



Neutral Citation Number: [2022] EWHC 3404 (Fam)

Case No: DE2150076

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 05/12/2022

**Before :**

**MRS JUSTICE LIEVEN**

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**Between :**

**DERBYSHIRE COUNTY COUNCIL**

**Applicant**

**and**

**AA**

**First Respondent**

**and**

**BA**

**Second Respondent**

**and**

**X**

**(a child, through his Children's Guardian)**

**Third Respondent**

**and**

**UNIVERSITY HOSPITALS OF DERBY & BURTON NHS FOUNDATION TRUST**

**Intervener**

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**Mr Stefano Nuvoloni KC and Ms Louise Sapstead (instructed by Derbyshire County Council) for the Applicant**

**Mr Brendan Roche KC and Ms Helen Knott (instructed by Nelsons Solicitors) for the First Respondent**

**Ms Shiva Ancliffe KC and Mr Chris Adams (instructed by Timms Solicitors) for the Second Respondent**

**Ms Kathryn Taylor (instructed by Smith Partnership Solicitors) for the Third Respondent**

**Ms Zoe Henry** (instructed by **University Hospitals of Derby & Burton NHS Foundation Trust**) for the **Intervener**

Hearing dates: **5 December 2022**

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**Approved Judgment**

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MRS JUSTICE LIEVEN

This judgment was handed down in private on 5 December 2022. It consists of 28 paragraphs. The judge gives leave for it to be reported in this anonymised form.

**Mrs Justice Lieven DBE :**

1. These proceedings concern X, a child now aged 18 months. The first respondent, AA, is X's biological mother. The second respondent, BA, is X's mother and the wife of X's biological mother. For ease of reference, I will refer to the first respondent as "Mother", the second respondent as "BA", and both together as "the parents". The local authority is Derbyshire CC, represented by Stefano Nuvoloni KC ['SNKC'], and Louise Sapstead. The Mother is represented by Brendan Roche KC ['BRKC'] and Helen Knott. BA is represented by Shiva Ancliffe KC ['SAKC'] and Chris Adams. The child is represented by his children's guardian through Kathryn Taylor. The NHS trust is represented by Zoe Henry, but for reasons which will become obvious Miss Henry took little part in the proceedings today.
2. This judgment concerns whether or not I should hold a 9 day fact finding hearing into alleged non-accidental injuries to X.
3. On 12th July 2021, X attended at hospital for a routine standard operation for a tongue tie. When attending at the hospital the parents said that X had been unsettled the evening before and they asked the consultant if X could be seen at the A & E department. Chest x-rays were carried out and revealed healing rib fractures which were to the 6th, 7th and 8th ribs to the left side. The view of the paediatrician at the time was that these were likely to be non-accidental injuries and so various experts have been instructed.
4. Care proceedings were issued on 2 August 2021 and the matter came before HHJ Williscroft on 4 August 2021, with an application by the Local Authority for an Interim Care Order ['ICO']. The Judge considered that the tests for making public law orders were not made out and therefore no ICO or supervision order was made. It was agreed that X should be subject to what was a complex and very full supervision plan, and he has been subject to that supervision ever since.
5. Since the proceedings commenced, all X's care has been supervised by at least one family member. For two weeks of every month, he lives in Derbyshire with both parents and the mother's mother (X's grandmother). However, the other two weeks are spent in West Sussex 'with his grandmother...' and one of his parents. This obviously involves a significant journey every two weeks from West Sussex to Derbyshire. There are other family members, who have been approved as supervisors, who supervise at various times. At no stage has X been removed from his parents' care. Throughout this period of intensive supervision and oversight from the Local Authority (including visits and phone calls), at no point has there been any doubt about the quality of care that the parents are giving to X or any other concerns about their parenting.
6. The Local Authority's threshold (which I do not need to read in detail) alleges a non-accidental injury caused to X by one or both of the parents and alleges that the parents have not been honest with the Local Authority professionals about this. The parents fervently deny ever injuring X in any way, and thereby causing him harm, and they raise the possibility of X having been injured at birth or in hospital immediately after birth. It is for that reason that the Trust was joined, and Miss Henry appeared before me today.
7. Various experts have been instructed, and it is the general view of the experts (without going into detail) that the injuries are more likely to be non-accidental inflicted injuries

