



Neutral Citation Number: [2023] EWCA Civ 743

Case No: CA-2023-000618

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE FAMILY COURT AT CHELMSFORD**  
**Her Honour Judge Shanks**  
**CM20C05117**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 29 June 2023

**Before :**

**LORD JUSTICE PETER JACKSON**  
**LORD JUSTICE NEWEY**  
and  
**LORD JUSTICE BAKER**

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**ADA (Children: Care and Placement Orders)**  
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**William Green** (instructed by **Fisher Jones Greenwood LLP**) for the **Appellant Mother**  
**Alison Easton** (instructed by **Essex County Council**) for the **Respondent Local Authority**  
The **Respondent Father** appeared in person  
**Zoe McGrath** (instructed by **Michaels & Co**) for the **3<sup>rd</sup> Respondent**

Hearing date : 20 June 2023  
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## **Approved Judgment**

This judgment was handed down remotely at 10.30am on 29 June 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:**

### *Introduction*

1. These appeals arise from the making of care orders in relation to B and C, aged 14 and 10, and care and placement orders in relation to D, aged 2. At trial, the question in relation to B and C was whether they should return from foster care to their mother, while the question in relation to D was whether she should be placed with her aunt and uncle or placed for adoption. The proceedings also concerned an older child, A, with agreement that she should remain in foster care. There are three appeals: the mother appeals from the orders in relation to B, C and D; B appeals from the order in relation to herself; D's father appeals from the orders in relation to D.
2. For the reasons given below, my conclusion is that the appeals in relation to B and C should be dismissed, but that the appeals concerning D must be allowed and the applications for care and placement orders in her case be remitted for rehearing. In brief, the judge had ample material upon which to find that it is not in the interests of the older children to return to their mother's care at this time, but the application in D's case did not receive the degree of focused attention that was necessary to justify an order leading to adoption. The result of the appeal has no bearing on the outcome of the rehearing, where the decision will be a matter for the family court.

### *Background*

3. The mother was born in Jamaica. Her stepfather was abusive to her mother and she was sometimes caught up in violence between them. Physical chastisement was a feature of her childhood, both at home and at school. She was sexually abused as a teenager by a family member. She moved to London with one of her aunts when she was 15. A year after she arrived, she learned that her mother had been murdered by her stepfather in harrowing circumstances.
4. In her late teens, the mother began a relationship with the father of A and B. This ended when she separated from him and moved away. He suffered a brain injury after a suicide attempt and now lives in a care home. The mother later gave birth to C by another man. Neither father played any active part in the proceedings.
5. In 2014, the mother began a relationship with D's father. The family first became known to the local authority in 2016 after A alleged that her mother had assaulted her, but she later retracted her allegations. In 2018, another referral was made after A alleged further physical abuse and arguments between the mother and the father. In 2019, the police made a referral to social services after arresting the father for assaulting the mother.
6. These proceedings began in 2020. On 21 January 2020, C alleged that the mother had hit him with a belt. A and B made similar allegations. The police removed the children to foster care, with A placed on her own and B and C together. The mother and D's father separated. The children gave ABE interviews. In April 2020, the local authority took care proceedings and interim care orders were made. As will become clear, the proceedings have taken a long and tortuous course.

7. The mother's younger half-sister ('the aunt') and her husband ('the uncle') also originate in Jamaica and now live about 40 miles away from the mother with their own two children, aged 8 and 3. There is no history of social services involvement in their family and both aunt and uncle work in a care home. In September 2020, a full assessment by Ms M concluded that special guardianship orders should be made in respect of all three children in favour of the aunt and uncle. That recommendation was accepted by the local authority.
8. In May 2021, a three-day fact-finding hearing took place before Her Honour Judge Shanks. She found that the mother had assaulted each of the children on multiple occasions, sometimes with a belt; that the father had assaulted C and threatened A and B; and that the children had on more than one occasion witnessed violence between the mother and the father.
9. Shortly after that hearing, D was born. Proceedings were issued and interim care orders were made, with the result that she has been in foster care since birth.
10. In February 2022, B became separately represented on the basis that she had sufficient understanding to conduct the proceedings without a guardian.
11. Over the course of proceedings a number of other assessments were undertaken. Dr P, a forensic psychologist, conducted a psychological and cognitive assessment of the mother. Ms S, an independent social worker, provided a sibling assessment. Ms L, an independent social worker, wrote culturally-informed parenting assessments of the parents, recommending the return of the older children to their mother.
12. A final hearing of the consolidated proceedings was due to take place in October 2022, but in the previous month the court adjourned the hearing to allow for an addendum assessment to consider whether the aunt and uncle could become special guardians for D as well. Up to this point, the care plan for B and C, supported by the guardian, had been for them to be placed with the aunt and uncle.
13. That position changed in January 2023. The further special guardianship assessment, prepared by Ms C, was not an addendum report but a complete reconsideration. The outcome was negative in respect of all the children. The conclusion was that an SGO could not be recommended due to the concern that the aunt and uncle would not be able to adequately safeguard the children in future contact with their parents, that the children would be at risk of future emotional and physical harm and neglect, and that D had no established relationship with the aunt and uncle, making an SGO unrealistic. In signing off the report, the team manager observed that:

“Evidence presented in the assessment and that has come to light since the last SGO assessment suggest the couple do not fully acknowledge the abuse the children have disclosed. This is concerning given the fact finding judgement was clear in respect of their mother. The couple are not able to put the children's experiences and need for safety above their own loyalty to [the mother]. Furthermore there have been occasions that professionals are aware of where the children have been allowed to spend time with their parents, unsupervised against the direction of the Local Authority. This is concerning as the couple have

a good understanding of safeguarding issues through their work and involvement with vulnerable adults.”

14. The local authority’s care plans therefore changed, and the contact that was previously being afforded to the aunt and uncle was stopped. The statement of the social worker Mr A of 30 January 2023 now recommended care orders for B and C and a care order and placement order for D, with family contact coming to an end. Evidence was provided by Ms B about the availability of culturally appropriate adopters. In her final report dated 24 February 2023, the guardian endorsed the local authority’s recommendations but in D’s case recommended post-adoption sibling contact between four and six times a year.
15. The family’s position crystallised just before the trial in response to the local authority’s late change of plan. The mother accepted that A should remain in foster care, that being A’s wish by this stage. She sought the return of B and C to her care, and supported D being placed with the aunt and uncle. B strongly argued that she and C should be allowed to return home. D’s father asked for D to be placed with him, or in the alternative with the aunt and uncle. The aunt and uncle, who were not represented but appeared as witnesses called by the mother, now sought to care for D only, something that has never been the subject of any specific professional assessment.

*The judge’s decision*

16. The final hearing began on 28 February 2023, when evidence was heard over four days. The judge met B and C. She heard evidence from the social workers Mr A, Ms C, Ms S, Ms B and Ms L, and from the mother, the father, the aunt and the guardian. On 6 March, the parties filed written submissions and on 13 March, the judge gave an oral judgment. She made care orders in respect of all four children and a placement order in respect of D; she also made an order under s 26 of the Adoption and Children Act 2002 providing for contact between the older children and D four times a year.
17. In her judgment, the judge introduced the parties and their positions, listed the evidence read and heard and provided factual and procedural background. She found that the threshold was crossed in respect of all of the children by reason of her findings of fact. She quoted from the reports of Dr P and summarised the oral evidence of each witness.
18. I will cite passages from the judge’s account of the evidence, edited to remove names and focusing particularly on D. First, the children’s social worker, Mr A:  
  
“18. His description of the children was that they were children who were highly traumatised, and that was mainly to do with the influence exerted by both the mother and the maternal family. B was traumatised and conflicted. She had said that the family had told her her mother had accepted she had hit them with a belt but this was not so. He agreed that it would be best for D to be cared for within the family, but with the proviso that it had to be safe. Most of D’s needs, he said, were emotional, and she required an attuned care giver to meet her needs. The aunt had two children of her own, and he was not confident that D’s emotional needs would be adequately met if placed with her aunt.

He was struck when the aunt came forward to care for D, because previously she had said she wanted nothing to do with her. He was worried about the collusive nature of the relationship between the mother and her sister, and feared that if D was placed with her aunt the mother would be back parenting, so the risk of harm would be present. The mother was the elder of the two sisters, and had influence over her younger sister.”

