Hilary Term
[2013] UKSC 8
On appeal from: [2012] EWCA Civ 984

JUDGMENT

In the matter of L and B (Children)

before

Lord Neuberger, President
Lady Hale
Lord Kerr
Lord Wilson
Lord Sumption

JUDGMENT GIVEN ON

20 February 2013

Heard on 21 January 2013

Appellant
Gwynneth Knowles QC
Sarah Kilvington
(Instructed by Russell and Russell Solicitors)

Respondent
Anthony Hayden QC
Karl Rowley
(Instructed by Bolton Council Legal Services)

Respondent
Charles Geekie QC
Rachael Banks
(Instructed by CMA Law)

Respondent
Gillian Irving QC

(Instructed by Barkers Solicitors)

Respondent
Frances Judd QC
Linda Sweeney
(Instructed by AFG Law)

LADY HALE (with whom Lord Neuberger, Lord Kerr, Lord Wilson and Lord Sumption agree)

1. The issue in this case is whether and in what circumstances a judge who has announced her decision is entitled to change her mind. The issue arises in the context of fact-finding hearings in care proceedings in a family court, but it could obviously arise in any civil or family proceedings. So a subsidiary question is whether the principles are any different in that context.

2. One difference is that section 1(2) of the Children Act 1989 requires that any court hearing a case in which a question about the upbringing of a child arises is to have regard to the general principle that delay in determining it is likely to prejudice the welfare of the child. This court heard the appeal on 21 January 2013. The final hearing to determine the future of the child in question was fixed to take place the following week. Accordingly, we announced our decision to allow the appeal at the end of the hearing, with judgment to follow.

The facts

3. The proceedings concern a little girl whom I shall call Susan, who was born on 8 July 2010, and her elder half brother whom I shall call Terry, who was born on 30 January 2006. On 21 September 2010, Susan was taken to hospital by her mother and found to have suffered a number of fractures to her ribs, clavicle and long bones, as well as some bruising to her face and head. Care proceedings were brought in respect of both children three days later. Susan was placed in foster care, where she has remained ever since. Terry was initially removed from his home with his maternal grandparents, but was returned to them after a few days, and has remained with them ever since.

4. On 15 November 2010, Judge Penna directed that the case be listed for a fact finding hearing to determine the nature and extent of Susan's injuries, their causation whether accidental or non-accidental, and if non-accidental, the identity of the perpetrator or perpetrators. That hearing began on 31 May 2011. Unfortunately, it became necessary to adjourn the hearing on the second day, because of the mother's mental health. She suffers from a serious mental illness and was unable to cope with giving evidence in the ordinary way. The hearing was resumed on 26 September 2011, with the mother giving evidence via a video-link, but she was also unable to cope with this. On 29 September the judge concluded that the mother lacked the capacity to take part in the proceedings and invited the

Official Solicitor to act as her litigation friend. This he agreed to do on 20 October 2011.

5. The fact finding hearing resumed on 22 November and concluded on 25 November 2011. The mother gave no more evidence but the father gave evidence over two days. Thus the father was cross-examined but the mother was not. The judge also heard oral evidence from various family members and from the paediatric sister at the time of Susan's admission to hospital, the health visitor, and the mother's community psychiatric nurse. She had written reports from the medical witnesses about the nature and causation of Susan's injuries. By that stage it was common ground that these were non-accidentally caused and that the only possible perpetrators were the mother and the father. The judge also had written psychiatric reports about the mother's mental condition. After the conclusion of the evidence, the parties made written submissions. The local authority, in a noticeably balanced account of the evidence, submitted that it was not possible to identify a sole perpetrator on the evidence. The mother argued that the father was sole perpetrator and the father argued that the mother was sole perpetrator. The children's guardian took a neutral stance.

