KEYNOTE SPEECH NO. 2

RECENT DEVELOPMENTS IN PUBLIC LAW: PART 2

Presented by Helen Knott

1. Care Planning and Consultation

1.1. There is nothing new in the principle that a local authority is obliged to ensure that parents are fully involved in the decision making process (**Re G (Care: Challenge to Local Authority's Decision) [2003] 2 FLR 42**).

1.2. What is the local authority to do if it assesses the risk of harm to the baby as too high to permit disclosure of its plan to remove a child? This question was considered in **Bury Metropolitan Borough Council v D [2009] EWHC 446 (Fam)**. In that case the proposed plan was declared by the Court to be lawful.

1.3. Is the consequence that the local authority *must* seek declaratory relief to remove at birth without telling the parents? In a recent case (in the County Court) where the local authority had not done so, the judge said:

> *"I do anticipate that in future, if faced again with this highly unusual situation, the local authority would wish to seek the sanction of the court before implementing a plan to withhold from the parents their intention to invite police officers to remove the child at the moment of his or her birth. In such extreme circumstances checks and balances are all the more vital. Seeking the sanction of the court in such rare and unusual circumstances can act only to reinforce the rigour of the Local Authority's decision-making process."*

Whilst only a first instance decision it would seem to be a sensible approach.

1.4. To reiterate Munby J (as he was then) in **R(G) v Nottingham City Council [2008] EWHC 152 (Admin):** "*no baby, no child, can be removed simply 'as the result of a decision taken by officials in some room'*". In that case Sir James Munby was of course considering the legality of the actions of the local authority in removing a child from its mother at birth, in the absence of any order and in circumstances where the mother presented no immediate risk to the child's safety, but the sentiment holds good.

1.5. Finally on this point, **A v East Sussex County Council and Chief Constable of Sussex [2010] 2 FLR 1596** is authority for the principle that, where practical, a court order should be sought in preference to the use of the powers under the **Children Act 1989, section 46** (*Removal and Accommodation of Children by Police in Cases of Emergency*).

1.6. A recent reminder of the ongoing duty to consult *during* proceedings is found **in R (on the application of H) v Kingston–upon-Hull City Council [2013] EWHC 388 (admin)** where a judicial review application pursuant to the **HRA 1998** was brought by a mother whose child, who was subject to an ICO, had been removed from the interim care of the paternal grandparents to foster care without consultation. The case serves as a "*useful reminder of the need of all local authorities to consult meaningfully and not engage in unilateral decision making*". The Judge was highly critical of the local authority's approach:

> *"Let there be no misunderstanding the LA made the decision to remove the children from their grandparents on 31st January 2013. That was not a proposal subject to negotiation or debate; it was a firm decision. The only consultation was for the purposes of implementation. The only consultation (more accurately information) was planned to be with the mother and father. They were to be informed of the decision and – one assumes – the grandparents would be informed thereafter. The guardian was not informed at all – certainly not until after the unhappy events I shall come to describe. It is unclear from the contemporary computer records when the LA intended to inform the guardian. There was discussion with the police, but no record of it.*
>
> ***R (OTA of H) v Kingston–upon-Hull City Council [2013] EWHC 388*** *(paragraph 30)*

> *The computer records of decisions do not contain minutes or any analysis of why decisions were made, any discussion or consideration of alternatives to the course decided upon. The decision to remove was in every sense unilateral."*
>
> ***R (OTA of H) v Kingston–upon-Hull City Council [2013] EWHC 388*** *(paragraph 31)*

1.7. The duty to consult is even more crucial during the interim phase of proceedings when final decisions as to threshold and outcome have not been made by the court. The question as to whom the local authority needs to consult is distinctly "fact-specific". It should ordinarily include the parents, the Children's Guardian and any other family member who has a material interest in the children (a family member who may be caring for a child or otherwise closely concerned with the child).

1.8. The need for local authority's and social workers to be alive to the provisions of the **HRA 1998** was reiterated:

> *"Let there be no misunderstanding: the convention applies to local authorities in respect of their decision making in care cases and all social workers need to be alive to its provisions and import; moreover they must apply the convention. The texture of decision-making needs to have the weave of the convention visible and palpable."*
>
> ***R (OTA of H) v Kingston–upon-Hull City Council [2013] EWHC 388*** *(para 53)*

1.9. The Court considered whether judicial review was the appropriate forum for such a complaint and concluded that the answer was a qualified yes (see paragraphs 56, 71 and 74). It was declared that the decision to remove the children was unlawful. Although declaratory relief was granted and the Court considered there to be a viable argument for the decision to be quashed, the Court did not quash the decision as the matter was now being closely monitored by the family court.

2. Use of CA 1989, Section 20 (Provision of Accommodation for Children: General)

2.1. In **Re CA (A baby) [2012] EWHC 2190**, Hedley J reviews the law in respect of section 20 (at paragraphs 25 - 47) and sets out at the following general guidance to social workers at paragraph 46 (i) - (x) in respect of obtaining consent under section 20 from a parent to the removal of a child immediately or soon after birth in cases where care proceedings will be necessary:

(i) *Every parent has the right, if capacitous, to exercise their parental responsibility to consent under Section 20 to have their child accommodated by the local authority and every local authority has power under Section 20(4) so to accommodate provided that it is consistent with the welfare of the child.*

(ii) *Every social worker obtaining such a consent is under a personal duty (the outcome of which may not be dictated to them by others) to be satisfied that the person giving the consent does not lack the capacity to do so.*

(iii) *In taking any such consent the social worker must actively address the issue of capacity and take into account all the circumstances prevailing at the time and consider the questions raised by Section 3 of the 2005 Act, and in particular the mother's capacity at that time to use and weigh all the relevant information.*

(iv) *If the social worker has doubts about capacity no further attempt should be made to obtain consent on that occasion and advice should be sought from the social work team leader or management,*

(v) *If the social worker is satisfied that the person whose consent is sought does not lack capacity, the social worker must be satisfied that the consent is fully informed:*

a. *Does the parent fully understand the consequences of giving such a consent?*

b. *Does the parent fully appreciate the range of choice available and the consequences of refusal as well as giving consent?*

c. *Is the parent in possession of all the facts and issues material to the giving of consent?*

(vi) *If not satisfied that the answers to a) – c) above are all 'yes', no further attempt should be made to obtain consent on that occasion and advice should be sought as above and the social work team should further consider taking legal advice if thought necessary.*

(vii) *If the social worker is satisfied that the consent is fully informed then it is necessary to be further satisfied that the giving of such consent and the subsequent removal is both fair and proportionate.*

(viii) *In considering that it may be necessary to ask:*

a. *what is the current physical and psychological state of the parent?*

b. *If they have a solicitor, have they been encouraged to seek legal advice and/or advice from family or friends?*

c. *Is it necessary for the safety of the child for her to be removed at this time?*

d. *Would it be fairer in this case for this matter to be the subject of a court order rather than an agreement?*

(ix) *If having done all this and, if necessary, having taken further advice (as above and including where necessary legal advice), the social worker then considers that a fully informed consent has been received from a capacious mother in circumstances where removal is necessary and proportionate, consent may be acted upon.*

(x) **I***n the light of the foregoing, local authorities may want to approach with great care the obtaining of Section 20 agreements from mothers in the aftermath of birth, especially where there is no immediate danger to the child and where probably no order would be made.*

2.2. In this case the LA conceded in respect of the mother's application for relief pursuant to the **HRA 1998** that a section 20 consent should not have been sought in the circumstances that it was, and that such a removal was not proportionate to the risks that then existed. The LA accepted it had breached the Art 8 rights of mother and child. Damages were awarded.

3. Interim Removal

3.1. The case of **Re GR (Children) [2011] 1 FLR 669** remains a leading judgment as to the principles underpinning interim removal. Black LJ reviewed the existing authorities in relation to interim care orders which serve as a guide as to how to approach the second stage of the court's determination (i.e. whether to grant an Interim Care Order) the purpose of which is, of course, to establish a holding position pending a full hearing.

3.1.1. In **Re H (A Child)(Interim Care Order) [2002] EWCA Civ 1932**, Thorpe LJ said:

"38. … Above all it seems to me important to recognise the purpose and the bounds of an interim hearing. There can be no doubt that a full and profound trial of the local authority's concerns is absolutely essential. But the interim hearing could not be allowed to usurp or substitute for that trial.

It had to be properly confined to control the immediate interim before the court could find room for the essential trial.

39. … In my judgment, the Arts. 6 and 8 rights of the parents required the judge to abstain from premature determination of their case for the future beyond the final fixture, unless the welfare of the child demanded it. In effect, since removal from these lifelong parents to foster parents would be deeply traumatic for the child, and of course open to further upset should the parents' case ultimately succeed, that separation was only to be contemplated if B's safety demanded immediate separation."

Re H (A Child)(Interim Care Order) [2002] EWCA Civ 1932 *(paras 38 & 39)*

3.1.2. In **Re M (Interim Care Order: Removal) [2005] EWCA Civ 1594**, Thorpe LJ referred, in the final paragraph of his judgment, to "*the very high standards that must be established to justify the continuing removal of a child from home*" as well as to the need to weigh in the balance the potential risk to the child of extended separation from their parents.

3.1.3. In **Re K and H [2006] EWCA Civ 1898**, Thorpe LJ said (at paragraph 16): *"Decisions in this court emphasised that at an interim stage the removal of children from their parents is not to be sanctioned unless the child's safety requires interim protection."*

3.1.4. In **Re L-A [2009] EWCA Civ 822**, influenced by the decision of Ryder J in **Re L (Care Proceedings: Removal of Child) [2008] 1 FLR 575**, which the trial judge considered to have altered the law, the trial judge had not made an interim care order when it appears he might otherwise have been inclined to do so. The reference in Ryder J's judgment in **Re L [2008]** which had influenced him was with regard to *"an imminent risk of really serious harm, i.e. whether the risk to ML's safety demands immediate separation"*.

