Neutral Citation Number: [2025] EWCA Civ 1504

Case No: CA-2025-002760

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**
**MRS JUSTICE JUDD**
**FD25P00732**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 November 2025

**Before:**

**LADY JUSTICE KING**
**LORD JUSTICE MOYLAN**
and
**LORD JUSTICE PHILLIPS**

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**Re: R (A Child)**

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**Bridget Dolan KC and Bruno Quintavalle** (instructed by **Irwin Mitchell LLP**) for the **Appellant**
**Claire Watson KC** (instructed by **Bevan Brittan LLP**) for the **Respondent**
**Victoria Butler-Cole KC** (instructed by **Cafcass Legal**) for **Cafcass**

Hearing date: 19 November 2025

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# Approved Judgment

This judgment was handed down remotely at 12.00 noon on 21 November 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 Moylan:**

1. A reporting restrictions order has been made in respect of this case which must be strictly observed.

2. The parents of a child (who, for the purposes of anonymisation, I will give the initial R in this judgment) appeal from the order made by Judd J on 7 November 2025. By her order, the judge declared that R had died on 4 November 2025 and that it would be lawful for all ventilation and other intensive case support to be withdrawn.

3. There are two Grounds of Appeal for which King LJ gave permission to appeal:

   (3) "The court failed to make R a party to proceedings and failed to secure representation for her by CAFCASS. The Court thereby breached her common law right to a fair trial and her Art 6 ECHR Article rights as well as her rights under Article 2 and 8 ECHR"; and

   (4) "The hearing was procedurally unfair in that in proceeding at a time when: R was not a party, the parents were not legally represented (despite the fact that with a short period of additional time Legal Aid would have been available), the parents had had no or no feasible opportunity to read the medical records, understand the legal issues, adduce evidence, or prepare to question witnesses (one of whom had not made a statement), they were unable properly to participate, and the circumstances were such that the urgency did not preclude an adjournment to a date in the week commencing 10 November 2025".

4. The parents were represented at the hearing by Ms Dolan KC and Mr Quintavalle and the Trust was represented by Ms Watson KC. In her order giving permission to appeal, King LJ invited Cafcass to attend this hearing and we are very grateful to them for instructing Ms Butler-Cole KC to appear on their behalf.

5. During the course of the hearing, Ms Watson indicated that the Trust was no longer actively opposing Ground 4. At the conclusion of the hearing, the parties were informed that Ground 3 would be dismissed but that the appeal would be allowed on Ground 4 and the matter remitted for rehearing, with a directions hearing listed for Friday 21 November.

6. This judgment sets out my reasons for agreeing with that decision. I would add that, because the substantive application is being reheard, I only set out a very brief summary of the background and do not, of course, engage with the merits of that application.

*Background*

7. I do not propose to set out the tragic event which led to R being admitted to hospital on 29 October 2025. As Judd J said in her judgment, what has happened "is utterly heartbreaking for R's parents, siblings and wider family".

8. R was first taken to a local hospital where, as set out in the evidence, "clinical examination indicated the severity of the hypoxic brain episode noting her fixed dilated pupils throughout". Further investigations were carried out including a CT scan of the brain and a CT angiogram "which indicated significant brain swelling and early signs of coning". R was then transferred to the hospital where she remains.

9. An AEEG was undertaken and was "isoelectric" meaning that "no electrical activity was seen". An "official" EEG was performed on 31 October 2025. This "was described as featureless and reported as "*The EEG does not show any discernible cortical rhythm consistent with very severe diffuse cerebral dysfunction as seen in HIE".* "HIE" means hypoxic-ischaemic encephalopathy - which is a brain injury".

10. Brain stem tests were undertaken on 4 November 2025. As set out in the relevant Code of Practice, they were performed twice by two doctors on each occasion (one doctor was involved in both with the second doctor being different on each occasion). The doctors concluded on both occasions that the tests demonstrated that there was no brain stem function.

11. The parents were informed of the results of the brain stem tests and were told that the hospital planned to withdraw intensive care support the next day. The parents did not agree to intensive care being withdrawn and referred to seeking or needing legal advice.

12. On 5 November there were further discussions with the parents. They indicated that they had been in contact with lawyers but had not formally appointed anyone.

