] 2 FLR 703** where Black LJ (as she then was) said the following;

"...6.A number of grounds of appeal were advanced by F but I think it is fair to say that the principal complaint was about the way in which the judge approached the hearsay evidence adduced by the local authority. I will concentrate upon this issue because it is sufficient to determine the appeal and, as there is to be a rehearing of the factual issues, it is important that I say as little as possible about the evidence so that the judge who deals with this matter is free to evaluate it as he or she thinks proper. Nothing that I say in this judgment should be taken as indicative of any view as to the weight (or lack of weight) of particular pieces of evidence. Making findings of fact is a complex process, which depends upon the judge's evaluation of the whole of the evidence presented and of the witnesses who appear before him or her. It is only when the whole jigsaw is assembled that the weight of an individual piece of evidence can reliably be determined.

7.This case gave rise to no general arguments of principle. There is a great deal of authority on the subject of hearsay evidence in cases concerning children. I will list below the authorities that were cited to us as of particular relevance to the issue but we were not asked to revisit them or to venture any general guidance, the appeal being approached with commendable practicality on the basis that the judge erred in the way in which she treated the evidence in this particular case. The authorities were: Official Solicitor v K [1965] AC 201; Re W (Minors)(Wardship: Evidence) [1990] 1 FLR 203; R v B County Council, ex parte P [1991] 1 FLR 470; Re N (Child Abuse: Evidence) [1996] 2 FLR 214; Re D

(Sexual Abuse Allegations: Evidence of Adult Victim) [2002] 1 FLR 723; Re B (Allegation of Sexual Abuse: Child's Evidence) [2006] EWCA Civ 773; H v L [2006] EWHC 3099 (Fam); B v Torbay Council [2007] 1 FLR 203; W (a child) [2007] EWCA Civ 1255; JFM v Neath Port Talbot Borough Council [2008] EWCA Civ 3; Enfield LBC v SA (By her Litigation Friend, The Official Solicitor) [2010] EWHC 196 (Admin); Re W (Children)(Abuse: Oral Evidence) [2010] UKSC 12 [2010] 1 FLR 1485; Surrey County Council v M, F and E [2013] EWHC 2400 (Fam).

8.We were also referred to the Children (Admissibility of Hearsay Evidence) Order 1993, the Civil Evidence Act 1995 and Articles 6 and 8 ECHR.

9.Much of the local authority's evidence in relation to the sexual abuse findings was hearsay. The principal source of evidence about what happened to T was obviously T herself. She had spoken to social workers about her experience in late 2012/early 2013 and they reported to the court what she had said. However, Judge Davies (who very properly attended to the case management of this case throughout) was quite rightly intent on ensuring that her evidence should be received by the court in a more direct form and made an order on 20 March 2013 that if the local authority were relying on her evidence, they were to file a statement from her. A date was given for the filing of the statement and when that was not complied with, an extension was given. However, still no statement was forthcoming…

…22.Where an adult's evidence is so central to a finding or findings sought, I would normally expect that adult to give evidence, although there can, of course, be situations in which that is not possible. Judge Davies herself made clear by her order of 20 March 2013 that she expected that T would furnish direct evidence. She was never asked to revoke that order, although equally she was not asked to direct that the local authority could not rely on the hearsay material as to what T had said.

23.Where it is said to be impossible to obtain a statement from a witness or to secure a witness's attendance at court, the court needs to know the reasons why so that that can be considered when, to use the phraseology of section 4 Civil Evidence Act 1995, "estimating the weight (if any) to be given to hearsay evidence".

24.There are ways in which witnesses can be assisted to overcome difficulties in engaging in court proceedings and the various options should always be considered when there are problems in getting evidence from a central witness. They include special measures such as screens in the court room or a video link. Alternatively, a witness summons may be appropriate. None of these options seem to have been considered in this case. We were told that T has recently given a statement to the police by way of an ABE video interview. Had that course been taken before the fact finding hearing, the video interview would at least have covered the ground that would have been covered by a statement. The question of cross examination could then have been addressed as a supplementary issue in the knowledge of what T had said in the ABE interview.

