Neutral Citation Number: [2025] EWCA Civ 1044

Case No: CA-2025-001313 & CA-2025-001318

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WEST LONDON
HHJ Willans (sitting as a Deputy High Court Judge)
ZW25C50018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2025

Before:

LORD JUSTICE BEAN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE BAKER

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G (A Child: Scope of Fact-finding)

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Mark Twomey KC and Christopher Archer (instructed by **London Borough of Ealing Legal Services**) for the **Appellant Local Authority**
Andrew Bagchi KC and Emma Hudson (instructed by **Russell Cooke Solicitors**) for the **Appellant Child through their Children's Guardian**
William Tyler KC and Chris Barnes (instructed by **Oliver Fisher Solicitors**) for the **Respondent Mother**

Hearing date: 8 July 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 31 July 2025 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. In *Re H-D-H (Children), Re C (A Child),* [2021] EWCA Civ 1992; [2021] 4 WLR 106, it was said that decisions about the scope of fact-finding are core case management decisions with particular consequences for the length and cost of proceedings, the impact of the litigation on parties and others, and the allocation of court time. It was confirmed that the long-standing approach set out in the *Oxfordshire* case (*A County Council v DP* [2005] EWHC 1593 (Fam); [2005] 2 FLR 1031) remains valid and that the factors it identifies should be approached flexibly in the light of the overriding objective of doing justice efficiently in the individual case. Decisions about whether to investigate particular events are not always easy and the factors typically do not all point the same way: most decisions will have their downsides. Overall, the court must ask itself whether its process will do justice to the reality of the case. It should be able to make its ruling quite concisely by referring to the main factors that bear on the individual case, and identifying where the balance falls and why. The reasoned case management choice of a judge who approaches the law correctly and takes all relevant factors into account will be upheld on appeal unless it is shown that something has gone badly wrong with the balancing exercise.

2. These appeals provide an acute example of a case management decision of this kind. The judge (His Honour Judge Willans, sitting as a Deputy High Court Judge) is conducting care proceedings about a young mother's second baby. The question for him was whether to direct a fact-finding hearing in relation to the death of the mother's first baby, which had occurred 6½ years earlier at a time when the mother was herself a child. For reasons given on 28 May 2025 in a high-quality reserved judgment, he decided that it was not. The local authority and the children's guardian now appeal. The issue for us is whether the judge's conclusion was wrong or unjust.

3. I would dismiss the appeals. This was a difficult and intensely case-specific decision. The proceedings were at week 18 and there had been five hearings, all conducted by the judge himself. He was therefore familiar with the mass of evidence about the family history over the years, and with the shape of the case, by which I mean the range of realistically possible outcomes and the means by which they might be reached. In short, he had a feel for the case. He directed himself correctly in law and he took all relevant factors into account. It follows that we could only intervene if the only course open to him was to make findings of fact about the first child's death. As to that, the appellants had arguments, substantially based on logical reasoning, and the judge addressed them. Their arguments might have prevailed, but the reality of the case included the fact that this baby has been in her mother's care since birth and that there is no present intention to separate them; further, that the process of investigation itself would be exceptionally lengthy and onerous. I consider that the judge's decision was one that was open to him and that, taking account of the latitude that is due to informed judicial case management, it was at all events not wrong.

The earlier history

4. It is necessary to set out the sad family background in broad detail. This is not by way of a 'mini-trial' of the kind deprecated in *H-W (Care Proceedings: Further Fact-*

Finding Hearing) [2023] EWCA Civ 149; [2023] 4 WLR 19, but so that the extent of the information available to the judge can be appreciated.

5. The mother had a very difficult childhood and the local authority was sporadically involved from the time she was aged 5. In the following decade she was made subject to child protection plans for a range of reasons: neglect, substance abuse, family dysfunction, historic domestic violence, challenging behaviour at school, truancy and childhood sexual exploitation. When she was aged 8, her baby brother died in his cot, aged 6 months.

6. A child and family assessment in May 2018 described the mother, then aged 15, as:

> "an individual, who finds it hard to regulate her own emotions, and can be aggressive and verbally abusive when upset. [She] is seen to be unpredictable and erratic in her behaviour which includes her acting aggressively toward others."

7. In April 2018, the mother and her sister were made the subject of interim care orders and placed in foster care. Later that month it was discovered that the mother was pregnant, and in May 2018 she and her sister moved to live with their grandmother, who was also looking after three young cousins. The mother turned 16 in July 2018, and a week later she gave birth to Z, a baby boy. In October 2018, the mother and her sister became the subject of final care orders.

8. After his birth, Z was made the subject of a child protection plan, and to the PLO process, but care proceedings were never issued.

9. The mother and her boyfriend Mr A, who she had named as Z's father, were assessed in a residential setting for 12 weeks. The assessment began positively but it deteriorated when DNA testing carried out by Mr A's family established that he was not Z's father. Escalating concern was felt about Z's safety and wellbeing arising from the mother's dysregulated behaviour and emotions. Further concerns included her drug use and her ability to meet and prioritise Z's needs. The final assessment report (full names removed) recorded:

> "99. Given these indications of potential, it was with considerable sadness that we observed her functioning and parenting capacity to decrease over the course of this assessment. The trigger for this was the result of the DNA test which showed that in all likelihood Mr A was not Z's biological father. This appeared to represent a profound loss for her in terms of the emotional support which she believed would have been ongoing from Mr A and his family, as well as in terms of how she viewed herself and her situation. Also significant at this time for her is likely to be her unconscious fears about Z's wellbeing, due to her little brother dying of cot death and her possible unsolved feelings about this."

The assessment was terminated and it was recommended that the mother and Z return to live with the mother's grandmother, who would be Z's primary carer with a view to

becoming his special guardian. The mother and Z accordingly moved there on 20 November 2018. Z slept in a cot in the mother's bedroom.

10. The mother's family nurse had visited at least fortnightly since Z's birth. On 11 December 2018, she noted a marked change in the mother's behaviour towards him. She was not engaging with him and she expressed her upset at the behaviour of Mr A and his family. The nurse recorded:

> "I would describe her as strong willed feisty character when I first met her and during the initial visits and early stages, she was doing incredibly well and was acting more mature than her age. Unfortunately, after the result of the DNA test I could see she became less focused on Z and more focused on Mr A and her standards that she had set early on were not being achieved any more."

11. Just a week later, the mother reported finding Z not breathing in his cot. He was taken to hospital. On the next day, life support treatment was withdrawn and he died, aged 5 months.

The investigation of Z's death

12. A post mortem examination was carried out by Dr Cary (Home Office forensic pathologist) and another pathologist. Z appeared to be a well-cared-for, well-nourished baby and there were no external injuries. Further investigations were carried out by Professor Mangham (histopathologist), Professor Luthert (ophthalmologist) and Professor Al-Sarraj (neuropathologist). Their broad consensus was that Z had sustained extensive injuries to the brain, eyes and spinal cord, associated with shaking/impact trauma. There were some limited differences of opinion, arising principally from the fact that no subdural haemorrhages were found.

13. These experts gave evidence to that effect at a Coroner's inquest on 1 September 2022. A police officer gave evidence that there was nothing to denote child cruelty or neglect. The mother made a written statement and gave evidence. She described finding Z unresponsive in his cot. Realising something was seriously wrong, she panicked and ran with him to her grandmother. She denied any rough handling or frustration. She said that she had a lot of questions about what had happened to Z in the ambulance and at hospital. The grandmother gave evidence of the mother bursting into her room with Z. The Coroner recorded that Z had died from a head injury and returned an open verdict.

14. At an earlier stage, the mother was interviewed by the police and in May 2020 she was arrested for murder, but in late 2022 the Crown Prosecution Service determined that no further action would be taken in respect of Z's death.

The proceedings about X

15. In 2024, the mother became pregnant. She attended for antenatal care from July 2024, stating that she did not know the identity of the child's father. The local authority was concerned about her mental health needs not being managed and supported, her use of skunk cannabis during the pregnancy, and her consistently hostile and confrontational

attitude towards professionals trying to help her. After a pre-birth assessment, X was made the subject of a child protection plan in October 2024.

16. X was born in January 2025 and remained in hospital with her mother for several days. Care proceedings were issued. At the first hearing on 23 January 2025, the judge granted an interim care order and approved the local authority's plan for a residential assessment, which began the following day.

17. When issuing its proceedings, the local authority advanced this basis for threshold:

> "1. M misused cannabis during her pregnancy with X, placing her at risk of suffering significant harm;
>
> a. M had urine testing as part of her antenatal care and tested positive for cannabis on the 05.07.2024 and on the 16.12.2024.
>
> 2. M has a diagnosis of Chronic, Complex PTSD with psychotic features, placing X at risk of suffering significant harm in her mother's care;
>
> a. M presents as highly triggered and quick to anger, without any coping mechanisms in place, placing X at risk of suffering significant harm.
>
> b. M declined intervention with the perinatal mental health team during her pregnancy with X placing her at risk at suffering significant harm.
>
> 3. M has an extensive history with social services involvement since 2008. On 18.12.2018 her first child sadly passed away at 5 months old. On 14.05.2020, M was arrested on suspicion of the murder of the child. On 01.09.2022 inquest into the death identified M as the main carer and determined possible shaken baby syndrome but severity of trauma did not meet the criteria. The inquest concluded with an open verdict with cause of death given as a Head injury."

