Neutral Citation Number: [2013] EWCA Civ 1227

Case No: B4/2013/1280

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Swansea County Court
Her Honour Judge Mifflin
FN12C00001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2013

Before:

THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE McCOMBE
and
LORD JUSTICE RYDER

- -

In the matter of W (A Child)

Between :

RW	**Appellant**
- and -	
Neath Port Talbot County Borough Council [1]	**Respondent**
-and-	
MH [2]	
-and	
W (A Child) [3]	
(by her Children's Guardian)	
-and-	
CH and SH [4]	
-and-	
AW [5]	

- -
- -

Miss Lorna Meyer QC (instructed by **Cameron Jones Hussell and Howe**) for the **Appellant mother**
Mr Robin Tolson QC with Ms Clare Templeman (instructed by **Neath Port Talbot County Borough Council Legal Department**) for the **First Respondent local authority**
The Second Respondent father and the Fourth Respondent paternal grandparents appeared in person
Mr Charles Geekie QC (instructed by **Llewellyn-Jones**) for the **Third Respondent Child by her Children's Guardian**
The Fifth Respondent maternal grandfather did not appear and was not represented

Hearing date: 18 July 2013

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Approved Judgment

Lord Justice Ryder:

Background:

1. This is a case about a mother, RW, who made serious but false allegations of sexual and physical abuse that she said had been perpetrated upon her by others. In care proceedings in the county court her child, who I shall call W, has been held to be at risk of significant emotional harm. On 25 April 2013 the judge decided to make a care order in respect of W on the basis that she would remain in the care of and living with RW. It is from that order that this appeal is brought by RW. The local authority, Neath Port Talbot County Borough Council, who were the applicants for a care order in respect of the child, refuse to accept the judge's evaluation of risk arising out of the findings of fact. The question for this court is whether the judge was wrong to have made a care order on the basis of a care plan with which she did not agree and in the circumstance that the order was opposed by both the local authority and mother.

2. RW's appeal is supported by the local authority. There is no Respondent's Notice. The appeal is opposed by father, MH, the paternal grandparents, CH and SH, who appear in person, and by the children's guardian. The maternal grandfather, AW, has taken no part in the appeal. I shall limit this court's commentary upon some of the issues in the proceedings because, as will become clear, there remain decisions to be made about W.

3. W was born on 5 December 2011 and is now aged 21 months. The local authority issued an application for a care order on 3 January 2012 and mother and baby were placed in a specialist mother and baby foster care placement on 13 January 2012. Prior to the foster placement, mother and W had lived with W's maternal grandmother. The foster placement broke down in September 2012 but was replaced by a similar arrangement so that mother has never been separated from W. On 25 April 2013 the court made a care order, after which and by agreement, mother and W moved to live in independent accommodation, where they remain.

4. W has not been harmed by anyone. The case has always been about the likelihood of harm to her. The local authority's application was made on the basis that RW had made allegations in September 2007 that she had been sexually abused by her three older brothers and physically abused by her parents. Despite this alleged history, RW was saying that her family posed no risk to her or to W and that she intended to live with one or other of them. The key issue as originally described was the nature and extent of the risk to W presented by various members of the maternal family and the capability of RW to protect W and herself (as W's primary carer) from the same.

5. The local authority's case was that RW's allegations of abuse were probably true, that she had been persuaded to withdraw her allegations and that she was unable to protect her child from the risks presented by her own family. RW's case was that she had fabricated the allegations and that there was no risk. The court invited the local authority to consider what its case would be if the mother's position on the facts was preferred. Their position at that time was that if mother was found to be lying (in her initial allegations) they would not seek to argue that the jurisdictional "threshold" in section 31 of the Children Act 1989 [CA 1989] was satisfied and would not want an order.

6. There followed a 10 day fact finding hearing involving five extended family members who were required to answer the allegations made against them within which consideration was give to the legal question of whether facts existed which were sufficient to satisfy the threshold in section 31. There is a careful and detailed judgment of 4 August 2012 in which the judge concludes that the allegations of sexual and physical abuse made by mother were false. The interveners were discharged from the proceedings. The judge went further than holding that the allegations were not proved. She found as a fact that mother had lied in 2007 and had on occasion repeated and embellished the lies up to the time of W's birth. The findings were conveniently summarised by the judge at the beginning of her welfare judgment in the following terms:

> "the Court found that RW had made up appalling allegations against those closest to her and maintained them over a period of time. Those allegations divided the family and continue to do so. However, the Court went further and found that RW continued to lie about other matters and embellish lies that she had already told. Indeed her need to lie continued even during the evidence she gave to the Court."

7. So far as the threshold was concerned, the local authority's stance remained that they declined to pursue the proceedings because the court had come to the conclusion that the allegations were false. Contrary to authority, as I shall in due course describe, they declined the judge's invitation to pursue the proceedings on an alternative threshold based upon the court's conclusions. As a consequence, the judge adjourned the proceedings and directed a report from Professor Gray, an independent expert in psychology, on the threshold issues "to assist the Court to understand Mother's behaviour". That case management direction was not appealed and the letter of instruction to Professor Gray was agreed by all parties.

8. The judge undertook an evaluation of the interim threshold based upon the findings that she had made and held that:

   i) Mother's tendency to lie was a maladaptive way of dealing with the prevailing circumstances (which were not at that stage identified) at the times she told the untruths;

   ii) If she continued to invent serious allegations or lies about significant issues, that might seriously impact on the child's emotional wellbeing and her ability to deal with the child's needs;

   iii) It was necessary for the question whether the child is at risk of suffering significant emotional harm if cared for by mother to be addressed by expert evidence.

9. That formulation was not appealed and was sufficient to satisfy the threshold for an interim care order in section 38 CA 1989, that is where the court "is satisfied that there are reasonable grounds for believing that circumstances with respect to the child are as mentioned in section 31(2)".

