Neutral Citation Number: [2025] EWCA Civ 163

Case No: CA-2024-002608

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT SITTING AT WOLVERHAMPTON
HHJ BUGEJA
WV23C50295

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2025

Before :

LORD JUSTICE ARNOLD
LORD JUSTICE DINGEMANS
and
MR JUSTICE COBB

- -

Re M (Care Order: Risk: Family Placement)

- -

Stefano Nuvoloni KC (who did not appear below) and **Kathryn Taylor** (instructed by **WM Law**) for the Appellant (mother)
Lorna Meyer KC (who did not appear below) and **Ricky Seal** (instructed by **Local Authority Solicitor**) for the First Respondent (LA)
Richard Hadley KC (who did not appear below) and **Susan Todd** (instructed by **Ridley & Hall**) for the Second Respondent (father) (written submissions only)
Nick Goodwin KC (who did not appear below) and **Mark Cooper-Hall** (instructed by **Talbots Law**) for the Third Respondent (child, by her Children's Guardian)

Hearing date : 6 February 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

The Honourable Mr Justice COBB :

Introduction

1. This appeal concerns an infant girl, 'M'. She is now 18 months old.

2. M has lived with her mother since her birth. M's father has never lived with them; he is a convicted sex offender, and has been excluded from the family home under an order made by the Family Court shortly after M's birth.

3. When M was just a few days old, the local authority for the area in which M lives (the 'Local Authority') issued proceedings under Part IV of the Children Act 1989 ('the CA 1989'), seeking a care order; it also applied for an interim care order, which was, at the first hearing, made by consent. At the final hearing of the Local Authority's application, and for reasons set out in a lengthy judgment, HHJ Bugeja made a full care order, approving a care plan to remove M from her mother to place her for her long-term future with M's paternal grandparents (hereafter 'Mr and Mrs G').

4. It is against that order that the mother now appeals. She is supported in her appeal by the father and by the Children's Guardian on behalf of M. Mr and Mrs G, who played no formal part in the hearing below or in the appeal have also informally made known that they do not support the removal of M from her mother (see §69 below). The appeal is opposed by the Local Authority. The appeal is brought with the permission of Peter Jackson LJ. At the time of granting permission, Peter Jackson LJ granted a stay of the order; thus, at the time of the appeal, M remains with her mother.

5. The central issue at the hearing was whether the mother will be able to protect M from the father in the future. This issue of future risk arose within the court's determination of M's best interests, the parents having conceded, before the hearing began, that the section 31 CA 1989 'threshold criteria' for the making of a Part IV CA 1989 order had been established on the filed evidence ([453][1]).

Background facts

6. The summary background facts are taken from the judgment.

7. The father ('the father') is 32 years of age. He has some cognitive limitations; he was assisted during the hearing of the application before the Judge by a court-authorised intermediary. The mother ('the mother') is 26 years old.

8. In October 2014, when 22 years old, the father was convicted of fourteen serious sexual offences against three female children aged between 11 and 16 whom he had accessed online; the offences were of increasing seriousness over a period of months, and had been committed when the father was 19 to 20 years old. The seriousness of the offences was aggravated by the fact that the father psychologically coerced his victims after the abuse, threatening suicide and fabricating an account that he was suffering from cancer. He was sentenced to thirty two months' imprisonment; a Sexual Harm Prevention Order ('SHPO') was simultaneously imposed, which expired in October 2021, and the father was disqualified from working with children. The father is subject to the notification requirements of the Sex Offenders Register, and

[1] Numbers in [square brackets] refer to the paragraph numbers in the judgment below.

will remain on the register indefinitely. He has been cautioned at least once (in 2022) for breach of his notification requirements.

9. The father currently lives with his parents; he has done so since M's birth. The father will need to move out of their home if, as the Local Authority proposes, M is placed into the care of Mr and Mrs G.

10. The parents met and began their relationship in 2016; they are not married. It is unclear precisely what the mother knew of the father's convictions in the early part of their relationship, but she appears to have been aware at least of the outline nature of his offences. In early 2022, shortly after the expiry of the SHPO, the mother and father sought IVF treatment. It appears that they both misled the fertility clinic by concealing the father's offending history ([117]). The Judge was later to find that the father had lied "on a number of occasions" about the IVF process, adding that she was "quite satisfied he was well aware of the need to disclose such convictions and of the impact it would have on the safeguarding of children" ([124]).

11. The IVF treatment was successful, and the mother became pregnant. In early 2023, the Local Authority learned of the father's serious offending history, and of the mother's pregnancy. Pre-birth assessments were commenced, and a child protection case conference was held to discuss the risks to the unborn child. The Local Authority commissioned a report from Dr Tanya Garrett, Clinical and Forensic Psychologist; her risk assessment report on the father was provided to the Local Authority on 2 August 2023, only a matter of days before M's birth. It is a long and detailed report. The social worker provided this report to the mother just as she was going into labour; the timing was acknowledged by Dr Garrett, and commented upon by the Judge, to have been "unfortunate" ([182]). Having read the report, the mother stated that she would separate from the father; the father in fact attended the birth of M, which caused the Local Authority to question her declared intentions. The father's name appears on M's birth certificate, and he therefore has parental responsibility for M.

12. In the meantime, a child protection plan had been drawn up by the Local Authority, and less than one week after M's birth in the summer of 2023, care proceedings were issued. The application was founded upon the risk posed to M by the father; the Local Authority also asserted that M was at risk of harm because of the mother's social isolation, and her ability to be a protective parent towards M.

13. At the first hearing of this application, the parents indicated that they had separated from each other, physically if not emotionally. The mother wished to be assessed as a sole carer for M. Alongside the interim care order, the court made an order under section 38A CA 1989, excluding the father from the family home; this of course required the agreement of the mother (section 38(2)(b)(ii) CA 1989) which was forthcoming**.** Following his exclusion from the family home, the father had only supervised contact with M. A 'Working Agreement' was drawn up and signed by the relevant parties, which stipulated that: (a) M was to be cared for by the mother, and was not at any time to be in the care of the father; (b) the father was not to attend/visit the family home of the mother and M; (c) the mother was not to visit the father anywhere, at any time, when she has care of M; (d) the mother was not to share any photos of M with the father without permission of the Local Authority; (e) the mother was not to take part in any video calls with the father which would show M in the

background or forefront of the call; (f) family time between the father and M was to be supervised by the Local Authority.

14. During the year in which this arrangement was in place, it is recorded in the judgment that the Local Authority social workers visited M and her mother once every 4-6 weeks.

15. The future of the parents' relationship, and specifically the mother's stated intention to separate from the father, was the focus of much social work and professional assessment over the following months.

16. In June 2024, ten months after M's birth, the Local Authority's application was listed for an Issues Resolution Hearing ('IRH'); this was the Judge's first involvement in the case. By this time, social work assessments of the mother and father had been completed and a 'Connected Persons' assessment had been undertaken in respect of Mr and Mrs G. The order at the IRH recorded the Judge's view that "leaving the child in the care of the mother is a significant risk". The mother later complained that this demonstrated bias on the part of the Judge and sought permission to appeal her ultimate decision at least in part on this recital of that judicial view; Peter Jackson LJ refused permission to appeal on that ground. The Judge added on the face of the IRH order, rightly in my view, that the "central issue" was "proportionality, and risk assessment, management and mitigation. This case involves a balancing of the risks to the child".

17. Following the IRH there were two important developments. First, evidence came to light which revealed that the father had contacted a woman (notably, the mother of a young child) via the Tinder online dating/network app. Sexual messages had been exchanged between the father and this other woman. Suspicious that she may have been given false information by the father about his identity, and using the Child Sex Offender Disclosure Scheme ('Sarah's Law'), this woman enquired from the police whether the father had an offending history for child sexual offences; this of course yielded an affirmative response, which was shared with the woman. All contact between the father and the woman ceased. Further police evidence about the father's use of Tinder was filed, but not until after the start of the final hearing (between the first and second days) ([95]). The father denied at the final hearing that he was in any way involved in this activity on Tinder.

18. Secondly, a Family Group Conference took place, involving M's parents and both sets of her grandparents, facilitated by the Local Authority. At the meeting, Mr and Mrs G indicated that they supported the father returning to the family home to live with the mother and M, and queried what the Local Authority meant by the term 'significant risk'; the notes of the meeting record their comment: "[i]t is difficult to plan all safety concerns if social services can't provide evidence of what significant risk is!". A follow-up visit from the social worker to discuss their query was recorded in an e-mail, which was shown to us at the hearing of the appeal; to my mind, the note does not reveal what, if any, assistance the Local Authority actually offered to Mr and Mrs G to help their understanding of 'significant risk'. The note does however reveal that the father's probation officer had reportedly advised Mr and Mrs G that "[the father] was very low risk and in his opinion wouldn't offend again". The e-mail continues: "[Mr and Mrs G] are confused why the term "significant risk" is now being used after they have been informed their son is low risk. They want to know what he

is at significant risk of so that they can protect M". It is notable that these comments were made significantly after the Connected Persons assessment of Mr and Mrs G, which had positively recommended them as carers for M.

