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Case No: [2023] EWFC 173

**IN THE FAMILY COURT AT CHESTER**

Chester Civil And Family Justice Centre  
Trident House  
Little St John Street  
Chester CH1 1SN

Date of hearing: Thursday, 10<sup>th</sup> August 2023

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**Before:**

**HIS HONOUR JUDGE PATES**

**Between:**

**A LOCAL AUTHORITY**

**- and -**

**(1) MOTHER**  
**(2) FATHER**  
**(3) THE CHILDREN**  
**(via their Children's Guardian)**

**Applicant**

**Respondents**

**MS N ROSS** appeared for the **Applicant**

**MS DOYLE** appeared for the **First Respondent**

**MS DEANS** appeared for the **Second Respondent**

**MS TURNER** appeared for the **Children's Guardian**

**Approved Judgment**

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## HIS HONOUR JUDGE PATES:

1. The matter is listed for an Issues Resolution Hearing today in relation to the welfare of three children. The first child is A, a girl born on [DATE]. A is 11 years, 3 months old. She has recently moved to what is proposed to be a long-term placement with Mr and Mrs X, maternal great aunt and uncle. She moved there on 8 August 2023, and appears to be settling well.
2. The second child I am concerned with is B, a girl, born on [DATE]. She has therefore only just turned 9 years old. Following a period of time in foster care, she has also moved recently to the care of Ms E and her partner, paternal grandmother and her partner, on 8 August 2023. She also seems to be settling well.
3. Finally, there is C, a boy, born on [DATE]. C is 3 years, 10 months old, He has been placed previously with B in foster care and has also moved recently to the family placement with Ms E and her partner.
4. The children are represented within these proceedings by their Guardian Michelle Smith, and by their solicitor Ms Turner.
5. The Local Authority, who bring these care proceedings are represented by their counsel Ms Ross. The Allocated Social Worker is Ms F who has been allocated as their social worker since 23 February 2023.
6. The children's Mother is 29 years old. She is represented today by her counsel Ms Doyle.
7. The father of B and C is 31 years old and is represented today by his counsel Ms Deans.
8. The court has not been able to identify A's father, for the reasons which are set out within the mother's statement at C66 of the bundle.
9. The Issues Resolution Hearing was adjourned to today, given the issue which had arisen as to whether it is right and necessary to engage in disputed elements of fact finding in circumstances in which it appears that they have no direct bearing on the final care plan of the Local Authority, which is that the children should remain living with their respective family carers under care orders.
10. The children are currently receiving support in the case of A from RASAC; in the case of the younger children, from Polaris. That support is not anticipated to change as a result of whether or not the court determined the allegations in issue or not.
11. The proceedings themselves are already at week 39. The children have moved into placements which are going to become their long-term placements, but they will not have the knowledge of that until the proceedings have concluded.

The Scope of Fact-Finding:

12. The Local Authority seek findings in relation to sexual harm against Father; failure to protect arising out of that harm against Mother (in particular, an allegation that she knew of the harm, did nothing to address it, and actively discouraged A from informing others about it); and domestic abuse against both, including Father being an alcoholic.
13. It is the necessity or appropriateness of making findings against the parties in relation to the first two issues that remains contentious.

The Threshold: What is the scope of disagreement?

14. The original threshold is to be found in the bundle at A9. On the portal I was provided helpfully with a colour coded version of that document, which set out those matters which were agreed, and incorporated the mother's proposal in relation to a finding of failure to protect. The threshold of course relates back to events on 11 November 2022, when the Local Authority commenced proceedings. It is right to say that the instigating factor was information provided by A on 11 October 2022 within the school environment. It is equally fair to say that the threshold encompasses issues going beyond the matters which she had discussed.
15. The first element of dispute is set out in paragraph 5. Father filed one statement in these proceedings in which he denied any form of sexual abuse by him towards A. He ceased having any contact with the younger children on 4 November 2022, and he has not provided instructions or attended hearings for a considerable period, measured in months. That continues to be the position today.
16. The allegations against him are a pattern of sexual abuse of A from the time when she was 7 years old, up until 10 October 2022. He has been arrested by the Police in relation to allegations of rape and child cruelty, and a charging decision is awaited from the CPS, now scheduled to be next week.
17. The second area the Local Authority seek to rely upon is contingent upon the findings against Father, in other words, it is said that she had independently failed to protect A from the harm she suffered at the hands of Father. It is encapsulated in paragraph 7C, where it is asserted by the Local Authority that the mother showed inadequate insight into risk of sexual harm to the children and prioritised her relationship with Father over the children.
18. In her response the mother accepts she ought to have been aware that Father posed a potential sexual risk more generally and failed to take reasonable steps to protect A. That relates to two separate occasions when she had been confronted with information regarding separate allegations against him.
19. Thus, the scope of the dispute is not about whether there was a failure to protect, it is not about whether there were risks which the mother should have avoided, it is whether the mother in the form of paragraphs 7D and E was specifically told in clear terms that A was being sexually abused; and, knowing that she was being sexually abused, not only did she do nothing to protect her, but actively discouraged her from giving that information to people who could help.