10. The judge was then asked to consider whether mother and child could move from the mother and baby foster placement into independent living. After hearing further evidence and submissions over another three days, the judge gave a judgment on 7 September 2012 declining to hold that the proposed move was in the interests of the child. That judgment was not appealed.

11. The welfare hearing took place over 11 days in January and February 2013. By that time, applications had been made by the paternal grandparents for a residence order, supported by the child's father, and also by the maternal grandfather to be considered as an alternative carer to mother should the court conclude that W could not remain with RW. One of the more significant witnesses at the hearing was Professor Gray. After hearing the oral evidence the paternal grandparents decided not to pursue their application. The children's guardian had hitherto provisionally supported them. The guardian changed her position to accepting that W should not be separated from her mother provided that the local authority shared parental responsibility with mother that is, provided a care order was made.

12. Following receipt of the psychologist's report, the local authority revised its position and submitted a new threshold document describing the risk to which the child was subject as "[W] (i) will come to behave in similar ways; and/or, (ii) will be emotionally and, hence, developmentally harmed by this behaviour […] The effects of mother's behaviour, illness and personality are such that the consequences of it upon [W] cannot be alleviated in ways which would sometimes be available and which do not involve an order under Part IV CA 89 […] The threat of suicide […] is a further risk to [W]". They argued for the continuation of the child's placement with her mother in the community and asked for a supervision order. Mother submitted that the threshold was not satisfied or in the alternative, if it was, that no order or a supervision order was a proportionate response to the threshold. The children's guardian remained of the opinion that a care order was necessary and was unhappy about the content of the local authority's care plan and in particular their rejection of the risk identified by the court.

13. At the welfare hearing Professor Gray gave oral evidence in which she identified a number of continuing factual allegations which, if true, could lead the court to conclude that mother had continued to lie during the proceedings and to Professor Gray herself. The judge was persuaded that the allegations needed to be determined. The local authority disagreed and continues to do so before this court. Before this court they submit:

> "on any reasonable examination they [the factual issues] are of little importance in the context of either any proposed separation of mother and child or a debate as to whether a care or supervision order should be made."

14. The judge explained her case management decision, which was recommended by the guardian and which was not appealed by any party, by reference to the following evidence of Professor Gray, which she accepted:

> "…the lies are a manifestation of the deficits in RW's psychological makeup. RW behaves in a maladaptive way. Professor Gray was of the view that these deficits and how RW

> relates to stressors would give rise to the real possibility or likelihood of [W] suffering emotional harm in the future.
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> […]
>
> Her view was that if the Court found that Mother had continued to lie, then that would have a significant impact on any ongoing risk assessment and would impact appreciably on any professional's ability to manage risk if Mother and [W] were in the community.…
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> […]
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> Professor Gray took the view that the allegations could be made against anybody. They were likely to be made in the context of Mother being challenged which would make risk management very complicated. At one point Professor Gray was suggesting that the risk might in fact be unmanageable.
>
> Additionally Prof. Gray raised concerns that the nature of the lies that Mother had been found by the Court to have told were made with the intention of hurting others, often close to her. A lie therefore had "an aggressive or violent motive" behind it. It is as if she is lashing out against the people about whom she makes false allegations."

15. It is clear from the judgment that the point behind this analysis was that no-one would know whether mother was being truthful or not about significant welfare issues and that the triggers for her behaviour did not relate to any identifiable issue that could be predicted such as, for example, mother's history of significant depressive illness. Furthermore, if the additional allegations were found against mother, they would represent violence and anger against someone with an emotional bond to mother (MH's sister), violence in a public place which mother had not been able or willing to contain and an incident outside the maternal home where the maternal grandparents' presence was not a deterrent.

16. Having regard to the fact that the additional findings of fact are not the subject of the appeal to this court, it is sufficient to summarise them as follows:

    i) *Whether MH was violent to RW at the time of their separation:*

    > The judge decided that it was RW who had reacted violently to the relationship coming to an end and that she "embellished this incident and lied about what she says MH did to her that night". In fact she made a serious allegation of domestic violence against MH which the judge rejected. The judge continued: "It follows therefore that she has lied to Prof. Gray in her clinical interview and maintained that lie to the Court despite knowing that the stakes were high within these proceedings if she was found to have been untruthful…The lies told by the Mother are significant and could only be designed to undermine the Court's view of MH, when the Court considers the issue of contact. This is a

serious finding against RW not only that she has lied historically but that she has chosen to lie to a professional assessing risk and to the Court."

ii) *Whether MH's sister attacked RW at the Neath Fair:*

The judge decided that what had happened "was an unprovoked attack by RW on [MH's sister] in a public place."

iii) *What happened during a second incident between the two women a month later when RW and MH had separated and reconciled:*

The judge decided that "There is no issue that without any warning RW came out of the house and ran at [MH's sister] pulling her by the hair. RW pulled [the sister's] head onto the front of the van". The judge commented about this incident that it showed "that RW is prone to violent outbursts even where there is no immediate build up to the situation. There appears to be little that acts as an external inhibitor. On this occasion, certainly the presence of the Maternal Grandparents did not prevent this incident nor did the fact that this was happening in a public place."

iv) *Whether the paternal grandfather, SH, had made threats to kill RW and her baby, had repeatedly threatened to burn the house down and was a violent man:*

The judge concluded that although there was one incident of inappropriate behaviour by SH when he marched RW off his property, holding her by the arm, he was not the kind of man to have done what was alleged by RW.

v) *Whether RW's behaviour in response to relatively minor safety issues raised by the first foster mother was of significance:*

There is no dispute that RW changed a recording in the foster mother's diary notes immediately before the September 2012 court hearing when the question of placement was to be decided and the judge concluded that thereafter "there is little doubt that RW had made a settled decision not to make any attempt to build bridges". She risked being separated from W if funding for another placement was not approved on the basis that she had deliberately attempted to break the placement and ultimately, although another placement was approved, the judge concluded that "RW was deliberately being defiant with the Foster Mother" and that this "was another attempt by RW to undermine her relationship with professionals, even though she must have understood what the ultimate consequences might be."