25.Assuming that none of the available measures secures direct evidence from the witness, the judge has to have regard to the reasons for this in weighing the hearsay evidence on which reliance is placed instead. A judge may be less uncomfortable in giving weight to such evidence where there is a good reason for the witness's non-engagement (such as the sort of profound psychological difficulties from which C is suffering or a protracted physical illness) than where the reason is hard to divine or the non-engagement appears to be a matter of deliberate choice on the part of the witness.

26.The estimation of the weight to be given to T's recent complaints was complicated by the fact that she had retracted what she said. She did so in the form of two letters. She has problems with literacy and they were written by her brother B and signed by her. The first is dated 6 February 2013 (E105). It alleges that social services are trying to "manipulate and intimidate me into making a

statement" and says that she is not willing to make a statement about F molesting her as it would be a false statement. The second letter (E253) is undated but I think it was received by social services towards the end of April 2013. It says that social services had blackmailed her by saying they would pay for a deposit for a house move if she made a statement about F but that she would not do so as it would be false.

27.The judge referred to the two letters in §§20 and 21 of her judgment but went on to make her findings about T's complaints in §22 without setting out how she had approached them in her evaluation. She had earlier rejected the suggestion that the social workers had put pressure on family members to make untrue allegations (see §10) and found the social workers to be very careful in their evidence and accurate in their note-taking and recollection. This was, of course, material to her approach to the retraction letters in which improper conduct on the part of social services was suggested. She also stated in a different section of the judgment later on (§31) that she found that pressure had been put on T by B and by both parents to withdraw her allegations but this was a bald statement without any supporting analysis or details and without specific reference to the letters.

28.The retraction of a complaint normally requires careful and specific consideration and this case was no exception. Obviously the fact that a complaint is subsequently retracted does not prevent a judge from accepting that it is in fact true but it gives rise to questions which must be addressed sufficiently fully and directly in the judge's reasons so that one can be confident that the fact of the retraction has been given proper weight in the judge's conclusions about the subject matter of the retracted allegation. Where, as here, the only evidence before the court about the complaint is hearsay, it seems to me that this is particularly so and the judgment was insufficiently specific in my view.

56. Recent cases have rigorously considered the quality and cogency of evidence to be expected in family cases.

57. This was highlighted in first instance decision of the then President of the Family Division in **Re A (A Child), [2015] EWFC 11: [2016] 1 FLR 1, [2015] Fam Law 367**;

"…8.The first fundamentally important point relates to the matter of fact-finding and proof. I emphasise, as I have already said, that it is for the local authority to prove, on a balance of probabilities, the facts upon which it seeks to rely. I draw attention to what, in Re A (A Child) (No 2) [2011] EWCA Civ 12, [2011] 1 FCR 141, para 26, I described as:

"the elementary proposition that findings of fact must be based on evidence (including inferences that can properly be drawn from the evidence) and not on suspicion or speculation."

This carries with it two important practical and procedural consequences.

9.The first is that the local authority, if its case is challenged on some factual point, must adduce proper evidence to establish what it seeks to prove. Much material to be found in local authority case records or social work chronologies is hearsay, often second- or third-hand hearsay. Hearsay evidence is, of course, admissible in family proceedings. But, and as the present case so vividly demonstrates, a local authority which is unwilling or unable to produce the witnesses who can speak of such matters first-hand, may find itself in great, or indeed insuperable, difficulties if a parent not merely puts the matter in issue but goes into the witness-box to deny it. As I remarked in my second View from the President's Chambers, [2013] Fam Law 680:

"Of course the court can act on the basis of evidence that is hearsay. But direct evidence from those who can speak to what they have themselves seen and heard is more compelling and less open to cross-examination. Too often far too much time is taken up by cross-examination directed to little more than demonstrating

that no-one giving evidence in court is able to speak of their own knowledge, and that all are dependent on the assumed accuracy of what is recorded, sometimes at third or fourth hand, in the local authority's files."

