Case No: B4/2012/2924

Neutral Citation Number: [2013] EWCA Civ 963
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NOTTINGHAM COUNTY COURT
HER HONOUR JUDGE BUTLER QC
OG11C01711

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2013

Before :

LORD JUSTICE LLOYD
LADY JUSTICE BLACK
and
LORD JUSTICE MCFARLANE

- -

P (A CHILD)

- -
- -

Miss Julia Belyavin (instructed by **Brewer, Harding & Rowe**) for the **Appellant**
Miss Hannah Markham (instructed by **Straw & Pearce**) for the **Respondent**

Hearing dates : 16 May 2013
Final written submissions: 24 June 2013

- -

Judgment

BLACK LJ:

1. This appeal concerns orders made by HHJ Butler QC in relation to a child, L, who was born on 11 September 2009 and is 3 ¾ years old.

2. The appellant is L's father (F). He was one of several respondents in the court below, the others being L's mother (M) and L herself by her children's guardian. The applicant in the proceedings was the local authority (LA).

3. M has taken no part in the appeal. The guardian has not attended or been represented but her solicitors wrote to the Court of Appeal before the appeal hearing setting out her position which was in line with that of LA and explaining that, in view of the need to save costs, the guardian did not intend to be represented separately at the hearing.

4. F was represented before HHJ Butler QC. However, he began his appeal as a litigant in person. His application for permission to appeal was considered by McFarlane LJ at an oral hearing in February 2013. At that time, there was very little documentation. The basis on which F put his proposed appeal at that stage has largely turned out not to be a productive one but McFarlane LJ was sufficiently concerned to adjourn the application for permission to a hearing in front of the full court with the appeal listed to follow if permission was then granted. That hearing took place on 18 April 2013. There was considerably more information available to the court by then but the guardian had not been served with notice of the proposed appeal. As the court considered that F's appeal had sufficient prospect of success for permission to appeal to be granted, it was inevitable that the case should be adjourned and the appeal hearing re-listed giving the guardian time to consider the position and make representations, as has been done. This also gave F the opportunity to secure legal representation which he has managed to do. We are grateful to his counsel, Ms Belyavin, and to counsel for LA, Ms Markham, who both assisted the court very ably at the hearing of the appeal but neither of whom acted in the court below. They have continued to assist us after the oral hearing, making further written submissions on issues which arose during the course of the hearing and again once the decision of the Supreme Court in In the matter of B (a child) [2013] UKSC 33 (Re B) became available.

5. There are a number of orders against which F appeals. His overriding focus is upon the interim care order that Judge Butler made on 23 August 2012 and the care and placement orders that followed on 4 October 2012. However he also appeals against case management decisions which were made in preparation for these orders, namely an order on 26 April 2012 refusing an application by him for a psychological assessment and an order on 23 August 2012 refusing an application for an independent social work assessment.

6. The appeal has been dogged by problems in obtaining transcriptions of the proceedings in the county court. I take this opportunity to underline how vital it is that this court should be able to have access to transcripts of the judgments which are material to an appeal and, where material, transcripts of the argument and evidence. In this case, the county court had difficulty finding the tapes of the proceedings. Ultimately transcripts of Judge Butler's judgment on 17 April 2012 (when she made findings of fact about some of the factual background), 26 April 2012 (the application for a psychological assessment) and 4 October 2012 (placement order) were obtained

but no recording of the proceedings in August 2012 could be found and we have had to manage with a note of the hearing and the judge's judgment. It is very important that systems should be in place in all courts to ensure that this does not occur and also to ensure that when transcripts are sought for the purposes of an appeal, the necessary steps are taken without delay to obtain them. If this does not happen, proceedings in this court are delayed which is not in the interests of the parties, and in particular of course of the children.

7. I need to begin with some history of the period leading up to the commencement of the care proceedings, after which I will deal with the developments thereafter. It will be noted that I have gone into the evidence in this case in much more detail than would normally be expected. This is because it is, in my view, a difficult case which must be resolved having careful regard to the material that is available about F, including in particular his care of L and his conduct towards M and towards professionals. For the most part, that material has to be tracked down in the statements, reports and other source documents as little of it appears in the judge's short judgments.

The relationship of the parents in Devon

8. F and M formed a relationship whilst both were living in Devon where F and his family remain based. They separated in April 2010. Social services became involved at around that time and an initial child protection conference took place on 31 August 2010. Causes for concern were the neglectful care given to L by M, "domestic violence which L was witnessing" and F's "aggressive stance towards professionals and [M]". The conference determined that there should be a child protection plan under the category of likely neglect.

9. After the conference, work was done with both M and F. There were visits by a social worker to their homes and workers from the family intervention service spent time working with each of them on their parenting. There continued to be concerns about the state of M's house and her care of L. The relationship between the parents was poor and there was trouble over contact.

10. It is important to look in a little more detail at the picture presented to the next child protection review which took place on 28 April 2011. The review received contributions from various sources, both in writing and orally, and decided that L should remain subject to a child protection plan which should be under the category of actual emotional abuse.

11. In his report for the review, the social worker said that L "has remained at risk of harm through neglectful and inconsistent parenting and that issues over contact/relationship between the parents also makes [sic] her at risk of harm". Indeed, he thought that there had been an increase in the risk to L since the last child protection conference. This was so despite the parents having had adequate support and an opportunity to improve the situation (F1-16). He considered that "both M and F have failed to take their parenting role seriously and in respect of their relationship they have allowed this to consume them to the detriment of L". He said:

> "At the current time I cannot offer anything positive in terms of the parents' capacity to make and sustain change. The issues

> over contact and the parents' relationship have been long standing and despite all efforts of support and advice the situation has remained harmful for L. In addition and equally as concerning is the lack of stimulation and L's physical and emotional presentation."

and

> "Given the overwhelming concerns for L's welfare it would be my view that the parents have left the local authority no alternative but to seek legal advice which may result in L being removed from her parents' care, so that the local authority can guarantee her safety, development and well being."

12. It is clear from the review meeting minutes that the social worker's concern in relation to F was about the impact on L of the parents' wrangling over contact and not about his physical care of L. The social worker told the review meeting that F had made and maintained huge improvements in the standard of his home and there were no concerns about it.

13. Positive aspects of F's care of L also appear from the report of the family intervention worker, Ms Bond, about her work with F. F had been available for every session with her and she commented on his efforts to make his home more appropriate and safe for L's visits. Ms Bond said that he appeared to have a good knowledge of L's basic care needs and he was very concerned, with some foundation, about the way she was cared for by M. She said that he always appeared affectionate and caring towards L during her (Ms Bond's) visits and L appeared happy in his care. She had seen him praise and encourage L and play with her, as well as monitoring her at all times when she was with him. Ms Bond commented that F's family provided him with a great deal of support and that L spent a great deal of time with the grandparents who had age appropriate and stimulating toys for her.

14. However, Ms Bond was concerned that F and his family were "voicing their distaste of M in L's presence" and that there had been "name calling and shouting during a recent handover of L from M's father towards F" to which L should not be subjected (F1-25). She was also concerned that F was refusing to use a contact book and was putting his own feelings about that before L's welfare. According to the health visitor's report, F's reluctance to use the book was because he thought it was none of M's business what he did with L. The health visitor also noted that she had been unable to review L's development as F did not attend the appointment with L (F1-20).