17. From the outset of the proceedings the judge acknowledged that mother was doing very well in her care of W, who had thrived. She had met the emotional and physical needs of W when they were in the specialist foster placement and was "undoubtedly able" to deal with her physical care. The children's guardian provided a further snapshot at the conclusion of the welfare hearing when she reported that:

> "[W] is delightful because she has been nurtured in early life and the nurturing was provided by her mother" and

> "[W] has received quality parenting in terms of this mother meeting [W]'s basic needs for water, food, shelter, money, physical safety in that she has secure attachment behaviour, routines, stimulation, love and self worth."

18. The welfare judgment was handed down on 28 March 2013. The judge concluded that "[mother's] difficulties prevent her from adopting a protective role". As to the likelihood of significant harm required by the threshold in section 31 and the risk of harm in section 1(3)(e) CA 1989 she said:

> "RW has deep seated, long standing and complex difficulties in dealing with her emotions which leads to her behaving in ways whereby [W] is at risk of suffering emotional harm. This is not just a case where a Mother has been found lying, even repeatedly. Nor is this a case where the actions of this Mother stem from her age or immaturity. Unless and until RW is in a position to be enabled to deal with her difficulties she will continue to put her daughter at risk of emotional harm. … Neither the love that she has for her daughter nor the bond that she has established can protect the child in the circumstances from the likely consequences of RW's behaviour.
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> […]
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> This court is concerned that [W] may herself develop a maladaptive way of dealing with her emotions as a result of the role model that she will have in her Mother. There is every likelihood that if the Mother continues to behave as she has then [W] will copy her behaviour, which the child will regard as "normal". A further concern is of course that the child's perception or understanding of and relationship with her paternal family might also be undermined given the nature and content of the untruths found to have been told by RW. These lies have continued and (have been) repeated even within RW's evidence to this Court.
>
> The court is satisfied that [W] might be caught up in or at least witness a violent outburst by her Mother. In addition [W] might be put at risk as a result of her Mother using her (emotionally or physically) in her grievances with others. … It is simply not convincing for RW to suggest that she would not expose her daughter to the sort of behaviour that she has adopted in the past, as her relatively recent actions suggest otherwise. This is compounded by RW's lack of insight. Prof. Gray was concerned that RW was not able to understand the impact of her behaviour upon others, she lacked empathy. That was again clear from the way in which RW gave her evidence to the court."

19. The judge relied on Professor's Gray's analysis of the key deficit in mother's parenting capability and in particular her ability to protect as follows:

> "Ultimately mother needs to be brought into a range of "normal" behaviour; she needs to learn to express emotion long before she is at the top of the scale, which is when she lashes out by making false allegations or with violence. This should be done by a process of meaningful support, but only if mother will engage with the process"

20. Finally in her welfare evaluation, while rejecting the risk of suicide, the judge particularised some of mother's capability problems which she decided needed to be addressed from the perspective of W's welfare:

    i) She will continue to struggle with the expression of emotions

    ii) She will continue to avoid and repress dealing with emotional issues

    iii) She does not have an understanding of her own emotions or the emotional reactions of others to her behaviours

    iv) She is not emotionally intelligent

    v) She suppresses her emotion until it erupts into anger by making allegations that are designed to be hurtful to those against whom she is angry, or by expressing anger through violent outbursts

    vi) She may be unable to work with professionals who challenge or do not share her view, without some degree of compulsion which may mean that they become the subject of false allegations

    vii) She may involve W in her lies to the detriment of a healthy relationship between W and her paternal or extended maternal family

    viii) She may not prevent W from being caught up in Mother's violent outbursts against a third party

    ix) She may be willing to use W in order to achieve her aims.

21. The judge identified the key welfare issue as "whether the risk can be managed in the community and on what basis". She described the risk and evaluated the placement options and the order, if any, that was necessary as follows:

> "the risk to the emotional welfare of the child is both substantial and unpredictable and comes from mother's maladaptive behaviours … This has led the court to the conclusion that the impact of mother's behaviour on [W's] welfare could not be managed without the local authority sharing parental responsibility. This would allow the local authority to effectively manage the situation by either exercising parental responsibility for [W] or curtailing mother's exercise of it. This in my judgment is central and fundamental to any plan to protect [W]. "

22. The judge's welfare evaluation adopted the guardian's position as follows:

> "… in this case mother and daughter have a strong bond, which would be difficult to break without inflicting some harm on [W]. The balance is not tipped in favour of such a course".

The judge concluded that:

> "The success or otherwise of [W's] placement with mother (both in terms of remaining with her mother and having all of her needs met) is dependent upon the local authority sharing responsibility with the mother. This will mean putting together a robust plan which sets the boundaries that are required in order to ensure that this mother understands what has to be done. If her attitude continues to be that she will not change who she was even if that meant losing [W], then so be it, she will have to take the consequences."

23. There was a significant disagreement between the local authority and mother on the one hand and the children's guardian and the court on the other as to whether the local authority's proposals within the proceedings as reflected by their section 31A care plan met the risk identified by the court. In summary, the court accepted evidence to the effect that RW would need continuing mental health support and regular sustained social work supervision. The care plan did not identify services which met those needs.

