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Case No: BM21C00128
Neutral Citation Number: [2024] EWFC 244 (B)

IN THE FAMILY COURT AT BIRMINGHAM

Civil & Family Justice Centre
33 Bull Street
Birmingham
B4 5DS

Date of hearing: 24 April 2024

Before:

DISTRICT JUDGE PARKER

- -

Between:

S	**Applicant**
- and -	
(1) BIRMINGHAM CITY COUNCIL	**Respondents**
(2) H	
(3) F	
(4-6) THE CHILDREN, via their Guardian	

- -

- -

MR CHIPPECK (C) (instructed by **GT Stewart Solicitors**) for the **Applicant**
SIMON MILLER (C) (instructed by **Birmingham Children's Trust**) for the **First Respondent**
The **Second** and **Third Respondents were not present or represented**
ANNABEL HAMILTON (C) (instructed by **Star Legal Solicitors**) for the **Guardian**

- -

JUDGMENT

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DISTRICT JUDGE PARKER:

Introduction

1. On 6-10 March 2023, I heard a final hearing of the local authority's application for care orders for SH, SA, SI and A and care and placement orders for A. The case came before me in week 90.

2. The mother, S, was unrepresented by choice at the time and she was not in attendance on days 1 to 4 of the hearing or for judgment on day 5. Again, by choice, despite clearly wishing to challenge all the evidence. I note she also failed at the time to attend the advocates' meeting.

3. I note from my judgment in those proceedings that I had read all the bundle, which consisted of 1,440 pages, including Mother's response to the guardian's report and a letter dated 2 March 2023 which she had written, setting out the reasons why she did not intend to attend the final hearing. I noted that the mother's engagement with professionals within those proceedings had been limited and her compliance with court orders somewhat patchy.

4. There was a negative PAMS assessment of her for which she lodged a part 25 application for an independent social work assessment which was refused. I note that a ground rules hearing took place on 25 October 2022 in relation to her in respect of her participation at the final hearing in accordance with the cognitive functioning assessment as provided for within those proceedings, more particularly paragraphs 17 and 18 of that assessment, and more particularly the use of simplified language and breaks, given her general difficulties in learning.

5. At the outset of the proceedings, the local authority proposed placing the mother and children in a residential unit in order to assess how she was able to manage the children as a sibling group and impose routines and boundaries. However, whilst initially agreeing to this, the mother subsequently retracted her agreement and at a hearing on 15 July 2021 the children were removed from her care. In March 2022, Mother stopped contact with the children in reaction to the local authority's proposed reduction in family time.

6. The threshold document for the purposes of the care proceedings before me relied upon the mother's long-standing substance and alcohol misuse, neglect, domestic abuse and chaotic lifestyle. The Mother did not accept that the threshold was crossed. The children's guardian supported the local authority's application, a key issue being Mother's inability to accept responsibility, her tendency to blame others and her lack of engagement.

7. On day 1 of the final hearing before me, (I had no prior involvement in this case until then) I refused Mother's application to adjourn for the reasons set out in my written judgment at pages 38 to 71 of the bundle The outcome of this was notified to the mother and although no formal permission was sought to appeal this decision, she indicated to the court that her intention not to attend remained steadfast. Despite that, I treated her subsequent challenge to my decision as an appeal and again refused her permission to appeal for the reasons set out in my written judgment.

8. Throughout the multi-day hearing, the mother was also informed of the subsequent change of care plans for SH and SI. At the conclusion of the hearing I found the threshold met for the reasons set out in my judgment and made care orders for the

four children and a placement order for A, the consent of the mother was dispensed with. No permission to appeal that order was made.

9. This brings me to the application currently before the court which is dated 4 January 2024. The mother now seeks to reopen my findings on the basis that she now states that she was not able to participate in the proceedings by reasons of the absence of an intermediary when one was required. Accordingly, the proceedings were procedurally unfair.

10. In doing so the mother relies upon the papers from a new set of proceedings in respect of a child born subsequent to the conclusion of the previous proceedings under case no. BM23C5019C, including an intermediary assessment report dated 24 August 2023.

11. That report confirms sight of the previous cognitive assessment of the mother by Dr Furlong dated 25 August 2021. It comments that:

> "The court experience is likely to be an anxiety-provoking situation for the mother and her difficulties may mean that she is likely to find it challenging to communicate effectively and may see the court as intimidating, which could lead to increased levels of anxiety and/or stress for her, which could lead to the following: feelings of panic or mental overload, a shut down in terms of performance and engagement, outbursts of frustrated behaviour and the urge to provide any answer simply to bring the questioning to an end".

12. A number of recommendations were made by the expert which is not unusual and often quite standard in cases of this nature, none of which, however, in that report was for the appointment of an intermediary. I know not why the current proceedings proceeded straight through to an intermediary report being ordered without an updated cognitive assessment report being required. However, it is not for me to second-guess the reason for that. However, the assessment report that has been

provided in the current proceedings concludes that the mother is a vulnerable person in the 'court communication environment', will struggle during hearings and recommends the use of an intermediary. Of course, this is alongside other recommendations not dissimilar to those put forward previously by Dr Furlong.