19. The final hearing of the application began on 1 August 2024 and took altogether seven further court days, spread over several weeks in August and September 2024. The Judge heard from the father's Offender Manager, Dr Garrett, two social workers, the mother, father and Children's Guardian. The Judge was invited to consider two realistic placement options for M: either she would remain in her mother's care, or she would be placed in the care of Mr and Mrs G. It was the mother's case at the hearing that she had finally separated from the father ([58]); the father confirmed that he was not seeking to return to the family home, and he was no longer pursuing his application for a further risk assessment ([59]).

20. The draft judgment was circulated to the parties' advocates by the Judge on 22 October 2024. Mr and Mrs G were not entitled to a copy, but the father showed it to them. On 4 November 2024, they contacted the Children's Guardian (see §69 below) expressing their disagreement with the decision. The transition plan provided for M to move to live with Mr and Mrs G within three days.

21. Two weeks later, on 19 November 2024, the Judge handed down her judgment.

The Judgment

22. The judgment is a lengthy and detailed document. It runs to over eighty pages of closely typed script (more than 55,000 words) divided into more than five hundred paragraphs; there are three short schedules, one of which provides a summary of the judgment. There can be no doubt that it was the work of very considerable industry on the part of the Judge. It contains a background history, and, towards its conclusion, a summary of the applicable legal principles. The majority of the judgment is dedicated to a pain-staking recital of the written and oral evidence, witness by witness. At the conclusion of the section on each witness' evidence, the Judge has provided her 'analysis' of that evidence. The all-important overall evaluation is contained within eighteen paragraphs ([476]-[494]) towards the end of the judgment.

23. In a recent appeal judgment (*Re H (Parents with Learning Difficulties: Risk of Harm)* [2023] EWCA Civ 59), Baker LJ had cause to comment on a Family Court judgment of yet greater length than this. *Re H*, like this case, was one in which the threshold criteria had been conceded, and attention had been focused on the ultimate order; Baker LJ was of the view that such an exercise "can generally be completed reasonably succinctly". I agree. It is unnecessary for me to repeat here, either verbatim or even in summary, what Baker LJ said at [18]-[22] of *Re H*, but I associate myself entirely with his comments (and those of Lewison LJ and Peter Jackson LJ which he cites) which apply with similar force to the judgment under review in this appeal.

24. For the purposes of explaining my reasoning in determining this appeal, I propose to focus only on those parts of the judgment which are relevant to the arguments which have been presented. Inevitably, the extracts which follow are selective, but I consider are faithful to the overall tenor of the judgment.

25. *Future risk: the father:* On the key issue of future risk to M, the Judge heard evidence from the father's Offender Manager, from Dr Garrett and of course from the father himself. The Offender Manager had referred to the father as "high risk" ([93]) with "no victim empathy" ([14]). Dr Garrett had undertaken a forensic 'sexual violence risk assessment' of the father; she concluded that the father poses a "significant risk" of sexual harm to M, and to children generally. Dr Garrett opined that it would not be safe for the father to live in a household which included M, either now or in the future ([102]).

26. Dr Garrett described the father's account of his offending as "clearly marked by minimisation and denial" ([125]); she advised the court that "just over 23% of subjects offended against both family and non-family victims" and that "the possibility of related victims such as his own daughter should not be ruled out" ([130]) (emphasis added). Dr Garrett had highlighted that if the father were to be part of a household including his daughter:

> "…it will be very difficult to manage future contact with her friends who could be at risk from him as they would be unrelated females. She said this would be of particular concern as his daughter became older and once she and her friends reached the age of his victims (11 plus)" ([130]).

In this regard, the Judge added later:

> "… [Dr Garrett] was not necessarily talking about the current and immediate risk but the risk in five years which would be an issue as [M] gets older and her friends want to come and play" ([195]).
>
> "Dr Garrett also set out that some characteristics of individuals who sexually abuse very young victims are more likely to abuse alcohol and may live with a mental illness (such risk factors being absent in this case)" ([196]). (In each case, emphasis by underlining added).

27. As I mentioned above (§17) in early July 2024, it became apparent that the father had used the dating/networking app Tinder to contact another woman who had a young child. Having considered the evidence provided by the police (via the Offender Manager) and the father, the Judge found that the father had indeed used Tinder in this way ([369]/[475(iii)]).

28. This fed into the Judge's overall finding of the risk posed by the father, which she set out in the final section of her judgment under the sub-heading 'Assessment and Balance of Risk':

> "[481]: In my judgement, the risk to [M] of sexual harm from her father is well documented, agreed by all the professionals and I cannot improve on the eloquent assessment of that risk as identified by Dr Garrett. [M] is at significant risk of sexual harm from her father who is an untreated sex offender".

29. In the concluding section of the judgment, and adhering to the guidance offered by Peter Jackson LJ in *Re F (A Child: Placement Order: Proportionality)* [2018] EWCA Civil 2762 ('*Re F*') the Judge continued:

> "[484] (1) The father is a known and identifiable risk of sexual harm to [M] for the reasons I have given. This risk will increase as she gets older".
>
> (2) … I am satisfied that the risk of sexual harm to [M] (and later to her friends) is more probable than not and that is likely to start with coercive and controlling behaviour, before turning to grooming".

30. *Future risk: the mother:* Crucial to the Judge's assessment of the current and future risk posed to M was whether the mother and father had separated, or would separate, permanently.

31. The Local Authority social worker and Dr Garrett had expressed real doubts about whether the mother would permanently separate from the father. The Judge recorded the many instances in which, during the assessments, the mother had expressed the hope or intention of reuniting with him. That was not to say that the mother had not formed an appropriate view of the father's offending, namely (as the mother told Dr Garrett, and the Judge recorded) "… that it is 'horrific' and she felt disgusted by it" ([164]). Nor was the mother lacking in empathy for the father's victims: "she also felt angry about his offending when she learned about it in terms of the impact on the victims and showed some concern that the father showed no emotion" ([164]). It had in fact been Dr Garrett's evidence that the mother "had a good understanding of the father's offending behaviour and her position would be that she would believe the alleged victim if there was another allegation made against him" ([164]). That said, the Judge spoke of the mother's "naivety" about the father's behaviour (which the mother, in fact, accepted to some degree) ([137], [145], [165]) and specifically the mother's lack of insight into the risks posed by the father ([166]).

32. However at the final hearing, following the evidence of the social worker and Dr Garrett, the mother gave oral evidence. This gave the mother her first opportunity to provide her reaction to the recent discovery of the father's use of Tinder to contact a woman with a young child. The judgment had described the mother's evolving view about her relationship with the father but related how the emergence of this evidence had caused the mother to declare firmly that she would permanently separate from the father "irrespective of the court decision" ([58]). Later, the Judge recorded the mother as having told the court that "… she was not in a relationship with the father and had no intention of being so in the future including if [M] were to be placed with her paternal grandparents [Mr and Mrs G]" ([296]). The Judge recorded the mother's further evidence that: "… she did believe the father posed a risk to children and to [M]. She was asked why she believed that, and she said she based that upon the evidence of Dr Garrett" ([298]).

33. The Judge noted how the evidence about the father's recent use of Tinder had impacted upon the mother's perception of the risk posed by him, namely that this "meant the risk [the father] posed remained significant" ([297]), particularly given that his previous offences "also started online'" ([301]). The incident had shown the

mother, so the Judge recorded, that "Dr Garrett's report of [the father] was right" ([300]); the Judge added that the mother had told the court that she had been "gradually altering her position and the Tinder information was the last nail in the coffin" ([311]), and that it was the "realisation that the father has behaved in this way that has led her to finally say she is going to separate from him" ([370]).

34. The Children's Guardian was the only professional witness to follow the oral evidence of the mother; he was therefore in a unique position from among the professional witnesses to comment on the mother's 'epiphany' (as the Judge described it [482]); he commented that the mother: "…had finally 'woken up and smelt the coffee' after learning about the father's communications with another woman via social media" ([398]). The Judge recorded the Children's Guardian's assessment that following the Tinder evidence the mother was "finally" detaching from the father "albeit at the eleventh hour" ([402]).

35. There is much in the judgment which suggests that the Judge accepted the sincerity of the mother's epiphany:

> "I recognise that the mother's own position has changed, and that for the first time in the witness box she has said she will separate from him irrespective of whether [M] is placed in her care, but this is an extremely recent revelation" ([327]).