3.1.5. On appeal, it was common ground that Ryder J had not intended to alter the approach set out in the three Court of Appeal cases referred to above. Thorpe LJ took the opportunity to restate the principles established by those authorities. From paragraphs 38 and 39 of **Re H [2002] EWCA Civ 1932** he extracted two propositions:

"… the decision taken by the court on an interim care order application must necessarily be limited to issues that cannot await the fixture and must not extend to issues that are being prepared for determination at that fixture"

and

"… separation is only to be ordered if the child's safety demands immediate separation."

*(both see **Re L-A [2009] EWCA Civ 822**, paragraph 7)*

3.1.6. The important point from **Re M [2005] EWCA Civ 1594** was the very high standard which a local authority must meet in seeking to justify the continuing removal of a child from home.

3.1.7. As to **Re K and H [2006] EWCA Civ 1898**, Thorpe LJ identified the key paragraph as paragraph 16 providing that interim removal is, *"not to be sanctioned unless the child's safety requires interim protection."*

3.1.8. In **Re B (A Child) [2009] EWCA 1254** the appeal was against the dismissal of the local authority's application for an interim care order. The trial judge had given himself what was described as an *"immaculate self-direction"* in these terms:

"whether the continued removal of KB from the care of her parents is proportionate to the risk of harm to which she will be exposed if she is allowed to return to her parents' care".

3.1.9. Black LJ reiterated Wall LJ's definition of "safety" in **Re B (A Child) [2009] EWCA 1254** in this passage:

"The concept of a child's safety, as referred to in the authorities which I have cited, is not confined to his or her physical safety and includes also his or her emotional safety or, as Wall LJ put it, psychological welfare. Indeed, it may be helpful to remember that the paramount consideration in the court's decision as to whether to grant an interim care order is the child's welfare, as section 1 Children Act 1989 requires"

*see **Re GR (Children) [2011] 1 FLR 669** at paragraph 42*

3.2. In **Re L (A Child) [2013] EWCA Civ 489** the facts were as follows:

- The mother had two older children who were no longer living with her (the older child had been placed with MGM and the middle child had been adopted). The mother became pregnant with her third child. She did not attend for ante-natal care. She was subsequently arrested for burglary and was sentenced to 3 years imprisonment. Her earliest release date was a year after her date of sentence.

- She wanted to look after the baby in the prison mother and baby unit but social services did not support this; their plan was to apply for an interim care order and to place the baby in foster care with M having monthly contact.

- Initially, M was refused a place in the mother and baby unit. The baby was taken into foster care but no court order was sought authorising this course.

- The District Judge granted an ICO but subsequently M's case was reconsidered by the admission board ("the board") responsible for deciding whether prisoners can be admitted to a mother and baby unit and she was offered a place but there was by then an ICO in place and the local authority was not prepared to place A in the unit with her.

- The District Judge then heard a contested application for an ICO in order that the dispute over the child's placement could be resolved. The District Judge granted an ICO, the effect of which was that the child A remained in foster care rather than joining M in the unit.

- The local authority asserted in the threshold documentation that M had an extensive history of class A drug misuse dating back to her early teens and continuing during her pregnancy until she was remanded in custody, that she has engaged in criminal activity, including theft, burglary and prostitution, in order to fund her drug habit. It also asserted that she has a history of involvement with violent men and that she failed to avail herself of ante-natal care during her pregnancy and that by virtue of this and her continued use of Class A drugs during pregnancy, she has put the child at risk of significant harm. Despite support, it said, she has shown that she remains unable to prioritise the needs of any children in her care.

- The mother appealed to the Court of Appeal. Black LJ carried out a review of the authorities and noted that the focus of M's case was upon the authorities which talk in terms of removal not being justified unless the child's safety requires it whereas the local authority preferred to look at the issue in terms used in the two **Re B** (Wall LJ) cases (i.e "*whether the continued removal of the child from the care of her mother is proportionate to the risk of harm to which she will be exposed if she is allowed to return to her mother's care*"). Black LJ did not consider Wall LJ's approval of the proportionality approach was intended to alter the import of what had been said by the earlier authorities. Their description of the circumstances in which an interim care order is justified assists in determining whether removal is proportionate and vice versa.

3.3. The central issue in the case was how the courts should approach an application for an interim care order where the interim safety of the child is not in question but for other reasons it may be in the child's interests not to be reunited with their parent.

3.4. Black LJ reiterated that the purpose of the interim care order regime is:

> "*to ensure that the child is kept safe in the period prior to the court's full consideration of the local authority's care application. The focus of an interim care hearing is upon what may happen to the child during the interim period if he or she continues to live with or returns to live with his or her parents. An interim care hearing is not designed for the purpose of evaluating the longer term future except in so far as that is necessary to give directions for the management of the case. And it should not lead to the making of an interim order that will, as a matter of fact, afford an advantage to the local authority (**Re G (Minors)(Interim Care Order)** (above) or prejudice a parent's ability to put forward proposals to care for their child."*
>
> ***Re L (A Child) [2013] EWCA Civ 489** at paragraph 53*

> *"In saying that an interim care hearing was not the place for an evaluation of the longer term position, I am not saying that the district judge had to decline to look at the possible outcome of the final hearing at all. He was required to manage the case procedurally and for that purpose he was entitled, I think, to make a provisional evaluation of it on the evidence assembled so far and needed to do so in order to determine how the case should proceed thereafter. As he recognised, he needed to keep a firm control over the proceedings and had to ensure that in so far as possible the timetable for the proceedings did not get in*

the way of A's timetable. I agree with counsel for M that the way in which he could properly have minimised the impact of delay on A was to schedule an early final care hearing, rather than taking decisions at the interim care hearing which in my view came perilously close to prejudging the outcome of the case. Depending on the complexion of the evidence by that stage, that early final hearing would provide an appropriate forum for consideration of whether the prospects of M successfully caring for A herself were so poor as to leave no alternative to the making of a final care order or whether there was sufficient optimism to justify a further postponement of the decision or the making of some order which would permit continued exploration of the possibility that A might live with her."

Re L (A Child) [2013] EWCA Civ 489 *at paragraph 57*

3.5. Black LJ held that there was no danger to A's safety, physical or emotional, in the prison unit and it was inappropriate to class the longer term issues as a danger to A's emotional safety of the type contemplated in the authorities. The relationship of A and M should have been preserved pending a final adjudication of the issues in the care proceedings. Concern as to delay should have been addressed by making arrangements for this final adjudication to take place promptly rather than by foreshadowing its determination by the making of an interim care order, which kept M and A apart. The appeal was allowed and an interim supervision order was substituted for the ICO.

3.6. This case has significant implications for cases where the immediate safety of the child is not in issue, e.g. where the parent/s and child have a place in a drug rehabilitation unit where outings in the community are closely supervised.

3.7. The Court of Appeal was asked to set aside an ICO made without hearing oral evidence in **Re W (Interim Care Order) [2012] 2 FLR 240**.

- The mother's three older children were removed from her care due to concerns of neglect and emotional abuse. When the local authority discovered that she was expecting another child with a different father they put a care plan in place for the family to move to a special foster placement following the birth. During the placement an independent social worker reported that a continuation of the placement with the mother was no longer in the child's best interests; the mother left voluntarily and the child, now aged 14 months, remained in the sole care of the father in the foster home.

- The local authority applied for an Interim Care Order due to a number of concerns such as the father having fallen asleep with the child and at least twice the child having fallen and banged his head, albeit without significant injury. By the time of the hearing the authority had concluded that the care plan would be one of adoption.

- The judge refused the father's application to hear oral evidence and commented that it was not for the court to make findings of fact before the change of plan could be evaluated. He endorsed the local authority's plan for removal of the child from the foster home and continued the case by way of submissions. The father appealed on the grounds that the judge fell into procedural error in failing to hear oral evidence and that his decision was plainly wrong.

Held – dismissing the appeal –

(1) The judge had not fallen into procedural error in refusing to hear oral evidence and he would not have gained a radically different insight from hearing live evidence than the insight he was able to gain, supported by the father's own admissions (see para [31]).

(2) The judge had been plainly right in his welfare determination. The decision had been within his discretion on the facts before him and his approach was focused squarely on the child rather than the difficulties in caring for him. Another judge might reasonably have come to the conclusion that it was safe for the child to remain with his father but it was impossible to say that the outcome that the judge arrived at was outside the range of reasonable determinations (see paras [32]–[37]).

4. Human Rights Act 1998: injunctions Preventing Removal

Injunctions Preventing Removal from a Parent

4.1. The Human Rights Act has been used successfully to prevent separation from a parent. In **Re H (Children) [2012] 1 FLR 191; [2011] EWCA Civ 1009**, the local authority placed the mother and child in a safe environment under an interim care order. However, by the time the next interim care order application came before the court, the local authority had decided that the child needed to be removed from the

mother and placed with foster carers. The judge took the view that removal of the child from the mother's care would be a breach of the mother and child's rights under Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, being neither a necessary nor a proportionate interference with the right to respect for family life, and invited the local authority to amend its proposed care plan. The local authority declined to do so and pressed for an interim care order to be made on the basis of the current care plan. The judge conceded that, in the light of authority, she had no alternative but to grant the interim care order despite her strong disapproval of the current care plan. However, in response to a submission by the mother's counsel based on s. 8 of the Human Rights Act 1998, the judge indicated that she would be prepared to hear a formal application for injunctive relief under the 1998 Act. Two days later the mother applied for an injunction under s. 8(1) of the 1998 Act. However, the judge dismissed the mother's application, concluding, on reflection, that she had no jurisdiction to grant an injunction under s. 8(1) once an interim care order had been made.

