

IN THE FAMILY COURT AT WEST LONDON

West London Family Court,
Gloucester House, 4 Dukes Green Avenue
Feltham, TW14 0LR

Date: 24 November 2023

Before:

HIS HONOUR JUDGE WILLANS

Between:

The London Borough of Merton

Applicant

- and -

(1) The Mother

Respondents

(2) The Father

(3) The Children (by their Children's Guardian)

Katherine Lewis (instructed by **Applicant Legal Department**) for the **Applicant**
Louise MacLynn KC (instructed by **Atkins Hope Solicitors**) for the **First Respondent**
Sam Momtaz KC (instructed by **Duncan Lewis Solicitors**) for the **Second Respondent**
Sharan Bhachu (instructed by **Goodman Ray Solicitors**) for the **3rd-5th Respondents**

Hearing dates: 24 November 2023

JUDGMENT

His Honour Judge Willans:

1. In this case the children's guardian supported by the applicant local authority seeks the appointment of an expert. The respondent parents oppose such instruction. This judgment explains my reasons for refusing the application at the hearing on 24 November 2023. I have reached this conclusion having had regard to the documents contained within the hearing bundle and the submissions (written and oral) from counsel for all parties. I am grateful for those concise and helpful submissions.

Concise Background

2. I will keep this background to the bare minimum required to understand this decision.
3. The mother was party to previous proceedings concluding in 2021 under which her four older children were made subject to a supervision order and shared child arrangements order in favour of the mother and the maternal grandmother. I am informed that subsequent to this decision each of these children are now cared for by family members and not by the mother.
4. In February 2022, the parents suffered the death of one of twin babies at the age of 1-month. The circumstances surrounding this event did not lead to the applicant commencing proceedings. It is a matter of record that the parents accept the child was found unconscious in circumstances of co-sleeping.
5. These proceedings commenced in May 2023 and concern the mother's three youngest children aged 3 years and under (none of whom were subject to the first proceedings – the second respondent father was not the father within those proceedings). On 13 June 2023, the Court held a case management hearing and I note the comprehensive directions (including expert assessments) included within that order. The matter was listed for issue resolution hearing on 12 October 2023. That hearing proved to be ineffective in the light of the current expert application under consideration within this judgment and in the light of other case management issues (which were separately determined at the hearing before me).
6. I have reviewed the threshold document found within the bundle at [556] and which was before the Court on 12 October 2023. I will not recite the allegations on which the applicant relied save to observe it did not include the issue in respect of which the expert is now asked to report and to which I return below save that it alluded to the impact of that event on the parents at an emotional level and raised a risk of co-sleeping as a risk in the case. The independent social worker has reported on this as a feature of the case [1220-1221] among other matters.
7. By a Part 25 application dated 7 October 2023 the guardian sought the appointment of an expert on the following basis:

This is a concerning matter which features the death of a 2-month-old sibling child...while co-sleeping. Coroners' documentation refers to the death as being treated as 'unexplained.' The guardian is concerned that children in these parents' care have been put at risk but at this time it is unknown the exact level of risk, and therefore whether the parents have insight into this as we do not know exactly what happened. Thus, the court may need to seek a finding of fact hearing to explore this properly and expert overview of the postmortem medical and police papers, mothers maternity records and births records for the birth of the twins to provide if there is any missed evidence/ opinion as to causation can be formed.

This is a family where there have been previous proceedings...the LA have again issued but despite the infant's death in the interim, have not sought to explore this. The guardian had to request the papers in respect of death than the LA presenting they would seek the evidence/ considering the issue when issuing, which has led to delay.

The parents' parenting capacity has been assessed, but those assessments have not taken into consideration this death properly when looking at parenting ability, and it cannot be ascertained if their actions were in fact the cause which is necessary to know for a just disposal of proceedings. If the parents were to parent or have unsupervised time with these or any other children in future it is relevant to safety. While the expert can explore the parents understanding of risk of co-sleeping there is a fundamental difference if there has been a death caused by their actions and any parenting / psychological assessor cannot go far enough - any assessor needs to know the facts to do a proper analysis.

