Neutral Citation Number: [2025] EWCA Civ 93

Case No: CA-2024-002112 & CA-2024-002137

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT MANCHESTER
Her Honour Judge Tyler
MA23C50800

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2025

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE MALES

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T (Children: Risk Assessment)

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Arron Thomas (instructed by **Harper Law Solicitors)** for the **Appellant Parents**
Yvonne Healing (instructed by **Bolton Metropolitan Borough Council**) for the **Respondent Local Authority**
Samantha Birtles (instructed by **Alfred Newton Solicitors**) for the **Respondent Children by their Children's Guardian**

Hearing date : 30 January 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 7 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson :

Introduction

1. This appeal concerns three brothers, A1, A2 and A3. They have been together in foster care since October 2023. On 19 August 2024, Her Honour Judge Tyler made final care orders for all three and a placement order in respect of A3. They were then aged 11, 9 and 16 months respectively.

2. The parents now appeal, seeking the children's return. The appeal is resisted by the local authority and the Children's Guardian.

3. At the end of the appeal hearing, we informed the parties that the appeal would be allowed. For the reasons given below, I agree and would remit the local authority's applications for rehearing.

Background

4. The parents, who are from different West African countries and are now in their 40s, met and married in England. The mother has three older children. The older two were brought up by family in Africa and are now adults. Her third child, D, lived with the parents, and in due course A1 and A2 were born. The father worked and the mother looked after the children. There were no known concerns.

5. In June 2015, when A2 was aged 15 weeks, the mother took him to the GP with swelling to his head. On investigation, he was found to have a linear skull fracture with overlying haematoma. Care proceedings were issued by the local authority in whose area the family then lived and D, A1 and A2 were placed in foster care.

6. The parents stated that the mother was the only adult at home when the injuries to A2 occurred. She denied having caused them and suggested that D, then 4½, may have caused them accidentally.

7. At a fact-finding hearing in January 2016, a District Judge found that the injury was caused by the mother. There was no finding that it was deliberately inflicted, as opposed to accidental, and no other matters were relied upon to satisfy the threshold.

8. After the fact-finding hearing, the parents stated that they had separated. On 29 September 2016, the court made a care order in relation to D, who was then aged 5. As to A1 and A2, the court made a supervision order and a child arrangements order in favour of the father. They returned to his care, aged 3½ and 1½. They were to have monthly contact with the mother, supervised by the local authority.

9. D has been in the care of that local authority for a decade. He is not doing well. In March 2022, the mother applied unsuccessfully to discharge the care order.

10. Returning to A1 and A2, the supervision order expired in 2017, and there was no further local authority involvement until 2019. At that point, a child protection conference was convened due to concerns at the school that the father was not meeting the boys' needs and was not co-operating with professionals. The children became the subject of child protection plans.

11. However, during the summer holidays in August 2019, the father took A1 and A2 (then aged 6 and 4) to Africa. He left them in the care of their maternal grandmother and returned to the UK a month later. A1 and A2 remained in Africa for four years, and each parent visited them several times for periods of a month or more.

12. Despite what the court had been told in 2016, the parents had not truly separated. Their marriage continued, though they stated that they lived separately. They concealed the position from professionals, and from the present local authority after they moved into its area.

13. So it was that A3 was born in England in March 2023. The mother co-operated fully with medical appointments before his birth, and while he remained in her care there were no concerns of any kind. She did not tell professionals about the past proceedings.

14. In September 2023, the father brought A1 and A2 back to England and placed them with the mother. She and the three children then lived together for five weeks. The older children were placed in school and registered with health services.

15. In October 2023, a health visitor became aware of the history from the records, and made a referral to the local authority. Social workers visited the mother's home and found the children to be well-presented, and the home to be clean, tidy, and comfortable. However, the local authority took proceedings within days and interim care orders were made. The three children were placed in foster care.

16. Since then, the children have been in three different foster placements. A1 and A2 have made allegations against their carers in each placement and have refused to attend school throughout their time in foster care. By the time of the final hearing they had lived for several months with a family of Asian origin that shared the family's faith.