4.2. The matter was appealed and the CA allowed the appeal and granted interim relief until the case could return to the judge. There was plainly jurisdiction to injunct the local authority from separating mother and child under s. 8 of the Human Rights Act 1998; the judge should have been asked to consider the application for a s. 8(1) injunction at one and the same time as the application for the interim care order.

Injunctions Preventing Removal from a Prospective Adopter

4.3. In **RCW v A Local Authority [2013] EWHC 235 Fam** the local authority had placed the child when she was 8 months old with the prospective adopter, a single woman. Within weeks of the child being placed, the prospective adopter began to notice a deterioration in her visual acuity and she was subsequently diagnosed with a (benign) brain tumour which was pressing on the optic nerve and this required urgent surgery. The surgery left her without sight. It was not known whether this was a permanent or temporary condition. On the day that the prospective adopter could have made her application for adoption (because the child had been with her 10 weeks) she was having surgery and the application was not made.

4.4. The local authority after two planning meetings informed the prospective adopter of their intention to remove the child from her care. On the same day the prospective adopter lodged her application for adoption. There was some uncertainty about whether the prospective adopter had made her application for adoption before

receiving written notice of the local authority's intention to remove. The prospective adopter made an urgent (on notice) application for injunctive relief to prevent the child's removal.

4.5. The claim was brought under the **HRA 1998, Section 6** (which renders it unlawful for a public authority to act in a way which is incompatible with a Convention right), and under the **HRA 1998, Section 7** which provides that:

> *"A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may*
>
> *(a) Bring proceedings against the authority under this Act in the appropriate court or tribunal, or*
>
> *(b) Rely on the Convention right or rights concerned in any legal proceedings*
>
> *But only if he is (or would be) a victim of the unlawful act."*

4.6. The local authority accepted that if the prospective adopter had "made" her application for an adoption order before she received the written notice of intention to remove, then the **Adoption and Children Act 2002, Section 35(5**) applies, and it would not be entitled to remove SB.

4.7. Cobb J noted that there was some uncertainty about the timing of the adoption application and the local authority's notice of their intention to remove, and that if the issue of timing had been the only basis upon which the application for an injunction had been sought, he would have been minded to grant it – even for a short period – to allow the parties to establish the precise sequence of events. However, he concluded that there was "*a much more substantial basis for the grant of the relief sought"*. He reiterated that a decision to remove a child who has been placed with prospective adopters is *"…a momentous one. It has to be a solidly welfare-based decision, and it must be reached fairly"*. He found it difficult to identify on what material the local authority could truly contend that it had reached a proper:

> "*welfare-based evaluation; there had been limited direct observation and assessment by that time; no apparent discussions with the friends and supporters; and little knowledge of [the prospective adopter's] condition or, more pertinently, its likely prognosis".*

*(**RCW v A Local Authority** [2013] EWHC 235 Fam, para 30)*

On the information before him he was satisfied that the local authority failed to give the prospective adopter,

> "*a full and informed opportunity to address its concerns about the future care arrangements for the child. In this respect, the local authority had acted in breach of the procedural rights guaranteed by* **Article 8** *and* **Article 6***, and of the common law principle of fairness"*.
>
> *(**RCW v A Local Authority** [2013] EWHC 235 Fam, para 32)*

Further, there was no evidence the LA had given any consideration to offering the placement "*practical and integrated support" (see paragraph 38)*. Cobb J granted the injunction. There was an assessment of the prospective adopter's ability to meet the child's needs and subsequently an adoption order was made.

Injunctions: General

4.8. The extent to which HRA injunctions are being granted is unclear. The writer would welcome any examples. One (unreported) example in chambers involved placement of children with maternal grandparents ("MGPs") who were subsequently not approved as carers, although there was some disagreement within the department about the assessment. An injunction was granted under the **HRA 1998** on behalf of the children to prevent their removal from MGPs' care.

4.9. An important consideration for a local authority is the position when the Court invites the local authority to amend its care plan. There can be conflicting views within the social work team and management team who will need to be advised as to:

- Whether the LA may be injuncted to prevent removal;
- If it is not willing to amend the care plan, deciding who needs to attend court to justify the decision of the local authority, and
- Having alternative plans if the local authority's application is refused.

4.10. Some comfort to social workers who are so often damned if they do and damned if they don't is to be found in **Re S (Care proceedings: Human Rights) [2012] 2 FLR 209:**

- The mother was a heroin addict who had served sentences of imprisonment for dishonesty. The mother's three older children were already in local authority care. When the mother's fourth child was born the mother was in prison serving a term of 15 months' imprisonment; the baby had to be treated for drug withdrawal at birth and the local authority applied for an interim care order in respect of the baby, but this was on the basis that the mother would continue to care for the baby in the mother and baby unit.

- However, the day before the local authority's application for an interim order was due to be heard, the prison reported that the mother's behaviour in the mother and baby unit was unsatisfactory. The prison told the local authority that the mother had been observed ‘prop feeding' on a number of occasions, leading, at least once, to a serious choking risk. The social worker involved discussed the matter with the prison authorities, who explained that for long periods of time, extending to hours, the unit would be unable to supervise or monitor the mother's care. Despite the court hearing listed for the following day, the social worker asked the prison authorities to call the police immediately to arrange for the baby to be separated from the mother under a police protection order.

- The following day the family proceedings court granted an emergency protection order ex parte, and adjourned the Interim Care Order application until the following week.

- At the next hearing the judge heard oral evidence and then granted an interim care order; however, she also made a number of findings critical of the local authority's decision to remove the baby prior to a full investigation of the prison's concerns, expressing her dismay that by removing the baby when it had, the local authority had effectively usurped the authority of the court.

- The mother later issued proceedings based on the Human Rights Act 1998, seeking a declaration of breach of rights by the local authority. The human rights proceedings came before the same judge, who considered that her previous findings in the care proceedings were binding in the human rights proceedings, and that if the authority wished to defend the human rights proceedings, it would have to appeal the previous findings.

- The local authority’s appeal was allowed. The court held that when deciding whether a judge had been right to make a finding that a local authority had

effectively usurped the authority of the court, the court could ask a simple question: what would an impartial observer be saying if the local authority had delayed, and something had gone wrong? In the current case the question was what would have happened if the social worker had left the child with the mother in prison overnight, and the child had died or suffered significant harm through being prop fed; the answer was that the social worker responsible would have been severely criticised for taking an unwarranted risk with the child's safety. In any event, when faced with such a difficult choice, the social worker could not be criticised for removing the child; the circumstances were wholly exceptional (*see paras [70]–[73], [75], [77], [80]*).

4.11. Removal from interim placement was considered as discussed above in **R (on the application of H) v Kingston–upon-Hull City Council [2013] EWHC 388 (Admin)**.

5. Evidence from children

Guidance Following Re W (Children) [2010] UKSC 12

5.1. Following **Re W (Children) [2010] UKSC 12** and its implementation, the Working Party of the Family Justice Council issued Guidelines in relation to children giving evidence in family proceedings in December 2011 (Appendix 1).

5.2. Key points highlighted are:

5.2.1. Consideration to whether children will give evidence should be given at the earliest opportunity by the Court and all the parties, and not just left to the person requiring a child witness.

5.2.2. The principal objective is a fair trial.

5.2.3. The Court should consider:

i. *the possible advantages that the child being called will bring to the determination of truth balanced against;*

ii. *the possible damage to the child's welfare from giving evidence i.e. the risk of harm to the child from giving evidence**; having regard to**:*

a) *the child's wishes and feelings; in particular their willingness to give evidence; as an unwilling child should rarely if ever be obliged to give evidence;*
b) *the child's particular needs and abilities;*
c) *the issues that need to be determined;*
d) *the nature and gravity of the allegations;*
e) *the source of the allegations;*
f) *whether the case depends on the child's allegations alone;*
g) *corroborative evidence;*
h) *the quality and reliability of the existing evidence;*
i) *the quality and reliability of any ABE interview;*
j) *whether the child has retracted allegations;*
k) *the nature of any challenge a party wishes to make;*
l) *the age of the child; generally the older the child the better;*
m) *the maturity, vulnerability and understanding, capacity and competence of the child; this may be apparent from the ABE or from professionals' discussions with the child;*
n) *the length of time since the events in question;*
o) *the support or lack of support the child has;*
p) *the quality and importance of the child's evidence;*
q) *the right to challenge evidence;*
r) *whether justice can be done without further questioning;*
s) *the risk of further delay;*
t) *the views of the guardian who is expected to have discussed the issue with the child concerned if appropriate and those with parental responsibility;*
u) *specific risks arising from the possibility of the child giving evidence twice in criminal or other and family proceedings taking into account that normally the family proceedings will be heard before the criminal; and*
v) *the serious consequences of the allegations i.e. whether the findings impact upon care and contact decisions.*

5.2.4. The Court must always take into account the risk to the child although that does not necessarily mean an expert assessment;

5.2.5. Whether the child could answer further questions away from attendance at court;

5.2.6. In practice, there may be a preliminary report from the CG dealing with the relevant factors from the child's perspective.

5.3. In the event that the Court determines the child should give evidence the Guidelines set out practical recommendations to enable a child to give evidence, and advice on best practice in respect of the cross examination of children.

Application of Guidance on Children Giving Evidence

5.4. In **Re G and E (Children) (Vulnerable Witnesses) [2011] EWHC 4063 (Fam)** there was consideration of whether 17 year old girl with learning difficulties should give evidence in public law proceedings as to allegations of sexual abuse by her father.