It is a common feature of care cases that a local authority asserts that a parent does not admit, recognise or acknowledge something or does not recognise or acknowledge the local authority's concern about something. If the 'thing' is put in issue, the local authority must both prove the 'thing' and establish that it has the significance attributed to it by the local authority…" (emphasis supplied)

11. Aitkens LJ in Re J (A Child) [2015] EWCA Civ 222 endorsed if not advanced this thinking as follows (again with emphasis given);

"…55. I agree with the judgment of McFarlane LJ. This case exhibited many of the shortcomings that were highlighted in the judgment of Sir James Munby P in Re A (a child) [2015] EWFC 11. I wish to endorse and underline all the points of principle made and the salutary warnings given by the President in that case. It is a judgment that needs to be read, marked and inwardly digested by all advocates, judges and appellate judges dealing with care cases and particularly adoption cases. As the judgment of the President in that case is necessarily long and detailed, I have respectfully attempted to summarise below the principles set out, none of which are new. I venture to give this summary in the hope that advocates and judges throughout England and Wales who have to deal with these difficult care cases will pay the utmost heed to what the President has said. Advocates and courts are dealing in these cases with the futures of children, often very young and therefore very vulnerable. They are also dealing with the futures of parents who may be imperfect (as we all are) but who often dearly love the child who is at the centre of the litigation. Separating parents and child by placement and adoption orders must only take place if it is proved, upon proper evidence, that "nothing else will do".

56. The fundamental principles underlined by the President in Re A, which, as I say, are not new and are based on statute or the highest authority or both, can, I think, be summarised thus:

i) In an adoption case, it is for the local authority to prove, on a balance of probabilities, the facts on which it relies and, if adoption is to be ordered, to demonstrate that "nothing else will do", when having regard to the overriding requirements of the child's welfare.

ii) If the local authority's case on a factual issue is challenged, the local authority must adduce proper evidence to establish the fact it seeks to prove. If a local authority asserts that a parent "does not admit, recognise or acknowledge" that a matter of concern to the authority is the case, then if that matter of concern is put in issue, it is for the local authority to prove it is the case and, furthermore, that the matter of concern "has the significance attributed to it by the local authority".

iii) Hearsay evidence about issues that appear in reports produced on behalf of the local authority, although admissible, has strict limitations if a parent challenges that hearsay evidence by giving contrary oral evidence at a hearing. If the local authority is unwilling or unable to produce a witness who can speak to the relevant matter by first hand evidence, it may find itself in "great, or indeed insuperable" difficulties in proving the fact or matter alleged by the local authority but which is challenged.

iv) The formulation of "Threshold" issues and proposed findings of fact must be done with the utmost care and precision. The distinction between a fact and evidence alleged to prove a fact is fundamental and must be recognised. The document must identify the relevant facts which are sought to be proved. It can be cross-referenced to evidence relied on to prove the facts asserted but should not contain mere allegations ("he appears to have lied" etc.)

v) It is for the local authority to prove that there is the necessary link between the facts upon which it relies and its case on Threshold. The local authority must

demonstrate why certain facts, if proved, "justify the conclusion that the child has suffered or is at the risk of suffering significant harm" of the type asserted by the local authority. "The local authority's evidence and submissions must set out the arguments and explain explicitly why it is said that, in the particular case, the conclusion [that the child has suffered or is at the risk of suffering significant harm] indeed follows from the facts [proved]".

vi) It is vital that local authorities, and, even more importantly, judges, bear in mind that nearly all parents will be imperfect in some way or other. The State will not take away the children of "those who commit crimes, abuse alcohol or drugs or suffer from physical or mental illness or disability, or who espouse antisocial, political or religious beliefs" simply because those facts are established. It must be demonstrated by the local authority, in the first place, that by reason of one or more of those facts, the child has suffered or is at risk of suffering significant harm. Even if that is demonstrated, adoption will not be ordered unless it is demonstrated by the local authority that "nothing else will do" when having regard to the overriding requirements of the child's welfare. The court must guard against "social engineering".

vii) When a judge considers the evidence, he must take all of it into account and consider each piece of evidence in the context of all the other evidence, and, to use a metaphor, examine the canvas overall.