19. The survey of Ms C’s evidence included this account:

“23. She described the aunt and her husband as adults who were relaxed and loving with their children. There was a strong family bond. Present within that household were the mother’s aunt and her partner, who would not agree to a DBS check being carried out, and although her mother’s aunt had indicated that they would move out if D came into the care of the aunt the partner did not seem to know anything about that. She entirely agreed that D would want to be cared for by family rather than strangers, but she would want to feel safe, and when looking at safety consideration had to be given to the child’s emotional safety and whether needs would be met. The aunt, she said, was meeting the basic needs of her own children, but introducing a child similar in age to the younger of her two children would be demanding and challenging, and her evidence was that D’s emotional needs would not be met. The aunt, she said, had a superficial understanding of trauma and its possible challenges and how they could be managed. There was no established relationship, she said, between D, the aunt and her husband.

24. In respect of the relationship between the aunt and her sister, her evidence was that there was very much a feeling of respect for her sister and a willingness to do anything to help. The aunt did not believe most of the findings which had been made, and she did not believe that the children had been harmed, as she had not witnessed any abuse. The mother was not seen as a risk but rather the father was seen as the problem. Her evidence was that it was exceptionally important for D to know she was in a safe environment, emotionally and physically, and she was concerned about the ability of the aunt and uncle being able to protect her and provide what she needed, because they did not understand the impact of trauma from the children’s early experiences and did not understand risk. She was concerned also that the father had been spoken of within that family environment with some dislike, and the uncle had commented how D looked like her father. She wondered how they would get past that if D were to be in their care.

25. Her assessment was that the aunt and uncle did not understand the intention behind a special guardianship order, namely that it was intended to provide permanency for a child until 18. Her evidence also was that the parents would not accept that she could exercise parental responsibility to their exclusion.”

20. The judge said this of the aunt:

“43. Next was the aunt. She gave her evidence with some confidence. The first special guardianship assessment in respect of the three eldest children was positive, and she struggled to see how the second assessment was negative. Her evidence was that when it became clear that the plan for D was one of adoption, she had put herself forward. She had not understood, she said, that she was being reassessed. The assessment which was carried out, the second assessment, was negative and contact stopped. If D was in her care she considered she would definitely be able to protect. She described a respectful relationship with her sister, and she, her sister, would respect boundaries put in place. The aunt told me that she would take time off work, her aunt and her partner would leave the home, thus creating a room for D. She, her husband, and their two children would welcome D into their home, and they would be a happy family. She did not use corporal punishment within her household. She sought a special guardianship order which her husband supported.

44. Her evidence was that corporal punishment was not acceptable. The children had expressed their lived experiences, but she was not saying they were lying. What she was saying was she had not been a witness to them being injured. She was aware, she said, that the children had been both physically and emotionally harmed. She disputed the accounts given by C regarding unsupervised time with her sister. She disputed other references within the local authority evidence. At E394, this is part of the assessment [by Ms C], “C shared that he enjoyed being at his aunt and uncle’s house, and he gets on well with his cousin, however he gets in trouble as he is basically the ring leader and they are called triple trouble, and he leads them, sharing that if the aunt’s older child does something wrong that is on him. C shared, he never feels scared by uncle but he does hide when the older child gets told off, as he does not like seeing it”. Again, another passage in the assessment, “Both the aunt and uncle shared being physically chastised as children by care figures when living in Jamaica. The uncle attributes his strength of character to this, stating that it made him the man he is, and feeling no ill will for this form of punishment from his mother. I feel that both aunt and uncle have normalised this behaviour, and although they are both sharing that they do not physically chastise their own children, there are accounts from all children that the uncle uses a fear based approach to create compliance within the children with older child sharing that then uncle has physically chastised him in the past”.

45. I asked a series of questions of the aunt, not, as counsel for the mother suggested, to carry out my own assessment, that was not so. The purpose of my question was to enable me to understand whether the aunt understood the magnitude of the task in her putting herself forward as a carer for D. Her answers indicated to me that she probably had had her heart strings tugged, wanted to keep D in the family, but had not actually reflected upon the reality of what it would all mean.”

21. The judge’s account of the guardian’s evidence included this:

“49. The guardian acknowledges the value of an ongoing relationship between D and her half siblings. ... She could not support placement of D with her aunt, there was a negative special guardianship assessment, and she was troubled by the family dynamics which applied within the family.”

22. The judge gave herself this limited legal direction:

“50. So I turn now to the law. I cannot make a care order unless threshold is crossed. The outcome of the fact finding hearing establishes threshold. I remind myself that for the three eldest children it is their welfare which is my paramount consideration. That welfare extends throughout their childhood, the welfare check list under section 1(3) of the act applies. For D the position is different because the plan is one of adoption. The Adoption and Children Act applies, and accordingly welfare is the paramount consideration, but it is throughout her life, not simply whilst she is a child. The welfare check list under section 1(4) of the act applies.”