6. The judge gave her first judgment orally on 15 December 2011. When it was partially transcribed much later (the recording started after the judge had begun to deliver judgment but we are told that nothing of substance has been missed), the judgment was headed 'Preliminary Outline Judgment approved by the Court'. The transcript consists of only 15 paragraphs. It does not deal at all with the specifics of the injuries to the child, their nature, or their timing. It concentrates on the stresses upon the family caused by financial problems, the mother's mental illness, and caring for a young baby who cried often and was not easy to feed. It concluded that the pressures upon the father, who took the lion's share of the responsibility for looking after Susan, became intolerable and he snapped. So the finding was that the father was the perpetrator, although the judge took care to stress that under ordinary circumstances he was a loving and competent parent and had a valuable role to play in his daughter's life. The judge also stated that if any party would be assisted by the provision of detail in relation to specific points, she would address them.

7. At that hearing and by email the following day, counsel for the father asked her to address a number of matters in an addendum to her judgment: the context in which both mother and father had given their evidence; the mother's opportunity to have perpetrated the injuries; the inconsistencies in the mother's account; the mother's lack of parenting skills and what she did when the baby cried and the father was not there. This accords with the guidance given in *In re A (Children) (Judgment: Adequacy of Reasoning) (Practice Note)*, [2011] EWCA Civ 1205, [2012] 1 WLR 595. At para 16, Munby LJ stressed that:

> ". . . it is the responsibility of the advocate, whether or not invited to do so by the judge, to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process."

8. The order drawn up as a result of the judgment of 15 December recorded that the "Court provided a summary judgment in respect of the fact finding hearing where the father was seen to have caused the injuries to [the child]". It went on to order the next steps in the case, including an experts' meeting before a further directions hearing on 23 January 2012, with the final hearing provisionally booked for 20 February 2012. Unbeknown to anyone at the time, that order was not formally sealed by the Manchester County Court until 28 February 2012.

9. The local authority's care plan was for Susan to be placed with the maternal grandparents where her half brother Terry was already living. At the directions hearing on 23 January 2012, it was recorded that the court would use three days of the hearing beginning on 20 February to determine whether Susan should be placed in the grandparents' care. The judge ordered that a perfected judgment would be distributed by 9 February and deemed to have been handed down on the date of distribution. However, on 15 February, the judge delivered a bombshell in the shape of a written "perfected judgment". This expanded upon the earlier judgment in some respects: it gave an account of the injuries, concluded that they were non-accidental, that one of the parents must have been the perpetrator, that the same parent was likely to have inflicted all the injuries, that Susan had been injured during the course of the day before she was taken to hospital or the two or three days beforehand, and that she had been injured on (at least) one occasion before that. However, it reached a different conclusion from the conclusion reached in December:

> "Given the uncertain nature of the evidence after the passage of so much time I am unable to find to the requisite standard which of the parents it was who succumbed to the stress to which the family was subject. It could have been either of them who injured [Susan] and that is my finding."

10. At the hearing on 20 February, counsel for the mother asked the judge to explain why she had changed her mind and not given the parties an opportunity to make further submissions before doing so. She delivered a short extempore judgment apologising to the parties, although she did "not view the development of this matter as a complete change of direction and the scenario which I posited when giving my view in December remains a possibility". She went on, "the

decision I reached had to be reached on the balance of probabilities and when I considered the matter carefully I could not exclude the mother because I was not sufficiently satisfied that no time had arisen when she had been alone with the child and might have caused some injury".

11. The order made on 20 February recorded that "The mother through her counsel, supported by the other parties, sought clarification of the reasons behind the court's determination that it could not identify a sole perpetrator as between the mother and the father in its judgment of 15 February 2012, compared with the conclusion indicated in the preliminary judgment of 15 December 2011". It was ordered that the hearing listed for 23 February should be for case management, with a view to a further assessment of the father as a carer for Susan, rather than for considering the placement with the maternal grandparents.

