

IMPORTANT NOTICE

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 no person other than the advocates or the solicitors instructing them and other persons named in this version of the judgment may be identified by name or location and that in particular the anonymity of the child[ren] and members of their [or his/her] 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.

Case No: BM21C50020

IN THE FAMILY COURT AT BIRMINGHAM CIVIL AND FAMILY JUSTICE CENTRE

IN THE MATTER OF THE CHILDREN ACT 1989

AND IN THE MATTER OF :

RE: N (A CHILD) (Termination of appointment of children’s guardian).

Date: 09/02/2022

Before :

HER HONOUR JUDGE CARTER

Between :

BIRMINGHAM CITY COUNCIL

Applicant

- and -

THE MOTHER (1)

THE FATHER (2)

THE CHILD (3)

Respondents

Mr Ageros for the Local Authority

Ms Binnion for the mother

Ms Lakin for the father

Ms Hussain for the child.

Hearing date: 9.2.22

APPROVED JUDGMENT

1. This is a judgment in relation to the father's application to terminate the appointment of the guardian in these care proceedings in relation to his son.

Background to the application:

2. I do not need to set this out at length. N is the first child of these parents together, although the mother has 2 older children who do not live with her. It appears the parents commenced a relationship at some point in 2020, and the mother has alleged domestic abuse against the father. The father is a registered sex offender, having pleaded guilty in 2016 to meeting or communicating with a female child under 16 following sexual grooming.
3. Care proceedings were commenced when N was born, and he was made subject to an interim care order in October 2021 and placed in a residential unit with his mother. The mother left that placement in January 2022, leaving N at the placement, and he is now living in a foster placement.
4. The case has previously been allocated to be heard at District Judge level, but this issue was listed before a Circuit Judge, which in my view was entirely appropriate given the serious nature of it. It is unfortunate that it has taken so long to be heard, covering such a lengthy period within important court proceedings. In my view, this should have been brought to the attention of the Designated Family Judge at this court, and should not have been allowed to wait such a substantial period of time.
5. The build up to this application starts just before a hearing listed on 30 November 2021.
6. Prior to that hearing, the local authority had filed an assessment plan in relation to the father. That can be found at F 99 in the bundle. It is a detailed statement outlining the planned assessment of the father, and on the second page says the following

“Birmingham Children’s Trust propose father undergo’s (sic) a social work risk assessment to explore the risk identified by professionals. This assessment will be

completed by ND (Social Worker) and will determine father's understanding of professional concerns in relation to harmful behaviour including domestic abuse and sexual harm. The assessment will consider father's capacity to change.

I, SN am a newly qualified social worker therefore, it is in Birmingham Children's Trust view that this assessment will need to be completed by a more senior social worker. Whilst I remain the allocated Social Worker, I will co-work with the assessment worker due to my level of understanding of the family history, and pre-existing relationship with the family.

It is proposed that during the course of the assessment all sessions will be coworked to ensure the allocated Social Worker has full oversight of the assessment process.

The assessment of father will be allocated to on 8th November 2021. It is proposed this assessment will be concluded within 12 weeks, and can be filed with the court by 17th January 2021”.

7. Notably, within that document, the experience of the social worker ND is not set out, although it does say that she is “a more senior social worker”. Given that it also says that SN is newly qualified, that does not assist greatly. That document is dated 2 November.
8. On 26 November 2021, an application was filed on behalf of the father to instruct an independent social worker to complete a full assessment of him. That application sets out a concern that waiting for the outcome of a proposed 12 week risk assessment, and then beginning a parenting assessment would build in delay to the proceedings. It is a properly made Part 25 application which includes a schedule of experts, CVs, a draft letter of instruction and a draft order. It seems there may have been a position statement as well, but I do not have that.

9. On 30th November the matter was listed before Deputy District Judge Sharp, an extremely experienced Deputy District Judge. There was an advocates' meeting arranged on 29 November 2021.
10. Prior to that advocates' meeting, on the morning of 29 November, an email was sent by the solicitors instructed by the father to the local authority. It seems in fact that it was sent by Mr Singh's assistant. The wording of that email is important and I set it out below in full:

“In advance of the advocates’ meeting this afternoon and in response to the assessment plan of the local authority, I would be grateful if you could confirm how many sexual risk assessments ND has prepared and what relevant experience she has in relation to this kind of assessment? Please can you also confirm what tools she proposes to use for the assessment?”

11. The local authority replied by email later that day to say that ND had not completed a sexual abuse risk assessment before, but that she could access guidance from their case progression officer who has completed assessments previously. It goes on to say that ND has experience of conducting risk assessments from 2015, and that in respect of the father, although the sexual abuse risk was one significant risk there is also the risk of domestic violence and abuse to consider, which she has a wealth of experience in assessing. It goes on to set out the tools that would be used. No issue appears to have been taken by the local authority of that enquiry, which was answered perfectly appropriately.
12. It is asserted on behalf of the father that at the pre hearing meeting the advocates were told that the Guardian was “quite angry” about a suggestion that an independent social worker should be instructed. I was not addressed in relation to that.
13. The father pursued his application at that hearing. The order from that day records that the father's application for an independent social worker was adjourned, ‘but not considered necessary today’. It then timetables the local authority filing and serving the risk assessment in respect of the father by 4pm on 17 January, and in the event that the

outcome of that risk assessment recommends a parenting assessment, the local authority would file and serve the same by 4pm on 14 February 2022.

14. I am not aware of what submissions were made during the course of that hearing. The father was represented by counsel Miss Lakin.
15. On 1 December at approximately 4pm, the Guardian Mr Turner, emailed Mr Jas Tamber, the head of the family law department at the solicitors' firm representing the father. He is not the solicitor dealing with the father's case. It is right to record, it seems to me, that Mr Turner knows Mr Tamber well, and that the father's solicitors' firm routinely conducts work not only for parents but representing children through their guardians before this court. It is a large firm.
16. It is a lengthy email, taking up nearly 2 pages of close type. I do not need to repeat it all.
17. The email begins with the phrase 'Dear Jas'. It goes on to say that Mr Turner is contacting Mr Tamber 'with (his) thoughts relating to the above case'. Mr Turner goes on to set out some of the background of the case. Mr Turner expresses his surprise that the father had made an application for an independent social work assessment. He then says that he was:

“further concerned that following the making of such application, father’s solicitor wrote to the Local Authority seeking to ascertain the professional competency of the Local Authority social worker, what skills and qualifications they had, what tools they would be using to assess father and whether they had the necessary acumen and experience to undertake a task which they considered to be sufficiently complex that only an ISW would have the necessary skills required to complete the report”

18. Mr Turner goes on to say that having considered the papers carefully himself he could not see the necessity for an independent social worker to assess the father in this matter.

He sets out his view that this is ‘the bread and butter work that social workers are specifically trained for’. He goes on to say:

“Therefore, I was very surprised that father’s solicitor should seek to undermine the competence of the social worker and argue that only someone with a significant level of experience in assessing sex offenders could undertake such a task.”

19. Mr Turner goes on to set out and expand his argument, in addition to the specific criticisms of the solicitor for the father and pointed out to Mr Tamber the importance of accepting that social workers have significant expertise in relation to these matters.
20. Mr Turner then turns to his second point. This he says relates to “the actions of the solicitor”.