The Judge referenced more than once the mother's 'Damascene moment' "in which the mother appeared to display some clarity of thought" ([317] / [427]). However, notwithstanding the passages from the judgment which I have reproduced above (§§31-34), the Judge was not confident that the new 'clarity of thought' had given the mother "any genuine insight into the risk posed by the father" ([316]); the Judge was equally unpersuaded that this meant that she would "engage with professionals in an honest and open way" (ibid.).

36. The Judge remarked that the "disentanglement" of the parents' relationship needed to be "well established" before it could be said that M was safe in her mother's care ([331]). The Judge returned to this when identifying three requirements on the mother which she said would be needed to 'mitigate' effectively the risks to M (see [493] and §41 below: viz: "the mother must remain separated from the father").

37. On the issue of the mother's ability to protect M, it is necessary for me to pick up briefly another strand from the judgment, namely the Judge's conclusion that the mother "has not taken any protective steps to protect [M]" ([324]) in the period since M's birth, and that "whenever [the mother] has had the opportunity to demonstrate a protective instinct she has not taken it" (ibid.). The Judge purported to illustrate that finding by reference to a number of pieces of evidence, including the mother's deception of the IVF clinic, her failure to question the father and challenge him about his offending before M's birth, the mother's failure to engage with the father's Offender Manager, her failure to engage "at the outset" with the social worker, and her "attack" upon the professionals who had provided risk assessments (ibid.). Whether the examples truly illustrated the Judge's conclusion is a moot point, but they were in any event somewhat at odds with the evidence of Dr Garrett, which was recorded by the Judge as follows:

> "… the mother had engaged entirely with the process and that the measures that have been put in place to safeguard [M] have meant that she has been provided with consistent and positive care" ([186]).

Indeed, no suggestion had been made at the hearing before the Judge that M had maintained anything other than complete adherence to the 'Working Agreement' since M's birth, nor had M come to any harm while in her mother's care; of this, the Judge found that the mother had abided by the "restrictions put in place" only because she had "an end date" ([482]) (i.e. a final hearing) in sight.

38. The Judge expressly found the risk to M of remaining in her mother's care "less easy to define" than the risk posed by the father "but that does not mean it is not present…" ([482]). The Judge raised doubt about the mother's resolve to separate from the father, and was concerned that her recent declaration of intent to end the relationship "has been led by his perceived infidelity rather than from any child-safeguarding perspective". She continued ([482]):

> "I do not consider that her recent epiphany in the face of ambiguous intent to separate in the past, can be relied upon until such time as it is tested and maintained". (Emphasis by underlining added).

39. Again, following the guidance from *Re F* (see §29 above) the Judge went on to conclude that although the mother had "parented [M] to a high standard, in a loving and nurturing way" in the previous fifteen months, "[t]he mother has not demonstrated that she can protect [M] from the father on her own" ([484(2)]), without the "considerable safety net" of court proceedings, the "benefit of an exclusion order", her legal team "who will have given her robust and sound advice", and "ongoing monitoring supervision and surveillance (albeit not frequent unannounced visits)".

40. *Future risk: mitigation*: Having identified the risk to M, the Judge rightly raised the issue of whether the risk could be mitigated ([111]); she did so only effectively to dismiss it. In her *Re F* review (again see §29 above) the Judge was explicit in concluding that she did "not consider that there are any steps that could be taken at this time to mitigate the risks to [M] in her mother's care" ([484](4)) (emphasis added). This fed into her 'Concluding Remarks' as follows:

> "[492] … taking into account all that is required of me and for the reasons I have given I consider the risks to [M] of remaining in her mother's care are significant and real and they cannot be mitigated by any order".

41. This seemingly unambiguous conclusion appears to have been controverted in the following paragraph of the judgment, in which the Judge set out three requirements of the mother which she considered, if satisfied, could enable M safely to remain in her mother's care:

> "[493] …. the only way in which the risks to [M] would be mitigated if she remains in her mother's care are if the following occurs:

> (i) the mother must remain separated from the father. This must be a complete and utter separation not simply physical but an entire emotional detachment which only the mother can bring about. This must be an actual separation that withstands the test of time, and which the mother must be prepared to demonstrate in its finality.
>
> (ii) The mother must be able to demonstrate insight into the father's offending history, into his displayed grooming methods, into his dishonesty and recognise that his manipulative pervades all his relationships; personal, familial and professional.
>
> (iii) [The mother] must engage, and choose to engage, in the recommendations set out by Dr Garrett. She needs to willingly and wholeheartedly participate in therapy so the therapeutic intervention will help her process her own loss and grief and help her understand the impact of the father's offending on his victims".

42. Aligned to the issue of mitigation of risk was the mother's amenability to therapy to support her to develop insight, an understanding of sexual offending, and capacity to protect ([137]/[175]). Against the background that the mother had, it was agreed, engaged successfully in professional intervention through the 'New Start' programme in the recent past, Dr Garrett had suggested further specialised forensic psychological therapy and counselling, expressing the view that "such [psychological] intervention would require possibly 25 sessions which would take approximately 12 to 18 months" ([168]). The Judge recorded Dr Garrett's opinion that "the mother is psychologically minded because she is able to make connections between her experiences and her subsequent behavioural reactions" ([169]).

43. Importantly the Judge noted that:

> "[203] Dr Garrett confirmed that the mother might be able to undertake the recommended interventions <u>whilst [M] was in her care</u> and if the local authority funds the therapy but there would need to be ongoing assessment. Dr Garrett confirmed that many providers might be able to start quickly and that the initial session might give an indication of the mother's motivation however, she emphasised that her recommendation for the therapy being provided to the mother was unenthusiastic".

44. However, the judgment reflected the mother's accepted ambivalence about engaging with therapy (she "does not regard herself as in need of professional intervention because she believes she has overcome the issues [in relation to her past] herself" [169]); the Judge acknowledged that the mother had agreed to engage with therapeutic work recommended by the Children's Guardian ([295]) but would only undertake it "if it meant that [M] could stay with her" ([297]). Although the mother had told the Judge that she accepted that "she needed the psychological intervention to help her

"grasp the whole situation"" ([310]), the Judge recorded that the mother did not seem "invested" in the process ([323]).

45. *The mother and her care of M*: The extract from the judgment quoted in §39 above contains reference to the "high standard" of parenting which the mother had provided to M since birth, particularly as a first-time single parent ([325]). The judgment contains several similar references to the "high quality" of care afforded to M. The Judge specifically reflected the "widely held view amongst professionals" that "the parents were well prepared for [M]'s arrival, that they completed relevant parenting programmes and the mother's ability to meet [M]'s basic care needs was never in question" ([139]). The social worker had accepted (as the Judge recorded [218]) that the mother had "demonstrated a high level of emotional warmth to [M] during her assessment" (and [324]); the Judge later referred more than once to the mother's "love" for M. In her conclusions, the Judge observed:

> "[M] has been with her mother for over a year. She is the only carer she has known since birth. She is securely attached to her mother, and they have a strong bond. Her mother loves her very much, and so does her father" ([476]).

46. It is notable that the Judge also recognised the good personal qualities possessed by the mother, that the mother had engaged with all medical professionals' assessments, and that Dr Garrett had identified in the mother:

> "… a high degree of general assertive behaviour, she is clearly able to communicate her true feelings even when her opinions may be unpopular and may cause confrontation, that she has leadership potential, good self-confidence and is likely to be comfortable in giving and receiving praise" ([144]).

The Judge described the mother as "a very likeable individual who appreciates straight talking and who herself is confident to be able to put across her own points of view" ([313]).

47. However, when the judgment is read as a whole, the positive reflections which I have summarised in §45 and §46 above are overshadowed by the Judge's adverse findings about the mother's credibility, her asserted lack of insight, her tendency to minimise concerns, and her low level of co-operation with professionals (summarised in the judgment at [314]-[319] and [329]). The Judge referred many times to the mother having misled the IVF clinic, social workers, professionals, and others. Even though Dr Garrett had referred to both "positive and negative indicators in relation to the mother's honesty" ([159]), and although the Children's Guardian had advised the Judge that the mother had showed "willingness to talk about difficult subjects in what he regarded as appearing to be an honest and open way" ([379]), the Judge's criticisms of the mother for her lack of candour were largely unqualified.

48. *Mr and Mrs G*: As I have already indicated (§9 above), Mr and Mrs G had not given any evidence before the Judge, either written or oral. The principal evidence about them was located in the Connected Persons' assessment report; the author of that

report did not give evidence either. It was accepted that Mr and Mrs G knew M well, and that they had been a support to the mother. The Judge accepted that Mr and Mrs G required training to assist them to manage a new family situation in which they cared for their granddaughter; this was to take the form of "twelve more courses" (according to the Family Group Conference).