17. Family time, which took place several times a week before the hearing was described by the Guardian as being of excellent quality, and by the social worker as containing wonderful expressions of emotional warmth. The children were often distressed to leave their parents at the end. The parents engaged well with the assessments and appointments associated with the proceedings, and they worked well with the foster carers.

The judge's decision

18. The final hearing took place between 22 and 26 July 2024. Evidence was given by an independent social worker ('ISW'), the children's social worker, the parents and the Guardian. Delivering her judgment on 19 August 2024, the judge approved a care plan for A1 and A2 of long-term foster care, with weekly parental contact (the local authority had proposed monthly). The plan for A3 was a six-month time-limited search for an adoptive placement, with a fallback plan for foster care in the same placement as his brothers.

19. In the course of a reserved oral judgment, the judge noted an agreed summary of the law and she briefly referred to some core principles. She summarised the background and found that there was a clear emotional commitment between the parents. She found that, although the mother had expressed a great deal of regret that A2 was injured in 2015, she had never been able to accept the court's finding.

20. Between the end of the hearing and delivery of the judgment, A1 and A2 attended a meeting with the judge. She recorded that they desperately want to go home. She also recorded the view of the Guardian, who described them as the most distressed children she had ever come across in foster care. The judge described the time they spend with their parents as very loving. She declined to find that the parents had encouraged the boys not to attend school in order to undermine the foster placements. She described them as bright children and their non-attendance at school as tragic. She acknowledged that the present foster placement was not ideal as it did not reflect the children's cultural heritage.

21. The reason for an ISW report was because the Guardian recommended a 'Resolutions-based' assessment, which may be commissioned where there is a lack of parental acceptance of previous findings. The parents, who had also engaged in parenting courses, committed themselves to the assessment, attended every session and engaged in discussions with the ISW. The judge described the resulting assessment as thorough and detailed. She recorded that the ISW had concluded that it was not an appropriate case for the Resolutions model to be used. The ISW's conclusion was that the risk factors applied to all three of the children because the parents lacked insight into the local authority's anxieties, and lacked insight into their own actions and risks arising from not following safety plans. There was therefore an inability to meet the children's emotional needs and, particularly in the case of A3, a risk of physical harm. Until the parents were able to develop more insight, they would not be in a position to have the children safely returned to their care, even with a safety plan in place, because the ISW was not satisfied that they would adhere to it, and because in her view it would need to be professionally supervised 24 hours a day, seven days a week.

22. The social worker aligned himself with these views. He described the children as being in a great state of confusion and despair. There was an excessive amount of evidence that A1 and A2 were suffering emotional harm, but this was in his view caused by the parents' behaviour and not by the system. He accepted that the parents can to a large extent meet the boys' emotional and developmental needs. However, the older boys' loyalty to their parents and lack of trust in professionals meant that they were unlikely to reveal any problems arising at home. The social worker thought there was a realistic chance of them settling once they knew they were not going home. He accepted that the local authority would struggle to obtain an appropriate adoptive placement for A3. The judge expressed the hope that the children would indeed settle, observing that the case was a difficult one because "one is looking, or attempting to look, into a crystal ball to look at risks and the balance of harm."

23. Evidence was given by the parents. The judge accepted the positives in their situation: attendance at family time, ability to meet the children's needs, engagement in the assessment process. She also noted, as "really positive", the absence of alcohol or drugs, mental health problems, criminal culture or physical chastisement. She continued that the issues that the local authority relied upon were in some ways hard to grasp for the parents. She referred to the father's tendency to concrete, rather than hypothetical, thinking, and suggested that he might seek some help with that. She also said that she could understand why the local authority, the Guardian and the ISW might have some reservations about what she described as "the flight risk" that might arise if the children were in the parents' care.

24. The judge observed that the very high quality of the family time was a reason why she was going to set a higher level than the local authority proposed. She rejected the social worker's view that monthly visits would be sufficient to maintain the children's relationship with their parents and to support their language and cultural heritage. She found that to reduce family time to fortnightly would compound the distress A1 and A2 had already experienced.

