Neutral Citation Number: [2020] EWCA Civ 1680

Case No: B4/2020/1766 and 1774

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WATFORD
HH Judge Clarke
WD19C01494

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 December 2020

Before :

LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF X, T, A, E AND S (CHILDREN)
Between :

SS (1)	**Appellants**
DB (2)	
- and -	
A LOCAL AUTHORITY (1)	**Respondents**
DH (2)	
MS (3)	
X, T, A, E and S (4) TO (8)	
(by their children's guardian)	

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Rebekah Wilson (instructed by **Blaser Mills Law**) for the **First Appellant**
Ranjit Singh (instructed by **David Barney and Co**) for the **Second Appellant**
Mai-Ling Savage (instructed by **Local Authority Legal Services**) for the **First Respondent**
Grant Keyes (instructed by **Knowles Benning**) for the **Fourth to Eighth Respondents**
The Second and Third Respondents were neither present nor represented at the hearing.

Hearing date: 2 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Friday 11 December 2020.

LORD JUSTICE BAKER:

1. This judgment concerns two appeals against findings made by HH Judge Clarke in care proceedings involving five children.

Background

2. At the start of the proceedings, the composition of the family was as follows. The two appellants, a woman, hereafter referred to as SS, and a man, DB, started a relationship in August 2018 at a point when each was looking after children from previous relationships. SS has two daughters, E, now aged ten, and S, who is seven. DB also has two children, a girl, T, aged nine, and a boy, A, who is also seven. Tragically, the mother of T and A took her own life in June 2018. At that point, in addition to his own children, DB was also looking after their mother's older child, X, who is now aged twelve.

3. Following the breakdown of SS's relationship with the girls' father, involving arguments between the adults which led to the police being called, there were proceedings for child arrangements orders about contact between the girls and their father. There was, however, no involvement between the family and social services.

4. In contrast, the three children for whom DB was caring were involved with social services at various stages. There were referrals concerning X as a baby when he was in the care of his mother and father. After that relationship ended, the mother started a relationship with DB in 2010 which continued until 2015 and led to the birth of T and A. During that period, social services received a number of reports about concerns for the care of the children. In 2015, DB was arrested and subsequently convicted for an assault on the children's mother. After the breakdown of that relationship, the three children, X, T and A, lived initially with their mother, but social services became involved again following concerns about the mother's care of the children. In January 2016, following an alleged incident of rough treatment, the three children were made subject to police protection orders and placed with DB. Subsequently, a child arrangements order was made for all three children to live with DB, with a supervision order in favour of the local authority for a period of 12 months. Once that order came to an end in November 2017, the local authority closed the case.

5. Meanwhile, both T and A had been diagnosed as suffering from a chromosomal duplication error which they had inherited from DB. Both children were identified as having similar clinical difficulties, including autistic spectrum features and learning and communication delay. On two occasions in 2016, T was observed to have hurt herself at school, on one occasion hitting her hand "quite hard" and on another occasion "biting her arm all morning". In February 2018, social services had become involved again after DB had reported concerns about sexualised behaviour between X and T. As a result, the children were made subject to child in need plans. In June 2018, as mentioned above, the mother of T and A died.

6. SS and DB met online in August 2018. At that point, SS and her daughters were living in Hertfordshire and DB and his family in Yorkshire. The first face-to-face meeting between SS and DB took place in December 2018 and thereafter they alternated between visiting each other in Yorkshire and Hertfordshire, taking the children with them on every occasion.

7. On 29 May 2019, T was admitted to hospital in Yorkshire with bruises and scratches all over her body. T told medical staff that she had caused the injuries herself. The hospital staff concluded that there were no concerns that the injuries were non-accidental. T's school recorded that she was "struggling with a change in family situation and is trying to gain attention through negative behaviour". In addition to self-harming, there were reports that T was hurting her brother A.