- G was a 17-year old girl who had significant learning difficulties and functioned at the level of an 8-year old. She was represented through the Official Solicitor, who had raised concern over whether she should give oral evidence about sexual abuse allegedly perpetrated on her by her father**.**

- A chartered clinical psychologist, with special expertise in evaluating individuals with learning difficulties and an independent expert instructed by the Official Solicitor commented that, with special measures in place, G would be able to cope with the court experience.

- At the preliminary hearing to deal with this question, the Official Solicitor accepted that G was competent to give evidence, but raised concerns about the potential detrimental impact to her of doing so. Were she to be called to give evidence, the Official Solicitor wished for questions to be put by a single individual, potentially the witness intermediary. The local authority and the Guardian invited the court to conclude that with appropriate support and safeguards, G should give evidence. Representatives of the family members were broadly neutral on the issue.

5.5. Pauffley J first considered whether G was competent by way of **CA 1989, Section 96(2)**. She could not understand the hesitance of the Official Solicitor on this question, given the unity of opinion from the experts. She found that G was undeniably competent. She then turned to the discretionary exercise and the guidance, which flowed from the decision of the Supreme Court in **Re W [2010] UKSC 12**. She outlined

the two considerations, which she needed to bear in mind: i) the advantages that the evidence would/might bring to the determination of the truth, and ii) the damage that the evidence giving process might do to G's welfare.

5.6. She noted that it was highly significant that the local authority's case on threshold was founded upon G's allegations. She also noted that it was relevant that one of the experts gained the distinct impression that G often said she had forgotten information as a means of avoiding demands and not necessarily because she had forgotten. She considered that G might not provide much more detail than she gave in the ABE interviews that the Official Solicitor urged the judge to rely on, but considered that there was no way of knowing whether this was the case. She noted that she would be able to control questions that were put and ensure that G was protected from inappropriate questioning, but concluded that there was little way of telling how things would work out until the cross-examination process was underway. As to the question of whether the process of being cross-examined would have a detrimental effect on G's health and trigger further thoughts of self-harm, the judge noted that the psychologist had considered that if the judgment was that G was not telling the truth this might have a detrimental effect on her mental health, but not significantly greater than if she had not given live evidence. She also noted that G wanted to give evidence and that G might perceive not giving evidence in person to mean that others did not believe her. She emphatically concluded that the only sensible conclusion arising out of the balancing exercise based around those considerations was that G should give oral evidence.

She proposed that the barristers would initially be able to cross-examine in the normal way, but that she would consider the possibility of a witness intermediary based on the quality of the evidence given and the extent to which G was showing signs of discomfort. She further set out that she proposed that G would have adequate and regular breaks.

5.7. In **Re J (Child Giving Evidence) [2010] 2 FLR 1080:**

- the mother who had come to this country seeking asylum had three children by two different fathers. When the two elder children, teenage twins, were, according to the mother, 10 years old, they claimed that the mother had physically abused them. The mother eventually pleaded guilty to two counts of cruelty to a child under 16 (on the basis that she had beaten each of the boys on one occasion only), and was given a suspended sentence.

- In the care proceedings the mother accepted that the boys should remain in foster care, but wished to go on caring for the youngest child, aged 5. However, the local authority considered that the youngest child should be removed from the mother and supported an application by the father for a residence order in his favour.

- There was a significant dispute as to the true age of the teenage twins. There was also an issue as to paternity: the mother had identified the boys' father as someone who had been killed many years earlier, whereas the local authority believed that he was a different man, alive and living in Uganda. The local authority asked the court not only to make findings that the mother had lied about these important matters, causing the boys significant emotional and physical harm, but also to make findings that she had exposed the boys to invasive medical tests and procedures in connection with presumed precocious puberty and had subjected them to sustained physical abuse and serious threats of physical harm, including ritual cutting in association with witchcraft.

- By the first day of the hearing all parties were agreed that if the boys were to communicate with the judge, it should be by way of giving evidence. The guardian reported that one of the two boys wished to give oral evidence and urged the court to respect his wishes, expressing the view that he had appropriate maturity. The mother argued that he should not give evidence, in particular because that might affect the relationship of both boys with herself and with the youngest child.

5.8. The Court of Appeal allowed the child to give oral evidence and held:

(1) Applying **Re W (Children) [2010] UKSC 12**, there was no presumption that a child should or should not give evidence; the court was to balance the particular factors applicable in the circumstances of the case, considering with care both the advantages and the harm that might flow from the child giving evidence. The best interests of the children involved were extremely important, albeit not paramount. In addition to weighing the advantages that the evidence would bring to the determination of the truth against the damage that the giving of evidence might do to the welfare of the child or any other child, in this case a further factor to be placed in the balance was any welfare advantage to the child seeking to give evidence, or to any other child, of the evidence being given (see paras [26], [27], [29]).

(2) The child had potentially relevant evidence on key factual issues and was of sufficient maturity to be able to give that evidence; the court would potentially be in a better position to evaluate his evidence if it had been tested. Unusually and importantly the child himself wished to give evidence and would feel a profound sense of injustice if he were not permitted to do so. The rights of all parties, including the child, to a fair trial under **Art 6** of the **European Convention for the Protection of Human Rights and Fundamental Freedoms 1950** pointed in favour of the evidence being given. The risk of harm to the child and to his twin brother if he were not permitted to give oral evidence outweighed the harm to any of the children if he were permitted to do so. The boys' relationship with the mother was already profoundly damaged, and would be unlikely to be affected. It would be highly inappropriate for anyone to tell the youngest child that her elder brother had given evidence 'against' the mother at present, thereby damaging her relationship with both brothers.

Children's Evidence: General

5.9. In **TW v A City Council [2011] EWCA Civ 17** the Court of Appeal set aside findings of sexual abuse against the child's uncle. Sir Nicholas Wall P held that the inadequacies of the ABE interview were manifest. Even allowing for a broad margin of latitude to anyone conducting such an interview, the departures from the ABE Guidance were self-evident and glaring. There was, on the face of the interview (1) an inadequate establishment of rapport; (2) absolutely no free narrative recall by the child; (3) an abundance of leading questions, and (4) no closure. Everything was led by the officer, and nothing was introduced into the interview by the child.

> "*As we have already pointed out, the Guidance makes it clear that the interviewer has to keep an open mind and that the object of the exercise is not simply to get the child to repeat on camera what she has said earlier to somebody else. We regret to say that we were left with the clear impression from the interview that the officer was using it purely for what she perceived to be an evidence - gathering exercise and, in particular, to make LR repeat on camera what she had said to her mother. That, emphatically is not what ABE interviews are about and we have come to the view that we can place no evidential weight on it.*"
>
> (***TW v A City Council [2011] EWCA Civ 17**, para. 52)*

5.10. In **Re I-A (Children) [2012] EWCA Civ 582** the Court of Appeal set aside the judgment of the court below. Thorpe LJ described the judgment as having *"fatal flaws"* and Etherton LJ stated:

> "*Overall, I am quite satisfied that it is impossible to uphold this judgment of the judge in view of the failure properly to address and assess the evidence of the stepfather and to weigh against that the evidence of K, particularly in the light of her manifest lack of credibility in relation to other allegations she has made and then withdrawn."*
>
> *(**Re I-A (Children) [2012] EWCA Civ 582**, para 21)*

6. Adoption and Placement Orders

6.1. The question of the test to be applied in applications for leave to oppose care and placement orders has been recently revisited, very famously last month in **Re B-S (Children) [2013] EWCA Civ 1146**. *(**Re B-S [2013] EWCA Civ 1146** and the opportunity the Court of Appeal took to restate principles which had been considered in a number of cases during July 2013 arising from **Re B (A Child) [2013] UKSC 33** are discussed elsewhere in this handout.)*

6.2. **Re B-S (2013)** arose in the context of an appeal against Mrs Justice Parker's decision to refuse a mother leave to oppose an application for adoption made under the **Adoption and Children Act 2002, Section 47(5)**. The appeal failed on every ground and was dismissed. However, the test – a long standing one to be found in **Re P (Adoption: Leave Provisions) [2007] 2 FLR 1069**, then added to in **Re W (Adoption: Set Aside and Leave to Oppose) [2011] 1 FLR 2153** – was reconsidered, having been reconsidered only 5 months previously on 25 April 2013, also by the President, in **Re C (A Child) [2013] EWCA Civ 431**.

6.3. In **Re C (2013)** the Court of Appeal confirmed that having cleared the first part of the test (namely there had been the necessary change in circumstances) the father would have to satisfy the court that, in the exercise of its discretion, it would be right to grant permission (the **Re P (2007)** test). The Court of Appeal confirmed (at paragraph 30) that in its application of the test at this stage "a stringent approach" was required (introduced by **Re W (2001)** at paragraph 28). The appellant argued that the trial judge's approach had been too stringent. Sir James Munby P found that the judge's decision *"displays no error of law, no error of approach, whether viewed from a purely*

domestic perspective or, as one must, from the broader Strasbourg perspective". At paragraph 44 he sets out the very high bar against any challenge to an adoption order and at paragraph 45 refers to that being a *"very stringent test"*.