13. This matter initially came before me on paper on 15 January 2024. I refused the application of the court's own initiative pursuant to FPR 18.11 for the following reasons:

14. Firstly, that throughout the final hearing the mother failed to attend through choice, despite being given ample opportunity to do so.

15. Secondly, the application appears to be in essence an appeal via the back door and significantly out of time.

16. Thirdly, in the alternative of it being an application under rule 27.5(3), it equally fails the necessary test.

17. However, by order of 17 January 2024, following the applicant exercising their right, which they are entitled to do under FPR 18.11 to review my decision at an attended hearing, I ordered for the matter to be listed for full argument on the basis of submissions only, as a remote hearing, with selected papers to be provided for in the order. As I have indicated, I have had the opportunity of a full and complete bundle which encloses both papers from the previous proceedings and indeed from the current proceedings which are still ongoing.

18. I note the report from Frank Furlong dated 24 August 2021. I repeat that it records that notwithstanding the deficits in Mother's cognitive skills, the mother demonstrated her ability to understand the information that is presented to her using simplified

language where necessary. Although it records she experiences general difficulties with learning, her profile does not satisfy the criteria for a diagnosis of significant learning disability. As indicated, it makes a number of recommendations for professionals working with her as well as accommodating her in court.

19. I have also had sight of the PAMS assessment dated 2 November 2021. It records that:

> "Mum to her credit engaged in the assessment and there are a number of positives. However, the assessment reflects her complete denial of the allegations made against her which she contended as being malicious. The assessor was concerned as to her ability to take any responsibility for the situation regarding the children and the local authority's involvement, placing the blame on others. The assessor concluded that the mother showed limited understanding of the children's emotional needs and was unable to offer the parenting that these children needed, despite some improvements having been made".

20. I now turn to the papers from the current ongoing proceedings. The subject child of those proceedings was born on 9 July 2023. I note that the final hearing before me was on 6-10 March 2023. Mum, of course, would have been five months pregnant at the time, although at the time of the application for an adjournment, no information had been provided as to her being so. None of the professionals were aware of that and there was no medical evidence filed in support of her application for an adjournment. The hearing took place before me four months prior to the birth, and by my calculation Mother would have been in the second trimester.

21. I note that within those proceedings an independent social work assessment was undertaken by the previous assessor. I note that mum refused to engage with that assessment due to perceived bias, bearing in mind that the assessor has, of course, previously negatively assessed the mum in the proceedings before me. That assessor remained of the view that her assessment of the mother remained negative due to her

inability to work with professionals, a lack of insight into her own parenting and inability to display capacity to change.

22. Mother thereafter pursued an application for assessment at a residential unit. Although the unit concerned was unable to recommend a placement, they were prepared to undertake an initial viability assessment.

23. Within those proceedings an applications was made for an intermediary assessment and a part 25 independent social work assessment.

24. By order of 2 August 2023, the court approved for there to be an initial assessment by the residential unit. The application for an independent social work assessment was adjourned and an intermediary assessment was directed.

25. I note that within the current proceedings in relation to the new child that mum indicated that she believes she would have benefited from the support of an intermediary in the proceedings before me as she believes that having such support would have improved her understanding of the court process and the legal advice given. I note, however, that at the pre-proceedings meeting in relation to the new child, the mother agreed with the local authority that an updated cognitive functioning report was not required.

26. With regard to the residential unit's preliminary assessment of the mother and the new child, it recommends following on from that a parent only residential assessment for three weeks. That ultimately led to an assessment from Dudley Lodge on 11 January 2024. Within that report it shows that mum has demonstrated an ability to meet her daughter's basic care needs, albeit there was an initial reluctance to change and to trust professionals. The report states that they remain tentative as to Mother's ability

to make long-term changes due to her recent acceptance of the concerns, but she has displayed commitment. However, this needs to be tested in the community and the vulnerabilities remain and cannot be underestimated, as such change as the mother has evidenced is in its infancy and untested. It also comments that the assessment relates only to the new child, and the unit would have concerns as to Mother's ability to care for more than one child at this time alongside her daughter.

27. I have read the various skeleton arguments before me today.

Mothers Skeleton Argument

28. On behalf of the mother, it is the mother's case that the threshold findings and welfare judgment in March 2023 should be reopened, primarily because firstly of fresh evidence and secondly, procedural irregularity and a breach of Article 6 by the consequential hindsight analysis (as it is described) which was not apparent to the court at the time.

29. The fresh evidence, of course, relates to the subsequent intermediary report obtained in the second set of proceedings, post-conclusion of the first set of proceedings dealt with by me. The proceedings relating to the new child, I would add, are not being case-managed by me and I have had no involvement with them.

30. I also am given to believe that there are proceedings afoot to oppose the consequential application for an adoption order for A. I am not involved in that either.

31. Mother also relies on the fact that she has made, in her words, transformative progress due to the impact of the intermediary's involvement. It is stated that the fact that in this new set of proceedings the Mother requires an intermediary, is in direct contradiction to the report of Frank Furlong in the proceedings before me, although I

note that within those proceedings his recommendations were not challenged and moreover was the focus of a subsequent ground rules hearing.