8. In summary this submission is that the death of the child was unexplained and that an explanation needs to be sought / obtained to enable a just disposal of the proceedings. In pursuit of this answer the guardian proposes the instruction of the expert whose CV describes his clinical experience as including 'a major research and clinical interest in the investigation and care of families after unexpected deaths of infants and young children.'
9. On 12 October 2023, the Judge felt unable to determine the application and adjourned the matter to enable further investigations to be undertaken and for leading counsel for the parents to be instructed. The issue for me is as to whether I should appoint Professor F ('the expert') to report as to the causation of death of the child.

Current available evidence

10. As would be expected the death of the child was thoroughly investigated to seek to establish the cause of the death. I understand some of this evidence may not have been previously before the Court. I now find the evidence in section **K3** of the bundle. It is sensibly summarised by counsel for the father in his skeleton argument and the following is noted:
 - i) Each of the parents were interviewed separately by the Metropolitan Police Service. The current position of the police is found at [1377] and confirms the case is closed and no prosecution has followed.
 - ii) Dr R (Consultant Paediatrician) physically examined the body and took a history from the parents. The confirmed co-sleeping. His view was that this was a SUD of an infant without any obvious cause [1076].
 - iii) Dr M (Paediatric Pathologist) carried out the autopsy. His conclusions are found at [1079] and include a synthesis of various tests. He concluded there were no suspicious findings with no external injuries or injuries to internal organs; no fractures were revealed on a full body skeletal survey; no fractures were identified on post-mortem examination and toxicology revealed no adverse findings. Further radiology did not reveal features to suggest an underlying metabolic bone disease or skeletal dysplasia; microbiology indicated no infection; tests for metabolic diseases were negative; there was no natural disease revealed on histologic examination. He did make clear however that smothering or suffocation (to include accidental overlay) of an infant this age would be possible without leaving any positive signs. Applying the balance of probabilities and in the light of the above there was no cause, whether natural or unnatural which accounted for the death, As such the cause of death remained *unascertained*. He discussed SIDS but explained how this could not be the appropriate category given the fact of co-sleeping. As such the appropriate category was SUD either unexplained or unascertained.

Arguments

11. I bear in mind the guardian's previous skeleton argument for the October hearing and the supplemental argument for this hearing. The guardian makes clear this is not as yet an

application or request for the hearing of a fact finding. Rather it is the instruction of an expert for the purposes of establishing (if warranted) the factors considered in such an application. I refer back to §7 above. The expert is said to be required as 'this this may be the last opportunity for a proper and full assessment to define the risk to these and any future children of this young family.' It is contended this need not lead to delay if the outcome remains neutral but that if a positive finding comes back then any additional delay would be justified. Whilst supporting the application the local authority added nothing by way of argument.

12. The parents took a common position. They argued the appointment was not necessary given the available evidence and that it would cause unjustified delay. In addition, it would have a broadly negative impact on the parents and family without any purpose. The application amounted to a fishing exercise and any conclusion as to co-sleeping would not amount to a threshold finding. Whatever the view of the expert it would have to be assessed on the basis that it was a paper exercise in comparison to the physical examinations and conclusions drawn at the time. There is no basis for arguing the instructed ISW has been unable to fully engage with the issue as to risk from co-sleeping in the absence of an expert report.

Decision

13. At the conclusion of the hearing, I indicated I would refuse the application and would provide detailed reasons in due course. These are my reasons.
 - 13.1 First, I consider this is not a case which exists in an evidential vacuum. I agree with those for the parents who argue there has been a thorough and extensive consideration of the cause of death of this child. The Court has access to the results of a physical examination undertaken by a consultant paediatrician and the post-mortem examination undertaken by a paediatric pathologist. In addition, an assessment of contemporaneous circumstances can be found in the police process which ran alongside the medical investigation.
 - 13.2 Secondly, the above process has plainly reached conclusions as to causation. It is quite clear these have been approached on the basis of the same legal standard (the balance of probabilities) as I would apply on any assessment. The conclusion reached is of 'sudden unexplained death in infancy - unexplained' ('**SUD**'). Whilst this conclusion does not identify a discrete cause it is nonetheless a professionally acceptable categorisation of cause of death. The 'unexplained' component is not suggestive of a lack of thorough investigation rather it is the conclusion reached on the available medical investigation after a thorough investigation. It is very difficult to understand on what basis a paper review would likely reshape conclusions as to cause of death with any greater accuracy.
 - 13.3 I note the distinction drawn between **SUD** and 'sudden infant death syndrome' (**SID**). It appears accepted that were that to have been the conclusion then no further investigation would be warranted within these proceedings. However, I note that this finding was not available to the professionals given the acknowledged fact of co-sleeping. This is a distinction as to categorisation, but it says absolutely nothing as to the actual cause of death save that it widens the pathological landscape.
 - 13.4 The guardian is clear in contending this application solely relates to establishing whether co-sleeping was the operative cause of death. I am grateful for this concession but note there is evidence within the papers of further analysis / testing such as a skeletal survey and toxicological testing which rule out the same as being operative causes. In reality it is difficult to conceive on what basis this further