25. The Children's Guardian said in her report that during family time the children "are afforded excellent care by their parents, there is a closeness, a warmth. The family time records are heart breaking to read with A2 and A1 clinging to parents when they are leaving the session." Nonetheless, she agreed with the local authority that "the risks to the children of likely physical harm and neglect are exceedingly high" and she supported long-term foster care and adoption with a heavy heart as there was no plan that could secure the children's safety.

26. The judge set out the reasoning for her orders:

> "65. I am sure that these parents have the capacity, if they choose, to work with the local authority to secure the welfare of their children in the foster placement and to be able to support that. If they can do that, then the local authority can and should try to work with them and their support network members to see whether at some stage it would be possible for these children to return to the care of their mother and father, not simply in an emergency situation should a placement breakdown, but in a planned way so that if there was a placement breakdown, the parents would be well on the way to being assessed and, if the children continue to be as distressed as they currently are, then it would provide a potential platform for a return to the care of the parents if that work had been undertaken in a proper thorough manner. I realise that is asking a great deal of the local authority, given the resource difficulties which every local authority has, and I understand that, but my real concern so far as these two children, A1 and A2, is the potential effect on them of staying in local authority care if this placement breaks down and they then end up potentially in a succession of other placements, possibly residential placement. The statistics for young black boys, young men and adolescents, do not make happy reading. D is at 13 already, it seems, on a trajectory from which he might not be able to come back. Both of these parents can see this with that young person and are really, really worried about it for A1 and A2. I understand that, as I too, share concerns about that for each of them because there are in many ways risks to the self-confidence, the self-identity of a young person, their ability to perform educationally, their potential for getting involved in all manner of scenarios which really would prejudice their welfare in a whole range of ways. I am satisfied that the risks which exist of a return to the parents just about outweigh the risk if they remain in foster care and that does not go well.
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> 66. That is why when I look at the evidence as a whole so far as A2 and A1 are concerned, I am satisfied that despite their wishes and feelings, which are very clearly expressed to all the professionals and

> to me as I have already outlined, I cannot give them what they want and I cannot give the parents what they want so far as those children are concerned. It is called long-term foster care, but for some children it is not long term because circumstances change and local authorities will take a fresh look, but that will require [the parents] to apply themselves very carefully to developing a proper understanding of why the local authority is so concerned, at this stage, about the children going home.
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> 67. A3's situation, of course, is very different and I am urged by counsel for the parents in their written submissions to conclude that for A3 adoption is not the only option. The risks to A3 of physical harm are high. I agree that they are high. I know he is older than A2 was when he sustained his physical injury, but they are still high. Where there is a high risk of physical injury, that does not necessarily mean that the risk is there all the time, but with a young child the risk of physical injury really relates the potential for severity of such injury. The local authority's primary plan for A3 is not foster care with his brothers and that is because of his age. The local authority hopes to find a placement for him where he can settle and become a part of a family which he can live with through into adulthood. If that cannot happen, and happen quickly given that these proceedings themselves are now in excess of the statutory timetable for such proceedings, then the local authority will, and should look to reuniting A3 with his siblings and, if possible, in the current placement, which is in some ways meeting the needs of these three children at the moment. It will be a placement with which A3 was familiar as well as his siblings being there. So, it seems to me that as a contingency plan for A3 is one which the local authority needs to really seriously look at if there are difficulties with finding an adoptive placement for him.
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> 68. I have very carefully considered the alternative of a return to the care of [the parents] for all three of these children and, whilst I have set out the many positives that there are for them, I am satisfied that on the analysis by not only the independent social worker and the allocated social worker, but also the children's guardian of the issues relating to the risk involved in a return to the care of the parents, that the balance of harm falls down on the side of none of the children returning to their care. It is a very sad case and I have been very troubled by it because there are so many positives with the parents' situation and their abilities, but I have had to do what I believe to be in the welfare interests of the children. I have three separate, experienced social workers (including the children's guardian) whose evidence, it seemed to me, was cogent and persuasive in terms of the decision which I am making today."