12. The mother, the Official Solicitor still acting as her litigation friend, was granted permission to appeal against the February judgment. The Grounds of Appeal complained, firstly, that the second judgment was "flawed and/or unjust. No adequate reasons have been provided to account for the change of decision and to place the mother back into the pool of possible perpetrators", and secondly, "that no opportunity to make further representations was afforded to the mother" beforehand. Before the appeal hearing, the mother and the children's guardian proposed that the case should be remitted to the judge for amplification and clarification of her change of mind. The local authority and the father argued that it had been adequately explained. No-one was suggesting that the December findings be restored without more ado.

13. At the outset of the appeal hearing on 14 June 2012, the court suggested to the mother's counsel that she should be arguing that the judge was functus officio after the December judgment had been recorded in a perfected order. Only after inquiries were made of the Manchester Civil Justice Centre did it emerge that the order had not in fact been sealed until 28 February. Nevertheless, the Court of Appeal, by a majority, not only allowed the mother's appeal but ordered that the findings of 15 December 2011 "stand as the findings of fact as to the perpetration of the injuries", the judgment of 15 February 2012 was quashed, and all reference to it excised from the orders made on 20 and 23 February.

14. The father now appeals to this court. With the support of the local authority, the children's guardian and (tellingly) the maternal grandparents, he argues that the judge was entitled to change her mind and the February judgment should be restored. The mother, now acting on her own behalf, opposes this. Given the passage of time, no party is suggesting that the case be remitted, either for further clarification of the judge's reasoning or for a rehearing. The judge has now recused

herself and the final hearing took place before His Honour David Gee in the week beginning 28 January 2013.

15. The parties' written submissions to this court spent some time discussing whether the majority in the Court of Appeal decided (a) that the judge had no jurisdiction to change her mind; or (b) that she had such a jurisdiction but should not have exercised it on the facts of this case. For reasons which will later appear, I believe that they must have meant (b), although there are passages, particularly in the judgment of Sir Stephen Sedley which are more consistent with (a). But we do not need to discuss what they really meant, as those are the very issues before this court. Rimer LJ dissented. He held that the judge did have jurisdiction and was entitled to exercise it in the way that she did.

The jurisdiction

16. It has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected.

17. The modern story begins with the Judicature Acts 1873 (36 & 37 Vict c 66) and 1875 (38 & 39 Vict c 77), which amalgamated the various common law, chancery and doctors' commons jurisdictions into a single High Court and created a new Court of Appeal for England and Wales. In *In re St Nazaire Company* (1879) 12 Ch D 88, the Court of Appeal decided that there was no longer any general power in a judge to review his own or any other judge's orders. Sir Richard Malins V-C had permitted a petition to proceed which sought to vary an earlier order which he had made and which had been unsuccessfully appealed to the Court of Appeal. The Court of Appeal held that he had no power to do so. Sir George Jessel MR explained that the Judicature Acts had changed everything. Before they came into force, the Lord Chancellor, Vice-Chancellor and Master of the Rolls had power to rehear their own decisions and, indeed, the decisions of their predecessors. He remarked that "the hope of every appellant was founded on the change of the judge": p 98. (An example of Jessel MR revisiting one of his own orders is *In re Australian Direct Steam Navigation (Miller's Case)* (1876) 3 Ch D 661). But such an application was in the nature of an appeal and jurisdiction to hear appeals had now been transferred to the Court of Appeal. Thesiger LJ added that, "whatever may have been the practice in the High Court of Chancery before the Judicature Act as to the review of their decisions or the rehearing of their decisions, nothing can be clearer than that there was nothing analogous to that in the Common Law Courts" 12 Ch D 88, 101. The court's conclusions harmonised the practice in all Divisions of the newly amalgamated High Court.

18. Nothing was said in *In re St Nazaire* about the position before the judge's order was perfected. *In re Suffield and Watts, Ex p Brown* (1888) 20 QBD 693, a High Court judge had made an order in bankruptcy proceedings which had the effect of varying a charging order which he had earlier made under the Solicitors Act 1860 (23 & 24 Vict c 127). All the members of the Court of Appeal, citing *In re St Nazaire*, agreed that he had no power to do this once his order had been drawn up and perfected. Unlike the bankruptcy jurisdiction, the Solicitors Act gave no power of variation. As Fry LJ put it, at p 697:

> "So long as the order has not been perfected the judge has a power of re-considering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end."