18. The mother applied for a psychiatric assessment, and the children's guardian applied for the instruction of an expert paediatric neurosurgeon (Mr Jayamohan) to review the evidence surrounding Z's death and to advise the court about its causation. At a case management hearing on 10 February 2025, the judge granted the mother's application and adjourned the guardian's application, which was opposed by the mother, for skeleton arguments to be filed. Other directions were given ahead of an issues resolution hearing set for 4 July 2025, including hair strand testing of the mother, a final parenting assessment, and the obtaining of a transcript of the coroner's conclusions.

19. At a hearing on 18 March 2025, the judge acceded to the guardian's request to adjourn the application in relation to Mr Jayamohan until the court had decided whether a fact-finding enquiry would be held and, if so, the scope of such enquiry. A hearing was listed on 12 May 2025 for the court to determine that question. Before that hearing, the

local authority itself issued an application for a paediatric overview of Z's case to be conducted by Dr Rose or Dr Cartlidge.

20. On 11 April 2025, the local authority filed a revised threshold document in these terms:

> "**The Death of Z**
>
> 1. On or around [date] December 2018, X's maternal half-brother, Z (a boy, born [date] 7.2018), at the age of 5 months, sustained the following injuries:
>
> a. Extensive, bilateral, intraneural and perineural haemorrhage involving the cervical spine nerve roots and ganglia.
>
> b. Generalised cerebral and cerebellar swelling (with effacement of the basal cisterns and of cerebrospinal fluid of the foramen magnum).
>
> c. Retinal haemorrhages in the right eye and bilateral optic nerve haemorrhages.
>
> d. Encephalopathy causing primary respiratory arrest and collapse.
>
> e. Ischaemia in the brain and spinal cord as a result.
>
> 2. The cause of Z's injuries (and each of them) was abusive head trauma.
>
> a. The trauma consisted of shaking and/or impact.
>
> b. The level of force required to cause the injuries was in excess of rough handling.
>
> c. Collapse will have occurred shortly after the episode of shaking and/or impact.
>
> 3. Z's injuries (and each of them) were caused by M, in whose care he was at the time.
>
> 4. Z died at 20.51 on [date] December 2018. There was no evidence of any underlying natural disease that caused or contributed to his death.
>
> 5. Z died as a result of the injuries set out at paragraph 1. Accordingly, his death was caused by M.
>
> 6. X is at risk of suffering similar significant physical harm.
>
> **The Mother's Mental Health**

> 7. M has a diagnosis of chronic complex post-traumatic stress disorder with psychotic features.
>
> 8. M declined intervention with the perinatal mental health team during her pregnancy and was not receiving support or treatment for her condition.
>
> 9. As a result of her condition, M is easily triggered and quick to arouse. This places X at risk of suffering significant physical and emotional harm.
>
> **Cannabis**
>
> 10. M has been an habitual user of cannabis for many years.
>
> 11. M was using cannabis around the time of Z's death.
>
> 12. M misused cannabis during her pregnancy with X, testing positive for cannabis ante-natally on 5th July 2024 and 16th December 2024.
>
> 13. X has been exposed to the risk of developmental harm in utero. She is at risk of emotional harm and neglect as a result of the impact of cannabis use on M's capacity to parent and her emotional unavailability at times due to cannabis use."

In argument on behalf of the local authority, Mr Twomey KC accepted that paragraphs 7 onwards are free-standing threshold allegations that do not depend on the findings sought in the previous paragraphs.

21. Dr Cleo Van Velsen, consultant psychiatrist, produced reports on the mother dated 15 April and 8 May 2025. I take this summary of her first report from the guardian's skeleton argument:

> "In her report Dr Van Velsen noted that the mother had experienced chronic difficulties when she was younger from her own mother's drug use, her parents' hostile relationship and poor home conditions. She also noted the mother's past history of significant substance misuse. She noted a pattern of a lack of transparency. Dr Van Velsen observed that in relation to the mother's personality there is a long and consistent description of the mother being emotionally labile, hostile, angry and non-collaborative. Although she expressed the view that the mother does not appear to have significant symptoms of borderline personality disorder, there were some underlying borderline personality difficulties. Although Dr Van Velsen expressed the view that there was some evidence that over time the mother had matured, which process can play a significant part in the improvement of personality difficulties, in her opinion there remained ongoing vulnerabilities in her situation and she was heavily reliant on her family for support."

22. The final parenting assessment report produced by the residential placement is dated 30 April 2025. It noted that X was thriving, that the mother was capable of meeting her practical needs and that there was a strong emotional bond between them. However, family and professional support would be required for at least 12 months and the author was concerned about whether the mother would engage fully and openly as she struggles to work with professionals whose views do not align with hers.

23. Earlier in April, the residential unit had proposed the mother and X would move to the mother's own flat with a strong support package, but concern about the mother's cooperation led to the unit and the local authority instead proposing an 8-week mother and baby foster placement to support a move to the mother's flat. Since X's birth, the mother has expressed frustration about not being allowed to return to her flat with her. By the time of the hearing before the judge, she was allowed to spend unsupervised time in the community with X.

24. It was against this background that the judge made his decision. He heard submissions on 12 May 2025 and handed down a written judgment at a hearing on 28 May 2025.

The judge's decision

25. The judgment runs to 17 pages. After concisely describing the background, the issue and the legal principles, the judge moved to his analysis and conclusion, framed with reference to the authorities. He accordingly asked himself whether it was 'right and necessary' to investigate Z's death having regard to:

    a. The interests of the child (which are relevant but not paramount)

    b. The time that the investigation would take

    c. The likely cost to public funds

    d. The evidential result

    e. The necessity or otherwise of the investigation

    f. The relevance of the potential result of the investigation to the future care plans for the child

    g. The impact of any fact-finding process upon the other parties

    h. The prospects of a fair trial on the issue

    i. The justice of the case.

26. The main contours of the judge's reasoning were these:

    (1) The delay (anticipated to be close to a year because of a range of difficulties in assembling the evidence at this distance in time), the high expense, the exacerbation of stress on the mother, and the consequent harmful effect on X, mean that the grounds for embarking on a fact-finding hearing in this case must be clear and compelling.

(2) Yet some issues are so significant and so requiring of determination that delay, and even significant delay, has to be countenanced. It is difficult to conceive of circumstances in which a question of fact-finding that needed to be answered to ensure a child was safe would not be pursued simply because of delay.

(3) The necessity of the investigation and its relevance to the future care plans for X lay at the heart of the decision.

(4) Other considerations did not ultimately point strongly one way or another.

27. As to necessity and relevance, the judge's reasoning proceeded in this way:

(1) A finding which would or be likely to identify an existing and continuing risk of a significant nature and which, without fact-finding determination, could not be properly brought into the process of risk assessment, would almost always require adjudication by way of fact-finding hearing. The question is whether the care planning for X would in fact or in all likelihood be materially different if the court found that, 7 years previously and whilst herself a child, the mother had acted in a manner which led to the death of Z.

(2) The coronial review showed that the local authority's case in relation to Z's death has a meaningful foundation. However, it is not asserted that the death was the result of cruelty, as opposed to an impulsive loss of control.

(3) If the local authority proved its case (denied by the mother) that there is current evidence of her acting impulsively, the court could act on that basis.

(4) Planning is focused on what causes risk (here impulsivity) and the question of how that might play out should not be limited to past outcomes. Care planning and risk assessment will not materially change as a result of a finding about Z's death. Planning can have regard to risks of loss of control, including by shaking, without a finding being made about Z's death.

(5) In fact, the local authority had formulated a plan for X without the issue being determined.

(6) A plan for adoption could not be based on events that almost certainly occurred in mere seconds, many years ago when the mother was herself a child, as opposed to being based on an up-to-date risk assessment.

28. The judge's decisive reasoning appears in these paragraphs:

> "32) … Of course, a 'shaking' event might be associated with a more malicious act conducted in bad faith which could include actions with a sadistic or similar motivation. Plainly that would fall far outside of the category of impulsive behaviour referenced above. However, it seems clear to me that no party in this case envisages the likely pursuit, let alone finding of such a nature. Given the passage of time and the available information (considered by both Police and Coroner) there really is scant basis for proceeding on the basis that the Court might reach a conclusion of such a character. There are very strong grounds for

holding that any finding in this case would likely recognise the event as being one of temporary loss of control.

33) I recognise it is not for this Court to attempt a mini trial on the evidence available as one does not know what the totality of evidence would be should a fact finding be undertaken. I have proceeded above on the basis that a finding were made but within a likely context of a loss of control in the moment rather than a more sustained or malicious action. I do not consider this to amount to a quasi-mini trial given it appears to reflect entirely the issues of risk before me by those seeking a fact-finding and also gives regards to the real challenges in a detailed assessment beyond that which we already know of events which occurred such a time ago. It is most likely the evidence received will closely follow that which was laid down in subsequent years.

34) I have stepped back and reflected on this point with care. I consider it is likely to rest centrally within any conclusions I reach. I have taken the view that it is better to proceed on the assumption the LA will make out a case of the Mother being responsible for the matters alleged although I have caveated that in the manner set out above. It is only by doing this that I have been able to properly assess the impact the same will have on care planning and risk assessment. In doing so I have struggled to identify why the care planning and risk assessment will materially change as a result of this finding being made. I made this enquiry of the LA. Reference was made as to the potential for an adoptive outcome and I questioned as to how the LA's case, which would not otherwise support adoption, could become one of adoption as a result of a finding as to events occurring almost certainly in mere seconds, many years ago when the Mother was herself a child. For my part I remain unable to conceive of circumstances that would permit this marked change of direction. Whilst the case put before the Court might be for placement I cannot see that this will have been set by any fact-finding.