32. It is contended that one of the reasons why the Mother failed to attend the hearing was because she was pregnant and she was worried as to the effect that this would have on her stress levels. I accept the mother was indeed five months pregnant, but at the time of the application for an adjournment before me, the Mother had provided no evidence of this or any evidence as to her ability to participate in the hearing. Therefore, the application for an adjournment was refused. I also refused permission to appeal and subsequently no further evidence was filed. The hearing, therefore, proceeded over successive days. The point being made is without an intermediary, Mother did not feel able to attend the final hearing, which was conducted wholly in her absence.

33. Mother seeks to reopen my findings not only in relation to threshold but also the welfare disposal as well. Of course, there is a balance between the finality of the court process and the court making soundly-based welfare decisions. In that respect the court has to have regard to the effect of delay, the importance of establishing the true facts, the nature and significance of the findings and the relevance of further evidence.

34. The question, of course, for the court, and I will return to this later, is will this result in any different finding?

35. There has to be solid ground for believing that the earlier findings require revisiting. Mere speculation and hope is not enough.

36. Significance is also placed on the fact that the mother was not represented at the final hearing and would not have known of her right and entitlement to have an intermediary. However, I note that at some stages during the process she was represented.

37. It is contended that not having the assistance of an intermediary impacted upon Mother's ability to participate. Of course, it is to be noted that Mother did not participate at all at the final hearing. However, it is contended that with an intermediary she may well have done.

38. In essence, the issue is one of fairness within mum's Article 6 rights bearing in mind the seriousness of the proceedings, which included a placement application for A. It is contended that this is an absolute right and once breached, speculation as to how an intermediary would have assisted the mother is neither here nor there. Reliance is placed on *A Local Authority v M* [2022] EWHC 2793, although it is said this can be distinguished due to mum not being present.

39. It is contended that the fact that an intermediary would not be required for the whole trial does not negate their importance, because it may have enabled her to participate. That due to the fact that Mother did not have a solicitor, her difficulties were not identified. Finally, it is contended that the transformative effect of having an intermediary in the new proceedings supports the application.

40. I have read the skeleton argument of the local authority and the children's guardian. I will deal with the children's guardian's position first.

The Guardians Skeleton Argument

41. Quite rightly, the children's guardian questions what precisely is to be opened. It appears that it is the entire hearing, both threshold and welfare disposal. Reference is made to the fact that no appeal was lodged as to the decision before me in March 2023 and is now considerably out of time, the intermediary report itself being dated 24 August 2023 and the application before it only being issued in January 2024. Although, in a very helpful opening submissions by Mother's representative, an explanation has been provided with regard to that, which I shall refer to.

42. The guardian furthermore raises the issue that if the mother wished to challenge the making of a placement order she could have applied under section 24 of the Adoption and Children Act 2002. Pray in aid the transformative changes she says she has now made, as well as seeking to discharge the care orders.

43. As to the appointment of an intermediary, it is pointed out that alternative adaptations could be made to ensure Mother's participation without one and that even a recommendation for an intermediary, (for which there was no such recommendation in the previous proceedings) is not itself determinative. That one should only be appointed when it is necessary to do so.

44. It is pointed out that within the proceedings the court had the benefit of the report of Mr Furlong, who of course did not himself recommend such an appointment and indeed, no such appointment was sought by any of the other parties. It is contended that indeed, if one had been requested at the time, it is questionable, based upon the evidence, that one would have been granted. It is furthermore reiterated that the mother provided no medical evidence to assist the court in relation to her application to adjourn the hearing and understandably, the children's guardian sees Mother's failure to attend the hearing of fundamental importance when it comes to considering

the application currently before the court. The fact that she had failed to attend, it is submitted, would render the attendance of an intermediary wholly redundant.

45. It is also contended that the fact that the mother was by choice unrepresented, also removed yet another important layer of support for her. It is contended by the guardian that in elevating the potential involvement of the intermediary, as the applicant does in this case, ignores other factors at play; the impact on her of the previous proceedings and its outcome and the involvement of her newly-appointed representatives.

46. The court is reminded that an intermediary is for use at hearings only and usually when evidence is to be given. It is, therefore, reiterated that she absented herself from the hearing and also refused any representation.

47. The guardian also makes the point as to the inevitable delay a rehearing would entail, when the court has made a placement order twelve months ago and for a child who will soon be four, and therefore potentially at the cusp of a viable adoptive placement. In conclusion, it is the children's guardian's position that a rehearing would not result in a different finding or outcome and there are no solid grounds justifying revisiting the earlier findings and therefore the application should be dismissed.

Local Authority's Skeleton Arguement

48. The local authority takes a similar course and agrees with the children's guardian that there are no solid grounds for revisiting the court's findings in March 2023, either in respect of threshold or welfare. That, in essence, this is an appeal out of time. It is also adds that there has been no application to discharge the care order, revoke the

placement order or appeal the judgment and similarly, the application should be dismissed.

49. I have heard very helpful submissions from all represented parties.

Mother's Submissions

50. On behalf of the mother, whose application it is, some context has been given in relation to the delay in proceeding with this application. The mother gave birth to her most recent child on 9 July 2023. An intermediary report was obtained in August 2023 and the original application in relation to revisiting the findings was made in the current proceedings, for which funding was refused as the Legal Services Commission indicated that it should proceed by way of a standalone application made within the proceedings before me. This required supporting information.

