Neutral Citation Number: [2020] EWCA Civ 734

Case No: B4/2020/0715

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (FAMILY DIVISION)
Mr Justice Williams
ZC19C00356

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 June 2020

Before :

LADY JUSTICE KING
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

- -

Re C (Children)(Covid-19: Representation)

- -

Elizabeth Isaacs QC, Mark Rawcliffe, and Lachlan Stewart (instructed by **Dawson Cornwell**) for the **Appellant Mother**
William Tyler QC and Tim Parker (instructed by **the Local Authority Solicitor**) for the **Respondent Local Authority**
Mark Twomey QC and Siobhan Kelly (instructed by **TV Edwards**) for the **Respondent Father 1**
Trisan Hyatt (instructed by **Faradays Solicitors**) for the **Respondent Father 2**
Darren Howe QC and Sally Stone (instructed by **Creighton & Partners**) for the **Respondent Children by their Children's Guardian**
Tina Cook QC and Joy Brereton (instructed by **Powell Spencer & Partners**) for the **Intervener**

Hearing date: 4 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Wednesday, 10 June 2020.

Lord Justice Peter Jackson:

Introduction

1. Following a remote hearing on 4 June, we informed the parties that this appeal would be dismissed. This judgment contains my reasons for agreeing with that outcome.

2. The appeal arises from a decision to continue a fact-finding hearing in care proceedings concerning four young children in circumstances where leading counsel for one of the parents cannot be physically present because she is required to shield from the Covid-19 infection. In what has become known as a 'hybrid' hearing, the court has already taken a substantial amount of expert evidence remotely and it has been decided, with the agreement of all parties, that the remaining lay evidence will be given live in court. The mother applied for the proceedings to be adjourned until the autumn to allow for the possibility of her leading counsel being able to attend in person. The judge, although sympathetic, refused the application and determined that the hearing would resume on 24 June, when the time estimate for completing the evidence is 3½ days, followed by written submissions. The intention is that assessments will follow and that welfare decisions will be taken at a hearing in September. By that time the children will have been in foster care for 16 months.

3. The judgment of Williams J, who has had the conduct of the proceedings since June 2019, can be found at [2020] EWHC 1233 (Fam). The nature of the proceedings is described in the opening paragraph:

> "1. On 6 April 2019, a young girl who I shall refer to as K, died in hospital. She was born in 2016 and so was only three years of age when she died. A special post-mortem and toxicology tests indicated that her death was consistent with cocaine ingestion. Her death has led to both a police investigation by the Metropolitan police and care proceedings commenced by the Local Authority in respect of K's 4 siblings. Three of them have been in foster care since May 2019, and the fourth who was born during the proceedings has been in foster care since birth. In July 2019 the case was listed before me for fact finding commencing on 21 April 2020. This judgment addresses the question of whether the fact-finding hearing should continue either remotely or semi-remotely or whether the case should now be adjourned until an in-person hearing of pre-Covid 19 format can take place; possibly in September or possibly later. Expert evidence from seven witnesses has been heard remotely. No party seeks that police or social work witnesses give oral evidence. The only evidence remaining is the oral evidence of the mother, the father, the paternal grandmother and possibly the maternal grandmother."

4. In the course of the proceedings the judge conducted many case management hearings. Since the advent of Covid-19, no fewer than six hearings were held, being on 3 April, 21 April, 4 May, 5 May, 12 May and 15 May. On 21 April, the father and

paternal grandmother stated that they were not putting themselves forward as carers for the children. The mother maintains her wish to resume their care.

5. At an advocates' meeting on 1 April, the mother's leading counsel Ms Elizabeth Isaacs QC very properly made clear that if the hearing became an attended hearing, she would offer to return the brief. In the event, her client wished her to continue with her representation unchanged.

6. The expert evidence was heard remotely between 23 April and 1 May. It led to a significant narrowing of the issues. The mother, the father and the paternal grandmother accepted that, as opposed to being unascertained, the cause of K's death was ingestion of cocaine leading to cardiac necrosis and heart failure. For its part the local authority amended the findings of fact it seeks. It now alleges that cocaine was ingested by K due to the culpable actions or neglect of either the mother, the father or the paternal grandmother; alternatively, they culpably failed to protect her. It further asserts that the children were exposed to emotional abuse as a result of domestic violence perpetrated by the father upon the mother. The possibility that cocaine was deliberately administered to K is no longer pursued but, as the judge remarked, the allegations are still extremely serious.