23. Next, she assessed aspects of the evidence she had read and heard:

“51. I deal firstly with the expert evidence, which was given both in writing and orally by Miss L. The reports go back in time. Her evidence on the issue of chastisement was troubling. That is referenced in her assessment at paragraph 20.7. “The mother used this method of discipline with her own children, not to hurt or abuse them but to discipline them in the same way she was disciplined”. I have to say I did find that part of Miss L’s evidence troubling. The mother has lived here since her teenage years, the children were born and are being brought up here. A further difficulty with Miss L’s evidence is the longevity or otherwise of her involvement. It was over a short period of time. There is also an element of superficiality in her assessment, the lacking of curiosity, as described by the allocated social worker, taking that which the mother said at face value, not following up consideration or conversation with either of the counsellors, that is troubling.

52. Within her written submissions, counsel for the guardian rightly references the case of Re MW (Care Proceedings) and the dicta of Wall LJ, - judges decide cases not experts. Miss L’s reports are part of the evidence of course, but looking at that evidence, the evidence of the social worker trumps it by reason of his lengthy involvement. There is too the superficiality of Miss L’s assessment, to which I have already referred.”

24. The judge then assessed the parents’ evidence:

“53. The evidence of the parents. I was struck by the oral evidence given by both parents as to their lack of acceptance regarding the findings which were made when I heard evidence from both of them. The lived experience as described by the children, the consistency of their accounts, the awful description which was given, C whimpering

like a dog, the lack of appreciation of the emotional impact upon the children. I acknowledge that the mother gave evidence that she has undertaken work, but there is no evidence which is before me which indicates that that has actually allowed her to develop insight in a meaningful way, or has equipped her to engage meaningfully with professionals. She is stuck, she is stuck in not wishing to engage, she has an element of privacy on the one hand about her, keeping things held in, as she described it, but the more so the avoidant element in her evidence, which was also present at the fact finding hearing.

54. So far as the father's evidence is concerned, again I was struck by his lack of acceptance. I acknowledge of course that he has done work, he has tried hard, he describes the bond that he has with D. That bond will be nothing like the bond that she has with her current foster carer, because the contact is twice per week for one and a half hours in a supervised setting. His plan also does not have a sense of reality. His changing his working hours, for which there is no evidence, S [an older daughter] moving in in order to assist care. The relationship between D and S is tenuous, although it seems that D recognises her half paternal sibling, saying 'Hi' to her."

25. Next, the judge said this about the aunt and uncle:

"55. The aunt. I acknowledge of course that she has two children who she values and loves, two children who she tells me very much wish to be reunited with their cousin, a cousin they have not seen over some time, but when I reflect on the evidence which was given by the aunt there was a lack of reality about what it would mean for D to be placed in her care, and I do conclude that her coming forward for caring for D has been driven by a sense of loyalty towards her sister, the sense of wanting D to be kept within the family, which of course is understandable, but it is also the negative parts of the assessment, missing training, not providing the necessary information, all of which is detailed within the assessment."

26. The judge then referred to the welfare checklists:

"56. So when I think, first of all, about the three eldest children and the welfare check list, which I propose to take briefly. The ascertainable wishes and feelings of the children concerned. The three eldest children I am sure do love their mother, but they also have that feeling, particularly A, of feeling blamed, that blame attaches to them for not being at home, and the expression from B in one of her letters, talking about she should be given a second chance. A has done nothing wrong. That, in my judgment, entirely meshes with the way in which there have been unhelpful influences at play from the maternal family. The children's physical, emotional and educational needs. They have the needs of any children of their respective ages but the more so in respect of their emotional needs by reason of the lived experiences which they have. The emotional impact of those lived experiences still remain live and present. The effect of any change in circumstances. I



do understand, of course, that the mother wishes B and C to return home, which would be in accordance of their apparent expressed wishes and feelings, but what would the effect of that change be. It would mean that they would be different to A and D, of course. It would also mean that they know that they cannot speak out. There is a reference in the papers to the children being silenced, and that for me is a very real live worry. Age, sex, background, any characteristics which the court considers relevant. I have referred to their ages, I have referred to their sexes, they have a rich Jamaican culture. Any harm which they have suffered or are at risk of suffering. They have suffered harm, they have suffered actual physical harm and emotional harm, that emotional harm is ongoing. The capability of the parents in meeting the children's needs. I have referenced the parenting assessment which was carried out by Miss L, the defects in that assessment. Any other person. Well, in fact, although the aunt put forward herself to care for the three eldest children, and indeed maintained that position, but also putting herself forward for D in her final statement, served very proximate to the start of the final hearing. Her position now is that she puts herself forward for D only. The range of powers, and I am going to come back to that.