51. There was a delay in relation to that, because Mother was then in subject to a robust assessment with her new child. Information was provided and further questions were raised by the Legal Services Commission prior to funding eventually being granted shortly before Christmas 2023. Therefore, the application came in on the first available date.

52. Having dealt with that, Mother's counsel set out the reasons for reopening matters, both in relation to threshold and welfare.

53. Firstly in relation to further evidence and also the infringement of Article 6. Mother's counsel was at pains to add that they are not suggesting the court was in error but consequences flow from the receipt of the intermediary report that has now been provided. That on balance, the court should accept that mum's ability to participate is

settled and fixed. That if in August 2023 she needed an intermediary, then it is likely that she needed one in March 2023.

54. It is put forward that vulnerable parties need to have their rights safeguarded and protected, especially given what was at stake in the previous proceedings. It is a fundamental right of fundamental importance, irrespective of whether the outcome is speculative or not. It is contended that it is not Mother's fault that she did not attend the hearing. She did not attend the hearing because of the stress an attendance would have necessitated, for which an intermediary may well have made a difference. Therefore, by objective analysis, we have information now that we did not have at the time that the mother needed the support of an intermediary.

Local Authority's Submissions

55. In essence, they say the application is pure conjecture and speculation. It is put forward that within the previous proceedings as well as the current ongoing proceedings, Mother does show some lucidity and understanding of the process, in her response to the evidence, and certainly with regard to her correspondence with the court at day 1 of the original hearing before me, in her request for an adjournment.

56. They draw my attention to the report from the residential in relation to the new child and that the transition into the unit was not itself without difficulties. There was active avoidance to attend at the outset, which was a purposeful decision by the mother, they say, replicated in the previous court process. It also contended, however, that she does in fact show insight into her previous non-engagement, which they describe as an intellectual decision taken by her at the time and therefore an inability to reflect as to the incorrect choices previously made and express regret.

57. All this, it is said, shows Mother's intellectual capacity to make informed choices. It is also pointed out that from the previous proceedings, as indeed contended in the new set of proceedings; some elements of the original threshold are indeed accepted. Again, it is pointed out that the residential unit's report itself has a number of caveats to it. In essence, the test for rehearing is not crossed.

Children's Guardian's Submission

58. The children's guardian in their submissions repeats much of what the local authority have said and endorses it. It highlights to the court that there is a difference between communication issues and engagement issues.

Discussion as to Appropriate Procedure

59. I note, although it is not contended in this case as a gateway for reopening this hearing, that rule 4.1(6) provides for variation or revocation of an order. However, such a rule, it has been submitted, does not extend to allowing the court to revisit a final order as a substitute for an appeal, although I appreciate they are conflicting decisions. To that extent, Lord Merriman's explanation of the difference between an appeal and a set aside application is still valuable, as set out in *Peek v Peek* [1948] 2 All ER 297:

> "An appeal is where the applicant says the court got it wrong on the materials before it, whether it be fact or law, whereas a set aside application, no error of the court is alleged because information was either withheld or was not before the court.

60. It is contended that the court's power to vary or revoke an order under rule 4.1(6) could apply to final orders as there are no restrictions in the rule on what order could be made or on what basis an order could be made.

61. Having said that, it has been held that within the corresponding power in the civil jurisdiction, which is CPR 3.1 paragraph 7, there is a distinction between whether the order that is sought to be revoked is procedural or interlocutory, and where it is final in disposing of the claim. In the latter case it has been held inappropriate to exercise the court's jurisdiction to vary or revoke final orders or judgments which dispose of the claim. A final order remains such unless proper grounds of appeal exist. A final judgment, however, obtained by fraud could be set aside, but nothing less would do (*Prompt Motor Limited v HSBC Bank plc* [2017] EWHC 1487)

62. In the Court of Appeal decision of *Vodafone Group plc v IPCom GmbH and Co. KG* [2023] EWCA at 113, it was said:

> "The overwhelming thrust of the authorities is that the court's power under CPR 3.1(7) to vary or revoke orders either cannot or should not be used to discharge a sealed final order".

63. However, there is also section 31F(6) of the Matrimonial and Family Proceedings Act 1984 which also allows the court to vary or revoke its own orders.

64. In GM v ZM [2018] EWFC 6 it held that the applicant must show that the evidence in support could not have been made available with due diligence at the original hearing. Accordingly, a successful application under rule 4.1(6) or section 31F(6) has to surmount a higher bar than one under rule 27.4, which is an application to set aside an order made in a party's absence, as there is no due diligence requirement under rule 27.5.

65. As I have said, there has been debate as to whether FPR 4.1(6) allows the court to set aside a final order in children proceedings.

66. There is the case of *NBJ (Power to Set Aside a Return Order)* [2017] EWHC 2752 where Mr Justice MacDonald doubted that rule 4.1(6) could be used to vary or revoke a final order.

