Neutral Citation Number: [2019] EWHC 2782 (Fam)

Case No: CA18C00002

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Liverpool Civil and Family Court
35 Vernon Street, Liverpool, L2 2BX

Date: 17/07/2019

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

Cumbria County Council	**Applicant**
- and -	
S	**First**
-and-	**Respondent**
E	**Second**
-and-	**Respondent**
R	**Third**
(A Child acting by her Children's Guardian)	**Respondent**

- -

Mr Damian Sanders (instructed by **Martin McAlister**) for the **Applicant**
Ms Sarah Dines (instructed by **Brendan Flemming**) for the **First Respondent**
Mr Nicholas Howell-Jones for the **Second Respondent**
Mr Peter Rothery for the **Third Respondent**

Hearing dates: 25 to 28 June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with a final welfare hearing in respect of R, a child born in October 2017 and now aged 1 year 8 months. Cumbria County Council, represented by Mr Damian Sanders, issued care proceedings on 3 January 2018. The first respondent to those proceedings is R's mother, S, represented by Ms Sarah Dines. The second respondent is R's father, E, represented by Mr Nicholas Howell-Jones. The father has parental responsibility for R. R is represented through her Children's Guardian, Rebecca Tomlinson, by Mr Peter Rothery. R is the subject of an interim care order in favour of the local authority.

2. Following a finding of fact hearing on 16 to 25 July 2018 and 10 to 21 December 2018, Parker J made the following findings in respect of injuries, namely subdural haemorrhage and bilateral retinal haemorrhages, sustained by R and leading to her emergency admission to Royal Lancaster Hospital late on the evening of 26 December 2017 when R was aged 7 weeks old:

    i) On 26 December 2017 R was taken to hospital by ambulance following the sudden onset of an encephalopathic illness at home.

    ii) On examination, R was found to have bilateral extensive retinal bleeding to both eyes and a right sided acute subdural haematoma.

    iii) An MRI scan performed on 28 December 2017 showed blood in the subdural spaces over the frontal, parietal and occipital convexities of the cerebral hemispheres, in the interhemispheric fissures, over the tentorium and over the posterior fossa.

    iv) There is no pre-existing infection, metabolic abnormality or blood clotting that would explain R's presentation.

    v) The bleeding on the initial scans and the brain injury are acute injuries which could not date back to the time of delivery.

    vi) R's retinal haemorrhages are not related to her birth.

    vii) There is no evidence of any other medical condition that may have pre-disposed R to the formation of retinal haemorrhages.

    viii) There is no history of accident or incident which could account for the injuries.

    ix) R's injuries are non-accidental in nature.

    x) The retinal haemorrhages and the subdural haematomas were caused by R being shaken.

    xi) R was injured as the result of a loss of control on the part of a carer who had not planned to injure her.

xii) R's injuries are likely to have occurred after the last time that she was behaving within the bounds of normality and is likely to be the point of collapse. R would have been immediately unwell after the causative event.

xiii) R suffered shaking type injuries as a result of acceleration / deceleration to her neck and head.

xiv) The injuries were inflicted injuries sustained immediately before the 999 call and were caused by either the mother or the father or both as the result of intentional or reckless behaviour on their part.

xv) Both the mother and the father were present when the injuries to R were sustained.

xvi) Both parents know how the injuries were sustained and both have withheld the truth from the Police, the local authority and, ultimately, the court.

3. At this hearing, the mother invites the court to consider further evidence that has arisen since the findings were made by Parker J which, the mother submits, has a bearing on those findings, namely a further account by the father given on 17 March 2019 regarding the circumstances in which R suffered serious head injuries. Specifically, the mother contends that the new information available to this court allows the court to be satisfied that (a) it was in fact the father who was responsible for R's injuries and (b) that the mother was not in fact present when those injuries occurred.

4. Within this context, in addition to the judgment of Parker J and bundle of evidence available to the court, I have heard additional oral evidence at this hearing from the father and from the mother on both the issue of the new information and on the question of the welfare outcome for R. Whilst additional questions were put to the jointly instructed experts in this case (Dr Stoodley (Consultant Neuroradiologist), Dr Cartlidge (Consultant Paediatrician), Mr Richards (Consultant Neurosurgeon) and Professor Lloyd (Consultation Ophthalmologist)) no one sought to cross-examine those experts with respect to the answers provided. In addition to the evidence given by the mother and the father, I heard evidence from Michelle Challender (independent social worker), Peter Sykes (allocated social worker), Dr Young (consultant adult forensic psychologist) and Rebecca Tomlinson (Children's Guardian). I have also heard brief oral evidence via video link from Ms Nugent, a contact supervisor.

5. At this final hearing the local authority proposal is for the placement of R with her paternal grandparents under the auspices of a Special Guardianship order. The local authority also seeks a 12 month supervision order to support that placement. The mother's primary case, predicated on this court agreeing to revisit the findings of Parker J in the manner the mother contends for, is that she wishes to care for R herself. Her secondary case, in the event that the court does not agree to revisit the findings of Parker J is that she agrees to R being cared for under the auspices of a Special Guardianship Order by the paternal grandparents. For his part, the father supports the positions taken by the mother. On behalf of R, the Children's Guardian agrees that R should be placed permanently with the paternal grandparents. However, given what the Children's Guardian contends are the particular complexities of this case, and in circumstances where the proposed placement is untested, the Children's

Guardian contends that the placement should take place initially under the auspices of a final care order for reasons that I examine in more detail below.

BACKGROUND AND EVIDENCE

6. The background to this matter and the basis on which Parker J made the findings set out in the introduction of this judgment is set out in the judgment of Parker J of 21 December 2019. Parker J's judgment should be read with my judgment and, save as set out below, it is not necessary for me to repeat those matters here. Following the findings of fact made by Parker J a number of assessments were undertaken as follows:

   i) An Independent Social Work risk assessment of the parents completed by Michelle Challender on 8 April 2019;

   ii) An Independent Social Work risk assessment of the paternal grandparents completed on 8 April 2019;

   iii) A psychological assessment of the parents by Dr Young, Consultant Adult Psychologist, on 29 April 2019.

   iv) A Special Guardian Report completed by the local authority in respect of the paternal grandparents dated 9 July 2018 and an addendum dated 8 May 2019.

7. As I have noted, on 17 March 2019, and prior to the assessments of Michelle Challender and Dr Young being completed, the father, in conversation with Michelle Challender, made further statements regarding the circumstances in which R was injured. In her report, Ms Challender recounts as follows:

> "[The father] was visually becoming more and more anxious as we proceeded and stated that he maintained that R's injuries were sustained from when she bumped her head on his chin earlier that day. I reminded [the father] that this was not accepted medically and therefore this was not an accepted explanation. I reminded both parents that if they knew what had happened to R they needed to be honest. [The mother] maintained she did not know, however [the father] was in tears and very distressed with his head down. I asked [the father] again did he know what had happened to R and he nodded his head to indicate yes. [The mother] was clearly in shock with the expression on her face. I asked [the father] if he wanted [the mother] to leave the room then could tell me, he nodded his head indicating yes. I asked [the mother] to leave which she did, leaving just me and [the father] in the living area.
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> [The father] was deeply distressed, he could not maintain any eye contact and was crying and very distraught. I asked him again if he knew what had happened to R he said yes he did, I offered him a starting point to try and talk to me about the minutes on 26 October 2017 and the time line from when he was feeding his daughter.
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> [The father] then said that it was true that [the mother] had gone upstairs to bathroom and closed the living room door behind her.

> [The father] said that he was sat on a rocking chair that is no longer in the house, he described feeding R and her then refusing to feed and starting to cry, he said that he was still trying to feed her, but she was moving her head about. He said that he remembered feeling really tired and decided to stand with R to try and settle her that way, he said as he was in the process of standing he slipped backwards against the rocking chair and as he did he lost R from his arms, he described her going head down and landing on her head on the floor which is carpeted, but not thickly piled and landing on her face.
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> He said that as soon as it happened he picked her up, she let out a cry which [the mother] has always maintained she heard from the bathroom before making her way down the stairs. [The father] said as soon as he picked R up from the floor and heard the cry she was floppy and unwell. I asked if he knew he had caused her injury from a serious fall, whilst very distressed he said *'yes I knew I had done it'*. He said that by the time [the mother] entered the room she was in his arms and this is when [the mother] noted that R was very unwell and an ambulance called.
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> I asked [the father] if he had told [the mother] about this incident, he said he had not as he was scared as he knew he had seriously injuries their daughter and had feared what would happen to him.
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> I asked if he had told anyone else, he confirmed he had not and I was the only person that he had disclosed the information to.
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> [The mother] was asked to come back into the room. [The father] asked if I would tell her what happened which I did.
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> [The mother] was just completely shocked and instantly broke down saying '*why have you done this I knew something had happened I knew you knew more, you haven't been the same and I knew it, I have lost my baby, I have lost my baby and I didn't do anything you have taken eighteen months of my life away why would you do this, when I dropped her I admitted it you know I did why would you do this to us all*."