8. In August 2019, DB and the three children moved down to Hertfordshire to live with SS and her daughters in her two-bedroom property, with the adults occupying one bedroom and the five children altogether in the other. In September 2019, X, T and A started attending the same school as E and S. In September 2019, T was seen by a community paediatrician with bruising on her chest, neck and shoulders. The family reported that the marks were self-inflicted. On 14 October 2019, there was an incident at school when T was reported as pulling her tie round her neck tightly. There were further incidents at school when T was reported to have harmed herself. On 17 October 2019, A was noted at school to have a mark on his ear which he initially alleged had been caused by SS biting him. Subsequently, however, A said that T had inflicted the injury. On 31 October 2019, T attended an initial appointment with CAMHS where staff noted that she had marks on her neck and jaw. T said that she had hurt herself and gestured toward her neck with a fist.

9. On 4 November 2019, T presented at school with widespread bruising to her face, spreading down her neck and both on and inside her ears. Asked about the bruising, she replied "mum and dad, they know about it". DB was advised to take her the hospital, but in the event did not do so until the following day. During this period, SS said text messages to DB in which she appeared to discourage him from taking T to hospital, saying amongst other things "it took months to get out of her head at the hospital wasn't a fun place to be and she herself more trying to get there I don't want us all to go through that again" and "the bruises aren't anywhere near as bad as they used to be and we are doing all we can already".

10. At hospital, T was examined by a paediatric registrar who recorded a significant number of bruises to her forehead, face, jaw, neck, chest, abdomen, back, right upper arm and legs. In a subsequent report, the registrar recorded DB's explanation that T had harmed herself and expressed the view that it was developmentally possible for T to have inflicted the injuries herself. On reviewing the case a few days later, however, a consultant paediatrician at the hospital took a different view. He was concerned about the absence of any detailed explanation as to how the injuries had been inflicted and concluded that there should be a full assessment. It was his opinion that the injuries "are beyond doubt inflicted injuries representing a significant sustained serious assault". As a result, social services and the police were notified and, following a strategy meeting, DB and SS were arrested and the children removed under a police protection order. Subsequently, on 11 November 2019, DB and SS signed an agreement for the accommodation of the children under s.20 of the Children Act 1989 and the children were placed in two foster care placements, with X, T and S in one placement and E and S in the other.

11. On 5 December 2019, care proceedings were started in respect of all five children and, on 23 December 2019, they were made the subject of interim care orders. Subsequently, X moved to live with his father under a child arrangements order. The other children remain in foster care. Notably there have been no reports of T self-harming since she

was placed in foster care. Case management directions given in the proceedings included authorisation for the instruction of an expert paediatrician as to the causes of the bruises sustained by T.

12. In January 2020, all the children were interviewed under the Achieving Best Evidence ("ABE") procedure. In the course of her interview, T said that her injuries had been self-inflicted. In his interview, A said that T's injuries were inflicted by DB. Both adults were interviewed by the police and denied responsibility for the injuries. In February 2020, T told her foster carer that she had been physically abused by SS. As a result, she was interviewed again under the ABE procedure and repeated that allegation.

13. In March 2020, SS and DB separated and have not resumed their relationship.

14. On 8 July 2020, a fact-finding hearing started before the judge. It was a hybrid hearing in accordance with the procedures which have been adopted as a result of the Covid-19 pandemic. The hearing ran into a number of difficulties including technical problems and issues about disclosure of transcripts and other documents. As a result, after seven days the hearing was adjourned part-heard. At that point, the judge discharged the interim care orders with regard to SS's children, E and S. The local authority's appeal against that decision was allowed by this Court and the children remained in foster care. Further difficulties arose when the hearing before the judge resumed in August and as a result the hearing was adjourned again. After another false start on 4 September, the hearing finally resumed on 21 September and eventually concluded after a total of fifteen days. Judgment was reserved and handed down on 9 October. In his judgment, the judge made a number of findings against DB and SS which I shall consider below. After judgment, further case management directions were made, including an expert assessment by a child psychologist, with a view to a final welfare hearing which was listed before the judge for five days on 14 December 2020. An application by DB and SS for permission to appeal against the findings was refused.

15. On 26 October 2020, SS filed a notice of appeal to this Court against the findings. On the following day, a further notice of appeal was filed on behalf of DB. On 16 November, permission to appeal was granted by Peter Jackson LJ who listed the hearing for 2 December.

16. I record at this stage that the technical problems which bedevilled the hearing at first instance continued to afflict the case. The appeal was originally listed before a three-judge court but because of technical problems King LJ was unable to join the hearing. As a result, the appeal continued before my Lady and myself sitting as a two-judge court.