than birth related, although I note the time window for the fractures includes X's birth. The medical evidence also states that there is no underlying condition which would increase the likelihood of fractures and nothing unusual about the birth process or immediately afterwards which would have caused the fractures. If the matter proceeds to a fact-finding hearing, the parents intend to challenge the expert evidence and suggest that there is some other cause of the injuries. The case is currently set down for a 9 day fact finding hearing commencing on 9 January 2023 and various experts are warned to attend.

8. The familial background here is that BA has three adult children and neither parent has had any previous involvement with social services before the facts of this case. It is agreed by all parties that there are no risk factors or red flags concerning either parent in this case, such as those which were set out by Peter Jackson J (as he then was) in Re BR (Proof of Facts) [2015] EWFC 41.
9. Since the events of 12 July 2021, the parents have been subject to very considerable oversight by the Local Authority for 16 months and there are numerous notes of their interaction with the Local Authority over that period. There is no suggestion that their parenting has been anything other than positive and the clear view of everyone who has been involved is that there is nothing to suggest that they are anything other than caring and loving parents. Despite his movements up and down the country, X appears to be thriving developmentally, although there are some specific health concerns which I will address in a moment. The parents – and this is important - are noted to have fully cooperated with the Local Authority throughout the proceedings. When they have wished to change the supervision plan, they have assiduously raised this with the Local Authority. There is therefore every reason to believe that they would fully co-operate with the Local Authority going forward.
10. This hearing was listed for a pre-trial review before the fact-finding hearing in January 2023. BRKC, supported by SAKC, makes an application for the case to be dismissed. He submits that these proceedings are not necessary to protect X and that to proceed to a fact-finding hearing does not meet the tests in the case law. He relies on the President of the Family Division's recent 'View' dated 29 November 2022, in which he stresses the need for the Family Justice System to focus its energies on what is really necessary and in particular to try and get back to, or closer to, the principles of the Public Law Outline ['PLO']. BRKC is supported in his position by SAKC. I note that BRKC's position in this respect is set out in his position statement and neither SNKC or KT have suggested that they were not fully prepared to deal with this argument today.
11. In considering this application, I start with the principles in Family Procedure Rules 2010 ['FPR'] and the overriding objective at FPR r1.1, which includes ensuring that the case is dealt with expeditiously and fairly, proportionately, and with fair allocation of resources. FPR r1.1 states:
  - (1) *These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.*
  - (2) *Dealing with a case justly includes, so far as is practicable –*
    - (a) *ensuring that it is dealt with expeditiously and fairly;*

*(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;*

*(c) ensuring that the parties are on an equal footing;*

*(d) saving expense; and*

*(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.*

12. The test for whether or not to have a fact-finding hearing in family cases has recently been considered in the context of private law cases in the judgment of K v K [2022] EWCA Civ 468 by the Court of Appeal. At paragraph 66 of that judgment, the Master of the Rolls says:

*“the main things that the Court should consider in deciding whether to order a fact-finding hearing are: (a) the nature of the allegations and the extent to which those allegations are likely to be relevant to the making of the child arrangements order, (b) that the purpose of fact-finding is to allow assessment of the risk to the child and the impact of any abuse on the child, (c) whether fact-finding is necessary or whether other evidence suffices, and (d) whether fact-finding is proportionate.”*