8. Within this context Ms Challender was cross examined about the father's statements and made clear in the witness box that in relating the matters set out above, the father appeared to be genuinely upset and gave her no cause to question what he was saying, Ms Challender considering that he presented as "deeply distressed". Ms Challender took the same view of the mother when describing the mother's reaction to being told what the father had stated regarding the circumstances of R's injuries, Ms Challender describing the mother as presenting as "devastated", "completely overcome" and as initially reacting with anger towards the father. Ms Challender considered the mother's presentation to be spontaneous and a genuine reaction to shock. Ms Challender also made clear in oral evidence her view that it was "extremely concerning" that the father had left it so late to give an account and that, if not true, that a fabricated account would markedly increase the level of risk.

9. As I have noted above, as a result of the further statements made by the father, I gave permission for further questions to be put in writing to the jointly instructed medical

experts who gave evidence before Parker J. I deal with the respective responses of those experts below.

10. With respect to the evidence on the question of welfare, in summary, the assessment of Ms Challender outlines a number of positive, protective factors in her report in respect of each parent, which extensive list of positives I have given careful consideration. However, against these manifest positives, Ms Challender's report also cites a significant number of vulnerabilities having regard to the evidence before the court and the findings of Parker J. In particular, and in summary, the following matters were considered by Ms Challender to represent significant vulnerabilities in the parents' ability to meet R's needs:

    i) R has sustained serious head injuries in December 2017, which remained without explanation until the father's statements in March 2019 and in respect of which the court has made findings in respect of both parents.

    ii) Notwithstanding the statements made by the father in March 2019, the father still does not fully accept responsibility for the injuries to R that occurred in December 2017, continuing to raise the possibility of a medical cause, stating that the Health Visitor told lies about him and that blaming the Police and social workers for his inability to be open and honest. In addition, the father's explanation remains inconsistent with the preponderance of medical evidence in the case regarding the mechanism of injury.

    iii) Both of the parents have demonstrated dishonesty during the proceedings in respect of the quality of their relationship both prior to and subsequent to R being injured. In contending he had no understanding of how R came to be injured, the father was dishonest for a period of eighteen months following the serious head injuries sustained by R. He permitted R to be treated for sepsis and meningitis when he knew she had sustained a head injury in his care. The father could not be relied on in the future to be open and honest if R sustained injury in the future.

    iv) Notwithstanding that the mother's case at the finding of fact hearing was, ultimately, that R was likely to have been injured in the care of the father and that the injury could have been inflicted the mother has remained in a relationship to date. Whilst since the father's assertion that he was responsible for R's injuries the mother has stated that she will need to separate from the father and will take this action she remains in a relationship and has also stated she loves the father and will not abandon him. The relationship between the parents is one of significant and complex difficulty and fragility. Their relationship is co-dependent in nature but the parents do not communicate with each other above a basic level.

    v) Within this context, the mother has continued to make allowances for the father by accepting he may have blanked out the event in which R was injured. If the mother is thereby seeking to exonerate the father this raises serious questions regarding her ability to understand and protect from the risk the father presents to any child in the parents' primary care. In any event, the mother's stated intention to separate from the father against the fact of her continuing relationship with him evidences her prioritising her relationship

with her father over the needs of R and evidences her inability to protect or accept the longer term risk the father poses.

vi) The father is high suspicious of professional involvement. He has a deep-rooted, long standing and entrenched mistrust of professionals and has verbalised his distrust of professionals. The father presents as guarded when professionals make attempts to work with the family and emotionally withdrawn generally. The father evidences an ability to protect information from others. In the context of this case, these factors create a barrier to co-operation and to his being open and honest. There would be serious difficulties in engaging the father in any meaningful way.

vii) Whilst the mother is more accepting of professional involvement, she has demonstrated a fear of professionals which presents a barrier to meeting R's needs. The evidence demonstrates issues with respect to the mother's ability to work openly and honestly with professionals in the future, in particular her failure to seek mediation advice and attention in respect of a fall sustained by R two weeks prior to her suffering serious head injuries.

viii) Each parent has complex emotional issues that require expert intervention. Whilst the mother is ready to address her deep-rooted emotional anxieties this will be a protracted process and certainly not achievable within timescales commensurate with R's needs. Both parents suffered significant emotional trauma during their own childhoods. The mother does not have a positive parenting model to draw upon by reason of the emotional harm and domestic violence she experienced in the care of her primary carers. The father's experiences of bullying and marginalisation as a child have affected him more profoundly than he is prepared to acknowledge.

11. Within this context, Ms Challender concludes that the parents are unable, either together or individually, to care safely for R and to meet her welfare needs. In her final report, Ms Challender states as follows in this regard:

> "I have carefully considered if R could be placed back into parental care and if she could be safeguarded from further risks with a protective plan in place. However, for the reasons that I have discussed in detail throughout my report, I must conclude that no permutation of risk management in this case could ensure R's long term safety if she was too be placed back into her parents (*sic*) care, either together or as single carers."

12. Having undertaken a psychological assessment of both parents, which assessment identified psychological difficulties in both parents, the conclusions of Dr Young are summarised in the following passages of her final report:

> "7.9.1. It is my view that having a clear plan of support in place that covers both parents' needs to address their psychological difficulties, with parenting support and a more formalised plan of support to be available through the wider family, this could continue to build on the protective factors and the risks could be managed for R to be returned to the care of [the mother]. It appears [the mother] has remained consistent throughout

> the proceedings that she was not in the room at the time R sustained her injuries and the more recent account of [the father] attests to this.
>
> 7.9.2. My reservations about [the father] being included in any plan, in terms of him also residing in the household at this time are that there continue to be inconsistencies in his account of what happened at the time R sustained her injuries. He states that what happened was an accident and asserts that he subsequently lost his memory of this until recently and this was why he did not disclose this earlier. However, he indicated to the Independent Social Worker that he is aware of what had happened but did not disclose this for fear of what may happen. He is struggling significantly at this time with his mental health, is exhibiting some post traumatic stress symptoms and there is evidence that R being distressed can act as a trigger for his own distress. Whether or not this could be due to the guilt he feels about what happened, it indicates some continued vulnerability that I think he needs some time to explore more fully before there is consideration of him re-joining the family, thus I would advocate him moving out of the family home for a period of time, if possible back to his family home where he has the support of his parents."

13. It will be seen that Dr Young's conclusion in respect of the mother did not take account of the findings made by Parker J that that the mother *was* present at the time the injuries occurred. In addition, during cross-examination Dr Young indicated that her opinion was predicated on the father's statements made in March 2017 being true. Finally, and within the context of her having read the assessments of Michelle Challender and of the Children's Guardian, Dr Young confirmed that she had in fact changed her conclusions. Dr Young considered that, whilst her original formulation had been that the vulnerabilities of the parents had not dominated their relationship and had manifested only at times of stress, for example when caring for R, having read Ms Challender's report (and the report of the Children's Guardian) it was clear that the parents difficulties are in fact far more pervasive such that and had not been fully disclosed to her by them. Within this context, Dr Young made clear that she could no longer recommend rehabilitation to the mother's care.

14. With respect to the paternal grandparents, they have been positively assessed as 'Connected Person Foster Carers' and as prospective Special Guardians for R. In addition, the assessment of Ms Challender of the paternal grandparents is positive, the assessment of Ms Challender concluding that, whilst upsetting, the paternal grandparents accepted the findings made by the court that R was injured in her parents care. They further accept that notwithstanding the father's statements made in March 2017 there remain significant question marks regarding what had happened and that the father has been dishonest for an extended period. Within this context, the paternal grandparents made clear that they would prioritise R's welfare, safety and wellbeing over the needs of their adult son and the mother. The assessments of the paternal grandparents provide strong evidence that they will be able to meet the welfare needs of R in the long term.