24. The judge decided that W should remain with her mother but that in order to take that less interventionist approach as to placement, the child's welfare required a more interventionist role for the local authority, that is by them sharing parental responsibility with mother. The local authority's stark submission to this court in response to the judge's conclusion is that "The mother does not have to change in order to keep her child". While that is now argued with Mr Tolson's customary skill and diplomacy, the essential problems that the submission masks are twofold: a) the local authority assessment of the risk of harm differed in nature and extent from the judge's own evaluation which was based upon the evidence, and b) the local authority's welfare proposal was necessarily different from the evaluation of the judge because it sought to provide for a different risk.

25. As a consequence of her welfare evaluation and before making the full care order, the judge briefly adjourned the proceedings and asked the local authority to re-consider their care plan. The local authority filed a statement from their Head of Service which rejected the judge's evaluations and indicated that the main thrust of the care plan would not be changed:

> "It appears to me from my reading of the judgment and understanding of the local authority's position that the key difference is that the social work professionals regard the mother as a very able committed warm mother. Transition to the community is not seen as carrying significant risk … the local authority believes there are no short-term risks in the move from the mother and baby placement."

26. Further argument ensued with the filing of skeleton arguments relating to the question of the content of the care plan and its management once an order was made. On 25 April 2013 the adjourned final hearing concluded with the making of a care order and an invitation to the local authority contained in a recital to the order to re-consider the resources and/or services to be allocated to the case.

27. The local authority acknowledge the stark difference of opinion that led them to a different conclusion from that of the judge. They also acknowledge that the judge had twice invited them to re-consider their position and they had twice declined. Lest it be thought that they are unprincipled in their stance, which in terms of the genuineness of their professional social care opinion they are not, they proffer an olive branch to this court that they will take away this court's conclusions about whether the judge's evaluation of risk was right or wrong and reflect upon the same. That said, it should not be the expectation of local authorities that a disagreement with a judge about the nature and extent of the judge's evaluation of risk should come to the Court of Appeal in all but the small minority of cases where the judge's evaluation is wrong. There must be a solution to even serious disagreements having regard to the fact that it is the function of the judge to make a decision upon the application that is made. Necessarily, in a contested case, that involves someone disagreeing with the judge.

The grounds of appeal:

28. The grounds of appeal have been skilfully and attractively developed and responded to by leading counsel for all represented parties to whom the court is very grateful. As submitted by Miss Meyer QC for mother, they are that:

    i) The judge was wrong in her evaluation of risk and/or mother's capability to care for the child (by protecting against that risk) in her decision that it was necessary to make a care order;

    ii) The judge was wrong in the exercise of her value judgment / discretion by giving too much weight to the risks and/or too little weight to mother's capability and the protective arrangements that mother and the local authority had agreed;

    iii) The judge's order was a disproportionate interference in the ECHR Art 8 rights of the mother and child and was wrong in the circumstance that a less interventionist order would meet the needs of W and the sharing of parental responsibility failed to address the risk of harm identified;

    iv) The imposition of a care order was an error of law either by the making of the order when the local authority sought a less interventionist order or because the judge's criticisms of the local authority dominated her decision making.

The statutory scheme:

29. This is a case that originates from and was heard at first instance in Wales. As explained by Pill and Munby LJJ in *In the matter of X and Y (Children)* [2012] EWCA Civ 1500 at paragraphs [66], [67], [70] and [72], it is necessary and helpful when dealing with the delegated legislation that applies in Wales to identify both the

delegated legislation and the equivalent English materials. Where appropriate, common principles can be expressed so that they can be applied in a consistent way in both parts of the jurisdiction and intended differences of approach within the competence of the devolved legislature can be identified. We are grateful to the parties for their assistance in identifying a comprehensive body of materials for use by this court.

30. The analysis of this case begins where their Lordships' House finished in *Re S (Minors) (Care Order: Implementation of Care Plan); Re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10; [2002] 1 FLR 815. There has been (and could be) no attempt before this court to re-open the issues of principle decided by them. The purpose of this hearing has been to find practical solutions to the problem that arises when a judge concludes that a care plan is inadequate or wrong but that a care order may be necessary. To do so, it is helpful to recollect the statutory scheme of the 1989 Act and some of the principles which are established in the authorities including *Re S; Re W*.

31. The statutory scheme includes *inter alia* the following division of functions as between local authorities and the courts:

    i) The decision to apply for a care or supervision order under Part IV CA 1989 is that of the local authority (or an authorised person) and not the court;

    ii) Decisions about the conduct of proceedings are exclusively those of the court

    iii) The decision whether to make an order and if so, what order is exclusively that of the court;

    iv) Decisions about the implementation and review of arrangements for looking after a child including *inter alia* the care plan and any full care order that the court may make are governed by subordinate legislation administered by the local authority not the court and decisions about the steps which are reasonably necessary to give effect to a supervision order are matters for the supervisor not the court.

32. Before considering the statutory scheme and the functions of the court and the local authority, it is worthwhile noting that the court's jurisdiction is not entirely at an end when a care order is made. Although the family court retains no supervisory jurisdiction over the local authority's implementation of the order made, there remains the jurisdiction in the family court to make decisions about contact with a child in care under section 34 CA 1989, to consider an application for the discharge of a care order under section 39 and to extend the duration of a supervision order for up to a maximum period of three years under paragraphs 6(3) and (4) of Schedule 3 CA 1989, in appropriate circumstances. The High Court retains a supervisory jurisdiction to restrain unlawful acts and to exercise its supervisory jurisdiction to remedy illegalities either in classic public law terms or for breach of a person's Convention rights, including by injunctive relief.

33. Parliament has provided only one route by which the full public law child care duties, powers and responsibilities of local authorities may be exercised and that is by an

application which has to be made by a local authority or an authorised person under section 31 of the Act which is as follows:

> "s31 Care and supervision orders
>
> (1) On the application of any local authority or authorised person, the court may make an order –
>
> (a) placing the child with respect to whom the application is made in the care of a designated local authority; or
>
> (b) putting him under the supervision of a designated local authority."