13. Although that is a private law case, the principles as to whether a fact-finding is necessary and proportionate (to determine what, if any, welfare orders should be made) are equally relevant to public law.
14. SNKC points out that a key difference between private law cases such as K v K case and this case is that in public law proceedings threshold findings need to be made out before any public law orders can be made. In this case the parents deny threshold because they say that they have caused no harm. Therefore, if there is no fact-finding hearing and the threshold is not made out, the Court does not have jurisdiction to make public law orders. I accept that is a significant difference to private law proceedings, but that does not alter the Court's approach that a finding of fact hearing should not be undertaken unless it is going to make a material difference to the welfare outcome and the orders which may be made.
15. I have also been referred to authorities in the public law context. The leading and most frequently cited authority on the issue of whether to hold a finding of fact hearing is Oxfordshire County Council v DP, RS and BS [2005] EWHC 1593, where McFarlane J, at para 24, states:

*“The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not 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.'*

16. I have been referred to two other first instance judgments, *K v WD* [2010] EWHC 3342 and *A Local Authority v W and Ors (Application for Summary Dismissal of Findings)* [2020] EWFC 40, both on the approach to fact finding. I note that in McDonald J's decision in *A Local Authority v W*, he found that there was no power to strike out a public law care application, but that there were case management powers to determine what facts, if any, needed investigating before the court could reach its determination.
17. In the public law context, the most recent authority is *H-D-H* [2021] EWCA Civ 1192 where at paragraph 22 Peter Jackson LJ referred back to the Oxfordshire case and expanded the relevant considerations somewhat:

*“The factors identified in Oxfordshire should therefore be approached flexibly in the light of the overriding objective in order to do justice efficiently in the individual case. For example:*

*(i) When considering the welfare of the child, the significance to the individual child of knowing the truth can be considered, as can the effect on the child's welfare of an allegation being investigated or not.*

*(ii) The likely cost to public funds can extend to the expenditure of court resources and their diversion from other cases.*

*(iii) The time that the investigation will take allows the court to take account of the nature of the evidence. For example, an incident that has been recorded electronically may be swifter to prove than one that relies on contested witness evidence or circumstantial argument.*

This is probably not relevant here.

*(iv) The evidential result may relate not only to the case before the court but also to other existing or likely future cases in which a finding one way or the other is likely to be of importance. The public interest in the identification of perpetrators of child abuse can also be considered.*

I don't think SNKC relies on this.

*(v) The relevance of the potential result of the investigation to the future care plans for the child should be seen in the light of the s. 31(3B)*

*obligation on the court to consider the impact of harm on the child and the way in which his or her resulting needs are to be met.*

*(vi) The impact of any fact finding process upon the other parties can also take account of the opportunity costs for the local authority, even if it is the party seeking the investigation, in terms of resources and professional time that might be devoted to other children.*

*(vii) The prospects of a fair trial may also encompass the advantages of a trial now over a trial at a possibly distant and unpredictable future date.*

This probably does not apply here.

*(viii) The justice of the case gives the court the opportunity to stand back and ensure that all matters relevant to the overriding objective have been taken into account. One such matter is whether the contested allegation may be investigated within criminal proceedings. Another is the extent of any gulf between the factual basis for the court's decision with or without a fact-finding hearing. The level of seriousness of the disputed allegation may inform this assessment. As I have said, the court must ask itself whether its process will do justice to the reality of the case.”*

## Decision

18. In applying those tests to the facts of this case I have decided that it is neither necessary nor proportionate to hold a finding of fact hearing. The fundamental purpose of public law proceedings is to determine what public law orders are needed for the welfare of the child and to protect the child from future risk. Understanding the facts and circumstances of an alleged non-accidental injury is often critical to the determination of future risk. But here I do not find that is necessary, and even if I made all the findings it would be unlikely to have any material impact on the ultimate orders for X.
19. There is no evidence here to support any finding of deliberately inflicted injury. The overwhelming probability is that if the court did find a non-accidental injury, it would be a single act of significantly inappropriate handling of a very young baby, rather than any deliberate act or any course of conduct.
20. There has been detailed oversight of the parents and their parenting capacity for well over a year, for once a happy consequence of the delay in this case. That observation has shown that their parenting is entirely positive, and all of the observations give no cause to believe that X is at risk in their care. Importantly, there are no risk factors, or “red flags” of the kind identified in *Re BR*. In my view, that is particularly significant in making a decision such as that because it is critical to any assessment of future risk. The parents have wholly cooperated with the Local Authority despite strongly refuting the allegations and the very high level of supervision and the significant intrusion in their lives through the supervision plan.
21. When considering what orders might ultimately be made, there is evidence that the current regime of supervision is causing X harm. The very extensive twice monthly travel must be stressful for him and I am told that X has recently had a serious chest infection which led him to be taken to A & E and discharged with antibiotics. It is not