15. Finally in relation to the background and the evidence before the court, the court has the benefit of a comprehensive final analysis of the Children's Guardian, and heard oral evidence from her. The report of the Children's Guardian makes clear, and she made clear in her oral evidence, that even were the court to accede to amending the

findings made by Parker J, there is a high degree of risk in returning R to the care of her mother whilst the mother remains in a relationship with the father or whilst any purported separation is in its infancy. The Children's Guardian's assessment is that the mother would be likely to gravitate back to this relationship and, as such, her capacity to safeguard and protect R would be thus limited. The Children's Guardian is clear that should R not return to the care of her mother, the paternal grandparents are the appropriate long term carers for R, albeit she differs from the local authority as to the appropriate legal framework for such a placement.

16. Within the foregoing context, the issues that fall for determination at this hearing can be summarised as follows:

    i) Do the statements made by the father to Michelle Challender and the responses of the medical experts in respect of the same justify any amendment to the findings made by Parker J in December 2018?

    ii) If not, should R be placed in the care of her paternal grandparents as her permanent placement?

    iii) If so, under what order should that placement be made?

THE LAW

Revisiting Findings

17. I deal first with the law concerning the manner in which the court should deal with new evidence that arises following the making of findings. As I have noted, in this case Ms Dines submits that the court should adopt the approach in *Re B and H (Children)* [2003] EWCA Civ 1818 in which the Court of Appeal confirmed that where subsequent evidence casts doubt on findings made at a split hearing, the court can reconsider those findings in light of the new evidence at the welfare stage. At [16] Butler-Sloss P observed as follows regarding the treatment of evidence that had arisen since findings had been made:

> "...there is undoubtedly medical evidence which casts a question mark over some at least of what has happened. Whether that question mark is serious, whether it is in fact possible that it has or could have any effect on the second part of the hearing, is a matter exclusively for the trial judge and not for the Appeal Court. I ought to say that the additional evidence which we have accepted to be adduced, for what it is worth, would more appropriately be considered at the trial stage than at the appeal stage. It is evidence both as to medical opinion and also some evidence of what is sometimes termed disclosures. All of those are matters that can properly be investigated by the trial judge. I can see no reason why His Honour Judge Hunt should not be the trial judge. Indeed, I agree with counsel representing the other parties that it would be wrong for it not to be Judge Hunt, because he is the one judge who has had all the evidence up to now. He is able to reconsider what he has done, if he considers it necessary, in the light of any further evidence that has come since the hearing before him."

And at [17]:

> "All of those matters are up for reconsideration by the judge, within the basis of his judgment on the last occasion but with the opportunity to look at the doctors giving evidence, to see whether there should be any change of view as a result of that evidence or as a result of any other evidence that may be adduced at the disposal hearing. To do that is entirely in accord, not only with the best practice in the Family Division and also followed by experienced circuit judges in these very difficult cases, but it has been approved by the Court of Appeal in *Re M and MC (Care: Issues of Fact: Drawing of Orders)* [2002] EWCA Civ 499 , [2003] 1 FLR 461".

18. The case of *Re M and MC (Care: Issues of Fact: Drawing of Orders)* involved, as does the instant case, a parent who had changed their account following the findings being made by the court and confessed to a social worker that they had been responsible for the injuries to the child. As in this case, in *Re M and MC* the care proceedings were ongoing and had reached the stage of a welfare hearing. In this context, Thorpe LJ held that in such a situation the court should avoid the extremes of, on the one hand, *completely* reopening the issues of fact that had been tried and, on the other, ignoring the later development when considering the welfare stage of the proceedings. Within the context, the Court of Appeal held that the appropriate resolution of this tension is for the court to conduct the welfare hearing taking the findings of fact as a foundation but making adjustments to take account, where necessary, of the later confession, giving the parent opportunity to explain himself in the witness box and the local authority the opportunity to question him on his evidence. In this regard, at [13] and [14] Thorpe LJ observed as follows:

> "[13] Plainly trial judges have to be firm in not permitting the court's important duty to investigate and establish past fact to be derailed or diverted by what may be simply strategic manoeuvring in response. Particularly, courts must be guarded in acceding to applications for yet another trial of an issue of fact in what should be the relatively brief period between the preliminary hearing of disputed facts and the subsequent hearing to dispose of the outstanding application for care orders.
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> [14] So the notion that the process … should be torn up as though it had never happened simply because one of the adults had subsequently made a statement shifting position was plainly unlikely to succeed and was, in my judgment, rightly rejected by Judge Hamilton. That of course is one extreme. The other extreme would be to reject the development absolutely and treat the previous finding of fact as incapable of being revisited. There is, between these two extremes, an obvious middle way, and that is to conduct the disposal hearing in such a way as to adopt the process of preliminary hearing as the foundation, and then to make such adjustments as are necessary to reflect subsequent developments rigorously tested through the process of examination-in-chief and cross-examination. Judge Hamilton clearly suspected that there was no greater value in the fifth statement than in the earlier statements, and in that suspicion he may be right. But no complete conclusion can be reached without affording the mother the opportunity of explaining herself in the witness box and answering as best she can the local authority's response, namely, that the

> fifth statement is contradicted by or is inconsistent with, the medical evidence."

19. Mr Rothery also referred the court to the decision of the former President, Sir James Munby, in *Re Z (Children)(Care Proceedings: Review of Findings)* [2014] EWFC 9 [2015] 1 WLR 95. In that case, Sir James Munby agreed with the approach set out in *Re M and MC (Care: Issues of Fact: Drawing of Orders)* observing at [19] that:

> "The care proceedings here are part heard. Although there has been a separate fact-finding hearing, the split hearing "is merely part of the whole process of trying the case. It is not a separate exercise. And once it is done the case is part heard": see *In re B (Children: Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] AC 11, para 76. The findings at a fact-finding hearing are not set in stone so as to be incapable of being revisited in the light of subsequent developments as, for example, if further material emerges. Until the final decision is made, the judge must be able to keep an open mind and is entitled at any time to reconsider his earlier findings, at least if fresh evidence or further developments indicate that an earlier decision was wrong: see *In re A (Children: Judgment: Adequacy of Reasoning)* [2012] 1 WLR 595 , para 21, *In re L (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634 , paras 33–35."

20. In the circumstances, in considering the new account provided by the father on 17 March 2019, the task of this court is not to plunge into a full re-opening of the factual issues that were before Parker J in the case, but rather to consider whether the recent "confession" of the father justifies revisiting those findings. In doing so there is an *evidential* burden on those who seek to displace an earlier finding, but the *legal* burden of proof remains throughout on the local authority. The court is required to look at the matter afresh and to consider the fresh evidence alongside the earlier material before coming to a conclusion in the light of the totality of the material before the court (see *Re Z (Children)(Care Proceedings: Review of Findings)* at [12] to [16]).

21. I am conscious that in *Re B and H (Children)* the Court of Appeal highlighted the advantages of the reconsideration of findings in light of new evidence being undertaken by the judge who originally heard the matter and made the findings. However, in this case this has not been possible by reason of the retirement of Parker J and I note that in *Re Z (Children)(Care Proceedings: Review of Findings)* it was made clear that the approach set out above will apply whether the matter is before the same judge or, as in this case, a different judge.

22. Within the context of these principles, a number of further points fall to be made in the circumstances of this case regarding the principles governing the evaluation of the evidence that is said by the mother to justify amendment to the findings made by Parker J. In particular, with respect to evaluating the evidence relevant to the question of whether the findings made by Parker J should be revisited in light of new information, the question of credibility comes to the fore in circumstances where the majority of that new information is comprised of a new account by the father of an alleged accident witnessed *only* by himself.

23. Within this context, and in circumstances where each parent seeks to rely on what they contend was the genuine nature of the distress they each exhibited on 17 March 2019 and thereafter with respect to the father's new account, it is important to bear in mind the observations of Macur LJ in *Re M (Children)* [2013] EWCA Civ 1147 at [11] and [12], noting that:

> "Any judge appraising witnesses in the emotionally charged atmosphere of a contested family dispute should warn themselves to guard against an assessment solely by virtue of their behaviour in the witness box and to expressly indicate that they have done so".