67. Whether the rule could be used to vary or revoke a final order also arose in *Re D (Costs of Appeal: Application to Vary or Revoke Orders)* [2023] EWHC 1244. In that case, after considering the authorities, the judge concluded as follows:

> "I am prepared to accept that rule 4.1(6) does give the court power to vary or revoke a final order, although I accept that the circumstances in which the power can be used in relation to a final order is likely to be limited and discrete, self-contained orders such as a costs order is one good example".

He goes on, however, to draw similarities with the court's powers under section 31F(6) of the 1984 Act, saying, however, that the power to revoke or vary orders under that Act is not unbounded and has to be subject to principled curtailment. The discretion is likely to be more sparingly exercised in relation to a final order as opposed to a procedural interlocutory, injunctive or case management order.

68. In so far as revisiting findings go, we have, having said all that, the very helpful decision of *Re E (Children) (Reopening Findings of Fact)* [2019] EWCA at 1447. It confirms that:

> "The family court has a statutory power under the Matrimonial and Family Proceedings Act 1984, section 31F(6) to review its findings of fact within the same set of proceedings or at any time thereafter. This is due to the intrinsic nature of family proceedings. Such an application should be before the trial court as they are more likely to be in a better position to assess the true significance of the further evidence, as opposed to an appeal".

69. In relation to the admission of fresh evidence, of course, I have to be aware of the case of *Ladd v Marshall* [1954] 1 WLR 1489 as to whether the evidence could not have been obtained with reasonable diligence for use at the hearing, and if permission

were given, would have an important influence on the result of the case and is credible.

Revisiting Findings

70. A court will only entertain a reopening of a fact finding when there is genuine new information and when a reopening is likely to make a significant difference to the arrangements for the children. The test for revisiting earlier findings is a three-stage test as originally set out in *Re ZZ and Others (Care Proceedings: Retraction of Testimony)* [2014] EWFC 9:

> "At the first stage the court considers whether it will permit any reconsideration or review of or challenge to the earlier finding. One does not get beyond the first stage unless there is some real reason to believe that the earlier findings require revisiting. Mere speculation and hope are not enough, there must be solid grounds to challenge.
>
> The second stage relates to and determines the extent of the investigations and evidence concerning the review and the third stage is the rehearing of the review".

71. That case further states that:

> "There is an evidential burden on those who seek to displace an earlier finding in the sense that they have to 'make the running'. But the legal burden of proof remains throughout where it was at the outset. The judge has to consider the fresh evidence alongside the earlier material before coming to a conclusion in the light of the totality of the material before the court.
>
> At the first stage, the court considers whether it will permit any reconsideration, review or challenge to the earlier finding. If it does, the second and third stages relate to its approach to that exercise. Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial. The court will want to know whether there is any new evidence or information casting doubt upon the accuracy of the original findings".

72. As for the first stage, in the case of *Re T and J (Children) (Fact Finding Rehearing)* [2020] EWCA Civ 1344, the Court of Appeal distilled the principles as follows:

> "The court should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly-based welfare decisions on the other. It should weigh up all the relevant matters. These will include the need to put scarce resources to good use, the effect of delay on the child, the importance of establishing the truth, the nature and significance of the findings themselves and the quality and relevance of the further evidence. Above all, the court is bound to want to consider whether there was any reason to think that a rehearing of the issue will result in any different finding from that in the earlier hearing. There must be solid grounds for believing that the earlier findings require revisiting".

73. As said in *Re B (A Child)* [2012] EWCA at 1742:

> "It will take powerful evidence to persuade the judge to permit a party to reopen the findings".

74. Indeed, in the case that I previously cited from, *Re E (Children) (Reopening Findings of Fact)* [2019] EWCA at 1447 it is said that:

> "When a court is faced with an application to reopen a previous finding of fact, the court should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly-based welfare decisions on the other. It should weigh up all the relevant matters",

75. And of course the court should consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that of the earlier hearing. There hasto be solid grounds for believing that the earlier findings require revisiting. In other words, the court above all will be influenced by the question as to whether there is reason to think that the rehearing would result in a different finding.

76. Again recently, in *Re CTD (A Child: Rehearing)* [2020] EWCA 1316 the court was given a further opportunity to consider the three-stage test on reopening findings of fact. Commenting on the first stage, it confirmed:

> "The court has to ask whether the applicant has shown solid grounds for believing that the previous findings require revisiting and that a

> rehearing would result in a different finding. A decision to allow past findings to be relitigated has to be a reasoned one. The court would also need to be satisfied that the challenged finding was likely to make a significant legal and practical difference to the arrangements for the children.
>
> The second stage is that the court has to make a case management decision to ensure that the hearing does not become a free-for-all in which evidence is repeated and issues reopened without good reason".

The third stage is the rehearing itself:

> "Once the decision is taken to reopen the case, the court approaches the task of a fact finding in the conventional way. It does not give presumptive weight to the earlier findings. A rehearing, therefore, is quite distinct from an appeal, in which findings stand unless they are shown to be wrong".

77. As more recently quoted by counsel for the mother, we have *Re J (Children: Reopening Findings of Fact)* [2023] EWCA 465 where the court confirmed that the law in relation to reopening findings of fact in children's cases is settled and found in the two previous cases that I have mentioned, namely the three-stage test. In so far as the first stage is concerned, however, it says this:

> "For the court to consider whether it will permit any reconsideration of the earlier finding, one has to remind oneself of the balance of public policy favouring finality in litigation and soundly-based welfare decisions on the other, and if so to determine the extent of the investigations to be considered. Also, is there any reason to think that a rehearing will result in a different finding on the earlier trial. There have to be solid grounds for believing that earlier findings require revisiting".