clear that that was related to the travel but sitting in a car for upwards of four hours is unlikely to be positive for him. These proceedings are also placing enormous strain on X and his family and normal family relations. This would be wholly justifiable if the evidence suggested that it was necessary in order to safeguard X. But it does not appear to me that the evidence is now supportive of that position.

22. The evidence does not support SNKC's proposition that unless the facts are found and the parents accept such findings, the risk will continue. I agree with BRKC that even if the Court finds that the facts are made out, the benefits of a fact-finding hearing would be extremely limited. It is highly unlikely that the parents would accept any findings even if I made them, so even if a fact-finding hearing were held, there is a strong possibility that in practical terms we would be no further forward.
23. I also have to take into account the proportionality of a 9 day fact-finding hearing. There are the costs of the lawyers, NHS resources, CAFCASS and social work resources in play. I note what was said by Peter Jackson LJ in *H-D-H* that even if the Local Authority and the Children's Guardian support a fact-finding hearing taking place, I can still take into account the impact on their resources.
24. What benefit would there be in a fact-finding hearing? Given the oversight of the family so far, it is extremely unlikely that (even if all of the facts were found) any Court would remove X from the care of his parents. That is not a realistic prospect given all that has happened over the last 18 months. SNKC submits that removal is a possibility but, in my view, on the evidence it is highly unlikely. He says there could be a care order at home. But we know that the latter course of action has been discouraged in all but the most necessary of circumstances. I cannot see that such an order would be justified on the facts of this case. Therefore realistically, in all probability, the Court is only going to be considering whether to make a supervision order with X living at home, and some form of safety plan in place.
25. Both parents' representatives make it clear that the parents will agree to a gradually decreasing supervision/safety plan over the coming months so that the Local Authority can be satisfied that X is safe. That type of plan is almost certainly what the Court would order in any event. The current amount of supervision cannot be maintained in even the medium term with the extensive travelling between Derby and West Sussex. Therefore, the Court is likely to end up with the same plan for a decreasing level of supervision whatever findings may be made following a fact-finding hearing.
26. I accept that if the parents do not concede threshold, the Court has no power to make a public law order. The supervision plan would therefore not be legally binding. It therefore comes down to a question of whether it is justifiable to hold a 9 day finding of fact hearing in order to determine whether it is appropriate to make a legally binding supervision plan as opposed to an agreed supervision plan. In my view that would be a disproportionate use of court time.
27. It is sometimes argued in these circumstances that the parties and child need to know "the truth" of what has happened. Peter Jackson LJ refers to this at paragraph 22(i) in *Re H-D-H*. In this case the benefit of finding out what happened is largely illusory. X is too young to know (or care) what happened. I think it highly unlikely that the parents would accept findings even if I made them. I cannot see any justification for a 9-day finding of fact hearing so that at some point in the future X can know "the truth".



28. If it is not known how X's injuries were caused, the parties can still work together to agree a plan which can form a recital to the order that brings these proceedings to an end. If the parents do not follow that plan it would be open to the Local Authority to bring the matter back to Court through fresh proceedings. The order can make clear that any future application in respect of X should come back before me. That way, in my judgement X will be protected and the disproportionate use of resources for a 9 day finding of fact hearing will be saved. The Local Authority can either apply to me to withdraw proceedings, or we can proceed to a short final hearing in the new year to determine the final order.