6.4. In **Re B-S (2013)** Sir James Munby P again considers **Re W (2001)** including paragraph 28 and concludes (at paragraph 59) "*thus far, subject only perhaps to his use of the word "stringent", we see nothing in what Thorpe LJ was saying that it is in any way inconsistent with the analysis in* ***Re P (2007)****"* and later:

> *"we share McFarlane LJ's misgivings about Thorpe LJ's use of the phrase "exceptionally rare circumstances" and also about his use of the word "stringent" to define or describe the test to be applied on an application under section 47(5). Both phrases are apt to mislead, with potentially adverse consequences. In the light of* ***Re B (2013)*** *they convey quite the wrong message. Neither, in our judgment, any longer has any place in this context. Their use in relation to section 47(5) should cease."*
>
> *(****Re B-S (Children) [2013] EWCA Civ 1146****, paragraph 68)*

6.5. The Court of Appeal sets out (at paragraph 74) the factors which the court must take into consideration in determining part two of the test, namely if there has been a change in circumstances, should leave to oppose be given? The factors are as follows:

(i.) *Prospect of success here relates to the prospect of resisting the making of an adoption order, not, we emphasise, the prospect of ultimately having the child restored to the parent's care.*

(ii.) *For purposes of exposition and analysis we treat as two separate issues the questions of whether there has been a change in circumstances and whether the parent has solid grounds for seeking leave. Almost invariably, however, they will be intertwined; in many cases the one may very well follow from the other.*

(iii.) *Once he or she has got to the point of concluding that there has been a change of circumstances and that the parent has solid grounds for seeking leave, the judge must consider very carefully indeed whether the child's welfare really does necessitate the refusal of leave. The judge must keep at the forefront of his mind the teaching of* ***Re B (2013)****, in particular that adoption is the "last resort" and only permissible if "nothing else will do" and that, as Lord Neuberger emphasised, the child's interests include being brought up by the parents or wider family unless the overriding requirements of the child's welfare make that not possible. That said, the child's welfare is paramount.*

(iv.) *At this, as at all other stages in the adoption process, the judicial evaluation of the child's welfare must take into account* all *the negatives and the positives,* all *the pros and cons, of* each *of the two options, that is, either giving or refusing the parent leave to oppose. Here again, as elsewhere, the use of Thorpe LJ's 'balance sheet' is to be encouraged.*

(v.) *This close focus on the circumstances requires that the court has proper evidence. But this does not mean that judges will always need to hear oral evidence and cross-examination before coming to a conclusion. Sometimes, though we suspect not very often, the judge will be assisted by oral evidence. Typically, however, an application for leave under section 47(5) can fairly and should appropriately be dealt with on the basis of written evidence and submissions: see* ***Re P (2007)****, paras 53-54.*

(vi.) *As a general proposition, the greater the change in circumstances (assuming, of course, that the change is positive) and the more solid the parent's grounds for seeking leave to oppose, the more cogent and compelling the arguments based on the child's welfare must be if leave to oppose is to be refused.*

(vii.) *The mere fact that the child has been placed with prospective adopters cannot be determinative, nor can the mere passage of time. On the other hand, the older the child and the longer the child has been placed the greater the adverse impacts of disturbing the arrangements are likely to be.*

(viii.) *The judge must always bear in mind that what is paramount in every adoption case is the welfare of the child "throughout his life". Given modern expectation of life, this means that, with a young child, one is looking far ahead into a very distant future – upwards of eighty or even ninety years. Against this perspective, judges must be careful not to attach undue weight to the short term consequences for the child if leave to oppose is given. In this as in other contexts, judges should be guided by what Sir Thomas Bingham MR said in* ***Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124****, that "the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems." That was said in the context of contact but it has a much wider resonance:* ***Re G (Education: Religious Upbringing) [2012] EWCA Civ 1233, [2013] 1 FLR 677****.*

(ix.) *Almost invariably the judge will be pressed with the argument that leave to oppose should be refused, amongst other reasons, because of the adverse impact on the prospective adopters, and thus on the child, of their having to pursue a contested adoption application. We do not seek to trivialise an argument which may in some cases have considerable force, particularly perhaps in a case where the child is old enough to have some awareness of what is going on. But judges must be careful not to attach undue weight to the argument. After all, what from the perspective of the proposed adopters was the smoothness of the process which they no doubt anticipated when issuing their application with the assurance of a placement order, will already have been disturbed by the unwelcome making of the application for leave to oppose. And the disruptive effects of an order giving a parent leave to oppose can be minimised by firm judicial case management* before *the hearing of the application for leave. If appropriate directions are given, in particular in relation to the expert and other evidence to be adduced on behalf of the parent,* as soon as *the application for leave is issued and* before *the question of leave has been determined, it ought to be possible to direct either that the application for leave is to be listed with the substantive adoption application to follow immediately, whether or not leave is given, or, if that is not feasible, to direct that the substantive application is to be listed, whether or not leave has been given, very shortly after the leave hearing.*

*(x.) We urge judges always to bear in mind the wise and humane words of Wall LJ in **Re P (2007)**, para 32. We have already quoted them but they bear repetition: "the test should not be set too high, because [parents] should not be discouraged either from bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable."*

7. Costs

Costs Orders when Serious Allegations Not Proved

7.1. The question of costs was raised by grandparents in care proceedings against whom serious allegations of sexual, physical and emotional abuse were made by the local authority: **Re T (Costs: Care Proceedings: Serious allegations not proved) [2011] 2 FLR 264**

- They were joined as interveners before the fact-finding hearing. At the hearing not only were the allegations not proved but the judge exonerated them completely and discharged them as parties. They applied for their costs but the judge refused. The grandparents appealed.

7.2. The Court of Appeal allowed the appeal and ordered the local authority to pay the grandparents' costs. The Court held that the proposition that there be no order for costs in cases concerning the future of a child did not apply where allegations had not been established after a fact-finding hearing (paragraphs 10 - 18). Just pause to imagine the ramifications for local authorities. The local authority appealed to the Supreme Court.

7.3. In **Re T (Children) [2012] UKSC 36** the Supreme Court disagreed with the Court of Appeal and held that:

> *"In the context of care proceedings it is not right to treat a local authority as in the same position as a civil litigant who raises an issue that is ultimately determined against him. The **CA 1989** imposes duties on the local authority in respect of the care of children. If the local authority receives information that a child has been subjected to or is likely to be subjected to serious harm it has a duty to investigate … and where there are reasonable grounds…to instigate care proceedings. It is for the court not the local authority to decide whether the allegations are well founded. It is a serious misfortune to be he subject of unjustified allegations in relation to misconduct to a child, but where it is reasonable that these should be investigated by a court, justice does not demand that the local authority responsible for putting the allegations before the court should ultimately be responsible for the legal costs of the person against whom the allegations are made"*
>
> *(**Re T (Children) [2012] UKSC 36**, paragraph 42)*

> *"The general practice of not awarding costs against a party, including a local authority, in the absence reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice and should not be subject to an exception in the case of split hearings".*
>
> *(**Re T (Children) [2012] UKSC 36**, paragraph 44)*

One can hear the sigh of relief…

Costs Orders when Guidance Note Followed

7.4. In **HB v PB [2013] EWHC 1956** Cobb J made an order for costs against a local authority. The case involved allegations of "fabricated illness " and the Local Authority had been ordered to prepare a Section 37 report. He found that the guidance for social workers undertaking assessments, namely the ***Supplementary Guidance to Working Together to Safeguard Children: Safeguarding Children in whom illness is fabricated or induced*** (supplementary to ***Working Together to Safeguard Children*** **(2006)**) had not been followed. In addition the social workers had not been aware of the "*Incredibly Caring Programme"* (Bools & Ors [2007]) recommended in the DCSF Guidance at para 6.52-6.60) used to train social workers in dealing with cases of fabricated illness, nor the guidance in **Coventry City Council v X, Y and Z (Care Proceedings: Costs) [2011] 1 FLR 1045**.

8. Experts

"Necessary": From Re TG [2013] EWCA Civ 5 to Re H-L [2013] EWCA Civ 655

8.1. The court has a duty to scrutinise any application pursuant to **Part 25** for the instructions of an expert. **Re TG (A Child) [2013] EWCA Civ 5** contains guidance on the test for permitting the instruction of experts.

- The child concerned was found to have sustained four left rib fractures, two right rib fractures, two skull fractures and a number of subdural and intraretinal haemorrhages when he was just twelve days old. The father had claimed that the baby must have fallen from the bouncy chair.

- Care proceedings were commenced in relation to TG and his two older siblings. The case was transferred to the High Court.

- HHJ Bellamy refused to give the father permission to adduce expert evidence from a biomechanical engineer. At an earlier case management hearing the judge had given directions for five medical experts to be instructed including a Consultant Paediatric Radiologist, a Consultant Paediatric Endocrinologist, a Consultant Neuro-radiologist, a Consultant Paediatrician, and a Professor Emeritus of Paediatric Ophthalmology.

8.2. Sir James Munby P giving the lead judgment upheld HHJ Bellamy's case management decision. He noted that the **Family Procedure Rules** were shortly to be modified and that with effect from 31 January 2013 the amendments made by **The Family**

Procedure (Amendment) (No 5) Rules 2012, Rule 1.4(2) would provide (at paragraph (e)) that active case management includes "controlling the use of expert evidence."

Rule 25.4(1) would provide that:

> *"In any proceedings, a person may not without the permission of the court put expert evidence (in any form) before the court."*

Rule 25.1 was to be significantly amended to provide that:

> *"Expert evidence will be restricted to that which in the opinion of the court is necessary to assist the court to resolve the proceedings"*

8.3. Sir James Munby P held:

> "…*It is a matter for another day to determine what exactly is meant in this context by the word "necessary", but clearly the new test is intended to be significantly more stringent than the old. The text of what is "necessary" sets a hurdle which is on any view significantly higher that the old test of what is "reasonably required.*"
>
> *"Whether applying the present test or the new test, the case management judge will have to have regard to all the circumstances of the particular case. The judge will need to consider the nature of the particular expert evidence the admission of which is in issue. The evidence of an expert in one discipline may be of marginal use; the evidence of an expert in another discipline may be crucial. The judge will also need to be sensitive to the forensic context. The argument for an expert in a care case where permanent removal is threatened may be significantly stronger than in a case where the stakes are not so high. We strive to avoid miscarriages of justice, but human justice is inevitably fallible and case management judges need to be alert to the risks…*
>
> *"In every care case, as indeed in every case, the case management judge will need to assess and evaluate the degree of likelihood that a particular expert's evidence, or the evidence of an expert in a particular discipline, will or will not be of assistance to the parties in exploring, and to the judge in determining, the issues to which the evidence in question is proposed to be directed. It is vital that the case management judge keeps an open mind when deciding whether or not to permit expert evidence. The judge will need to be alert to the risks posed by what may turn out to be 'bad science'. On the other hand, the judge must always*

be alert to the possibility that some forensically unfamiliar or even novel expert discipline may provide the key to explaining what at first blush appears to be a familiar type of case."