<u>Intermediaries</u>

78. In cases where a witness or party faces cognitive difficulties, the court has the option of appointing an intermediary or indeed a lay advocate to assist a party or witness with problems of communication or understanding. The Equal Treatment Bench Book defines the intermediary's role as:

> "Facilitating communication between all parties and ensuring the vulnerable person's understanding and participation in the proceedings. This includes making an assessment and reporting orally or in writing to the court about the communication needs of the vulnerable person and the steps that should be taken to meet those needs".

79. Section 29.2 of the Youth Justice and Criminal Evidence Act 1999, provides that:

> "The function of an intermediary is to communicate to the witness questions put to the witness and to any person asking such questions, the answers given by the witness in reply to them and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question".

That provision is replicated in the Family Procedure Rules 3A paragraph 1:

> "Intermediaries, moreover, can assist by carrying out an initial assessment of the person's communication needs, providing advice to professionals on how a vulnerable person communicates, their level of understanding and how it would be best to question them whilst they are giving evidence. Directly assisting in the communication process by helping the vulnerable person to understand questions and helping them to communicate their responses to questions. Writing a report about the person's specific communication needs and assisting with court familiarisation".

80. Within the criminal context, in *R on the application of OP v Secretary of State for Justice* [2014] EWHC 1944 the issue for the court was whether an intermediary was required for the whole trial or just whilst the defendant gave their evidence. Analysing this issue, Lord Justice Rafferty identified two distinct needs which may arise during a hearing:

> "The first is founded in general support, reassurance and calm interpretation of unfolding events. The second requires skilled support and interpretation with a potential for intervention and on occasions suggestion to the Bench associated with the giving of the defendant's evidence. The first task is readily achievable by an adult with experience of life and the cast of mind apt to facilitate comprehension by a worried individual on trial, In play are understandable emotions, uncertainty, perhaps a sense of territorial disadvantage, nervousness and agitation.
>
> The second requires developed skills of the type contemplated by the inclusion in the witness intermediary scheme. The most pressing need

> for the help of an intermediary self-evidently bites at the point of maximum strain. That is when the accused, should he or she do so, elect to give an account of themselves by entering the witness box and submitting to cross-examination".

81. In that case the court held that they were

> "not persuaded that it was essential for a registered intermediary to be available to all defendants for the duration of their trials. In many instances the provision of help centred upon the cast of mind and life experiences described that are likely to prove sufficient. A pinch point is in the giving of evidence when in the court's view it is unarguable that an individual in jeopardy should be put in the best position to do justice to themselves."

82. I also note the case of *R v RT and Another* [2020] EWCA Crim 155, another criminal case:

> "Intermediaries are not to be appointed on a just in case basis or because the report by the intermediary, the psychologist or the psychiatrist has failed to provide the judge with a proper analysis of a vulnerable defendant's needs in the context of the particular circumstances of the trial to come. These are fact-sensitive decisions that call for not only an assessment of the relevant circumstances of the defendant but also the circumstances of the particular trial. Put otherwise, any difficulty experienced by the defendant must be considered in the context of the actual proceedings which they face.
>
> Cases vary infinitely in factual complexity, legal and procedural difficulty and length. Intermediaries should not be appointed as a matter of routine trial management but instead because there are compelling reasons for taking this step, it being clear that all other adaptations to the trial process would not sufficiently meet the defendant's needs to ensure that they can effectively participate in the trial."

83. Thus, from the criminal context, the principles which the court will consider when faced with an application for an intermediary to assist during or throughout trial will include the following.

84. Firstly there is no presumption that a defendant will be assisted by an intermediary and even where an intermediary would improve the trial process, appointment is not mandatory.

85. Secondly, the court is expected to adapt the trial process to address a defendant's communication needs.

86. Thirdly, directions to appoint an intermediary for a party's evidence will thus be rare, and for the entire trial, extremely rare.

87. Fourthly, where a party is vulnerable, or for some other reason experiences communication difficulties such that they need more help to follow the proceedings than their legal representatives readily can give, having regard to their other functions on the defendant's behalf, then the court should consider sympathetically any application for that party to be accompanied throughout the trial by a support worker or other appropriate companion who can provide assistance.

88. Fifthly, a trial will not be rendered unfair because a direction for an intermediary for the defendant is ineffective, for example, because one cannot be found.

89. Finally, faced with an ineffective direction it remains the court's responsibility to adapt the trial process to address the defendant's communication needs.