viii) In considering a local authority's application for a care order for adoption the judge must have regard to the "welfare checklist" in section1(3) of the Children Act 1989 and that in section 1(4) of the Adoption and Children Act 2002. The judge must also treat, as a paramount consideration, the child's welfare "throughout his life" in accordance with section 1(2) of the 2002 Act. In dispensing with the parents' consent, the judge must apply section 52(1)(b) as explained in Re P (Placement Orders, parental consent) [2008] 2 FLR 625…"

58. When I determined that HL should not be compelled to give evidence I did so on the grounds that she was resolutely refusing to give evidence and that it would be inimical to her welfare for her to be required to do so. I accept that in so ruling, there became a justifiable reason why the Court was deprived of direct evidence from her and therefore arguably, more reliance could properly be placed upon the hearsay account of her allegations that her social worker could present to the Court.

59. AD's statement is a detailed one and it sets out HL's allegations with care, supported by contemporaneous recordings of their discussions. I was quite prepared to hear that evidence and assess its weight once I had heard all of the evidence, including crucially, the evidence of the Mother, in order to assess whether the local authority had satisfied me on the balance of probabilities that HL's allegations were true.

60. The evidence that shifted the local authority's approach in this matter was the statement of AL who attended Court in readiness to give oral evidence. Her witness statement is detailed, she has known HL throughout HL's life and has provided a home to her. She gave a number of specific examples of HL making false allegations and provided an account, which cast considerable doubt on HL's veracity. Having investigated her claims, the LA did not seek to challenge her evidence and instead sought to withdraw the findings that it sought based on HL's allegations.

61. I had made clear to the LA from the commencement of my involvement in this matter that the LA ought to be providing direct evidence from HL and I had directed that a statement be filed from her. I had indicated that if it was not able to produce direct evidence from HL, it ought to reflect on whether these allegations could and should be pursued. In giving those indications I had very much in mind the case law that I have set out above and in particular the observations of the then President of the Family Division and Black LJ (as she

then was). I also had very much in mind the rigorous approach that I must apply to evidence in a case such as this where an adoption plan is put before the Court.

62. I take the view that the LA's amended stance in light of AL' statement is a sensible one. Given the positions of the parties, with no party seeking to challenge AL' evidence and given her account, the Court would be hard pressed to make findings against the Mother based on the evidence before it. It would be highly unusual for the Court to make findings against the Mother in a case of this nature when expressly invited not to do so by the local authority. Such a course would involve the trial judge needing to 'descend into the area' to challenge evidence directly in circumstances in which none of the advocates would seek to do so. I am satisfied that such an approach would not be appropriate here.

63. Having considered the factual concessions made by the Mother I accept them as proportionate to the only realistic welfare outcome that I could properly endorse in this case. There is no reasonable prospect of me making findings against the Mother on the state of the evidence now presented, and absent those findings there is no recent evidence that would justify the draconian outcome of adoption in this case. That position is accepted by the LA, the child's IRO and crucially the Agency Decision Maker who no longer supports adoption for R. Accordingly I do not consider that it is necessary for me to hear any further factual evidence in this case. In reaching that decision I have considered and applied the following legal framework:

The Legal Framework

64. The case law is to be seen in the context of the court's duty to further the overriding objective by actively managing the case in accordance with the Family Procedure Rules 2010, Rule 1.4.

65. In *A County Council v. DP & Ors.* [2005] EWHC 1593 (Fam) ("the Oxfordshire Case"), Mr Justice McFarlane (as he then was) set out the factors to be considered

when the court was determining whether to conduct a particular fact finding exercise:

(a) The interests of the child (which are relevant but not paramount)
(b) The time that the investigation will take;
(c) The likely cost to public funds;
(d) The evidential result;
(e) The necessity or otherwise of the investigation;
(f) The relevance of the potential result of the investigation to the future care plans for the child;
(g) The impact of any fact finding process upon the other parties;
(h) The prospects of a fair trial on the issue;
(i) The justice of the case.

66. Mr Justice McFarlane's language was in the terminology of "necessary", "justified" and "proportionate" which applies the test that the court is now invited to consider in terms of necessity and proportionality.