20. These allegations derive essentially from information provided by A within the school environment on 11 October 2022.
21. There is acceptance within paragraphs 8 to 12 of domestic abuse and alcohol abuse within the parents' relationship. There is specific reference to a pattern of behaviour which speaks to the deplorable circumstances which the children were required to live. Father is an alcoholic, and alcohol abuse has been a feature in his behaviour towards the children; there is no issue about that. In paragraph 10, the mother accepts that she has repeatedly downplayed the issues in the home, with domestic abuse and Father's alcohol use, to professionals, and has not taken appropriate steps to safeguard the children, in permitting Father to remain in the home, and in not reporting his behaviour to professionals.
22. That relates directly to her role as a protective factor within the home environment to these children. The only difference is that the Local Authority seek to establish two particular factual allegations which suggest not only did she fail but she did so in the knowledge that there were specific issues of sexual abuse occurring.

What is the welfare outcome?

23. The children will remain with their current carers, as I indicated earlier, under care orders. There is no opposition to that. As I clarified with Ms Ross, and she took instructions from Ms F, there is no aspect of the permanence provisions of the care plan which would alter whether or not the court were to engage in fact finding in relation to the disputed elements.
24. The Local Authority has filed a revised contact plan, as agreed with the Children's Guardian at the last hearing [C291], and it appears that there is no longer any dispute about that as a starting point for the arrangements, which will of course be reviewed within the Looked After Children process.
25. There is no proposal for any contact between Father and any of the children. Given that he has not attended contact with the younger two children since 4 November 2022, any request for contact would necessarily require robust risk assessment given the multiple risks, and it remains entirely unclear what his position is regarding that fact.

The Position of the Parties:

26. Ms Ross for the Local Authority submitted a skeleton argument, which may be found at A27, and additional submissions in the form of a position statement filed on 9 August 2023. The Local Authority seek the findings indicated in relation to paragraphs 7D and E, and at paragraph 5 in relation to sexual harm. They urge the court to grapple with the issues at this stage and relate that to the benefit of a determination to the certainty and clarity with which they would be able to manage issues which may emerge in the future in terms of these children, whether that be discharge of care, contact or even future as-yet-unborn children to the mother or Father.
27. They do not suggest the court could resolve the issues today in the absence of evidence, and it is accepted that despite the proceedings being at week 39 there are a

range of pieces of evidence which are not superfluous but are relevant, should have been obtained, and require to be obtained, in order to ensure the court has the evidence, if it were to proceed to determine those issues:

28. There are a range of contemporaneous documents which are still to be filed in relation to the failure to protect allegations to the extent the court needs to consider them; a statement from a relevant social worker at the time; information from the police regarding the process by which they arranged the ABE interview; forensic evidence which appears to exist but has not yet been disclosed or sought and obtained, suggesting that Father's semen was found on A's duvet.
29. There remain questions about the events which took place during what appears to have been the prolonged questioning of A within the school environment on 11 October 2022. Whilst there are detailed statements from the teaching staff concerned, the relevant electronic disclosure has only just been filed, and the teaching staff are not available to clarify or file any additional statements regarding issues such as the length of time A was engaged in those discussions, or in relation to context or demeanour at particular points during that process. It will now not be possible to clarify those matters until the start of the new school term, given that they all work within the school environment. It is hoped that they would be available sometime after the beginning of school term, but we will not be able to check in fact whether that is the case until some time in September 2023.
30. It is equally arguable that in the absence of further disclosure, it is difficult for the court to identify the proper scope of the witness evidence, whether there are any additional lines of enquiry which are proportionate to be undertaken before it, and accordingly to list for a final hearing, based upon a meaningful time estimate, and a witness timetable.
31. A hearing could be anywhere from, at a minimum, 2 days plus time for reading, submissions and judgment, up to 5 to 7 days plus reading, submissions and judgment. That is a substantial difference depending on the scope of the enquiry and the number of live witnesses, and the time required for the additional stages. If the court were to look for an estimate at the upper end of that range, the matter would not be listed before the last part of October 2023. The proceedings would be probably not be listed earlier than week 50.
32. The position of the mother is set out by Ms Doyle in her skeleton argument at A52. Importantly, certainly from A's perspective, the mother accepts that A has been sexually abused by Father. That means she must accept that over the years from when her daughter was 7 until 2022, she was exposed to the most grievous harm. She accepts she should have ended her relationship with Father at a much earlier point in time, and as a result failed to protect the children from the risks she knew he posed. Her only element of rejection is that she in fact knew he was abusing her.
33. Ms Doyle also notes that there are a range of documentation relating to social care evidence and the earlier periods in relation to 2014 and 2018 which remain outstanding. Her submission is that the allegations do not need to be determined, certainly in relation to failure to protect, but she would of course not object to the court making findings in relation to Father if it felt it appropriate to do so.