Strictly speaking, the reference to what may be done before the order is perfected was obiter, but that this was the law was established by the Court of Appeal no later than the case of *Millensted v Grosvenor House (Park Lane) Ld* [1937] 1 KB 717, where the judge had revised his award of damages before his order was drawn up and the court held that he was entitled to do so.

19. Thus there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under the Civil Procedure Rules (rule 40.2(2)(b)), an order is now perfected by being sealed by the court. There is no jurisdiction to change one's mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal. On any view, therefore, in the particular circumstances of this case, the judge did have power to change her mind. The question is whether she should have exercised it.

Exercising it

20. As Wilson LJ pointed out in *Paulin v Paulin* [2009] EWCA Civ 221, [2010] 1 WLR 1057, para 30(c), "Until 1972 the courts made no attempt to narrow the circumstances in which it would be proper for a judge to exercise his jurisdiction to reverse his decision prior to the sealing of the order". He referred to *In re Harrison's Share Under a Settlement* [1955] Ch 260, in which the judge recalled an order approving the variation of a settlement on behalf of infant, unborn and unascertained persons, because after he had pronounced it but before it was formally drawn up the House of Lords had decided that there was no power to make such an order. The Court of Appeal rejected the submission that the order could only be corrected for manifest error or omission (as can a perfected order under the "slip rule"): "When a judge has pronounced judgment he retains control over the case until the order giving effect to his judgment is formally completed": pp 283-284. The court went on to say that "This control must be . . . exercised

judicially and not capriciously" but that was all. The court clearly contemplated that people might act upon an order before it was drawn up, but they did so at their own risk.

21. In 1972, however, the Court of Appeal decided *In re Barrell Enterprises* [1973] 1 WLR 19, in which it refused to allow the re-opening of an unsuccessful appeal in which judgment had been given some months previously dismissing the appeal but the order had for some reason never been drawn up. Russell LJ, giving the judgment of the court, stated, at pp 23-24, that:

> "When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought save in the most exceptional circumstances to be able to assume that the judgment is a valid and effective one. The cases to which we were referred in which judgments in civil courts have been varied after delivery (apart from the correction of slips) were all cases in which some most unusual element was present."

There was no such justification in that case.

22. In *Paulin* [2010] 1 WLR 1057, 1070, Wilson LJ also pointed out that the limitation thus placed on the proper exercise of the jurisdiction was "not universally welcomed". In *Pittalis v Sherefettin* [1986] 1 QB 868, Dillon LJ had in effect "emasculated [it] into insignificance" by pointing out that it was exceptional for a judge to be satisfied that the order he had previously pronounced was wrong.

23. In *Stewart v Engel* [2000] EWCA Civ 362, [2000] 1WLR 2268, the Court of Appeal unanimously held that the power to recall orders before perfection had survived the coming into force of the Civil Procedure Rules 1998. However, for some reason (probably the submissions of counsel) they termed this "the *Barrell* jurisdiction". By a majority, they affirmed the *Barrell* limitation, which Sir Christopher Slade said "must apply a fortiori where the judgment is a formal written judgment in final form, handed down after the parties have been given the opportunity to consider it in draft and make representations on the draft": pp 2274, 2276.

24. Clarke LJ dissented on this point. He did not think that the court was bound by *Barrell* to look for exceptional circumstances. He clearly took as a starting point the overriding objective in the Civil Procedure Rules of enabling the court to deal with cases justly. He considered that the judge had been right to direct himself that the examples given by Neuberger J in *In re Blenheim Leisure (Restaurants)*

Ltd (No 3), The Times, 9 November 1999,- a plain mistake by the court, the parties' failure to draw to the court's attention a plainly relevant fact or point of law and the discovery of new facts after judgment was given - were merely examples: "How the discretion should be exercised in any particular case will depend upon all the circumstances": [2000] 1WLR 2268, 2285 .