35) I accept that for those working with the Mother in the future or those planning their ability to work with the Mother in the future, that an answer to questions of this sort are bound to be helpful. By definition such a conclusion will provide a Court based determination on balance of probability. But I do not understand why those working in such a setting would be unable to bring into their care and safety planning the prospect of a range of risk outcomes including that which would be subject to fact-finding. I consider, and agree with those acting for the Mother, that the risk planning is focused on what it is that causes risk (here impulsivity). The question of how that might play out should not be limited only to those outcomes which have been established to have previously arisen as a result. Any such risk

> planning would be short sighted in the extreme. Rather the risk planning would take a broader approach in its evaluation of the best way to manage risk. Put simply it is most unlikely any care planning would be structured simply to guard against a future risk of 'shaking' given any future risk would on balance likely arise in a different way. But risk planning would be able to have regard to risks including loss of control and conduct towards the child, including by 'shaking' without such a finding being made.
>
> 36) An obvious question was as to how the current assessment has been able to conclude (as it has) without this issue being determined. I consider the LA did not have an answer to this and I judge this is the case because there is no answer that sits comfortably with the argument of need for fact-finding. The LA did reference points in the assessment which note the fact the issue had not been determined but the assessment did not restrict its ability to provide a conclusion without the same being determined.
>
> 37) There is significant strength in the point that any assessment of current risk and the planning to mitigate the same is bound to be focused on and assisted by the existing evidence of current care informed by other available expert evidence, available network support and other present matters than it would be by the circumstances pertaining at the time of Z's death. The Mother makes the point that as at 17 April 2025 she was being told the professional view was that she was to return into the community supported by her family. Whilst positioning has changed due to perceived difficulties arising since, it is very hard to reconcile this planning with the continuing need for the Court to undertake fact-finding to inform safety planning and risk assessment. Viewed in this way there is a fundamental question as to the extent to which any fact-finding will in fact take the case forward."

29. In a concluding paragraph, the judge drew together the strands of his analysis. In summary:

(1) The issue does not need to be determined before the local authority can consider safety planning, risk assessment and their final evidence. It is not accepted that in principle the *degree* of risk to X would be greater if a finding of loss of control in relation to Z was made. That would confuse risk with outcome. It is also not accepted that the *nature* of risk is different if such a finding is made. Assessment of the mother does not therefore require the issue to be determined first.

(2) The absence of criminal prosecution does not of itself justify fact-finding by this court.

(3) There is no basis for believing that a failure to make findings now will by necessity cause future difficulties. Professionals are able to assess the fundamentals of risk without a need to determine the actions of the mother 7 years ago. A determination

would not have an impact on the ability to dispose of the case justly. A finding would in all likelihood necessitate a further assessment. There is a danger that this would turn out to be a circular process. The focus of the case should be on the circumstances *now* as opposed to *then.*

(4) The ultimate conclusion against fact-finding is supported by other factors, which standing alone would not have been conclusive themselves. They include delay, cost, impact on the mother, and resultant impact on X. There are residual concerns, arising from the passage of time, about the fairness of any fact-finding hearing.

The appeal

30. The local authority and the guardian appeal with permission granted by Lord Justice Baker on 4 June 2025. We heard the appeal on 8 July. X and her mother moved from the residential unit to a mother and baby foster placement the following day.

31. There are in total eleven grounds of appeal, with overlap and over-pleading. The appellants seek the reversal of the judge's decision. (If the appeal were to succeed, that would surely be the right course, there being no reason for us to remit the question to the Family Court.)

32. The local authority's grounds of appeal are these:

> 1. The judge wrongly concluded that the allegations concerning the injuries to and cause of death of the subject child's sibling should not be subject to a fact-finding process. The court was thereby unable to adjudicate upon the potential dangers to the subject child arising from her mother and prevented itself from making an informed decision on the risk of harm to her.
>
> 2. The judge was wrong to conclude that risk to the subject child could be assumed to be based on impulsivity and no more, without first deciding whether the local authority had proved its allegations against the mother and, if so, undertaking a risk assessment thereafter based on any findings made. This approach to risk was speculative.
>
> 3. The judge erred in refusing to investigate the local authority's allegations concerning the mother's culpability in the death of her first child on the basis of an erroneous conclusion that the mother's impulsivity was the only risk factor. In its evidential references document, the local authority highlighted a number of wider canvas points which, in its submission, were relevant to the context in which that child met his death. The Court attached undue weight to the mother's "impulsivity" and insufficient, if any, weight to the other circumstances surrounding his death, such as the mother's mental health, her cannabis misuse and her wavering commitment to her son in a context where she was prioritising spending time with Mr A and her emotional

focus was largely directed to the problems in the relationship with Mr A.

4. The judge decided that a fact-finding enquiry into Z's death was unnecessary on the incorrect basis that a risk assessment of the mother could be undertaken on the basis of the mother's alleged impulsivity when she had made no concessions as to any such behaviour and none of the alleged recent impulsivity had consequences of a gravity similar to the allegations concerning her care of Z.

5. The judge's approach to the issues of (a) public interest in identifying perpetrators of child abuse and (b) the prospects of a fair trial was flawed.

6. The judge erred in two significant respects when determining not to undertake a fact-finding hearing in relation to the allegations against the mother concerning Z's death:

    a. in placing weight on an indication having been given in a meeting on 17th April 2025 that a transition home might be in contemplation;

    and

    b. in proceeding on the basis that the assessment at the residential unit had "concluded (as it has) without this issue being determined" and that they had not been restricted in their ability to provide a conclusion without the findings being determined."

33. The children's guardian's grounds of appeal are these:

1. The judge was wrong in his conclusion that a finding that the mother had brought about the death of a previous child, Z, by abusive handling would not be material to a current assessment of the risk of harm that she currently presents to a baby or infant child in her care. The relevance of such a finding is all too clear to see. The last time the mother had the unsupervised care of a baby, he tragically died in suspicious circumstances and there is persuasive evidence to suggest that he died as a result of inflicted injury and that she, the mother, was the perpetrator. It is axiomatic that a positive finding to that effect would be bound to be relevant to the question as to whether it would be safe for the subject child X to be placed in the care of her mother, and if so, as to what would be the scope and nature of protective measures necessary to arrange to mitigate any properly identified risk of harm.

2. The decision ignores the binary nature of the standard of proof in care proceedings. The court would either find that the injuries were inflicted by the mother or that they were not. Any risk assessment could only properly take place against the background of a determination of what had actually happened, not what might have happened. The spectrum of risk in a case where the previous child could have been killed by his parent is far too wide to suggest that a viable and effective assessment could take place contemplating all of the forensic possibilities ranging from an unknown and/or innocent cause of death to deliberate infliction of very significant harm.

3. The notion as posited by the judge that any assessment, including a risk assessment, could proceed on the basis of all of the possible posited scenarios is wrong in law. If, for example, the local authority/assessor took the view that it was simply too unsafe for X to be looked after by her mother because of the circumstances of Z's death, that would be an impermissible conclusion absent any finding of fact that the mother had handled him abusively. In those circumstances the mother would be quite entitled to submit that this would be an unfair basis upon which her separation from X could be justified. In short, the issue cannot properly be fudged in the way the learned judge's conclusions require.

4. The judge's conclusions as to the proper way to analyse the risks presented by the facts in this case were wrong. It was wrong for him to find that, in this case, it would be a flawed approach to focus on the outcome of an abusive event, rather than the risk of an abusive event happening in the first place. On one viable scenario, the last time the mother acted impulsively when she had sole care of a child, that child died as a result of abusive handling. The outcome could not have been more serious. A proper analysis must consider not just the magnitude of the risk of harmful event taking place (impulsive momentary loss of control), but also the gravity of the consequences of that event (death of a child). Just to focus on the former without consideration of the latter is illogical and a defective assessment of the risk of harm. Any viable risk assessment would be bound to address both elements.

5. The judge was wrong to have regard to the passage of time (7 years) as being of significance to the assessment of the risk of harm when there was plenty of evidence before the court of the mother's ongoing personality difficulties, impulsive and worrying behaviour which, on the face of it, stand in harmony with the wider canvas of evidence which

> suggests that in 2018 she could well have handled Z abusively so as to cause his death.

34. Oral submissions were more focused, and the appellants' combined case can be summarised in this way.

(1) The binary system of proof means that as a matter of law the court is required to assess risk on the basis of proven facts and not on assumptions or suspicions. The judge was therefore wrong to find that risks to X could be properly assessed without a determination of whether her mother was responsible for Z's death.

(2) It was speculative to assume that, if the mother caused Z's death, she did so impulsively.

(3) The evidence of the mother's impulsivity, contested by her, does not relate to situations comparable in gravity to Z's death. The judge wrongly focused on the magnitude of the risk but did not give due consideration to the gravity of the consequences.

(4) Further, the judge wrongly approached the question of the public interest, the history of care planning, and the fairness of a trial (these matters alone not being said to justify reversal).

The broader legal context

35. At this point it is convenient to situate the appeal in the context of statute and authority.

36. Whether making an interim care order or a final care order, the court must be satisfied that the statutory conditions contained in Part IV of the Children Act 1989 are met.

37. Section 31(2)(a) and (b) provide that a court may only make a care order or supervision order if it is satisfied that the child concerned is suffering, or is likely to suffer, significant harm attributable to unreasonable parental care.

38. Section 31(9) defines 'harm' widely, including 'ill-treatment or the impairment of health'.

39. Section 38 concerns interim care orders. Sub-section (2) provides that a court shall not make such an order unless it is satisfied that there are reasonable grounds for believing that the circumstances are as mentioned in section 31(2).