24. The need for care with witness demeanour as being indicative of credibility has also been highlighted by the Court of Appeal in *Sri Lanka v. the Secretary of State for the Home Department* [2018] EWCA Civ 1391. The Court of Appeal observed that it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth, noting research suggesting that interlocutors cannot make effective use of demeanour in deciding whether to believe a witness and some evidence that the observation of demeanour diminishes rather than enhances the accuracy of credibility judgments. Within this context, Leggat LJ stated as follows at [40] and [41]:

> "[40] This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.
>
> [41] No doubt it is impossible, and perhaps undesirable, to ignore altogether the impression created by the demeanour of a witness giving evidence. But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision-making. That requires eschewing judgments based on the appearance of a witness or on their tone, manner or other aspects of their behaviour in answering questions. Rather than attempting to assess whether testimony is truthful from the way it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts."

25. In *Sri Lanka v. the Secretary of State for the Home Department* Leggatt LJ thus made a clear distinction between the *demeanour* of the witness and the *content* of their evidence. The authors of Phipson on Evidence at [12-36] also emphasise the central role that the *content* of a witnesses evidence plays in the evaluation of the credibility of that evidence:

> "The credibility of a witness depends on his knowledge of the facts, his intelligence, his disinterestedness, his integrity, his veracity. Proportionate to these is the degree of credit his testimony deserves from the court or jury. Amongst the more obvious matters affecting the weight of a witness's evidence may be classed his means of knowledge, opportunities of observation, reasons for recollection or belief, experience, powers of memory and perception, and any special circumstances affecting his competency to speak to the particular case—all of which may be inquired into either in direct examination to enhance, or in cross-examination to impeach the value of his testimony."

26. Within the context of the foregoing legal principles, this court must bear in mind that the assessment of the credibility and reliability of the parents should coalesce around matters including the internal consistency of their evidence, its logicality and plausibility, details given or not given and the consistency of their evidence when measured against other sources of evidence (including evidence of what the witness has said on other occasions) and other known or probable facts. The credibility and reliability of that parent should not be assessed simply by reference to their demeanour, degree of emotion or other aspects of their presentation. This of course works in both directions. It is as problematic to rely on an impression that a witness has an 'honest' tone, manner or presentation, for example that they appear "genuinely upset", as it is to rely on an impression that the tone or manner of a witness appears 'dishonest', for example that they cross their arms or look at the floor. These principles must apply both when the court is evaluating the parent in the witness box *and* when the court is evaluating the significance of the observations of other's regarding the parent's demeanour at a given point.

27. Given the time span over which the various accounts in this case have been given, it is likewise important to note the observations of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suise (UK) Ltd Anor* [2013] EWHC 3560 (Comm) at [15] to [21] and, in the context of public law children proceedings, of Peter Jackson J (as he then was) in *Lancashire County Council v M and F* [2014] EWHC 3 (Fam) that:

> "To these matters I would only add that in cases where repeated accounts are given of events surrounding injury and death, the court must think carefully about the significance or otherwise of any reported discrepancies. They may arise for a number of reasons. One possibility is of course that they are lies designed to hide culpability. Another is that they are lies told for other reasons. Further possibilities include faulty recollection or confusion at times of stress or when the importance of accuracy is not fully appreciated, or there may be inaccuracy or mistake in the record keeping or recollection of the person hearing or relaying the account. The possible effects of delay and repeated questioning upon memory should also be considered, as should the effect on one person of hearing accounts given by others. As memory fades, a desire to iron out wrinkles may not be unnatural – a process that might inelegantly be described as "*story-creep*" may occur without any necessary inference of bad faith."

Welfare

28. It not being disputed in this case that the threshold pursuant to s 31(2) of the Children Act 1989 is met, in deciding whether to make orders in respect of R, and if so, which orders, pursuant to the Children Act 1989 s 1 the court must have regard to the welfare of each child as its paramount consideration and to (a) the ascertainable wishes and feelings of the child considered in light of his or her age and understanding, (b) the child's physical, education and emotional needs, (c) the likely effect on the child of a change of circumstances, (d) the child's age, sex, background and any characteristics the court considers relevant, (e) any harm the child has suffered, (f) how capable each of the parents is of meeting the child's needs and (g) the range of powers available to the court. The court must not make an order unless it considers that doing so is better for the child than making no order at all.

29. Where there are competing options for meeting the child's identified welfare needs, the court must undertake a process of holistic comparative welfare analysis of the competing options (see *Re G (A Child)* [2013] EWCA Civ 965 at [49]-[50] and *Re B-S (Children)* [2013] EWCA Civ 1146 at [44]). However in this case, in light of the court's decision not to amend the findings made by Parker J for the reasons set out below, all parties concur that there is only once placement option for R before the court, namely placement with the paternal grandparents. Within this context, the key issue before the court in terms of welfare concerns the choice of order.

Choice of Orders

30. Where, as here, the competing orders advanced before the court comprise on the one hand a special guardianship order and supervision order and on the other a final care order it is important to note the observations made in this context by the Court of Appeal in *Re P-S (Children)(Care Proceedings: Special Guardianship Orders)* [2019] 1 FLR 523. This authority was not drawn to the attention of the court by counsel during the course of the hearing or in closing submissions.

31. In *Re P-S*, as the Senior President of Tribunals identified, the central issue was the choice of order and the route to the determination of that issue lay in an evaluation of the evidence. Within the context of the judge at first instance having refused special guardianship orders in favour of what he identified as 'short term' care orders, and having identified that the orders available to the judge at first instance were a special guardianship order, a final care order or an interim care order with an adjournment the Senior President of Tribunals held as follows at [31]:

> "[31] I agree with the paternal grandparents of S that if and in so far as the judge needed more time to ensure that the relationship of the grandparents with the child and the parents was such that it was in the interests of each child to make an SGO, that could, if reasoned, have been an appropriate basis upon which to adjourn the proceedings. If the judge had not in his own mind resolved what form of final order was appropriate it could have been an appropriate course having regard to the guidance given by this court in *W v Neath Port Talbot* (supra) and would not have cut across the principles described in *In re S (Minors) (Care Order: Implementation of Care Plan), In re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291."

And within this context, as follows at [33] and [34]:

> "[33] The concept of a short term care order within which the placements could be tested was raised by the judge as a justification for making full care orders. Aside from the welfare merits of the orders, which were not adequately reasoned, the concept of a short-term order is flawed. There is no mechanism for a care order to be discharged on the happening of a fixed event or otherwise to be limited in time. The exercise of parental responsibility by a local authority cannot be constrained once a full care order is made other than on public law principles of unlawfulness, unreasonableness and irrationality. The judge should have reflected on the fact that if the local authority did not in due course apply to discharge the care orders themselves it would have been incumbent on the proposed special guardians to do so and to satisfy the test for leave to make that application without the benefit of legal aid, given that in the circumstance of a disagreement with the local authority it would be highly unlikely that the special guardians would be in receipt of funding from them.
>
> [34] Furthermore, the judge did not follow the guidance given in *W v Neath Port Talbot* and obtain from the local authority section 31A care plans for each of the children setting out the plan that he wanted them to pursue, namely a trial of the proposed placements by the local authority. The lack of scrutiny by the court of the plans that are required was contrary to section 31 (3A)(a) of the 1989 Act."

And in respect of SGO placements that are as yet untested, at [37]:

> "[37] The regulatory scheme, that is reg 21 and the Schedule to the Special Guardianship Regulations 2005, as amended, prescribes the elements that are to be assessed which include an applicant's 'current and past relationship' with the child. The regulations were amended by the Government in 2016 to include the need for assessments to be more robust in assessing whether a person is capable of caring for a child into adulthood: Special Guardianship review: report on findings, Government consultation response, December 2015. The opportunity to include provision for a period of assessment of a child living with a proposed special guardian was not taken by the Government. It is neither a statutory nor a regulatory requirement."

32. Finally, also relevant to the decision the court is required to make as to the appropriate orders in this case is the practice of Cumbria of administering its supervision orders under the 'Children in Need' provisions of Part III of the Children Act 1989. Within this context, I note at this stage that where a supervision order is made under the child protection provisions of Part IV of the Children Act 1989 the local authority is under a *specific* duty in respect of the *subject child* to advise, assist and befriend the supervised child and to take such steps as are reasonably necessary to give effect to the order. Parts I and II of Schedule 3 of the Children Act 1989 make further provision in respect of supervision orders, again referable to the subject child. By contrast, a local authority's duties to children under the Children in Need provisions of Part III of the 1989 Act are *general* in nature in respect of *all* children in need. In

particular, there is no duty under s 17(1) of the Act to meet the assessed needs of a *particular* child.