90. In the family law context, reference can be had to the case of *West Northamptonshire Council v KA* [2024] EWHC 79 which largely mirrors the approach adopted within the criminal jurisdiction:

> "It will be extremely rare for an order for an intermediary to be appointed for a whole trial. Intermediaries are not to be appointed on a just in case basis. This is notable because in the family justice system it appears to be common for intermediaries to be appointed for the whole trial. ………..a judge appointing an intermediary should consider very carefully whether a whole trial order is justified and not make such an order simply because they are asked to do so. The judge must give careful consideration not merely to the circumstances of the individual but also the facts and issues in the case. Intermediaries should only be appointed if there are compelling reasons to do so and

> intermediaries should not be appointed simply because the process would be improved.
>
> In determining whether to appoint an intermediary, the judge should have regard to whether there are other adaptations which will sufficiently meet the need to ensure the defendant can effectively participate in the trial. The application must be considered carefully and with sensitivity but the recommendation by an expert for an intermediary is not determinative. The decision is always one for the court.
>
> If every effort has been made to identify an intermediary but none has been found, it would be unusual, indeed it is suggested very unusual for a case to be adjourned because of the lack of an intermediary. In *R v Cox*, the Court of Appeal set out some steps which can be taken to assist the individuals to ensure effective participation where no intermediary is appointed. These include having breaks in their evidence and importantly ensuring the evidence is adduced in very shortly-phrased questions and witnesses are asked to give their answers in short sentences. This was emphasised by the Court of Appeal in *R v Rashid* [2017] 1 WLR 2449".

91. I also note that it must not be forgotten that intermediaries also require the informed consent of the witness they are appointed to assist. Of course, I am fully aware of paragraph 1.3 of Practice Direction 3AA that confirms that it is the court's duty as well as the parties' to actively consider and identify any party or witness who is vulnerable at the earliest possible stage of any family proceedings. Indeed, it is an ongoing duty throughout the case. Furthermore, by virtue of paragraph 1.4, all parties and their representatives are required to work with the court and each other to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished and without being put in fear or distress by reason of their vulnerability, as defined with reference to the circumstances of each person and to the nature of the proceedings.

The Effects of Non-Compliance

92. A wholesale failure to apply the Part 3A procedure to a vulnerable witness will make it highly likely that the resulting trial will be judged to be unfair. However, as said in

Re N (A Child) [2019] EWCA 1997:

> "It would go too far to say that a rehearing is inevitable in all cases where there has been a failure to identify a party as vulnerable, with the consequence that no ground rules have been put in place in preparation for their giving evidence and no intermediary or other special measures provided for their assistance".

93. This is reiterated in the case of *Re S (Vulnerable Party: Fairness of Proceedings)* [2022] EWCA Civ 8:

> "It does not follow, however, that a failure to comply with these provisions, whether through oversight or inadvertence, will invariably lead to a successful appeal. The question on appeal in each case will be first, whether there has been a serious procedural or other irregularity and secondly, if so, whether as a result the decision is unjust".

94. Of course, I am aware that counsel for the mother cites the case of *A Local Authority v A Mother* [2022] EWHC 2793. In that case there was a failure to adhere to the ground rules and provide regular breaks for parents with low cognitive functioning, and therefore the hearing was deemed unfair. The parents had ultimately been provided with intermediaries. However, as indicated, there is no automatic consequence that a lack of participation directions, even if they may have been appropriate had they been considered at the relevant time, will lead to a decision being overturned. The question has to be determined on the facts of the particular case. Here of course we did have the benefit of a cognitive functioning report and indeed a ground rules hearing.

95. In *BF v LE* [2023] EWHC 2009 Mrs Justice Lieven, echoing the previous case of *Re S* [2022] EWCA 8, and observed that:

> "There is no consequence that a lack of participatory directions, even if they might have been appropriate under the relevant rule and Practice Direction, will lead to a decision being quashed. The question is whether the failure to do so amounts to a breach of natural justice or an unjust decision. It is only if the lack of special measures leads to a

> breach of natural justice which itself impacted on the outcome of the case that a decision might be set aside".

Again, in *SP v DM* [2023] EWHC 2089, it was not accepted that any lapse or non-compliance with participation directions in some way makes the trial process unfair or puts a party at a disadvantage.

Application to the current Case

96. It is accepted that the purported procedural irregularity and breach of Article 6 by way of what is in essence a hindsight analysis, was not apparent to the court at the time and no criticism is made of the court itself. The process of that hearing was based upon the previous cognitive functioning report and the ground rules hearing which subsequently took place in relation to mum's participation at the final hearing before me, a final hearing which ultimately the mother failed to participate in.

97. The cognitive functioning report was not subsequently challenged nor indeed were questions raised pursuant to FPR 25.10.

98. Upon considering the state of the evidence at that stage, it appears more likely than not that even if an application for an intermediary had been made at the time, the evidence before the court was insufficient to have persuaded the court to appoint one.

99. The point is made that without an intermediary, Mother did not feel able to attend the final hearing at all. That, in my view, is also highly speculative. She by her own choice had disengaged from the process, including engagement with professionals, and by her own choice became unrepresented and indeed ceased having contact with her own children. Having representation would have added an important layer of support.

100. Having an intermediary, whilst providing communication support for the mother, would not have addressed the issue of her being unrepresented and in essence having to conduct proceedings, and the ultimate final hearing herself, subject of course to the adherence to necessary ground rules.

101. Mother's failure to participate at all in the hearing, in my view, deprives the court of the ability to assess itself what measures could be taken to enable her to effectively participate in the hearing as per paragraphs 1.3 and 1.4 of Practice Direction 3AA which I have described. Her non-attendance would have rendered any intermediary appointed wholly redundant, their role being limited to assistance at hearings at which evidence is normally given.

