Neutral Citation Number: [2023] EWCA Civ 465

Case No: CA-2023-000234

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT TAUNTON
Her Honour Judge Skellorn KC
TA22C50037

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 April 2023

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE NICOLA DAVIES
and
LADY JUSTICE ELISABETH LAING

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J (Children: Reopening Findings of Fact)

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John Tughan KC and **Hugh Travers** (instructed by **Simon Lacey Law Associates**) for the **Appellant**
Claire Wills-Goldingham KC and **Steven Howard** (instructed by **Alletsons Solicitors**) for the **1st Respondent Local Authority**
Aidan Vine KC and **Victoria Hoyle** (instructed by **Daniells Family Law Ltd.**) for **A**
Ellen Saunders (of **Porter Dodson**) for the **Children's Guardian** (by written submissions)

Hearing date: 20 April 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Overview

1. This appeal arises from care proceedings about four children, A, B, C and D. The older two are the children of M and F1, while the younger two are the children of M and F2. D, the youngest child, has a degree of disability and developmental delay.

2. In 2019, F2 was accused of a sexual assault by his step-daughter A. He was tried at the Crown Court in 2020 and acquitted after both had given evidence. In 2021, in Family Court proceedings between F2 and A's mother (M), the court made no finding against F2 after a hearing in which A did not give evidence and played no part. In 2022, an allegation of sexual assault was made against F2 by his daughter D. The local authority took care proceedings. Its case is that the threshold is met on three possible bases: assault on D in 2022, assault on A in 2019, or emotional abuse by M, including by fostering false allegations by D and/or by A. Meanwhile the children are living with M and contact between F2 and C and D is not taking place. The picture is of a complex and deeply unhappy family situation in which the threshold of significant harm has surely been crossed: the questions for the court are how, and with what consequences. The forensic effect of the earlier family proceedings is that the alleged assault on A is taken as not having occurred.

3. The court granted the local authority's application for the fact-finding outcome in respect of A's allegation to be reopened and a full threshold hearing has been fixed at which she will give oral evidence. F2 appeals. His appeal is opposed by the other parties: the local authority, M, F1, A and the Children's Guardian.

4. At the end of the hearing we informed the parties that the appeal would be dismissed. I now give my reasons for joining in that decision.

The legal framework

5. The law in relation to reopening findings of fact in children's cases is settled. It is to be found in the decisions of this court in *Re E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447, [2019] 1 WLR 6765 and *Re CTD (A Child) (Rehearing)* [2020] EWCA Civ 1316, [2020] 4 WLR 140. These authorities endorse the decisions of Hale J in *Re B (Minors)(Care Proceedings: Evidence)* [1997] 2 All ER 29, [1997] Fam 117, [1997] 1 FLR 285, [1997] 3 WLR 1 and Munby P in *Re Z (Children) (Care Proceedings: Review of Findings)*, [2014] EWFC 9, [2015] 1 WLR 95, [2014] All ER (D) 143.

6. In summary, the test to be applied upon an application to reopen a previous finding of fact has three stages. Firstly, the court considers whether it will permit any reconsideration of the earlier finding. If it is willing to do so, the second stage determines the extent of the investigations and evidence that will be considered, while the third stage is the hearing of the review itself.

7. In relation to the first stage: (i) the court should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly-based welfare decisions on the other; (ii) it should weigh up all relevant matters, including the need to put

scarce resources to good use, the effect of delay on the child, the importance of establishing the truth, the nature and significance of the findings themselves and the quality and relevance of the further evidence; and (iii) above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any a different finding from that in the earlier trial. There must be solid grounds for believing that the earlier findings require revisiting.

8. As Mr Aidan Vine KC rightly submitted, the requirement for 'solid grounds' is a part of the evaluation that the court must carry out. It is not a shorthand substitute for it.

9. In *Re W (Children: Reopening: Recusal)* [2020] EWCA Civ 1685, [2021] 2 FCR 793 at [28], I said this:

> "It is rare for findings of fact to be varied. It should be emphasised that the process of reopening is only to be embarked upon where the application presents genuine new information. It is not a vehicle for litigants to cast doubt on findings that they do not like or a substitute for an appeal that should have been pursued at the time of the original decision. In *Re E* at [16] I noted that some applications will be no more than attempts to reargue lost causes or escape sound findings. The court will readily recognise applications that are said to be based on fresh evidence but are in reality old arguments dressed up in new ways, and it should deal with these applications swiftly and firmly."