67. The issue was given further consideration by Lord Justice Munby (as he then was) in a very different context in private law proceedings in *Re C* [2012] EWCA Civ. 1489 in paras.14 and 15 from which the following propositions can be extracted:
(a) In family proceedings it is fundamental that the role of the Judge is essentially inquisitorial to further the welfare of the children, which is, by Statute, the paramount consideration.
(b) The Judge will always be concerned to ask is there some sound reason in the interests of the children why I should embark upon, or, having embarked upon, why I should continue exploring matters which one of the other parties seeks to raise.
(c) If there is or may be solid advantage to the children in doing so then the enquiry will proceed, but, if satisfied there is no advantage to the children in continuing the investigation further, it is within the court's case

management powers and a proper exercise of judicial discretion to determine that the proceeding should go no further.

The Father

68. The Father's solicitor filed a position statement dated 3rd July 2019 setting out a helpful chronology of his involvement in these proceedings and his engagement within them. He was served with notice of these proceedings, instructed solicitors and engaged sporadically in them between June 2017 and June 2018. At the time that he last gave instructions he was aware that the local authority's care plan was adoption.

69. I refused permission for the Father's legal representatives to withdraw from acting for him on the basis that I considered that renewed attempts should be made to contact him. I made an HMRC direction for disclosure of his current address on 13th May 2019. An address was provided and attempts at personal service of a court order giving notice of this final hearing were made but were unsuccessful. In the week of the final hearing, I directed that attempts to serve him should continue.

70. The Father's participation in these proceedings and with his solicitor has been sporadic. He engaged in 2017 for a period of time and then disengaged. That prompted the Court to make an HMRC direction previously in these proceedings in order to attempt to locate the Father at a time when he was understood to be living in Scotland. He was at that stage located and his engagement was temporality restored until June 2018. The Father had previously engaged with the Probation service at the outset of these proceedings but then ceased to engage with that service. Numerous attempts have been made to contact him by R's social worker and the Children's Guardian has also left recent messages for him that have not been returned.

71. No application to adjourn this final hearing was made on behalf of the Father and I am satisfied that it is appropriate that I continued to hear this case in the Father's absence given the lamentable delays that the child has already encountered in so far as final determinations for his future placement are concerned. Whilst I wanted to ensure that every effort was made to make the Father aware of this final hearing, I am satisfied that the Father was aware of these proceedings and chose to disengage from them. His solicitors have not changed their contact details and the Applicant local authority; Guardian, child's solicitor and Court Centre all remain the same from the time of his last involvement. He has therefore had the opportunity to re engage in these proceedings, but has chosen not to. He has therefore chosen not to challenge the child's care plan – despite at the time of his last involvement understanding that to be an adoption plan, has chosen not to pursue contact with the child and has chosen not to challenge the evidence filed against him. He has made some factual concessions in writing in respect of the threshold criteria. Where additional findings are sought above those that he has accepted I have made determinations based upon the written evidence that was not challenged on his behalf, having heard submissions and applying the relevant law as set out within this judgment.

72. I have been provided with statements from a process server instructed by the Father's solicitor to attempt personal service upon him this week. Those statements set out the repeated attempts made to locate him, using the address supplied following my disclosure order against HMRC. I am satisfied that all reasonable steps have been taken to attempt to effect service upon him of notice of this week's hearing and of the local authority's application for a s.34(4) Order.

<u>The positions of the parties</u>

73. At the commencement of this hearing the local authority sought care and placement orders on the basis that it contended that R should be placed for adoption. That plan had been ratified by the IRO and endorsed by the ADM. On

the second day of the hearing, the LA indicated that it sought to change its care plan and invited the Court to rehabilitate R to the care of the Mother under a care order. The IRO has filed a statement indicating her support for this revised plan and the Agency Decision Maker has filed an amended record of decision making indicating his support for the rehabilitation plan.

74. The Mother seeks the return of R to her sole care. She accepts that the threshold criteria for the making of a final public law order is crossed and agrees to the making of a Care Order on the basis of a care plan providing for the child to remain in her care.

75. The Father has not given any up to date instructions. His last known instructions were to support the child being placed with the Mother. He filed a signed response document dated 18th June 2018 setting out that he supported the rehabilitation of the child to the Mother's care and if that were not possible, then he would seek to care for the child with his partner. He has not attended court to advance that placement option or engaged in these proceedings in any way since June 2018. He is not having any contact with the child.