“I understand they sit on the Children’s panel and are deemed qualified to advocate on behalf of children. Like undertaking a parenting assessment is the bread and butter of social work, advocating in the Courts, presenting coherent arguments on behalf of those they represent and cross examining witnesses should be the staple diet of any practising solicitor. Further, any practising family law solicitor who is a member of the children’s panel should have that additional level of skill commensurate with the qualifications of the role. I was therefore rather concerned that having made a part 25 application to the Court for an Independent Social Work assessment, and further questioning the competence of the social worker undertaking an assessment of the father, the solicitor instructed Counsel to undertake this task on their behalf. It again concerns me that having questioned the competence of the social worker to undertake their role the solicitor appears to have abdicated their own role in this matter and asked someone else to present an argument to the Court for them”

21. As can be seen, Mr Turner is being critical of the solicitor instructed by the father for having briefed counsel. Mr Turner suggests that was inappropriate, particularly, as in his view, the solicitor had questioned the competence of the social worker, but then had not argued that case himself at the hearing.

22. Mr Turner then elaborates on that by saying:

“This action by the solicitor reminds me somewhat of the old proverb “people in glass houses shouldn’t throw stones”. I don’t know the solicitor personally and cannot offer comment on their character. All I can do is observe their practise and comment on this if required. Given their qualifications and experience I would have expected that presenting an argument to support their case would have been nothing more than a run of the mill task for them. However, given their reluctance to undertake this task, and willingness to place that task into the hands of others, and their recent criticisms about the practise and expertise of the allocated social worker, I can’t help but think that in demonstrating an inability to undertake fundamental tasks relating to their own practise they are in no position to offer comment on the competence or ability of other professionals to do theirs.

23. Mr Tamber responds briefly, asking for the name of the client or the colleague that Mr Turner was referring to. Mr Turner in his reply gave the name of the case, but not the name of the solicitor.
24. Mr Tamber then responds, starting his email, ‘Dear Paul’, and stating that he had noted and considered carefully the contents of the email. He sets out that discussions and advice to their client is confidential, and that therefore he could not respond about specific issues in this particular case, and pointing out that there are many reasons why it may be necessary or appropriate for counsel to be instructed for a particular hearing. He goes on to ensure that Mr Turner is aware that in accordance with Rule 6.4 of the SRA regulations, he would need to make the firm’s client aware of the correspondence and seek his instructions.
25. Mr Turner responds within an hour of Mr Tamber’s email. He set out that he accepted that it was the father’s right to make an application to the court for an independent social work assessment. He said that was not the issue that concerned him, but the issues:

“were in regard to criticisms made by his advocate regarding the qualifications and experience of the Local Authority social worker to complete a fair and balanced assessment without any supporting evidence, and my concern that whilst making such criticisms of others the advocate, who is a member of the Children’s panel, appeared to lack the competency to present their own argument to the Court. At the same time, I also recognise that in certain circumstances it is not possible for individuals to present matters to the Court on their own and occasionally they need to instruct others to act on their behalf”.

26. He goes on to say that he accepted that the members of Mr Tamber’s team were all suitably qualified, but that *“the competence of this particular individual, in my opinion, was questionable”*.
27. In his next paragraph he sets out that he will *“continue to raise concerns of any advocate if they unfairly criticised the practice of others, including local authority social workers without good cause or justification”*.
28. Although I have not seen any of the later correspondence, I understand that those instructed by the father subsequently suggested to the guardian that they viewed his comments as inappropriate, and requested he reflected on his position, or an application may be made for the termination of his appointment. I understand that there was no response to that, other than an acknowledgment.
29. An application was made on behalf of the father, dated 16 December 2021 seeking an order to be made pursuant to Rule 16.25(1)(b) of the Family Procedure Rules 2010 terminating the appointment of the Guardian. Attached to that application were copies of the emails exchanged between Mr Tamber and Mr Turner, and a statement filed by the father dated 15 December 2021.
30. The application set out that it is made on the following grounds:
 - i. There is a requirement for impartiality and a right to a fair hearing as contained in Article 6 of the European Convention of

Human Rights and father is not confident that the children's guardian will execute his duties fairly given his explicit opinion of him and those he instructs.

ii. The discussions between the children's guardian and father as reported in the annexed emails, do not accord with the recollection of father.

iii. Father feels that the children's guardian has predetermined his case in advance of any assessments having been completed of him and in the absence of the totality of the evidence.

iv. The children's guardian has expressed a view in writing which should be considered as having demonstrated unfair conduct.

v. There is a risk of the proceedings not being dealt with justly, expeditiously nor fairly, with potential for delay being caused at a later stage which would be contrary to the best interests of the child.

The other parties have been sent the emails annexed to this application. Those representing the child were invited to take instructions as to the ongoing role of the children's guardian in these proceedings and to discuss the same with Cafcass management by 4.00pm on Wednesday, 15 December 2021. No substantive response has been received from those representing the child, save for an acknowledgement of the email correspondence.

The Court is invited to list this matter for an urgent hearing in order to determine the application without delay. The Court is invited to consider whether the application should be determined by a Circuit Judge given the seriousness of the issues being raised.

31. The case was next listed before Deputy District Judge Chalmers on 5 January 2022. The order on that occasion records that the Guardian shall file and serve a witness statement in response to the father's application to have him replaced as the children's Guardian by 4pm on 21 January 2022.
32. The Guardian has filed a statement. Although it appears to be dated 20 January 2022, it was agreed by all parties before me that it was not received until 31 January 2022. It does not contain a statement of truth. I checked with Mr Hussain, counsel for the child at the hearing, who confirmed that it had been completed following discussion and legal advice being given to the Guardian, and indeed that was the reason it was late.
33. DDJ Chalmers also directed that the father and the Children's Guardian should file and serve skeleton arguments on the issue raised by 4pm on 28 January 2022.
34. I had no knowledge of this case until I received an email from Mr Hussain on Friday 4 February at 7am. He indicated to me that was instructed on behalf of the Guardian, informing me that skeleton arguments were now overdue, and that it had been, it seems, agreed between the advocates that the parties were going retrospectively to invite me to extend the filing date for skeleton arguments to have been exchanged and filed at 9am that day.
35. Mr Hussain informed me that for both professional and personal reasons he had been unable to comply with that and said this, "I hope in the circumstances you would allow and indulge me to file my skeleton argument over the weekend. I apologise for the inconvenience this will cause to you and those that represent the father, Miss Lakin".
36. Before I had an opportunity to respond, Ms Lakin then emailed myself, Mr Hussain and the solicitors to say that she entirely sympathised with Mr Hussain's difficulties, but wondered if I could advise her and Mr Singh, her instructing solicitor, as to how I would wish them to proceed, given that the order was for mutual exchange.
37. I responded that morning to say that I had not seen the case, or the bundle and so had as yet little knowledge of the issues. I suggested that if the Guardian was responding to an

application, it would seem to me that it made sense for Miss Lakin to file her skeleton today, and we had little choice but for Mr Hussain to file his as soon as possible thereafter.

38. I was then sent the skeleton argument on behalf the father later that morning.
39. That was as I say above, Friday 4 February. I received nothing else during that day, or indeed over the course of the weekend. I was sent a bundle by the court office, which when I had an opportunity to read Ms Lakin's skeleton argument I realised was incomplete as it did not contain the statement of the Guardian which she referred to a number of times.
40. At 8pm on the Sunday I emailed all the advocates in the following terms:

"I note that as of 8pm on Sunday night, as I am typing this, I do not have the position statement of the Guardian, or a copy of his statement. I am about to turn off my computer.