*(**Re TG (A Child) [2013] EWCA Civ 5**, paragraphs 30 - 32)*

8.4. **Re H-L (A Child) [2013] EWCA Civ 655** was an appeal against a case management decision in relation to the instruction of experts. Sir James Munby P defined what is meant by " necessary":

*"The short answer is that 'necessary' means necessary. It is, after all, an ordinary English word. It is a familiar expression nowadays in family law, not least because of the central role it plays, for example, in Article 8 of the European Convention and the wider Strasbourg jurisprudence. If elaboration is required, what precisely does it mean? That was a question considered, albeit in a rather different context, in **Re P (Placement Orders: Parental Consent) [2008] EWCA Civ 535, [2008] 2 FLR 625, paras [120], [125]**. This court said it "has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand", having "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable." In my judgment, that is the meaning, the connotation, the word 'necessary' has in rule 25.1."*

*(**Re H-L (A Child) [2013] EWCA Civ 655**, paragraph 3)*

8.5. In **Re H-L (2013)** Sir James Munby P said:

*"… it is worth reminding practitioners of the vital need to avoid blurring the important distinction between treating clinicians and experts: **Oxfordshire County Council v DP, RS & BS [2005] EWHC 2156 (Fam)**, **[2008] 2 FLR 1708**, and **Oldham Metropolitan Borough Council v GW and PW [2007] EWHC 136 (Fam)**, **[2007] 2 FLR 597**."*

*(**Re H-L (A Child) [2013] EWCA Civ 655**, paragraph 7)*

8.6. In **Devon County Council v EB & Ors (Minors) [2013] EWHC Fam 968**, a case involving allegations of NAHI, Mr Justice Baker finding the threshold was not crossed said :

"….this case required the involvement of a range of experts from different disciplines. If the case had been decided purely on the basis of the treating doctors, the outcome may have been very different. The perspective brought, in particular, by Dr Halliday, Dr Anslow, Mr Richards, Dr Sunderland and Professor Pope has been very important. Judges will be rigorous in resisting the call for unnecessary use of experts in family proceedings but equally will not hesitate to endorse the instruction of experts where, under the new rules, they are satisfied that they are necessary for the determination of the issues in proceedings"

(see ***Devon County Council v EB & Ors (Minors) [2013] EWHC Fam 968,*** *para 156)*

"this case demonstrates that, whilst it will be possible to conclude the vast majority of care cases within 26 weeks, as proposed by the modernisation reforms, there will still be a small minority of cases, exceptional cases, where the investigation takes longer. In this case, the further testing proposed by Professor Pope which led to a series of adjournments was unquestionably necessary. Judges must be vigilant to identify those rare cases which require longer time. It is, of course, important that these cases are identified as soon as possible at the outset of proceedings and that any delay is kept to a minimum."

(see ***Devon County Council v EB & Ors (Minors) [2013] EWHC Fam 968,*** *para157)*

8.7. To what extent will the court in future rely on treating clinicians as the experts? Will treating clinicians be reluctant to assume this role?

Experts: Focussing on Key Issues

8.8. In **Re IA (A Child) [2013] EWHC 2499 (Fam),** Pauffley J commented on the expert report, which was 35 pages long despite the request that he limit it to 10-12 pages. The court was critical of the tendency of experts to provide a "paediatric overview", rather than focussing on the issues in the case.

Experts: Applications for an Expert under Part 25, FPR 2010.

8.9. The amended **Part 25** (as interpreted in **Re H-L (2013)**) places a duty on judges to restrict expert evidence to only that which is necessary and requires all practitioners to consider the reasons behind any request for an expert report and how will it add to the

information the court already has. The amended **Part 25** is supplemented by **Practice Directions 25A – 25F** (A, B and C are the most relevant).

8.10. It is not sufficient for all of the parties to agree that an expert instruction is necessary; permission must still be sought and obtained from the Court. Expert evidence that is submitted without the court's permission can be ruled inadmissible (although anecdotally there have been increasing instances of expert evidence being obtained without permission and admitted *de bene esse*).

8.11. In his first "View from the President's Chamber" **[2013] Family Law 548**, the President wrote that:

> *"The case management judge's approach should be: 'give me three good reasons why you say this expert is necessary' "*

8.12. **Criteria to Apply**

8.12.1. When applying for the instruction of an expert in children proceedings the court must, under **FPR 25.5 (1)**, have regard to the following factors:

a) *any impact which giving permission would be likely to have on the welfare of the children concerned;*
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, duration and conduct of the proceedings;*
g) *any failure to comply with **FPR 25.6** or any direction of the court about expert evidence; and*
h) *the cost of the expert evidence.*

8.12.2. The revised PLO requires the local authority (see the PLO, Pre-proceedings checklist) to attach a social work statement to its application form. The social work statement is required (see the definition in the PLO, paragraph 7.1) to include details of any necessary evidence and assessments that are outstanding and the local authority's case management proposals. So the

local authority on Day 1 must set out its thinking in relation to expert evidence. The local authority, and indeed the other prospective parties, will need to consider **PD25A**, paragraph 3, which deals with pre-application instruction of experts.

8.12.3. Following the issue of proceedings, the Court on Day 2 (see the PLO, Stage 1) will consider allocation and give standard directions, including directions for the filing and serving of any application for permission relating to experts under **FPR Part 25**.

8.12.4. **PD25C, paragraphs 3.2 - 3.5**, set out the process for making preliminary enquiries of the expert *"in good time for the information requested to be available"* for the CMH. No later than 2 clear days before the CMH there must be an advocates' meeting at which (see the PLO, Stage 2) the advocates must identify any proposed experts and draft questions in accordance with **FPR Part 25**.

8.12.5. Parties are to apply for permission for an expert to be instructed *"as soon as possible and ...no later than the Case Management Hearing"* (see **PD36C, paragraph 7.1**, which substitutes a new **FPR 25.6**).

8.12.6. **FPR 25.7(2)(a)** sets out what the application notice "must" include; amongst other things the matters set out in **PD25C**, **paragraph 3.10**:

a) the discipline, qualifications and expertise of the expert (by way of C.V. where possible);
b) the expert's availability to undertake the work;
c) the timetable for the report;
d) the responsibility for instruction;
e) whether the expert evidence can properly be obtained by only one party (for example, on behalf of the child);
f) why the expert evidence proposed cannot properly be given by an officer of the service, Welsh family proceedings officer or the local authority (social services undertaking a core assessment) in accordance with their respective statutory duties or any other party to the proceedings or an expert already instructed in the proceedings;
g) the likely cost of the report on an hourly or other charging basis;

h) the proposed apportionment (at least in the first instance) of any jointly instructed expert's fee; when it is to be paid; and, if applicable, whether public funding has been approved.

8.13. **Draft Orders**

8.13.1. **FPR 25.7(2)(b)** provides that a draft of the order giving the Court's permission as mentioned in **FPR 25.4** is to be attached to the application for the Court's permission. That draft order must set out the following matters –

a) the issues in the proceedings to which the expert evidence is to relate and which the court is to identify;

b) the questions relating to the issues in the case which the expert is to answer and which the court is to approve ensuring that they –

i. *are within the ambit of the expert's area of expertise;*

ii. *do not contain unnecessary or irrelevant detail;*

iii. *are kept to a manageable number and are clear, focused and direct;*

c) the party who is responsible for drafting the letter of instruction and providing the documents to the expert;

*d) the timetable within which the report is to be prepared, filed and served**;***

e) the disclosure of the report to the parties and to any other expert;

f) the organisation of, preparation for and conduct of any experts' discussion (*see **Practice Direction 25E – Discussions between Experts in Family Proceedings***);

g) the preparation of a statement of agreement and disagreement by the experts following an experts' discussion

h) making available to the court at an early opportunity the expert reports in electronic form;

i) the attendance of the expert at court to give oral evidence (alternatively, the expert giving his or her evidence in writing or remotely by video link), whether at or for the Final Hearing or another hearing; unless agreement about the opinions given by the expert is reached at or before the Issues Resolution Hearing ('IRH') or, if no IRH is to be held, by a date specified by the court prior to the hearing at which the expert is to give oral evidence.

8.14. **Draft Letters of Instruction**

8.14.1. **PD25C**, **paragraphs 3.11** and **4.1** place an obligation on the parties to provide the Court with drafts of the letter of instruction and of the questions proposed to be put to the expert.

8.14.2. As **PD25C, paragraph 3.11(b)**, stipulates, the questions must not contain "unnecessary or irrelevant detail", they must be "kept to a manageable number" and they must be "clear, focused and direct." **(**PD25C, paragraph 4.1, specifies what must be included in the draft letter of instruction.)

8.15. **Independent Social Workers**

8.15.1. The **Family Justice Review 2011** recommended:

> *"The court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved in proceedings. Independent social workers should be employed only exceptionally as, when instructed, they are the third trained social worker to provide their input to the court'.*
>
> *(**Family Justice Review 2011**, November 2001, page 18**)***

8.15.2. Recently, Oxford University published a paper on the value of Independent Social Workers.

8.15.3. Notably, the above rules do not apply to evidence from a person who is a member of the staff of a local authority or a children's guardian (see **FPR 25.2(2) (a) – (c)**). The instruction of a social worker or guardian to undertake work in children proceedings does not need to be subject to the rules under Part 25. However, with some local authorities increasingly using allocated social workers to undertake parenting assessments in care proceedings, it is interesting to consider whether we will begin to see the emergence of expectations on local authorities to present detailed proposals for such assessments in advance of the CMH. Social workers may need to consider the best format for an assessment plan, which sets out the expectations on the parents, a schedule of work and the criteria by which the parents will be assessed.