10. As I noted in *Re E* at [50], the approach to applications to reopen is now well understood and there is no reason to change it. During the hearing of this appeal, counsel agreed that the judge in the case, Her Honour Judge Skellorn KC, directed herself correctly and they confirmed that in their experience the courts are having no difficulty in applying the guidance that has been given. That is also the experience of this court: applications for permission to appeal give no indication that the practice of the last 25 years needs revision.

11. I mention this because it has been necessary on this appeal to consider a first-instance decision – *RL v Nottinghamshire County Council* [2022] EWFC 13, [2022] 2 FLR 1012, [2022] 4 WLR 103 – that takes a different approach. That decision should not be followed for reasons given at the end of this judgment.

The relevant background

12. M's relationship with F1 lasted between 1999 and 2012. Her relationship with F2 lasted between 2012 and September 2019.

13. In May 2019, A, who was then 13 years old, told her teachers that F2 had sexually touched her the night before. She repeated the allegation in an ABE interview on the following day. A then went to live with F1. Until September 2019, M defended F2 and sought to persuade authorities that A was unreliable. Since then she has supported A's allegations. A returned to live with M in August 2021.

14. In November 2019, F2 made an application for a child arrangements order in respect of C and D. M obtained a non-molestation order against F2, alleging that he had harassed her and sexually abused A. M initially supervised contact between F2 and C and D. This then moved to a contact centre before ceasing altogether.

15. In February 2020, F2 was charged with sexually assaulting A and the family proceedings awaited the outcome. In October 2020, F2 was acquitted at the Crown Court after a hearing at which both he and A gave evidence.

16. In November 2020, the family court decided that a fact-finding hearing was now necessary. A was joined as a party, having indicated that she would give evidence. A *Re W* assessment was ordered but A then decided she did not wish to give evidence. Against her opposition, she was discharged as a party following an oral application made by F2 at a hearing on 26 May 2021. At that stage A's ABE interview had not been viewed by the court.

17. A fact-finding hearing then took place before His Honour Judge Edward Richards. The allegations made by M against F2 were of a sexual assault on A in May 2019 and of multiple incidents of coercive and controlling behaviour against M throughout their relationship. M and F2 were legally represented and gave evidence. The judge viewed the ABE interview and read a transcript of A's evidence at the criminal trial. In a judgment given on 4 June 2021, he made none of the findings sought by M. He was critical of the evidence given by both parents, more so of M than F2.

18. Following the fact-finding hearing, orders were made providing for contact between F2 and C and D. C effectively refused contact, but D's contact went ahead and eventually grew to include overnight stays. Disputes between M and F2 in this period were so fierce that the Children's Guardian undertook a risk assessment under s 16A of the Children Act 1989 and made a referral to the local authority.

19. In January 2022, D alleged that she had been sexually abused by F2. In April 2022, the local authority issued care proceedings.

The application to reopen

20. In September 2022 the local authority applied to reopen the 'non-finding' made in respect of A. (It makes no difference in principle that it was a non-finding as opposed to an inculpatory finding or an exoneration.) The application was supported by M, the Children's Guardian and A. It was opposed by F2. F1 took a neutral position.

21. The matter, which would have been listed before HHJ Richards had he not moved to another court area, came before HHJ Skellorn KC on 3 November 2022. The first issue that arose was that F2 suggested that the court needed to conduct a fresh *Re W* assessment of A before the question of reopening could be decided. On 7 November 2022, the judge gave her judgment on that matter: she decided that she wanted to determine the local authority's application to reopen before commissioning any *Re W* assessment. This decision was the object of the first ground of appeal, but the ground was not pursued before us, wisely in my view, and I need say no more about it.

22. The judge then heard argument on the reopening application on 14 December 2022 and gave a reserved judgment on 22 December 2022 in which she explained why she was granting the application.