7. As planned, the court took stock of the arrangements for the lay evidence after the expert evidence had concluded. At that point, the choice was between (a) continuing with the hearing there and then, (b) adjourning to 24 June, and (c) adjourning to September or October. On 5 May, the judge heard a range of submissions. The local authority, the paternal grandmother and the Guardian broadly favoured continuing, at least in relation to the evidence about cocaine ingestion; the mother, supported by the maternal grandmother, sought an adjournment until after 30 June in the light of the then current government advice about shielding; the father of the younger children, who asserted that he should also be shielding himself, was unwilling to attend court and unable to use remote technology. The judge considered that he had insufficient information about the practical possibilities, so he deferred a decision and heard further submissions on 12 May, when he gave his decision. He handed down a 27-page judgment on 15 May.

The judgment

8. Having identified the narrative and the parties' submissions, the judge reviewed the guidance and authorities. In particular, he noted this court's decision in *Re A (Children) (Remote Hearing : Care and Placement Orders)* [2020] EWCA Civ 583 at [3] and [8-9], where guidance was given about the conduct of remote and hybrid hearings.

9. The judge then directed himself in this way:

> "46. All of the guidance given in relation to hearing cases at this time is intended to ensure that the parties' article 6 rights to a fair hearing within a reasonable time by an independent and impartial tribunal are not infringed. The article 6 right is unqualified but what constitutes a fair hearing is not an absolute. There is no absolute rule that provides that a fair hearing can only take place if the party is able to attend court in

> person to give their evidence and to see and hear and respond to the evidence of other important witnesses. It is a question of fact and degree in any particular case. In addition, in cases such as this the article 6 rights of one party may be in conflict with the article 6 rights of another party. In this case the rights of the children and of the paternal grandmother and the local authority to a determination in the near future may be in competition with the rights of the mother and father to give evidence and to hear evidence in the way they consider best promotes their right to a fair hearing."

10. The judge then addressed each of the factors identified in paragraph 9 of *Re A* in detail. He identified the allegations as serious, although the evidence yet to be heard was not complex. The role that each of the three family members had played in how cocaine came to be ingested by K was very much a live issue, and one that could have a critical impact in particular on the mother's claim to resume care of the children. The children had been in foster care for nearly a year, and another 3½ months delay is very significant for them. As to the nature of the contested evidence, the judge said this:

> "54. In many cases the existence of a contemporaneous digital fingerprint or other contemporaneous or corroborative documentary or other evidence might affect the importance of the oral evidence. When the court has a host of other sources of evidence against which to measure the veracity or credibility of a party's evidence the significance of the oral evidence may be reduced. Conversely where other sources of evidence are limited the importance of the oral evidence of the parties assumes a greater prominence and the court's determination of the parties' credibility in the round including their demeanour in court as well as their responses to questioning may become crucial. The mother's evidence as to her drug consumption will have to be weighed alongside the Chemtox analysis which is inconsistent with her account and the Lextox analysis which is more consistent with her account. The mothers evidence as to domestic abuse and the father's evidence in rebuttal are the central planks of the case on domestic abuse. The mother's explanation for changes or developments in the accounts she has given over time may be important. The parties' evidence as to the nature and extent to which cocaine was present in the house is of considerable importance although we also have the oldest child's account and the police evidence as to the presence of cocaine in the family home and elsewhere. Some of the evidence is hotly contested as between the mother and the father, some as between the mother and father and the local authority, some as between the father and the local authority."

The judge also reviewed the arrangements that could be made for a safe attended hearing at the Royal Courts of Justice.