I see from Ms Lakin's position statement that it appears she has seen the guardian's statement, but that Mr Ageros has not according to his case summary. It is not in the bundle that I have been sent.

Please can I be sent that first thing Monday morning, together with the position statement. I shall 'time send' this to early Monday morning as it does not generally seem appropriate in my view for Judges to be asking advocates to be attending to matters over the weekend. I shall be travelling to court in the morning and may not arrive before 9am. I will therefore have limited time to consider such important documents.

May I mention however that I am extremely concerned in relation to this issue, and have raised it already with Mrs Justice Lieven, and HHJ Thomas. They are content for me to deal with it, but it appears the consequences of the decision, should I consider the guardian should be discharged, (and I emphasise that I have as yet seen nothing from

him) are very serious. I urge all parties to have sensible and constructive discussions in the morning to avoid any possible delay in this matter”

41. As I set out in that email, I delayed the sending of it until 7am in the morning. In my view, it is inappropriate for Judges these days to be emailing advocates asking them to undertake tasks at the weekend, such as sending documents which have not been sent to the court. It is, of course, still relatively routine for Judges to be emailed documents over the weekend, but in my view that falls into a slightly different category as that is often done by self-employed people working at times that suit them, and indeed there is no compunction on the court to read them.
42. Mr Hussain did send me, in the early hours of Monday morning, a detailed skeleton argument on behalf the Guardian and after my email was sent at 7am on the morning of the hearing, I was sent the statement of the Guardian. I later received in addition a position statement on behalf of the Guardian.
43. At the commencement of this hearing today, I told the advocates that in light of the fact that I had only been able to read the lengthy documents at 9am once I had arrived at court, and given the significance of the decision I was being asked to make, I did not intend to give a decision that day, but would hear all of the submissions and hand down a written judgment two days later to try and avoid any delay. No party suggested this was other than an appropriate course.

The law:

44. An application to terminate the appointment of a Children’s Guardian was considered by MacDonald J in *QS v RS and T (by her Children’s Guardian) [2016] EWHC 1443 (Fam)*. He sets out the authorities and summarised the law. That of course was a case regarding the termination of a Guardian in private law proceedings. The allegation in that matter was whether the Guardian had expressed a view in relation to the ultimate outcome of the case before all the evidence had been filed.

45. MacDonald J sets out a comprehensive analysis of the law relating to this issue in 16 paragraphs, and rather than attempt to summarise it, I shall set out the paragraphs that it appears to me are particularly relevant to this issue, whilst making it clear that I have borne in mind the entirety of what he sets out:

a) *As the terminology used in the test in Porter v McGill suggests, the question of apparent bias is ordinarily considered in the context of the conduct of a person or persons occupying a judicial or quasi-judicial role. Where the person whose conduct is in question is not acting in a judicial or quasi-judicial capacity it is inappropriate for the case to be approached in the same way as one would approach a person performing a normal judicial role or quasi-judicial role; a situation where the person is making a determination (R v Secretary of State for Trade and others ex parte Perestrello and another [1981] 1 QB 19 at 35). In such circumstances, the position of the person whose conduct is the subject of criticism is better considered by reference to whether the person in question was under a duty to act fairly, the ambit of that duty, and whether they have acted with the requisite degree of fairness, rather than by reference to the concept of apparent bias (R v Secretary of State for Trade and others ex parte Perestrello and another [1981] 1 QB 19 at 34). I pause to note that, pursuant to FPR 2010 r 16.27(1)(b) and PD 16A para 7.6, a children's guardian appointed pursuant to FPR 2010 r 16.4 is required to conduct the proceedings on behalf of the child fairly.*

b) *Art 6 of the ECHR enshrines the right to a fair hearing. When considering whether a hearing has been fair, the court will look at the proceedings as a whole as well as any alleged individual deficiencies (Barberá, Messegué and Jarbado v Spain (1988) 11 EHRR 360 at [68]). The right to a fair trial guaranteed by Art 6 is not confined to the 'purely judicial' part of the proceedings. Unfairness at any stage of the litigation process may involve a breach of Art 6 (Re L (Care: Assessment: Fair Trial) [2002] 2 FLR 730).*

c) *Where it is said that biased or unfair conduct on the part of person under a duty to advise the court will lead to bias or unfairness in the proceedings,*

such a causal link must be demonstrated. In R v Gough [1993] AC 646 at 664C the House of Lords held that it must be shown that by reason of the adviser participating in the decision making process there is a real likelihood that he or she would impose his or her influence on the tribunal (see also R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts and Another [2012] EWCA Civ 472 at [132]).

[18. Paragraph 18 details the provisions of FPR 2010 r 16.4.]

19. Within this context, it is important to note the observations of Macur LJ in [MW v Hertfordshire County Council \[2014\] EWCA Civ 405](#) (a case in which the children's guardian was appointed pursuant to FPR 2010 r 16.3) at [21] and [32] respectively that the children's guardian is not a "neutral" party or participant in proceedings and that the children's guardian does not have a "special" status within proceedings. Whilst the children's guardian is required to proffer advice to the court, in doing so the guardian becomes a witness subject to the same judicial scrutiny as any other witness. The children's guardian starts with no special advantage in proceedings as compared with other witnesses.

20. When the court is reaching its decision with respect to the welfare of a child it must consider all the evidence in the case including, but not limited to, the evidence of the children's guardian. The court is the decision maker and must reach its decision by reference to the matters set out in the Children Act 1989 s 1 having regard to the totality of the evidence before the court.

21. FPR 2010 r 16.25 provides as follows in respect of the power of the court to terminate the appointment of a children's guardian appointed under FPR 2010 r 16.4:

16.25 Court's power to change children's guardian and prevent person acting as children's guardian

(1) The court may –

(a) direct that a person may not act as a children's guardian;

(b) terminate the appointment of a children's guardian;

(c) appoint a new children's guardian in substitution for an existing one.

(2) An application for an order or direction under paragraph (1) must be supported by evidence.

(3) Subject to rule 16.24(6), the court may not appoint a children's guardian under this rule unless it is satisfied that the person to be appointed complies with the conditions specified in rule 16.24(5).

22. FPR 2010 PD16A para 7.17 makes clear that where an application is made for an order under FPR 2010 r 16.25 the applicant must set out the reasons for seeking it and that the application must be supported by evidence.