40. In the present case, there can be no doubt that the conditions for making an interim care order were met on the basis of the threshold as first pleaded. Further, as the judge found that there was a meaningful foundation for the additional allegation about Z's death, it would have been open to the court, applying the lower threshold applicable at the interim stage, to find that there were reasonable grounds for believing that X was at risk of physical harm from her mother arising from the circumstances of Z's death. But as the other evidence was ample to establish the *interim* threshold, that was unnecessary.

41. The appellants of course contend that the judge was obliged to go further before making a *final* order, and to investigate its allegation about Z's death to the civil standard. They rely on the leading decisions in *Re H (Minors) (Sexual Abuse: Standard of Proof)*

[1996] AC 563; [1996] 2 WLR 8 ('*Re H*') and, in particular, *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35; [2009] 1 AC 11 ('*Re B*').

42. In *Re H*, the House of Lords held that in section 31(2)(a) 'likely' is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case: see 585F.

43. In a well-known passage, beginning at 589C and headed 'A conclusion based on facts', Lord Nicholls emphasised that, in marked contrast to the standard of proof required for interlocutory (interim) decisions, conclusions at trials must be based on proven facts.

> "The starting point here is that courts act on evidence. They reach their decisions on the basis of the evidence before them. When considering whether an applicant for a care order has shown that the child is suffering harm or is likely to do so, a court will have regard to the undisputed evidence. The judge will attach to that evidence such weight, or importance, as he considers appropriate. Likewise with regard to disputed evidence which the judge accepts as reliable." 589C
>
> "A decision by a court on the likelihood of a future happening must be founded on a basis of present facts and the inferences fairly to be drawn therefrom." 590A
>
> "The court must have before it facts on which its conclusion can properly be based. That is clearly so in the case of the first limb of section 31(2)(a). There must be facts, proved to the court's satisfaction if disputed, on which the court can properly conclude that the child is suffering harm. An alleged but non-proven fact is not a fact for this purpose. Similarly with the second limb: there must be facts from which the court can properly conclude there is a real possibility that the child will suffer harm in the future. Here also, if the facts are disputed, the court must resolve the dispute so far as necessary to reach a proper conclusion on the issue it has to decide." 590B

44. He went on to make this important point at 591D:

> "Thus far I have concentrated on explaining that a court's conclusion that the threshold conditions are satisfied must have a factual base, and that an alleged but unproved fact, serious or trivial, is not a fact for this purpose. Nor is judicial suspicion, because that is no more than a judicial state of uncertainty about whether or not an event happened. I must now put this into perspective by noting, and emphasising, the width of the range of facts which may be relevant when the court is considering the threshold conditions. The range of facts which may properly be taken into account is infinite. Facts include the history of members of the family, the state of relationships within a family, proposed changes within the membership of a family, parental attitudes, and omissions which might not reasonably have been

> expected, just as much as actual physical assaults. They include threats, and abnormal behaviour by a child, and unsatisfactory parental responses to complaints or allegations. And facts, which are minor or even trivial if considered in isolation, when taken together may suffice to satisfy the court of the likelihood of future harm. The court will attach to all the relevant facts the appropriate weight when coming to an overall conclusion on the crucial issue."

45. *Re H* was a single-issue case, in which the local authority had relied only on suspected but unproven sexual abuse. Lord Nicholls regarded that as an important feature: see 584A. He referred to another single-issue case (*'Re P'*) at 588F:

> "In re P. (A Minor) (Care: Evidence) [1994] 2 F.L.R. 751 is another instance where the same problem arose. There the only matter relied upon was the death of the child's baby brother while in the care of the parents. Douglas Brown J. held that it was for the local authority to prove that the death was non-accidental and that, since they failed to do so, there was no factual basis for a finding of likelihood of harm to the surviving child."

46. In the context of this appeal, *Re B* does no more than affirm what was said in *Re H*. The appellants rely on Lord Hoffmann's summary:

> "2. If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

For the purposes of a case management decision of this kind, this well-known passage risks being reductive. Z's death is not to be treated as not having happened, and there are a number of 'facts' surrounding it that cannot reasonably be doubted. Z suffered a head injury from which he died. There has been no account of an accident and, given his age, there is therefore a strong case that this was an inflicted injury of a shaking/impact character. Given the mother's complete denial, the only 'fact' that could not be relied upon to satisfy the threshold for a final order in X's case without a judicial finding is that the harm was attributable to her under section 31(2)(b).

47. Be that as it may, it was not suggested by anyone in the present case that the court could base its final assessment of risk on anything other than proven fact. At this stage in the proceedings, the judge was addressing the precedent question of whether, as a result of a legal rule or otherwise, the local authority's allegation in respect of Z's death should be investigated.

48. In a number of decisions, of which the most recent is *Re T (Risk Assessment)* [2025] EWCA Civ 93 ('*Re T*'), this court has considered the correct approach to risk assessment, while emphasising that the assessment of actual or likely harm is not the same thing as an all-round welfare assessment. Accordingly, when addressing the welfare checklist factors of harm and parental ability in the present case, the court will ultimately have to address these questions:

    (1) What type of harm has arisen and might arise?

    (2) How likely is it to arise?

    (3) What would be the consequences for X if it did?

    (4) To what extent might the risks be reduced or managed?

49. It is in the context of these statutory provisions and authorities that the appeal arguments must be analysed.

Analysis

50. These case management decisions arise in a wide variety of settings and decision-making judges must tailor their approach to the facts of the individual case. Here, it is accepted by the local authority that the judge asked himself the right question:

> "27. … A finding which would or be likely to identify an existing and continuing risk of a material/significant nature and, which without fact-finding determination, could not be properly brought into the process of risk assessment, will in my assessment almost always require adjudication by way of fact-finding hearing. To fail to do so would mean any care planning would be structured without regard to the risk leaving the subject child at risk of harm. In such a case the care planning would be materially changed from what it would otherwise have been had a finding not been made…
>
> 28. The question for me in this analysis is as to whether the care planning for X would in fact or in all likelihood be materially different by reason of the Court finding that some 7 years previously and whilst herself a child the Mother acted in a manner which led to the death of Z?"

While all relevant factors had to be considered, the fulcrum of the balancing exercise was therefore the question of whether a finding about Z's death would realistically be likely to have a material impact on the orders that might be made about X.

51. As noted above, the appellants' central argument is that, because the court is required to assess risk on the basis of proven facts and not on assumptions or suspicions, the judge was therefore obliged to find that the risks to X could not be properly assessed without a determination of whether the mother was responsible for Z's death. Mr Twomey argued that professionals and the court could not properly answer any of the four *Re T* questions. Shorn of a finding about Z, everyday findings about the mother's volatility, aggression and impulsivity would be 'a world away' from a finding that she

might pose a fatal risk to X. Further, the judge's working hypothesis that Z's death was a result of impulsive behaviour, and not something more sinister, was speculative in the absence of a trial.

52. In my view the judge was entitled to reject those arguments for these reasons.

53. In the first place, case management decisions always require judges to make reasoned projections about whether or not a direction will promote the over-riding objective of enabling the court to deal with the case justly, having regard (in a family case) to child welfare. That calls for a comparison between the likely realistic outcomes at each stage of the proceedings if a direction is or is not made. In making the comparison, the court takes a fair and practical view of the evidence and the inferences that it might bear. That is right and proper, and it does not amount to a mini-trial.

54. Here, the realistic range of fact-finding outcomes were: (a) a finding that the mother was responsible for Z's death, (b) a 'pool finding' that included the mother, and (c) a finding that the allegation was unproven. As to that, the judge sensibly proceeded on basis (a) at this stage in the light of the complexion of the inquest evidence.

55. For the same reason, the judge understandably proceeded on the basis that the evidence suggested an impulsive shaking event, as opposed to sustained or cruel mistreatment. That reading was supported by the medical evidence and was soundly based in the court's general experience. It was also supported by the way the local authority had pleaded its case, as paragraph 2 of the revised threshold document, cited above, asserts that the cause of Z's injuries was abusive head trauma, consisting of shaking and/or impact followed by collapse. If more were needed, it can be found in these exchanges between the judge and Mr Christopher Archer, then the advocate for the local authority:

> "JUDGE WILLANS: … I am not going to engage in a mini trial. I did say at the start that I might be talking in terms of what-ifs. But taking the local authority's case at its highest, I mean, we are all familiar with cases involving these sort of issues without this outcome, and we are all aware of the conclusions courts often come to which is not, necessarily, an intended or malicious action of temporary loss of control and the like. Evidentially, when one looks at something which happened a year ago, the court often reaches that conclusion, unless there is something that stands out, that demonstrates that there was more going on. If you are looking back now at eight years, the prospects shifting from that, at most, is going to be very challenging. I mean it would probably be realistic to take the view that the local authority's case at its highest would be, in a moment of something such as frustration or temporary loss of control, there was a shake. That is probably, it seems likely, as far as one might go, taking at its highest.
>
> MR ARCHER: I would refine that slightly, my Lord, respectfully and say in a moment of madness, given the vulnerabilities which the mother had and which she continues to have."