15. The health visitor's report gave another practical example of the potential impact of issues between the parents on L in that apparently L had been prescribed cream for her nappy rash by the GP but the parents were reluctant to hand it over to each other. The health visitor also commented on the situation in more general terms, saying that:

> "L has appeared confused and subdued at meetings where both parents are present. There is significant animosity between parents and this has had an obvious impact on L's emotional development." (F1-20)

16. A report from the Children's Centre said that the parents needed to be "more proactive at ensuring L is comfortable and secure during their handovers" (F1-43), commenting that sometimes there seemed to be a competition between the parents over L's affection and that L found that very difficult to cope with and seemed unsure how to react, therefore seeming withdrawn and hesitant. The author of the report commented that the parents spent a lot of time criticising the other parent instead of concentrating on their own parenting. The view was expressed that the parents would benefit from counselling and support about how to interact appropriately with each other for L's well being.

17. The police provided a "Summary of Incidents" (F1-48) since November 2010 which set out how, on two dates, one or other of the parents or both contacted the police complaining about trouble between them about contact.

18. In summary, the state of play in Devon at the end of this review was as follows. There were still concerns about M's care of L. F had made some improvements in the practical arrangements for L whilst she was with him for contact. Since October 2010, he had been having L for three full days each week without supervision. However, there had been no improvement in the damaging strife between the parents over contact which was having a harmful effect on L emotionally. The local authority had not actually commenced proceedings under the Children Act but had warned that they may need to do so and one of the decisions of the review was that the social worker should seek legal advice about care proceedings.

M and L move to Nottinghamshire in summer 2011

19. Matters then took an unexpected turn. M moved from Devon to Nottinghamshire with L. It became clear later that she had done so to pursue a relationship with another man. LA were alerted to her presence in their area by Devon social services. According to the statement (dated 8 September 2010 but presumably of 8 September 2011, C1-3) made for the care proceedings by Ms Van Gils, one of LA's social workers, the allocated social worker from Devon contacted LA on 14 June 2011. The information he provided was that Devon "had reached the decision that Care Proceedings would be issued" but that M had moved to Nottingham before that happened. Their concerns were reported to be about certain aspects of M's care of L plus F's "aggressive stance towards M and professionals", "ongoing domestic violence between parents, which L was witnessing", "health appointments being missed", "dirty and unhygienic home environment in respect of both M and F's property", cannabis use by F and "self-care issues of F".

20. A social worker from LA visited L at M's new home. A man was there, now known to be M's new boyfriend. M presented him to the social worker as C, her cousin.

21. LA held a child protection conference on 5 July 2011. The focus of the conference was largely on M's care of L. It was agreed that L would become subject to a child protection plan under the category of neglect and various steps would be taken such as the completion of a parenting assessment of M and regular social work visits to M's home. The social worker from Devon attended. He put some matters that had been raised by F to the conference, including F's view that C was M's new partner and needed to be checked out. He said that F would no doubt make an application for contact at some point and that he supported this as L had always enjoyed time with F

and unsettled behaviour was around the parents' relationship not actual contact with F. It seems from F's first statement for these proceedings that towards the end of June 2011, he had got public funding to make a residence order application but that this was overtaken by events in Nottingham.

22. On 1 August 2011, F telephoned LA to ask about L as he had not seen her for 8 weeks; he was said to be very worried (see §5.2.17 of the report of the independent investigator into F's complaint, as to which see below). M was contacted and said she was refusing access to F as L had been happier since living in Nottingham and she had concerns that F had previously acted irresponsibly when caring for L and was a cannabis user (statement of Ms Van Gils, C1-4).

23. As is now known, at around this time, L was suffering various non-accidental injuries at the hands of M's boyfriend. The gravest of these injuries resulted from the boyfriend raping L, then not yet two years old, on 22 August 2011. L was taken to hospital seriously injured following this incident.

24. It is not entirely clear from the papers when F was informed of the situation but it is plain that he immediately came up from Devon to Nottingham, arriving at the hospital in the early hours of 25 or 26 August. He told LA that he did not agree to them accommodating L and wanted to return to Devon with her. LA responded by urgently seeking an interim care order although F later did consent to L being accommodated.

25. In LA's application form dated 26 August 2011 seeking a care or supervision order, they expressed the view that L could not safely be returned to the care of either parent. In so far as the reasons given for this concerned the situation in Devon, they were that there was "neglect of L's basic care needs" in various respects, "concerns related to the high level of domestic violence between parents, both of whom were perpetrators", and "concerns dating back to November 2011 [sic, but must mean 2010] when following a domestic incident the ambulance crew reported concerns of F's rough handling of baby L". LA commented also on F's "self-care", his home conditions and misuse of cannabis (B10).

26. When Ms Van Gils dealt with F's capacity to meet L's needs in her statement of 8 September 2011, she said (C1-14):

> "F is reported by Devon CYPD to have made improvements in his parenting capacity with intensive support from Family Intervention Services in respect of cleanliness and hygiene. He is reported to have a good understanding of L's basic care needs, has provided suitable toys and stimulation in his home and ensures basic safety. The concern is that he has required a a lot of support from professionals and family members to achieve this and further investigation is needed to assess whether this is something that can be consistently maintained."

F's complaint about Nottingham Children's Services

27. I will deviate from my chronological account to record that LA's handling of L's move into their area has been found wanting. This is an important part of the background.

28. F felt that Children's Services had failed in their duty to L. In 2012, he made a complaint to LA about their failure to respond quickly enough to his concerns that L was at risk from M's boyfriend and to carry out the necessary checks on him. His complaint was upheld but he was not offered a full explanation or apology. He pursued matters further and the local government ombudsman determined in December 2012 that LA should investigate the complaint under stage 2 of the Children Act complaints procedure.

29. An independent investigator reported fully in April 2013 upholding F's complaint. She recommended that a full apology should be offered to him for the shortcomings in social work which had been identified including the failure to carry out checks on M's boyfriend in good time, the paucity and lateness of the social worker's recordings of the case and the failure of the social worker to contact F directly after L moved to Nottinghamshire.

After L went into LA's care

30. Since L has been in care, F has attended regularly for contact with her, making the round trip from Devon each time. Initially it was weekly and then, following a gap of 4 weeks when F had transport problems following an accident in his car, fortnightly. F's mother (PGM) and grandmother (PGGM) have also attended contact. It is said that L played and interacted well with them all.

The April 2012 hearing leading to Judge Butler's judgment of 17 April 2012

31. The purpose of the April 2012 hearing was to establish the threshold criteria. Its main focus was upon the injuries L suffered whilst in Nottingham with M but some findings were sought against F in relation to the period preceding that. Judge Butler said of F in her judgment (§9):

> "So far as F is concerned…. a finding was sought against him in relation to his time with M and L in Devon when they both lived together and cared for the child. He has admitted certain matters and all parties agree that his admissions are sufficient to meet the threshold criteria and I will read out the agreed threshold in relation to the father:
>
> (1) Father accepts that the threshold is met in relation to the child, L, in that at the relevant date she was at risk of suffering emotional harm due to the following:
>
> (a) F's relationship with M became volatile and verbal arguments occurred between them, on occasions within earshot but not in front of L, and that as a consequence L was likely to have suffered emotional harm;
>
> (b) arguments centred on contact and care of L and primarily took place at handover;

> (c) F further accepts pushing M on two occasions, but not in front of L, around the time of the breakup in their relationship in March/April 2010; and,
>
> (d) F believes that the police were called eight or nine times and the police logs record he was aggressive on two occasions to ambulance staff, although that is not accepted by F."

32. This summary in the judgment reflects F's account of events as set out in his first statement and in a formal document responding to LA's threshold document. However, in the response to the threshold, whilst F accepted that the findings in relation to M satisfied the threshold criteria, he said that he did "not accept that the Threshold Criteria are met as a result of any harm suffered by L being attributable to the care given, or likely to be given, to her, by himself" (C3-24).