The local authority's case

17. The findings sought by the local authority were amended on two occasions during the hearing. The final version was, in summary, in the following terms:

    (1) On date or dates before 5 November 2019, T suffered physical harm and that harm was *either* inflicted upon her by DB, SS or either of them *or* self-inflicted and DB, SS or either of them neglected to protect her from so doing.

(2) As a result of the injuries suffered by T, she has suffered significant harm, being emotional harm and physical harm through inflicted injury and/or neglect.

(3) DB and/or SS failed to protect T from the other.

(4) X, A, E and S live in the same property in which T suffered harm so would have suffered emotional harm either hearing the injuries being inflicted and/or seeing T with her injuries.

The schedule of findings listed the injuries suffered by T and summarised the evidence on which the local authority relied.

The judgment

18. The judge began by setting out the background in chronological order. He then recited the findings sought by the local authority and set out the legal principles comprehensively. After that, he summarised in considerable detail the written and oral evidence, again adopting a chronological approach. He recorded relevant extracts from T's school records in Yorkshire and details of her hospital attendances in Yorkshire in 2019. He summarised the ABE interviews of the children, noting the comments made by T about self-harming in her first interview and by the other children describing how DB and SS used the "naughty step" as a disciplinary method, including on occasions punishing T for harming herself. He recorded how A had said during his interview that it was DB who had hurt T's face. He summarised T's second ABE interview in which she had repeated the allegation made to her foster carer that the injuries had been inflicted by SS. At paragraph 101 of the judgment, he noted some criticisms of the way in which T's second ABE interview was conducted.

19. The judge then considered the expert evidence of Dr Cleghorn, consultant paediatrician, as to the cause of the bruises. In her report, she concluded that some of the injuries were likely to be accidental, some likely to have been inflicted but not by T, and others possibly caused by T herself. At paragraph 103 of the judgment, the judge recited other conclusions set out in the report:

> "Dr Cleghorn confirmed her experience that children with neurodevelopmental disorders who self-harm habitually will do this in any setting but more often in settings which provide either stress or stimulus. Children who are self-harming from a degree of psychological stress (for e.g. after a bereavement) will again do this in any area (school or home) and will settle once the cause of the distress is dealt with. Having considered the reports of the two incidents at school [in 2016] and the lack of self-harming behaviour in foster care she suggested that if T has been self-harming that this is more likely to be a response to some emotional or psychological distress which has now resolved. She recommended a psychological assessment, but none has been obtained."

20. The judge went on to consider Dr Cleghorn's oral evidence. By that stage she had been provided with better quality photographs which led her to conclude that, in addition to the bruises identified in her report, T had suffered injuries to her ears, including bruises to the inside of the ears which were likely to have been inflicted non-accidentally. The judge set out Dr Cleghorn's oral evidence in some detail including the following points:

- that she had not seen self-inflicted injuries to the face in children with neurodevelopmental disorders as seen on T's face
- that children tended not to punch themselves and, although they might hit themselves with their fists, tended to do so against their forehead or around their nose, rather than in the locations where T's bruises were seen
- that she had never seen self-inflicted bruises on the cheek such as the injuries sustained by T
- that the injuries would have hurt and T would have cried
- that self-harm caused as a result of emotional or psychological distress was mostly seen in teenagers and it was quite worrying to see such behaviour in a younger child if there were no other issues
- that she had experience of cases where self-harming stops when a child goes into foster care because the psychological or emotional stress has stopped
- that where self-harming behaviour is attributable to neurodevelopmental disorders, it would not be expected to stop suddenly in foster care.

21. The judge then referred to the evidence of the hospital consultant whose report had triggered the social services investigation. In evidence, he agreed with Dr Cleghorn's opinion. In 20 years' experience, he had only seen one or two cases of children inflicting nasty injuries on themselves.