*23. Whilst FPR 2010 r 16.25(1)(b) sets out the power of the court to terminate the appointment of the children's guardian, it articulates no criteria against which the court should consider an application for termination. When examining the almost identical provision in CPR 1998 r 21.7 dealing with the power to terminate the appointment of a litigation friend, Foskett J observed in *Bradbury v Paterson* [2015] COPLR 425 at [31] that the court's discretion is a full one. Within the context of determining an application to terminate the appointment of a children's guardian pursuant to FPR 2010 r 16.25(1)(b) in my judgment the following matters will be relevant to the exercise of the court's discretion.*

24. Pursuant to FPR 2010 r 1.2, when exercising its power under FPR 2010 r 16.25 or interpreting FPR 2010 r 16.25 the court must seek to give effect to the overriding objective in FPR 2010 r 1.1 to deal with the case justly having regard to the welfare issues involved. Pursuant to FPR 2010 r 1.1(2) dealing with the case justly includes, so far as is practicable:

i) Ensuring that the case is dealt with expeditiously and fairly;

ii) Dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

iii) *Ensuring that the parties are on an equal footing;*

iv) *Saving expense; and*

v) *Allotting to the case an appropriate share of the court's resources while taking into account the need to allot resources to other cases.*

25. *There are few authorities concerning the termination of the appointment of the children's guardian. In Oxfordshire County Council v P [1995] 1 WLR 543, [1995] 1 FLR 552 Ward J (as he then was) allowed the application to terminate the appointment of the children's guardian in circumstances where the mother had disclosed to the guardian that she had caused injuries to the child and the guardian was thereafter interviewed by the Police to obtain a witness statement from her to prove criminal charges arising out of the injuries, during which interview she disclosed the mother's admissions without the leave of the court. Ward J concluded in respect of the guardian that "To encourage frankness on the part of the parents, she must be replaced even though her work in all other respects has been wholly admirable and my criticism of her is technical not substantial."*

26. *In Re J (Adoption: Appointment of Guardian ad Litem) [1999] 2 FLR 86 the Court of Appeal refused an application to terminate a guardian's appointment (made within the context of an application for permission to appeal an order appointing a guardian in adoption proceedings) notwithstanding that at a meeting following the cessation of her appointment in the care proceedings, but prior to her appointment in the adoption proceedings the guardian had expressed agreement to the proposal that the child be placed for adoption. In Re J Ward LJ held that it is untenable to assert that there is bias or the appearance of bias based simply on adverse views expressed in the course of long proceedings.*

27. *Further, in Re J Ward LJ agreed with the observation of the judge at first instance that, frequently, a children's guardian holding a certain view can be persuaded under cross-examination to change their minds, that the "flexibility,*

rigidity, competence, balance, wisdom or other aspects of her conduct of the case are matters which the court will be invited to take into account when deciding whether to accept her evidence or recommendations" and that "Only in very rare circumstances can such factors disqualify a Guardian from acting at all". Within this context I also note the observation of Sir Nicholas Wall in A County Council v K, C and T [2011] 2 FLR 817 at [117] that:

"The reasoning of the Cafcass guardian, whether given orally or in writing is always open to challenge in cross-examination, which can always go to method. Added to which, of course, where the report is in writing, good practice requires the investigative and reasoning processes to be set out. Once again, the decision is for the court, which is heavily dependent upon the quality of the advice it receives."

28. Finally, in respect of Re J, at 88 Ward LJ agreed with the observations of the judge at first instance that the guardian's function is not a judicial function. In short, and once again, the court and not the children's guardian is the final arbiter of what is in the child's best interests. Within the context of this latter point, it is important, once again, to note the observations of Macur LJ in MW v Hertfordshire County Council [2014] EWCA Civ 405 at [32] that the children's guardian is a witness subject to the same judicial scrutiny as any other witness and starts with no special advantage in proceedings as compared with other witnesses.

29. Finally, in relation to the authorities, in Re A (Conjoined Twins: Medical Treatment)(No 2) [2001] 1 FLR 267 Ward LJ held that the court can terminate the appointment of a Children's Guardian where he or she has acted manifestly contrary to the best interests of the child, observing as follows:

"It was not necessary for the President, in order to dispose of the application, to attempt any comprehensive statement of the circumstances in which it might be expedient to remove a guardian ad litem, and the President wisely did not embark on that course. Neither r 4.10(9) of the Family Proceedings Rules 1991 nor the corresponding provision of the Civil Procedure Rules 1998 (r 21.7(1)) specifies any limit on the court's power to terminate the appointment of a guardian ad litem or litigation friend. The President focused on the particular situation in which the

court is asked to replace a guardian ad litem because the guardian has in the conduct of litigation taken a course of action (in which we include an omission), or is about to take a course of action, which is manifestly contrary to the best interests of the child whose interests it is the guardian's duty to safeguard. If the guardian (or litigation friend) does act manifestly contrary to the child's best interests, the court will remove him even though neither his good faith nor his diligence is in issue."

30. Overall, it would appear that whilst the court's discretion to terminate the appointment of a children's guardian under FPR 2010 r 16.25(1)(b) is a full one, it is nonetheless a discretion that should be exercised sparingly, taking into account the imperative of the overriding objective in FPR 2010 r 1.1 to deal with the case justly having regard to the welfare issues involved. Within this context, where the grounds relied on in support of an application to terminate the appointment of the children's guardian concern the methodology adopted by the guardian, the court may terminate the appointment where the guardian acts manifestly contrary to the child's best interests or, but only in very rare circumstances, where the guardian has engaged in conduct that the court would ordinarily be invited simply to take into account when deciding whether to accept or reject the guardian's evidence or recommendations.

The positions of the parties:

The father:

46. Ms Lakin has filed a comprehensive position statement which I do not need to set out again, and supplemented that within the hearing, having seen Mr Hussain's skeleton argument.
47. She asserts that the Guardian has demonstrated a loss of objectivity and independence, has shown an interest in the conduct of the proceedings which is adverse to that of the child (by which she refers to the defence of the social work profession in general rather than focusing upon this case), and has failed to make a considered professional

judgement initially with regard to his conduct and then by failing appropriately to reflect on that conduct.

48. Ms Lakin elaborates in relation to that by saying that the other parties to the proceedings, the judiciary and the general public cannot have confidence in a Guardian who has improperly expressed opinions about another professional which are without foundation and erroneous. She suggests that leads the court to consider that he pursues not the child's best interests but rather some defence of his own profession.
49. In her oral submissions Miss Lakin, in responding to Mr Hussain's skeleton argument, set out what she asserted was the evidential link to unfairness. She asserted that this issue was in relation to the fundamental role of the Children's Guardian, and that he had gone outside of any proper boundaries in conducting that role. She asserted that this case was 'far more akin to the Oxfordshire case', in which a guardian improperly had discussions with the police, and was removed from the case.
50. She was at pains to emphasise that it was entirely accepted on behalf of the father that everyone could make mistakes. She accepted that it is easy to press send on an email, and potentially to regret it later. The issue, she asserted, was that there appeared to be nothing in the evidence now before the court to suggest that the Guardian had indeed reflected upon whether his behaviour was appropriate or not, and he appeared to stand by his criticisms of Mr Singh. She asserted that the comment in his witness statement that he may have been "harsh" did not come close to an acknowledgement of the inappropriateness of his behaviour. She suggested that it was troubling that the Guardian had not taken the opportunity to reflect at any point since the application had been filed. Miss Lakin made it clear that in the view of the solicitor representing the father, and indeed in the view of his head of department, he had done nothing wrong at all.
51. Ms Lakin argued that there was nothing within those emails that was about conducting litigation on behalf of a child and that emphasised that when one considered the spectrum of conduct of a professional acting in such a case, this had fallen outside the boundaries.