57. Turning now to the welfare check list under the Adoption and Children Act, firstly D's ascertainable wishes and feelings in the light of her age and understanding. D of course is too young to articulate her wishes and feelings, but undoubtedly she would wish to feel safe, secure, nurtured and stable in the care of any care giver. Her particular needs. She has a high level of emotional needs, that that is so has been identified by the social workers who rank as experts. The effect of ceasing to be a member of the original family and becoming an adopted person, that has a wide meaning. I have to consider her best interests to ensure that she is in a safe and secure environment. Age, sex, background, any characteristics. I have referred to her age, she is a little girl, she has a rich Jamaican culture. Any harm which she has suffered or is at risk of suffering. There is a risk of harm were she to be placed in the care of her father, for the reasons I have already articulated, and likewise were she to be placed in the care of her aunt. Relationship with relatives, any person who is a prospective adopter, any other person to whom the court or agency considers the relationship to be relevant, including the likelihood of any such relationship continuing, the value of the child in doing so, the ability and willingness of any of the child's relatives or any such person to provide the child with a secure environment in which the child can develop and otherwise to meet the child's needs, the wishes and feelings of any of the child's relatives or of any such person regarding the child. I recognise of course that for the three eldest children they value their half sibling, they want her to be present in their lives. The Guardian balances that need as against D's need for permanency in adoptive placement by a section 26 order to ensure that there is that contact. In terms of the parents themselves, I do understand that they are opposed to adoption for reasons which are human. They want the child to remain within the family. I also

acknowledge that the aunt and her husband do not wish to see D lost to the family. Those are all matters which I have to consider.”

27. The judgment concludes:

“58. So I turn now what effectively a balance sheet of the various options. For A the plan is for her to remain in long term foster care. She is in a placement where she is thriving, she is doing well at school. That placement is supported by her mother, who does not seek A’s return to her care. That does not mean that she does not love her. The benefits of a care order are that that enables the local authority to share parental responsibility, it enables A to maintain continuity within her placement, to continue to thrive. Against that I have to recognise that A may feel different to other children, she may feel stigma attaches to her by reason of being a looked after child, the ever presence of the local authority in her life, having to seek permission for matters which might seem relatively insignificant.

59. So far as B and C are concerned, the plan I know is long term foster care against the mother’s desire for those children to be returned to her care, either under a child arrangements order with or without a supervision order. The advantage of a return to the mother’s care of course would mean care being provided by a parent, a recognition of the children’s wishes and feelings - both B and C very much wish to return to the care of their mother. Against that is the lack of acceptance by the mother in respect of the findings which I made on the basis of evidence. Whilst the mother has done some work, the work that she has done is not sufficient to enable her to care for the children. The poor professional relationship that she has with the local authority, no evidence of there being positive change, the reference to the children being silenced, which comes from the assessment of the aunt, silenced is the word which is used, and the pressure that B feels, the desire to fix her family, when in fact she is powerless to do so. She cannot fix her mother, that is something which lies within the mother’s hands only. B and C are different children, but the same checks and balances apply.

60. So far as D is concerned, the father very much wishes to parent his daughter, and I understand that. The positive could be said to be the opportunity for D to be looked after by a natural parent. It could be said that that is important for her identity going forward and importantly that she would be kept within the family, but against that I have to weigh his lack of acceptance of the findings from the fact finding hearing, the difficult relationship he has with professionals, his not wishing to listen to and accept his advice, his reliance on others as part of his plan to care for D when D is a child who has enhanced emotional needs which, on evidence, I am satisfied he is not equipped to meet.

61. So far as the aunt is concerned, of course if it were possible to place D with her it would mean she is kept within the family, that would be important for her sense of identity. She would retain connections with

both sides of her family, both maternal and paternal, but against that I have to weigh the description of the fear based environment which comes from the assessment and to which I have already referred, the insight that the aunt has of what it would mean to have D within her household, given that she has two children of her own, the younger of whom is proximate in age, and the evidence that she gave in answer to me indicated that lack of a sense of reality.