22. The judge then set out the parents' evidence in detail. Each denied that either of them was responsible for the injuries. The judge recorded that DB did not accept that T had suffered any psychological distress in his care. She had rebelled against the new boundaries they had put in place but there had not been any particular problems between the children and SS. Asked if T had hated SS he had replied "not all the time" but he accepted that T wanted to split them up. In her evidence, SS described having a "bumpy start" with T and that T had said she did not like her, but over time they had grown closer. SS told the judge that the use of the "naughty step" had been "blown out of proportion", that it had not been overused, and that T had never been sent to the naughty step for self-harming behaviour. When challenged about evidence provided by neighbours who had been recorded as telling the police that they had heard the children being shouted and sworn at, both DB and SS denied that this happened, and SS described ongoing antagonism with the neighbours about whom she had made multiple complaints. DB and SS accepted that they had used make-up to cover up some of T's bruises before sending her to school on 4 November 2019. It was DB's evidence that they had done this because that was what T had wanted.

23. After this extensive recital of the evidence, the next section of the judgment is headed "Discussion". Here, between paragraphs 150 and 187, the judge made a number of observations ranging across the issues in the case. In doing so, he expressed some conclusions about the evidence but in other respects raised questions without providing an express answer.

24. At paragraph 152 of the judgment, he noted that there had been no significant history of T self-harming prior to the relationship between SS and DB, "save possibly the two minor incidents in 2016". At paragraph 154, he concluded that he was unable to make any substantive findings about the injuries presented in Yorkshire in May 2019 but would proceed on the basis that the injuries had been self-inflicted as diagnosed by the hospital at that stage. He added, however, that the fact that T had a history of self-harming behaviour did not preclude her from also being a victim of physical abuse.

25. The judge concluded that he should not rely on the opinion given by the hospital consultant. He had not been an expert instructed in the case and had never met or examined T. The judge thought that he had reached a very entrenched position at an early stage. On the other hand, the judge described Dr Cleghorn as a "convincing expert" who had "sought to give her best professional opinion to assist" the court. Although he did not say so in express terms, it is manifestly clear from what followed that the judge accepted Dr Cleghorn's evidence as to how T's injuries had been sustained. Later in the "Discussion" section, the judge recorded that DB and SS relied on the opinion of the hospital registrar, but added that he had not been called as a witness and it was not known whether he would agree with Dr Cleghorn or the hospital consultant as to the cause of the injuries.

26. In the course of the "Discussion" section of the judgment, the judge made a number of observations about the parents. He noted the generally positive impression of SS's parenting of her daughters. He described DB as coming across as a more easy-going character than SS, noting that she had an antagonistic relationship with her daughters' school. He observed that "the evidence is that they threw themselves into the relationship with limited regard for the feelings of the children", adding that "T's open opposition was ignored". He recorded that each of them had denied that there were any additional stresses living in such small accommodation, notwithstanding the fact that T had said she did not like to be crowded. He recorded that T had been clear that she did not like SS, although both of the adults have sought to portray the relationship between T and SS as loving.

27. The judge recorded DB's case that he had been instrumental and proactive in seeking professional support for T. He observed, however, that there was no suggestion that DB had sought medical help in August or October for T's self-harming behaviour and that "there was a clear reluctance to take T to hospital on 4 and 5 November 2019". At paragraph 163, the judge said:

> "the texts from SS to DB on 4 November 2019 appear to argue against taking T to hospital. The question arises, if they were that keen to obtain support for T why did DB not just go? Is the explanation that T liked the attention in hospital credible?"

28. With regard to the ABE interviews, the judge recorded at paragraph 175:

> "SS argues no weight can safely be placed on the [second] ABE interview of T. T gave a compelling account in [the first interview]. She had a clear dislike of SS. She would have no reason not to identify SS as the perpetrator in the first interview. T's second interview included leading and tag questions …. It took place after a discussion with the foster carer and after T was made aware of other allegations being made. Is it possible she felt safer in foster care by that stage and therefore she was able to speak up? The evidence from the school was that the children

seemed immediately happier once taken into foster care, so why would it have taken so long?"

29. The judge then considered statements made by the other children:

> "181. The children in the family home give clear and generally consistent evidence of use of the naughty step, what it was used for and who was on there most. It is contradictory to that of the adults.
>
> 182. The other children in the household saw T with significant physical injuries to the face and body and would have experienced distress at seeing the injuries. None of them saw or heard her inflict these to herself. None of them reported seeing or hearing anyone else do it either.
>
> 183. [E and S's father] points out that if noise can be heard from the flat above then any noise in the flat itself is likely to be heard. It is therefore extremely difficult to understand how SS and DB, or any of the other children, would not have heard T injuring herself, or being injured, to the levels shown or any consequent distress, whenever it happened. However, there are no reports of any such distress at all."