The judge's decision

23. In a judgment of high quality, the judge set the factual and procedural scene, accurately identified the applicable law, and summarised the parties' arguments. On F2's part these included a reliance on the decision in *Re RL*, which Mr Hugh Travers, who then appeared as advocate, argued underscored the importance of maintaining the legal protections surrounding decided cases unless extraordinary circumstances arise to undermine those protections.

24. The judge's analysis appears between paragraphs 61 and 77. She noted that it was suboptimal that the reopening application was not before HHJ Richards. She further noted that she needed to gain a clear understanding of the previous family proceedings and the shape of the present litigation in order to address the application properly. She set out in detail the public policy arguments in favour of finality of litigation in general, and she asserted that F2 had been through two trials and was entitled to finality unless there was good reason to reopen A's allegation. She then addressed the policy reasons favouring sound factual findings. She asserted that she was entitled to weigh up all relevant matters, as identified in the authorities, and should not allow past issues to be revived in a wasteful and unfair way. She reminded herself that solid grounds were required before a finding could be reopened.

25. Although the parties in the two sets of family proceedings were not identical, the judge accepted that the issue relating to A was the same as before. She noted that the proposed reopening would be one part of a wider fact-finding exercise designed to inform threshold issues for the four subject siblings. She described A's allegation as dovetailing with D's allegation and with the alternative allegations that M had influenced each child to make allegations or that the allegations sprang from significantly harmful maternal parenting, including negativity towards F2. She noted that the allegations were now made by the local authority and not by M, although she supported the case against F2.

26. The judge then came to her analysis, which needs to be fully set out to show the quality of her reasoning.

> "71. … In my assessment, the truth or falsity of A's allegations would be an integral, important component of the global Threshold exercise the LA now intends to place before the court. It would not be possible to achieve clarity on the various, interlinked issues without returning to them. It is technically possible, as Mr Travers maintains, for the court to hear a fact finding to determine D's allegations and the secondary questions about the aetiology of those allegations <u>without</u> reopening A's allegations, but in my assessment that would be an incomplete enquiry and carry with it the potential for skewing as a result. I have no doubt that a partial trial would repeatedly run headlong into the issues I am considering in this judgment. The one thing that all parties in this matter are agreed about is that there should be an alternative-basis threshold criteria before the court in order to consider all of the

competing cases. M says A and D have suffered significant sexual and emotional harm at the hands of F2 and that future unrestricted contact would pose an ongoing risk of the same. F2 does not assert a positive driver for what he says were false allegations by A but he clearly does not rule out M having been part of the aetiology. Insofar as C and D are concerned, it has been F2's stated case (for years) that his relationship with C and D has been marked by hostility, negative influence and alienation. A's allegations are at the very heart of the parental separation and the dysfunctional dynamics which have, on any reading of the papers impacted upon C and D over the years leading up to D's apparent complaints. On balance I am not able to accept Mr Travers' submissions that the exploration of an alternate basis threshold is amply achievable without reopening A's allegations. I am sceptical about that suggestion and favour Ms Smith's submission that to take that approach would result in the case circling round a fixed tether point (the position at law that F2 has not abused A in circumstances where doubt is cast on the accuracy of that).

72. The paper or intellectual merits of a new, wide fact-finding exercise cannot, of course, be determinative of the application; something further would be necessary. As Mr Travers rightly submits, litigation finality should not be overridden by the fact that the LA (or a later court) may consider it forensically preferable to approach new litigation on a basis which required reopening. The wide powers of "issue management" are irrelevant here. Instead, focus must fall upon on [sic]: *whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial.* Although many decided cases on reopening, especially those relating to alleged inflicted injury are predicated upon new evidence, the test does not strictly require new 'evidence'. Evolving or emerging information or knowledge can suffice. Hence the Re B list contains (the third prompt of three): *whether there is any new evidence or information casting doubt upon the accuracy of the original findings.* That is one item on a list of potential features which I assess to be (i) guidance and (ii) non-exhaustive. I therefore understand the Re CTD concepts of *reason to think* and *solid grounds* to be capable of being established with or without *new evidence* but – in either scenario – there must be a proposed, changed litigation landscape with identifiable and tangible markers of something new 'to hear' or 'to be factored into' the assessment and that must show prospects of yielding a different outcome (again, this does not have to be an entire reversal of outcome). If those features exist, they are enough to *cast doubt upon the accuracy of the original finding* and without them, a reopening would be the mere re-hashing of a case and would offend justice.