25. Other formulations of the *Barrell* principle have been suggested. In *Cie Noga D'Importation et d'Exportation SA v Abacha* [2001] 3 All ER 513, Rix LJ, sitting in the Commercial Court, referred at para 42 to the need to balance the concern for finality against the "proper concern that courts should not be held by their own decisions in a straitjacket pending the formality of drawing up the order". He went on, at para 43:

> "Provided that the formula of 'exceptional circumstances' is not turned into a straitjacket of its own, and the interests of justice and its constituents as laid down in the overriding principle are held closely to mind, I do not think that the proper balance will be lost. Clearly, it cannot be in every case that a litigant should be entitled to ask the judge to think again. Therefore, on one ground or another the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary or exceptional. An exceptional case does not have to be uniquely special. 'Strong reasons' is perhaps an acceptable alternative to 'exceptional circumstances'. It will necessarily be in an exceptional case that strong reasons are shown for reconsideration."

26. In *Robinson v Fernsby* [2003] EWCA Civ 1820, [2004] WTLR 257 May LJ commented that "that expression ["exceptional circumstances"] by itself is no more than a relatively uninformative label. It is not profitable to debate what it means in isolation from the facts of a particular case" (para 94). Peter Gibson LJ commented, at para 120:

> "With one possible qualification it is in my judgment incontrovertible that until the order of a judge has been sealed he retains the ability to recall the order he has made even if he has given reasons for that order by a judgment handed down or orally delivered. . . . Such judicial tergiversation is in general not to be encouraged, but circumstances may arise in which it is necessary for the judge to have the courage to recall his order. If . . . the judge realises that he has made an error, how can he be true to his judicial oath other than by correcting that error so long as it lies within his power to do so? No doubt that will happen only in exceptional circumstances, but I have serious misgivings about elevating that

> correct description of the circumstances when that occurs as exceptional into some sort of criterion for what is required . . . ”

The possible qualification was when the judgment has been reasonably relied upon by a party who has altered his position irretrievably in consequence.

27. Thus one can see the Court of Appeal struggling to reconcile the apparent statement of principle in *Barrell* [1973] 1 WLR 19, coupled with the very proper desire to discourage the parties from applying for the judge to reconsider, with the desire to do justice in the particular circumstances of the case. This court is not bound by *Barrell* or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in *Stewart v Engel* [2000] 1 WLR 2268, 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in *In re Blenheim Leisure (Restaurants) Ltd*, Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances.

Exercising the discretion in this case

28. If that be the correct approach, was this judge entitled to exercise her discretion as she did? Thorpe LJ concluded (at para 56) that she was bound to adhere to the conclusion in her December judgment, having recited (at para 55) the clarity of the conclusion reached, the general assumption that the order had been perfected, the general implementation of her conclusion, her adherence to it at the hearing on 23 January, and the absence of any change in the circumstances and the “general slackness” that left the order unsealed. He was also somewhat puzzled as to why the result of her change of mind was “seemingly to elevate the father from low to first consideration as the primary carer, albeit the rationality of that elevation is not clear to me, given that he remained a suspected perpetrator” (para 56). Sir Stephen Sedley held that something more than a change in the judge’s mind was required, because “it will only be exceptionally that the interests of finality are required to give way to the larger interests of justice” (paras 79, 80). Rimer LJ, on the other hand, held that the judge was “honouring her judicial oath by correcting what she had come to realise was a fundamental error on her part. . . . the judge would be presented with real difficulty in her future conduct of this case were she required to proceed with it on the basis of a factual substratum that she now believes to be wrong. The court should not be required to make welfare decisions concerning a child on such a false factual basis”. It could not be in the

interests of the child to require a judge to shut his eyes to the reality of the case and embrace a fiction.