102. Indeed, bearing in mind Mother's non-participation in relation to disengaging with professionals, disengaging with the court process, not attending the hearing, stopping contact, it is a moot point as to whether or not she would have even consented to an intermediary, giving the level of mistrust she had in the entire court process.

103. It is argued that Mother would not have known of her entitlement to have an intermediary. I think "Entitlement" is too strong a word. I must also remind myself, of course, that within those proceedings a cognitive functioning report was sought and obtained, a ground rules hearing took place and she was at various times represented, albeit not at the final hearing or in the run-up to it.

104. It is contended that the mother has made transformative progress in the fresh proceedings, due no less to the input of having an intermediary within those proceedings. I am afraid that I am not convinced with regard to this contention. It may be contended that the experience she had in relation to the proceedings conducted before me has to some extent galvanised her in not wanting history to

repeat itself. However, I am afraid that without playing down the role of an intermediary, which provides an invaluable role of support to vulnerable parties, in this case the purported transformative effect of the intermediary, in my view, has been 'over-egged'. As the children's guardian says, there is a difference between communication issues and engagement issues.

105. As to the relevance of the additional evidence by way of the intermediary's assessment, I am not persuaded, in the circumstances of this case, that the evidence would result in the court making any different finding from that which it did. There have to be solid grounds for believing that the earlier findings require revisiting. Mere speculation and hope are not enough. In this case I am presented, in my view, with an application which is purely speculative.

106. Indeed, the report outcome from the residential unit in the current ongoing proceedings in my view reinforces this and moreover, evidences that such change that there is is not, in my view, solely down to the intermediary's input, the report itself containing a number of caveats and indeed outlining a number of concerns.

107. It is also not without relevance that there are ongoing contested proceedings for an adoption order in relation to A which, of course, will entail consideration in any event of any change of circumstances Mother wishes to put before the court by way of section 47 of the Adoption and Children Act 2002. For all those reasons, therefore, I am not satisfied that the test for reopening this matter is met. I am not satisfied that the new evidence in essence will lead to a different outcome and therefore, for the reasons I have outlined, the application is dismissed.

JUDGE PARKER: Yes. Anything arising in relation to that?

MR CHIPPECK: Judge, thank you very much. I should formally, because I will need to take instructions, of course, ask for permission to appeal, which I do.

JUDGE PARKER: Okay. And the basis for you seeking permission to appeal would be?

MR CHIPPECK: It would be a reiteration of the submissions that I made, so I do not think that will assist. But it is to do with the fundamental nature of the intermediary and the absence of the intermediary during the earlier court proceedings, and the implications of it, etc.

JUDGE PARKER: All right, thank you. I will deal with that now.

108. Not wholly unexpected, due to the importance of the decision that I have made, the mother seeks permission to appeal. I am minded of the fact that of course permission is likely to be granted in cases where the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. "Real" means the prospect of success must be realistic rather than fanciful, as set out in the case of *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311:

> "Permission to appeal will only be given where the court considers an appeal would have a real prospect of success or there are some other compelling reasons, i.e. the prospects of success must be realistic rather than fanciful."

109. Permission will be granted in cases where the court concludes that a decision was wrong or procedurally unjust because an error of law has been made, a conclusion on the facts which was not open to the judge on the evidence has been reached; the judge has failed to give due weight to some very significant matter or has clearly given undue weight to some matter; a process has been adopted which is procedurally irregular and unfair to an extent that it renders the decision unjust, or a discretion has

been exercised in a way whilst outside the parameters within which reasonable disagreement is possible.

110. In exercising such a discretion, the court has to also have regard to the overriding objective set out in rule 1.1, including considerations as to proportionality, even where the appeal has a real prospect of success.

111. In *R (on the application of Wales & West Utilities Limited v Competition and Markets Authority)* [2022] EWHC 2940, Mr Justice Mostyn sought to summarise the various standards to be applied depending on whether the appeal asserts an error of fact, a faulty evaluation of the relevant facts and matters or a miscarried exercise of discretion. Within that he says that:

> "An appeal against a finding or primary fact can only succeed where the finding had no evidence to support it or was based on a misunderstanding of the evidence or was one no reasonable judge could have reached.
>
> An appeal against an evaluation of primary facts as found or undisputed can succeed (?) only for the same reasons.
>
> An appeal against an exercise of discretion will succeed if the decision-maker has failed to take into account relevant matters or had regard to irrelevant factors or reached a decision that is plainly irrational. Otherwise, a review by an appellate court is 'at its most benign'. Even if the appeal court disagrees with the discretionary decision, it cannot interfere".

112. On the basis for the appeal, counsel for the mother reiterates the arguments in their skeleton argument which I have considered and made my decision for the reasons that I have already outlined having regard to the law and applying them to the facts of this case.

113. I am accordingly satisfied that I have not fallen into error or indeed taken on board matters which I should not have done and not given sufficient weight to the issues in

this case.

114. Therefore, for all of those reasons I am of the view that the appeal does not have a real prospect of success to justify permission being granted.

115. For all those reasons, permission to appeal is refused.

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