DISCUSSION

33. Having considered the evidence and submissions in this case carefully, I am satisfied that the findings of Parker J do *not* require to be revisited on the basis of the new information provided by the father and must stand. Further, in light of this conclusion, and having regard to the contents of the assessments before the court, I am further satisfied that it is in R's best interests to be placed with her paternal grandparents initially under the auspices of a further *interim* care order. My reasons for so deciding are as follows.

Findings

34. I reject the late account provided by the father on 17 March 2019 as a fabrication. A number of factors underpin my conclusion in this regard.

35. The following points fall to be noted in relation to the new account given by the father to Ms Challender on 7 March 2019:

    i) By contrast to his assertion to Ms Challender that as soon as he picked R up from the floor and heard the cry she was floppy and unwell (which assertion the father repeats in similar terms in his subsequent statement of 2 April 2019), in his earlier statement to the court, the father contended that R was "crying her eyes out" whilst he was winding her, which was normal, and that as he was doing this he passed her back to the mother and only noticed something wrong when the mother stated there this and passed R back to him. In her final statement the mother maintained that whilst out of the room she "heard R start to cry which was normal for her after a feed" and that it was not until the father passed R to him that she noticed her breathing had changed. *Neither* parent related that R was already floppy and unwell when the mother entered the room as now contended by the father to Ms Challender.

    ii) In explaining to Ms Challender why he had not told the mother about the incident he made no claim to have forgotten about it or otherwise having an impaired memory of it. Notwithstanding that his case before this court was very firmly that his late explanation was explained by him forgetting what had befallen R, he was clear when speaking to Ms Challender that his failure to mention the incident was fear of what would happen to him in consequence.

    iii) Within this context, at no point in any of his previous statements, nor in the account he gave to the Police, does the father suggest that there was a period during the time at which R's injuries were caused in which his recollection or memory of events is hazy or incomplete. There are no unaccounted for gaps in his earlier accounts to this court or the Police.

    iv) In neither her statement filed following the father's assertions on 17 March 2019 nor in her final statement, and at a time the mother was having regular contact with the father, the mother makes no assertion that in the aftermath of

his conversation with Ms Challender did the father claim to have forgotten that he had dropped R.

36. Notwithstanding this position, and having made clear to Ms Challender that his failure to mention the incident was fear of what would happen to him, when he saw Dr Young on 1 and 2 April 2019 the father is recorded as offering a completely different explanation for his delay in giving an account of how R was injured:

> "We explored why [the father] was disclosing what had happened now, and not before, either at the time of the incident or during the Finding of Fact hearing. Of this, he said 'Until the last few weeks...what had happened had gone from my mind...I never connected the dots until Michelle (the independent social worker) came round...in the early months, in my head I kept thinking R could have died. If I hadn't been there she would have died...since the hearing in December 2018 I felt something was not right but I couldn't pinpoint it. The judgment was pointing towards one of us shaking her. Why would I do that?' He explained that from the moment she was hospitalised, 'The police and social worker painted a picture of me as a thug and a moody person. When I was arrested they painted a picture that I viciously tried to hurt R...it just shut me down and it's been a battle since then...we're hard working parents but were being portrayed as incapable...the social worker was not being upfront. They'd say one thing, that the house was clean, then write in the report that the house was cluttered and dirty. I felt they worked against us...I'll never trust any of them again."

37. In his statement to this court dated 2 April 2019 the father's continues to press his different account with respect to why he did not reveal the alleged incident of dropping R, stating as follows:

> "Thereafter, I somehow managed to block out this memory. I cannot explain this and cannot explain why I was unable to recall it at the hospital or since. It is only when Michelle Challender came to assess us that I started to putting the pieces together and was able to tell her what happened. From the moment I picked R off the floor I went into complete shock and was focused on what R was doing, struggling to breathe, which left me in a state of terror, scared of losing R. From their onwards I believe I was in some kind of traumatic shock."

38. Within this context, when he gave evidence about these matters the father was a *deeply* unimpressive witness. He was prone to dissemble on the facts when faced with difficult questions about contradictions in his account and often displayed a tendency to take refuge in a litany of tangential matters in order to avoid a direct answer to the question asked. It was of particular note that the father was almost entirely fixated on how the events of December 2017 and the subsequent proceedings had affected *him*, with little or no reference to their impact on R. Within this context, the father was prone to become lost in self-pity, self-regard and self-centred introspection and to avoid questions aimed at elucidating apparent inconsistencies between his accounts. On a number of occasions the father was simply unable to give any reasons for the forensically significant changes to his account or the inherent

unlikelihood of him forgetting only one, narrow aspect of the traumatic events of December 2017.

39. When seeking to explain during cross-examination why he had only given his new explanation to Ms Challender on 17 March 2019, some 14 months after R sustained injury, the father's central contention continued to be that, in the hour between the injuries and being asked for a history by doctors he had *forgotten* that he had dropped R. This lapse in memory, he contended in his oral evidence, had continued through his police interview and the subsequent Police investigation which looked specifically at the circumstances in which R sustained injuries, through the case management stage of these proceedings setting up the fact finding hearing to consider that same question, through the finding of fact hearing (notwithstanding that Ms Dines asked the father *in terms* during cross examination at that hearing whether R had been injured in an accident involving the rocking chair) and for some three months after that hearing as assessments were undertaken as to the welfare options for R.

40. The reason why the father forgot the accident that had befallen R only an hour after that incident, but none of the details before and after that time, and why he did not remember the account he now gives despite that precise scenario being put to him in December 2018, was never satisfactorily explained by him beyond a further, vague contention by the father that the trauma of giving CPR to R resulted in this almost immediate and persistent memory loss of the manner in which she had sustained injury.

41. As to how the memories came to be recovered on 17 March 2019, the father could not say beyond an unparticularised allusion to Ms Challender being a good listener and to his having had nightmares prior to this meeting. As I have noted, he was not able to explain why this, rather than Ms Dines putting to him in December 2018 the *precise* accidental scenario for which he now contends, resulted in him remembering in March 2019. Further, in her substantive report, Ms Challender is clear that "I am confident that my assessment technique did not ignite his sudden memory, therefore I am concerned about his current motives".

42. Finally, as I have already alluded to and as he conceded in cross-examination when continuing to advance this justification for his delay in describing what had happened to R, it was apparent that it is only the fact of having dropped R that appears to have slipped from the father's memory for eighteen months after the event. He conceded that, by contrast, he has an accurate reflection, indeed an acutely accurate recollection of giving R CPR, of attending hospital and of the events that led up to the point at which R was injured. Thus, the father's asserted temporary amnesia covers, and *only* covers, the point at which R was injured, coupled with a further and specific revision of his account of when R became acutely unwell in relation to the point at which the parents contend the mother became present in the room.

43. I have of course paid careful regard to the fact that the parents pray in aid in support of their case that Michelle Challender and Dr Young stated that the presentation of both parents on 17 March 2019, and the upset they each exhibited, appeared genuine, and that each appeared not to be attempting to mislead. Further, in their closing submissions both Ms Dines on behalf of the mother, and Mr Howell-Jones on behalf of the father pressed this aspect of the case. However, as I have noted above, it is important for this court to bear in mind that context that the court's assessment of the

credibility and reliability of the parents should coalesce around matters such as the internal consistency of their evidence, its logicality and plausibility, details given or not given and the consistency of their evidence when measured against other sources of evidence (including evidence of what the witness has said on other occasions) and other known or probable facts. The credibility and reliability of that parent should not be assessed simply by reference to their demeanour, degree of emotion or other aspects of their presentation. Within this context, I am satisfied that this is a case in which the manifest internal inconsistency, illogicality and implausibility of the father's new account must weigh far more heavily in the balance than the parents emotional presentation when the new version of events was given.

44. Further, in evaluating the credibility of the father's new account I am satisfied that it is also important to have regard to the fact that certain aspects of *both* the father and the mother's accounts have changed since December 2018, and to the fact that those parts that have changed (a) are, in significant respects, the same and (b) act now to support the mother's submission that not only she should be exculpated on the basis that the father has admitted causing the injuries but *also* that the finding that she was present at the time the injuries occurred should also be set aside.