49. However, the Judge also recorded a range of concerns from different quarters about Mr and Mrs G. First, the author of the Connected Persons assessment had flagged "[Mr and Mrs G]'s view of their son's convictions" ([223]), which was a reference to the fact that Mr and Mrs G had said that they do not feel that their son poses a risk to M (see §68 below). The author's disquiet had apparently been assuaged by the reassurance offered by Mr and Mrs G that they had a "commitment to prioritise" M ([ibid.]). Secondly, it had been the mother's evidence that Mr and Mrs G had "appeared to minimise [the father's] offending behaviour because they attributed it to his learning difficulties" ([155]). This chimed, thirdly, with the evidence of Dr Garrett:

> "… the father has developed a narrative, possibly likely to have been influenced by his parents, that the reason for his sexual offending was because of immaturity, a lack of confidence and relative isolation, saying that such a narrative absolves him of any responsibility for his offending … within that context it causes others around him including his parents and [the mother] to emphasise his learning difficulties "as a framework within which they understand his sexual offending"." ([129]).

And later in the judgment, it was recorded that Dr Garrett:

> "… considered that [Mr and Mrs G] appeared to minimise [the father's] offending; they themselves regarded him as posing no risk of reoffending which she considered was important when considering the potential impact for the mother to be able to appraise the risk posed by the father in circumstances where his parents were one of the few sources of support available" ([163]). (Emphasis by underlining added).

50. The Judge later ([208]) accepted that there may be "validity in that which [Dr Garrett] says about them" (i.e., in the passages in §49 above), but that weight could not be attached to her view, as Dr Garrett "has not conducted the in-depth comprehensive assessment of their ability to protect" ([208]) which had been done by others (by which I infer the Judge was referring to the Connected Persons assessment, although the assessment does not in my judgment warrant the Judge's description).

51. In the same vein, the allocated social worker had told the court of two concerns which had emerged at the Family Group Conference, first the request by Mr and Mrs G for clarification of the meaning of 'significant harm' ([251]) (see §18 above), and secondly that "the family" (i.e., including Mr and Mrs G) "supported [the father] returning home to live in the same household as [M]"; as to the second point, the Judge added ([231]):

> "[The social worker] also identified it was concerning that the paternal grandparents [Mr and Mrs G] shared the view that the father could possibly live with [M] bearing in mind as part of their assessment their views about the father's living-related arrangements had been fully canvassed".

52. Finally it is to be noted that the Children's Guardian had also aired his reservations, as the Judge recorded, about "the possibility of the paternal grandparents as proposed carers, suggesting that it may be that they have the same limited insight into risks as the mother" ([390]) (emphasis added).

53. *Welfare 'Analysis'*: In the introductory section of her judgment, the Judge had correctly recorded that her decision would need to be informed by "consideration of all factors set out within the welfare checklist" ([37]); this self-direction was repeated at [447]. The Judge provided this 'welfare analysis' in one paragraph ([485]) which I set out in full:

> "[485] Pursuant to section 1(3) I must have regard in particular to –
>
> (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding); I imagine that if she could articulate her feelings, [M] would tell me that she would like to stay with her mum, but also that she wants to feel safe and protected from harm.
>
> (b) his physical, emotional and educational needs; [M] has all the usual needs of a 14 month old child, including a need for love, security and stability.
>
> (c) the likely effect on him of any change in his circumstances; [M] will be affected by a move to her grandparents' care. This is likely to be confusing for her, and she will not understand the loss of her mother as her primary carer. However, [M] will be moving into a safer environment where the risks of harm can be managed
>
> (d) his age, sex, background and any characteristics of his which the court considers relevant; I have taken this into account
>
> (e) any harm which he has suffered or is at risk of suffering; I have set out my full risk analysis above
>
> (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; the mother is able to meet [M's] basic needs, however she is not able to meet her needs for long term protective parenting for the reasons I have set out.

> (g) the range of powers available to the court under this Act in the proceedings in question. I have considered the full range of powers available to me and do not consider there is any way in which [M] can be safely cared for by her mother. I have considered the competing proposals of the guardian and the local authority and I do not consider that either a supervision order or a care order would safely protect [M] at home".

54. Corresponding with the statutory obligation, before making a care order, to consider contact between the child and "any person" (section 34(11) CA 1989) the Judge outlined the Local Authority's proposal for the mother's contact with M, following M's move ([247], [250], [263], [419]); this was to take place at a local contact centre, for 2½ hours each week, where it could be 'supported'; contact in the community could be contemplated where it could be "supervised" by Mr and Mrs G once they had been 'trained'.

55. *Comparative evaluation:* In the section of the judgment dedicated to the law, the Judge addressed the issue of competing claims for care of a child by a parent and non-parent relative. Of this, she made the following comments:

> "[462](iv) There is a presumption that children's best interests are served by being brought up within their family of origin whenever possible. Fortunately, for [M], placement within her family are the only options being considered. There is no presumption in favour of her being brought up by a parent over any other relative, however, I recognise that a decision which involves the long-term separation of [M] from her mother, her primary carer with whom she has always lived, requires a high degree of justification".
>
> "[463] It is accepted by all parties that there is no explicit statutory provision which imposes a presumption in favour of children being placed in parental care".
>
> "[466] I accept that whilst there is no presumption in favour of [M] being placed with her parents, the lack of such an explicit statutory presumption is not an open invitation for her removal from parental care to be achieved without proper scrutiny of the realistic options. I must however, compare the advantages and disadvantages of each option within the context of welfare, necessity and proportionality"

56. The Judge referenced (at [463]) the case of *Re D (Child: No.3)* [2016] EWFC 1 ('*Re D (No.3)*'), and alluded (although not explicitly) to Sir James Munby P's comments at [152] of the judgment, namely, "the *positive* obligation on the State under Article 8 imposes a broad obligation on the local authority in a case such as this to provide such support as will enable the child to remain with his parents" (emphasis in the original).

57. The Judge continued by considering the impact on M of removal from the care of her mother. The social worker had "readily accepted" before the Judge that a move "would disrupt her stability", and that M would be "likely to suffer some emotional harm" ([245]); surprisingly to my mind, the social worker was recorded to have dismissed the suggestion that this would "necessarily be an immediate traumatic event for [M]" (ibid.). Later the Judge recorded that the social worker had accepted that "the plan she is recommending [i.e., removal from the mother] will result in emotional harm for [M]" ([266]). (Emphasis by underlining added).

58. The Judge found that M would be "bewildered and upset" ([477]) by removal from her mother; the Judge further found that "she will miss her mother and … would be very unsettled and unhappy not understanding the loss of the most important person in her life" (ibid.). The Judge spoke of the separation of mother and daughter being "unsettling initially [for M]… it will have an impact on her" and added (though it is unclear from where in the evidence this view is located):

> "I do not underestimate that there is a likelihood of rupture in [M]'s relationship with her mother, however I do not consider that this will be deeply traumatic such that it will have a detrimental long lasting impact upon her sense of self or her sense of security" ([477]). (Emphasis by underlining added).

59. The Judge went on to speak of the "risk of grief and loss" for M ([478]), but sought to balance this detriment to M with her view that as M is "securely attached" to her mother this makes it "more likely that she will be able to transfer her attachments" (ibid.).

60. In reaching her conclusions, the Judge translated those features of the evidence to which I have just alluded into a finding that M "would suffer loss and confusion" at being removed from her mother's care ([484(5)]), but that this is likely to be "short lived" and that M "will soon settle into a routine with sensitive, attuned carers who will be able to promote her identity". In the 'Summary of Findings' appended to the judgment, the Judge's view was recorded thus:

> "Removal from the mother's care would disrupt her stability and may result in some emotional harm although this will not necessarily be an immediate traumatic event for [M]". (Emphasis by underlining added).

Grounds of Appeal: the parties' positions on appeal

61. The mother initially raised altogether nine grounds of appeal; permission to appeal was granted on all but one (see §16 above). In their Skeleton Argument in support of the appeal, Mr Nuvoloni KC and Ms Taylor on behalf of the mother grouped together several grounds, and these were further trimmed in oral submissions. In reviewing the mother's case for present purposes, I have therefore treated the grounds as falling under four main heads:

    i) The Judge's risk assessment was flawed in the following ways:

a) She failed to consider adequately the mother's proven capacity to protect M, which she had successfully achieved for more than one year at the time of the hearing;

b) She failed to consider the efficacy of the steps which could be taken by the mother and/or the monitoring/support which could be offered by the Local Authority to reduce or mitigate the risk of harm from the father to M going forward;

c) She failed to consider that the risk of harm (on the expert's evidence) would not be likely to eventuate for a number of years, during which time the mother could receive therapy, and the parents' ability to separate could be tested;

d) She failed to consider whether there was a 'likelihood' of sexual harm to M;

ii) The Judge failed to undertake a true comparative (side-by-side) evaluation of the placement options, before endorsing the Local Authority's plan to remove M from her mother and place her with Mr and Mrs G. On the facts of this case, the Judge was wrong not to receive evidence directly from Mr and Mrs G;

iii) The Judge did not sufficiently consider the proportionality of the care plan when compared to the assessed risk;

iv) In reaching her conclusion as to future placement, the Judge attached disproportionate weight to the views of Dr Garrett, and in so doing failed to consider adequately or at all important wider welfare factors relevant to M.