*Proceedings*

13. The Trust's application for a declaration was made on 6 November. This stated that the application needed to be dealt with "urgently" and proposed dates for the hearing of between 7 and 10 November. A draft case management order was provided with the application. This included a potential provision that R be joined as a party and that a guardian be appointed from the Cafcass High Court Team. An order was made on the papers by Poole J which provided for the service of evidence respectively by the Trust and by the parents and listed the application for a "substantive hearing" at 2.00pm on 7 November. R was not joined as a party but the order invited the attendance of a member of the Cafcass High Court Team at the hearing.

14. There is some dispute as to when documents were served on the parents in hard copy in addition to by email. It is not necessary to address that dispute. The judge's order records that the parents were informed by the Trust in person on 5 November 2025 of the intention to make an application to the court. It is said that, on the morning of 6 November, the parents were informed that the Trust would be seeking an early hearing and that they were provided with a list of solicitors experienced in this field. Documents were sent to the parents by email during the course of 6 November 2025 starting with the application at about 9.30 am and concluding with the Trust's position statement for the hearing and a draft order at about 7.00pm. The other documents comprised a statement from the consultant in charge of R's care and treatment, Dr A, (sent at about 1.00 pm), a bundle of documents (sent at about 2.30 pm) and medical records (sent at about 6.30 pm). The parents say that they were given a large bundle of documents at the hospital at about 6.30 pm on 6 November.

15. The parents were provided with another bundle in the morning of 7 November which included some additional documents from the medical records. The parents attended the hearing remotely from the hospital and the judge gave them some additional time to consider the documents.

16. The judge first considered whether R should be joined as a party and a guardian appointed. She heard submissions from a solicitor from the Cafcass High Court Team, from the parents and from the Trust. It was submitted on behalf of Cafcass that, because the court was not making a best interests decision but was considering the factual issues required to determine the Trust's application, this was not a case in which a guardian would be able to assist the court. The judge accepted these submissions and decided that R should not be joined as a party and a guardian appointed but that, if a declaration was not made as sought by the Trust, the issue could be reconsidered.

17. The judge heard oral evidence from Dr A and from another doctor who had not given a written statement but who had been involved in discussions with the parents. She also heard from the parents who asked Dr A a number of questions. She then gave judgment.

*Judgment and Order*

18. In the light of our decision, I only very briefly summarise the judgment.

19. The judge set out the background medical history and the brief history of the proceedings. She noted, as referred to above, that the parents had been told in the morning of 6 November that the Trust would be seeking an urgent hearing. The order records the details of when the parents were sent documents by email, as referred to above. The parents told the judge that they had not looked at their emails until the previous evening.

20. The judge decided that it was necessary to determine the application at the hearing having regard to the nature of the application and its urgency. She also considered that the parents appeared to be "fully conversant with what the Trust are saying".

21. The judgment sets out that the mother "raised concerns as to whether the brain stem tests were properly carried out" but the judge considered it was "clear from the conversations with doctors and [the parents'] submissions … that the main thrust of their case is that they seek a second opinion from abroad and further testing additional to the tests that have already been done".

22. The judge summarised the legal framework and referred to the updated Code of Practice for the diagnosis and confirmation of death published in January 2025 by the Academy of Medical Royal Colleges.

23. The judge was "satisfied that the brain stem tests were carried out validly and rigorously in accordance with the conditions set out in" the Code of Practice. "The conclusions of both tests were the same and are consistent with all other tests and clinical observations. I cannot see any evidence of human error or flaws in the process followed". The judge was also satisfied that there were "no gaps in the evidence". She, accordingly, decided to make the declaration sought by the Trust.

*Submissions*

24. The case advanced on behalf of the parents in respect of Ground 4 is that the process leading to the determination of the Trust's application at the hearing on 7 November was sufficiently procedurally unfair that the order should be set aside. Ms Dolan

accepted that the application needed to be dealt with expeditiously but submitted that it had proceeded with such speed and in such a manner that the parents were not given a proper opportunity to engage meaningfully in the proceedings prior to their determination by the judge at the hearing on 7 November. It was, she submitted, not so urgent that it could not have been adjourned to the following week.

25. Ms Dolan relied, in particular, on the following. The parents did not have legal representation; they were entitled to non-means and non-merits tested Legal Aid under paragraph 3(2)(h) of The Criminal and Civil Legal Aid (Amendment) Regulations 2023, SI 2023 No. 745 but had not had a real opportunity to obtain legal assistance. They had not been able to file any evidence and were not able effectively to participate in the hearing. As summarised by Ms Dolan, they had had "no feasible opportunity to read the documents, to understand the legal case, to adduce their own evidence or to cross-examine the witnesses".