30. Following the "Discussion" section, the judge concluded his judgment by setting out his findings in the following terms:

> "188.1 T is a child with a medical history of self-harming. The significant nature of the self-harming only arose after the start of the relationship between DB and SS;
>
> 188.2 T was clearly not happy with the new relationship. She expressed that both directly, saying she hated SS, and through self-harm;
>
> 188.3 Both DB and SS were aware of the problems. They minimised the issues and prioritised their relationship over T's needs;
>
> 188.4 The parents sought to introduce boundaries. However, those boundaries applied a blanket rule which was not responsive to either A or T's difficulties. T, in particular, spent more time on the naughty step than anyone else and this included time for not telling the parents how she had sustained injuries;
>
> 188.5 As a result of the conduct of the parents, T self-harmed further in August, September, October and early November [2019];
>
> 188.6 The following injuries were caused by T to herself as a result of the emotional harm suffered by her in the care of the parents and lack of adequate supervision:
>
> - 13 small bruises over the whole of the chest and abdomen
> - A large bruise to the side of the right upper arm
> - A bruise to the right upper thigh
> - Two bruises to the left upper thigh

188.7 The following injuries were inflicted on T

- 3 large bruises to the left side of the face
- A large bruise over the right jaw
- A bruise over the right upper cheek
- A bruise on the left side of the chest
- A bruise to the left ear
- Two bruises to the right ear

188.8 The injuries were significant. The other children were present in the family home and were exposed to the emotional harm of seeing the injuries on T;

188.9 The parents sought to minimise the issues. Both had opportunity to harm T, although SS had more than DB, were identified as perpetrators by one of the children and had a history of aggression. The list of potential perpetrators is limited to DB and SS and there is a real possibility that either of them was the perpetrator. The pool of perpetrators is therefore SS and DB;

188.10 On the balance of probabilities only one of the adults caused a injuries. However, the court is unable to identify which of them because the injuries and therefore matters rest with them both being within the pool."

The grounds of appeal

31. The first and principal ground of appeal advanced on behalf of DB is that the internal reasoning of the judgment was fundamentally flawed in that the judge failed to explain his reasoning for the findings recorded at paragraph 188. The further grounds of appeal are summarised in terms that the judge was wrong to find that some of T's injuries were inflicted by DB or SS rather than by T herself. The second ground of appeal is that the judge was wrong to make the finding at paragraph 188.3 in respect of DB because there was evidence that he was attempting to engage the support of CAMHS and the school to assist T and there is no basis for the finding that he sought to minimise issues or prioritise his relationship. The third ground is that the judge was wrong to find at paragraph 188.4 that attempts to put boundaries in place included putting T on the naughty step for failing to disclose how she sustained her injuries. The fourth ground is that the judge was wrong at paragraphs 188.5 and 188.6 to find that T self-harmed as a result of the conduct of the parents, inadequate supervision or emotional harm. It is contended that the judge was not in a position to make any findings about why T self-harmed. The fifth ground is that the judge was wrong to find that any of T's injuries were inflicted by DB or SS and that the judge failed analyse why there was a likelihood that DB inflicted the injuries and was therefore "in the pool". The sixth ground is that the judge was wrong to find that DB and SS exposed the other children in the home to emotional abuse through seeing T's injuries. It is submitted that the judge was not in a position to make a finding that either of the adults would willingly expose the children to emotional harm.

32. The grounds of appeal advanced on behalf of SS are more limited. In particular, SS does not appeal against the finding that some of the injuries were inflicted or that there is a real possibility that both she and DB inflicted the injuries so that each of them is in the "pool of perpetrators". The focus of SS's appeal is on the judge's findings relating to the cause of T's self-inflicted injuries. There is some overlap between the five grounds of appeal. In the first ground, it is said that the judge erred in making findings which were not properly put to the parents. In the second ground, it is argued that he erred in not allowing the parents know the case against them and respond to that case. It is asserted that many of the incidents occurred when T was not in SS's care and that, had she known these findings were a possibility, evidence as to the causation and duration of the self-harming would have been adduced. In the third ground, it is contended that the judge erred in making a finding as to the responsibility for the self-harming in the absence of expert evidence (as recommended by Dr Cleghorn) as to the reasons for the self-harming. In the fourth ground, it is argued that the judge erred in making a finding of emotional harm against SS when the incidents occurred when the child was not living with her. The fifth ground of appeal is that the judge erred in making a "pool" finding of emotional harm against SS when there was a history of concerns of emotional harm going back many years before T was in her care.