34. Parliament has entrusted to the local authority not to the court the role of determining whether or not public law children proceedings in relation to a child are to be issued. The only "authorised person" who may institute proceedings is the NSPCC. If an application were to be made by such an authorised person, the evidence which would be necessary for the court to evaluate the options available for the child would still come from the relevant local authority and that authority would be required to file the evidence directed by the court regardless of the view it took about the institution of the proceedings.

35. The jurisdictional facts which have to be satisfied before an order can be made are set out in section 31(2):

> "s31(2) A court may only make a care order or supervision order if it is satisfied –
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> (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."

36. Although it is conventional to speak of facts having to be proved on the balance of probabilities by the party who makes the allegation, proceedings under the 1989 Act are quasi-inquisitorial (*quasi*-inquisitorial in the classic sense that the court does not issue the process of its own motion). The judge has to decide whether sufficient facts exist to satisfy the threshold (the jurisdictional facts) whether or not the local authority or any other party agree. Furthermore, the basis upon which the threshold is satisfied is a matter for the judge, not the parties. It is a question of jurisdiction, not just the facts in issue between the parties. To that end, if the judge directs that an issue be settled for determination, then absent an appeal, the issue will be tried whatever any party may think about that. As Pitchford LJ said in *R (CJ) v Cardiff City Council* [2012] 2 All ER:

> "[21] … The nature of the court's inquiry under the 1989 Act was inquisitorial. To speak in terms of a *burden* of establishing precedent or jurisdictional fact was inappropriate.
>
> [22] … I am persuaded that the nature of the inquiry in which the court is engaged is itself a strong reason for departure from the common law rule which applies a burden to one or other of the parties. I gratefully adopt my Lord's analysis that the High Court is exercising its supervisory jurisdiction and in so doing is applying the rule of law. Neither party is required to prove the precedent fact. The court, in its inquisitorial role, must ask whether the precedent fact existed on a balance of probability."

37. The various emergency protections provided by the 1989 Act all lead eventually to the need for an application for a care or supervision order if the child is to be the subject of one of these orders. The power in a court to make a care or supervision order of its own motion, for example in wardship proceedings using section 7 of the Family Law Reform Act 1969, has been abolished.

38. The only vestige of the powers formerly exercised by the High Court to make care orders of its own motion is a power in a family court to make an interim care order where a court directs the appropriate authority to undertake an investigation into a child's circumstances under section 37 of the Act. That power is contained in section 38(1):

> "s38 Interim orders
>
> (1) Where –
>
> (a) […]; or
>
> (b) The court gives a direction under section 37(1).
>
> the court may make an interim care order or interim supervision order with respect to the child concerned.
>
> (2) A court shall not make an interim care order or interim supervision order under this section unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2)"

39. Sections 37(2) and (3) impose obligations upon the local authority that is directed to undertake a section 37 investigation into the child's circumstances to consider whether they should *inter alia* apply for a care or supervision order and give reasons to the court for their decision. The authority cannot be required to apply for a care or supervision order by the court (see, for example, *Re M (Intractable Contact Dispute: Interim Care Order)* [2003] EWHC 1024 (Fam) per Wall J at [123]). Furthermore, although a court has jurisdiction to make more than one section 37 direction in the proceedings or to extend an existing direction on the basis of which a further interim care order can be made, once the purpose of the section 37 direction is properly discharged, that is the local authority has discharged its duty, there is a jurisdictional

line beyond which the court may not go in deploying the power to make further interim care orders: *Re K (Children)* [2012] EWCA Civ 1549 per McFarlane LJ at [27] to [33] and [45].

40. Once an application is made, however, it cannot be discontinued by the local authority. Rule 29.4(2) Family Procedure Rules 2010 (FPR 2010) requires the permission of the court before an application may be withdrawn. Such an application is 'a question with respect to the upbringing of a child' and accordingly the welfare test in s 1(1) of the Act applies whenever permission is asked (see, for example: *Redbridge London Borough Council v B and C and A* [2011] EWHC 517 (Fam); [2011] 2 FLR 117 per Hedley J and *WSCC v M, F, W, Y and Z* [2010] EWHC 1914 (Fam); [2011] 1 FLR 188 per Hedley J). Strictly, as explained by Waite LJ in *London Borough of Southwark v B* [1993] 2 FLR 559 at 572, such an application *may* not represent an occasion when the court is 'considering whether to make, vary or discharge an order under Part IV' of the Act for the purposes of section 1(4)(b) so that the welfare checklist may not apply. It may or may not do so and given the function of the checklist as a non-exclusive *aide memoire*, the consequence of analysing welfare by reference to it is hardly likely to change the end result. The question upon such an application is whether the proposed withdrawal will promote or conflict with the welfare of the child. The discretion is in the court, that is it is not for the local authority to refuse to pursue an application or pre-empt the outcome, for example, by declining to present the evidence: see for example, *R v Birmingham Juvenile Court ex parte G and Ors (Minors) and ex parte R (A Minor)* [1990] 2 QB 573; [1989] 2 FLR 454.

41. A reported example of the court declining to grant permission where a local authority were submitting that a voluntary agreement would be sufficient to protect a child against risk can be found in *Re N (Leave to Withdraw Care Proceedings)* [2000] 1 FLR 134 per Bracewell J.

42. A more full reading of *Ex parte G and ex parte R* is instructive in an analysis of the catalogue of problems encountered in these proceedings. The two cases reported together involved appeals from the decision of Sir Stephen Brown P quashing the decisions of the juvenile court to dismiss proceedings under the Children and Young Persons Act 1969 without hearing evidence and in the face of opposition to that course from the children's guardian in each case. The local authority decided to call no evidence once the juvenile court had declined to allow them to withdraw the proceedings and the guardian's submission on the merits was that voluntary supervision of the parent by the local authority or what would now be called partnership working would not safeguard the interests of the children.