62. So looking at the picture so far as B and C is concerned, I am satisfied that a care order is both necessary and proportionate. I endorse the care plan advanced by the local authority on the basis that the contact arrangements will be kept under review, particularly for B, at the stepping down process described in the care plan. Much will depend on how B is doing, whether she will feel a sense of relief now a final decision is being made for her.

63. So far as D is concerned, I am satisfied that on the evidence a care order is both necessary and proportionate for the reasons I have given. A placement order is necessary and proportionate, and D's welfare requires me to dispense with parental consent. I make those orders.

64. In making my decision I have considered first and foremost the welfare of each of the subject children. Of the three eldest, their welfare during their childhood, in respect of D, her welfare throughout her lifetime. She will have life story work, she will, and with the skills that the adopters are taught, know that she is an adopted child who was much loved by her parents, and the direct contact under a section 26 order enables her to maintain the sibling relationship, the sibling relationship is the most enduring relationship which anyone can have. I have considered the Article 8 rights of those concerned. The orders are both necessary and proportionate in order to secure the welfare of each of the children. I have prepared this judgment from notes, it is an ex tempore judgment, I reserve the right to amend it or to expand upon it should it be necessary to do so. The time for appeal runs 21 days from today."

28. I granted the three applications for permission to appeal on 11 May 2023 and directed that the mother's appeal would be the lead appeal.

*The appeals in relation to B and C*

29. The mother and B advance two grounds of appeal and B advances a third:
- (1) The court erred in not giving sufficient analysis to the benefits of B and C being returned to the care of their mother, in the light of the positive culturally-informed parenting assessment.
  - (2) The court erred in giving too much weight to the view of the local authority and the guardian that the mother could not care for the children if she could not accept the court's findings of fact.

- (3) The court failed to give proper consideration to B's wish to return home or properly consider the level of risk of harm to her in doing so.
30. On behalf of the mother, Mr Green points to what he describes as a formidable parenting assessment by Ms L, which identifies the positive benefits to B and C from a return home. The difference in duration between her involvement with the family and the allocated social worker's does not mean that her view must be discarded. She should not have been faulted for reporting the mother's rationale for using physical punishment: discipline, rather than abuse. There was insufficient reasoning to support the judge's decision to depart from the assessment's conclusions. Too much emphasis was placed on the partial nature of the mother's acceptance of the findings. She concedes that she has used physical punishment and that this is wrong and it is possible for her to be a safe parent without accepting the findings in full. The approach of the local authority and the guardian, accepted by the judge, was unfair and disproportionate to any risks.
31. On behalf of B, Ms McGrath submits that the judge did not properly recognise the significance of her being a child with sufficient competence to instruct her own lawyers. Only token consideration was given to her wishes and feelings and no consideration was given to the instability of B's situation in foster care. The judge did not properly perform the balancing exercise mandated by the Supreme Court in *Re H-W (Children)* [2022] UKSC 17, [2022] WLR 3243 at paragraphs 59-62, but focused entirely on the disadvantages associated with rehabilitation.

*Conclusion about the appeals in relation to B and C*

32. The appellants' arguments do not lead to the conclusion that the decision to make care orders in relation to B and C was wrong. As to the first ground of appeal, the judge had to choose between two divergent professional opinions. She was entitled to prefer the approach of Mr A, the children's social worker, to that of Ms L, despite her acknowledged expertise in relation to the cultural issues. The observation that Mr A had longer knowledge of the children was not a criticism of Ms L but a fact. The concern about the distinction that Ms L drew between discipline that would be lawful in Jamaica and abuse was not based on the identification of the distinction but on Ms L's acceptance of the mother's account at face value, with insufficient attention being paid to the full weight of the court's findings. Having read and heard Ms L's evidence the judge was entitled to make this judgement. Next, as Ms Easton submits on behalf of the local authority, the mother's position on the findings had a number of implications for her ability to meet the children's needs. There is no indication that the judge applied a rule that the mother could not succeed without total acceptance of the findings, but she was clearly entitled to treat continued denial as a relevant factor because it raised the level of risk of some form of repetition and showed that the mother was still contradicting the children in relation to their most serious accounts. Nor can I accept that the judge, who had met B and C, was not fully aware of the strength of B's feelings, and the respect that is due to them. Finally, a specialist judge is unquestionably aware of the detriments and insecurities that can accompany foster care and indeed the judge made reference to some of these when considering A's situation.
33. Ms McGrath makes a fair point about the absence of an explicit balancing of the positive and negative aspects of rehabilitation for B, but that does not take matters

further in substance. Read as a whole, the judgment contains ample underpinning for the judge's conclusion that it would not be physically or emotionally safe for B and C to return to their mother's care at this stage when the problems that had led to the placements breaking down have not yet been sufficiently addressed.