34. The father's position is summarised by Ms Deans in her skeleton argument at A41. The reality is Ms Deans has been in an unenviable situation. She has had to base her submissions upon the father's bald denial of the allegation within his initial statement, but his disengagement with the proceedings has meant that she has had no up-to-date instructions, so that she cannot take instructions or provide advice. She is left to essentially raise issues which would be relevant to the weight to be attached to the accounts given, based upon her client's case.
35. Ms Deans invited me in her skeleton argument to conclude that an objective assessment of the current evidence would lead to the inevitable conclusion that the court could not make findings of sexual abuse or failure to protect. One can see that traced out carefully in paragraphs 10 to 16 of her skeleton argument, which I will not repeat.
36. Essentially she submits that the process of questioning in school went far beyond the parameters of an initial account (*Achieving Best Evidence in Criminal Proceedings* (January 2022) at paragraph 2.5 and elsewhere), which is described within the judgment of MacDonald J in *Re AS* [2016] EWHC 532 (Fam) and the Court of Appeal in *Re JB (child: sexual abuse allegations)* [2021] EWCA Civ 4.
37. Her complaint extends to what she submits are "blatantly leading questions" within the ABE interview. It is fair to say that significant departures from the guidance are likely to result in reduced and, in extreme cases, no weight being attached to the content of an ABE interview, but it is for the judge to consider the interviews and the extent to which they comply with or depart from the guidance in the context of all the other evidence, in weighing them.
38. I must accordingly express respectfully disagreement about the offer made by Ms Deans, which appears to me to amount to a form of mini trial, a course of action which is specifically deprecated by Baker LJ in *Re HW* for reasons which are self-evident.
39. I have nonetheless borne that issue in mind in relation to the allegations of failure to protect, and whether the evidence as a whole could be said to be particularly weak.
40. The position of the Children's Guardian is set out in the skeleton argument of Ms Turner at A38. The essence of her position begins at paragraph 51 in her final analysis, in which she finds her statement that she did not think determining the disputed elements would have any impact upon the proposal she was making for the care of the children. Ms Turner and the Guardian have of course considered the skeleton arguments.
41. Thus, the Guardian is content for those allegations to remain undetermined. That does not mean they did not happen, but it means those issues remain undetermined, and capable of being determined if there is a circumstance in which it is appropriate to do so.
42. The greatest concern for the Guardian was the knowledge that A was clear that her mother believed her. In the Guardian's view that is the critical knowledge which A requires. The Guardian's position is that these proceedings should conclude without the sexual abuse allegations being litigated, in the knowledge that the children's

welfare will be met by allowing them to settle in their long-term placements, and that the court proceedings are over.

43. The Guardian notes that there is still the prospect of criminal proceedings in relation to these allegations. There has been an investigation, the Police have submitted a file to the CPS, and a charging decision is imminent. Whilst it cannot be said that there is a guarantee that there will be a positive charging decision, neither can it be said that the Family Court is the only forum within which the allegations will ever be ventilated.

The Law:

44. I have prepared a summary of the applicable legal principles, which has been provided to the parties in advance of the hearing, with a final version being provided to them within the course of the hearing by email. There is no material difference between both versions. The second is some adjustment to the typographical errors in the first.
45. I incorporate that summary within the judgment at this stage.
46. The court must further the overriding objective to deal with cases justly, having regard to the welfare issues involved. Rule 1.2 of the Family Procedure Rules 2010 provides that: -

"Dealing with a case justly includes, so far as is practicable –

- (a) ensuring that it is dealt with expeditiously and fairly;
- (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
- (c) ensuring that the parties are on an equal footing;
- (d) saving expense; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

Rule 1.4 imposes a duty on the court to manage cases actively.