11. The judge then gave his decision:

"64. Drawing all of those strands together, having regard to the Guidance and to the judgments of the Court of Appeal and of the President and balancing the competing arguments I conclude as follows.

i) The issues on which the remaining evidence is to be given are not complex but they are of very considerable importance both to the mother, father and paternal grandmother and to the children and wider family. The outcome of the evidence may have profound implications for the possibilities of rehabilitation and thus for the family life of the children and the parties.

ii) The absence of very much contemporary documentary evidence, digital fingerprints, or other corroborative evidence places a considerable focus on and premium on the oral evidence of the parties. Whilst it can be tested remotely, where it is of such importance and where there is the lack of other evidence against which to measure it. the giving of evidence in a court setting in the presence of the judge in my view has an advantage both to the party and to the court. This arises not only from the evidence actually given but also from the interplay between the party and their team and the dynamic that may be observed as between the parties. Thus, on the particular factors which are present in this case I consider that giving evidence in person has a material advantage over remote evidence giving. If giving evidence in person can be facilitated within a reasonable time period that should be facilitated in order to deliver a fair hearing.

iii) I thus do not consider that it is appropriate to continue with the hearing later this week and next week. Although a safe court environment can be provided the mother cannot participate in person as she has been exposed to a person diagnosed with Covid 19. Even were she prepared to attend court in those circumstances, I would not permit her to do so given the risks to herself and to others. The father may be reluctant to attend this week and next but he and his team could attend if I so required them. The paternal grandmother and her team can and indeed urge me to allow her to attend to give her evidence. Were I to allow the father and paternal grandmother to attend in person but to restrict the mother to giving evidence by remote means, on the facts of this case, I do not consider that I would be allowing the parties to participate on an equal footing. The mother inevitably would feel a sense of grievance that she was participating in a manner which she felt was less likely to present her evidence effectively.

iv) The mother, the father and the paternal grandmother can attend a court hearing in June. A safe court environment will then be even more sophisticated or developed for the parties, the lawyers and the court staff. All can then give their evidence

in person with the advantage that brings in this case. The difficulty in June is that Ms Isaacs will not be able to attend in person. That I accept will have some impact on how the mother's case is presented. It is likely to impact on how the mother feels at court, it will mean that interactions between the mother and Ms Isaacs will not be immediate but will be filtered via Mr Rawcliffe and a remote application, and it will mean that Ms Isaacs' physical presence in court to cross examine the father and the paternal grandmother will be replaced by a remote presence: albeit on screen this may be as prominent, if not more so than being physically present. I accept that this amounts to some interference with how the mother and her legal team would choose to exercise their fair trial rights and objectively is likely to have some impact on the presentation of the mother's case; however this does not mean that a fair trial cannot be delivered. A party's subjective perception of what amounts to a fair hearing is not determinative. A fair hearing sets a minimum standard but how it is delivered is not fixed and may vary from one case to another. Some cases involve several leading counsel on each side, others proceed fairly with litigants in person on one side and leading counsel on the other. A fair hearing can be achieved in such circumstances and I am satisfied it can be achieved here.

v) Balanced against the mother's article 6 rights are the article 6 rights of the other parties to a fair trial within a reasonable time. All, including the mother have emphasised their desire for the case to be resolved as soon as possible. The agreement of a party to proceeding either remotely or in a hybrid hearing does not relieve the court of the responsibility to determine whether a fair hearing can take place any more than the opposition of a party relieves the court of that obligation. The Guardian is concerned at any delay and would prefer to have proceeded immediately from the point of view of the children and achieving a rapid resolution of the case. The paternal grandmother also sought an early resolution by continuing with this hearing. The local authority likewise. I have concluded that whilst desirable such a rapid approach would be a significant interference with the mother's rights to a fair hearing and would (along with various other obstacles) prevent a fair hearing and that would outweigh the limited delay involved in adjourning to June which would constitute a hearing within a reasonable time. There is thereafter (as between June and September) also a balance to be struck between interfering with the children's rights to a fair hearing within a reasonable time and the mother's rights to a fair hearing within a reasonable time. Whilst the particular components engaged from each party's perspective may differ a balance still must be struck.