62. Mr Goodwin KC and Mr Cooper-Hall for the Children's Guardian supported the appeal on behalf of M, expressly adopting all the points listed above. In his oral submissions Mr Goodwin laid particular emphasis on the points which I have recorded in §61(i)(b), §61(i)(d), and §61(iii) above.

63. In defending the Judge's decision, Ms Meyer KC and Mr Seal for the Local Authority reminded us of the unique advantage which the Judge enjoyed in seeing and hearing the witnesses, that the findings and conclusions which she reached were open to her on the evidence which she heard, and that it would be improper for this court to do other than to assume that she had been aware of the competing risks of the two alternative placements when reaching her conclusion. Ms Meyer described the judgment as "conscientious, thorough, and detailed", generally relying on the well-recognised points made in *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5, *Volpi & Anor v Volpi* [2022] EWCA Civ 464, and *Piglowska v Piglowski* [1999] 2 FLR 763 at 784. The fact that the judgment may in places have been better expressed is not a reason for allowing the appeal.

Mr and Mrs G

64. Before discussing the arguments and outlining my conclusions, it is appropriate that I should set the scene a little more in relation to Mr and Mrs G.

65. It will be clear from what I have said so far (§§3, 18-20, 48-52) that Mr and Mrs G occupied a central position in the future plans for M, and in the issues which were before the court at the final hearing. However, they were not respondents to the care application nor had they been invited to intervene; they were not witnesses, nor did they participate in the hearing. They were not present or represented on the appeal.

66. We were told that on the first morning of the final hearing, junior counsel for the Children's Guardian had suggested to the Judge that she may wish to hear oral evidence from Mr and Mrs G. This Judge did not take up this suggestion, and it was not renewed.

67. The voices and views of Mr and Mrs G were before the court albeit filtered through assessment reports and reported conversations. The principal evidence about and/or from Mr and Mrs G was limited to:

    i) The 'Connected Persons' assessment report, which had been undertaken by a social worker (completed in February 2024);

    ii) Social work evidence (various) and the report of the Children's Guardian;

    iii) The note of their contribution to the Family Group Conference (24 July 2024) and the note of a follow-up social work visit;

    iv) Their e-mail to the Children's Guardian (4 November 2024).

68. We have seen the Connected Persons' assessment (9 February 2024). In it, the social worker author reported that "the couple have been open and honest in respect to their views in regard to the safety of [M] as they do not feel that [the father] poses a risk to her …" and later "… if the Local Authority or other professionals are able to provide evidence that [the father] does pose a risk to [M] then they will accept the information given to them". In a later passage it was said: "[Mr and Mrs G] were both able to reflect upon how it may be difficult to not allow their son into their home initially however they feel able to do so in order to ensure the wellbeing of their grand daughter". (Emphasis in each case by underlining added). There is nothing in the report to suggest that the author challenged Mr and Mrs G about their son's upbringing and its relevance, if any, to his serious offending in early adulthood. As the assessing social worker had not given evidence, none of this was explored at the hearing.

69. Materially, after the draft of the judgment had been circulated to the parties on 22 October 2024, it appears that the father shared a copy with his parents, with whom he was (and is) still living. On 4 November 2024, Mr and Mrs G sent an e-mail to the Children's Guardian in these specific terms:

> "I understand that the next court date is the 19th November [for the hand down of the judgment] and where they're still planning on removing [M] from [the mother] and for [M] to come and live with us.
>
> Although we will do anything for our grandchildren we don't think this is the right decision after this length of

> time being with her mother. [The mother] is an excellent mother and has had no problems and [M] is not in any danger with [the mother]. She is a happy healthy little girl who has an obvious strong bond with her mother.
>
> [M] has never been to our home as [the father] is staying with us.
>
> And we believe this is an unnecessary upheaval for [M] for no reason that will cause unnecessary trauma for the rest of her life.
>
> We are amazed that the local authority is even contemplating this after [M] has been with her mother for 15 months with no problems.
>
> These are just our thoughts on what has been unbelievably long process which has caused so much stress for the whole family.
>
> As [M]'s guardian what do you think?" (Emphasis by underlining added).

70. On receipt of this message, the Children's Guardian issued an application for court directions, and the Judge appropriately made an order permitting the Children's Guardian to file this evidence; she directed the Local Authority to meet with Mr and Mrs G and file a statement in response. The Local Authority complied with this direction. We have been shown that statement, in which it was recorded that Mr and Mrs G now more clearly understood the Local Authority's concerns about the mother's ability to protect M from the risks posed by the father, but nonetheless concludes:

> "[Mr G] and [Mrs G] confirmed that they will do everything that is asked of them by the Local Authority but still believe it would not be the right decision for [M] to be removed from [the mother]'s care after being with [the mother] for 15 months". (Emphasis by underlining added).

71. None of these views found their way into the final judgment.

Discussion

72. The evidence in this case convincingly demonstrated that the father poses a significant risk to children and young people. The Judge's finding in this regard ([475(i)]) is unchallengeable.

73. It is also clear from the Judge's findings that neither the mother nor the father had been open, honest, and/or co-operative with professionals (social workers, the father's Offender Manager) at all times; the Judge took this into account in considering the parents' ability to co-operate with professionals responsible for managing risk going forward.

74. Ms Meyer is right, of course, to point to the fact that the Judge has had the considerable advantage of seeing the parents and the expert and professional witnesses, and has been able to make an assessment of them. But the flaws in the judgment in this case do not lie in the Judge's assessment of the witnesses, but in her analysis and reasoning, in at least three respects:

    i) The Judge's assessment of risk failed to take proper account of the steps which had been taken in the short-term, and could be taken in the longer-term, to mitigate the identified risk of harm posed by the father, while allowing M to remain with her mother;

    ii) The Judge did not undertake a proper comparative evaluation of the two placement options; this fundamentally undermined the proportionality of the decision to remove M from her mother's care;

    iii) The Judge allowed her assessment of risk so to dominate her welfare evaluation that in reaching her ultimate conclusion she gave insufficient attention to the range of other welfare factors, and to the high degree of justification required to separate M permanently from her mother.

    There is inevitably some overlap between these points, but I deal with them discretely in the paragraphs which follow.

    Risk and Mitigation

75. As I have pointed out above (§16), at the IRH the Judge correctly identified that the issues for her to try were "proportionality, and risk assessment, management and mitigation. This case involves a balancing of the risks to the child". In this regard she rightly referenced the judicial guidance given in *Re F* (see §29 above), since repeated in *Re K (Children: Placement Orders)* [2020] EWCA Civ 1503 and more recently in *Re L-G (Children: Risk Assessment)* [2025] EWCA Civ 60 at [18/19] ('*Re L-G*'), and (even since the hearing of this appeal) *Re T (Children: Risk Assessment)* [2025] EWCA Civ 93 ('*Re T*'). Given its relevance to the instant case, I reproduce the questions which Peter Jackson LJ suggests need to be considered in a case of this kind (*Re T* at [33]):

    i) What type of harm has arisen and might arise?

    ii) How likely is it to arise?

    iii) What would be the consequences for the child if it did?

    iv) To what extent might the risks be reduced or managed?

    v) What other welfare considerations have to be taken into account?

    vi) In consequence, which of the realistic plans best promotes the child's welfare?

    vii) If the preferred plan involves interference with the Article 8 rights of the child or of others, is that necessary and proportionate?

76. The Judge's position on mitigation (*Re T,* question (iv) above) was that there was nothing that could be done in the future to support the mother and/or to mitigate effectively (or at all) the risk posed by father. She had expressly found that there were *no steps* which could be taken to lower the risk of harm to M ([484(4)]) and that the risk posed by the father "cannot be mitigated by any order" ([492]) (see §40 above). This, in my judgment, overlooked the following important points, particularly when taken cumulatively, which had plainly emerged in the evidence:

    i) That the protective steps which the Local Authority had put in place since M's birth had been effective;

    ii) That the mother had, in the Judge's finding, formed a clearer view of the father's propensity to abuse following the evidence about his use of Tinder, and a firmer intent to separate;

    iii) That a protective future framework had been devised by the Local Authority and presented to the Judge, on her specific direction, in the form of the 'shadow care plan' which, at the very least, warranted close attention;

    iv) That the future risk was not likely to eventuate for a number of years, within which time M could continue to live with her mother, the parents' separation could be tested, and the mother could access therapy;

    v) The mother had indicated her willingness to work with the Local Authority under a care order.