Active case management includes identifying the issues at an early stage (1.4(2)(b)(i)),

deciding promptly which issues need investigation and hearing and which do not (1.4(2)(c)(i)) and considering whether the likely benefits of taking a particular step justify the cost of taking it (1.4(2)(h)).

Any delay in determining the question is likely to prejudice the welfare of the child (s. 1(2)).

47. In public law proceedings, s. 32(1) CA 1989 establishes a duty to draw up a timetable with a view to disposing of the application without delay, and in any event within

twenty-six weeks from the date of issue. The Court is required to have particular regard to the impact which the timetable would have on the welfare of the child to whom the application relates and on the conduct of the proceedings (s. 31(3)).

48. In exercising its functions, the Court is required to consider the permanence provisions of the care plan (s. 31(3A)) namely (s. 31(3B)): -

“(a) such of the plan’s provisions setting out the long-term plan for the upbringing of

the child concerned as provide for any of the following -

(i) the child to live with any parent of the child’s or with any other member of, or any friend of, the child’s family;

(ii) adoption;

(iii) long-term care not within sub-paragraph (i) or (ii);

(b) such of the plan’s provisions as set out any of the following

-

(i) the impact on the child concerned of any harm that he or she suffered or was likely to suffer;

(ii) the current and future needs of the child (including needs arising out of that impact);

(iii) the way in which the long-term plan for the upbringing of the child would meet those current and future needs.”

49. The Court of Appeal considered these matters in *Re H-D-H (Children: Fact-finding)* [2021] EWCA Civ 1192 (King LJ, Peter Jackson LJ and Sir Patrick Elias). I adopt and apply the approach approved therein. Peter Jackson, LJ noted that the non-exhaustive list of factors coined by McFarlane, J in *Oxfordshire County Council v DP, RS and BS* [2005] EWHC 1593 has “proved to be a useful structure for judges making these decisions” ([17]) and “remains valid when read alongside the statutory framework” ([20]).

Is fact-finding of the scope proposed “right and necessary”?

50. Before turning to the factors themselves, Peter Jackson, LJ said this [21]: -

“Many of the factors identified in Oxfordshire overlap with each other and the weight to be given to them will vary from case to case. Clearly, the necessity or otherwise of the investigation will always be a key issue, particularly in current circumstances. Every fact-finding hearing must produce something of importance for the welfare decision. But the shorthand of necessity does not translate into an obligation to conclude every case as quickly as possible, regardless of other factors, and that is clearly not the intention of the

administrative guidance. There will be cases in which the welfare outcome for the child is not confined to the resulting order. Not infrequently, a finding in relation to one child will have implications for the welfare of other children. Sometimes, findings that cross the threshold at a minimum level will not reflect the reality. The court's broad obligation is to deal with the case justly, having regard to the welfare issues involved. McFarlane J put it well in paragraph 21 of *Oxfordshire* when he identified the question as being whether, on the individual facts of each case, it is "right and necessary" to conduct a fact-finding exercise."

51. It is for precisely this reason that there must be an open textured application of the relevant factors to the particular circumstances at play. Later authorities evidence the application of the framework developed in *Re H-D-H* and illustrate the potential gulf between findings sought which might support threshold or welfare issues and the resultant refusal to engage in such a process. This may be seen in the decision of Lieven, J in *Derbyshire CC v AA, BA and X* [2022] EWHC 3404 (Fam) in which she declined to permit a 9-day fact-finding hearing in relation to non-accidental injuries. In *A Local Authority v X, Y, Z And M* [2023] EWFC 121, MacDonald, J refused at [67] to direct a fact-finding hearing notwithstanding the "potential for there to be a gulf between the factual basis for the court's decision were the court to proceed on the basis of the current allegations of chronic neglect, and the factual basis for the court's decision following a finding of fact hearing into the cause of C's death were that hearing to result in a finding that C's death was caused non-accidentally by the mother or the intervener. The court must, however, be concerned not only with whether there is a gulf, but also with whether, on the facts of this case, that gulf has a consequence adverse to the justice of the case".
52. These illustrations of the exercise of an evaluative judgment emphasise the need for a case specific approach in which assumptions should be challenged and the focus is upon the impact of the decision on the welfare of the child and the justice of the case. A court sanctioned finding of fact hearing does not need to fill every significant gap if justice can otherwise be achieved.
53. Children can be given life story work in appropriate circumstances without a narrative provided by the Family Court following such a fact-finding hearing. In *Re H-W (children) (care order)* [2022] EWCA Civ 149, Baker, LJ, having noted the decision of Mostyn, J in *Barnsley Metropolitan Borough Council v VW and others* [2022] EWFC 83, added at [24] that "[f]or the avoidance of doubt, it is to the statement of principles as summarised in the Oxfordshire case and in *Re H-D-H* to which courts should turn when making these often difficult decisions." Baker, LJ did, however, offer the following observation at [28]:

"No additional guidance is required beyond what is set out in the Oxfordshire case and *Re H-D-H*, save in one respect. When considering the potential evidential result of a fact-finding hearing it may sometimes be appropriate for the judge to have regard to the apparent quality of the evidence. It will never be appropriate, however, to carry out a detailed evaluation, not least because the court can only make findings on the totality of

the evidence and at the case management stage not all of the evidence will have been filed. Anything akin to a mini-trial of the allegations would therefore be wrong in principle and wasteful of time and resources. Although each decision will depend upon the circumstances of the case, the apparent quality of the evidence is accordingly unlikely to be a powerful factor in the overall decision unless it is clear without the need for detailed assessment that the evidence appears to be particularly strong or particularly weak.”

#### The Non-Exhaustive List of Factors

54. Peter Jackson, LJ reiterated that the *Oxfordshire* factors must be approached flexibly in order to do justice efficiently in the individual case [22]. I set out those factors below including the illustrations given by Peter Jackson, LJ of the flexibility which may be required in any particular case. Typically, as he noted at [23], the factors “do not all point the same way: most decisions will have their downsides. However, the court should be able to make its ruling quite concisely by referring to the main factors that bear on the individual case and identifying where the balance falls and why.”

#### The interests of the child (which are relevant but not paramount)

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

#### The time that the investigation will take

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

#### The likely cost to public funds

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

#### The evidential result

The evidential result may relate not only to the case before the court but also to other existing or likely future cases in which a finding one way or the other is likely to be of importance. The public interest in the identification of perpetrators of child abuse can also be considered. It may be appropriate to have regard to the apparent quality of the evidence (strong or weak) without descending into a mini-trial.

#### The necessity or otherwise of the investigation

As noted earlier, every fact-finding hearing must produce something of importance for the welfare decision. But the shorthand of necessity does not translate into an obligation to conclude every case as quickly as possible, regardless of other factors, and that is clearly not the intention of the administrative guidance. There will be cases in which the welfare outcome for the child is not confined to the resulting order. Not infrequently, a finding in relation to one child will have implications for the welfare of

other children. Sometimes, findings that cross the threshold at a minimum level will not reflect the reality. The court's broad obligation is to deal with the case justly, having regard to the welfare issues involved.

The relevance of the potential result of the investigation to the future care plans for the child

The relevance of the potential result of the investigation to the future care plans for the child should be seen in the light of the s. 31(3B) obligation on the court to consider the impact of harm on the child and the way in which his or her resulting needs are to be met.

The impact of any fact finding process upon the other parties

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

The prospects of a fair trial on the issue

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

The justice of the case.

The justice of the case gives the court the opportunity to stand back and ensure that all matters relevant to the overriding objective have been taken into account. One such matter is whether the contested allegation may be investigated within criminal proceedings. Another is the extent of any gulf between the factual basis for the court's decision with or without a fact-finding hearing. The level of seriousness of the disputed allegation may inform this assessment. The court must ask itself whether its process will do justice to the reality of the case. This should include any other relevant factors not already considered within the non-exhaustive list.

Failure to Protect

55. Caution is required in determining such allegations because of their variability, the fact they are contingent on a form of abuse having been suffered by the child by a different person but they remain a separate threshold factor, requiring the necessary causative link between the conduct and the occurrence or risk of harm alleged. In *Re G-L-T (children)* [2019] EWCA Civ 717, King, LJ observed at [68 – 69] that: -

“68. It should never be forgotten that a finding of what is generally called “failure to protect” is itself a threshold finding, which satisfies the threshold independently of any finding that is made in relation to the conduct of the perpetrating parent.”

69. In *L-W(Children)*[2019] EWCA Civ 159, I said:

“62. Failure to protect comes in innumerable guises. It often relates to a mother who has covered up for a partner who has physically or sexually abused her child or, one who has failed to get medical help for her child in order to protect a partner, sometimes with tragic results. It is also a finding made in cases where continuing to live with a person (often in a toxic

atmosphere, frequently marked with domestic violence) is having a serious and obvious deleterious effect on the children in the household. The harm, emotional rather than physical, can be equally significant and damaging to a child.