The appeal

27. On 27 September 2024, the mother and father, unrepresented and acting separately, applied for permission to appeal, and I granted their application on 27 November 2024.

28. At the appeal hearing, the parents were both represented by Mr Arron Thomas. With evident respect for the judge, he succinctly argued that there were a number of fatal problems with her reasoning. She did not identify the type or degree of risk to which each child would be exposed, or consider questions of risk management. She did not make a link between the threshold findings and the children's welfare. She did not address the welfare checklists under the Children Act 1989 or, in A3's case, the Adoption and Children Act 2002. Consequently, she took no account of important matters such as: the father's ability to manage and mitigate any risk; the impact on the children of separation from their parents and, if A3 were adopted, from each other; the difficulty in finding an adoptive placement for A3; the practicality of the children returning home later if they did not do so now. There was no side-by-side comparison of the competing alternatives; instead, the analysis was linear, beginning and ending with an evaluation of what the parents could or could not offer. Nor was there a final assessment of whether the orders were proportionate. All of these shortcomings had a snowball effect, leading to an outcome that cannot be justified.

29. The local authority, through Ms Yvonne Healing, and the Children's Guardian, through Ms Samantha Birtles, sought to sustain the judge's decision. They identified the risk as being one of physical harm, arising from the historic injury to A2. They also asserted that the evidence supported a conclusion that there had been emotional harm, arising from what was described as the children's chaotic history in their parents' care, and the parents' dishonesty and inability to co-operate with professionals. However, they accepted that the judge had made no such findings. They further accepted that the court also had to take account of D's extremely troubling situation, the fact that the children had been well-loved and cared for before their removal, and the fact that they had encountered serious problems in foster care. They acknowledged some difficulties in the structure of the judgment, but they argued that it contained an adequate analysis of the facts and the law, and that the outcome was not wrong. The judge had been entitled to accept the Guardian's advice that the risks to the children of likely physical harm and neglect were exceedingly high and that no effective safety plan could be devised.

Analysis

30. The separation of a child from a family can only be approved after a process of rigorous reasoning. That is essential where there is a plan for adoption, but it is also necessary for any significant decision where the outcome is not obvious. A structured process is of real benefit for these important and often difficult decisions, as without it there is a greater chance of error, leading to children living unsafely at home or being kept unnecessarily in care. The fact that the underlying principles are well-known to specialist judges does not relieve the court of its duty to the child, to the family and to society, to explain and justify its decision.

31. This court's recent decision in *Re L-G (Children: Risk Assessment)* [2025] EWCA Civ 60, reiterates the guidance given in *Re F (A Child: Placement Order: Proportionality)* [2018] EWCA Civ 2761, [2018] All ER (D) 94 (Dec). The risk of harm, important as it is, is one of a number of factors in the welfare checklist and it has to be carefully assessed, particularly where it may be decisive.

32. The Children Act 1989 provides a framework within which the court assesses whether a child has suffered or is likely to suffer 'significant harm' for the purposes of the

threshold for intervention, and 'harm' for the purposes of the welfare assessment. Section 31(9) defines harm in this way:

> "harm" means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another;
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> "development" means physical, intellectual, emotional, social or behavioural development;
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> "health" means physical or mental health; and
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> "ill-treatment" includes sexual abuse and forms of ill-treatment which are not physical.

33. Accordingly, the court had to address these questions in relation to each of these children:

(1) What type of harm has arisen and might arise?

(2) How likely is it to arise?

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

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

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

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

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

34. A structured analysis of this kind, adapted to the facts of the individual case, is of benefit to those who make decisions and to those who are affected by them. The analysis need not be lengthy, but it ensures that undue weight is not given to one factor, however notable, and that other important factors are not overlooked. It must be remembered that risk assessment is about the realistic assessment of risk, not about the elimination of all risks. Likewise, the assessment of actual or likely harm is not the same thing as an all-round welfare assessment.