33. F's concession in relation to the threshold was partial in that there was material available suggesting more aggressive/violent behaviour on his part. M's account of events went further as did the police material. This comprised the police Summary of Incidents to which I have already referred (§17 above) plus two further police reports (F1-67 and F1-69) which set out police involvement related to M and F on 9 occasions between November 2009 and October 2010. There are indeed two references in these reports to calls to the police from ambulance staff (on 22 and 24 November 2009) reporting that F was aggressive to them when they attended on M; these are the references which F accepted existed although he denied that he behaved as they suggested. In the account of the incident on 22 November, it is recorded that the ambulance crew were of the view that F was rough when handling the baby (reflected in LA's application form of 26 August 2011, see above) but F denied this in his response to the threshold and commented that all the professionals who had observed his contact had been "very content and positive about my care of L" (C3-22). Verbal arguments between the parents were reported by M to the police on three occasions between February and April 2010. In June 2010 M reported to the police that they had split up and complained about F but the police report records that he gave an explanation and no action was taken. In mid-September 2010, M called the police because she said F was late returning L after contact. She then called them twice in the next few weeks after verbal arguments with F. On the second occasion, the police called on F who had L with him for contact. F was said to have been at first aggressive and reluctant to let the officer in the house but then to have calmed a little and the officer was able to see L "who looked ok".

34. The only actual violence conceded by F was pushing M on two occasions. This is explained in F's response to the threshold where at §11 (C3-21) he said that he pushed M away on two occasions near the end of their relationship. On the first occasion, he said she had hit him with a broom handle and he pushed her away to avoid being attacked further and walked away. On the second occasion (§12 of the response), he said she shouted abuse at him, standing virtually nose to nose with him, and again he pushed her away and walked off. He acknowledged that on both occasions, he shouted back at M.

35. No further findings were made by the judge at any stage about aggressive or violent behaviour during the period before M left Devon. It appears that LA did not ask her to make any and F did not force the issue either. It must follow, therefore, that as far as

this aspect of the case is concerned, the factual basis upon which the court had to proceed was that conceded by F, namely that the relationship with M became volatile and they had arguments, centring on contact and care of L and primarily at handover times, which were likely to have been harmful emotionally to L, that F pushed M twice but only in response to her violence/abuse, and that the police were called 8 or 9 times. Reliance could not be placed on aggression towards the ambulance staff because it was denied and no finding was made about it. It would be inappropriate, I think, to term what was conceded a "high level of domestic violence between parents, both of whom were perpetrators" which was the basis upon which LA had begun proceedings back in August 2011. However, I have been particularly struck, in this case, by the imprecision of the term "domestic violence", which is used to cover many things ranging from actual physical violence to arguing with one's partner or seeking to control their behaviour. Care should be taken, I think, to spell out what is meant in a particular case because it may make a difference to the weight to be given to this problem in making decisions about a child's future.

26 April 2012 order

36. On 26 April 2012 the court reconvened to deal with case management issues including the parents' applications for psychological assessments. These had to be considered against the background of the assessments that were already available.

37. A **core assessment had been carried out by Devon social services** in August 2010 (E1).

38. It is important to look at what provoked that assessment and what conclusions were reached. I think it is fair to say that these were quite mixed.

39. The assessment covered both F and M. The assessment report says that there were two main concerns about parenting capacity at that time (E4) and both related to M rather than F, being first the state of her home and secondly her care and stimulation of L. However, one of the reasons given for carrying out the assessment was concern "for L's safety, due to F's aggressive behaviour, and an unwillingness to work with the recommendations from [the health visitor] about feeding and basic care" (E1).

40. The assessment referred (E3) to "significant domestic violence between the parents when they were in a relationship and for a period of time following the ending of their relationship". This was said to be "[m]ostly…in relation to verbal arguments between the parents that happened in front of L". It was said there had been no reports of incidents in the past few months as contact between the parents stopped for a while and then restarted "on a more amicable basis". Concerns had been expressed about the possibility F would be aggressive toward L "as he had been aggressive towards M" but it was said that an assessment carried out by the social worker in relation to F having unsupervised contact with L "did not highlight any significant concerns in relation to this particular issue" and M herself now felt that F was not a risk at all to L. The section entitled "Family and Social relationships – needs and strengths" reads:

> "As previously stated, there has been significant domestic violence in the past between the parents. This issue has since ceased and the parents have an improved relationship currently. There are concerns that as F failed to complete a REPAIR

> course, that it is possible he may revert to old patterns of behaviour that include threatening behaviour with occasional violence (e.g. pushing and grabbing M, and refusing to leave M's home as well as long arguments between the parents). The parent's relationship is volatile at times and this is concerning as L may be exposed to this in the future." (E3)

41. The assessment commented on F's "very caring and warm responsiveness" to L, seen by the social worker during his assessment which is reported to have found that "overall F's parenting was pretty good", subject to improvements being needed in the safety of his home "in terms of wires etc and provision of more toys for L, as well as playing more with L on the floor". He was considered able to care for L safely on his own.

42. There is reference in the assessment report to "concerns that L's social presentation is a little guarded and withdrawn and she is not as exploratory as might be expected" (E4) and a suggestion that the reasons for this "might include previous exposure to domestic violence" as well as a lack of stimulation from M. The author of the assessment commented that she did not feel that L had a fully secure attachment with either parent.

43. Ms Van Gils and Ms Webster subsequently carried out a **parenting assessment of F for LA.** This concluded that:

> "…..social care does not feel confident that F would be able to meet L's basic needs, with particular concern regarding L's emotional needs. Social care is therefore recommending that L does not live in the care of F." (E103)

44. Commencing on 7 October 2011, there were five 1 ½ to 2 hour sessions then a longer session in Devon in November 2011 when the assessors were able to meet F's family. Contact between F and L was also observed by the assessors and the observations of other contact supervisors were reviewed. The resulting report is, lamentably, undated but possibly filed on 4 December 2011 (see C1-29 but compare C1-31).

45. F's potential to care for L was analysed in the report under various headings. There is a considerable amount of detail. It is not necessary to refer to it all here but I will deal with the approach taken in the assessment to the question of domestic violence and also what was said about family support for F.

46. Domestic violence was discussed with F. M had spoken of "a high level of physical violence" towards her from F, of which she said that Devon social services were aware. However the assessors' enquiries of Devon revealed that they were not aware of this although concerns were consistently recorded regarding F's aggressive verbal behaviour towards M. What F said to the assessors about physical violence was not out of line with what he acknowledged for the purposes of the threshold. He admitted being verbally abusive towards M and said it was mutual; it was generally focussed on M's care of L. The assessors said:

> "This verbal aggression is of concern as F does not appear to understand the impact that this had on L at the time. During F's

> engagement with Nottinghamshire social care there have been a number of times when F has been very angry and aggressive. It was recognised throughout the assessment that F has been very upset with the current situation however his temper at times has felt threatening."

47. They said that during their sessions F was at times "physically shaking with anger" and would raise his voice. They understood that he was "angered by the significant concerns related to L's care since she moved to Nottinghamshire" (E82) but commented that his conduct could be "intimidating" for professionals involved with him. He said to them that he was "not aggressive, just frustrated" (E78) but it was felt that he was minimising events. Although F was said always to appear calm around L in contact, the assessors said that his behaviour had led them to believe that:

> "F does not recognise his controlling behaviour and is not able to see how this may impact on L in the future. This also leads to concerns regarding future relationships where F may become controlling and therefore L's future safety should she live with him."