Discussion and conclusions

33. This was a particularly demanding hearing for the judge. For a series of unfortunate reasons, it extended to 15 days over a period of nearly 3 months. The principal issue – whether T's injuries were inflicted or self-inflicted – was unusual and difficult. To resolve the issues, the judge was required to analyse an extensive volume of evidence.

34. Drafting a judgment in such circumstances presents a number of challenges. The judgment under consideration here was carefully structured. The judge set out the background of the case, the law and the evidence in very considerable detail. He then analysed the issues in the section headed "Discussion" and concluded with his findings. The appellants are correct in pointing out that the judgment does not contain a section where the judge expressly sets out the reasons for his findings. I think it would have been better had he done so. I do not, however, regard his failure to do so as a "fundamental flaw" so as to require this court to conclude that the findings must be set aside. Save in one respect, I am satisfied that it is possible to discern the reasons for his findings from the rest of the judgment, in particular the "Discussion" section.

35. Accordingly, I would not allow the appeal on the first ground advanced on behalf of DB.

36. The evidence as summarised and discussed in the judgment was in my view plainly sufficient to support the judge's findings at paragraphs 188.2, 188.3 and 188.4 – that T was not happy about her father's relationship with SS; that she said she hated SS; that DB and SS minimised her problems; that they prioritised their relationship over her needs; that they introduced boundaries which were not responsive to some of the children's difficulties; and that they sent T to the "naughty step" for refusing to say how she had sustained her injuries. It is clear from the earlier sections of the judgment there was evidence on which the judge was entitled to rely in reaching all of these findings. It is to my mind sufficiently clear that, for example, he was relying on the evidence of the children as to the use to which the "naughty step" was put. His findings that the adults minimised T's problems and prioritised their own relationship was clearly based

on his overall assessment of DB's and SS's evidence and the evidence of others about what they had said and done. Accordingly, I would dismiss DB's second and third grounds of appeal.

37. Furthermore, and more importantly, the basis of the judge's findings as to whether the injuries were accidental, self-inflicted or inflicted by others was manifestly based on Dr Cleghorn's evidence which the judge obviously accepted. It is correct that he did not say so in terms, but before us Mr Singh frankly acknowledged the findings were open to the judge on the basis of the expert evidence. Dr Cleghorn was the court-appointed expert and the judge was clearly entitled accept her evidence and to prefer it over the opinion of the hospital consultant which he rejected for reasons clearly explained in the judgment. For my part, I see nothing wrong with the judge's approach to the opinion offered by the registrar. It follows that the judge was entitled to find that some of T's injuries had been inflicted by another person and I reject the arguments advanced on behalf of DB to the contrary. It is notable that SS did not seek to appeal against this finding.

38. Equally, in my view, the judge was entitled to conclude that there was a real possibility that both DB and SS were responsible for inflicting the injuries so that both of them were in the "pool of perpetrators". Although it might have been better for the judge to draw the threads of his reasoning together, I am satisfied that it was open to him to reach that conclusion and that he identified the basis for his conclusion in his discussion of the evidence. Accordingly, I would dismiss DB's fifth ground of appeal.

39. Furthermore, it was clearly open to the judge to conclude that the other children were exposed to emotional harm through seeing significant injuries sustained by T. In the sixth ground of appeal put forward on behalf of DB, it is asserted that there was no evidence that he or SS "willingly exposed" the children to emotional harm. But I do not read the judge's finding in those terms. What he found was that the children had suffered emotional harm through witnessing T's injuries. Given the fact that all five children were sharing a bedroom, that T's injuries were significant and extensive, and that the children were plainly aware of the injuries, it was manifestly open to the judge to make the finding in those terms. I would therefore dismiss DB's sixth ground of appeal.