The Guardian:

52. On behalf of Mr Turner, Mr Hussain asserted that any unfair conduct alleged against the Guardian cannot amount to a real likelihood that such unfair conduct or inability of the Guardian to act fairly would lead to unfairness in the proceedings as a whole.
53. Mr Hussain sets out the history of this case, in which he helpfully summarises the positions and decisions made in the case, which certainly shows that the Guardian has at times opposed the local authorities position, such as at the very beginning of the case, which also in fact accorded with the father's position.
54. Mr Hussain sets out that the Guardian visited the father and clearly had a lengthy discussion with him, and that the Guardian was entirely prepared to express views supporting assessment of the father, and to set out clearly his views in relation to contact. Mr Hussain asserted that the Guardian has taken a proactive hands-on stance to this case.
55. Mr Hussain also deals in his skeleton argument with the suggestion, made by the father, that the Guardian had made an inappropriate comment to him related to his sex offender status. The Guardian denies making that comment, and I made it clear in the hearing that I was not going to be assisted in relation to that matter, as I would need to hear evidence about it. That was neither necessary nor proportionate, given the other matters that I needed to determine.
56. Mr Hussain asserts that any perception that the father has that the Guardian has acted unfairly would be matters that could appropriately be put under cross examination and brought to the Court's attention. He asserts that there is no causal link to suggest that a criticism of the father's representative enables a causal link to a conclusion that there would be unfairness in the proceedings.
57. Mr Hussain sets out in his position statement that the court 'may consider that the Guardian airing his concerns.... were matters which should have been dealt with in less emotive language and in a different forum'. He goes on to say that however unpalatable

those representing the father may feel those comments to be, they do not or cannot lead to a causal link that the Guardian would fail to execute his duties fairly, or why the Guardian would show any form of lack of impartiality, or being incapable of being fair in his recommendations about the case.

58. At the conclusion of his skeleton argument, Mr Hussain sets out that the Guardian has reflected and recognised that a professional boundary may have been crossed. Mr Hussain reminds the court that family cases of this nature can invoke strong views and opinions from professionals, sometimes they overspill into the court arena or cross words are to be had.
59. When I was addressed orally by Mr Hussain, I asked him specifically whether the statement filed by the Guardian had been completed with the assistance of his legal representatives. I was told it had.
60. Mr Hussain elaborated upon his written skeleton. He submitted that the crux of this case was whether the Guardian's course of conduct amounted to unfair conduct which was manifestly contrary to the interests of the child. He asserted it did not, and reminded the court that I must look at the actions of the Guardian not only in relation to this, but also in general, reminding me of the otherwise exemplary work by the Guardian. He asserted that, therefore, the father was able to have faith in this Guardian.
61. Mr Hussain told me that the Guardian accepted he had 'overstepped the mark', but posed the question as to whether that rendered his capacity as a guardian to give advice and opinions to the court likely to mean that he would be either unfair or fail to treat the parties on an otherwise equal footing. He said that the Guardian considered he was right to raise the questions, as he did not want there to be unfair criticism of the social worker. Mr Hussain went on to tell me that the Guardian does accept that 'on reflection the question should not have led him to raise the concerns that he has which relates to other cases'.
62. I queried both of those assertions with Mr Hussain; that the guardian accepted he had 'overstepped the mark', and that he accepted 'on reflection the question should not have

led him to raise the concerns he did'. I asked Mr Hussain whether the was now saying that on instructions, and that was now genuinely the Guardian's view, as that did not seem to be what was set out within any of the emails, or his witness statement, filed very recently.

63. Over the course of a discussion between myself and Mr Hussain, I offered Mr Hussain an opportunity to pause the hearing and take instructions, as I considered this to be an important aspect. Mr Hussain told me that was not necessary. He then told me that the Guardian's position is that he did not feel he was wrong to raise the issue that solicitors have in some cases raised unnecessary criticisms of the expertise of social workers where there is no foundation in relation to that. I emphasised to Mr Hussain several times that this was not the issue I was deciding, and there was no prospect that I was going to consider that a general assertion or even complaint by a Guardian that solicitors should not make unfounded criticisms of social workers, or suggest that they are unable to undertake assessments, could possibly be a ground to remove the Guardian. I made it clear that what was in issue here were the personal comments made in relation to the father's solicitor. Mr Hussain after some lengthy discussion where I pressed him on this point, told me that the Guardian's position was as set out in his client's witness statement, which was that he realised his criticism may have been too harsh. He went on to say that his instructions were that the questions in the original email were not unreasonable, but at the time they were sent the Guardian considered that underlying those questions there was some perception of criticism of the social worker's ability to undertake that work. It was quite apparent from the discussions I had with Mr Hussain that the Guardian's position was as set out in his statement.

64. I took Mr Hussain to the further criticisms made by the Guardian in his statement. Mr Hussain asserted that the Guardian continues to advocate for the best interests of the child, and that regardless of his views of the father's representatives, the views that he expresses to the court are child focused.

65. Mr Hussain submitted that the court is well able to assure the father that any perceived unfairness that he perceives the Guardian to have or have had in relation to his

representative, the court would be alive to that issue and able to ensure that is taken into account.

66. At the conclusion of Mr Hussain's submissions, I asked him whether he wished to add anything in relation to the second part of the Guardian's criticisms of Mr Singh, but he said that the Guardian had set out in his statement his views in relation to that, and he did not have further instructions.

The position of the Local Authority.

67. The local authority had not been ordered to file a skeleton argument in this matter, and of course Mr Ageros had only seen that filed by Miss Lakin during the day on Friday, and Mr Hussain's earlier on Monday morning.
68. Prior to hearing submissions from Miss Lakin and Mr Hussain, I indicated to Mr Ageros that, given the implications of this decision upon the child, it appeared to me appropriate that the local authority did express a view in relation to this application. I told the parties that it seemed to me it was a far more difficult matter for the mother to give instructions in relation to this matter, and I did not see it as being necessary. No one suggested that they disagreed with my stance.
69. Mr Ageros reminded the court that the issue of fairness or apparent bias was not interchangeable, although I had been addressed in that way previously. He submitted in accordance with para 15 of *QS v RS* that I must consider whether the person in question was under a duty to act fairly, the ambit of that duty and whether they have acted in the requisite degree of fairness. He reminded me that the court must look at the proceedings as a whole, and that I must consider the causal link to the proceedings.
70. He suggested in accordance with the case law, that I needed to consider whether I could conclude that the Guardian's conduct was manifestly contrary to N's best interests.

71. He reminded the court that we can all send emails that we regret, or express ourselves better, but went on to say that the local authority fully accepts the criticisms that Miss Lakin sets out about the nature of that email exchange. He accepted it is not just the content of the emails, but the fact that they were sent without copying in others, and he accepted that seems a very ‘odd course of action’. He explicitly accepted, on behalf of the local authority, that the criticism of Mr Singh that he briefed counsel could not be justified on any view. He said that does trouble the local authority.
72. Mr Ageros however also pointed out that there was an inescapable aspect of the case that the Guardian has at several points taken issue robustly with positions advanced by various parties in the matter as is his role in the care proceedings. He suggested I must balance the litigation conduct of the Guardian, against the fact that he appears to stand by his stance in those emails, which he described as “troubling”.
73. He went on to submit that I needed to consider whether this was a case, looking at the overall situation, it was possible to make a causal link between the Guardian’s behaviour and a general suggestion of unfairness, and told me that the local authority considered it to be very finely balanced, and concluded that the local authority stance was that it was a matter for the court.
74. I told Mr Ageros that given he was instructed by professional clients, and the importance of this matter within these proceedings, it seemed to me that the local authority should express a view as to whether the Guardian’s appointment should be terminated, and invited him to take instructions in relation to that and adjourned the hearing for him to do that.
75. Upon the hearing resuming, Mr Ageros told me that whilst the local authority did not wish to take away any of the concerns, they would not support the application to terminate the appointment of the Guardian. He said that in their view the apparent unfairness of the Guardian’s approach could not be said in this case to permeate the Guardian’s overall actions.