48. The assessors referred to the police report of what the ambulance service said in relation to 22 and 24 November 2009 and to other incidents when M called the police. They appear to have relied upon this material in commenting that:

> "there are concerns that M contacted the police on many occasions due to fear of F's behaviour. There are further concerns that the Ambulance crew felt threatened by F's behaviour."

They had "considerable concerns regarding F's aggressive behaviour towards M and professionals and concerns that this would impact negatively on L in the future should she be living with F".

49. F's extensive family support was detailed in the report, the assessors having met a number of family members whilst they were in Devon. They thought the family appeared to be close and that it seemed they had supported F a great deal throughout his life. His brother lives in the same road as F does. PGM (whose husband he sees as his father) and PGGM live very close by. The assessors commented that "a positive of L going back into F's care would be the support from his mother and grandmother" (E100). The assessors explored with the family the negative view that they have of M. Ms Bond who had been involved with the family in Devon (see above) had told the assessors that she thought the family would never be able to put their feelings about M to one side and be positive about her. The assessors considered that "social care would need to be confident that the family knew the effect this could have on L before they placed L back with F or indeed extended family members" (E97).

50. The analysis section of the report (E101) identifies positives and negatives drawn from the body of the report before arriving at the conclusion to which I have already referred in §43 above. It is not easy to get a sense of which of the problems were seen to be of particular significance. Perhaps the most positive aspects were F's love for L, his commitment to seeing her, his good interaction with her, the fact that contact

appeared to be a generally positive experience for her and his good support network of family members. Against these was set the "major concern" about domestic abuse which the assessors concluded consisted in F being "aggressive and emotionally abusive towards M" which Devon social care believed had a great impact on L. Also weighing in the scales against F was the way he presented in the assessment sessions which had included being intimidating, aggressive and controlling at times and also saying contradictory things. Additionally, there was anxiety about the very negative view he and his family had about M and about the risk he may replicate his behaviour with M in his relationship with future partners as well as about his ability to provide the high level of emotional support that L may need in the future because of her early experiences.

51. The assessors took the view that F had had "little experience of caring for L" and were concerned "that historical information from Devon social care and other agencies suggested F struggled to meet L's basic needs and ability to put them before his own needs" [sic]. If this was a reference to F's conduct towards M in the context of contact, it is understandable. But if it was intended to convey that Devon social care thought there were problems about F's basic day to day care of L, it does not seem to me to be entirely accurate as the material from Devon conveys a picture of F having made his home appropriate and safe, having a good knowledge of L's basic care needs and being affectionate and caring towards her on the three full days a week that he had her in his care.

52. The foundation for **F's application for a psychological assessment** was set out in his position statement in support of his application. In essence, he wanted it to enable him to challenge LA's negative assessment of him. His position statement identified that the only findings made against him related to "domestic violence between him and M, the verbal arguments of which [sic] on numerous occasions took place within earshot of L". It set out what the proposed assessment would address including F's insight into the rows, his ability to change and to develop strategies to deal with frustrating situations in future, and his ability to accept advice and to work co-operatively with professionals. It concluded:

> "F needs to be in a position where he can properly challenge the negative parenting assessment at trial. Much of the concerns in the parenting assessment relate to domestic violence, F's attitude towards M and F's reluctance to take on board professional advice in relation to the care of L. That can and should be properly informed by expert psychological evidence." (C3-26)

53. In her judgment, Judge Butler accepted that F loves L and had shown commitment, attending most days of the fact finding hearing and most contact. She said:

> "However, the history of M and F's relationship is a worrying one. The history pre the birth was an aggressive and controlling behaviour towards M. There have been angry outbursts over the years on a regular basis towards people in authority, for example the police and ambulance crews on occasion, and there has been aggressive behaviour towards staff of social care over the years and this has occurred both in Devon, where M and F

> lived until M came to Nottingham in June 2011, and also here in Nottingham. Even during a parenting assessment by Nottinghamshire social care F was extremely angry at times with the assessment supervisors."

54. She said that the very long and detailed assessment by LA

> "shows a level of aggression over a long period, which is a worry, and there has been no sign over that period of any change in this type of behaviour exhibited by F. The assessment draws on work completed by Devon social care and Nottingham over some three years, and, as I say, there has been no improvement in his aggression and his outbursts. Clearly there was a risk of emotional harm from his behaviour and that of M. That is why Devon social care was involved in the first place, and in Devon he failed to complete a Repair course which, no doubt, would have helped in relation to his aggression. Devon core assessment said they feared that having failed to complete that course he would revert to his old pattern of behaviour."

55. She considered that with "such longstanding problems" it would take a lengthy period before the court could consider him not to be a risk to L and that the court "can be 99 per cent satisfied" that any psychological assessment would suggest further work/therapy which F needed to undertake, which would "take many months if not years and that is well outside the timescales of a child of L's age". She quoted from the guardian's submissions to the effect that F could undertake work on the issue without the need for a full psychological assessment and that it was difficult to see what further information such an assessment would provide. She refused F's application but said that in so doing she had "not prejudged the issue"; F would be able to present evidence of any change or therapy he undertook at the IRH/final hearing and it would be assessed then.

56. In my view, the judge was not wrong to refuse the assessment F sought. Case management decisions of this sort are particularly hard to appeal and in this case, it cannot be said that the judge overlooked any considerations which were material. An assessment such as LA's parenting assessment of F can be challenged in ways other than obtaining a competing assessment. If the facts upon which the assessment has proceeded are wrong, they can be disputed. If the opinions are flawed, that can be explored in cross examination, the author of the report being taken to the material which undermines or contradicts the conclusions he or she has drawn. Or, as the guardian contemplated here, a party can take steps to address the problems that have been identified and/or that he or she acknowledges.

57. As the judge made clear, she was not prejudging the issues simply by refusing to allow a psychological assessment. In so far as she overstated the aggressive behaviour that had been established, for instance in relation to police and ambulance services, that could be addressed at the final hearing.

After the April 2012 hearings

58. LA's final social work statement was provided in July 2012 by Ms Jalil. LA's view remained that F was not in a position to care for L. Ms Jalil said she had contacted F to discuss LA's recommendations with him on 26 July 2012 and he had been aggressive in his manner, reluctant to speak in any great depth about the situation and adamant that L would soon be returned to his care (C1-32). F said of this in his statement (C3-29) that he was "firm, but not aggressive" and told Ms Jalil that he did not think he had been properly assessed as a carer by LA. Ms Jalil reported that of the various assessments done of family members, only that in favour of a paternal aunt and uncle had been positive. However she said that, in mid July, that couple withdrew their application to care for L as they felt that with all the family issues it would be untenable and they would struggle to manage the pressures from family members. F spoke in his statement of 13 August 2012 (C3-33) of a malicious referral that the aunt and uncle believed had been made to social services about the uncle abusing drugs. He thought they believed he had made the referral and denied doing so. However, somewhat puzzlingly, the guardian said in her report completed on 16 August 2012 (E314) that F "has confirmed that once they withdrew from the process, he had made the … referrals".

59. In his statement, F accepted the matters that he had admitted in relation to the threshold criteria and said he regretted them but that he did not believe they justified LA's view that he could not care for L. He felt that he had been overlooked because of the focus on L's injuries whilst in M's care and because of geography. He said that apart from the guardian attending a contact session, he had only seen the guardian when they were both attending at court and not for a separate discussion about the case. He referred to the anger management therapy he had just started at his own expense with a psychologist. He also spoke of his intention to attend a parenting programme.

60. Ms Jalil also provided an addendum to the parenting assessment, dated 13 August 2012 (the same date as F's statement). The report is an amalgam of summarised history with an account of Ms Jalil's two recent telephone conversations with F, that on 26 July to which I have referred above and another, during which she found F more amenable, on 13 August. It is disconcerting to find that Ms Jalil incorporated into the addendum M's side of the story of the relationship, including her assertion that F hit her with all sorts of things and punched her, without any acknowledgment that F denied this.