investigation could be of anything other than a consideration of the role of co-sleeping as explanation for death.

- 13.5 It is right to acknowledge that there is no question that co-sleeping is at this time a **possible** cause of death. This is an undeniable consequence of the evidence available. As such the purpose of the expert would have to be so as to ascertain whether the possible could be found to be the **probable**. As I have noted the investigating clinicians did not express themselves in such terms.
- 13.6 But I question the actual relevance of being able to turn the possible into the probable (putting to one side for the moment the challenge this might face). I accept it would be informative (although of course this would be limited to the extent the parents/parties accepted it as a conclusion) but beyond that what more would it achieve?
- 13.7 I do not accept alone it would actually reshape a meaningful assessment of the case. I do not accept the co-sleeping without more would amount to a threshold allegation or could therefore justify a fact finding. I do not accept that co-sleeping is without more an act of culpability insofar as the death is concerned. It might explain the death without placing blame on the parent. I accept that certain forms of co-sleeping may by their very nature raise a threshold allegation (e.g., sleeping on an angled sofa with the child to the inner side of the sofa). Alternatively surrounding circumstances **might** make co-sleeping which is otherwise blameless subject to criticism (e.g., in conjunction with alcohol or drug consumption). But as is the case here co-sleeping in a bed with the child placed to the extremity of the bed is not of itself likely to be sufficient. That would therefore call into assessment the circumstances of the co-sleeping. But that raises the question of why this would require an expert given this would be an entirely factual matter. At this point, the expert will not be able to grasp a better understanding of the circumstances from the papers.
- 13.8 I bear in mind that this feature has of course been known to all parties since the commencement of the proceedings and yet the application has been left to late in the proceedings. The applicant whilst supporting the application today has not to date made this a material part of its case.
- 13.9 It is suggested the consideration of probable cause is required to enable the professional assessments in this case to come to a proper and considered conclusion and that there would be a material distinction to be drawn between a case in which co-sleeping was a possible cause of the death and the probable cause of the death. It is said this has materiality with respect to the parents understanding and response to the same. I accept that a clear conclusion as to this issue would have some benefit, but I do not see that it is needed to assess the capacity of the parents to care for the remaining children. It seems clear the ISW has been able to engage with this feature of the case within needing a determination as to probable cause.
14. In reaching my conclusions I have had regard to the case law¹ referred to and to the principles underlying the instruction of experts². The principled test is one of necessity and consideration should be given to:
- (a) *any impact which giving permission would be likely to have on the welfare of the children concerned, including in the case of permission as mentioned in subsection (3) any impact which any examination or*

¹ Oxfordshire CC v DP [2005] EWHC 1593 Fam; Re H (Children) (Fact Finding) [2021] EWCA Civ 1192; H-W (Care Proceedings: Further Fact-Finding Hearing) [2023] EWCA Civ 149

² section 13(6) & (7) Children and Families Act 2014

other assessment would be likely to have on the welfare of the child who would be examined or otherwise assessed,

- (b) the issues to which the expert evidence would relate,*
- (c) the questions which the court would require the expert to answer,*
- (d) what other expert evidence is available (whether obtained before or after the start of proceedings),*
- (e) whether evidence could be given by another person on the matters on which the expert would give evidence,*
- (f) the impact which giving permission would be likely to have on the timetable for, and duration and conduct of, the proceedings,*
- (g) the cost of the expert evidence, and*
- (h) any matters prescribed by Family Procedure Rules.*