29. The Court of Appeal were, of course, applying an exceptionality test which in my view is not the correct approach. They were, of course, right to consider the extent to which the December decision had been relied upon by the parties, but in my view Rimer LJ was also correct to doubt whether anyone had irretrievably changed their position as a result. The care plan may have been developed (we do not have the details of this) but the child's placement had yet to be decided and she had remained where she was for the time being. The majority were, of course, also right to stress the importance of finality, but the final decision had yet to be taken. I agree with Rimer LJ that no judge should be required to decide the future placement of a child upon what he or she believes to be a false basis. Section 1(1) of the Children Act 1989 provides that where a court determines any question with respect to the upbringing of a child the welfare of the child shall be its paramount consideration. While that provision does not apply to procedural decisions made along the way, it has to govern the final decision in the case.

30. Mr Charles Geekie QC, on behalf of the mother, argues that even if the judge was entitled to change her mind, she was not entitled to proceed in the way that she did, without giving the parties notice of her intention and a further opportunity of addressing submissions to her. As the court pointed out in *Re Harrison's Share Under a Settlement* [1955] Ch 260, 284, the discretion must be exercised "judicially and not capriciously". This may entail offering the parties the opportunity of addressing the judge on whether she should or should not change her decision. The longer the interval between the two decisions the more likely it is that it would not be fair to do otherwise. In this particular case, however, there had been the usual mass of documentary material, the long drawn-out process of hearing the oral evidence, and very full written submissions after the evidence was completed. It is difficult to see what any further submissions could have done, other than to re-iterate what had already been said.

31. For those reasons, therefore, we ordered that the father's appeal against the decision of the Court of Appeal be allowed. No party had sought to appeal against the judge's decision of 15 February 2012, so the welfare hearing should proceed on the basis of the findings in the judgment of that date. We were pleased subsequently to learn that agreement has now been reached that Susan should be placed with her half-brother and maternal grandparents under a care order and, after a settling-in period, have visiting and staying contact with her father and her paternal family. The local authority plan to work with both families with a view to both mother and father having unsupervised contact in the future and it is hoped that the care order will be discharged after a period of one to two years.

But what if the order had been sealed?

32. On the particular facts of this case, that is all that need be said. But what would have been the position if, as everyone thought was the case, the order made by the judge on 15 December 2011 had been formally drawn up and sealed? Whatever may be the case in other jurisdictions, can this really make all the difference in a care case?

33. The Court of Appeal, despite having themselves raised the point, do not appear to have thought that it did. Sir Stephen Sedley said that it seemed to be of little or no consequence that the order recording the first judgment had not been sealed or that a final order in the case remained to be made (para 74). Both Thorpe and Rimer LJJ held that the relevant order in care proceedings is the final care order made at the end of the hearing. They expressly agreed with Munby LJ in *In re A (Children: Judgment: Adequacy of Reasoning)* [2011] EWCA Civ 1205, [2012] 1 WLR 595, para 21. This was a case in which the mother challenged the adequacy of the judge's reasons for finding her complicit in the sexual abuse of her daughter in a fact-finding hearing in care proceedings. Having quoted my observation in *In re B (Children: Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] AC 11, para 76, that a split hearing is merely part of the whole process of trying the case and once completed the case is part-heard, Munby LJ continued, at para 21:

> "Consistently with this, the findings at a fact-finding hearing are not set in stone so as to be incapable of being revisited in the light of subsequent developments as, for example, if further material emerges during the final hearing: see *In re M and MC (Care: Issues of Fact: Drawing of Orders)* [2003] 1 FLR 461, paras 14, 24."