26. The parents had not applied for an adjournment because they were not aware that this was a possibility. It was submitted, however, that the hearing should have been adjourned because it was procedurally unfair to determine the application on 7 November 2025.

27. Ms Dolan referred to and relied on, in particular, *Re A (Withdrawal of Treatment Legal Representation)* 2022 EWCA Civ 1221, [2023] 1 FLR 713 ("*Re A*").

28. As to Ground 3, Ms Dolan submitted that, as a matter of policy, a child should *always* be joined as a party and represented by a guardian when the proceedings concern an application for a declaration of death. She submitted that the issues and rights involved are such that this is a necessary step to ensure that the issues are properly and fairly determined and that R's rights and interests are properly and fairly protected. She also suggested that there might be a role for a guardian in this case because of the parents' beliefs about death.

29. In her submissions in response, Ms Watson indicated, as referred to above, that the Trust was not actively opposing the appeal on Ground 4. It was recognised that it would have been appropriate for the hearing to be adjourned at least to give the parents an opportunity to obtain legal representation.

30. In respect of Ground 3, Ms Watson submitted that the judge was entitled, and indeed was right, to decide not to join R as a party. There was no procedural error and this decision did not render the hearing unfair. She referred to MacDonald J's observations in *St George's University Hospitals NHS Foundation Trust v Casey & Ors* [2023] EWHC 2244 (Fam) at [57] about the "narrow question" being considered by the court and there being "no best interests decision in respect of which the Official Solicitor can discharge her duties (or, in the case of a child, the Children's Guardian)". In dismissing an application for permission to appeal, the Court of Appeal had upheld MacDonald J's decision that it had not been necessary to join Mr Casey as a party nor to appoint a litigation friend to act for him: *St George's University Hospitals NHS Foundation Trust v Casey & Ors* [2023] EWCA Civ 1092. This, she submitted, applied by analogy with the current proceedings.

31. Ms Butler-Cole KC did not advance submissions on the merits of Ground 4 but pointed to the fact that there is a long-standing clinical consensus in this jurisdiction, which has

been accepted by the courts since *Airedale NHS Trust v Bland* [1993] AC 789, that if a person's brain stem has ceased to function, they have died.

32. In respect of Ground 3, Ms Butler-Cole referred us to a number of provisions in the Family Procedure Rules 2010. She said that the general position taken by Cafcass is that, on the basis of the present caselaw, where the court is determining the factual issue of whether a child has died based on the validity of brain stem testing, there is no reason to join the child as a party and no role for a guardian to undertake. The guardian will have no special expertise in respect of the medical issues being addressed by the court. The medical evidence will be determinative and there will be no best interests decision for the court to take in respect of which a guardian could express an opinion.

33. She added that there might be circumstances in which Cafcass would be willing to act as an advocate to the court but this would need to be considered and justified in the circumstances of the particular case.

*Conclusions*

34. In respect of Ground 4, I propose first to refer to what was said in the judgment of the court, given by Baker LJ, in *Re A*:

> "[29] There are at least two fundamental reasons why procedural fairness is important. The first is that it helps to improve the chances of reaching the right result. In *John v Rees* [1970] Ch 345, at 402, Megarry J noted that there are some who would say that, when the outcome of a case is obvious, why force everybody to go through the tiresome waste of time involved in framing charges against a person and giving them an opportunity to be heard? Megarry J eloquently answered that question in the following way:
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> > "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."
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> [30] This leads to the second reason why fairness is important. The last point made by Megarry J in that passage in *John v Rees* was one also noted by Lord Reed JSC in *Osborn* [*R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115] at paragraphs 68-70. When setting out the values which underlie the concept of procedural fairness, Lord Reed pointed out that the purpose of a fair hearing is not only that it improves the chances of reaching the right decision. Those values also include the avoidance of