15. Reflecting on the above I consider factor (d) to carry significant weight. I have noted the high-quality evidence available, evidence which was obtained for the very purpose of assessing likely cause of death. Evidence which had the profound benefit of being contemporaneous and which was able to physically exam the child. I have received no foundation for casting doubt on either the qualifications or the quality of those investigations. I also have regard to delay. These proceedings have already exceeded 26 weeks and today I have had to extend the proceedings further. I accept it is possible this information could be obtained without causing further delay but there is a reasonable likelihood it would push the case back further into May of next year. For the avoidance of doubt this might be delay which was justified and indeed required were the circumstances different. But in the circumstances before me I consider it highly likely such delay will be shown to have had no purpose at all. I also bear in mind (e) insofar as there is evidence already in existence from professionals on this very issue. In my analysis above I have commented as to factor (b) in that the issue would be co-sleeping alone; this is an acknowledged fact of the case, and it seems clear it is a possible cause of the death. I have struggled to see what benefit would be provided to the case by greater clarity for the reasons given above. I bear in mind the other factors but make no specific further comment.

16. Addressing the legal authorities, I bear in mind each case will turn on its own particular facts and that care needs to be taken in drawing too much from the specifics of a case. These authorities relate to the question of a fact-finding hearing, and I appreciate this is not the specific issue before me. However, this application is a potential prelude to the same and so warrants an equivalent approach. In the **Oxfordshire** case the Court noted the following non-exhaustive list of factors to bear in mind when considering a fact-finding hearing:

- a) The interests of the child (which are relevant but not paramount)*
- b) The time that the investigation will take;*
- c) The likely cost to public funds;*
- d) The evidential result;*
- e) The necessity or otherwise of the investigation;*
- f) The relevance of the potential result of the investigation to the future care plans for the child;*
- g) The impact of any fact-finding process upon the other parties;*
- h) The prospects of a fair trial on the issue;*
- i) The justice of the case.*

17. In **Re H** when reflecting on the Oxfordshire case the Court noted these factors should be applied flexibly in the light of the overriding objective and indicated at §22:

(i) When considering the welfare of the child, the significance to the individual child of knowing the truth can be considered, as can the effect on the child's welfare of an allegation being investigated or not. (ii) The likely cost to public funds can extend to the expenditure of court resources and their diversion from other cases. (iii) The time that the investigation will take allows the court to take account of the nature of the evidence. For example, an incident that has been recorded electronically may be swifter to prove than one that relies on contested witness evidence or circumstantial argument. (iv) The evidential result may relate not only to the case before the court but also to other existing or likely future cases in which a finding one way or the other is likely to be of importance. The public interest in the identification of perpetrators of child abuse can also be considered. (v) The relevance of the potential result of the investigation to the future care plans for the child should be seen in the light of the s. 31(3B) obligation on the court to consider the impact of harm on the child and the way in which his or her resulting needs are to be met. (vi) The impact of any fact-finding process upon the other parties can also take account of the opportunity costs for the local authority, even if it is the party seeking the investigation, in terms of resources and professional time that might be devoted to other children. (vii) The prospects of a fair trial may also encompass the advantages of a trial now over a trial at a possibly distant and unpredictable future date. (viii) The justice of the case gives the court the opportunity to stand back and ensure that all matters relevant to the overriding objective have been taken into account. One such matter is whether the contested allegation may be investigated within criminal proceedings. Another is the extent of any gulf between the factual basis for the court's decision with or without a fact-finding hearing. The level of seriousness of the disputed allegation may inform this assessment. As I have said, the court must ask itself whether its process will do justice to the reality of the case."

18. In **H-W** the Court added the following:

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...