76. The Guardian's final report filed for this hearing indicates her inability to come to a recommendation in respect of the applications without hearing all of the evidence, and in particular the evidence of the Mother. Following my rulings in respect of the factual evidence in this matter now she endorses the rehabilitation of R to the care of the Mother under the auspices of a Care Order.

Threshold Criteria

77. The Mother accepts that the threshold criteria for the making of public law orders pursuant to s.31 Children Act 1989 is crossed by virtue of the concessions that I have already set out.

78. In the Father's signed response document dated 18th June 2018, he states "I accept that M and I have a very volatile and toxic relationship and that on one occasion I did use excessive force against her and was convicted of that. He also accepted that he "has a significant history of drug misuse, which has led to admissions to hospital" and that he continued to use cocaine recreationally.

79. On the basis of these admissions I am satisfied that the threshold criteria for the making of final public law orders pursuant to s.31 Children Act 1989 is crossed on the basis that the child is at risk of suffering significant physical and emotional harm.

80. The local authority no longer seeks any further findings in respect of the threshold criteria and I endorse that position.

Welfare Findings Sought

81. The local authority seeks the following welfare findings against the Father:

    1. Father continues to use cocaine socially.
    2. The Father has an on-going involvement with drugs and is a risk to R whilst under the influence of drugs.
    3. The Father misuses drugs. This would pose a significant bar to developing safeguards for R should he be placed in F's care.
    4. Father has disengaged from proceedings and shown no commitment to R, he has failed to attend contact for a significant period of time.
    5. F has failed to commit to consistent contact with R.

82. The Father accepted recreational use of cocaine in June 2018 but stated an intention to stop use at that point. Due to his lack of engagement I have no up to

date information about his current involvement and use of drugs. This is an issue that needs to be explored and investigated prior to him recommencing his relationship with R and should form part of a risk assessment. Due to the lack of information and up to date evidence in respect of this issue, I am not in a position to make findings 1-3. I am satisfied that he continued to misuse cocaine during the period of time that he engaged in these proceedings and that his history of drug misuse and associated lifestyle poses a risk of significant harm to R.

83. The Father has failed to engage in these proceedings since June 2018. He failed to attend contact with R. I am satisfied that he has had every opportunity to do so, having been involved in these proceedings over the course of the first year of this case and having instructed solicitors to act for him who remain engaged. I make findings 4 and 5 accordingly.

Legal Framework in respect of welfare decisions

84. I remind myself that the child's welfare is my paramount consideration. That is section 1(1) of the Children Act 1989. In considering what orders to make I have regard to the Welfare Check List found in section 1(3) of the 1989 Act.

85. In relation to the threshold criteria of section 31(2) Children Act 1989 I have regard to whether I am satisfied that the child has suffered or is at risk of suffering significant harm.

86. When considering which orders if any are in the best interests of the child I start very clearly from the position that, wherever possible, children should be brought up by their natural parents and if not by other members of their family. The state should not interfere in family life so as to separate children from their families unless it has been demonstrated to be both necessary and proportionate and that no other less radical form of order would achieve the essential aim of promoting their welfare. In Re B [2013] UKSC 33 the Supreme Court emphasised this,

reminding us such orders are "very extreme", and should only be made when "necessary" for the protection of the child's interests, "when nothing else will do". The court "must never lose sight of the fact that (the child's) interests include being brought up by her natural family, ideally her parents, or at least one of them".

87. I have looked again at the words of the then President in Re B-S (Children) [2013] EWCA Civ 1146 as well as the judgments in Re B (supra) and reminded myself of the importance of addressing my mind to all the realistic options for the child, taking into account the assistance and support which the authorities or others would offer.

88. In considering making a Care Order I have had close regard to the Article 6 ECHR and Article 8 ECHR rights of each parent and of the child, but I remind myself that where there is tension between the Article 8 rights of the parent, on the one hand, and of a child, on the other, the rights of the child prevail; *Yousef v The Netherlands [2003] 1 FLR 210*.