43. The issue of law centred on whether the proceedings were adversarial, thereby arguably fixing the court with any evidential decision that the local authority might make. This court upheld in strong terms the decision of the President that the proceedings were an objective inquiry involving a judicial discretion once the proceedings had been instituted. Although the statutory code and the rules are different as to their detail from those involved in this case, the proceedings were all governed by the paramountcy of welfare and it is the implication of that principle which gives rise to some interesting similarities.

44. In *Ex p G; ex p R* at 589C Purchas LJ held that:

> "in a case where the welfare of children is involved to prevent the admission of evidence tending directly to those very issues which has (sic) been prepared by order of the court itself because of a rigid adherence to statutory procedural provisions is not only an affront to common sense but a denial of justice."

He continued, citing from an earlier decision of Ackner LJ in *R v Wandsworth West Juvenile Court, Ex parte S* [1984] FLR 713 at 717 in respect of the obligation to present all relevant available evidence fairly, that is to lead and where appropriate cross examine evidence touching on the issues before the court as decided by the court, as follows:

> "I would have anticipated that … the magistrates would have been provided, as they should be, with all available material relevant to the interests of the child so as to ensure that they reached a just determination."

45. In the same case at 597F , Russell LJ cited the judgment of Lord Widgery CJ in *Humberside County Council v R* [1977] 1 WLR 1251 at 1255 where the Lord Chief Justice described care proceedings as being "essentially non-adversary, non-party proceedings" in the sense that they are an "objective inquiry" by the court not a contest between parties. Dillon LJ at 594A emphasised the judicial function. The court is not bound to give effect to the local authority's position or decisions once proceedings are instituted. If it were, that would be a mere administrative function rather than a judicial function. These propositions are as valid now as they were in the last century. Although it is conventional to draw a line under the jurisprudence of this court prior to the enactment of the Children Act 1989, on occasion it is possible to identify enduring principles of general application. The implications of the paramountcy of welfare, where that is the overriding test to apply to a decision in question, have if anything been strengthened since the Act's commencement.

46. Returning then to the scheme of the 1989 Act, by section 1(3)(g) CA 1989, the court is required to have regard to the range of powers available to it under the Act and must make such order as it determines is in the interest of the child at the end of the proceedings. By section 1(5) an order has to be better for the child than no order before it can be made. The scheme of the Act is that the court should begin with a preference for the less interventionist rather than the more interventionist approach. Provided procedural safeguards are maintained, for example those contained in the FPR 2010 and the associated Practice Directions of the court, it is possible to make private law orders to persons who are not parties, for example a special guardianship or residence order in respect of a child to a relative or friend and also to combine the same with public law orders, for example a residence order to a relative or friend and a care or supervision order to a local authority. Specifically, sections 31(5)(a) and (b) CA 1989 permit a court to make a care order where the local authority has limited its application to a supervision order or vice-versa. The flexibility vested in the court by Parliament is important, it reflects the control that exists in the court once proceedings are instituted and until full orders are made and the obligation upon the court to decide what is proportionate.

47. The difference between the duties imposed upon and the powers available to the local authority under the different orders is of more than academic interest, including on the facts of this case. The effect of a care order is set out in section 33:

> "s33 Effect of care order
>
> (1) Where a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force.
>
> (2) […]
>
> (3) Where a care order is in force with respect to a child, the local authority designated by the order shall-
>
> (a) Have parental responsibility for the child; and
>
> (b) Have the power (subject to the following provisions of this section) to determine the extent to which-
>
> (i) a parent, guardian or special guardian of the child; or
>
> (ii) a person who by virtue of section 4A has parental responsibility for the child,
>
> may meet his parental responsibility for him.
>
> (4) The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.
>
> […] "

48. That brings with it a range of other duties relating to "looked after children" including the general duties described in section 22 of the 1989 Act *inter alia* to safeguard and promote the child's welfare, promote the child's educational achievement and make use of services available for children cared for by their own parents and the specific duties imposed by and powers vested in local authorities by Part II of Schedule 2 of the Act (and the Regulations made in accordance with that Part) which are concerned with local authority support for looked after children which by section 22(1) of the Act includes children in their care. In addition, there are significant duties imposed on local authorities by the provisions of the Children (Leaving Care) Act 2000 as implemented *inter alia* by sections 23A to 23F CA 1989 (with some differences as to detail between England and Wales). A care order that is not an interim order will last until the child reaches the age of 18 years unless it is brought to an end, for example, by a successful application to discharge the order made under section 39 CA 1989.

49. The effect of a supervision order made under section 31(1)(b) CA 1989 is set out in section 35:

> "s35 Supervision orders
>
> (1) While a supervision order is in force it shall be the duty of the supervisor-
>
> (a) to advise, assist and befriend the supervised child;
>
> (b) to take such steps as are reasonably necessary to give effect to the order; and
>
> (c) where-
>
> (i) the order is not wholly complied with; or
>
> (ii) the supervisor considers that the order may no longer be necessary,
>
> to consider whether or not to apply to the court for its variation or discharge.
>
> (2) Parts I and II of Schedule 3 make further provision with respect to supervision orders."

50. Schedule 3 gives very limited powers to a court to impose requirements (for example on the person with parental responsibility or with whom the child is living but only if that person consents) and grants powers to supervisors to give directions to the supervised child. A supervision order does not confer parental responsibility on a local authority. Paragraph 11(1) of Schedule 3 confers a power in the Secretary of State to make regulations relating to the exercise by a local authority of their functions under a supervision order but these have never been made. Paragraph 6 of Part II of Schedule 3 provides that a supervision order shall cease to have effect after one year unless an application is made to extend the order up to the end of a maximum period of three years.