61. Ms Jalil described F becoming aggressive and agitated during the first conversation (E300) but said he was more amenable during the second.

62. She contacted F's psychologist who said she would be providing six sessions. The psychologist said that she had found F extremely co-operative and willing to work and she thought he had not got an angry nature and got anxious and wound up rather than angry. Ms Jalil's view was that F's motivation in relation to the therapy and his commitment to it was untested, that it was worrying that he had not started it sooner when it had been identified as necessary in the main parenting assessment, and that even if he pursued it, a positive outcome would not be achieved soon enough for L.

63. Ms Jalil reported that F had attended all of the last 10 available contact sessions and on the whole contact had been positive although a few relatively minor issues were reported, including that during some sessions F had voiced his discontent with the way the case was progressing and was angry about a number of things and although he tried to keep some of his frustration from L, she picked up on the tensions.

64. Ms Jalil's recommendation that L should not be placed with F follows a list of two strengths/protective factors (one of which is, rather puzzlingly, that L is placed with an independent foster carer) and seven vulnerabilities/risk factors but is really more in the nature of an assertion than a closely reasoned case.

65. In her final report, the guardian recommended adoption (E323). She said that she would have serious concerns for L if she were to be returned to either parent at that time. In so far as M was concerned, there was obviously the major issue of the abuse L had suffered at C's hands but the guardian also referred to the emotional harm caused to L by the domestic violence and said that neither parent had been able to recognise their part in this. She also commented that it was only recently that F had chosen to address his anger management issues and that she would need to see this tested out over time and would meanwhile be concerned that L would be at risk of emotional harm in F's care.

66. F adduced a letter of 15 August 2012 from his psychologist which confirmed that tests administered to him had not indicated any cause for alarm or concern. Some negative aspects of his character are mentioned, such as a passive aggressive communication style and a poor ability to resolve conflict, and there is a reference to stubbornness or sudden outbursts of temper under pressure. Nothing in his responses required an in depth psychological intervention. He had engaged in the process of therapy and was responding well to the approach taken.

The August 2012 judgment

67. On 23 August 2012, the judge gave judgment after hearing evidence over two days. She determined that there should be a care order with a care plan of adoption. She also refused F permission to have a report from an independent social worker.

68. It will be recalled that there is no transcript of this hearing. It has been necessary to do the best we can with notes of the proceedings (which include notes in relation to F's application for an independent social work report) and of the judgment.

69. An issue which arose at the outset of the hearing was the inability of Ms Van Gils, the author of LA's main parenting assessment of F, to attend court because of health problems. It was not therefore possible for her to be cross-examined. Evidence was given on behalf of LA by Ms Jalil and two other witnesses, the team manager and a senior practitioner who had assisted in the addendum assessment of M. From the brief notes available of the hearing, it is difficult to see to what extent issues with regard to Ms Van Gils' assessment were taken up with those witnesses in cross examination. What they did certainly deal with was their view (formed from their own experience and/or from records) that F was aggressive, that he had done little to seek help about this until it was too late and that there was concern as to whether he could work with LA.

70. Evidence was also given at the hearing by the parents, by the paternal great grandmother and by the guardian.

71. According to the short note of judgment, the judge made the following negative comments about F, all of which relate to aggression:

> "F caused emotional harm and agreed there were arguments at handover and agrees to pushing mother in March 2010 and accepts the police recorded him as aggressive on two occasions.
>
> F has problems with domestic violence…..F has sought help but it is early days. F has only had three sessions of anger management and it is far too early to test his ability to change. Such a timescale to test his ability to change is simply not in L's interests.
>
> His own mother has stated he is aggressive as did PGGM and this can be seen in his relationship with M. F has been seeking help for his problems since July 2012 despite the fact LA have been asking him to seek help since 2010. We will not know the effect of F's anger management for some time and L has been in care for one year now. The risk is too great for L to rehabilitate her back into F's care……F has presented as aggressive and interrupting in court although I appreciate it is very hard for him."

72. On the positive side, she recognised that F was committed to L and that the contact records demonstrated this.

73. As far as L's needs were concerned, she was obviously influenced by the need to make progress in plans for her without delay. She also accepted the evidence of the guardian and LA that L requires a high standard of care or, as the note records, no doubt in shorthand, "better than enough care…stimulating care".

74. The judge concluded that it was too great a risk to consider returning L to either parent and that a care order had to be made with a view to adoption.

75. The basis for F's application for an independent social work report, which the judge decided to hear at the conclusion of the hearing rather than at the outset, was that LA had not reviewed him objectively, with Ms Jalil simply adopting the concerns set out in Ms Van Gils' assessment and failing to recognise that social work input could address the issues identified. The application was refused. In so far as the judge's reasons for this can be identified from the notes we have, it appears that she considered that there was no need for such a report because LA had done a full assessment and, in so far as F's work on anger management was concerned, this was at a very early stage and the guardian had given evidence that it would be at least six months after it was completed before it would be apparent whether it had been successful.

76. At the conclusion of the 23 August 2012 hearing, the judge adjourned for LA's internal processes concerning adoption to be completed and LA to file an application

for a placement order. She made an interim care order but clearly with a view to it becoming final when that was done.

The October 2012 judgment

77. At the October 2012 hearing, the judge made a placement order, dispensing with the parents' consent in accordance with section 52(1)(b) Adoption and Children Act 2002 on the basis that L's welfare required that.

78. What the judge had determined in August 2012 was the starting point for the decision about the placement order but the decision had to be taken on the basis of the evidence as it was in October. Since the August hearing, F had continued to have therapy for what the judge described in the October judgment as "his anger within relationships" and the judge needed to assess the impact of that on the situation.

79. The psychologist had produced a report dated 22 September 2012 (E332). F had concluded his intensive six week course, attending all his appointments, and was said to have engaged with the process well, showing increasing insight and understanding as the sessions progressed. The psychologist said:

> "It should be noted that the original measures did not indicate a significant problem to start with, but after completing the treatment, F has acquired a range of management strategies…."

80. Her tests showed, amongst other things, that his "overall scores have dropped to within norms i.e. he is no more likely to become angry than the average person".

81. Her conclusion in summary was:

> "All repeated outcome measures consistently indicated that F has enhanced his understanding and repertoire of coping strategies, both in terms of personal control and interpersonal awareness. He has acquired a range of useful cognitive, behavioural and emotional strategies which are informed by psychological therapy and practice. He is clearer about appropriate responses in challenging situations and will be able to apply skills he has learnt to diffuse anger and resolve conflict."

82. The judge commented that it was very late in the day that F had gone to see the psychologist, although she credited him with the fact that it was of his own initiative. She took into account the benefits that the psychologist had noted from the work but she made two observations about the psychologist's contribution which she plainly considered weakened the impact of the report on her decision. First, the results of the work had not been tested in the community and secondly, it was not a piece of work that was ordered by the court so none of the other parties had had any input into the psychologist's instructions and she had not had sight of the papers in the case and would not have known the full background.

83. Once again, a significant concern for the judge was clearly the delay in getting L's future settled and the time L had already spent in foster care. She considered that it

would take some months for F to prove on a practical basis in the community that the therapy had helped him with his anger management and that "that time is simply not available for L".

84. So, with neither parent able to provide a home for L, she concluded that the plan for adoption was the right one and L's welfare required that parental consent be dispensed with.