89. When considering whether to make a placement order, it is trite law that I must be satisfied that any orders I make are a lawful, necessary, proportionate and a reasonable response to the child's predicament. The granting of a placement order represents the most drastic curtailment of the rights of these parents and of the child under Article 8 of the European Convention on Human Rights and Fundamental Freedoms, which can only be justified by pressing concerns for the child's welfare. However, in construing both the Convention and domestic law, I have the assistance of the decision of the Supreme Court in *Re B (A Child) [2013] UKSC 33* followed by the decisions of the Court of Appeal in *Re P [2013] EWCA 963* and *Re G [2013] EWCA 965*. Those cases firmly re emphasise that a placement for adoption is a "very extreme thing" and "a last resort to be approved only when nothing else will do". Both domestic and Convention law do require a high degree of justification before adoption can be endorsed as "necessary", the

term in the Convention or "required", the term in the Adoption and Children Act.

90. I must apply the welfare checklist found in section 1(4) of the Adoption and Children Act 2002, and I must be satisfied that the making of a placement order accords with the child's welfare throughout his life.

91. If I conclude that the child's welfare throughout his life demands that such an order is made then the law requires me to dispense with the consent of the parents to the making of a placement order in circumstances in which they oppose the application.

Evidence

92. During this hearing, I have heard from the legal representatives on behalf of each party. I have read the bundle of documents filed for this hearing, including the transcripts of evidence taken at the abandoned hearing in December 2018. I heard oral evidence over the course of two days, on 15th July from: AD, HL's key social worker in respect of the Re W issue and on 16th July from LM, the Mother's Gentoo support worker. Both witnesses were impressive in their own ways and I am grateful to them for the evidence that they gave.

Welfare analysis

93. In so far as realistic placement options are concerned, there is now just one option- a placement with the Mother. There are no other viable family or kinship placements available to R. Negative viability assessments have been concluded and not challenged. The local authority no longer invites me to consider adoption as a realistic option in this case, conceding that, with appropriate support and services rehabilitation to the care of the Mother can be safely achieved.

94. On the basis of all of the evidence that I have read, and the oral evidence of LM I am

satisfied that the Court could not reach the conclusion that nothing but adoption would do for R. For several months now the Mother has demonstrated stability both in respect of her mental health, her housing and her interpersonal relationships. She has engaged well with her Gentoo support worker, has kept her home to a very high standard and has produced hair strand test results that are clear of illicit substances and alcohol. She is not currently in a relationship. The quality of her contact with R is good and she is committed to caring for him. She is able to meet his basic care needs well within the confines of a contact setting. R is a fit and well toddler whose primary attachments are to his foster carer but who has a good relationship with the Mother. He has no known additional care needs.

95. Risk factors remain as a consequence of the Mother's history of entering into domestically abusive relationships, binge drinking, use of cocaine and her diagnosis of a Personality Disorder. Those matters justify the making of a Care Order to permit the local authority to share Parental Responsibility with her and to give it a formal role in providing corporate parenting to R. Stringent statutory monitoring is required, not just whilst the transition of R's care from foster placement to the Mother takes place but beyond that to ensure that he is kept safe within her care. I am therefore satisfied that it is necessary and proportionate to make a Care Order in this case, endorsing the care plan that R live with the Mother. Given R's age and the paucity of alternative care options within the family, the Mother can be under no illusion that should this plan fail, the alternative would be the permanent removal of R from her care and the resurrection of a Placement Order application with a view to an adoptive placement being found. It is imperative that she continues the progress that she has demonstrated this year and that she works co-operatively with the LA in future. I have considered the contract of expectations, proposed rehabilitation plan, placement with parents regulations assessment and the revised care plan for R and I approve those documents as providing the Mother with the necessary support and services that are required to manage the risks in this case. The framework and timescales for R's return are appropriate ones and there are a series of safeguards in place to monitor and ensure his safety during the transition to his Mother's care and beyond. The success

of this plan will now depend on the Mother's willingness and ability to engage openly and honestly with professionals, follow advice and seek help when she needs it. I wish her well.

96. In all the circumstances, I grant leave to the LA to withdraw its Placement Order application and I make a Care Order in favour of this local authority.