73. Considering *(a) whether the previous findings were the result of a full hearing in which the person concerned took part and the evidence was tested in the usual way*. There was certainly a full hearing. If 'the person concerned' is the applicant for reopening, then I record that the LA did not participate in the original hearing. I accept Mr Howard's

characterisation of a LA as a party with a unique status in the bringing of care proceedings (an authorised applicant and the emanation of the State). If, alternatively, I consider the complainant, A, to be 'the person concerned' in the above extract then it is a matter of fact that, without her consent, A was discharged as a party shortly before her allegations were determined and she was not represented. Nor was all of the evidence tested: *in the normal way* (which I interpret as meaning an adversarial process which afforded interested parties the opportunity for cross examination, to receive advice and to take instructions on the evolving evidence and to have submissions advanced on their behalf at the close of the evidence). Here, the complainant A was (i) a potential child witness and (ii) initially, a child party with litigation capacity. Insofar as a Re W analysis determined that A would not give further evidence under cross examination, that was not an unusual order in this context; it was consensual and no party criticises it here. It was therefore a standard variation for a case involving the allegations of a child, but it did not represent the full trial process I consider is envisaged within the test.

74. Considering *(b) if so, whether there is any ground upon which the accuracy of the previous finding could have been attacked at the time, and why therefore there was no appeal at the time.* If my consideration of parties who may be 'the person concerned' is accurate then, technically, this guideline may not even be engaged as it is a secondary enquiry contingent upon participation in the trial process. I will address it in any event. Whilst reiterating the caveats expressed in paragraph 63 above, I have formed the view that there are *prima facie* features of the case management and the fact finding judgment which may have had the potential to have founded an appeal.

(a) I say this firstly in relation to the decision to discharge A's party status and her subsequent inability to participate at the hearing. I accept the submissions that representation for A may have made a considerable contribution to the hearing in June 2021. A's advocate would have been using both the child's 'static' complainant evidence and any 'dynamic' instructions received during the hearing. This is not an unusual situation in family cases and a court is always able to categorise any information received (it does not mistake submissions for evidence). Both adults could have been cross-examined; submissions directed to the quality of the processes during ABE and the criminal trial and submissions directed to the considerable volume of evidence from several sources which came relatively late into the fact-finding bundle. I do not accept Mr Travers' argument that it was a standard course to end the party status (and representation) of a competent child party upon the making of a Re W determination against oral evidence. Participation directions for children and vulnerable witnesses under FPR r.3A and PD 3AA are not restricted to the giving of oral evidence. The attendance note from 26 May 2022 does not suggest that those issues were canvassed at that hearing. I also note the

consensus that the application to discharge A was raised in the face of the court and had to be opposed by counsel without the benefit of notice, or a formal application or the opportunity to take instructions. I refer to my judgment dated 6 November 2022 which recited at some length the issues engaged in a Re W assessment, a number of which reflect the manner in which the evidence can be explored and critiqued should there be no cross examination of the child. It seems highly likely that A's team would have advanced her Re W position on the assumption that their representation would continue and they would be able to balance the absence of live or pre-recorded cross examination of their client with a detailed exposition of her account and her case during the trial.

(b) The criminal trial transcripts raise indisputable points of procedure in respect of A's evidence as a child and vulnerable witness (pursuant to YJCEA 1999). Questions that were poorly formulated by reference to the Advocates' Gateway (TAG) are self-evident. Neither counsel nor the Crown Court intervened when A stated that she had not been afforded a chance to refresh her memory. The previous version of ABE was in force at the time. It provides: [the judge then quoted the passage from the ABE guidance saying that witnesses are entitled to read their witness statement before giving evidence and that viewing the recording ABE interview is the equivalent of that].