> vi) There is no perfect solution to this clash of rights. Any solution is an imperfect solution with some interference with the rights of one or another party; primarily article 6 but also article 8 rights in particular in terms of how rapidly resolution can be achieved for the medium to long term future of the children. A delay until September will, if Ms Isaacs is then able to attend in person, ensure the fullest compliance with the mother's article 6 rights; the minimum standards will be well exceeded. However, such a delay will infringe upon the children's rights to a fair hearing within a reasonable time. I accept that a delay of 3 months is a significant one and will cause harm to the children. It is not a reasonable time to adjourn from now until September if some alternative earlier hearing can be achieved without infringing the mother's rights to an extent that outweighs the delay caused infringements of others' rights. A hearing in June will protect the children's article 6 right to a fair hearing within a reasonable time but will infringe to some degree on the mother's competing rights. However, I do not consider that the inability of Ms Isaacs to attend will prevent the mother receiving a fair hearing. The personal presence of leading counsel is one part of the framework which contributes to a fair hearing. It is a desirable part, but in my view it is not essential to the provision of a fair hearing. The combined effect of the rest of the framework; that provided by the court, that provided by the mother's representation and to an extent the representation of the other parties all play their part in making the hearing fair. Inevitably in some cases leading counsel is prevented from playing the expected role – part of junior counsel's role is to take on that role. In fact, in this case Ms Isaacs can continue to play a role and in my view (and experience in this case so far) an effective role by remote participation. Some adjustments may be necessary to allow the most effective communication within the mother's team but this on my experience to date is manageable.
>
> vii) Having given anxious consideration to these imperfect solutions that which in my evaluation reaches the best balance is to adjourn the hearing until June to enable the mother to participate in person at that hearing albeit without the physical presence of her leading counsel. That hearing can be a fair one to the mother and to the other parties. That will then enable the facts to be determined which will lead to a final welfare hearing in September and will avoid a further 3 to 4-month delay, which acceding to the mother's submissions would inevitably require; and that assuming Ms Isaacs was then able to attend. If she was not then able to attend would the matter require further adjournment?"

12. It can be seen that the judge addressed the nature of the proceedings at (i) and (ii) and that he rejected the invitation to continue the hearing there and then at (iii). At (iv) he

considered the position of the mother if the hearing went ahead in June, at (v) he considered the consequences of a longer adjournment, and at (vi) and (vii) he came to his conclusion.

The appeal

13. The mother sought permission to appeal, which was granted by King LJ on the basis that the management of cases of this kind is a matter of importance in the current circumstances.

14. The grounds of appeal are these:

> *Ground 1*
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> The judge's decision in adjourning the part-heard fact-finding hearing to a date at which M's leading counsel was prevented from attending in person to represent her (by virtue of Government guidance) ("the hybrid hearing") was wrong in law because it breached M's Article 6 right to a fair trial. In particular –
>
> a. The judge failed to carry out any or any proper assessment of whether the proceedings as a whole, including the hybrid hearing, would be adequate and fair; and/or
>
> b. The judge failed to take any or any proper account of the seriousness of what is at stake for M when assessing the adequacy and fairness of the hybrid hearing; and/or
>
> c. The judge failed to give proper or adequate consideration to whether the arrangements proposed for a hybrid hearing satisfy M's right to an adversarial trial; and/or
>
> d. The judge failed to take sufficient or adequate account of the importance to M of the appearance of a fair trial, the principle of the equality of arms and whether the hybrid hearing respects the "fair balance" that ought to prevail between the parties.
>
> *Ground 2*
>
> The judge was wrong in failing to consider properly or at all whether unfairness in the trial process may involve a violation of the Article 8 rights of M and the Article 8 rights of the children.
>
> *Ground 3*
>
> The judge was wrong in failing to have carried out any proper judicial evaluation of the competing Article 6 rights of the parties.

15. It can be seen that there are a number of ways of expressing the same essential complaint, which was put in this way by Ms Isaacs QC and Mr Rawcliffe:

> "The thrust of M's case is that the decision to adjourn for a part-heard hybrid hearing until 24th June 2020 (rather than a full in-person hearing on 28th September 2020) runs entirely contra to that guidance which, at the time of writing, has not been amended or withdrawn. It is submitted that for the court to contemplate resuming the fact-finding hearing at which every person hitherto involved (judge, lay parties, counsel) is in attendance except her own leading counsel is unfair and fails to respect the fair balance that ought to prevail between her and the other respondents."

They identified the range of contentious issues that arise between the family members, centring on domestic violence, drug use and drug dealing, and submitted that the credibility of the mother, for whom the stakes are highest is crucial.