63. Such findings where made in respect of a carer, often the mother, are of the utmost importance when it comes to assessments and future welfare considerations. A finding of failing to protect can lead a Court to conclude that the children's best interests will not be served by remaining with, or returning to, the care of that parent, even though that parent may have been wholly exonerated from having caused any physical injuries.

64. Any Court conducting a Finding of Fact Hearing should be alert to the danger of such a serious finding becoming 'a bolt on' to the central issue of perpetration or of falling into the trap of assuming too easily that, if a person was living in the same household as the perpetrator, such a finding is almost inevitable. As Aikens LJ observed in *Re J*, "nearly all parents will be imperfect in some way or another."

Analysis and decision:

56. I have already referred to a number of relevant factors identified by the authorities. I do not treat it as a checklist but a flexible guide to a number of factors which may be important. Those factors are not exhaustive, and I have sought to bear in mind all relevant factors in my assessment.
57. The Local Authority's submission is that there is a welfare interest in the matters being determined at this stage. It is submitted that it is important for A's welfare for her to understand that her allegations have been taken seriously and listened to. That was explained by Ms Ross to mean an official confirmation of the position by the court, given she knows of proceedings, which would be important for her.
58. Allied to that is the submission made by Ms Ross that the Local Authority cannot otherwise complete meaningful life story work with all of the children, to help them understand as they grow up why they cannot live with their parents. Ms Ross did not maintain that position in her submissions because she accepted the Local Authority would have to do its best and implement life story work, but suggested that there would be a significant benefit to that work, with the clarification obtained by determination of the facts.
59. The contrary point is that the most important confirmation for A is the knowledge about the belief in her allegations by her mother. Determining the allegations will make no difference about that. Life story work could be achieved carefully, addressing the combination of issues and concerns which led to the Local Authority's involvement and ultimately the lived experience of the children in not being with their parents. It is not a factor which is relied upon by the Children's Guardian as requiring a determination of the allegations.

60. The parties have referred to the impact of the mother's hope or wish, or even the Local Authority's hope or wish, to seek a discharge of the care order when mother may well seek rehabilitation of the children. The parties are fully aware of the relevant jurisprudential approach derived from the decision of the Court of Appeal in *Re TT (children) (discharge of care order)* [ 2021] EWCA Civ 742, in relation to the lack of any need to re-prove threshold or to prove that threshold no longer applies.
61. This is a welfare analysis which will pick up all of the issues which have been before the court, and the existing threshold already in my judgment amply describes profound deficits in the security of the care provided to these children over a number of years.
62. The Local Authority suggest that findings would still provide particular assistance, and I accept that those findings would be a relevant backdrop to what would be a robust welfare assessment and risk analysis at the time, albeit one falling short of the need to either prove threshold, or to prove that threshold no longer exists. I do not regard that purpose as being significant in the context of the deficits already at play.
63. It is said that A could be catapulted at a future date into a further enquiry as to whether she should give oral evidence, if these allegations were to re-emerge. She could in some way be destabilised because there was an enquiry about it. It is possible but it is not inevitable given the issues otherwise at play.
64. A has not by any party's request been required to give evidence, and that includes Father. Any impact of doing so would of course feature heavily in any request regarding her giving evidence. In that way, full account would be taken of the impact of that issue on her being dealt with at the time.
65. It is fair to say that there would undoubtedly be a benefit to resolve the issue now and avoid any debate about it at all. But the counterpoint to her welfare is the reality that the proceedings for her and the other children have already lasted 39 weeks, they have already experienced changes of placement, they are just becoming settled within what will become, if these proceedings conclude, their long-term permanent homes, and further delay in determining these issues simply means further delay in building on their security and the arrangements for contact, which will need to evolve, based upon that placement decision. In this case, following the statutory presumption, and based upon the individual circumstances, delay for them does not come without a cost, and the delay may be significant in terms of when any final hearing will be listed.
66. It is said by Ms Ross that the paternal grandparents appear to regard findings as pivotal in managing their relationship with Father. As carers they have been assessed as capable of caring for and protecting all of the children. The Local Authority are fully confident that they are capable of doing so. The positive assessments speak to that. In the event that they were clear that the allegations had not been resolved against Father nor had he been acquitted of those allegations and that they remained live, real allegations which the Court had not been required to resolve within these proceedings then I would anticipate they would be able to understand that, and understand the need to work with that position, and that view would no doubt be subject to the potential impact of criminal proceedings being issued, and a trial in the future too.