*The appeals in relation to D*

34. The mother advances two grounds of appeal, contending that the judge erred in making a care and placement order in respect of D:

- (1) when it was not proportionate to the risk of harm, and
- (2) when this was not a case in which 'nothing else will do'.

D's father has filed written arguments in identical terms.

35. I start with a number of general submissions made by Ms Easton, who did not represent the local authority at trial. Perfection is not to be expected of a judgment and this judgment is more than adequate when read in its totality. The judge had detailed knowledge of the family and she accurately identified the issues and the evidence. Evaluative decisions of this kind in family cases attract particular latitude. To the extent that there are any omissions, it was the duty of the intending appellants to have asked for supplementary reasons. This course was suggested in the response to the application for permission to appeal and Ms Easton invited us to consider remitting the matter to the judge before determining the appeal.

36. As to the substance of the matter, Ms Easton drew our attention to judgment paragraphs 45, 55, 57 and 61, all set out above. The judge was entitled to accept the assessment of Ms C and the guardian that there were risks in the placement. Between them they found that:

- (1) The aunt and uncle minimised the risk posed by the mother.
- (2) Their view of the father was troubling.
- (3) The uncle minimised the significance of physical punishment he had received as a child.
- (4) There was a likelihood that D would be exposed to physical punishment or the threat of it.
- (5) They had allowed the mother unauthorised unsupervised contact during the proceedings, showing that there may be collusion leading to the mother resuming parenting remotely; and
- (6) They would not be able to meet D's significant emotional needs.

37. Ms Easton argues that this very experienced judge sufficiently engaged with the analysis of the pros and cons of the placement with the aunt and sufficiently undertook a cross-check of necessity and proportionality. She moved through each of the welfare checklists, making an assessment and weighing it in the balance. She had regard to the benefits to D of remaining with her biological family and she made a sibling

contact order, showing that she was mindful of the importance of these relationships. Her awareness of the broader advantages of the placement with the aunt permeates the judgment. However, on the evidence before her, she was entitled to conclude that the risks outweighed the benefits. Given the mother's poor cooperation with the local authority, and the aunt and uncle's inconsistent engagement, the judge was entitled to reach the conclusion that the above risks could not be managed. She was also entitled to form a view of the lack of a sense of reality in the aunt's position.

38. In response, Mr Green argues that the judge simply failed to address his submissions about the assessment of harm. In his closing submissions he had drawn attention to the questions contained in *Re F* (see below), which in this case concerned whether the parents could be kept at arm's length:

“(i) How likely is it that the parents would try to interfere?”

(ii) What might the aunt and uncle do if they did?

(iii) What would the consequence be of unauthorised contact, however limited?

(iv) In short, what was the actual risk, and could it be managed with local authority supervision and support, or by orders preventing the parents coming to the aunt's home area except in accordance with approved arrangements?”

Having said that she would return to take account of the powers of the court the judge did not do so and accordingly she gave no consideration to possible protective measures.

39. Mr Green argues that because these questions have not been addressed, the balancing exercise has gone out of kilter. He also asserted that the court had lost sight of the fact that until a very late stage the aunt and uncle were prospective special guardians approved by the local authority for the older children. For them to be ruled out on the basis of this level of concern suggested that the court was asking for too much of family members and approving adoption too readily. The reasoning behind the decision did not sustain it. References to a lack of sense of reality, ongoing emotional harm, collusion and fear-based parenting were nebulous, and the judge gave no weight to the wealth of positive features in the aunt and uncle's situation.