16. Ms Isaacs argued that the judge's decision breaches a very fundamental principle of natural justice and prejudices her client's right to participate *effectively* in the hearing. The physical absence of leading counsel excludes the opportunity for immediate dynamic interaction with the client in the courtroom. Ms Isaacs suggested a number of practical issues and challenges that her physical absence might entail. The judge, she said, did not balance up all the relevant considerations and it is impossible for her client to see why he reached his decision. Nor did he weigh up the possible consequences of the absence of leading counsel in circumstances where all that has to be shown is a risk of unfairness, not actual unfairness. It is further argued that the judge did not deal with the *inequality* of arms that his decision creates. The feelings of the affected party about the fairness of the trial are of importance, but the judge failed to take account for the need for the trial to appear fair to the mother.

17. On the other side of the scales, Ms Isaacs says that the judge allowed considerations of delay to dominate his evaluation of welfare and the article 8 rights of the children, when they have a wider welfare interest in the need for a just decision. He did not take account of factors that might support a purposeful 12-week delay. He should, said Ms Isaacs, have given little weight to what she described as speculation about what might happen in the future if the hearing did not continue in June.

18. The appeal is supported by the father. It is said that a later hearing will allow him to attend court with greater confidence for his own safety. Mr Twomey QC and Ms Kelly describe the proposed hearing as an experiment. They support the mother's assertion that there will be an impermissible infringement of her right of cross-examination and that a reasonable observer would appreciate her sense of unfairness at what is a nervous time for everyone. However, it became clear that this concern for the mother's feelings did not extend to the point where the father would voluntarily instruct Mr Twomey to examine witnesses remotely in the same way as had been offered by other advocates.

19. For the father of the oldest child, while maintaining a position of formal neutrality, Ms Hyatt emphasised in a short and effective submission the window of opportunity that a June hearing offers in an uncertain world and the severe consequences for the

children if that opportunity is lost. The judge had struck a balance in the circumstances as they are, and he had rightly acknowledged that perfection could not be achieved.

20. The other parties opposed the appeal. For the local authority, Mr Tyler QC and Mr Parker submitted that the judge's decision cannot be faulted and that the arrangements for the proposed hearing come nowhere near to breaching Article 6. If the appeal succeeded, the decision for the children could be postponed indefinitely. Assessments cannot take place until findings of fact have been made. They challenge the impression given that everyone will be in one place except for the mother's leading counsel. At least 20 people have attended the hearing so far, all from different locations, and no more than half of those could be physically present in the courtroom when the hearing resumes. The judge's order provides for a further case management hearing on 19 June when attendances will be reviewed and ground rules established. With social distancing, there can be no impromptu in-court, or indeed out-of-court, communication even for those who are physically present. Notes cannot be passed and whispered conversations are not possible.

21. On behalf of the paternal grandmother, Ms Cook QC and Ms Brereton made submissions, as did Mr Howe QC and Ms Stone for the Guardian. They observed that many of the appellant's arguments are based on unlikely worst-case scenarios and that they do not take account of the upcoming ground rules hearing.

Conclusion

22. It is in the public interest and in the interests of children and families that, wherever it can happen in a safe and fair manner, the work of the courts should continue. This case provides a very strong example. These four children are entitled to a decision about their futures without further avoidable delay and the court's obligation is to put in place a fair process to achieve this. The older three have already been in foster care for over a year after suffering the tragic loss of their sister. The eldest child, aged 11, is said by her Guardian to have a strong wish to return to her mother. The youngest was born into foster care and plans for her future are no clearer now than they were then. The decisions that remain to be made will have lifelong consequences for the children and their family. That is the context in which the fairness of these proceedings falls to be assessed.

23. A number of aspects of the right to a fair hearing, guaranteed by common law and Article 6 ECHR, are relevant:

    (1) Fairness is case-specific and is to be assessed in relation to the proceedings in their entirety: *Ankherl v Switzerland* (2001) 32 EHRR 1 at [38].

    (2) There must be protection not only from actual unfairness but also from the risk of unfairness: *Kanda v Government of the Federation of Malaya* [1962] AC 322 (PC) at p.5.

    (3) The right of access to the court must be effective, so that the individual has the opportunity to address all material that might affect the court's decision and is placed in a position to call evidence and to cross-examine: *Mantovanelli v France* (1997) 24 EHRR 370 at [36].

(4) The importance attached to the welfare of the child must not prevent a parent being able effectively to participate in the decision-making process: *L v UK* [2002] 2 FLR 322 at 332.