    Having ruled out any possible supports or mitigations, the Judge, confusingly, went on to suggest three mitigating circumstances under which M could in fact safely remain in the care of the mother (see [493]; §41 above) but did not afford time for them to be tested. I take each of these points in turn.

77. (i). It was clear that M had been protected from the risk posed by her father for the first 15 months of her life. There is no suggestion in the judgment that the mother had not adhered to the 'Working Agreement' with the Local Authority (see §13 above) to the letter. So had the father. If the parents had been tempted to reunite in the first year of M's life, the 'Working Agreement' and the section 38A CA 1989 injunction had been effective to avert this. It is revealing that in the first year of M's life, the Local Authority had chosen a relatively low level of visiting at every 4-6 weeks. It was accepted by counsel before us that there was indeed a brief period in which there was no allocated social worker at all (although the current social worker was reported by the Judge to be unaware of this ([251])).

78. (ii). Crucial to the Judge's assessment of risk was the status of the parents' relationship and the mother's ability to protect. The parenting assessment of the mother and Dr Garrett's assessment of the mother had both pre-dated the evidence about the father's use of Tinder, and the mother's so-called 'epiphany'. The judgment is clear that this evidence had hardened the mother's resolve to separate from the father, and the Judge appeared to accept at face value her sincerity. The Children's Guardian had expressed the legitimate view, albeit rejected by the Judge, that it mattered not greatly why the mother had decided permanently to separate if that was indeed her genuine position. In reaching her conclusion, the Judge, perhaps

understandably, placed heavy reliance on the earlier assessments and her analysis did not in the end take account, either sufficiently or at all, of that 'eleventh hour' change.

79. Notwithstanding the ostensibly intuitive reflections of the mother recorded in the judgment (see §31) the Judge was concerned that the mother's 'epiphany' did not reflect greater insight into the father's offending; however, as Peter Jackson LJ observed in *Re L-G*, what was important was for a judge to consider "the likely real-world consequences of her lack of insight" ([21]). If the relationship between this mother and this father was well and truly over, and the father was good to his intention not to seek to return to the family home, the mother's lack of insight into the father's offending became less of a 'real world' issue.

80. (iii). The Judge's conclusion about the lack of relevant support and/or mitigation was not supported by any, or any detailed, judicial analysis. It could reasonably be expected that the Judge would, at the very least, have considered the contents of the shadow care plan and child protection plan which she had expressly commissioned after the fifth day of the final hearing in the event that M was to remain with the mother. These documents were before the court. The shadow care plan only attracts passing mention in the judgment. Under this plan, the Local Authority had contemplated that:

i) M would have an allocated social worker;

ii) There would be an Independent Reviewing Officer;

iii) 6 monthly Children Looked After ('CLA') reviews would be held;

iv) Care planning meetings would take place between the CLA reviews;

v) There would be fortnightly social work visits (announced and unannounced) for three months, then reduced to monthly;

vi) A contract of expectations would be drawn up and agreed;

vii) The Local Authority would "signpost" the mother to Dr. Garrett's recommendations and a funding referral.

81. The Judge was obliged, in my view, to explain why this level of support and monitoring would not mitigate the risk to M. There is no suggestion that the mother had not co-operated with social work visits, announced and unannounced in the past. She had co-operated with all assessments. As the Judge herself had alluded to, there is a well-recognised "*positive* obligation on the State" (qua local authority) under Article 8 to provide such support as will enable M to remain with her mother (Sir James Munby P in *Re D (No.3)* referenced at [463] in the judgment: see §56 above). In failing to recognise the importance of these steps, which would have yielded a less interventionist outcome than removal of M from her mother, there was a real risk that the outcome contended for by the Local Authority would not pass the test of proportionality.

82. In failing to address what steps had been taken to mitigate the risk in the past, and could be available to mitigate the risk in the future, the Judge had only partially completed the exercise required. As Peter Jackson LJ observed in *Re T*, it is necessary

for a judge to undertake a "structured analysis in a case of this kind to ensure that undue weight is not given to one factor, however notable, and that other important factors are not overlooked" ([34]). He added (also [34]):

> "It must be remembered that risk assessment is about the realistic assessment of risk, not about the elimination of all risks."

83. (iv). On the expert evidence, as I have outlined above (§26), the risk to M in this case was not likely to arise for some time, probably measured in years. The expert's view on indicators of risk to very young victims (mental illness, alcohol abuse) were, as the Judge rightly reflected, "absent" from this case; materially, the Judge recorded Dr. Garrett's evidence to the effect that particular concern would arise when M reached the age of the father's victims (minimum age, 11), or possibly earlier (when M is five years old) (again see §26 above).

84. Within that period, ample opportunity would be presented to the Local Authority to gauge whether the relationship between the parents had indeed ended. Furthermore, the mother could access therapy to assist her to gain greater insights. Although the Judge rightly recognised the mother's reluctance to engage with psychological interventions, the evidence was that a limited number of initial sessions could be offered quickly to "give an indication of the mother's motivation" ([203]); this initial phase of treatment, at the Local Authority expense, was specifically contemplated by a recital to the final order approved by the Judge. Significantly for present purposes, Dr Garrett had accepted that the therapy could be delivered to the mother while M remained in the mother's care (see [203] at §43 above).

85. (v). The mother had indicated her willingness to adhere to further restrictions, and was agreeable to sharing parental responsibility with the Local Authority under a care order. We were told by Mr Nuvoloni, without contradiction, that the social worker's tabular analysis of the realistic placement options did not even refer to M remaining at home with her mother under a care order. In this regard, the Judge did not, in my judgment, engage appropriately with the decision in *Re JW (Child at Home under a Care Order)* [2023] EWCA Civ 944. There was no specific consideration in the judgment to whether the 'exceptionality' test discussed by Sir Andrew McFarlane P in that case could apply in the instant case, and/or whether this was one of those rare cases where it would be appropriate for the Local Authority to share parental responsibility with the mother for M, while M remained at home. Instead, the Judge set out reasons why she felt she could distinguish the decision on its facts ([486]). In *Re JW* Sir Andrew McFarlane P had quoted extensively from the Public Law Working Group's report (March 2021); at [31] of his judgment, he cited this extract from the report:

> "A care order represents a serious intervention by the state in the life of the child and in the lives of the parents in terms of their respective ECHR, article 8 rights. This can only be justified if it is necessary and proportionate to the risks of harm of the child."

That proposition requires no elaboration, but in my judgment removal of M from her mother's care on these facts was bound to be a yet more serious intervention by the

state.

86. By way of post script to this point I ought to observe that it was the Local Authority's evidence that a supervision order "underpinned by a child protection plan" would be preferable to a care order if M were to remain at home with her mother as it would offer M greater protection ([255]/[258]). This view, although surprising, was found by the Judge to be the result of "considered and reflective reasoning" ([265]) and ultimately "reliable and compelling" ([265]).

87. Finally, and by reference to the final paragraph on §76, the Judge's conclusions on the absence of support and/or mitigation were to a significant degree undermined in my judgment by the fact that she went on to lay out at [493] three requirements on the mother under which M could in fact safely remain in the mother's care. At the time of the judgment, the Judge did not have conclusive adverse answers to those questions, which would only become apparent at some point following the end of the therapeutic intervention. In approving the plan to move M forthwith to live with her paternal grandparents, the Judge wrongly deprived the mother of the opportunity to meet those conditions; I found positive signs in the judgment that she would be able to meet all three.

88. The upshot of this partial, somewhat lop-sided, assessment of risk, reinforced by the Judge's failure to identify a time-frame within which she considered the harm was most likely to arise, was that the Judge could not properly conclude that there was a 'likelihood' (in the sense of a 'real possibility') of harm to M: *Re S-B* [2009] UKSC 17 at [8]. There was of course no evidence, that the mother, parenting alone, posed a risk of harm to M.

89. There is one final contextual point to make. The Judge placed great weight on the mother's lies and dishonesty as illustrative of her lack of protective capability, but in my judgment she failed to have proper regard to the observations of Peter Jackson LJ in *Re F* at [25] and Sir James Munby P in *Re A (Application for Care and Placement Orders: Local Authority Failings)* [2015] EWFC 11, [2016] 1 FLR 1, at para [12]:

> "Lies, however deplorable, are significant only to the extent that they affect the welfare of the child, and in particular to the extent that they undermine systems of protection designed to keep the child safe".

90. In this case, the lies of the parents had not undermined the protective framework around M thus far, and there was little or no reason to suspect that they would going forward.

91. Taking all of these matters into account, I find that the Appellant has made good the points outlined at §61(i) above.