34. This court has since agreed with that proposition. In *Re S-B (Children)(Care Proceedings: Standard of Proof)* [2009] UKSC 17, [2010] 1 AC 678, all seven justices agreed that:

> "It is now well-settled that a judge in care proceedings is entitled to revisit an earlier identification of the perpetrator if fresh evidence warrants this (and this court saw an example of this in the recent case *In re I (A Child) (Contact Application: Jurisdiction) (Centre for Family Law and Practice intervening)* [2010] 1 AC 319)." (para 46)

35. There are many good reasons for this, both in principle and in practice. There are two legal issues in care proceedings. First, has the threshold set by

section 31(2) of the 1989 Act been crossed? Secondly, what does the paramount consideration of the child's welfare require to be done about it? Much of the evidence will be relevant to both parts of the inquiry. It may be very helpful to separate out some factual issues for early determination, but these do not always neatly coincide with the legal issues. In this case, for example, there was no dispute that the threshold had been crossed. Nevertheless, it was convenient to attempt to identify who was responsible for the child's injuries before moving on to decide where her best interests lay. In such a composite enquiry, the judge must be able to keep an open mind until the final decision is made, at least if fresh evidence or further developments indicate that an earlier decision was wrong. It would be detrimental to the interests of all concerned, but particularly to the children, if the *only* way to correct such an error were by an appeal.

36. This is reinforced by the procedural position. As Munby LJ pointed out in *In re A* [2012] 1 WLR 595, para 20, in the context of a fact-finding hearing there may not be an immediate order at all. It was held in *In re B (A Minor) (Split Hearings: Jurisdiction)* [2000] 1 WLR 790 that the absence of an order is no bar to an appeal. Nevertheless, it would be very surprising these days if there were no order. In *Re M and MC (Care: Issues of Fact: Drawing of Orders)* [2002] EWCA Civ 499, [2003] 1 FLR 461, the Court of Appeal ruled that the central findings of fact made at a fact finding hearing should be the subject of recitals to an order issued there and then. But this is merely a recital in what is, on any view, an interlocutory order.

37. Both the Civil Procedure Rules and the Family Procedure Rules make it clear that the court's wide case management powers include the power to vary or revoke their previous case management orders: see CPR r 3.1(7) and rule 4.1(6) of the Family Procedure Rules 2010 (SI 2010/2955). This may be done either on application or of the court's own motion: CPR r 3.3(1), rule 4.3(1). It was the absence of any power in the judge to vary his own (or anyone else's) orders which led to the decisions in *In re St Nazaire* 12 Ch D 88 and *In re Suffield and Watts, Ex p Brown* 20 QBD 693. Where there is a power to vary or revoke, there is no magic in the sealing of the order being varied or revoked. The question becomes whether or not it is proper to vary the order.

38. Clearly, that power does not enable a free-for-all in which previous orders may be revisited at will. It must be exercised "judicially and not capriciously". It must be exercised in accordance with the over-riding objective. In family proceedings, the overriding objective is "enabling the court to deal with cases justly, having regard to any welfare issues involved": rule 1.1(1) of the Family Procedure Rules. It would, for the reasons indicated earlier, be inconsistent with that objective if the court could not revisit factual findings in the light of later developments. The facts of in *In re M and MC* [2003] 1 FLR 461 are a good example. At the fact finding hearing, the judge had found that Mr C, and not the

mother, had inflicted the child's injuries. But after that, the mother told a social worker, whether accurately or otherwise, that she had inflicted some of them. The Court of Appeal ruled that, at the next hearing, the judge should subject the mother's apparent confession to rigorous scrutiny but that, if he concluded that it was true, he should alter his findings.

39. The question is whether it makes any difference if the later development is simply a judicial change of mind. This is a difficult issue upon which the arguments are finely balanced, not least because the difference between a change of circumstances and a change of mind may not be clear-cut.

40. On the one hand, given that the basis of the general rule was the lack of a power to vary the original order and there undoubtedly is power to vary these orders, why should it make any difference in principle if the reason for varying it is that, on mature reflection, the judge has reached a different conclusion from the one he reached earlier? As Rimer LJ said in the current case at para 71, it cannot be in the best interests of the child to require the judge to conduct the welfare proceedings on the basis of a false substratum of fact. That would have been just as true if the December order had been sealed as it was when it had not.