9. Disclosure

9.1. **Re A (A Child) [2012] UKSC 60** the issue was whether the local authority should disclose information held by them to parties in private law proceedings. The Supreme Court decision provides a useful review of public interest immunity (PII) and the impact of Human Rights.

Facts

- M and F separated and their child A remained living with M. F returned to Australia to live. There were contact proceedings in England and a number of contact orders made, the last of these provided for A to stay with her father during his expected visits to England. Prior to the staying contact commencing, X alleged that she had been seriously sexually abused by F when she was a young child. This account was first given to some adults she knew, who reported the matter to the local authority.

- Social workers investigated and formed the view that the allegations could be true. X was however adamant that she did not want any action to be taken on her allegations or her identity revealed to anyone. Knowing that F would be coming to England to see his daughter, the local authority informed M that a young adult had made serious allegations against F which the authority regarded as credible and that she should take steps to protect A from the risk of sexual abuse by F. After some "keep safe" work with A, and having advised M not to allow F to have unsupervised contact with A and to seek legal advice, the local authority closed the case.

- M then applied to vary the contact order. The County Court ordered the local authority to disclose the information about the allegations in its possession to the parties. The local authority resisted this because they wished to preserve X's confidence and her level of distress indicated that revealing her identity would expose her to the risk of further serious emotional harm.

Decision at First Instance before Jackson J

9.2. The proceedings were transferred to the High Court and A was joined as a party to the proceedings, represented by a Children's Guardian. When the matter eventually came

before Jackson J in September 2011, he adjourned it so that a report could be obtained from Dr W. a consultant psychiatrist who had been treating X. The report from Dr W. concluded that disclosure would be potentially detrimental to her health and that there was a significant risk that exposure to further psychological stress (such as that which would inevitably result from disclosure) would put her at risk of further episodes of illness. It would also be working against the current therapeutic strategy of trying to help minimise stress and engage with psychological therapy. Being summoned to court is one step further than disclosure and would inevitably be immensely stressful and therefore carry the same risk of deterioration in her physical (and mental) health.

9.3. By the time the matter came to be heard by Jackson J the state of knowledge of the various parties was as follows: the local authority not only knew the identity of X but also had a full record of her allegations; M also knew the identity of X; F stated that he did not know who X was; the Children's Guardian inadvertently came to know her identity. The Judge did, however, have all the material as he had previously ordered that the material for which the local authority claimed PII be disclosed to the court.

9.4. Jackson J gave judgment dismissing the applications of M, F and the Children's Guardian for disclosure of the local authority's records (see **[2012] EWHC 180 (Fam)**). He accepted the medical evidence about the potentially serious effect of disclosure on X's health. The information, once disclosed, could not be controlled. Her identity and the allegations were inextricably intertwined. Having earlier reached the conclusion that compelling X to give evidence would be "oppressive and wrong", to order disclosure when the court was not prepared to order her to give evidence would risk harming her health without achieving anything valuable for A and her parents.

The Decision of the Court of Appeal

9.5. The Children's Guardian appealed and it was agreed that the Court of Appeal should also see the full material. On 24 July 2012, the Court of Appeal announced that the appeal was allowed (see **[2012] EWCA Civ 1084**).

9.6. McFarlane LJ gave short oral reasons. The principal reason was that the mother was now "in the worst of all possible positions", knowing and believing X, but not being able to have the truth of the allegations resolved in the proceedings.

9.7. On 21 September 2012 McFarlane LJ gave a full judgment with which Thorpe and Hallett LJJ agreed (see **[2012] EWCA Civ 1204**). The Court held that the judge had

been wrong to link consideration of whether X could ever give oral evidence with the issue of disclosure. Until the relevant adults were told of the allegations, it was simply too early to decide whether or not they could be proved or disproved by reference to third parties or independent sources. Disclosure of the core material had a freestanding value irrespective of whether or not in due course X could be called to give oral evidence. The Court also held that it would have been wrong for Jackson J to continue to hear the case having read the confidential material but having refused to order its disclosure.

The Decision in the Supreme Court

9.8. The Supreme Court gave X permission to appeal. The Supreme Court did not see the material for which PII was claimed. Lady Hale gave the lead judgment describing the task of the court as follows:

> *"We are asked in this case to reconcile the irreconcilable. On the one hand, there is the interest of a vulnerable young woman (X) who made an allegation in confidence to the authorities that while she was a child she had been seriously sexually abused by the father of a little girl (A) who is now aged 10. On the other hand we have the interests of that little girl, her mother (M) and her father (F), in having that allegation properly investigated and tested. These interests are not only private to the people involved. There are also public interests, on the one hand, in maintaining the confidentiality of this kind of communication, and, on the other, in the fair and open conduct of legal disputes. On both sides there is a public interest in protecting both children and vulnerable young adults from the risk of harm."*
>
> *(**Re A (A Child) [2012] UKSC 60**, paragraph 1)*

9.9. X resisted disclosure on the primary ground that it would violate her right not to be subjected to inhuman or degrading treatment, contrary to **Article 3** of the **European Convention on Human Rights**. Alternatively, the balance between her right to respect for her private life and the rights of the other parties should be struck by the court adopting some form of closed material procedure which would enable the allegations to be tested by a special advocate appointed to protect the parents' interests but without disclosure to the father. The M, F and CG supported disclosure.

9.10. The Supreme Court dismissed the appeal and upheld the order for disclosure made by the Court of Appeal. Lady Hale said:

"**[29.]** *If we were dealing with the common law principles alone, the answer would be clear. There is an important public interest in preserving the confidence of people who come forward with allegations of child abuse. The system depends upon the public as its eyes and ears. The social workers cannot be everywhere. The public should be encouraged to take an interest in the welfare of the children in their neighbourhoods. It is part of responsible citizenship to do so. And that includes victims of historic child abuse who have information about the risks to which other children may now be exposed.*

[30.] *But many of these informants will not be required to give evidence in order to prove a case, whether in criminal or care proceedings, against the perpetrators of any abuse. Their information will simply trigger an investigation from which other evidence will emerge. Their confidence can be preserved without harming others. In this case, however, that is simply not possible. We do not know whether A is at risk of harm from her father. But we do know of allegations, which some professionals think credible and which would, at the very least, raise the serious possibility of such a risk. Those allegations have to be properly investigated and tested so that A can either be protected from any risk of harm which her father may present to her or can resume her normal relationship with him. That simply cannot be done without disclosing to the parents and to the Children's Guardian the identity of X and the detail and history of the allegations which she has made. The mother can have no basis for seeking to vary the arrangements for A to have contact with her father unless this is done..."*

*(**Re A (A Child) [2012] UKSC 60**, paragraphs 29 & 30)*

"**[32.]** *However, when considering what treatment is sufficiently severe to reach the high threshold required for a violation of article 3, the European Court of Human Rights has consistently said that this "depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim"… The context here is not only that the state is acting in support of some important public interests; it is also that X is currently under the specialist care of a consultant physician and a consultant psychiatrist, who will no doubt do their utmost to mitigate any further suffering which disclosure may cause her. I conclude therefore, in agreement with the Court of Appeal, that to disclose these records to the parties in this case will not violate her rights under article 3 of the Convention.*

[33.] *However, that may not be the end of the matter, for to order disclosure in this case would undoubtedly be an interference with X's right to respect for her private life. Clearly, her rights are in conflict with the rights of every other party to these proceedings. Protecting their rights is a legitimate aim. But the means chosen have to be proportionate. Is there, therefore, some means, short of full disclosure, of protecting their rights?"*

*(**Re A (A Child) [2012] UKSC 60**, paragraphs 32 & 33)*

"**[35.]** *The only possible conclusion is that the family life and fair trial rights of all three parties to these proceedings are a sufficient justification for the interference with the privacy rights of X. Put the other way round, X's privacy rights are not a sufficient justification for the grave compromise of the fair trial and family life rights of the parties which non-disclosure would entail."*

[36.] *It does not follow, however, that X will have to give evidence in person in these proceedings. There are many ways in which her evidence could be received without recourse to the normal method of courtroom confrontation. Family proceedings have long been more flexible than other proceedings in this respect. The court has power to receive and act upon hearsay evidence. It is commonplace for children to give their accounts in videotaped conversations with specially trained police officers or social workers. Such arrangements might be extended to other vulnerable witnesses such as X. The court's only concern in family proceedings is to get at the truth. The object of the procedure is to enable witnesses to give their evidence in the way which best enables the court to assess its reliability. It is certainly not to compound any abuse which may have been suffered."*

*(**Re A (A Child) [2012] UKSC 60**, paragraphs 35 & 36)*

10. Party Status

10.1. In **Re B (A Child) [2012] EWCA Civ 737** the Court of Appeal heard an appeal by a grandmother against the refusal of her application to become a party to care proceedings with a view to making an application to care for the child.