Comparative evaluation

92. Where two alternative prospective family placement options for the child are laid before the court, as here, it is appropriate, if not indeed necessary, for the judge to undertake a side-by-side analysis of the pros and cons of each in order to reach a reasoned conclusion as to which would best meet the needs of the child (see *Re H-W*

[2022] UKSC 17; [2022] 1 WLR 3243, at [51] and *Re N* [2024] EWCA Civ 938). The Judge correctly directed herself that there is no presumption in favour of the natural parent at the welfare stage, where section 1 CA 1989 is being applied: "once the section 31 threshold is crossed the evaluation of a child's welfare in public law proceedings is determined on the basis of proportionality rather than by the application of presumptions" (McFarlane LJ in *Re H (A Child) (Appeal)* [2015] EWCA Civ 1284, [2016] 2 FLR 1173 at [94]).

93. Thus it is necessary to examine whether the Judge performed the comparative evaluation; I address this issue under three sub-headings: (a) a procedural mis-step, (b) limited comparative analysis of relevant issues, and, as a result, (c) a flawed proportionality assessment.

94. (i) *Procedural mis-step*: There were several points in the progress of this application, especially close to (and even at) the final hearing, when it would have been appropriate for the Judge (or her judicial predecessor with case management responsibility) to consider calling for direct evidence, written or oral, from Mr and Mrs G. I have in mind: (a) at a hearing following the delivery of the Connected Persons Assessment, or at the IRH, given that the author of the report (see §68 above) had raised some question marks over the insight of Mr and Mrs G about their son's offending; (b) when junior counsel for the Children's Guardian suggested this on the first morning of the hearing, in light of the evidence which had recently emerged from the Family Group Conference, and particularly Mr and Mrs G's query - "they want to know what [the father] is at significant risk of", and their uncertainty about what is meant by 'significant harm' (see §18 above); (c) when Dr Garrett raised concerns in her oral evidence on the second day of the hearing about the insight of Mr and Mrs G, which the Judge later acknowledged may have 'validity' (see §50 above); and (d) in light of their e-mail to the Children's Guardian 4 November 2024, advising him that they did not believe that the Judge was making the right decision (see §69 above).

95. As an appellate court often observes (and indeed as Ms Meyer fairly submitted – see §63 above), it is one of the unique advantages of the trial judge that they have seen and heard the witnesses. Direct evidence, oral and written, from prospective long-term family carers of a subject child in a case like this will often provide valuable insights into their suitability and commitment, assisting judges to make truly informed decisions which most effectively prioritise the child's welfare; Lord Wilson captured the point with characteristic clarity in *Re B* [2013] UKSC 33; [2013] 1 WLR 1911, as follows: "[i]n a child case the judge develops a face-to-face, bench-to-witness-box, acquaintanceship with each of the candidates for the care of the child". This is not of course a legal requirement; the benefit to the judge in hearing from prospective family or other long-term carers will, it seems to me, depend on the type of case, its individual facts, "the degree of detail necessary to analyse and weigh [the] … internal positives and negatives" of each option (*re G (A Child) (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965; [2013] 3 FCR 293), the nature of the proposed placement, and the issues arising.

96. The decision as to whether prospective family carers ought to give direct evidence in a public law or private law family case is first and foremost a decision to which the judge will apply rule 1.1(1) of the Family Procedure Rules 2010 ('FPR'), enforcing their obligation to deal with cases "justly, having regard to any welfare issues involved", coupled with the associated duty to identify and decide "promptly which

issues need full investigation" (rule 1.4(2)(c)(i) FPR 2010). In this case, as in all others of its kind, the Judge also had available to her the wide powers of rule 22 FPR 2010 by which she could "control the evidence by giving directions as to (a) the issues on which it requires evidence; (b) the nature of the evidence which it requires to decide those issues; and (c) the way in which the evidence is to be placed before the court".

97. Where there are disputes or question marks over a proposed family placement, a judge is more likely to wish to hear from those prospective carers; where there are no challenges to the merits of a placement, less so. Where, as here, a side-by-side comparative analysis appears to be required between two sets of carers (parent and other family), this ought to be set up early during the case management phase, and the prospective family carers should be encouraged to file evidence. If, as here, the prospective family carers are supported in their claim by a local authority, then it would be incumbent on that authority to facilitate this.

98. At this final hearing, involving a straight choice between two family placements, there was a procedural imbalance; the Judge only saw and heard from the mother, and was surely at a disadvantage in making any true comparison with Mr and Mrs G. The mother was examined (it appears from the judgment) critically and forensically through the trial process; Mr and Mrs G were not. If there was to be a fair and balanced comparative evaluation, the question marks about Mr and Mrs G's insight and/or ability to keep their son at arm's length (see §§49, 50, 68 above) ought to have been explored, and they were not. It seems to me that the mother and M were entitled to the procedural protection of being able to test the Local Authority's case that M would be safer with Mr and Mrs G than with the mother, and the denial of this chance, as Ms Meyer acknowledged in answer to a question from Lord Justice Dingemans at the hearing, does "not look fair".

99. This situation has an echo in *Re H (Analysis of Realistic Options and SGO)* [2015] EWCA Civ 406; [2016] 1 FLR 286, in which the judge at first instance had been presented with two competing placements options for a child: (a) continued placement with the father, or (b) placement of the child with A, a friend of the mother who was putting herself forward as a special guardian; the judge at first instance had ordered the placement of the child with A. In allowing the appeal, McCombe LJ said (at [41]):

> "The idea that an order should be made appointing A as special guardian, without a thorough examination of the viability of this, and apparently with little opportunity being given to the father to challenge the proposal, struck me as highly unsatisfactory".

100. (ii) *Substantive issues*: A side-by-side evaluation of a number of issues, pros and cons, would, I believe, have been revealing. For example, did the respective candidates for long-term care of M show markedly different levels of insight into the father's offending? The mother's deficits in this regard were central to the Judge's conclusion that she could not be a protective parent (see §§31-35), even though the evidence had been far from all one-way. Regardless, I find no indication that the Judge cross-checked the same issue, certainly to the same level of scrutiny, as it applied to Mr and Mrs G. Had she done so, the evidence suggested that Mr and Mrs G were little if any

more insightful than the mother; to a number of professionals over a period of time Mr and Mrs G had minimised, and/or sought to explain away, the father's offending. Indeed, the Children's Guardian had expressly opined that they have the "same limited insight into risks as the mother" ([390], §52 above). His view was shared by the author of the Connected Persons assessment report, §49 above, the social worker (§51 above), the mother (§49 above) and Dr Garrett (§49-50 above) – noting that the Judge did not doubt the "validity" of Dr Garrett's views ([208])). Only days before the start of the final hearing, at the Family Group Conference, Mr and Mrs G were observed to be supporting the rehabilitation of the father back to the family home.

101. Aligned to this, it may be thought that the court would have wanted to know Mr and Mrs G's views upon the evidence that the father had embarked on his quest to form a new relationship on 'Tinder' while he was living under their roof, a development which appeared to have emphatically changed the mother's view of him.

102. Secondly, and equally important to the Judge's decision was her scepticism that the mother and father would truly separate, notwithstanding that (a) they had maintained an effective separation over the fifteen months prior to the hearing, and (b) they had mutually declared at the hearing (particularly after the 'epiphany' in the mother's case) that they harboured no intention of reuniting. What then of the emotional separation of Mr and Mrs G and their son? This is not addressed in the judgment, yet notably at the time of the hearing, the father was still living with Mr and Mrs G and they had revealed in the Connected Persons assessment that they may find it "difficult not to allow their son into their home initially" (see §68 above). Mr and Mrs G had expressed more recent worries to the social worker (in her follow-up meeting with them after their e-mail to the Children's Guardian) about the father being rendered 'homeless' if/when M moved into live with them.

103. Thirdly, a direct comparative analysis would have highlighted the qualitatively different relationship between M and her mother, as against M with her grandparents. M was, in the Judge's finding, securely attached to, and strongly bonded with, her mother with whom she had lived all of her life. By contrast, while the paternal grandparents were familiar figures, M had not at the time of the hearing (and we were told has still not) visited their home.

104. This was indeed the very point which Mr and Mrs G themselves made to the Children's Guardian some two weeks before the hand-down of the judgment (see §69 above), in which they expressly endorsed the mother as "an excellent mother" and confirmed that M "is a happy healthy little girl who has an obvious strong bond with her mother". Mr and Mrs G viewed M's proposed move to them as "an unnecessary upheaval" which "will cause unnecessary trauma for the rest of her life". In this respect, the Judge was presented with unanimity of view about the optimal outcome for M from all those who were being considered as potential long-term carers, yet the Judge appears to have taken no account of these views, and her judgment in relation to this small but important episode in the evolution of the case is silent.

105. Finally, a side-by-side analysis may have highlighted the discrepant reasoning of the Judge in her conclusion that it was necessary for the Local Authority to share parental responsibility for M under a care order on the basis that M move to live with Mr and Mrs G ([483]), while rejecting the proposal of the mother and Children's Guardian for

the same legal order if M were at home with her mother ([486]-[487]). This inconsistency required detailed explanation, but the explanation was missing.