And shortly after that:

> "JUDGE WILLANS: … That is the nub of it and you say, well, that is impulse, this is impulse and we need to follow that. It is not as simple as that, but you are saying there are impulsive behaviours now, that might be an impulsive response and, therefore, we need to be able to work through the risks that may be associated with further impulsive behaviours if X remains in her mum's care.
>
> MR ARCHER: Yes.
>
> JUDGE WILLANS: Are you not able to care plan with that in mind, in terms of risk assessments? In terms of, you know, safety plans and structures around the child. Is that not possible?
>
> MR ARCHER: My Lord, my submission on that would be the gravity of the risk is relevant to the qualities of a safety plan, the structure of a safety plan. If the mother's impulsive behaviour, as a result of her mental health difficulties, as a result of cannabis misuse, the local authority would aver, behaves impulsively, it is relevant to know whether, in a moment of impulsive behaviour, the sort of harm that is inflicted, is as serious as occasioned to Z. That is the nexus that I suggest there is between these two events. The relevance is there, because of the fact that these are underlying, innate difficulties that the mother has, which are a factor in what happened in December 2018, we say, and what might happen in the future."

In these exchanges, counsel was taking a fair view of the local authority's case, and there is no good explanation for its decision to resile from that approach on appeal.

56. In the light of all of these matters, the judge was on solid ground in testing the matter with reference to a potential finding that Z was injured during a momentary loss of control by his mother. That projection was based on an appropriately high-level view of the evidence, and not on speculation. Indeed, given the overall shape of the evidence, it is the new argument that a trial might elicit something more sinister that is speculative.

57. I also consider that the judge was entitled to reject, for the reasons he gave, the core submission that the risks to X could not be properly assessed without a determination of whether the mother was responsible for Z's death.

58. In the first place, the local authority itself pleaded that the mother's character was in itself the source of a risk of significant physical harm to X. As seen above, its first threshold document pleaded at paragraph 2a that:

> "2a. <u>M presents as highly triggered and quick to anger, without any coping mechanisms in place, placing X at risk of suffering significant harm.</u>"

This clearly refers to, or includes, a risk of significant physical harm.

Paragraph 6 of the revised threshold document, which relates to X, reads:

> "6. X is at risk of suffering similar significant physical harm."

Paragraphs 7-9 of that document, which relate to the mother, read:

> "**The Mother's Mental Health**
>
> 7. M has a diagnosis of chronic complex post-traumatic stress disorder with psychotic features.
>
> 8. M declined intervention with the perinatal mental health team during her pregnancy and was not receiving support or treatment for her condition.
>
> 9. As a result of her condition, M is easily triggered and quick to arouse. This places X at risk of suffering significant physical and emotional harm."

There is then reference to the mother's cannabis use.

59. I have underlined paragraphs 2a and 9 to emphasise that the local authority was advancing a clear, evidence-based case that the mother poses a risk of significant physical harm to X. Paragraph 6 is underlined to show that the only difference is the presence of the word 'similar'. That takes us to the heart of the appeal, which is whether the judge was entitled to say that a finding under paragraph 9 would mean that:

> "… risk planning would be able to have regard to risks including loss of control and conduct towards the child, including by 'shaking'…"

60. It is at this point relevant to note the difference between the threshold conditions under Section 31 and the welfare decision under Sections 1 of the Children Act 1989 and, if an application for a placement order were to be made, the Adoption and Children Act 2002. The threshold is to be judged at the date when protective measures were taken, here January 2025. The welfare determination, of which risk assessment is a vital component, will be made at the end of the proceedings. That therefore allows the court to take account of all of the evidence, including post-threshold evidence about the mother's parenting throughout X's life.

61. Like the judge, I reject the submission that, without a finding about Z's death, risk assessors including the court cannot effectively consider the full range of risks to X. Mr Twomey's submission is that it would be 'out of bounds' to take account of a future risk of maximum gravity without a past finding of maximum harm. I do not accept this. It is common experience that very serious harm may befall a baby at the hands of a carer who is "easily triggered", "quick to anger" and "without coping mechanisms". Risk reduction or management would be further affected if it were additionally shown that there is "a long and consistent description of [the carer] being emotionally labile, hostile, angry and non-collaborative". Of course, characteristics of this kind might or might not lead an assessor or a court to find that the risk to a particular child was

unacceptable. That would depend on the case. The court has, in Lord Nicholls words, to found its decision on the likelihood of a future happening on a basis of present facts and the inferences fairly to be drawn therefrom, with emphasis on the infinite range of the facts which may be relevant. Here, the judge reached a proper conclusion that care planning and risk assessment would not materially change as a result of a finding about Z's death. A valid risk assessment could take place on the basis of the long-standing evidence about the mother's character and an assessment of her current parenting of X. An assessment of what happened to Z in 2018 was not necessary for that purpose.

62. In contrast to this case, there will be situations where proof of the threshold, and thus the very ability to take protective measures. depends on a single issue. For example, where a child has died or been injured in circumstances where no other allegation is made against the parents, as occurred in *Re H* and *Re P*. In other cases, the index event has come 'out of a clear blue sky'. That, as was said by Lord Nicholls in *Re H* and by the judge in this case, is a very different situation, because a finding about the index event is then essential for the assessment of risk. That is not the case here.

63. It is also a misconception to consider that the four *Re T* questions could not be satisfactorily addressed. As I have explained, the judge was entitled to proceed on the basis that the type of harm that might arise includes very serious physical harm. The likelihood of it arising could fairly be judged from an intensive assessment of the mother's long-standing character traits and present parenting. The consequences for X of an assault might be of maximum severity and, contrary to the appellants' submissions, the judge took full account of that. The reduction or management of risk will depend upon an assessment of the mother's insight and her ability to accept support and guidance.

64. The plain fact is that a decision about X's future is likely to be a difficult one, regardless of what may have happened to Z. It was not unreasonable to think that it might be made easier by deferring it and undertaking a lengthy investigation into Z's death. Indeed, the judge accepted that a finding might be "helpful", but he was entitled to conclude that it was not necessary, and that, taken alongside the heavy disadvantages of fact-finding, it should not be attempted.

65. A further point is that progressive care planning for X had been going on without the issue of Z's death being resolved. The judge did not place decisive weight on this, but it is not surprising that he took note of the mismatch between the local authority's submissions and what was happening on the ground. The local authority might have relied on Z's death to justify the removal of X at birth, but it did not think that would be right. Several months later, there had been no plan for separation. If that were to change it would, as the judge said, be the result of current events and not historic ones. As matters stand, it is curious that the local authority proposes that X remains with her mother (with support) for a very lengthy interim period with a view to reviewing that plan following litigation about Z's death. The judge understandably considered that these practical considerations gave some support to his decision in principle.

66. The appellants correctly assert that a conclusion that the mother might have caused Z's death, or that it can be assumed that she did so, would not be a legally valid finding of fact. But they go on, incorrectly, to assert that the judge proceeded on the basis that the risk to X can be assessed on the basis of suspicion about what happened to Z. As I have shown, that is not what the judge decided. He took the local authority's case about Z's

death at its realistic highest in order to consider the likely evidential product of an investigation of that issue for the welfare determination. He did not, as the appellants argue, prevent them from making a legally valid case that a loss of control might have consequences of maximum severity, and he expressly preserved all risks for consideration.

67. There is one further point, which the judge did not labour, but which supported his decision. He remarked that there was "a fundamental question as to the extent to which any fact-finding will in fact take the case forward". The appellants submitted that fact-finding would enable the court to determine how and why Z died. That seems to me to be asking a great deal of the fact-finding process. If the mother assaulted Z, only she knows how and why, and even if she is now capable of explaining, she has spent years in combative denial. The evidence, most notably the detailed record of the coroner's inquest, shows that there is very little prospect of a further fact-finding process, seven or eight years after the event, providing any real illumination on these matters. It would no doubt formally establish that Z died of a shaking injury and the court might very well conclude that the mother was responsible. Anything more than those binary facts is scarcely to be expected, and the effort and expense of the process would almost certainly be hugely disproportionate to the evidential product. The fact that the mother makes no concessions at all about her behaviour at any time was not a matter of significance for the judge's decision. The fact that the process would cost hundreds of thousands of pounds of public money is something that he was certainly entitled to take into account in the balancing exercise.

68. The remaining arguments advanced by the applicants are acknowledged to be peripheral, and I need say no more about them.

69. Since writing this judgment, I have had the advantage of reading the judgment of Lord Justice Baker. He too considers that the central question is whether the judge was bound to conclude that a finding about Z's death might increase the likelihood and potential extent of harm to X (see paragraph 90 below). The judge might indeed have taken that view, but after due consideration he preferred the argument that a probable finding that X was likely to suffer 'significant physical harm' arising from his mother's impulsivity was a sufficient basis for future risk assessment and, if applicable, risk management. Like him, I do not consider that such a finding would tie the court's hands in this case: if that were so, the likelihood and consequences of 'significant physical harm' would have to be allocated notional ceilings. It is of course right that many impulsive individuals do not injure their children, and that where children are impulsively injured, they are more likely to suffer minor injuries than to be severely injured or killed. But the essence of impulsivity is that one cannot be sure. The position can be contrasted with cases of premeditated harm, such as cruelty or sexual abuse, where the predictive force of past behaviour is much stronger, and where the absence of a necessary finding might have serious safeguarding consequences.

Conclusion

70. The judge approached his decision with care and he reached a conclusion that was open to him, balancing the very specific factors that arose. Far from 'fudging' the issue, as the guardian complains, his analysis was clear-sighted and legally coherent. I would dismiss the appeal.

Lord Justice Baker:

71. In *Re F (A Child: Placement Order: Proportionality)* [2018] EWCA Civ 2761; [2019] 1 FLR 779 and *Re K (Children) (Placement Orders)* [2020] EWCA Civ 1503; [2021] 2 FLR 275, Peter Jackson LJ identified four questions to be answered by a court when assessing risk of future harm in care proceedings under Part IV of the Children Act 1989:

(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?