10.2. Black LJ noted that a curiosity of the case was that by the time of the care proceedings, grandmother had already been granted leave to apply for both contact and residence in the private law proceedings which were neither joined with the public law proceedings

nor withdrawn or dismissed. Although the grandmother's application was to become a party (and not for leave to apply for a substantive order), the judge had been correct to accept that the provisions of **CA 1989, Section 10(9)** were relevant. Black LJ did not consider that **Section 10(9)** contained a test and that

> "*by picking out some factors to which the court should have "particular regard", it acknowledges by implication that there may be other factors which the court has to consider. It would be wrong to try to list or limit these factors which will vary infinitely from case to case. One amongst them is plainly the prospects of success of the application that is proposed; leave will not be given for an application that is not arguable.*"
>
> (***Re B (A Child) [2012] EWCA Civ 737**, paragraph 48)*

10.3. A definition of what is arguable was not attempted by Black LJ but she made the following observations:

> "**[49.]** *…the fact that a person has an arguable case may not necessarily be sufficient to entitle him or her to leave under section 10 or to joinder as a party. I say this because section 10(9) picks out other factors as requiring particular regard and I think it must follow that there may be situations in which, when the judge exercises his or her discretion, balancing all the relevant factors, the presence of an arguable case is outweighed by those other factors or, indeed, by any other factor that carries particular weight in the individual circumstances of the case. Suppose, for example, that the applicant wishes to advance a barely arguable case with many attendant problems in relation to a child with special needs who is securely placed with an irreplaceable long term family who will be unable to withstand the rigours of any further litigation.*
>
> **[50.]** *…there is room, in cases concerning children, for applications or proposed applications to be checked at a very early stage and without wholesale investigation. The court has a broad discretion to conduct the case as is most appropriate given the issues involved and the evidence available, see for example **Re B (Minors)(Contact) [1994] 2 FLR 1, Re C (Contact: Conduct of Hearings) [2006] 2 FLR 289** and **Re N; A v G and N [2009] EWHC 1807 (Fam)**. Accordingly, some cases can appropriately be determined on submissions alone, for example. Furthermore, it is not always necessary for findings to be made in relation to all (or sometimes any) disputed facts, perhaps because the result does not depend upon them or because there are quite sufficient undisputed facts to form the foundation of the decision that needs to be taken. What is more, there is*

*no absolute entitlement to assessment with a view to caring for a child; **TL v LB of Hammersmith and Fulham** **[2011] EWCA Civ 812** contains observations relevant to this point.*

[51.] *…It is for the judge to ensure in each case that there is a fair determination of the claims of the parties and the issues in the case. Thorpe LJ's statement in Re J that judges should be careful not to dismiss the possibility of a child being cared for by grandparents "without full inquiry" must be read in the context of the facts of the particular case he was considering. The prospects of a grandparent taking over the child's care must, of course, always be looked into carefully because it can be greatly to a child's benefit to be kept within the family by such a placement. Our attention was invited also to **Re C (Family Placement)** **[2009] EWCA Civ 72**, which exemplifies this. But there are various levels of investigation of the possibilities. At one end of the spectrum, the grandparent's proposals may need to be explored at a full hearing with reports and on oral evidence; at the other a careful but limited examination of the situation by the local authority may disclose overwhelming reasons why care by the grandparent is obviously not an option. I do not think, therefore, that what Thorpe LJ said should properly be interpreted as a requirement that any grandparent who wishes to put forward proposals should be joined as a party to existing care proceedings or given leave to issue a section 8 application or still less permitted to air their case at a full hearing on evidence. Sometimes some or all of these things will be appropriate, sometimes none and it is for the judge to weigh the various factors and decide what the proper order is in the individual case. This court is slow to interfere with discretionary decisions of this kind.*

[52.] *…**Section 10(9)(c)** provides that the court must have particular regard to "any risk there might be of [the] proposed application disrupting the child's life to such an extent that he would be harmed by it". In **Re M** (supra), Ward LJ said (at page 95/96) that this particular provision was directed at risk to the child arising from the proposed application rather than arising from the making of any order that might result from it. Delay occasioned by or associated with the application is an obvious source of disruption and harm and must properly be considered under this heading."*

*(**Re B (A Child) [2012] EWCA Civ 737**, paragraph 49 - 52)*

10.4. The Court of Appeal did not consider that the judge erred in her approach to the decision to refuse to join PGM as a party to the care proceedings or arrived at a conclusion which was not open to her and dismissed the appeal.

11. Case Management – 26 weeks

11.1. **A London Borough v A (No 1) [2012] EWHC 2203 (Fam)**; **[2013] 2 FLR 129**:

- The local authority sought care orders in respect of three siblings, now aged 6, 18 months and 7 months, following a finding that the father had been responsible for the death of a fourth child.

- The father's appeal was dismissed and a review of the finding of fact was conducted in light of evidence that one of the siblings had kicked a carer, causing the father to raise the suggestion that that child may have been responsible for the child's death. The judge concluded that this information made no difference to the finding.

- The mother was now living apart from the father and sought an adjournment of a final decision for 6 months to enable her to embark on a course of insight-oriented psychotherapy, which it was hoped would enable her to care for her children in the long term. The local authority care plan was for the oldest child, who suffered from an autistic spectrum disorder, to remain in long-term foster care at his current placement, for the 18-month-old child, who was showing signs of global developmental delay, to either be adopted or placed in long-term foster care and for the youngest child to be adopted. The unanimous professional advice was that there was serious doubt about the mother's ability to meet the children's need to be kept physically safe and their emotional need to understand their family history. Although her parenting otherwise was found to be positive her good intentions could not protect the children over time while she genuinely believed that the father had been the victim of a miscarriage of justice.

11.2. Peter Jackson J adjourned the final hearing for 6 months for the mother's engagement in therapy:

(1) The welfare of the children was the court's paramount consideration, and other considerations, such as sympathy for the mother, had to give way to it (see para [9]).

(2) A decision could only be deferred if there was a real prospect of a different outcome emerging. That depended on the mother's state of mind and the court's criteria. In the circumstances of the case, the mother's unqualified acceptance of

the court's findings was not a precondition for reunification. Full acceptance would be best for the children, but it was possible that a substantial and genuine acknowledgement that the father may be dangerous, combined with a genuine emotional distancing from him, would be sufficiently protective (see paras [36], [58]).

(3) The prize for the children of being cared for by their mother was so valuable that they should only be denied it if the disadvantages of waiting were too great or the chances of success too small. On the evidence the risks arising from delay were sustainable. They were relatively slight for the oldest child. The chances of the 18-month-old child finding adopters, given the uncertainty about his development, were not great. The brunt of the disadvantage was borne by the youngest child, but even this was outweighed by the possibility of a lifelong relationship with her mother (see para [66]).

(4) In reaching a different ultimate conclusion from the advice of the professional experts, the difference of approach was identified as being: (i) that an unqualified acceptance of the findings was not an inflexible precondition to reunification of the mother and children, and (ii) that a chance of change was sufficient, even if it did not amount to a probability (see para [69]).

11.3. It should be noted that at the final hearing some 6/7 months later, Jackson J made care orders in respect of all three children and placement orders in respect of the two younger children. The parents remained living apart but the mother's therapist reported that while she had shown commitment to attending therapy sessions she still lacked sufficient understanding and acceptance of the risks the father posed to the children. He considered that she had not emotionally separated from the father and that once she was living at home, caring for the children herself, there was a high probability that her resolve to remain separated would weaken. The local authority, supported by the Guardian, sought care and placement orders in respect of the youngest two children while the plan for the oldest child was to remain with his foster family where he was doing well. On the evidence, the mother's views had not moved on in any meaningful way since she had undertaken therapy. She remained deeply sceptical about the father's responsibility for the child's death and it was not purely religious or cultural reasons that explained her decision to remain married to him (see para [57]).

11.4. A number of questions arise from this decision:

11.4.1. How can this decision be squared with the 26-week rule?

11.4.2. How will the 26-week rule impact on residential assessments?

11.4.3. Will local authorities be forced to have care orders at home/with relatives rather than a period of monitoring following rehabilitation taking place within court proceedings?

12. Finally- A Step Too Far?

12.1. In **AMV v RM (Children: Judge's Visit to Private Home) [2012] EWHC 3629 (Fam)** the parents of two children were disputing residence. The mother asserted that she lived in a rented three-bedroom property and accepted that she spent time at her parents' property which was close by. The father refused to accept the mother's claim and believed they were primarily living at the maternal grandparents' property and he was concerned about the standard of accommodation there. Shortly after the hearing commenced, the judge decided of her own motion that it would be appropriate to conduct an unannounced visit to both the mother's and the grandparents' properties in order to make a determination as to the mother's primary residence. The mother and her legal representative were given 15 minutes to decide whether they agreed. Although the mother was able to agree to a visit to her own property she had been unable to contact her parents in order to get their consent but the judge nevertheless decided to visit both properties. Upon arrival at the mother's property the judge inspected cupboards, fridges, even wastepaper baskets and when she specifically looked in a dustbin made an express finding as to the likely occupancy of the house. The group then proceeded to the grandparents' home where a similar search was conducted without them having legal advice. The judge concluded that the grandparent's home was cramped, dirty and untidy. The mother appealed.

Held – finding the practice conducted by the judge to be unlawful –

(1) *The entire procedure was wholly unacceptable. It was a suggestion which came within or shortly after the opening of the case and did not permit time for proper consideration of the implications. In reality it gave the mother and her legal adviser little effective choice but to agree for fear that a negative response would draw an adverse inference from the court. It was, in effect, litigation by ambush and, prima facie, a breach of the mother's Art 6 rights to a fair trial. It was not the role of the judge to play detective and enter a person's home (see para [8]).*

(2) *Prima facie, the judge entering the home of a third party in order to elicit evidence constituted an interference with the Art 8 rights of the maternal grandparents. The judge's job was to consider the facts presented, weigh up that evidence after cross-examination and make findings and a determination (see paras [9], [10]).*

(3) *If there were real concerns that the children were not being cared for properly it was a matter that could be dealt with by social services who were entitled to make regular, unannounced visits. The practice used here was to be deprecated (see para [10]).*

HELEN KNOTT
SUSAN QUINN

15 October 2013