51. Children who are the subject of supervision orders are not looked after children (unless they are for some reason provided with accommodation by the local authority under section 22(1)(b) CA 1989). They do not benefit from the duties imposed on local authorities by section 22 or Part II of Schedule 2 of the Act. The regulatory scheme for care planning, placement and review does not apply to them. In the absence of supervision order regulations, there is no equivalent regulatory safety net for the exercise of the local authority functions in relation to them including those exercised by "Independent Reviewing Officers" (IROs). By section 35(1)(b) CA 1989 the duty that is imposed upon the supervisor is "to take such steps as are reasonably necessary to give effect to the order".

52. The general and specific duties which apply to children who are the subject of supervision orders are those which also apply to "children in need" by reason of the broad definition of the circumstances in which "a child should be taken to be in need" to be found in section 17(10) CA 1989. They are contained in section 17 and Part I of Schedule 2 of the Act. They do not encompass the general and specific duties set out in section 22 and Part II of Schedule 2 which are owed to the individual child. The section 17 general duty is a framework duty owed to children in need in the local

authority's area that does not result in a mandatory duty to meet the assessed needs of every individual child (see *R (G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208 and *R (G) v Southwark London Borough Council* [2009] UKHL 26, [2009] 1 WLR 1259 at [23]). That said, as Hale J (as she then was) remarked in *Re O (Care or Supervision Order)* [1996] 2 FLR 755 at 759:

> "Parliament provided a duty in local authorities to take reasonable steps through the provision of services under Part III of the Act to prevent children within their area suffering ill-treatment or neglect. That is in para 4 of Sch 2 to the 1989 Act. It also provided a duty to take reasonable steps designed to reduce the need to bring proceedings for care or supervision orders with respect to children within their area, and also to reduce the need to bring any family or other proceedings with respect to such children which might lead to them being placed in the authority's care. That is in para 7 of that Schedule. Thus local authorities have considerable duties to provide services to prevent children coming to harm, and it was parliament's intention that those services should be offered."

53. In contrast, the arrangements for looked after children including children who are the subject of care orders are set out in regulations. In England the relevant regulations have been consolidated since 1 April 2011 in The Care Planning, Placement and Case Review (England) Regulations 2010 (the 2010 Regulations). In Wales they have not. This court was informed that consideration is being given by Cynulliad Cenedlaethol Cymru (the National Assembly for Wales) to consolidation, codification and regulation in its deliberations upon the Social Services and Well Being (Wales) Bill. Unless and until that happens, there are three component regulations in Wales, namely: the Placement of Children with Parents etc Regulations 1991, the Placement of Children (Wales) Regulations 2007 (the 2007 Placement Regulations) and the Review of Children's Cases (Wales) Regulations 2007 (the 2007 Review Regulations).

54. In England, the content of the care plan is prescribed by regulation 5 and review of the plan is prescribed by regulation 6 and Part 6 of the 2010 Regulations. It is important to note that responsibility for any change in the plan is that of the local authority alone. By regulation 6(1), if the local authority are of the opinion that a change to the plan is required, they must revise the plan or prepare a new plan. By regulations 6(2) and 32(2) and save as otherwise provided for in the regulations, the local authority must not make any significant change to the care plan unless the proposed change has first been considered at a review of the looked after child's case which by regulation 36 is normally chaired by the IRO.

55. In Wales, regulation 4(5) of the 2007 Placement Regulations provides that arrangements for the placement of a child must be recorded in writing. In making those arrangements the authority is to have regard so far as is reasonably practicable to the considerations which are set out in the schedules to the regulations (regulation 5(1)). These provisions pre-date the equivalent English materials and do not descend to the same level of detail, in particular in relation to placement, permanence, identity, various social care issues and the wishes and feelings of relevant persons, but the essential elements are the same. Likewise, the functions of the IRO in Wales are

broadly similar to those in England and are contained in regulation 3 of the 2007 Review Regulations.

56. The IRO has an important independent role in the governance of the local authority's implementation of the care plan and decisions made at looked after children reviews. By regulations 5(d), 6(3)(c) and 37(b) of the 2010 Regulations in England the local authority is required to name the IRO on each child's care plan, give a copy of the care plan to the IRO and inform the IRO of any significant failure to make arrangements to implement decisions made at reviews and of any significant change in circumstances occurring after the review that affects those arrangements. In Wales, and by regulation 3(1) of the 2007 Review Regulations, the local authority is required to appoint an IRO for each case who by regulation 9(1) has to be informed of significant failures to make or carry out arrangements and significant changes of circumstance.

57. It is now a statutory requirement that an IRO be appointed for each looked after child's case (section 25A CA 1989) and by section 25B the functions of an IRO include monitoring the performance by the local authority of their functions in relation to the child's case and referring the child's case to a Welsh family proceedings officer or an officer of Cafcass where the IRO considers it appropriate to do so for the officer to consider whether steps are necessary to safeguard and promote the welfare of the child, for example by instituting proceedings on behalf of the child (see regulation 45 of the 2010 Regulations for the position in respect of England and regulation 3 of the 2007 Review Regulations in respect of Wales). The role of the IRO is critical to the independent scrutiny of a local authority's actions once a care order has been made. A helpful commentary on that can be found in 'IROland: The lessons of history' 18 September 2013, Peter Jackson J, Family Law (forthcoming).

58. By this process there is intended to be scrutiny, due process and change to care plans only where that has been approved within the regulated process. The process includes an obligation on the local authority, so far as is reasonably practicable, to agree the care plan / written arrangements with the child's parents and any other person who has parental responsibility. None of this involves the court. Parliament has provided a scheme for the implementation, review and scrutiny of care plans which is the responsibility of others. A court would only be involved if a new application is issued, for example to discharge the care order or on an application for judicial review or for a remedy under the Human Rights Act 1998.