72. In the present case, the local authority asserts that: (1) the type of harm which the child X might suffer includes serious head injury caused by shaking; (2) there is a real possibility that she may suffer such an injury; and (3) the consequences would be that she would suffer permanent brain damage and possibly death. The central issue between the parties is (2), the likelihood of such an injury arising. The local authority's case is that there is a likelihood because the mother inflicted the head injuries that led to the death of her first child, Z, in part as a result of her personal circumstances which have not substantially changed in the intervening seven years. The mother denies causing Z's death. It is her case that there is no likelihood of X sustaining such an injury. In those circumstances, as Mr Wiliam Tyler KC submitted in the course of the appeal hearing, whilst the events in 2018 cannot be ignored entirely, it would be impermissible to proceed on a suspicion or quasi-finding that she was responsible for inflicting Z's injuries as a basis for assessing risk.

73. Peter Jackson LJ has concluded that the court can safely answer question (4) and identify the steps which could be taken to reduce the likelihood of harm arising without a fact-finding hearing into the circumstances of Z's death. I have come to the opposite conclusion.

74. I gratefully adopt my Lord's summary of the facts, the judgment at first instance and the submissions made to this Court.

75. An evaluation of the likelihood or risk of future harm may be required at two stages in care proceedings under the Children Act 1989. The first stage is when the court is determining whether the threshold criteria for making a care or supervision order are satisfied. Under s.31(2):

> "A court may only make a care or supervision order if it is satisfied -
>
> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
>
> (b) that the harm, or likelihood of harm, is attributable to -

> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
>
> (ii) the child's being beyond parental control."

The second stage is when, having concluded that the threshold criteria are satisfied, the court is deciding what order should be made for the children's future care. At that point, the court applies s.1 of the Act. Under s.1(1) the child's welfare is the paramount consideration and the court is required by s.1(4) to have regard to the factors in the "welfare checklist" in s.1(3). The list includes, under paragraph (e), "any harm which he has suffered or is at risk of suffering".

76. In submissions identifying the relevant legal principles to be applied to the assessment of the likelihood or risk of harm, counsel focused on the decision of the House of Lords in *Re B (Care Proceedings: Standard of Proof)* [2008] UKSC 35. In fact, that is the third in a series of four cases in the House of Lords and the Supreme Court in which the relevant principles have been elucidated.

77. The first – and still the leading – case on the meaning of s.31(2) is the decision of the House of Lords in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] 1 AC 563; [1996] 1 FLR 80. In his speech, with which the majority of the House agreed, Lord Nicholls of Birkenhead considered first the meaning of "likely" in the phrase "likely to suffer significant harm". He concluded (at 585F):

> "in section 31(2)(a) likely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case."

78. Under a further heading "A conclusion based on facts", Lord Nicholls continued (at 589C)

> "The starting point here is that courts act on evidence. They reach their decisions on the basis of the evidence before them. When considering whether an applicant for a care order has shown that the child is suffering harm or is likely to do so, a court will have regard to the undisputed evidence. The judge will attach to that evidence such weight, or importance, as he considers appropriate. Likewise with regard to disputed evidence which the judge accepts as reliable. None of that is controversial. But the rejection of a disputed allegation as not proved on the balance of probability leaves scope for the possibility that the non-proven allegation may be true after all. There remains room for the judge to have doubts and suspicions on this score. This is the area of controversy.
>
> In my view these unresolved judicial doubts and suspicions can no more form the basis of a conclusion that the second threshold condition in section 31(2)(a) has been established than they can

> form the basis of a conclusion that the first has been established ….
>
> At trials … the court normally has to resolve disputed issues of relevant fact before it can reach its conclusion on the issue it has to decide. This is a commonplace exercise, carried out daily by courts and tribunals throughout the country. This exercise applies as much where the issue is whether an event may happen in the future as where the issue is whether an event did or did not happen in the past. To decide whether a car was being driven negligently, the court will have to decide what was happening immediately before the accident and how the car was being driven and why. Its findings on these facts form the essential basis for its conclusion on the issue of whether the car was being driven with reasonable care. Likewise, if the issue before the court concerns the possibility of something happening in the future, such as whether the name or get-up under which goods are being sold is likely to deceive future buyers. To decide that issue the court must identify and, when disputed, decide the relevant facts about the way the goods are being sold and to whom and in what circumstances. Then, but only then. can the court reach a conclusion on the crucial issue. A decision by a court on the likelihood of a future happening must be founded on a basis of present facts and the inferences fairly to be drawn therefrom.
>
> The same, familiar approach is applicable when a court is considering whether the threshold conditions in section 31(2)(a) are established. Here, as much as anywhere else, the court's conclusion must be founded on a factual base. The court must have before it facts on which its conclusion can properly be based. That is clearly so in the case of the first limb of section 31(2)(a). There must be facts, proved to the court's satisfaction if disputed, on which the court can properly conclude that the child is suffering harm. An alleged but non-proven fact is not a fact for this purpose. Similarly with the second limb: there must be facts from which the court can properly conclude there is a real possibility that the child will suffer harm in the future. Here also, if the facts are disputed, the court must resolve the dispute so far as necessary to reach a proper conclusion on the issue it has to decide."

79. Lord Nicholls proceeded to identify several other factors which supported this interpretation. These included (at 591C) the fact that, if the contrary were true,

> "this would effectively reverse the burden of proof in an important respect. It would mean that once apparently credible evidence of misconduct has been given, those against whom the allegations are made must disprove them. Otherwise it would be open to a court to hold that, although the misconduct has not been proved, it has not been disproved and there is a real possibility

> that the misconduct did occur. Accordingly there is a real possibility that the child will suffer harm in the future and, hence, the threshold criteria are met. I do not believe Parliament intended that section 31(2) should work in this way."

80. At 591F he added:

> "It is, of course, open to a court to conclude there is a real possibility that the child will suffer harm in the future although harm in the past has not been established. There will be cases where, although the alleged maltreatment itself is not proved, the evidence does establish a combination of profoundly worrying features affecting the care of the child within the family. In such cases it would be open to a court in appropriate circumstances to find that, although not satisfied the child is yet suffering significant harm, on the basis of such facts as are proved there is a likelihood that he will do so in the future."

81. Seven years later, Lord Nicholls restated these principles in *Re O and N (Minors) (Care: Preliminary Hearing)* [2003] UKHL 18; [2004] 1 AC 523; [2003] 1 FLR 1169:

> "15. The first limb of condition (a), the 'significant harm' condition, concerns an existing state of fact: the child 'is suffering' significant harm. In the nature of things this calls for proof, to the requisite standard, of the facts said to constitute significant harm. An unproved allegation that the child has been sexually abused or subjected to non-accidental injuries will not suffice.
>
> 16. The second limb of condition (a) requires the court to evaluate the chance that an event will occur in the future: the child 'is likely to suffer' significant harm. In *re H (minors) (Sexual abuse: standard of proof)*[1996] AC 563 the House considered the matters which, in this context, the court may take into account in assessing whether the child is likely to suffer significant harm. In the context of section 31(2)(a) 'likely' does not mean more probable than not. It means a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case. This is a comparatively low level of risk. By a majority the House held that, for the purpose of satisfying this threshold level of risk in cases (such as alleged sexual abuse) in which there is a dispute over whether the child has indeed suffered past harm, the court may have regard only to harm proved to the requisite standard to have happened. Otherwise the purpose for which the threshold criteria were prescribed by Parliament could be defeated in a case where the only evidence that the child was likely to suffer harm in the future was an unproved allegation that he had suffered harm in the past. It would be extraordinary if, in respect of the self-same non-proven allegations, the self-same insufficient evidence could nonetheless be regarded as a

> sufficient factual basis for satisfying the court there is a real possibility of harm in the future: see [1996] AC 563, 591.
>
> 17. This would not be an acceptable interpretation of section 31(2). This suggests that, given the purpose of the threshold criteria, both limbs of the 'significant harm' condition call for proof of facts. Like the inference that the child is already suffering harm, the inference that the child is likely to suffer significant harm must be founded on one or more proved facts, as distinct from unproved allegations. Therein lies the protection Parliament intends the threshold criteria shall provide against arbitrary intervention by public authorities. This is the principal rationale for what might otherwise seem an unduly rigid approach."

82. In *Re B*, Lord Hoffmann reiterated these principles in the well-known passage in paragraph 2 of his judgment ("the law operates a binary system in which the only values are 0 and 1" etc.) which, as my Lord has observed, is somewhat reductive as a tool for case management. More pertinently for present purposes, Baroness Hale in *Re B* addressed an invitation issued by counsel to depart from *Re H*. Counsel's submission, summarised by Baroness Hale (at paragraph 53), was that the "artificiality of proceeding on the basis that such harm did not happen at all, when there is a real possibility that it did [was] irresponsible and dangerous".

83. Baroness Hale "unhesitatingly declined" the invitation in the following terms (at paragraph 54):

> "The reasons given by Lord Nicholls for adopting the approach which he did in *Re H* remain thoroughly convincing. The threshold is there to protect both the children and their parents from unjustified intervention in their lives. It would provide no protection at all if it could be established on the basis of unsubstantiated suspicions: that is, where a judge cannot say that there is no real possibility that abuse took place, so concludes that there is a real possibility that it did. In other words, the alleged perpetrator would have to prove that it did not. Mr Cobb accepts that it must be proved on the balance of probabilities that a child "is suffering" significant harm. But nevertheless he argues that those same allegations, which could not be proved for that purpose, could be the basis of a finding of likelihood of future harm. If that were so, there would have been no need for the first limb of section 31(2)(a) at all. Parliament must be presumed to have inserted it for a purpose."