41. In this respect, children cases may be different from other civil proceedings, because the consequences are so momentous for the child and for the whole family. Once made, a care order is indeed final unless and until it is discharged. When making the order, the welfare of the child is the court's paramount consideration. The court has to get it right for the child. This is greatly helped if the judge is able to make findings as to who was responsible for any injuries which the child has suffered. It would be difficult for any judge to get his final decision right for the child, if, after careful reflection, he was no longer satisfied that his earlier findings of fact were correct.

42. Mr Geekie, on behalf of the mother, also argued that the sealing of the order could not invariably be the cut-off point. If a judge is asked, in accordance with the guidance given in *English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] EWCA Civ 605 [2002] 1 WLR 2409, as applied to family cases in *In re A* [2012] 1 WLR 595, to elaborate his reasoning and in doing so realises that his original decision was wrong, should he not, as part of that process, be entitled or even required to say so? The answer to this point may very well be that the judge should indeed have the courage to admit to the Court of Appeal that he has changed his mind, but that is not the same as changing his order. That is a matter for the Court of Appeal. One argument for allowing a judicial change of mind in care cases is to avoid the delay inevitably involved if an appeal is the only way to correct what the judge believes to be an error.

43. On the other hand, the disconcerting truth is that, as judges, we can never actually *know* what happened: we were not there when whatever happened did happen. We can only do our best on the balance of probabilities, after which what we decide is taken to be the fact: *In re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] AC 11, para 2. If a judge in care proceedings is entitled simply to change his mind, it would destabilise the platform of established facts which it was the very purpose of the split hearing to construct; it would undermine the reports, other evidence and submissions prepared on the basis of the earlier findings; it would throw the hearing at the second stage into disarray; and it would probably result in delay.

44. Furthermore, if a judge were entitled to change his mind, a party would presumably be entitled to invite him to do so. No doubt most judges would do their best to have no truck with the invitation. But could the party be prevented from pressing for the exercise of the jurisdiction on the basis that, in his first judgment, the judge had failed to weigh certain evidence sufficiently or at all? In effect the judge would be invited to hear an appeal against himself. There is a distinction between an appeal and a variation for cause. This is the principle underlying the basic rule that an order is final once sealed.

45. The point does not arise in this case and it was not fully developed in the arguments before us. The arguments outlined above are so finely balanced that we shall refrain from expressing even a provisional view upon it. In our view the preferable solution would be to avoid the situation arising in the first place.

A concluding comment

46. As Peter Gibson LJ pointed out in *Robinson v Fernsby* [2004] WTLR 257, para 120, judicial tergiversation is not to be encouraged. On the other hand, it takes courage and intellectual honesty to admit one's mistakes. The best safeguard against having to do so is a fully and properly reasoned judgment in the first place. A properly reasoned judgment in this case would have addressed the matters raised in counsel's email of the 16 December. It would have identified the opportunities of each parent to inflict each of the injuries by reference to the medical evidence about the nature, manner of infliction and timing of those injuries and to the parents' and other evidence about their movements during the relevant periods. It would have addressed the credibility of the evidence given by each parent, having regard in this case to the problems presented by the mother's mental illness. Had she done this, the judge might well have been able to explain why it was that she concluded that it was the father who had more than once snapped under the tension. But she did not do so, and it is a fair inference that it was the task of properly responding to the questions raised by counsel for the father which caused her to reconsider her decision. No doubt the judge was anxious, given the

vicissitudes which had beset the fact-finding hearing, to deliver her first judgment quickly so that the welfare hearing fixed for the following February could be maintained. But the subsequent history demonstrates all too clearly that this was a false economy. Had that judgment been properly reasoned, none of this would have happened. Furthermore, if the judge had not changed her mind, the father would have had the opportunity of appealing against her findings to the Court of Appeal. One extraordinary result of the Court of Appeal's order in this case was that the findings against the father were restored without his having had the opportunity which he should have had of mounting a proper appeal against them.