(c) The June 2021 judgment suggests that the analysis (rejection) of A's evidence did rely, in part, upon:

(i) the criminal transcripts;

(ii) the initial account given by M that A was not a truthful complainant;

(iii) allegations made by M and/or F2 about A's character, experiences, motivations and veracity that would have been capable of challenge and/or analysis by use of material in the bundle to cross examine and make submissions.

75. I emphasise that I am not effecting an appeal decision. I have accepted the LA's (carefully boundaried) submissions that there are discernible and tangible flaws within the 2021 fact finding material and that this occurred in conjunction with A not having representation to consider and address those matters by the date of trial. Each problem is potentially more significant in the presence of the other. There are other points arising from the 2021 papers but they are less precise than the ones collated above and, therefore, require more speculation. I do not take them into account for the purposes of this judgment. A had no locus to appeal the non-findings (unless by harnessing them to a procedural appeal on discharge of her party status). An appeal was not therefore, impossible, but there were features of this case that sets it apart from cases where a party who has played a full role in a trial may

seek to use a reopening remedy having been well placed to make a timely appeal but having failed to do so. I do not consider that this case chimes with the descriptive warning in Re W that reopening should not be: *a vehicle for litigants to cast doubt on findings that they do not like or a substitute for an appeal that should have been pursued at the time of the original decision [old arguments dressed up in new ways]*.

76. In considering *(c) whether there is any new evidence or information casting doubt upon the accuracy of the original findings* I have noted that in several passages of their written skeleton arguments, it has been suggested that the fact that A now wished to give evidence and was prepared to do may amount to *new evidence*. The arguments contemplate that A might, now, speak to her own allegations (and any points of challenge made by F2) and that this would represent evidence which had not been capable of being secured in June 2021. As explored during the hearing, and conceded by the LA, I do not accept that that scenario alone would satisfy the test for reopening. The evidence that a person might give in this scenario evidence at a future time is not new evidence. That analysis would fall foul of the *mere hope/speculation* barrier. As recorded above, the LA conceded orally that it would be unthinkable for the Family Court to entertain the reopening of judgments on the basis that a child witness had gained maturity, rejected a past Re W decision, or simply said they 'now' wanted to give evidence. Oral submissions on behalf of A, M and the guardian took no issue with Mr Howard's concession on this point. Similarly, some passages of the written skeletons sought to characterise the emergence of D's allegations as new evidence which could not have reasonably [sc. have been] discovered at the time (in relation to A's allegations). Again, I do not accept that characterisation. It would not be permissible for a court to take into account the two sets of allegations (similar or not) without more. To have any notional, potential relevance to A's allegations D's allegations would have to be proved to the civil standard and a court would have to be satisfied that they add something by way of propensity or similar fact evidence by reference to the caselaw as to what is permissible. Those are complex areas of law which are applied on a case-specific basis. It is very far from certain that the proof of either child's allegations would be accepted as having corroborative or probative value for the other. As Mr Howard conceded, a floodgates situation may arise should allegations post-dating a fact-finding become an acceptable reason for allowing the reopening of cases.

77. The LA's application does not raise those latter two points in isolation, however. It raises a composite application, as analysed throughout this section and suggests that, as parts of a whole, the issues should lead to the grant of permission to reopen A's allegations. On a fine balance and taking into account all relevant, permitted facts and matters visible in this case at the date of this judgment, I agree. There are grounds to consider that the non-findings need to be revisited. A reopening will allow an unhindered consideration of the alternative-

> basis threshold with a view to achieving a reliable global factual matrix for the children. This course of action brings similar degrees of advantage and risk to both adult protagonists and will provide a full judicial consideration of their competing cases. A would be afforded representation and participation directions and could present her full case including (i) advancing her own cross examination of F2 and M; (ii) taking cross examination herself and (iii) advancing submissions. This would not be restricted to her sexual allegations: A has standing in relation to the other issues the LA wishes to litigate as a whole alternative-basis Threshold. Moreover, A's own welfare is engaged as a subject child, alongside that of her sibling and half siblings."

27. By a subsequent case management order, the judge provided for a substantial hearing in June 2023 and gave detailed preparatory case management directions.