84. In one respect, the House of Lords in *Re B* departed from the majority judgment in *Re H* by holding, (in the words of Baroness Hale at paragraph 70) that "the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less", as opposed to a variable standard depending on the seriousness of the allegation proposed by Lord Nicholls. But the principles derived from *Re H* under consideration in the present appeal were fully endorsed.

85. Those principles received a further endorsement from the Supreme Court in *Re S-B (Children)* [2009] UKSC 17; [2010] 1 FLR 1161. Giving the judgment of the court, Baroness Hale, referring to the threshold conditions in s.31(2), said:

> "8. The leading case on the interpretation of these conditions is the decision of the House of Lords in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563. Three propositions were established which have not been questioned since. First, it is not enough that the court suspects that a child may have suffered significant harm or that there was a real possibility that he did. If the case is based on actual harm, the court must be satisfied on the balance of probabilities that the child was actually harmed. Second, if the case is based on the likelihood of future harm, the court must be satisfied on the balance of probabilities that the facts upon which that prediction was based did actually happen. It is not enough that they may have done so or that there was a real possibility that they did. Third, however, if the case is based on the likelihood of future harm, the court does not have to be satisfied that such harm is more likely than not to happen. It is enough that there is "a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case" (per Lord Nicholls of Birkenhead, at p 585F).
>
> 9. Thus the law has drawn a clear distinction between probability as it applies to past facts and probability as it applies to future predictions. Past facts must be proved to have happened on the balance of probabilities, that is, that it is more likely than not that they did happen. Predictions about future facts need only be based upon a degree of likelihood that they will happen which is sufficient to justify preventive action. This will depend upon the nature and gravity of the harm: a lesser degree of likelihood that the child will be killed will justify immediate preventive action than the degree of likelihood that the child will not be sent to school."

86. This last point echoes the observation made by Lord Nicholls in *Re H* at p588 and again in *Re O and N* at paragraph 16. In addressing the question whether there is a real possibility that the child will suffer significant harm in future, the court considers whether the possibility is one which "cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case". The degree of likelihood required to cross the threshold varies depending on the type of harm. There is nothing abnormal in this variation. It reflects how we deal with risk in our everyday lives.

87. The approach mandated by the House of Lords and Supreme Court to the assessment of the likelihood of harm at the threshold stage of care proceedings under s.31(2)(a) of the Act also applies to the assessment of risk at the welfare stage under s.1(3)(e). This was the conclusion reached by this Court six months after the decision in *Re H* in *Re M and R (Child Abuse: Evidence)* [1996] EWCA Civ 1317; [1996] 4 All ER 239. Butler-Sloss LJ, giving the judgment of the Court, said (at 246j to 247d):

> "Section 1(3) requires a court, when considering whether, among other things, to make an order under s 31, to have regard in particular to a number of matters. The subsection then sets out those matters in the welfare checklist. Item (e) of this list is: 'any harm which [the child] has suffered or is at risk of suffering'.
>
> If there is a dispute as to whether the child has suffered or is at risk of suffering harm the task of the judge, when considering whether to make any order whether it be a care or supervision order under s 31 or a s 8 order, must be to resolve that dispute. Unless this is done, it will remain in doubt whether or not the child has suffered harm or is at risk of suffering harm and thus it will remain in doubt whether or not there exist factors which Parliament expressly considered to be of particular importance to be taken into account. The question is how such a dispute is to be resolved.
>
> To our minds there can be only one answer to this question, namely the same answer as that given by the majority in *Re H and R* (above). The court must reach a conclusion based on facts, not on suspicion or mere doubts. If, as in the present case, the court concludes that the evidence is insufficient to prove sexual abuse in the past, and if the fact of sexual abuse in the past is the only basis for asserting a risk of sexual abuse in the future, then it follows that there is nothing (except suspicion or mere doubts) to show a risk of future sexual abuse.
>
> Mr Newton submitted that this is not so. His point was that if there is a real possibility of harm in the past, then it must follow (if nothing is done) that there is a risk of harm in the future. To our minds, however, this proposition contains a non sequitur. The fact that there might have been harm in the past does not establish the risk of harm in the future. The very highest it can be put is that what might possibly have happened in the past means that there may possibly be a risk of the same thing happening in the future. Section 1(3)(e), however, does not deal with what might possibly have happened or what future risk there may possibly be. It speaks in terms of what has happened or what is at risk of happening. Thus what the court must do (when the matter is in issue) is to decide whether the evidence establishes harm or the risk of harm."

88. This approach was endorsed by Lord Nicholls (obiter) in *Re O and N* and then approved by the House of Lords in *Re B*. In the latter case the House was invited to overrule *Re M and R*. At paragraph 54 of her judgment, with which the rest of the House agreed, Baroness Hale, declining the invitation, said:

> "If Parliament had intended that a mere suspicion that a child had suffered harm could form the basis for making a final order, it would have used the same terminology of "reasonable grounds to suspect" or "reasonable grounds to believe" as it uses

> elsewhere in the Act. Instead, as Butler-Sloss LJ pointed out in *In re M and R*, it speaks of what the child *is* suffering or *is likely* to suffer."

89. In my view, an analysis of these principles clearly demonstrates the answer to the issue arising in the present appeal. The local authority asserts that the mother inflicted the injuries that led to Z's death and there is therefore a real possibility that X will suffer significant harm through inflicted injury. The mother denies inflicting Z's fatal injuries and says that there is no real possibility that X will be injured in her care. The issue of whether there is a real possibility that X will suffer inflicted injuries in the mother's care therefore turns principally on the question whether the mother inflicted Z's injuries. A fact-finding hearing into the circumstances of Z's injuries and death is required to determine: (1) the type of harm which X may suffer in her mother's care; and (2) the degree of likelihood that she will suffer that harm, bearing in mind that, if the mother was responsible for Z's injuries, the degree of likelihood required for the threshold to be crossed in X's case will be less, given the "nature and gravity of the feared harm".

90. As Lord Nicholls recognised in *Re H*, even if a court concludes that the harm alleged to have happened in the past did not occur, it may conclude that there is a real possibility that the child will suffer harm in the future although harm in the past has not been established, where the evidence establishes, on a balance of probabilities, what Lord Nicholls described as "a combination of profoundly worrying features affecting the care of the child within the family". In the present case, leaving aside the circumstances of Z's death, there are a number of features of the mother's background, character and current circumstances which are relevant to the question of whether the child X is at risk in her care and her capacity to care for the child. She has a history of significant mental health issues. She has been diagnosed as suffering from chronic complex PTSD with psychotic features. She has smoked skunk cannabis for many years, including during her pregnancy with X. Dr Van Velsen observed that the mother had "a long and consistent description of her being emotionally labile, hostile, angry and non-collaborative". She has shown a confrontational and sometimes hostile attitude to a range of professionals. She has been described by the local authority as "highly triggered" and quick to anger with no adequate coping mechanisms in place. In her own childhood, she experienced neglect and abuse and was exposed to domestic violence. Her brother died at the age of 5 months, the cause of death being sudden infant death syndrome. It may be that, taken together, those features give rise to a likelihood that X will suffer significant harm in her mother's case. But the likelihood would be higher, and the potential harm of much greater significance, if it is established that the mother inflicted the injuries that led to Z's death. Without a finding that the mother inflicted Z's fatal injuries it is extremely unlikely that the court would conclude that there was a real possibility that X may suffer harm of that type. With such a finding, the court may conclude, on the totality of the evidence, that there is a real possibility that X will suffer harm of that type, having regard to the degree of likelihood required to cross the threshold in cases involving harm of that type.

91. At the welfare stage, the court will proceed on the same basis when having regard, as required by s.1(3)(e), to the harm which X is at risk of suffering. Those professionals carrying out assessments to assist the court's decision about the child's future care arrangements – which may include, in addition to the local authority social worker and

children's guardian, an independent social worker and psychologist – will take into account any finding as to the circumstances of Z's death. In the light of that finding, they will scrutinise in careful detail the evidence about the mother's current circumstances. They will interview the mother and assess her level of understanding and insight. They will advise the court as to the nature and extent of any future risk to X and what steps can be taken to alleviate that risk to enable the mother to care for X safely. Without any finding one way or the other as to whether the mother inflicted Z's injuries, the professional advisers will be obliged to disregard it. In my view, any risk assessment carried out in such circumstances would be unfair and dangerous to the child.

92. In this case, the mother's core submission to the judge, as expressed in paragraph 30 of the judgment, was:

> "to acknowledge that a finding of impulsivity by its nature requires risk assessment when considering care of a young child but that the format of the risk assessment and the resultant care planning does not require the clear definition of the outcome or outcomes that might follow from the same."

The judge accepted this submission, saying (at paragraph 35):

> "I do not understand why those working in such a setting would be unable to bring into their care and safety planning the prospect of a range of risk outcomes including that which would be subject to fact-finding. I consider, and agree with those acting for the Mother, that the risk planning is focused on what it is that causes risk (here impulsivity). The question of how that might play out should not be limited only to those outcomes which have been established to have previously arisen as a result. Any such risk planning would be short sighted in the extreme. Rather the risk planning would take a broader approach in its evaluation of the best way to manage risk. Put simply it is most unlikely any care planning would be structured simply to guard against a future risk of 'shaking' given any future risk would on balance likely arise in a different way. But risk planning would be able to have regard to risks including loss of control and conduct towards the child, including by 'shaking' without such a finding being made."