The submissions

85. As well as making helpful oral submission, the parties have assisted the court with written submissions on a variety of issues, both before and after the hearing.

86. At the time this appeal was heard, the decision of the Supreme Court in Re B [2013] UKSC 33 was expected. It was plain that that decision may well have implications for this case and that it was desirable to await it before we arrived at our final conclusions. We are grateful to counsel for the written submissions that they made about it.

87. Ms Belyavin argued on F's behalf that the judge was wrong to conclude that F could not meet L's needs.

88. She criticised the judge for accepting that L needed better than good enough care when the recent evidence was that L's development was age appropriate and all there was to go on was the suggestion that in future she might have particular emotional and behavioural needs.

89. She submitted that LA's assessment of F was so flawed that its conclusions were unreliable. Given the limited findings made about it, LA's assessment put too much weight on historic domestic abuse in relation to which the findings were not, she said, of a nature and severity that should preclude a parent from caring for a child, and on concerns about aggression, particularly in the light of the psychologist's conclusions. In contrast, it ignored the evidence (from Devon social services and shown in the contact in Nottingham) that F had a good relationship with L and generally met her emotional needs, as well as the view of Devon social services that he had a good knowledge of L's other basic care needs. It also ignored the fact that, with their approval, he had been having her for unsupervised contact for three whole days each week. She submitted that the judge herself also gave the wrong weight to F's past behaviour and insufficient weight to the ability that he had demonstrated in Devon to care for L.

90. She pointed out that the judge's concerns were not about F's ability to provide basic care for L but about his aggression. She argued that the nature of this aggression was not reliably established. She took us to §3 of the 26 April 2012 judgment where the judge appeared to have gone beyond what F conceded by way of his conduct in this respect, for example speaking of his "aggressive and controlling behaviour towards M" before L was born and "angry outbursts over the years on a regular basis towards people in authority, for example the police and ambulance crews on occasion" (§3). Of course, it is fair to say that later in the judgment the judge went on to recite the guardian's submissions which accurately summarised the concessions and also that this judgment was in support of a case management decision rather than actually

determining whether F could care for L. However, I do not think that this is sufficient to remove all force from Ms Belyavin's point. The judge spoke in April of "such longstanding problems" on F's part that it would take a lengthy period before he could be considered not a risk to L and said that it was nearly inevitable that any psychological assessment would suggest long term further work or therapy. Recent aggression in the course of the assessment and at court was a different matter but as to F's past aggressive conduct, there is little indication in the later judgments of August and October that the judge revisited the question of what precisely it had involved.

91. As far as F's aggressive response to LA's social workers is concerned, Ms Belyavin submitted that the court should have taken into account what happened in relation to LA's conduct over L, in relation to which F's complaints have been upheld and which will have coloured his views about social services. She emphasised also that there had been no opportunity to cross examine Ms Van Gils to explore issues in relation to her assessment.

92. In addition, Ms Belyavin submitted that as the case against F depended on his aggression, any evidence in relation to that was crucial, particularly that of the psychologist. The psychologist's initial contribution identified no cause for concern but in any event, there was improvement following therapy and, she submitted, either the report was sufficient to allay concerns about F's aggression or there was a need at the least for some further assessment because the indicators were that the court's key concern had been addressed to a significant degree. The judge's point that the psychologist had been engaged by F alone and did not have the background material had to be seen, Ms Belyavin submitted, in the context of the judge having refused permission in April 2012 for F to seek a report from a psychologist who would have had those advantages, although counsel accepted that a discrete application could have been made for permission to disclose the papers to the psychologist. Furthermore, the judge was wrong, she said, to take the view that delay was an obstacle when the psychological report gave a sufficiently optimistic prognosis, a matter of months only would be required for a further assessment, and the alternative was adoption.

93. Ms Belyavin took us to the source material for the judge's comment that PGM had said F was aggressive which showed the context of this. It was in the LA assessment of PGM (E175) where PGM is recorded as having said that she understood that F did not always help the situation with his temper but that she felt strongly that his temper was caused by M's bad parenting.

94. The grounds of appeal drafted by F himself asserted that his family had been unfairly assessed and rejected. Ms Belyavin quite properly recognised that there was a limit to what she, instructed on behalf of F rather than on behalf of his relatives, could say about this but she did make the important point that he should not be seen as a father on his own but a father with the support of his family.

95. LA supported the judge's decision in all its respects. Ms Markham on their behalf acknowledged that F had played no part in the terrible events that had precipitated LA's application and was considerably distressed by them. It was also recognised that credit was due to him for his efforts to address the anger management difficulties that professionals had identified. However, LA's submission was, in essence, that their assessment of F and the extended family was sufficient and that the prospect of

parental improvement within a time that would fit with L's needs was insufficient to justify any further delay.

96. Ms Markham recognised that the judge's judgments were not lengthy documents and could have been more detailed. However, she reminded us of the authorities to the effect that all that is necessary is that the judgement should sufficiently have explained what the judge found and what he concluded as well as his process of reasoning, see for example Thorpe LJ in Re B (Appeal: Lack of Reasons) [2003] EWCA Civ 881. She submitted that the August and October judgments must be read together and that it was important to note that the judge had heard oral evidence from the social workers who had tried to work with F and from F himself who she had found "presented as aggressive and interrupting in court". She had had a long involvement with the case and, as the judgments record, had read material from Devon social services as well as LA's assessment. She submitted that where the judge has read all the papers, we should be cautious about proceeding on the basis that she had not taken into account all the factors, positive and negative, that appear in those papers in reaching her decision, even if they are not all mentioned.

97. We explored with Ms Markham the issue of what precisely the judge had taken F's aggressive behaviour to be. She rightly acknowledged that it appeared that the focus does not seem to have been on the detail of how F had behaved in Devon, the spotlight having been on what happened to L in M's care in Nottingham. However, she pointed out that F himself had accepted that he had a problem and she invited our attention, for example, to his statement of 25 September 2012. There he was arguing that he had changed rather than that the original assessment was flawed. He accepted his part in the risk of emotional harm to L due to the domestic abuse which took place between him and M, said he recognised that he would have been seen by previous social workers as being aggressive towards them, but relied on the improvement he had made through therapy and said he had made the necessary changes to address the concerns previously raised about him.

98. She argued that the judge acknowledged the positive changes F had made but was still entitled to find against F. She could not, however, point to passages in the judgment where the judge balanced positive factors about F against the negative ones save in the August judgment the recognition that F was committed to L as demonstrated through contact. She submitted that it was unfair to criticise the judge for not focussing on the positive aspects of the history in Devon as that was not how the case was put to her on behalf of F, nor were the positive points put to the social worker or guardian. The argument was now almost a different argument from that advanced to the judge, Ms Markham said.

99. To refute any suggestion that LA's assessment report was itself unbalanced, Ms Markham took us to some positive information recorded in it about F's situation in Devon, albeit accepting that the positives were not addressed in great detail. For example, there was mention of F interacting appropriately with L and there being some appropriate toys around the house, and a recognition that F had addressed the condition of his house in Devon. On the other hand, I noted above (§51) what was said about F struggling to meet L's basic needs and also about him having little experience of caring for L, despite the fact (to which I cannot recall seeing any attention paid in the assessment) that he cared for her on three days a week before M moved her to Nottingham,

100. Ms Markham submitted that the judge had in mind what had occurred in relation to F's relatives who were favourably assessed but withdrew. She said that F accepted making the anonymous referrals which contributed to the loss of this family placement. However, I cannot find any reference to this issue in either the August or the October judgment and F's statement of 13 August 2012 said that he did not make the calls to social services about the relatives.