The appeal

28. On behalf of F2, five grounds of appeal were prepared by Mr Travers. In summary, the court was wrong:

    (1) To refuse a *Re W* assessment before determining the reopening application.

    (2) To consider the discharging of A's party status to be a relevant issue.

    (3) To consider criticism of how A was cross-examined in the criminal proceedings to be relevant.

    (4) To conclude that a fact-finding exercise in respect of D's allegations and their aetiology would be incomplete without the reopening of A's allegations.

    (5) To reopen A's allegations where no "new evidence had emerged which entirely changes the aspect of the case and which could not with reasonable diligence have been ascertained before": Mostyn J in *RL v Nottinghamshire CC* [2022] EWFC 13, [2022] 2 FLR 1012, [43].

29. Permission was granted on all grounds by King LJ. She observed that, although on their own grounds 1-4 would have little prospect of succeeding, the decision in *Re RL* arguably did not sit comfortably with *Re E* and *Re CDT*. She accordingly granted permission on all grounds on the basis that there was a compelling reason for an appeal to be heard and to enable this court to have the complete picture before it.

30. As I have said, Ground 1 was not pursued by Mr John Tughan KC, who now leads Mr Travers. We also heard submissions from Ms Claire Wills-Goldingham KC, leading trial counsel Mr Steven Howard, and from Mr Vine KC, leading trial counsel Ms Victoria Hoyle. We have also had the benefit of a skeleton argument from Ms Ellen Saunders for the Children's Guardian and of position statements on behalf of M and F1, indicating their support for the position of the local authority. We are grateful for all these contributions.

31. For F2, Mr Tughan accepted that the judge had identified the law correctly, but argued that she had not correctly applied it. He submitted that the 2021 decision is contained in a solid, unappealed judgment. M had not been a credible witness, and A had given

different accounts and had told some lies. She had made no new allegations and there was no new information about her original allegation. That position was static and would not change at a rehearing. The local authority had accepted that the mere fact that A now wishes to give evidence cannot routinely lead to a reopening. There was no challenge at the time to A's discharge as a party. The judge had been wrong at paragraph 74 to put weight on that issue or on the manner of A's criminal cross-examination: grounds 2 and 3. Likewise, she had been wrong at paragraph 71 to fail to recognise that it would be possible and normal to hear the case in respect of D (both against F2 and M) without reopening the case about A: ground 4. The judge was correct that the truth or falsity of A's allegation might be relevant to D's allegation, subject to proper analysis, but she had given insufficient weight to the existence of the previous finding, whose significance was not waved away by the local authority's intervention. The difference in parties was not irrelevant but it was not of great significance.

32. As to ground 5, Mr Tughan made clear that, despite the way in which the ground is drafted, he did not seek to support the analysis in *Re RL*. He merely relied upon it as a recent emphasis on the importance of there being something new for the court to consider. This requirement is found in *Re E* at [28], citing *Re B*:

> "The court will want to know… (c) whether there is any new evidence or information casting doubt upon the accuracy of the original finding."

And in *Re W* at [28], referring to "genuine new information": see paragraph 9 above.

33. Mr Tughan's main argument was that the new information required to justify a reopening had to relate specifically to A's allegation. D's allegation was not new information in relation to that, and the fact that it may have impacted upon A, so that she was now willing to give evidence, is not sufficient. The judge was wrong at paragraph 72 to say that evolving or emerging information or knowledge can suffice with or without new evidence.

34. Mr Tughan therefore argued that these matters caused the judge to reach the wrong conclusion at paragraph 77. Factors that were permissible for the judge to take into account were not likely to lead to a different outcome in respect of A's allegation and the local authority's application should have been refused.

35. For the local authority, Ms Wills-Goldingham responded that the appeal now concerned the exercise of a discretion. The judgment was careful and the decision case-sensitive. The judge was right to ensure that assessments and decisions about the children's future were based on a solid factual matrix, otherwise there was a real risk of an incorrect decision being made in respect of D. She was also right to express some concern about the circumstances in which A had been discharged as a party in the previous proceedings. Her analysis of the potential of the non-finding to skew the global threshold exercise was sound. As to *Re RL*, although local authorities might be expected to welcome a narrowing of the reopening gateway, the established test is understood by them and there is no clamour for change.