67. Ms Ross also indicates in a very general sense, and this is perhaps admittedly not her primary position, that there is a general interest in identifying findings against Father as to whether they are established or not, given his young age and the reality that he may have further children. The counterpoint to that is that Ms Ross accepts that a fair trial may well be capable of being dealt with in future. The court has what is likely to be the best account of the allegations, namely the ABE interview of A. That will not disappear. It has the written accounts of the teaching staff, and the material which can no doubt be assembled after the proceedings if they end today regarding the process. Given the other significant issues affecting Father it remains to be seen whether these issues will emerge in the future.
68. To the extent that a finding now would assist a process, on balance I accept it would be better to engage in it from that standpoint, but I do not see that if it were not necessary at this stage, that there would be significant unfairness or inability to manage those allegations, if relevant, in the context then applying in future.
69. I have already dealt with the Guardian's position in terms of the interests of the child, and the significance to A in particular but all three children of knowing the truth. I do not accept the Local Authority cannot deliver effective life story work to the children without a definitive narrative from the court following a finding of fact hearing.
70. So far as the time the investigation will take, taking account of the nature of the evidence, I would summarise that by reference to my earlier comments, and note that there remain evidential lacunae.
71. So far as the likely cost to public funds is concerned, there is little dispute that a multi-day hearing, certainly 5 to 7 days, is going to incur huge additional costs to the public purse. It will involve Ms F continuing to be involved in her capacity as the social worker managing the care proceedings for a longer period. It is not yet clear to me whether she would in fact be required to give some evidence, but irrespective of that she would be required to attend, she would be required to update the court if there were developments on the ground, and that continued engagement with this case would of course reduce her capacity to take on other cases moving into proceedings.
72. So far as the evidential result is concerned, I have already referred to some of the public interest issues in relation to the identification of perpetrators of child abuse on existing or likely future cases in which a finding one way or the other is likely to be of importance. For the avoidance of doubt, I do not regard the evidence in relation to the allegations of sexual abuse as particularly weak, but as a matter which would require proper assessment on the basis of full evidence.
73. In relation to the failure to protect issue, specifically paragraphs 7D and E, I do not regard the evidence as being such that it would be definitely rejected, but on an obvious reading there are particular weaknesses within it. It is not about whether allegations are repeated, that very notion is inimical to the purpose of an ABE, which is explicitly not for a child to repeat allegations but to give them the opportunity to provide a forensic account of what might have happened, which is why it stands distinct from an early account which is focussed upon providing sufficient information to understand the nature of the allegation and what steps might be necessary immediately to protect the child.

74. The fact that allegations can be repeated is a feature which would clearly need to be weighed, but (inaudible) and answer to the deficits or breaches in the extent to which the questioning of A on 11 October 2022 went far beyond the confine of obtaining an initial account properly understood in accordance with the statutory guidance.
75. The simplest point is that the ABE interview, which is the principal means of the child giving a forensic account, does not support the primary case of the Local Authority. It is in fact positively contradicted by it. There may be, as I have indicated, on weighing the evidence fully, scope to make findings. I do not reject it, but it is in my judgment particularly weak, and that is a factor which I can at least take into account in deciding whether I should engage in the determination of those allegations. That is particularly the case where there remains of course information which may be relevant to the context of these allegations because that has not yet been disclosed, which is why I am clear that I do not reject the allegations as incapable of proof.
76. The reality is that so far as the necessity or otherwise of the investigation, it is clear that a determination of these allegations will produce no benefit to the immediate welfare needs of these children. To tie that in with the relevance of the potential result of the investigation to the future care plans for the children, it can be said that there is no impact on the Local Authority plan in relation to the issues identified in section 31(3)(b). They will remain the same.
77. It can be said that the issues of welfare go broader, and touch upon the future issues which may emerge, which I have already referred to. It is also said that the central issue in bringing the threshold to the court were the allegations of sexual harm, and that a failure to grapple with those will not do justice to the case. The court's broad obligation is to deal with the case justly, having regard to the welfare issues involved.
78. The reality is that the patterns of parenting go back well beyond and are far broader than the allegations which emerged on 11 October 2022. The reality is that issues in this case date back to the period from 2014 and particularly 2018. During the latter period the Local Authority were extensively involved, but actions were not then taken which provided the necessary safeguarding for A and the children.
79. I accept there is nonetheless a gulf between the threshold as sought and that as agreed, but it is not a gulf which in my judgment is adverse to the welfare of any of the children. Fact finding will of course place the parties under additional stress, but that, I am afraid, would be a small price to pay if the allegations were otherwise necessary to determine or just to resolve.
80. A fair trial, as I adverted to earlier, is entirely possible now. There are gaps in the evidence, but they may be capable of being filled without undue delay. Whether they are remains to be seen, but I would not be too sceptical about the ability to regularise the evidential position. It is not submitted that there is any reason to think a fair trial may not be possible in the future if the issue emerges.
81. The best that can be said is that the memories of some of the witnesses, which are already going to be approaching a year old by the time the case is probably before the court, are not likely to improve over time. The counterpoint to that is the best accounts of the witnesses are likely to be the detailed statements already provided.