45. The changed account of the father as to when R became ill, which contradicts the earlier accounts of *both* parents, has the effect of removing the mother from the room at the point of R's collapse. The mother has also now changed her account in this single respect. The court must in the circumstances ask itself whether it is coincidence that, although it is only the father who contends he now recalls the true events which injured R, *both* parents have now each changed their stories in the same way on the very subject that provides the mother with the exculpatory evidence she needs not only to overturn the finding that either or both parents were responsible but the finding that both parents were present when R was injured. The parent's both protested when this was put to them in cross-examination that it gave them too much credit and that they were not clever enough to have come up with such a ruse.

46. Having considered this point carefully, and whilst I entertain significant concerns about the fact that the father and the mother have changed certain aspects of their account, that those changes in some respects coincide and that certain of the concurrent changes have the effect of distancing the mother from the room in which the injuries occurred, I am not satisfied that that evidence permits me to make a finding of collusion on the balance of probabilities. However, I am *entirely* satisfied that these concerning aspects of the evidence provide a further and cogent reason for not interfering with the findings of Parker J.

47. Finally, I am satisfied that the additional responses of the experts provide further support for my view that the findings of Parker J made on the balance of probabilities do not require amendment. By way of response, the experts responded as follows, none of which responses have been challenged by the parties by way of cross-examination and accordingly stand unchallenged:

    i) Dr Stoodley considers that the neuroimaging of R is not consistent with impact trauma to the head of the type described by the father in his recent account. Within this context, Dr Stoodley opines that the explanation given by the father *cannot* be considered a reasonable possible explanation for R's injuries. Dr Stoodley points to the fact that there was no evidence of soft tissue scalp

swelling evident on the scans to suggest any recent significant impact head trauma;

ii) Professor Lloyd opined that an accidental fall of the nature described by the father would be *extremely* unlikely to produce the extensive bilateral retinal bleeding seen in R's eyes.

iii) Dr Cartlidge opined that a fall from the height described by the father has the potential to cause the intracranial and retinal bleeding found in R.

iv) Mr Richards opined that, on the medical features alone, he is unable to determine which explanation for the illness is correct.

48. In consequence, the findings made by Parker J stand. Accordingly, the factual basis on which this court proceeds to decide the welfare issues in respect of R is that found Parker J in December 2018, namely that:

i) On 26 December 2017 R was taken to hospital by ambulance following the sudden onset of an encephalopathic illness at home.

ii) On examination, R was found to have bilateral extensive retinal bleeding to both eyes and a right sided acute subdural haematoma.

iii) An MRI scan performed on 28 December 2017 showed blood in the subdural spaces over the frontal, parietal and occipital convexities of the cerebral hemispheres, in the interhemispheric fissures, over the tentorium and over the posterior fossa.

iv) There is no pre-existing infection, metabolic abnormality or blood clotting that would explain R's presentation.

v) The bleeding on the initial scans and the brain injury are acute injuries which could not date back to the time of delivery.

vi) R's retinal haemorrhages are not related to her birth.

vii) There is no evidence of any other medical condition that may have pre-disposed R to the formation of retinal haemorrhages.

viii) There is no history of accident or incident which could account for the injuries.

ix) R's injuries are non-accidental in nature.

x) The retinal haemorrhages and the subdural haematomas were caused by R being shaken.

xi) R was injured as the result of a loss of control on the part of a carer who had not planned to injure her.

xii) R's injuries are likely to have occurred after the last time that she was behaving within the bounds of normality and is likely to be the point of collapse. R would have been immediately unwell after the causative event.

xiii) R suffered shaking type injuries as a result of acceleration / deceleration to her neck and head.

xiv) The injuries were inflicted injuries sustained immediately before the 999 call and were caused by either the mother or the father or both as the result of intentional or reckless behaviour on their part.

xv) Both the mother and the father were present when the injuries to R were sustained.

xvi) Both parents know how the injuries were sustained and both have withheld the truth from the Police, the local authority and, ultimately, the court.

Welfare

49. Whilst the mother pursued as her primary case the placement of R in her care, she realistically conceded through Ms Dines in closing submissions that were the court not to amend the findings made by Parker J, as it has not done, then she would have to accept that her case for the return of R to her primary care could not succeed. Further, in endorsing the placement of R in the care of the paternal grandparents in such circumstances, the mother further, and again realistically, accepted through Ms Dines that they must be R's primary carers and that her role would be limited to regular contact.

50. The father likewise conceded that, in the event that Parker J's findings were not amended, and indeed in any event, he could not be considered as a carer for R either on his own or in combination with the mother or his own parents, and did not seek that outcome. Whilst he supported the mother's primary case, in the event that the mother remained the subject of the findings as determined by Parker J he too endorsed the placement of R with his parents. Both the local authority and the Children's Guardian endorse this outcome, albeit they take different positions with respect to the legal framework under which this outcome is to be facilitated.

51. For the avoidance of doubt, I make clear that even had I been minded to make the amendments to the findings sought by the mother, it is extremely doubtful that I could have concluded that R could be safely returned to the care of her mother in those circumstances. During the course of cross-examination Ms Challender made clear that her views stood not only if Parker J's findings were not the subject of amendment, but also were the findings to be amended to exclude the mother as a perpetrator of the injuries and to find she was not present when the injuries occurred. Ms Challender further made clear that she arrived at this latter view in circumstances where the mother has manifest untreated emotional issues and where she made a conscious decision to remain in a relationship with the father notwithstanding him hiding his culpability for the injuries to R for some eighteen months. In particular, Ms Challender stated that she could not be confident that the mother would not try to protect the father in the future in circumstances where the parents have an imbalanced relationship and the mother remans dependent on the father. Within this context, Ms Challender made clear that her conclusions as articulated in her report would not change even were the court to adjust the findings of Parker J in the way contended for by the mother.

52. The mother was a witness in whom it was possible to see in operation the characteristics identified by both Ms Challender and Dr Young. Her answers indicate that she continues to find it difficult to see any culpability on the part of the father with respect to R's injuries, even now being prone to look for alternative explanations for R's injuries and seeking to excuse the father's behaviour by seeking a compromise position. It was clear from her evidence that there is little 'depth' to her acceptance of the father's assertion of culpability and I was left with little confidence that she would be capable of challenging any narrative propounded by the father. This impression was reinforced by evidence concerning the mother's statements at contact.

53. The parents have continued to have regular supervised contact with R together each week. The contact records for that contact are before the court. One record has been the focus of particular attention at this hearing, namely that for 12 June 2019. On that day, the contact record, authored by a Ms Nugent, records the mother stating that she was not stressed at all and that she and the father had "done nothing wrong". The mother disputed this account and Ms Nugent was called to give evidence by video link. Whilst cross-examined in detail by Ms Dines, Ms Nugent was adamant that she had heard the mother state that she and the father had done nothing wrong. Further, Ms Nugent was clear that the mother had made other statements to this effect both before and after the finding of fact hearing. Insofar as her evidence was contradicted by the mother, I preferred the evidence of Ms Nugent, which was lent weight by the contact note prepared within days of the contact taking place and her emphatic and repeated confirmation that this is precisely what the mother had said.

54. In cross-examination, in explaining why her opinion had changed in reading the reports of Ms Challender, Dr Young considered the parents' respective psychological vulnerabilities, and their consequences, to be "pervasive" and "much more significant" in terms of the parents' capacity to move forward. Dr Young further stated in evidence that she considered the father still to be "in a place of denial" and not able fully to accept his culpability and that the question of the mother's ability to sustain a separation from the father remains unclear. Within this context, she considered the assessment of Ms Challender to be "much more persuasive than my own assessment".

55. These matters must be evaluated in light of two further aspects of the evidence that this court has before it. First, father made clear to Dr Young that he still does not discount the possibility that there is, in fact, a medical explanation for R's injuries. Second, whilst during the course of her cross-examination of Michelle Challender Ms Dines sought to characterise the current relationship between the parents in a variety of ways that sought to suggest that the mother had made progress by building distance between herself and the father, both parents were clear that (a) they are living apart physically but remain engaged to be married, (b) they still have strong emotional connection and rely on each other for emotional support and (c) that each entertains a hope that they and R will be reunited as a family unit in the future. This is entirely consistent with the position articulated at the FGC held only some 11 days prior to the commencement of this hearing, where it was made abundantly clear that "[The father] and [the mother] are currently living separately but remain in a relationship" and, as I have noted, "the hope is that [the father] will be able to return to the family home with [the mother] and R in the future...". Within this context, I am satisfied on the evidence

I heard during the course of the hearing and from other evidential sources available to the court that the parents remain in a close and co-dependent relationship.