36. For A, Mr Vine submitted that the result that the judge reached was well within her discretion. It is not necessary for the further evidence to relate specifically to A's

allegations. They are at the heart of the parental separation and the present family dynamic and are clearly important to the outcome. *Re RL* introduces an element of the test for appealing out of time (not available with reasonable diligence) which is inconsistent with the law as stated in *Re E*. There is no indication that the current approach is causing problems at the Bar, and the judge had no difficulty in applying it.

Conclusion

37. This reopening application raised difficult issues. It was made by an entity that was not a party to the earlier family proceedings and it was not prompted by a concern about the integrity of the previous finding in isolation. Rather, the judge had to grapple with the ramifications of granting or refusing the application for a just disposal of care proceedings concerning four children who are caught up in a damaging family breakdown. The object of the proceedings is to protect the children from further harm and to achieve a soundly-based welfare outcome. The extent of the investigation that is necessary to achieve that was a matter for the court's judgement, applying correct legal principles and taking account of all the circumstances. I recognise that it is hard on F2 that he should be facing the prospect of responding to A's allegations for a third time, but his interests are not the only ones in play.

38. In my view, the judge's response to this difficult decision cannot be faulted. She identified the law correctly and analysed the application with scrupulous care. She did not omit any relevant matter or take account of any irrelevant matter, and she reached a principled decision that was plainly open to her.

39. Ground 2 contends that the judge was wrong to treat the circumstances of A's discharge as a party to the previous proceedings as relevant. Mr Tughan rightly did not press the argument in such absolute terms, instead submitting that the judge attached too much weight to this factor, but I do not accept that. As the judge said, the court was obliged to gain a clear understanding of the previous proceedings. The degree to which A had participated in them was undoubtedly a relevant matter, however it had come about, as was the reason why no appeal was brought at the time. The weight to be given to them was a matter for her, and it was not submitted that her approach fell outside the range of reasonable assessments.

40. The position is the same with ground 3. The judge was similarly obliged to gain an understanding of the nature of A's evidence at the criminal trial and was entitled to take a view of the nature of the cross-examination when deciding the application that was before her.

41. Ground 4 argues that even if A's allegation was true it would not necessarily be probative of D's allegation, and accordingly it would not be bound to affect the outcome one way or another. Accordingly, solid grounds for reopening have not been shown. Mr Tughan rightly accepts that, were the matter being heard for the first time, each allegation might ultimately be capable of supporting the other. That evidently does not mean that reopening must occur, but it is a feature that the judge was entitled to weigh up, and I find her treatment of this issue at paragraph 71 to be convincing. It would of course be theoretically possible to determine D's allegation in isolation, but doing so would lead to considerable difficulty in assessing the alternative case

against M, which concerns both D and A; further, the truth or falsity of both allegations are capable of being mutually probative.

42. Ground 5 now leads to a more limited argument than had appeared likely when permission was granted. The judge did not follow *Re RL* (discussed below) and if it was ever suggested that she should have done, that argument has now been disavowed. Instead the issue is whether the new evidence or information must relate exclusively to the original finding if a reopening is to occur.

43. It is true that in the recent authorities the request to reopen arose from further information that related directly to the original finding. In that respect the present case is different. However, that reflects the variety of factual configurations from which a reopening request may arise, and it is not a reason to confine the scope of the jurisdiction. The judge was aware of the risk of opening the floodgates to inappropriate applications, but she rightly directed herself at paragraph 72 that the potential features to be taken into account are not exhaustive, nor, I would add, restrictive in the way that is now proposed. Her self-direction at the foot of that paragraph was in keeping with the guidance given in the authorities and was appropriate to the particular situation in the present case.