35. Unfortunately, as the parents have argued, several necessary questions were neither asked nor answered in the present case. The all-important concluding section of the judgment falls well short of justifying such far-reaching decisions. There was no effective risk assessment, and consequently no proper welfare evaluation, comparison of the options, or consideration of proportionality.

36. The care orders and placement order must therefore be set aside and the interim care orders will revive. The applications for care orders and for a placement order must be redetermined if they are pursued. We are grateful to the Designated Family Judge for agreeing to expedite the process. In particular, there will be a substantial interim hearing at the end of this month, at which she will be able to determine a range of issues

including: each child's interim placement; the frequency of contact; and case management orders, including streamlining further evidence, and consideration of whether there should be a change of Children's Guardian.

37. When remitting a case, I would normally abstain from further comment. Here however, certain features stand out:

(1) The injury to A2 in 2015 was a very serious one, amounting to actual significant harm, though it fortunately had no long-term consequences for his health. Apart from that (as in *Re L-G*), the other welfare factors appeared to strongly favour a placement of all three children with their parents. As the judge noted, there are no general risk features and many positives.

(2) The local authority's case on non-physical harm (i.e. emotional harm or neglect) was weak at best, and there was no finding of such harm in the threshold findings or in the judgment. The concerns felt about the parents' honesty and insight into the risk of physical harm were secondary to that risk and were only relevant to the likelihood of future physical harm and to risk management. They did not give rise to a separate category of statutory harm.

(3) Neither D nor A1 has suffered any harm at all in parental care, and nor indeed has A2 since 2015. Because the court was making its risk assessment many years after the single index event, it had the opportunity to assess what had actually happened, both to a child who had been in care and to the children who had not. It had to take account of this before picking up what the judge described as its crystal ball.

(4) The removal of A1 and A2 to Africa was not apparently illegal and even if it was in some way irregular, there is no evidence of the children suffering any harm during the four years they lived there, or as a result of their stay.

(5) The Guardian's assessment, accepted by the judge, that A1 and A2 are at exceedingly high risk of physical harm from their mother is, to say the least, questionable. They are grown boys, almost ten years older than they were when A2 was injured at the age of 15 weeks, and the parents' normal disposition towards them is well-documented.

(6) A3 is of course much younger, but he is, as the judge noted, older than A2 was when he was injured. He passed unharmed through the likely period of maximum risk in his mother's care and his experience was, for whatever reason, different. Again, the court had the opportunity to judge from experience of actual parenting, and was not limited to assessing future risk.

(7) Finally, the court had to assess the advantage and disadvantages of the local authority's plans. There is strong evidence that A1 and A2 are suffering visible harm from being in foster care, and it is likely that A3 is suffering invisible harm by being separated from his parents at a critical stage in his development. In A3's case, he might possibly be found an adoptive home, and otherwise would remain with his brothers (the judge's reference in paragraph 67 to reuniting him with them is hard to understand). If he remains in foster care, it will be for the next 16 years. He would be on his own for at least the last half of his childhood, and for

longer than that if his brothers voted with their feet before they reached majority. As it was common ground that long-term foster care is not a viable plan for A3, could that be justified?

38. I have referred to these matters because, if this appeal had concerned A1 and A2 only, I would probably have favoured an outcome that led to their return to their parents' care without the need for a rehearing. We will, however, remit in their case because the position of A3 is somewhat less clear, and because we cannot assess the possible effect of separating the children. The judge conducting the hearing later this month will be in a better position to decide whether any or all of the children can return to their parents' care on an interim or final basis and, if so, on what terms. As I have explained, that will not be a limited case management hearing, based on the assumption that the children will stay put until the final hearing, but will be an opportunity for the court to make whatever welfare decisions seem to it to be right, taking a broad view of the situation.

Lord Justice Males:

39. I agree with the judgment of Lord Justice Peter Jackson, including his concluding comments.

Lord Justice Moylan:

40. I also agree.