40. With regard to the grounds of appeal considered so far, therefore, I am satisfied that, notwithstanding the deficiencies in the structure of the judgement identified above, it is clearly possible to discern the reasons for the judge's findings. The difficulties in this appeal arise with the remaining grounds – SS's grounds of appeal and DB's fourth ground – all of which relate to the reasons for T's self-harming behaviour.

41. DB and SS accept that T harmed herself on a number of occasions. Indeed, it was their case before the judge that all of her injuries were self-inflicted. That contention was rejected by the judge who accepted the evidence of Dr Cleghorn as to which injuries were self-inflicted or inflicted by others. It is further asserted on behalf of DB and SS that, insofar as T's injuries were self-inflicted, it was not open to the judge to find that her behaviour was caused by their conduct or neglect. It is pointed out that it was never asserted by the local authority in any of the iterations of the threshold document that T's behaviour was attributable to the adults' conduct. As a result, neither DB nor SS adduced any evidence on this issue. Had it featured as part of the local authority's case, they would have sought to obtain and adduce in evidence more details about the

background, including T's behaviour and treatment in Yorkshire following the breakdown of her parents' relationship and the tragic death of her mother. It was asserted on their behalf, and not denied by counsel for the local authority or the children's guardian, that neither of them was cross-examined on that basis. It was never suggested to them in evidence that their conduct or neglect was the cause of T's self-harming. Mr Singh told us that it had been put to DB in cross-examination that T was self-harming because she was suffering from emotional harm but not that it was attributable to the conduct of DB or SS. On behalf of the local authority, Ms Savage fairly conceded this point and accepted that the judge's finding went beyond what the local authority had been seeking. It was assumed by all parties that the reason for T's self-harming behaviour was not something to be determined at the fact-finding hearing. The approach agreed by the parties was that the judge would be invited to decide whether the injuries were self-inflicted or inflicted by another person or persons and, in the light of his findings, psychological and other assessments would be obtained to address the reasons for T's behaviour for consideration at the final welfare hearing. In the course of her submissions, Ms Savage accepted that it was likely that the causes of T's behaviour were multi-factorial.

42. In those circumstances, it seems to me that SS's grounds of appeal and DB's fourth ground of appeal are made out. I conclude it was not open to the judge at the fact-finding hearing to find, as he did at paragraph 188.5, that T self-harmed "as a result of the conduct of the parents" (meaning DB and SS) or, at paragraph 188.6, that the self-inflicted injuries were caused "as a result of the emotional harm suffered by her" in their care or a lack of adequate supervision.

43. I would therefore allow the appeal against those findings and set them aside. The question as to why T harmed herself so extensively must be determined at the forthcoming welfare hearing. It may, of course, turn out that the conduct of DB and SS caused or contributed to T's self-harming behaviour, but that conclusion was simply not open to the judge at the fact-finding stage.

44. As a result of the way in which the findings were made, it is possible to delete those phrases from the findings as recorded at paragraph 188 of the judgment, leaving the rest of the findings intact.

45. If my Lady agrees, the only remaining question is what should now happen to the proceedings. In the course of the hearing, all parties agreed with the court's proposal that, if we were to reach the conclusion that the appeal should be allowed in part as I have set out above, the proceedings should remain with Judge Clarke. Following the hearing, however, Ms Wilson sent an email to the Court informing us that her client had lost confidence in the judge in the light of the two successful appeals in these proceedings and that it was SS's perception that to allow the judge to consider the issue again could be unfair. In my view, however, there is no reason to doubt that the judge will be able to re-evaluate the issue as to the reasons for T's self-harming behaviour in the light of all the evidence ultimately available at the welfare stage. Given the very limited basis on which, if my Lady agrees, this appeal will be allowed, it would be wholly disproportionate to transfer the case to another judge. Furthermore, given the difficulties facing the family justice system at present, such a course could lead to further delays in resolving the question of the future care of these children.

ELISABETH LAING LJ

I agree that the appeals should be allowed on the limited basis indicated by My Lord, Baker LJ, and that the case should be remitted to Judge Clarke, for the reasons given by Baker LJ in paragraph 45 of his judgment.