76. Given the submissions made by Mr Hussain, my questions to him and his responses, and the now stated position of the local authority, I asked Ms Lakin whether she needed to say anything in response, as clearly some of that was new information.
77. Mr Ageros had drawn my attention particularly to paragraph 30 in *QS v RS*, and Miss Lakin pointed out that paragraph was qualified with the words “within this context”. She suggested that it could easily be seen in that case that that was a matter which could be dealt with in cross examination within a final hearing. She suggested however that this case falls into a different category, because this is a guardian who has acted outside of his role, and when he has been alerted to the inappropriateness of his comments, he continued that conduct. She emphasised that he had been asked to reflect both before the application was issued, and in filing his statement, and he had failed to do so and had failed to apologise for his unfounded criticisms of Mr Singh.
78. She went on to say that although the Guardian appeared to think he was defending a social worker in fact he had then done exactly what he was complaining about, in that he criticised an officer of the court without evidence. She asserted that goes to the function of the Guardian and must be contrary to the child’s interests. She suggested this was not something that could be dealt with in cross examination, and that this issue had now developed into a form of satellite litigation operating as a distraction currently, and one which would inevitably do so again at a final hearing which should be concerned with the welfare of the child.
79. Lastly, she reminded me that the court had been told a guardian could be reallocated within one to two weeks.

Discussion:

80. As I discussed with the parties, it is unnecessary to seek to determine the factual dispute between the father and the Guardian as to what was said when the Guardian visited. In my view that would have required some evidence being given. No party suggested that I should take a different course.

81. I also made it clear to the advocates that there was no question of the Guardian being criticised for making general comments in relation to what is a widely held and accepted belief that social workers must be relied upon to undertake assessments, and their competence should be neither undermined without good reason, nor unfairly criticised. If Mr Turner had sent a general email to Mr Tamber, not discussing any cases, but suggesting that he was concerned about solicitors in general suggesting social workers were not competent to undertake assessments, and even had he expressed that in forthright terms, there could have been no complaint in my view. That is not the situation here however, and as I expressed to Mr Hussain, the matters that I needed to consider must not be confused with that.
82. It appears to me that I must conduct an analysis of the matters complained of, particularly when it was asserted to me by one party that the behaviour of the Guardian was unacceptable, falling outside a boundary where the Guardian only accepted he may have been ‘too harsh’, but otherwise he stood by his comments.
83. As I have set out above, there were two main aspects that the Guardian set out in his criticism of Mr Singh.

The first criticism.

84. The first criticism was that the email sought to undermine the competence of the social worker, and to argue that only someone with a significant level of experience in assessing sex offenders could undertake such a task. I have set the relevant part of the emails out in full above and shall not repeat them but, for ease, Mr Turner suggests that the email was asking whether the social worker had the necessary ‘acumen’ to undertake this task, and that an argument had been put based on ‘supposition and conjecture’.
85. In his statement filed for the court, in paragraph 20 Mr Turner says, “I was surprised by this line of questioning by Mr Singh of the professional competence of the social worker without any supporting evidence about her practice”. In paragraph 30, he sets out that he makes no criticism of the barrister’s submissions at the hearing, but says this “my criticism was of the earlier action of father’s solicitor, Mr Singh, in his email to the local

authority questioning the skills and competency of ND to undertake an assessment of father without any evidence to support his claims”.

86. Later in that statement he also refers to Mr Singh having sought “to undermine the skills and competence of the allocated social worker”, and then at paragraph 38 refers to feeling that his actions were justified “in raising concerns about Mr Singh’s unfair criticism of the social worker which in my opinion needs to be addressed”.
87. He does go on to say that “on reflection I realised that my criticism of Mr Singh may have been too harsh”, but then later in the same document at paragraph 44 states that in relation to this application it was brought because “I privately questioned the actions of Mr Singh with his senior in relation to his unfounded concerns about the professionalism and competency of the social worker to undertake an assessment of father. In doing so, Mr Singh sought to undermine confidence in the social work profession and the professionalism within it”.

Analysis:

88. As I have set out above, there is no question of this issue being about a Guardian expressing generalised views of concern of solicitors criticising social workers. Mr Hussain asserted on a number of occasions that the guardian had been trying to express his concerns about that, and each time I reminded Mr Hussain that was neither the complaint in this case, nor were we going to be side tracked into a discussion of that entirely reasonable viewpoint.
89. The quotations that I have set out make it quite apparent that Mr Turner makes specific criticisms of that email, and Mr Singh.
90. Mr Turner has had a significant time to reflect upon the emails that he sent in relation to this issue. He has then had, upon being notified that such an application was going to be made to terminate his appointment, another opportunity to reflect. He then had a substantial period to file a statement with the benefit of legal advice.
91. It is quite apparent that Mr Turner stands by his criticisms of Mr Singh, with the only potential qualification being that he may have been ‘too harsh’.

92. I have set out above, in full, the email that was sent to the local authority on behalf of the father. There is nothing at all within that email to justify the criticisms made by Mr Turner. In particular, it is simply not correct to assert that the email sought to undermine the competence of the social worker. The local authority had filed a parenting assessment plan, and an enquiry was made as to the experience of the social worker. In my view that was an entirely normal query to have been raised, and may well have been a question that a judge would ask if they were presented with such a plan.
93. At no point in that email is any criticism made of professional competency, nor is there any enquiry as to what acumen the social worker has, or any suggestion made that such a piece of work is sufficiently complex that only an independent social worker could do it. The email does not, as Mr Turner asserts, argue that only someone with a significant level of expertise in assessing sex offenders could undertake such a task. Mr Turner is simply wrong in relation to that.
94. Mr Turner suggests that Mr Singh has based his argument on supposition and conjecture. Yet again, there is simply nothing to support that within that email.
95. In his second email, Mr Turner asserts that Mr Singh had made ‘criticisms’ regarding the qualifications and experience of the local authority social worker to complete a fair and balanced assessment without any supporting evidence. Once again, that is simply not correct; there is nothing in that email which even suggests that.
96. Later in his email Mr Turner states that he will continue to raise concerns of any advocate if they unfairly criticised the practice of others, including local authority social workers, without good cause or justification. Once again, he is clearly there referring to Mr Singh, and once again the difficulty is that Mr Singh has not done that. The email simply does not say that, nor can it even be suggested that it infers that.
97. In his statement Mr Turner again asserts that Mr Singh has questioned the professional competence of the social worker, that he has questioned the skills and competency, and then that he has sought to undermine the professionalism experience and competence of ND; later he refers to the unfair criticisms of social workers.

98. As I have set out already on a number of occasions, the email simply did not do any of those things. I think it is important to make it clear, as it is relevant, that this is an entirely factual matter. The email is part of the evidence in this matter. It is very short. There is no prospect that there can be any misunderstanding, or any view that it could be read or interpreted in different ways. The email simply does not set out the matters that Mr Turner states repeatedly that it does.
99. What is particularly troubling about the statement filed by Mr Turner is that that was filed once he had had a substantial opportunity for reflection, and with assistance in relation to it. He does not resile from those views, certainly not the ones in the statement because they were made within the same document where he also accepted he may have been too harsh.
100. In considering the question sent to the local authority on behalf of the father, the emails sent by Mr Turner, and his statement, there is no possible other conclusion than that he is wrong in his assertions, he has been unable to reflect upon those assertions, and he believes he is correct even in the face of overwhelming evidence to the contrary. That is an extremely concerning situation in relation to a professional guardian.