#### *Conclusion about the appeals in relation to D*

40. The proper approach to a decision involving adoption is well established. I have attempted to encapsulate the essentials in these earlier decisions:

*Re D (A Child: Placement Order)* [2022] EWCA Civ 896

“1. The recent decision of the Supreme Court in *H-W (Children)* [2022] UKSC 17 underlines that a decision leading to adoption, or to an order with similarly profound effects, requires the rigorous evaluation and comparison of all the realistic possibilities for a child's future in the light of the court's factual findings. Adoption can only be approved where it is in the

child's lifelong best interests and where the severe interference with the right to respect for family life is necessary and proportionate. The court must therefore evaluate the family placement and assess the nature and likelihood of the harm that the child would be likely to suffer in it, the consequences of the harm arising, and the possibilities for reducing the risk of harm or for mitigating its effects. It must then compare the advantages and disadvantages for the child of that placement with the advantages and disadvantages of adoption and of any other realistic placement outcomes short of adoption. The comparison will inevitably include a consideration of any harm that the child would suffer in the family placement and any harm arising from separation from parents, siblings and other relations. It is only through this process of evaluation and comparison that the court can validly conclude that adoption is the only outcome that can provide for the child's lifelong welfare – in other words, that it is necessary and proportionate."

*Re K (Children) (Placement Orders)* [2020] EWCA Civ 1503

"30. Finally, in *Re F (A Child: Placement Order: Proportionality)* [2018] EWCA Civ 2761 I attempted to set out the questions that the court should ask itself when assessing risk of future harm and setting it in context:

- (1) What is the type of harm that might arise?
- (2) What is the likelihood of it arising?
- (3) What consequences would there be for the child if it arose?
- (4) What steps could be taken to reduce the likelihood of harm arising or to mitigate the effects on the child if it did?

The answers are then placed alongside other factors in the welfare equation so that the court can ask itself:

- (5) How do the overall welfare advantages and disadvantages of the realistic options compare, one with another?
- (6) Ultimately, is adoption necessary and proportionate – are the risks bad enough to justify the remedy?"

*Re B (Adequacy of Reasons)* [2022] EWCA Civ 407

"62. Turning to judgments in cases where a placement order is sought, the sequence of questions that must be asked are:

- (1) Are the threshold conditions under s.31(2) CA 1989 satisfied, and if so, in what specific respects?
- (2) What are the realistic options for the child's future?

(3) Evaluating the whole of the evidence by reference to the checklist under s.1(4) ACA 2002, what are the advantages and disadvantages of each realistic option?

(4) Treating the child's welfare as paramount and comparing each option against the other, is the court driven to the conclusion that a placement order is the only order that can meet the child's immediate and lifelong welfare needs?"

41. These principles will have been very familiar to the judge but it is not apparent that she identified the nature and probability of the risks that might arise in this family placement, the consequences if they did, or the availability of mitigating measures; nor did she sufficiently demonstrate how she was resolving the critical evaluations and comparisons that then arose. In a case where the evidence was overwhelmingly in favour of adoption, this might not matter, but the decision about D was a difficult one that required a particularly careful analysis. The issue was different to that facing the older children as it was not about a return to the mother but about a placement with a family with some strengths and no forensic history. It was a momentous decision for D, for her three siblings, and for the adult family members, and it was not made easier by the late changes in position, which meant that there had been no specific professional assessment of a placement of D alone with her relatives. There were clearly aspects of the aunt's offer that required investigation, but at paragraph 61 the judge alludes to, but makes no findings about, issues such as collusion with the mother and fear-based parenting, and her observations about the aunt's motivation are opaque. These were allegations advanced by the local authority but they were disputed by the family, and they therefore needed to be properly resolved if they were to assume the significance that the judge gave them. Similarly, the evidence about D being a particularly clingy child had to be considered, but her emotional needs were not obviously of a kind that ruled out a properly planned and supported family placement. Overall, a decision leading to adoption required more thorough analysis and explanation, with the focus firmly on D.
42. I finally address the suggestion made by Ms Easton, that supplementary reasons should have been sought before an appeal was launched or entertained, and that this court should now seek further clarification. We were told that practical difficulties arose because of Mr Green's absence when judgment was delivered, and the further reasoning that would have been needed would in any case have been extensive. This court can and occasionally does seek clarifications after embarking upon an appeal hearing, but that course would not be satisfactory here because, as I have said, the difficulties with the current order extend beyond the judge's reasoning to the question of whether the assessment of the aunt and uncle was sufficiently focused. We must therefore assess the decision on its own terms.

#### *Outcome*

43. I would dismiss the appeals regarding B and C but allow the appeals in respect of D, set aside the care order and the placement order in her case, substitute an interim care order, and remit the local authority's applications to the Family Division Liaison Judge for reallocation and directions for early hearing.



**Lord Justice Newey:**

44. I agree.

**Lord Justice Baker:**

45. I also agree.

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