82. Father is not engaging, and undoubtedly if he were seeking certain orders he would need to engage and could then be cross-examined in relation to his position.
83. I now turn to the justice of the case, which is the opportunity to stand back, consider the overriding objective, and ask whether the extent of any gulf between the factual basis for the court's decision, with or without the fact-finding hearing, is justified in the particular circumstances of this case.
84. The first thing to say is that there is a live investigation, and a charging decision is imminent. There is a possibility that there will be criminal charges and proceedings in which these allegations will be explored fully. That may well result in A being subject to pre-recorded cross-examination in relation to the allegations. There is of course no guarantee, but it is a real prospect at this stage.
85. The proceedings have lasted 39 weeks. The disclosure is not complete, and it may be necessary to have a further hearing to consider the further disclosure and witness availability in order to list properly and proportionately for a hearing. That may well result in a hearing taking place not before the latter part of October 2023, or not less than 50 weeks from issue.
86. This is not a single-issue case, albeit the allegations of sexual abuse prompted the intervention this time around, but there are profound deficits in the parenting given to the children. The threshold already identifies meaningful and serious acceptance of deficits.
87. I do not regard the allegations specifically dealt with in paragraphs 7D and E as being of such significance as to justify the delay and the costs of a fact finding hearing of whatever length. Fundamentally, the issues which would be the subject of any future assessment are understood and are clear. Furthermore, I regard the evidence in relation to that as weak and take that into account in the evaluation of whether that issue, the failure to protect, should be litigated or not.
88. The determination of these issues will make no difference to the permanence provisions of the care plan nor the type of order. There will be advantages in determining the matter now, certainly in terms of witnesses being known and being contactable, possibly to a small extent memory, albeit that may already have diminished significantly. It is not inevitable that the issues in relation to sexual harm will need to be determined in the future, given the multiple issues in the case, but there is a real prospect that they may need to be considered, and there would be a benefit in being able to have a determination of that now rather than later.
89. The lack of a fact-finding narrative should have no significant impact on the ability to provide life story work for the children. Whilst it may help the paternal grandparents to know, alongside other family members, whether the Family Court has made a determination on the balance of probabilities, that will not in my judgment impact their ability to prioritise the safety and care of the children, given the issue will be left undetermined.
90. Ultimately, the price of delay is too high a price to pay when the children need to understand the final outcome, and their long-time home with their current carers. It is important that they are able to adapt to the arrangements for contact, and whilst there

are undoubtedly some benefits to the court grappling with those issues at this stage, on balance I do not regard the failure to do so as adversely impacting the welfare of any of these three children.

91. Accordingly, I refuse to determine the allegations in paragraph 5 and in paragraphs 7D and E, on the basis that I adopt the revised paragraph 7 of the threshold and am otherwise content that the threshold are established for the purposes of making final orders in accordance with section 31(2) of the Children Act 1989. Subject to any clarification of this *ex tempore* judgment, that is my judgment.

JUDGE PATES: Let's deal with that: Is there any clarification or application please arising out of that determination? Ms Ross?

MS ROSS: Your Honour, purely to make clear that given the wording of the revised paragraph, that it is framed as a potential risk rather than an actual risk, and that that is the basis upon which the court makes -- I would not want there to be a suggestion that it is a finding of sexual risk by Father, and then that to cause any issue.

JUDGE PATES: I have taken it on the basis that it is a potential as opposed to "I knew", so it is a knowledge that "I ought to have been aware there was a risk, I wasn't positively aware there was one" in the way 7D and E -- so there is an ought to, and there was clearly a failure to recognise a risk, but it was a risk which was thought to be potential.

MS ROSS: Yes.

JUDGE PATES: So, it is not there is not one there, that is how I have read it, in that context.

MS ROSS: Your Honour, I am grateful. Nothing further from the Local Authority in terms of clarification.

JUDGE PATES: Yes, any issues or any clarification or applications?

MS DOYLE: No, thank you, your Honour.

MS DEANS: No, thank you, your Honour.

MS TURNER: No, thank you.

JUDGE PATES: Okay.

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**(This judgment has been approved by the Judge.)**