The second criticism of Mr Singh.

101. This second criticism does not arise out of the email, but is as a result of Mr Singh having briefed counsel to instruct the father at the hearing where the issue of assessments was to be determined.
102. I have set out above what is said in the emails sent by Mr Turner relating to this aspect.
103. Within Mr Turner's witness statement, he then says this "I also raised questions that given Mr Singh's own level of experience, as he is a member of the children's panel of solicitors, I was surprised that while seeking to undermine the skills and competence of the allocated social worker he had instructed an advocate to pursue his argument and make submissions to court rather than undertake this task himself".

104. At the conclusion of his witness statement he says “while seeking to undermine the competence of the social worker, Mr Singh demonstrated weaknesses in his own professional skill by not presenting his own case before the court and abdicating this responsibility to others”.

Analysis:

105. Once again in relation to this matter, I have borne in mind the fact that it seems Mr Turner’s emails were sent without any consultation with his legal representatives. That, however, is not the case in relation to his statement, where he clearly stands by such assertions, indeed elaborates upon them, and in an extremely personal way, expressing a view that Mr Singh demonstrated ‘weakness in his professional skills’.

106. These unpleasant criticisms of Mr Singh having briefed counsel to undertake a hearing within care proceedings are wholly misconceived, indeed without any basis at all. There are many reasons why solicitors instruct counsel, which may be as simple as availability, or finances or as complex as a view that a barrister has greater oratory and persuasive skills. It is entirely a matter for the solicitor instructed by a client, sometimes in conjunction with that client, as to whether a barrister is instructed or not. It is inappropriate for that to be the subject of comment, still less straightforward and personal criticism.

107. Mr Turner is an extremely experienced Guardian. He appears routinely before this court representing the interests of children in care proceedings. He sets out in his statement that he has been a Guardian since November 2009. He will have appeared, I would suggest, in hundreds of court hearings where counsel was instructed on behalf of the parent for a variety of reasons. It is extremely difficult to understand how Mr Turner could possibly genuinely believe that it was inappropriate for Mr Singh to instruct counsel for a contested Part 25 application, or that it could be appropriate effectively to suggest Mr Singh either is not competent to make the application in court, or that in some way he was acting against his client's interests in instructing counsel.

108. It seems appropriate to me that I record, for the avoidance of any doubt, that any criticism of Mr Singh's conduct in relation to either of these matters is incorrect. He has done nothing wrong.

The emails themselves:

109. It is another concerning aspect of this case, that no matter what the complaint about a case which was made by Mr Turner, that was raised by way of what he refers to as "private emails" between himself and Mr Tamber.

110. When one stands back and considers those emails, the Guardian is seeking to discuss the case with a solicitor who is a partner in a firm that represents the father without other parties being copied in. Within those emails, the Guardian discusses various views in relation to an ongoing case. There can be no doubt that is inappropriate.

111. In his second email response, Mr Tamber copied in the solicitor representing the child in these proceedings, and sets out clearly for the benefit of the Guardian, that he will need to make his client aware of the content of the previous email, and seek his instructions.

112. Notwithstanding that, Mr Turner not only responded, but did not include the child's solicitor in that response. He then elaborates as I have set out above on his views.

113. Within his witness statement, Mr Turner suggests that he had "sent an initial email privately to Jas Tamber, who is a senior colleague of Mr Singh". Later in the statement he again suggests he "privately questioned the actions of Mr Singh with his senior".

Analysis:

114. Once again, I have found myself unable to understand the position taken by Mr Turner. When drafting his statement, he had the benefit of legal advice, and so could be under no illusion that within care proceedings there is no such concept as him being able

privately to email a solicitors' firm acting at that time for another party and discussing a case.

115. In any event, Mr Turner, as I have already set out, has been a Guardian for many years, and must know that his actions were inappropriate. If it were possibly the case that despite having been a Guardian for that many years, he did not know that, he must have been informed, it seems to me, at the time he wrote his statement by those advising him of the inappropriateness of those emails, regardless of their contents. Yet he does not accept that in his statement. I am greatly troubled by the fact that he does not accept that, and is not able to reflect upon that in his statement.

The care case as a whole:

116. It is not suggested on behalf of the father (apart from the one evidential matter that I have declined to determine) that the Guardian has otherwise acted inappropriately in this case.
117. In fact, there is positive evidence to the contrary, that the Guardian has put forward an independent viewpoint in relation to the best interests of the child in this case, and has argued for that, at times agreeing with the actions or submissions of the local authority, and at times agreeing with the parents when they have been in conflict with the local authority. I accept that as right.
118. To the extent that it is relevant, it also seems to me right expressly to accept what Mr Hussain reminds the court, that this is a very experienced Guardian, who routinely reports within this court, and who is certainly not afraid to express his view in relation to what should be taking place within proceedings when he is representing the interests of the child. I accept, for the avoidance of any doubt, that Mr Turner has in many cases fairly and properly acted to represent the child, and often strongly advocated on behalf of children he represents, working under significant pressure. His recommendations are regularly accepted by this court as being child focussed and correct.

Conclusion:

119. I must then apply the matters I set out in my analyses above to the legal framework.
120. It does not appear to me that that any of the reported cases to which I have been referred are genuinely on all fours with this case.
121. *QS v RS* was of course a private law case, with a suggestion that the guardian had prejudged the case. That is somewhat similar to *Re J*, and in both instances the court did not consider it appropriate to terminate the appointment of the Guardian. The significant difference between those cases and is however, it seems to me, that in neither of them was there clear evidence that the guardians had, in fact, formed a settled view before seeing all the evidence, or that the guardians accepted that they had formed such a view, although they had expressed some views that could be considered in that way.
122. As Ward LJ pointed out, it was untenable to assert bias or the appearance of bias based simply on adverse views expressed in the course of long proceedings. Those were adverse views in relation to the positions of the parties, of course, not adverse views about the conduct of a solicitor representing a parent. It is also quite apparent that the guardians in those matters, asserted that they had not reached any final settled view, and as MacDonald J says in *QS v RS* at para 46, ‘the evidence of the children’s guardian will be the subject of forensic scrutiny by the court through the medium of cross examination’.
123. Any preliminary views therefore would, of course, be analysed during the hearing of the evidence at any final hearing. At para 47, in *QS v RS* MacDonald J goes onto also say that can take place by way of “challenging the methodology and reasoning process of the children’s guardian, which challenges will be taken into account by the court when deciding what weight to attach to his views”
124. It seems to me that argument cannot simply be transferred to this situation. This is not a criticism of the Guardian’s analysis of the case.