37. The decision whether or not to hold a fact-finding hearing is one of the most important case management decisions to be taken in the course of proceedings under Part IV of the Children Act. It is not always a straightforward decision. Care proceedings are quasi-inquisitorial. They are not confined within the tramlines of adversarial pleadings. There is therefore a recurrent danger that they veer off track. In a case with a complex family history, the court will often be encouraged by one party or another to explore an issue that has been unearthed during the investigation. Judges have to be very careful before acceding to such an application to avoid the unnecessary use of the limited resources available. In deciding whether to hold a fact-finding hearing, it is imperative that they conduct a proportionality analysis by reference to the factors identified in the *Oxfordshire* case and *Re H-D-H*."

It is contended the magnetic features in resolving that case were as to (a) the necessity or otherwise of the investigation, and (b) the relevance of the potential result of the investigation to the future care plans for the children. I agree with this analysis.

19. In referencing these principles, I am persuaded there is no need for the expert to be instructed in order to potentially assist me as to whether that which is currently known to be possible is by accepted legal principles more likely than not. I observe 'potentially' as I keep in mind the question of translating the expert's possible conclusion in such regard into a finding of the Court would itself require a decision as to future fact finding and would itself likely be controversial given the alternative evidence available. Whilst it is not for me to conduct a mini-trial at this stage I am conscious of the submission already made on behalf of the parents that a Court could not, even in the presence of a positive opinion as to cause from the expert assume that would enable a finding given the opinions expressed by the examining clinicians.

20. I am mindful of the factors in the **Oxfordshire** case. I question the prospects of **conducting a fair fact-finding hearing** in the circumstances that confront me. As noted above a conclusion of co-sleeping as likely cause would be but stage 1 of an investigative process conducted by

the Court. For this to justify a threshold finding it would require proof of significant harm attributable to the care given by the care giver. I consider this would necessitate an investigation not of the fact of co-sleeping but of the circumstances surrounding the same. With the passage of time material information such as parental toxicology would not be available. There would be no opportunity to carry out a non-paper examination to counter any views reached by the expert. In this context I doubt the real benefit of any **evidential result** reached at the end of such a process. To what extent would it materially progress the case. I accept one would have a finding, but I question to what extent this materially assists the professionals in working with the parents or the real likelihood of the parents reshaping their approach as a consequence. Plainly, I have doubted the **necessity** of the process given significant and high-quality existing evidence. Finally, I cannot for my part see that the result of the same would have obvious **relevance for the investigation as to the future plans for the children**. In this case the investigation is already proceeding on the basis that co-sleeping is an important risk factor. The key issue in such regard appears to be the capability or willingness of the parents to recognize the same and develop their parenting style in the light of the same. I disagree with the guardian that something significant changes if the parents are confronted on the same basis in the light of a professional opinion as to probability as compared to possibility. I agree the situation would be different if this were a suggested fact-finding issue which would of itself be a basis for determining placement for the children. But it is not. As to the **interests of the child** I consider these are far more closely linked to a timely resolution of these proceedings than to a determination of co-sleeping as a likely cause of death of their sibling. I am mindful of the **time the investigation will take** and particularly so given the likelihood of it further delaying the process whilst in my assessment bringing limited value to the process. Considering the **justice of the case** and the related observations in **Re H** I question the real extent of actual dispute between the parties in relation to this issue. As I have made clear there is no factual dispute as to co-sleeping and the evidence is clear that this may have been a possible cause of death. It is a risk factor which needs to be understood and assessed with respect to the future care needs of the other children. It can be assessed. It does not require the Court to elevate the possibility to a probability.

21. I finish by reflecting on **H-W** and find the magnetic features for me in this case is the existing evidence available to the parties which is of high quality against what seems to me the rather limited likely benefit of the additional expert evidence sought to be obtained. I fear pursuit of this may indeed cause this case to veer off track as suggested by that Court with the Court losing sight of what it has already available in search of greater clarity, clarity which I very much fear is likely to be illusory on the facts of this case.
22. I will now circulate this decision and allow the parties until 4pm on Thursday 30 November 2023 to raise any arguments consequential on the same. This can be done in writing if relevant. Otherwise, the case now proceeds to an issue resolution hearing as discussed at the hearing and embodied in the case management order.
23. This judgment will be published with the front page anonymised. If there are any corrections to the judgment or broader proposed steps to anonymise the judgment then can the same be provided by the time/date above.

His Honour Judge Willans