Application for an s.34(4) Order

97. During the course of this hearing, the local authority has applied for an order pursuant to s.34(4) Children Act 1989 to permit it authority to refuse contact between R and the Father, pending the successful completion of a risk assessment. For reasons I have already given, I am satisfied that all reasonable attempts have been made this week to effect personal service of this application on him.

98. This application is supported by the Mother and by the Children's Guardian.

99. The Father has not had any contact with R for over a year, since June 2018. By granting this application, there would be no interruption to his relationship with the child, as that relationship has not been maintained as a consequence of his lack of commitment. R is unlikely to have any memories of him given his age and therefore is not likely to suffer any negative consequences by the granting of such an order. The Father has completely disengaged in these proceedings. He has a significant history of drug misuse and of perpetrating domestic abuse towards the Mother. He has admitted that their relationship is a "toxic one". I am satisfied that he poses a risk of significant harm to R and that any attempt by him to have contact with R whilst he lives with the Mother poses a risk of destabilising the placement, unless managed professionally.

100. Whilst the Care Order is in force the local authority has a positive duty to promote "reasonable contact" to the Father in accordance with s.34(1) Children Act 1989.

Should the Father seek contact, the local authority may refuse it in accordance with s.34(6) Children Act 1989 but only if satisfied that it is necessary to do so to safeguard or promote the child's welfare and if the refusal is decided upon as a matter of urgency and does not last for more than seven days. Accordingly, the local authority seeks a permissive order pursuant to s.34(4) Children Act 1989 to enable it to refuse contact with the Father, pending the completion of a risk assessment.

101. I am satisfied that a risk assessment would need to be carried out before the Father could be permitted to have contact with R for the following reasons:

(a) The Father's lack of consistent engagement in contact to date poses a risk of significant emotional harm to R were this pattern to continue
(b) The Father has a history of criminal offending including offences of violence and has a conviction for domestic abuse against the Mother. By his admission their relationship is dysfunctional and volatile. I am satisfied that were he to have any contact with R in the presence of the Mother, there would be a risk that he would be exposed to domestic abuse.
(c) The domestic abuse that has occurred between the parents to date occurred in the presence of R, a risk assessment needs to take place to ascertain how such episodes could be prevented and how the Father's contact arrangements could be managed in future.
(d) The Father has a history of misusing illicit substances, including cocaine. His current drug misuse and the risks arising from that for R in a contact setting need to be assessed before contact could be reintroduced.

102. For these reasons, I am satisfied that it is necessary to grant a s.34(4) Order in favour of the LA to allow it permission to refuse contact to the Father. This is a permissive order, which will act as a safeguard for R. If the Father seeks contact, engages with the local authority and co-operates with a risk assessment then it may be that his contact can be promoted without the need for this order to be discharged.

103. Given the length of these proceedings and the adverse impact that continued litigation is likely to have on the Mother during the transitional period of the rehabilitation plan, it being an unnecessary intrusion and source of anxiety during this fragile period, I am satisfied that I can and should proceed to make orders in respect of this issue and conclude these proceedings without any further adjournment. Even if I were to adjourn this matter to further attempt to secure the Father's attendance I have no guarantees that service will be effected, and even if it were to be, that he would attend a further hearing. I am satisfied that this matter needs to be finally concluded in the best interests of the child and that if the Father seeks contact there is a mechanism by which he can do so. If he ultimately disagrees with the local authority's decision making in respect of his contact it is open to him to apply for an order pursuant to s.34 Children Act 1989 and I have been informed that his solicitor would be prepared to act for him in any such litigation on a pro bono basis. I am grateful to her for that indication.

104. I consider it essential that the local authority is empowered to refuse contact to the Father at this particularly sensitive time for R whilst he makes the transition from foster care to the care of the Mother. The Father does not require the leave of the Court to make an application to the Court for contact in future but I do not seek to encourage him to do so, I agree with Mr O'Sullivan that both the Mother and the child should be spared from further litigation if at all possible and I would instead encourage the Father to re engage with the local authority with a view to re establishing contact so that any such contact can be professionally managed.