(5) The principle of equality of arms entails a reasonable opportunity to present one's case, including one's evidence, in a way that does not place one at a substantial disadvantage to one's opponent: *Dombo Beheer BV v The Netherlands* (1994) 18 EHRR 213 at [33].

(6) The administration of justice requires not only fairness but the appearance of fairness: *R v Leicester City Justices ex p Barrow* [1991] 2 QB 260; *P, C & S v UK* [2002] 2 FLR 631 at [91]. However, the misgivings of individuals with regard to the fairness of the proceedings must be capable of being objectively justified: *Kraska v Switzerland* (1994) 18 EHRR 188 at [32].

(7) The determination must be made within a reasonable time: Article 6 itself.

24. Set against this framework, I am in no doubt that, even without such refinements as may arise from the ground rules hearing, the format proposed for the remainder of the hearing does not threaten any breach of the mother's right to a fair hearing, let alone the fundamental breach that has been claimed. The judge's decision was not only plainly open to him but, I think, correct. My reasons are these:

(1) The single basis of complaint is the fact that leading counsel cannot be physically present in court while other advocates can, at least in theory. That is unfortunate but it will not prevent the mother from participating effectively in the hearing. Perfection in the arrangements for a complex trial of this kind is not always achievable and the contemplated arrangements comfortably satisfy the requirements for a fair hearing. They are not to be described as an experiment. The judge's approach has been meticulous throughout and his decision was the result of principled case management.

(2) There will be no inequality of arms. A difference in the way parties are represented does not of itself amount to inequality in Convention terms. Any disparity created by the physical absence of leading counsel from the courtroom is likely to be slight and cannot amount to a substantial disadvantage rendering the proceedings unfair. A socially-distanced hearing will emulate some but not all of the characteristics of a conventional hearing. The capacity for 'immediate dynamic interaction' is not an indispensable element of a fair hearing and its absence will affect all parties to some extent. The description given at paragraph 15 above of a hearing where everyone except leading counsel will be present is not accurate.

(3) I make no doubt of the mother's anxiety about Ms Isaacs' inability to attend in person. However, the reality of the arrangements does not give rise to any appearance of unfairness. The mother's corner will be fought in a way that fully upholds her rights. Her case will have been prepared to a high standard, she will give her evidence in person in the presence of experienced junior counsel, and her leading counsel will no doubt be engaged before, during and after each stage of the hearing. There is no reason to downplay the effectiveness of remote examination and cross-examination by a skilled

advocate. The judge will keep the fairness of the proceedings under ongoing review and any valid complaint about the conclusions of the fact-finding hearing can be made to this court.

(4) As can be seen from reading paragraph 64 of the judgment alone, there is no substance to the argument that the judge's reasons for his order cannot be understood. His reasoning was clear. Nor was his approach contrary to guidance and authority. He did exactly what he was required to do by making a survey of all the relevant considerations at each stage of the process. The level of detail of his ruling no doubt reflects the fact that it was made at a time when the courts have been feeling their way forwards with decisions of this kind. I emphasise though that it is not expected that other rulings of this kind will need to be of similar length.

(5) The submission that the judge was impermissibly speculating when he considered the consequences of granting the adjournment application had an air of unreality. On the contrary, he was bound to set his assessment of fairness in the context of the proceedings as a whole. A short and certain adjournment may sometimes be granted to secure the attendance of counsel where that is important to a party and any delay is not significant. In this case the adjournment was neither short nor certain and I emphatically reject the submission that the length of the delay would be a small price to pay. Time is running against these children and three months or more in the lives of children of pre-school age and a baby is highly significant, particularly given the already disquieting timescale of these proceedings. The real possibility of an indefinite postponement was also something the judge could not fail to take into account.

25. To conclude, as was said in *Re A,* the means by which an individual case may be heard is a case management decision over which the first instance court will have a wide discretion based on the ordinary principles of fairness, justice and the need to promote the welfare of the subject child or children. For specialist judges, these are becoming routine decisions, and as time goes on a careful evaluation of the kind made in this case is no more likely to be the stuff of a successful appeal than any other case management decision.

Lady Justice Asplin

26. I agree.

Lady Justice King

27. I also agree.