56. For all these reasons, even had I been able to accede to the mother's submission that the findings of Parker J should be amended in the manner contended for, it is highly likely that the court would have reached the conclusion that, in any event, R could not be safely returned to the care of her mother.

57. Within the foregoing context, the *key* issue is what order should be made in this case having regard to R's best interests as the court's paramount consideration in order to meet her welfare needs. Having considered carefully the competing submissions of the local authority and the Children's Guardian, I am satisfied that the court cannot accept either submission as put and that, having regard to the principles very recently articulated by the Court of Appeal in *Re P-S*, the placement with the paternal grandparents should initially be managed under a further *interim* care order. My reasons for so deciding are as follows.

58. All parties accept that, having regard to the assessments before the court, the paternal grandparents are capable of meeting the welfare needs of R and will provide well for her day to day care. Having considered the evidence before the court carefully, I can identify no reason to doubt that consensus of opinion amongst the parties. Having regard to the assessment of the paternal grandparents I am satisfied that they are capable of meeting R's welfare needs. However, that is not the end of the matter when considering the appropriate order to make in this case at this stage.

59. During the course of her oral evidence Ms Challender carefully articulated the challenge facing the paternal grandparents in this case notwithstanding their identified ability to meet the needs of R. In particular, Ms Challender outlined the difficult task that will face the paternal grandparents in the context of the complexity of the parents' own needs, the complexity of the family dynamics, the level of risk to be managed and the natural human inclination towards sympathy and compassion. Within this context, Ms Challender made the following points:

    i) The placement is untested. R will be moving to the care of the paternal grandparents after some two years in foster care and will require a great deal of support to make sense of her family life.

    ii) Within the context of the family dynamics involved, the management of the placement, including contact and informing R of her history and life story, the paternal grandparents will require a platform support if the placement is not to be one that is set up to fail.

    iii) Within this context, the paternal grandparents will require significant guidance and training to assist them with the particular complexities of the placement, to manage relationships and to "embed" clear boundaries.

60. In these circumstances, Ms Challender was clear in her oral evidence that the plan advocated by the Children's Guardian of the placement with the paternal grandparents proceedings under the auspices of a care order is one that she would support as conferring clear benefits for the placement. Ms Challender considers that the LAC

framework that will apply under a care order will provide the initial robust framework that is required to ensure a safe and successful placement in the long term.

61. Within this context, I pause to note that the SGO support plan filed and served by the local authority, and the transition plan that accompanies it contain, in my judgment, some stark omissions at present. In particular, the SGO Support Plan contains no clear information on how and to what extent the paternal grandparents will be supported with respect to managing the risks presented by the parents, with managing the complex family dynamics, in dealing with issues such as the safe supervision of contact and provides no provision for training or regular review.

62. Indeed the SGO Support Plan is notable for just how many responsibilities are to be placed almost exclusively on the paternal grandparents from the outset, with little or no information beyond vague, generic assertions as to how those responsibilities are to be supported by the local authority in light of the issues identified by Ms Challender. Within this context, whilst enjoining the court to have regard also to the Transition Plan, during cross-examination the social worker was forced to concede that it too is very sparse in these respects. Other aspects of the support for the paternal grandparents explored with the social worker in cross-examination also lacked certainty, with issues such as the identity of life story resources awaiting the decision of "a manager".

63. With respect to the SGO plan and transition plan advanced by the local authority, I again note also that the position in respect of the administration of the supervision order sought by the local authority as a support for these provisions is somewhat idiosyncratic. As I have alluded to above when discussing the legal principles applicable in this case, during his evidence the social worker made clear that whilst Cumbria County Council seeks a supervision order under Part IV of the Children Act 1989, the stated intention of the social worker (and apparently the practice of Cumbria County Council more widely) is that the case will actually be managed under Part III of the Children Act 1989 and the provisions of s 17 of the Act. However, as the Children's Guardian points out, the approach of Cumbria results in a child protection case that has resulted in an order being made under the child protection provisions of Part IV of the Children Act 1989 being managed by the local authority under the children in need provisions of Part III of the 1989 Act, which provisions were designed for a different purpose and for a different constituency of children. Within this context, and noting that I did not hear full submissions on this point, I have taken account of the fact that Cumbria's stated intention to administer a supervision order made under Part IV of the Children Act 1989 within the legal framework provided by Part III of the 1989 Act has, on the face of it, the potential to cause confusion.

64. In her report the Children's Guardian makes the following further highly salient points regarding placement with the paternal grandparents, which points were not the subject of effective challenge in cross examination:

    i) Overall, the assessments of the paternal grandparents have concluded favourably regarding their capacity to provide R with stability, safety and security. However, there have been some issues, in particular their ability, prior to the fact finding hearing, to accept any findings made by the court (resulting in their being withdrawn from being presented to the Fostering

Panel) and have not always availed themselves of the time provided for them to spend with R.

ii) The Children's Guardian retains a residual concern that whilst the paternal grandparents have accepted the findings of the court that R was harmed whilst in her parents care, their understanding of risk could be clouded by information provided to them by the parents, particularly in light of the statements made by the father. It is of note in this context that the family made clear at the FGC in this context that, whilst appreciating the timescales may be protracted, "The hope is that [the father] will be able to return to the family home with [the mother] and R in the future, once professionals are happy that he has addressed their concerns and accessed all of the support required" and "The family wish that in time if everything is progressing well that [the father] can be reintroduced to the family home and the family can be reunited".

iii) The paternal grandparents will continue to work with the local authority but given residual frustrations with that local authority there may be a hesitation on the part of the paternal grandparents to address any concerns they have with the local authority for fear of repercussions.

iv) The paternal grandparents have had little opportunity to learn R's routines and due to delays in establishing time spent on their own with R.

v) There are currently additional pressures on the paternal grandparents, with the paternal grandmother's own mother receiving end of life care and they will need support and understanding as they deal with this difficult period.

vi) The placement is untested.

65. Within this context, the Children's Guardian concedes that the making of a special guardianship order would enable the paternal grandparents to have overriding parental responsibility for R in the context of assessments that indicate they would act in her best interests and would mean that R would not be a Child Looked After by the Local Authority and that a supervision order would require the local authority to advise, assist and befriend. However, the Children's Guardian further observes that:

> "There is a vulnerability of R becoming the subject to a Special Guardianship Order, she has not so far been placed in the full time care of [the paternal grandparents] and so this placement has not been tested. Whilst I remain optimistic that [the paternal grandparents] will endeavour to ensure R has a positive and happy upbringing and will do whatever is required to support her, there remains uncertainty as to how in reality this placement will progress. As R has not lived with [the paternal grandparents], the realities of what support they need are not yet know[n], it is only through the testing of a placement that the support needs of the grandparents, placement and R become clear. It is possible that [the paternal grandparents] and by the placement, R, could be disadvantaged by a support plan endorsed by the Court that may not in reality meet their needs."

66. Further, and citing the recent research study completed at the University of Lancaster in March 2019 by Harwin et al entitled *The Contribution of Supervision Orders and Special Guardianship Orders to Children's Lives and Family Justice* the Children's Guardian further observes that:

> "I have highlighted this recent study as the concerns raised by those interviewed as part of it resonates in the views shared by [the paternal grandparents]. They feel very much without a voice within the process and whilst I was meeting with them, they had many questions about what the implications going forward would be. Whilst this does not deter them from wanting to care for R, there is a worry that they may be left without the support they need, and they may feel powerless to ask for anything further. They do have concerns in respect of their relationship with the Social Worker(s) that R has had and that this is not an effective working relationship. I accept this may be their perception of the situation based on the experience they have had as part of these proceedings; however, such a perception could be a barrier to an effective working relationship going forward."

67. Within the foregoing context, the Children's Guardian goes on in her report to reiterate that it has not been possible in this case to test the placement within the proceedings in order that any issues or vulnerabilities can be swiftly supported within proceedings. The Children's Guardian is further of the clear view that the family will collectively need support to adjust to the paternal grandparents becoming the primary carer for R, which may not work in the idealised way envisioned by them, and that the current explanation being advance by the father risks clouding the accurate assessment by the paternal grandparents of risk and further highlights the paternal grandparents need for guidance and support to manage any difficulties with contact in this context.