125. Ms Lakin submitted the current situation was far more akin to the *Oxfordshire CC v P* case, where a guardian had improperly disclosed the mother's admissions to the police without the leave of the court. There can be no doubt that case was at the more extreme end of behaviour by a guardian, however Ward J (as he then was) made it clear that 'although the guardian was wrong to cooperate with the police, the court recognised that she was faced with an embarrassing predicament, and the court has much sympathy with the decision she took as a law-abiding citizen to help the police when asked for that help'.
126. The guardian was replaced in that case because she should not have disclosed the admissions without leave, and it was expressed that 'To encourage frankness on the part of the parents, she must be replaced even though her work in all other respects has been wholly admirable and my criticism of her is technical not substantial'.
127. It is quite apparent that the guardian accepted in that case she had been mistaken in steps that she took, and also surely there was no suggestion that she would once again repeat that mistake. It was also explicitly recorded that the rest of her work had been wholly admirable, and yet she needed to be replaced as, it is set out in the judgment, the mother had lost confidence in the guardian.
128. Giving further consideration to paragraph 30 of MacDonald's J judgment, it is quite apparent that he is there considering the methodology adopted by the Guardian. The criticisms made of this Guardian are not about his methodology. It seems to me they are about his behaviour.
129. I bear in mind that whilst I have a discretion in relation to this application, it must be exercised sparingly, and that I must take into account the overriding objective.
130. I am very conscious that disputes and arguments do take place between lawyers in many types of cases. Family cases, in particular perhaps, can cause emotions to come to the surface, and most family lawyers will have taken part in discussions and negotiations that are tense, sometimes discourteous, and even angry. I also accept that at times, although far less usual, social workers or guardians can become part of those discussions.

There is no suggestion that those sort of open discussion that regularly take place could lead to applications for the termination of a guardian's position.

131. I am also conscious, and have borne in mind, that it is not sufficient simply for the court to consider the guardian is wrong, that he has behaved badly, or rudely; this is not a value judgement on his conduct. Similarly, this is not a case about Mr Singh, or his assistant, and any upset he may feel at such comments being made about him. It is about the impact such matters have upon the fairness of the proceedings.
132. One of the reasons there is a discretion in these cases is because by their nature, the circumstances that give rise to them will often be unusual, or unexpected.
133. Ultimately, all the advocates in this case in various ways concluded that I must consider whether the guardian had acted with the required degree of fairness, and whether the Guardian has acted manifestly contrary to the child's best interests.
134. I must consider whether it is right that by raising unfounded criticisms of the father's solicitor, that by the sending of those emails, and by refusing to accept fault that the Guardian was acting in that way.
135. In my view, on the facts of this particular case, the Guardian's actions have fallen short of the degree of fairness required of him and have created unfairness for the father. They have also been manifestly contrary to the child's best interests. His actions require the termination of his appointment. My reasons are as follows:
 - a) Mr Turner is not only clearly and obviously wrong in the assertions that he makes in relation to the email, and against Mr Singh, but he has not been able to accept that he is wrong in relation to those. The fact that, in the face of overwhelming factual evidence showing that he is wrong, he maintains his views, and repeats them, inevitably has a significant impact not only upon the father's views of the Guardian's action and analysis in this case, but upon all the other professionals working within this case, and the mother.

Despite the other ways in which the Guardian has undoubtedly acted quite properly in this case, and in many other cases, and I have balanced that, it does not appear to me that that mitigates the impact of the fact that not only is he wrong, but he does not accept that he is wrong. In my view, if Mr Turner had been able to admit to the court that he had been in error in sending that first email, and the second email, in his witness statement or of course before that, there may have been a very different perspective to be placed upon his actions. Even if within the court hearing of this application, I had been told that he had been able to reflect and accepted he should not have acted in that way, it seems to me that there would probably have been a different view to be taken.

Professionals within these courts are currently acting under simply enormous pressure. Each of the advocates addressed me on the issue that people make mistakes, people send emails that they later regret, people reflect with the benefit of time and perhaps less pressure. That is however simply not the situation here. That fact goes to the ultimate confidence that the court and the other parties can have in the guardian's ability to make fair and sound judgments and recommendations in this case.

- b) Mr Turner has not only made these inaccurate and unfair criticisms of Mr Singh, but he also made them in an inappropriate way by asserting and maintaining that he can do that by way of 'private' emails. As above, it appears that even having had the benefit of legal advice, Mr Turner again does not accept he was in error in acting in that way. In my view that aspect creates an inevitable belief for both the mother and particularly for the father, that this is a Guardian who does not consider that the normal rules apply to him. Put simply, in these court proceedings, brought by the state to separate them (in their view) from their child, how could it be that a guardian acted in that way, and remained the guardian for their child. I can think of no way to rationalise that such that the parents could believe in the fairness of this process if this Guardian remained the person representing the interests of their son.

- c) Just as in the *Oxfordshire* case, it also appears to me it would be impossible for the parents to be able to be open and straightforward in future discussions with the Guardian, as they could not possibly view his actions as other than worrying at best, or blatantly wrong at worst. To further the welfare interests of N, this Guardian must be able to build a relationship with the parents, engage them, and for them to believe that he will act fairly in representing their son. I cannot see how these parents could possibly believe that, or how this court could suggest to them they could build that sort of relationship with him. Such a relationship of openness and respect it appears to me is extremely important in these proceedings. Indeed, that was reason for the guardian to be removed in the *Oxfordshire* case, to encourage frankness on the part of the parents. Mr Turner's actions therefore again are manifestly not in the interests of the child given the situation that it seems to me must result.
- d) I have considered the realities of what would happen in other respects if Mr Turner remains the Guardian. I agree with Ms Lakin that this issue would permeate and impact upon every decision made going forwards in this case, and in my view that would inevitably be contrary to the child's welfare. Given the findings that I have had to make in this case, every decision and recommendation that Mr Turner makes in this case will be questioned not only by the parents, but the social work team may do so as well if he disagreed with them. That in my view once again shows a direct causal link between his actions, leading to potential unfairness in these proceedings. It shows how his actions have been manifestly contrary to the best interests of the child. In the event that the Guardian takes a stance at any final hearing contrary to the wishes of the parents, or even potentially the local authority, a substantial amount of time would be taken up cross-examining Mr Turner about these issues. I accept that it may be by that point that Mr Turner is prepared to concede that his actions were wrong, but he may not given his stance to date. Whichever it may be, it creates confusion, significant worry for the parents, and a real possibility of delay in the future. In my view it also creates a significant diversion of the proceedings from the welfare interests of the child, and again a causal link is shown.

- e) If Mr Turner remains the court appointed guardian, there is another significant factor. Given what has happened, if the court considers he should remain the guardian for N, the reality must be the father would surely believe that an extremely important person in these proceedings views his solicitor as not being competent. That places the father in a most unhelpful state of uncertainty of how that could come about. I cannot see how that is fair to him. I have considered how that could be explained to the father and concluded that there would simply be no logical way to do so, particularly as Mr Turner has not resiled from his view. Again, that impacts directly upon the fairness of these proceedings, due to the father's inevitable concerns about what or who is right.

- f) Connected with that concern in relation to the father, if Mr Turner remains N's guardian, the father will consider in my view that he has been placed in the middle of a substantial argument between his solicitors and the guardian. As he puts in his statement, his concern would be that the guardian was not going to be fair to him and his case because of his representation. It is easy to see how a parent would struggle to draw a distinction. That cannot possibly be fair to the father. That leads to unfairness in these proceedings.

- g) These aspects that I set out above are not the type of issue that can be remedied by cross examination at a final hearing.

- h) I therefore conclude for all the reasons set out above that there is a real likelihood that the actions of the guardian will lead to unfairness in these proceedings as a whole.

END OF JUDGMENT