106. (iii) *Proportionality*: Given the Judge's lack of true comparative analysis, and specifically her failure to consider adequately the measures which would be available to mitigate the risk to M if she remained with her mother (see more generally above), her conclusion that Mr and Mrs G would "provide [M] with a much higher level of security and safety than one with her mother" [483] lacked evidential support, and was in my judgment flawed. The failure of comparative evaluation meant that the proportionality assessment was also lacking. A care order with a plan to remove a child from her mother must be necessary to meet her needs having regard to the advantages and disadvantages of each available option (see *Re H-W* at [4], and *Re T* [33](vii) at §75 above). Thus, the removal of M from her mother, which involves interference with her Article 8 rights and those of her mother, could not be allowed to be disproportionate in its adverse effect.

107. The Judge was absolutely right to direct herself that a high degree of justification is required before removal of a child from a parent is ordered, to reflect the special contribution which natural parents can make to the emotional needs of their child (see *Re G* [2006] UKHL 43; [2006] 1 WLR 2305 at [30]). In her final analysis, the Judge (and notwithstanding the short section of her judgment on 'proportionality' [484]) failed explicitly to confirm that she had been persuaded of the necessity of this outcome at that level.

108. In this regard, I find that the Appellant has made good the points raised at §61(ii)/(iii) above.

Risk: Welfare evaluation

109. Risk is but one of the welfare considerations which have to be taken into account in the overall analysis (see *Re T* [33](v) at §75 above); but for the risk of sexual harm from the father, every welfare factor strongly favoured confirmation of the existing arrangements under which M lived with her mother. On the issue of risk, the Judge placed significant store by the evidence of Dr Garrett about whom the Judge was "extremely impressed" ([204]), so much so, it appears, that the Judge's review of Dr Garrett's evidence occupied over one hundred and ten paragraphs of her judgment. Although Dr Garrett had rightly made clear in her evidence "that her angle is a psychological angle" ([186]), the Judge allowed Dr Garrett's evidence to dominate the picture, describing her later as providing a "holistic" analysis ([433]).

110. Although the Judge warned herself not to put Dr Garrett's evidence "on a pedestal" ([113]), the judgment regrettably indicates that she did just that. The pre-eminence which she afforded to the evidence of Dr Garrett became more problematic in this decision-making given that it appeared that Dr Garrett strayed outside of her field of expertise on at least two key issues on which the Judge relied:

    i) The Judge expressed herself to be in "no doubt that Dr Garrett readily recognises the impact on [M] of separation from her birth mother" [207], but Dr Garrett had not assessed M, her welfare, or her relationship with the mother;

ii) Dr Garrett had expressed the opinion that "if there was any leeway" or "if any of that strictness [of the court supervision] would be removed" the mother would "deviate" from the order in the future ([201]). I can locate nothing in the evidence or in Dr Garrett's expertise (I have her CV) which supports her competence to offer an opinion on a party's willingness to comply with court orders.

111. But risk was plainly not the only welfare issue. Much has been said over the years about the need for judges to avoid being formulaic in applying the 'checklist' contained in section 1(3) CA 1989, but it does of course offer the crucial matrix within which Judges are required to consider welfare, ensuring in the final analysis of a case that all welfare elements are taken into account. The Judge thus needed to consider the range of other welfare factors. In a judgment of this length it is surprising that the Judge gave such cursory attention to the welfare checklist (see §53 above), and in that regard she failed to deal adequately, in my judgment, with at least three factors:

i) The likely effect on M of a permanent move from the care of her mother (section 1(3)(c) CA 1989) was significantly underplayed by the Judge. That M would be "affected" and find it "confusing" to move from the only carer she had known was markedly to underestimate the impact of change on M. The Judge's conclusion that the move "<u>may</u> result in some emotional harm" misrepresented the social worker's evidence which was that a move "<u>will</u> result" in emotional harm ([485(c)]; the more emphatic prediction of emotional harm, rooted in the social work evidence, was unsurprising given the Judge's associated finding that M is securely attached to her mother.

ii) The Judge reported that she had taken M's "age, sex, background" (section 1(3)(d)) and relevant characteristics "into account", but did not explain how she had done so. The fact that M has spent all her life with her mother was surely an essential component of M's "background", as was the fact that she is "securely attached" to her mother, and said to be thriving in her mother's care. The Judge's total silence on these points in this welfare review strongly suggests her failure to give them any or any proper weight;

iii) The capability of the parents and of "any other person in relation to whom the court considers the question to be relevant, is of meeting his needs" (section 1(3)(f) CA 1989) called explicitly in this case for judicial discussion about the mother's capability in the widest sense as a single parent, her self-confidence (§46 above), and her proficiency in raising M. More specifically, it called for a discussion of the comparative 'capability' of Mr and Mrs G to protect M and meet her global needs. The Judge was not only inappropriately dismissive of the mother's capabilities in this regard, but she failed in this context to consider the position of the grandparents. This was the statutory prompt for the 'side-by-side' evaluation, which for the reasons which I have outlined in the section above, the Judge failed to deliver.

112. Finally, I considered it revealing that the Judge rationalised the placement of M with her grandparents on the basis that "her important relationship with her mother can be maintained by high levels of contact" ([479]), but went on to approve a care plan which contemplated that M would be seeing her mother for only 2½ hours of

'supported contact' weekly in a contact centre, supplemented by video calls, albeit that this arrangement would be subject to review (which expressly could lead to it "increasing/decreasing"). This level of contact does not, to my mind, correspond to the 'high levels' of contact which the Judge had regarded as integral to the success of the placement with Mr and Mrs G.

113. For the reasons which I have set out in this section, I find that the Appellant has made good the points raised at 61(iv) above.

Conclusion

114. No one can doubt the difficulty of this case, or the gravity or complexity of the issue with which the Judge had to grapple. Her assessment was undoubtedly made all the more problematic by the late-emerging evidence (from the Family Group Conference, and the father's use of Tinder) and the changing positions of the lay and professional parties. However conscientious the endeavour in producing a judgment of this length to explain her judicial reasoning, I regret that the Judge failed sufficiently to filter the evidence adequately, she allowed the opinions of Dr Garrett to dominate her thinking, and she ultimately failed to undertake the necessary holistic review when conducting her final analysis and reaching her conclusions.

115. Thus, for the reasons set out above, I would allow the mother's appeal.

116. At the hearing of the appeal, we canvassed with counsel their views about the appropriate order in the event that the mother were to succeed in overturning the Judge's decision. Mr Nuvoloni invited us to substitute the care order with a supervision order, reinforced with such private law and/or injunctive orders under the court's inherent jurisdiction as we considered fit. Mr Goodwin proposed that we could, if minded to allow the appeal, adjourn for a short period (a matter of days) and invite the Local Authority to reconsider whether it would be prepared to adopt its 'shadow care plan' and support the placement of M with her mother under a care order (as per *W v Neath Port Talbot County Borough Council* [2013] EWCA Civ 1227; [2014] 1 WLR 1611 at [84]). He submitted that if the Local Authority concluded now that it could support the placement of M with her mother, he would encourage this court then to confirm the care order on that basis; if the Local Authority proposed to adhere to its original plan the application could be remitted for re-hearing. Ms Meyer proposed that the matter be remitted to the Family Court for further case management and possible re-hearing.

117. We are not in any position to make any welfare determination on the material before us, and for that reason I decline Mr Nuvoloni's invitation to substitute the final care order with a supervision order. Tempting though I find Mr Goodwin's proposal, the Local Authority will need to satisfy itself once again, one way or another, of the current and future arrangements for M; it is possible that, if the Local Authority now consider that M's best interests are served by her remaining with her mother, it may revert to the view (which the social worker had expressed at the hearing, discussed at [265]: see §86 above) that this should in fact be under a supervision order, along with other protective orders, and not a care order. I am concerned that the Local Authority should be enabled to make this important decision without an artificially imposed pressure of time.

118. In the circumstances, I favour the approach advocated by Ms Meyer. Subject to my Lords' view I would therefore set aside the care order, replace it with an interim care order, buttressed as before by an order under section 38A CA 1989. I would remit the case to be heard, as soon as possible, initially for case management, by the Designated Family Judge at the Family Court sitting at Wolverhampton, or by a Circuit Judge allocated by her.

119. With my Lords' agreement, I would further propose to direct the Local Authority to file a statement from the allocated social worker or her Team Manager as soon as practicable and in any event no later than five days before the case management hearing referred to above, setting out its current assessment of M's welfare, and its outline proposals now for the long-term placement of M.

120. These proceedings have already been unnecessarily protracted. It would be manifestly in M's best interests for the current uncertainty about her long-term future to be resolved sooner rather than later.

Lord Justice Dingemans

121. I agree.

Lord Justice Arnold

122. I also agree.