101. Presumably Ms Markham was right to say that the judge took into account the guardian's negative assessment of F as well as LA's but equally that is not mentioned in the note of her August judgment.

Re B [2013] UKSC 33

102. The Supreme Court's decision in Re B is important for this case. There is no debate about the threshold here; it was satisfied. The question is whether the judge was wrong to make a care order with a care plan for adoption and then to go on to make a placement order. Re B is a forceful reminder that such orders are "very extreme", only made when "necessary" for the protection of the child's interests, which means "when nothing else will do", "when all else fails". The court "must never lose sight of the fact that [the child's] interests include being brought up by her natural family, ideally her parents, or at least one of them" and adoption "should only be contemplated as a last resort".

103. As Lord Wilson observed (§34):

> "the same thread …. runs through both domestic law and Convention law, namely that the interests of the child must render it *necessary* to make an adoption order" and the word "requires" in section 52(1)(b) 'was plainly chosen as best conveying….the essence of the Strasbourg jurisprudence' (*Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625, para 125)."

104. Re B also underlines the advantage that a trial judge often has over the appeal court and particularly where the decision is about the future of a child. This is something this court must factor into its review of the judge's decision and it is difficult to mount a successful appeal against a judge's decision about the future arrangements for a child (see, for example, Lord Wilson §42). As Lord Neuberger put it at §94, an appellate court needs to "think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence", giving the matter "anxious consideration", before reaching a final conclusion that the judge was wrong.

105. Re B also establishes that we must approach the appeal adopting the normal reviewing approach to appeals rather than considering the issues that the judge determined afresh. Because of the obligation of the trial judge not to determine the matter in a way which is incompatible with article 8 ECHR, the review by the appellate court must focus not just on the judge's exercise of his discretion in making a care order but also on his compliance or otherwise with that obligation (§45).

Discussion

106. I hope that my unusually detailed review of this case demonstrates that I have indeed given it the most anxious consideration. Even giving full weight to such advantages as Judge Butler had as the trial judge, I have concluded that the appeal should be allowed on the basis that her ultimate decisions (to make a care order with a care plan for adoption and a placement order) were wrong. In the context of this case, that does not mean that a placement with F is necessarily right. It was not submitted that, in the event that we allowed the appeal and overturned Judge Butler's orders, we should make an order that would result in F assuming care of L but that we should return the matter to a judge at first instance, either in the county court or the Family Division, in order for directions to be given as to how the issues over L's welfare are to be resolved. The starting point for this would be that the threshold has been crossed; the judge's findings in relation to L's injuries whilst in M's care were more than sufficient for this purpose. The concessions that F made about his behaviour would also stand. The next step in the proceedings, the welfare stage, would be for the court to determine, with the benefit of such evidence as is required, whether it is established that there are other features of his behaviour that are material to the court's decision and to consider those, together with all the other factors in the case, positive and negative, when deciding what order to make. Close attention to the provisions of section 1 Children Act 1989, including the welfare checklist in section 1(3), will assist in ensuring that this is achieved, as will attention to the provisions of section 1 Adoption and Children Act 2002 if that stage is reached.

107. If I were to summarise the reasons why I take the view that we should allow the appeal, I would say that it is because the judge was wrong in that she failed to carry out a proper balancing exercise in order to determine whether it was necessary to make a care order with a care plan of adoption and then a placement order or, if she did carry out that analysis, it is not apparent from her judgments. Putting it another way, she did not carry out a proportionality analysis. Another judge, doing the exercise as it should be done, may or may not reach the same conclusion. Nothing that I say in this judgment should be taken as indicating a view one way or the other.

108. I will try to demonstrate in a little more detail what it is about the judge's determination that leads me to take the view that I have.

109. The first difficulty is that it is unclear upon what basis the judge was approaching the historical facts, that is to say the facts as they were before M left Devon with L.

110. A fundamental feature of the case for care and adoption was F's aggressive/violent behaviour. I have already commented that there is some force in the submission made on F's behalf that the judge may have proceeded on the basis that F's conduct had been more violent/aggressive in Devon than had been established on the evidence. LA's assessors may have done the same.

111. This case demonstrates very clearly the need for there to be active thought from the outset about what the factual and evidential basis of a local authority's case is. In view of the changes that are currently being made to the court's approach to care cases, I propose to make some rather more general comment about this.

112. In his June 2013 "View from the President's Chambers", the President wrote of the need rigorously to confine social work chronologies and statements and the threshold statement, avoiding all unnecessary detail. We must expect threshold statements which no longer get bogged down in the detail of what occurred on this or that particular day or recite the contents of material from the bundle but instead expose the essential nature of the problems which have led the local authority to consider that intervention into the family's life should be contemplated. This will require social workers and lawyers to adjust their approach. Care cases involve "professional evaluation, assessment, analysis and opinion" (ibid) brought to bear on facts. As the President said, we need to distinguish clearly between what is fact and what falls into the other category which, for the sake of argument, we might loosely call the processing of the facts. The assessment and opinions of social workers and those of other professionals will only hold water if the facts upon which they proceed are properly identified and turn out actually to be facts.

113. That does not mean that there will have to be voluminous schedules setting out exhaustively every minute fact upon which the local authority's case proceeds. How to go about things effectively will depend very much on the circumstances of the individual case. In what follows, I am not attempting to lay down rules.

114. Sometimes, even though short, the threshold statement will, itself, sufficiently convey the factual basis on which the court will proceed not only to determine whether section 31(2) Children Act 1989 is satisfied but also to consider what order should follow. In other words, acceptance by a parent of what is asserted in the threshold statement, supported by the local authority's evidence on which that is founded (identified in the threshold statement by page references in the bundle), will tell the court all it needs to know.

115. Where a parent does not accept what is asserted in the threshold statement, or only accepts it in part, as here, it will be necessary for the parties to consider what to do about this. Allegations which are denied are not facts. If the local authority need to rely upon them as part of their case, they will have to produce the evidence to establish them. Whether this is done as part of the consideration of the threshold or as part of the court's consideration of what orders to make (to which I will refer as "the welfare stage") will depend on the circumstances of the particular case.

116. In the instant case, it would have been open to LA to have taken the view that the threshold was amply established by the concessions that were made, particularly by M, but to have invited the court to make findings about the disputed threshold allegations in relation to F at the welfare stage because these were considered to be important in determining what orders should be made in relation to L. So, for instance, if they did not accept F's case that he pushed M only to fend her off and they considered this question to be material to their and the court's determination as to what orders should be made, they could have invited the court to make a finding on the subject. Similarly, they could have requested a finding about the aggression apparently reported by the ambulance crews but denied by F. F had clearly joined issue on these points and I do not think the court could proceed on anything other than what he said about them unless findings were expressly made.

117. It is not always as clear that facts are challenged. This is often so in relation to the material on which reliance is placed at the welfare stage which frequently ranges

considerably more widely than that produced to satisfy the threshold criteria, including not only evidence of events since the local authority initially intervened but also analytical and advisory statements and reports of various kinds. By way of example, commonly an assessment report will, as in this case, expressly or impliedly proceed upon the basis of lots of "facts", some within the first-hand knowledge of the assessor and some not. For instance, it may contain observations about contact sessions: how many there have been, which ones the parent failed to attend, what was observed of the interaction between parent and child and so on. The local authority will not normally set out to produce all the underlying evidence to support these "facts" unless the parent actively challenges them. Similarly, it will normally be assumed that the reporter's observations about matters which are within his or her direct knowledge (such as the state of the parent's home and finances, what he said during assessment sessions and his demeanour) are accurate unless they are specifically challenged. This has always been so but it is clearly reflected in the revised Public Law Outline. That creates different categories of local authority material, namely a) evidential documents which are served with the application form and b) decision making records which are only disclosed on a request being made by a party, and it provides for an early case management hearing at which the key issues will be identified as will the evidence necessary to enable the court to resolve the key issues.