68. In a carefully reasoned report, the Children's Guardian accordingly considers that a care order being the initial legal framework for the placement would have the following advantages:

    i) It would provide a more robust level of support for the paternal grandparents and R whilst they settle into and adapt to a new circumstance in which the paternal grandparents have not yet faced the challenges of managing the new placement.

    ii) A care order would enable the paternal grandparents to remain 'foster carers' for a period, entitling them to the support of a fostering social worker to support and supervise them and from who they could seek advice and guidance and to advocate on their behalf.

    iii) R would be the subject of reviews at 28 days, 3 months and 6 months into the placement overseen by an IRO, monitoring the local authority's compliance with the care plan and ensuring that issues are promptly addressed.

    iv) A care order would afford the paternal grandparents the opportunity to engage in training provided by the fostering service, assisting them to understand the differing needs of children who have suffered trauma, who do not live in the

care of their parents and assist them in managing challenges arising out of kinship care.

v) Under a care order, day to day decision making in respect of R would be delegated to the paternal grandparents and they would be supported to make safe decisions.

69. In cross-examination the Children's Guardian reiterated her position that, based on the matters set out above, she supports the making of care orders as the appropriate order for the placement with the paternal grandparents to proceed initially. Within this context, I note that in his statement the allocated social worker recognises that the paternal grandparents may encounter situations in which they require guidance, relating both to the care of R and the management of the ongoing relationship between themselves, R and the parents. Indeed, when the position of the Children's Guardian as articulated in the foregoing paragraph was put to him in cross-examination, the social worker conceded that:

i) The task facing the Paternal Grandparents is a difficult and sensitive one. They have been through a difficult process of understanding in respect of the injuries sustained by R, comprising a shared belief that there was an innocent medical explanation, coming to terms with the findings made by Parker J and now having to contend with the statements made by the father in March 2017.

ii) The paternal grandparents will face a challenging task in helping R understand her life history and her place within her family in circumstances where her primary carers will be her grandparents and her parents will be limited to having sessions of supervised contact with her. These difficulties will have to be negotiated in the context of the paternal grandparents having feelings of loyalty to their son and the mother and in circumstances where the parents will seek a good level of contact.

iii) The placement with the paternal grandparents is untested and the transition period may through up complications and challenges that are not presently anticipated. There is a significant risk of placement breakdown absent appropriate support.

iv) Within this context, were the placement to proceed initially under the auspices of a care order R would have the benefit of an independent reviewing officer to make sure the placement with the paternal grandparents was properly supported (the social worker further confirmed that Cumbria does not deploy IROs in cases in which supervision orders have been made).

v) Were the placement to proceed initially under the auspices of a care order, as local authority foster carers the paternal grandparents would be entitled to receive training to develop resilience in respect of these issues and skills for dealing with the same.

vi) Were the placement to proceed initially under the auspices of a care order, the paternal grandparents would benefit from their own fostering social worker who could assist them to identify R's needs and their own needs that they may not immediately appreciate within the context of the complexities of the

placement and advocate for them to ensure that those needs are addressed as the placement settles. This will constitute an additional safeguard for an untested placement.

vii) The latter provision is particularly important in circumstances where, historically, the relationship between the family and the local authority has been difficult, with significant 'legacy' issues that create a real risk that the paternal grandparents will be less able to articulate any need for help and support.

viii) It would be a disaster for R if this placement broke down and all these matters will increase the chances of the placement being maintained as a safe and secure placement for R. Priming the paternal grandparents in this manner now would bring dividends in the future by providing a firm framework within which the placement with the paternal grandparents can settle and develop.

70. Having regard to the evidence of Ms Challender and the Children's Guardian, and to the concessions made in cross-examination by the social worker, I am satisfied that it would be premature to make a Special Guardianship Order in this case. I make clear that this is not a reflection on the ability of the paternal grandparents to meet the needs of R. Rather, it is a reflection of the complexity of that task within the particular circumstances of this case as outlined above, the level of guidance, training and support I am satisfied will be required in the early stages of that task to ensure a successful placement long term and of the fact that the proposed placement is as yet untested and the transition stage will represent a period of particular difficulty for the paternal grandparents.

71. Within this context, I accept the submissions of the Children's Guardian, based on her careful analysis and the careful assessment of Ms Challender, that there are manifest advantages, at this stage, of R retaining her status of a Looked After Child, with the advantages that will pertain in respect of the paternal grandparents in terms of guidance, training and support within that context, whilst she transitions to the placement with the paternal grandparents and during the initial stages of that at present untested placement.

72. The Children's Guardian submitted that a *final* care order should be made at this stage, with a view to an application being made to discharge that order in due course once it is clear that the placement has settled and any issues that risk placement breakdown addressed. However, as set out above, in *Re P-S* a number of difficulties with this course of action, as distinct from the making of a further interim care order were identified. Within this context, I repeat the observations made by the Senior President of Tribunals in the Court of Appeal in *re P-S*:

> "[33] The concept of a short term care order within which the placements could be tested was raised by the judge as a justification for making full care orders. Aside from the welfare merits of the orders, which were not adequately reasoned, the concept of a short-term order is flawed. There is no mechanism for a care order to be discharged on the happening of a fixed event or otherwise to be limited in time. The exercise of parental responsibility by a local authority cannot be constrained once a full care order is made other than on public law principles of unlawfulness,

> unreasonableness and irrationality. The judge should have reflected on the fact that if the local authority did not in due course apply to discharge the care orders themselves it would have been incumbent on the proposed special guardians to do so and to satisfy the test for leave to make that application without the benefit of legal aid, given that in the circumstance of a disagreement with the local authority it would be highly unlikely that the special guardians would be in receipt of funding from them.
>
> [34] Furthermore, the judge did not follow the guidance given in *W v Neath Port Talbot* and obtain from the local authority section 31A care plans for each of the children setting out the plan that he wanted them to pursue, namely a trial of the proposed placements by the local authority. The lack of scrutiny by the court of the plans that are required was contrary to section 31 (3A)(a) of the 1989 Act."

73. I am of course conscious that granting a further interim care order with an adjournment will result in further delay in this case. However, as the President of the Family Division further made clear in the Court of Appeal in *Re P-S* at [68] and [69]:

> "If the child has never lived with, or has only a tenuous relationship with, the proposed special guardian, what steps need to be taken and over what period to test the proposed placement? These are some of the questions the judge may need to have answered; no doubt there will be others...If the answer to these questions demonstrates that the process cannot be completed justly, fairly and in a manner compatible with the child's welfare within 26 weeks, then time must be extended. There can be – there must be – no question of abbreviating what is necessary in terms of fair process, and necessary to achieve the proper evaluation and furthering of the child's welfare, by concern about the possible impact of such necessary delay upon the court's performance statistics. In relation to SGOs, as elsewhere, justice must never be sacrificed upon the altar of speed."

74. Within this context, and once again having regard to the evidence of Ms Challender and the Children's Guardian and the concessions made by the social worker that I am satisfied mandate the continuation of the care order at this stage of the placement process for the reasons I have set out above, I am satisfied that the appropriate order to make at this stage of the proceedings is a further *interim* care order. This will have the advantage of both retaining her status of a Looked After Child under an interim care order (with the benefits that will pertain in respect of the paternal grandparents in terms of guidance, training and support within that context, whilst she transitions to the placement with the paternal grandparents and during the initial stages of that at present untested placement) *and* ensuring that the paternal grandparents are not left to satisfy the test for leave to make that application to discharge a final care order without the benefit of legal aid if the local authority did not in due course apply to do so. Within this context, I am satisfied that such an order is in R's best interests, having those interests as my paramount concern.

CONCLUSION

75. In conclusion, and satisfied as I am that the findings made by Parker J in December 2018 do not require amendment, I am further satisfied that, having regard to her best

interests as my paramount consideration, it is in R best interests to be placed with her paternal grandparents, initially under the auspices of a further *interim* care order for the reasons I have given.

76. I will invite counsel to draw orders accordingly, to include further directions for the filing of an amended interim care plan addressing the aspects of guidance, support and training identified by Ms Challender and the Children's Guardian as required within the context of R's transition to the care of her paternal grandparents, and for a further hearing at an appropriate point to address the making of the Special Guardianship Order.

77. That is my judgment.