44. I therefore reject each of the four grounds of appeal, and finally turn to the decision in *Re RL*.

RL v Nottinghamshire County Council

45. This was an application by a mother to reopen a finding, made five years previously, that injuries to a baby had been inflicted by her or by the child's stepfather. It was not a strong application and, after a careful analysis of the facts, Mostyn J dismissed it. However, his judgment contains a lengthy exegesis of the doctrine of res judicata in family proceedings, leading to a different version of the applicable test for reopening findings:

> "42. The authorities identify two types of case where justice provides an exception to an estoppel preventing re-litigation of the same issue between the same parties:
>
> i) First, and obviously, an anterior judgment can be challenged on the grounds that it was fraudulently obtained: *Takhar v. Gracefield Developments Limited* [2019] UKSC 13, [2020] AC 450.
>
> ii) Second, an anterior judgment can be challenged on the ground that new facts have emerged which strongly throw into doubt the correctness of the original decision. In *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 at 109 Lord Keith of Kinkel stated:
>
> "….there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was

> specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result …"
>
> This exception echoed the well-known decision of the House of Lords in *Phosphate Sewage Company Limited v Molleson* (1879) 4 App Cas 801 where Lord Cairns LC held that an anterior judgment can be challenged where additional facts had emerged which 'entirely changes the aspect of the case' and which 'could not with reasonable diligence have been ascertained before.' In *Allsop* at [26] the continuing validity of this exception was affirmed by the Court of Appeal.
>
> 43. It therefore seems to me that Jackson LJ's test of "there must be solid grounds for believing that the earlier findings require revisiting", ought to be interpreted conformably with these exceptions if a divergence from the general law is to be averted. This would mean that "solid grounds" would normally only be capable of being shown in special circumstances where new evidence had emerged which entirely changes the aspect of the case and which could not with reasonable diligence have been ascertained before.
>
> …
>
> 45. For my part looking at the matter from first principles I cannot see any reason why the general substantive law of res judicata should not apply to children's cases. …
>
> …
>
> 49. I naturally accept that Jackson LJ's test is binding on me. I completely agree that there should be a Stage 1 form of permission filter. I completely agree that on a rehearing application mere hope and speculation will never be enough to gain permission. I am merely suggesting an interpretative reconciliation between the solid grounds test and the general law such that solid grounds will normally only be demonstrated where either the fraud exception, or the special circumstances exception, is satisfied."

46. Although Mostyn J spoke of interpreting the approach set down by this court conformably with 'the general law', he recognised that the test that he proposed is a different and narrower one. At a number of points he speaks of the mother's application failing…

> "whether I apply the general law test of special circumstances or a more liberal interpretation of "solid grounds"."

47. The approach in *Re RL* should not be followed for two main reasons.

48. A judge's main responsibility is to decide the case in hand. The High Court and the appeal courts may also give rulings on matters of law to ensure that the law is correct, accessible to litigants and the public, and expressed in a way that is helpful to trial judges. This additional responsibility is not a vehicle to pursue a legal theory or to run the rule over binding decisions of higher courts, all the more so where the issue does not arise in the individual case. The analysis in *Re RL* was, and could be, of no legal effect: see *Rochdale Metropolitan Borough Council v KW* [2015] EWCA Civ 1054, [2015] WLR(D) 425. Decisions that reformulate a binding legal test or set up a different test are bound to be cited to trial judges and operate as a distraction and a drain on resources, as exemplified by the need for this appeal.

49. More fundamentally, it is a misconception that the time-tested approach to reopening findings of fact in children's cases has been arrived at in ignorance or defiance of the principles of res judicata in civil proceedings. There is rightly considerable consistency in the response of all courts to attempts to relitigate (see for example *Re W* at [28], cited at paragraph 9 above) but formulations cannot be cloned from one context to another without regard to their effect. Proceedings about children take place in the context of a statutory welfare imperative and, as the present appeal shows, reopening applications may arise in a very wide range of circumstances. In order to achieve just, welfare-based outcomes in these cases, the law operates a test that differs for good reason from a test identified in another context. The formulation in *Re RL* originates in the decision in *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801, which arose from efforts to relitigate a claim in bankruptcy, but *Re RL* and the present case required the court to evaluate the very different considerations that arise in cases of child welfare. The applicable law is clear and there is no need to unsettle it for the sake of theoretical conformity by transposing a test devised in a different legal context.

Outcome

50. The appeal is dismissed.

Lady Justice Nicola Davies:

51. I agree.

Lady Justice Elisabeth Laing:

52. I also agree.