> the feelings of resentment which will arise if a person is unable to participate effectively in a decision-making process which affects them. In this way the law seeks to protect the value of human dignity.
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> [31] As Lord Reed put it at paragraph 68:
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> > "… justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken."
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> 32. These principles apply to all litigation, including in the protective jurisdictions in the family courts and the Court of Protection. The fact that the welfare of a child is the paramount consideration in proceedings under the Children Act 1989 and the inherent jurisdiction relating to children, and that any act done, or decision made, under the Mental Capacity Act 2005 for or on behalf of a person who lacks capacity must be done, or made, in his best interests does not obviate the requirement for a procedure which pays due respect to persons whose rights are significantly affected by such decisions. *The specific procedural requirements will, however, be tailored to take into account the nature of the protective jurisdiction and the extent to which such persons are permitted to participate will depend on the specific circumstances of the case*." (emphasis added)

35. What is required to ensure procedural fairness will depend on the circumstances of the specific case. It is also clear that fairness might need to be assessed in the context of the proceedings as a whole rather than simply in respect of one element of the proceedings. However, the question in the present appeal can be phrased as being whether the process leading to the determination of the Trust's application on 7 November 2025 was procedurally fair.

36. In my view, it was not. In reaching this conclusion, I appreciate why the judge considered it appropriate to determine the application at the hearing on 7 November. As I have said, no application was made for an adjournment and she clearly considered that the parents were able to address the issues. However, largely for the reasons advanced on behalf of the parents, I consider that the process leading to the determination of the Trust's application at the hearing on 7 November 2025 was not fair.

37. The parents did not have the opportunity to engage meaningfully in the proceedings either before or at the hearing. Even taking the earlier times from the emails, they did not receive the application until the morning before the hearing. They only received the statement from Dr A, the principal evidence relied on by the Trust, at 1.30 pm on the day before the hearing; they received the bundle for the hearing later that afternoon; and received the Trust's position statement and proposed order at 7.10 pm. Further

documents were provided the next day. It is difficult to see how, in those circumstances, they could have been expected to respond substantively to the Trust's evidence prior to the hearing or to have participated meaningfully in the proceedings. Even with legal representation, this would have been a challenge but, without it, it was, frankly, not achievable. The application was urgent but it was not so urgent that it required determination at the hearing on 7 November. Accordingly, I am satisfied that the process leading to the determination of the Trust's application on 7 November 2025 was not procedurally fair and the order must, therefore, be set aside.

38. As to Ground 3, it is agreed that, in respect of the current proceedings which are made pursuant to the High Court's inherent jurisdiction, there is no rule which requires R to be joined as a party and that the court has a discretion whether to do so. The Family Procedure Rules 2010 apply to "family proceedings" which include "all causes and matters … relating to … (ii) the exercise of the inherent jurisdiction of the High Court in respect of minors": s. 61 of and para. 3(b)(ii) of Schedule 1 to the Senior Courts Act 1981 and s. 75(3)(b) of the Courts Act 2003. The provisions in Part 16 of the FPR 2010 deal with the representation of children. They set out "when the court will make a child a party in family proceedings". Rule 16.2(1) provides:

> "(1) The court may make a child a party to proceedings if it considers it is in the best interests of the child to do so."

If the court does make a child a party then, pursuant to rule 16.4, the court "must appoint a children's guardian for a child who is the subject of proceedings". There are a number of other provisions in Part 16 and PD 16A which deal with when a child should be joined as a party, the appointment of a guardian and the powers and duties of guardians.

39. In my view, the judge was entitled to decide that it was not necessary to join R as a party. As submitted by Ms Butler-Cole, the court was not engaged in a bests interest decision and there was no justification for joining R.

40. I do not accept Ms Dolan's submission that, as a matter of policy, a child should always be joined as a party and represented by a guardian when an application seeks a declaration of death. I agree with Ms Butler-Cole that it is difficult to see why, in accordance with the rules and more generally, it would be appropriate to join a child as a party and to appoint a guardian when the court is not engaged in a best interests decision as in the present case. Contrary to Ms Dolan's submissions, it is not necessary for a child to be joined and for a guardian to be appointed for the court to be able properly and fairly to determine the application and for the relevant rights and interests to be fairly and properly addressed. If the court requires additional assistance then the right route would be to seek such assistance from Cafcass as an advocate to the court although now that parents are entitled to non-merits and non-means tested legal aid, the need for this would seem to be significantly diminished.

**Lord Justice Phillips:**

41. I agreed with the decision referred to in paragraph 5 above for the reasons given by Moylan LJ.

## Lady Justice King:

42. I also agree.