93. The judge's ultimate reasoning on this issue was summarised in paragraph 43 of his judgment:

> "I simply do not accept that in principle the degree of risk to [X] is greater if this finding is made. As I have explained this is to confuse risk with outcome. I also do not agree the nature of the risk is different if this finding is made. Rather this is a risk which falls into a broad category of risks which sit on a spectrum of potential flowing from a finding of impulsive behaviour. The real question is not what may have happened on one occasion and then planning to prevent that but asking what in principle

> could happen and creating a plan to guard against a range of risks."

94. In my view, the judge's analysis is wrong for several reasons.

95. First, he was wrong to accept the submission made on behalf of the mother that the risk assessment and the resultant care planning did not require a clear definition of the outcome or outcomes that might follow. In order to assess risk, it is first necessary to identify the outcome – the type of harm – in issue. A finding of impulsivity on the part of a child's parent does not warrant a risk assessment unless the "range of risk outcomes" of the impulsivity includes the real possibility that the child will suffer significant harm. "Those working in such a setting" would only be entitled to include the risk of serious physical injury and death within the range of outcomes if it was agreed by the parent that such an outcome was a real possibility or after the court had reached that conclusion on the basis of findings as to past events. To include such a possibility within the range of outcomes without agreement or a finding would be manifestly contrary to the principles set out above. The judge's analysis ignores the point emphasised by Butler-Sloss LJ in *Re M and R* and by Baroness Hale in *Re B* that the Act speaks in s.31(2)(a) of significant harm which the child "is likely to suffer" and in s.1(3)(e) of any harm which the child "is at risk of suffering". As Lord Nicholls said in *Re O and N,* "for the purpose of satisfying this threshold level of risk in cases … in which there is a dispute over whether the child has indeed suffered past harm, the court may have regard only to harm proved to the requisite standard to have happened."

96. Secondly, the judge was wrong to conclude that the degree and nature of the risk to X would be no greater if a finding of loss of control in relation to Z was made. As Lord Nicholls explained in *Re L*, a real possibility means "a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case". As Baroness Hale added in *Re B,* "Predictions about future facts need only be based upon a degree of likelihood that they will happen which is sufficient to justify preventive action. This will depend upon the nature and gravity of the harm." A finding that the injuries to Z were inflicted by the mother would plainly be relevant to the degree and nature of the risk to X.

97. Thirdly, the judge was wrong to proceed on the basis that the risk that X would suffer serious physical injury leading to death fell into "a broad category of risks which sit on a spectrum of potential flowing from a finding of impulsive behaviour". If it is the case that the mother inflicted the injuries which led to Z's death, the risk to X would not be adequately covered simply by an agreed finding that the mother has the capacity to act impulsively. Many people act impulsively. The central issue in the assessment of risk in this case is whether the mother's impulsivity may lead her to act violently to the extent of causing the death of a child. A not insignificant number of parents have characteristics identified in this mother – a disturbed childhood with a history of being neglected and abused, significant mental health issues, a history of drug abuse, a confrontational attitude to professionals, and being emotionally labile and quick to anger. Very few of them inflict fatal injuries on a child. The likelihood of someone with those characteristics, who is liable to act impulsively, inflicting fatal injuries on a child through shaking will in all probability be greater if that person has done it before. A finding to that effect will obviously be relevant to the assessment of risk.

98. As Baroness Hale said in *Re B*, "the threshold is there to protect both the children and their parents from unjustified intervention in their lives." But it is also there to protect children from significant harm. The purpose of these proceedings is to devise a plan that will ensure the welfare and safety of the child. In order to devise such a plan, it is necessary to carry out a thorough assessment of the child's needs, the capacity of the mother to meet her needs, the risks to the child if she is placed with the mother, and the measures needed to support the mother to care for X safely and to alleviate the risks. The focus and details of the assessment, and the consequent plan, will be wholly different if there is a finding that the mother inflicted Z's fatal injuries.

99. The judge approached the question of whether there should be a fact-finding hearing by reference to the guidance in the case law, in particular the matters set out by McFarlane J in *Oxfordshire County Council v DP, RS and BS* [2005] EWHC 1593 (Fam); [2005] All ER (D) 91 (Aug), as approved and developed by this Court in *Re H-D-H (Children), Re C (A Child)* [2021] EWCA Civ 1192; [2022] 1 FLR 454. The factors identified in the *Oxfordshire* case are:

> "(a) the interests of the child (which are relevant but not paramount);
>
> (b) the time that the investigation will take;
>
> (c) the likely cost to public funds;
>
> (d) the evidential result;
>
> (e) the necessity or otherwise of the investigation;
>
> (f) the relevance of the potential result of the investigation to the future care plans for the child;
>
> (g) the impact of any fact finding process upon the other parties;
>
> (h) the prospects of a fair trial on the issue;
>
> (i) the justice of the case."

100. As Peter Jackson LJ observed in *Re H-D-H* at paragraph 21:

> "Many of the factors identified in *Oxfordshire* overlap with each other and the weight to be given to them will vary from case to case. Clearly, *the necessity or otherwise of the investigation* will always be a key issue, particularly in current circumstances. Every fact-finding hearing must produce something of importance for the welfare decision."

101. In most cases, the magnetic factors in deciding whether or not to allow a further fact-finding hearing are likely to be the necessity or otherwise of the investigation and the relevance of the potential result of the investigation to the future care plans for the children. If the investigation is unnecessary, and the result of it irrelevant to the future care plans, it would obviously be wrong to hold a fact-finding hearing. The only reason for holding a fact-finding hearing is to facilitate welfare decisions about the child.

Where the investigation and its potential result are of marginal relevance to the future care plans, the arguments for fact-finding hearing may be outweighed by other factors, such as the time that the investigation will take and the likely cost to public funds. But where the potential result of the investigation is of the utmost importance to the future care plans for the child, it is difficult to think of circumstances in which that factor would be outweighed by any of the others.

102. In my view this case falls into that category. There are a number of arguments against holding a fact-finding hearing. They include the delay in making decisions about how X's future welfare needs will be met, the costs that will be incurred, the fact that the passage of seven years since Z's death may impinge on the quality of the evidence, and the impact on the mother, and resultant impact on X. But those factors are outweighed by the importance of securing a sound basis for making the decisions about X's future. I note that, whilst acknowledging the concerns about "the very serious delay in the case, the substantial costs and the profound likely impact on the mother with resultant likely impact on X and the care given to that child", and the "residual concerns as to the fairness of any hearing", the judge reached his conclusion on the basis of his views about the necessity of a fact-finding hearing and the impact the same would likely have on the future planning for the child. He observed that "in the final analysis these are the magnetic features." I agree that they are the magnetic features, but for the reasons set out above I have reached the opposite conclusion about them.

103. I would therefore allow the appeals, set aside paragraph 1 of the judge's case management order, and order that there should be a fact-finding hearing into the circumstances of Z's death before another judge.

Lord Justice Bean:

104. In the course of his carefully reasoned reserved judgment which is the subject of this appeal Judge Willans said at [28] that the question he had to decide was "whether the care planning for X would in fact or in all likelihood be materially different by reason of the court finding that some years previously and whilst herself a child the mother acted in a manner which led to the death of Z?"

105. It was accepted by Mr Twomey KC for the local authority that this was the correct question. The issue was whether the judge's answer to the question was wrong.

106. The important points which emerge from the judge's decision include these:

a) There was no evidence to suggest that the mother had been a cruel or sadistic parent to Z. The allegation was one of baby shaking caused by a momentary loss of control and resulting in fatal brain injuries;

b) That incident occurred 7 years ago, when the mother herself was a child;

c) X was born in January 2025. Care proceedings were issued and an interim care order granted. The baby remained with her mother and at the time of the hearing before the judge there was no current intention of the local authority to separate them. As the judge observed:

> "I questioned as to how the LA's case, which would not otherwise support adoption, could become one of adoption as a result of a finding as to events occurring almost certainly in mere seconds many years ago when the mother was herself a child."

d) The local authority had advanced a basis for threshold which included that:-

> "M has a diagnosis of chronic, complex PTSD with psychotic features placing X at risk of suffering significant harm in her mother's care. M presents as highly triggered and quick to anger, without any coping mechanisms in place, placing X at risk of suffering significant harm."

107. These, among other factors, led the judge to say:-

> "I cannot see that a determination on the balance of probabilities as to what happened [to Z] will have a meaningful impact on being able to dispose of this case justly."

108. Having formed that view, he added that his conclusion was supported by the very serious delay in the case, the substantial costs and the "profound likely impact on the mother with resultant likely impact on X".

109. In *Re H-D-H Children* [2021] EWCA Civ 1192, Peter Jackson LJ, with whom King LJ and Sir Patrick Elias agreed, said at [23]:

> "These are not always easy decisions and the factors typically do not all point the same way. Most decisions will have their downsides. The reasoned case management choice of a judge who approaches the law correctly and takes all relevant factors into account will be upheld on appeal unless it has been shown that something has gone badly wrong with the balancing exercise."

110. This was not an easy decision and there were indeed factors pointing both ways, as shown by the fact that Peter Jackson LJ and Baker LJ have taken different views about the outcome of this appeal. To my mind this is a case where the principle set out in *Re H-D-H* should be applied. The judge approached the law correctly and took all relevant factors into account in the balancing exercise. I do not consider that it has been shown that he was wrong, still less "badly wrong". Accordingly, and for the reasons set out more fully by Peter Jackson LJ, with which I agree, I would dismiss the appeal.