118. Had that process been adhered to rigorously here, the difficulties that have arisen may not have done so. As it is, I am left unsure as to the factual basis upon which the court proceeded in so far as it concerned the central issue of F's aggressive behaviour, at least in Devon.

119. There is also force in the submission that the positive features of F's care of L in Devon were not recognised sufficiently or at all by the judge, not least that F understood her basic care needs, that he had sorted out his home to make it appropriate for a child of her age, that he had a good relationship with her and that he was actually looking after her for three days a week unsupervised with the approval of Devon social services. To that must be added the fact that whilst clearly anxious enough to seek legal advice about care proceedings, Devon County Council had not actually begun proceedings and this was so even though, in addition to any concern there was in relation to F, they had concern about M's neglectful care of L. It must always be remembered that what precipitated local authority intervention was what befell L at the hands of M's boyfriend whilst she was in M's care in Nottingham.

120. I do not think that the judge will have been helped to a clear appreciation of the situation in Devon by the way in which the case was presented to her. It seems to me that LA's assessment may not have given sufficient weight to the positive things that could have been said about F. The situation was compounded by the inability of the author of the report, Ms Van Gils, to attend for cross-examination. Although the more recent written statements by and on behalf of F might have suggested that he conceded he had a problem and had acknowledged that the onus on him was to show he had addressed it, the paperwork (such as F's application of 20 August 2012 at B82) and the fact of his two applications for another expert to be instructed (a psychologist in April 2012 and an independent social worker in August 2012) made it clear that he was criticising LA's assessment as flawed. I cannot tell what may have been pursued with Ms Van Gils had she been able to attend.

121. Considering the picture in Devon, I would invite attention again to what the President said in his June 2013 "View from the President's Chambers". He said:

> "Of course the court can act on the basis of evidence that is hearsay. But direct evidence from those who can speak to what they have seen and heard is more compelling and less open to cross-examination. Too often far too much time is taken up in cross-examination directed to little more than demonstrating that no-one giving evidence in court is able to speak of their own knowledge, and that all are dependent on the assumed accuracy of what is recorded, sometimes at third or fourth hand, in the local authority's files."

122. This case underlines what he said. I have pored over the Devon records to achieve some sort of understanding of the level of their concerns, the good things about F's care of L, the degree to which he was the cause of their anxiety and the degree to which it was M, and so on. Direct evidence from a social worker from Devon would have enabled the court to understand what the situation was in Devon far more easily and with much greater clarity, thus enabling it to be given proper weight in the decision that had to be made. I share the President's implication that it can be far less time consuming to call the witnesses who actually know about the events in question than to unravel layer upon layer of hearsay or to search back through record after record for the source of a comment or piece of information which may have become distorted in the telling. Recourse to the Devon records would only have been necessary if it was felt that the direct evidence was failing to portray an accurate picture.

123. Moving to another point, I can see in the judge's judgments no real consideration of the mitigating circumstances in relation to F's apparent aggression towards LA's social workers. The judge recognised, in stating that F had presented as aggressive and threatening in court, that it was very hard for him. However, F's aggressive responses to LA's social workers also had to be set against the backdrop of what had happened to L which was no fault of his. He had attempted to get LA to check up on M's boyfriend and they had not done what they should have done. He received no apology from LA for their failings, now identified in the independent investigator's report of 23 April 2013 as maladministration by the Department on the grounds that it did not follow its own procedures in the period before L was injured. When he was told about her appalling injuries, F came immediately from Devon but was not able to see her straight away whilst LA made enquiries and was not able to care for her because LA were taking protective action, ultimately by way of care proceedings. Since L has been in care, he has of course attended contact regularly notwithstanding the very long distance that he has to travel to see L.

124. Furthermore, there is little acknowledgment in the judge's judgments of the fact that adoption is a last resort and little consideration of what it was that justified it in this case. In fairness to the judge, the lack of a transcript for the August hearing means that it is not possible to see precisely how she put her decision at that stage and I take that fully into account. I also remind myself that as Lord Neuberger said in Re B (§70), an appellate court must be careful of placing an unrealistically high burden on the trial judge in relation to his giving of reasons. However, the note of the August judgment, which is the key judgment in ruling F out as a carer for L, extends to two

single spaced pages only. The first page includes some limited information about the situation in Devon and the rest of it is about the circumstances in which L was injured. The second page says that F has problems with domestic violence and says that he has sought help but that it is far too early to test his ability to change and that the timescale for this is not in L's interests. It deals with the standard of care that L needs and then, in a paragraph, F is ruled out on the basis of his aggression.

125. What was required was an identification of the nature of the harm that it was thought L was at risk of suffering in F's care and how likely it was to occur. It would probably have been desirable to consider that under at least two headings, namely physical care and emotional care. In so far as it was the judge's view that there were deficiencies in the care F would be likely to give L himself, she needed to consider whether the support of his family (and social services) would assist in any way. If there were specific matters upon which the judge placed reliance, such as F making malicious referrals about his relatives, then it would be good practice for those to be spelled out in the judgment, particularly if they have been contested as had been the case here, at least in F's statement.

126. Only by giving proper focussed attention to the specifics of what had happened so far and to the harm that LA consequently feared L would suffer in F's care would the judge be in a position to decide how likely harm was to occur and whether it was harm of a nature and gravity that required L to be removed from her family and placed for adoption. It would be difficult to make out a case for removal and adoption on the basis only of what F conceded for the purposes of the threshold. Accordingly, removal from F's care depended on additional matters being established, amongst them no doubt his aggression in other respects. Once the feared harm was identified, it would be possible to consider whether steps could be/had been taken to guard against it, such as F's therapy. Without a proper understanding of the ambit of the difficulties historically, it was not possible for there to be a proper evaluation of the need for therapy and its likely duration/prognosis. What remained by way of an intractable risk after taking account of the preventative steps that were reasonably available would then need to be weighed against the positive features of F's care and the benefits to L of living in her own family.

127. It is not apparent from the judge's judgments in August or October that she went through this process. I have commented already on the judge's approach to the issue of aggression/violence. Flaws in this potentially undermined her assessment of the prognosis for therapy which was heavily dependent on a proper assessment of whether/why F needed therapy. The availability of support for F, for instance from his family, was not considered. As for the positive features of F's care and the benefits of L living with her own family, the judge's recognition of F's commitment to L, demonstrated in contact, was simply not sufficient. Equally there was no real attention paid to the fact that adoption is a last resort.

128. I indicated at a fairly early stage in this judgment that I would dismiss the appeal in relation to the judge's refusal to endorse a psychological report. The appeal in relation to her refusal to order an independent social worker's report is subsumed in my consideration of the appeal against the care and placement orders and I do not propose to deal with it separately.

129. For the reasons I have attempted to explain, I would allow the appeal against the care and placement orders and remit the matter for consideration by another judge, starting with the welfare stage of the care proceedings. Counsel should consider, bearing in mind the witnesses who are likely to be called, whether the proceedings should be heard in Devon or Nottingham and attempt to reach agreement on that. I would anticipate the matter being listed urgently for directions in the court which will be handling the case from now on. The judge was, of course, right to be concerned about the delay in settling the arrangements for L and it is important that her future is settled as soon as possible.

MCFARLANE LJ:

130. I entirely agree and would particularly wish to associate myself with all that is said in the 'Discussion' section of My Lady's judgment from paragraph 106 onwards.

LLOYD LJ:

131. I agree.