59. The content of the care plan in England is set out at regulation 5 of and the schedules to the 2010 Regulations. The Schedules contain considerable detail but the principal headings can be summarised as follows:

    a) The long term plan for the child's upbringing (the plan for permanence)

    b) the health plan

    c) the personal education plan

    d) the placement plan unless the child is not provided with accommodation

e) the arrangements for the child's emotional and behavioural development, identity, family and social relationships (i.e. the contact plan), social presentation and self-care skills

f) details of the wishes and feelings of relevant persons

g) the identity of the IRO.

60. The content of the written arrangements in Wales is set out in the Schedules to the 2007 Placement Regulations. For the sake of convenience and because section 31A of the 1989 Act makes no distinction between England and Wales, I propose to refer to the written arrangements in Wales as a care plan. The detail set out in the schedules can be summarised as follows:

a) The authority's long term and immediate arrangements for the child including a permanence plan where appropriate

b) Health care arrangements

c) Education arrangements

d) Contact arrangements

e) The intended duration of the care order and arrangements for when the child is no longer looked after.

The section 31A care plan:

61. The care plan which the court is required to consider before a statutory order is made is a creature of statute. It was not always so. The care plan was not described in the 1989 Act on its commencement. It was a part of the local authority's care planning and statutory review responsibilities. Its content was not set out in the regulations but in guidance issued by the Secretary of State under section 7 of the Local Authority Social Services Act 1970. The last version of that guidance before the enactment of section 31A was LAC(99)29. That circular appears to have been withdrawn and replaced by the material in the regulations to which I have referred. Insofar as it described anything different from that prescribed in the regulations, its contents provided for a contingency plan and (for Wales as well as England) the views and wishes of relevant persons. Information under these headings is still provided to the court by local authorities as a matter of routine and good practice.

62. The role of the court in the scrutiny of the local authority's proposed care plan began in the Family Division as a matter of evidence and good practice. The first reported example was *Manchester City Council v F (Note)* [1993] 1 FLR 419 per Eastham J. The present statutory formulation was inserted into the Act by the Adoption and Children Act 2002 and is as follows:

"s 31A Care orders: care plans

(1) Where an application is made on which a care order might be made with respect to a child, the appropriate local authority must, within such time as

> the court may direct, prepare a plan ("a care plan") for the future care of the child.
>
> (2) While the application is pending, the authority must keep any care plan prepared by them under review and, if they are of the opinion some change is required, revise the plan, or make a new plan, accordingly.
>
> (3) A care plan must give any prescribed information and do so in the prescribed manner.
>
> (4) […]
>
> (5) In section 31(3A) and this section, references to a care order do not include an interim care order.
>
> (6) A plan prepared, or treated as prepared, under this section is referred to in this Act as a "section 31A plan"
>
> […]
>
> S31(3A)
>
> No care order may be made with respect to a child until the court has considered a section 31A plan."

63. It should be noted that a section 31A care plan is designed for the court's use and it may be different from other plans held by authorities in their "looked after children systems". The plan is prepared by the local authority at the direction of the court. The content is prescribed by the regulations and by guidance given to local authorities by the Secretary of State under section 7 LASSA 1970 (see, for example 'The Children Act 1989 Guidance and regulations Volume 2: Care Planning, Placement and Case Review, HM Government, March 2010 and in particular, chapter 2). It is for the authority not the family court to determine the narrative of the content and to decide whether and how to change that content.

64. In proceedings where the local authority are asking for a supervision order but the court might make a care order, the care plan will of necessity relate to an option that is not being proposed by the local authority. If directed by the court to prepare and file a plan, the local authority is obliged to do so even though the plan's contents would not reflect their formal position. A similar circumstance will arise where the local authority are asking for a care order but the court might make a supervision order. A supervision order does not require a care plan for its implementation but in order for the court to know how the local authority would implement such an order and what services would be provided there must be evidence of the same, whether that is put into the body of a care plan or in the authority's written evidence or both.

65. It can readily be seen that it is entirely possible in such circumstances for the care plan to be conditional upon the decision the court makes about an order or to be in the alternative to the authority's primary position. Whether that is the case or not, every

plan has to contain the prescribed content, which includes the permanence and placement strategy the local authority propose if a care order is made and the services identified to meet the risk. A care plan that is defective as to its content can be the object of an order from a family court or the High Court and there is nothing in the statutory formulation that prevents a family court requiring a local authority to specify the services that are practicable under each of the range of orders that the court may be considering and whether that is in the form of detail contained in the plan or a witness statement is simply a matter of form. It may need to be set out in one and explained in the other.

66. The court is required to consider but does not have to approve the section 31A care plan before deciding whether and if so what full order is necessary. A word of caution is necessary because there are provisions in the Children and Families Bill before Parliament which may change the nature and extent of the court's obligations in respect of the care plan and its scrutiny (for example, by limiting scrutiny to the permanence arrangements alone), and if and insofar as those changes are enacted and implemented, this judgment will have to be read subject to the same.

Discussion:

67. Turning then to some of the principles which are established in relation to the exercise of the court's jurisdiction in relation to care planning.

68. As Lord Nicholls said in *Re S; Re W* above:

> "[23] […] First, a cardinal principle of the Children Act 1989 is that when a court makes a care order it becomes the duty of the local authority designated by the order to receive the child into its care while the order remains in force. So long as the care order is in force the authority has parental responsibility for the child. The authority also has power to decide the extent to which a parent of the child may meet his responsibility for him: s 33. An authority might, for instance, not permit parents to change the school of a child living at home. While a care order is in force the court's powers, under its inherent jurisdiction, are expressly excluded: s 100(2)(c) and (d). Further, the court may not make a contact order, a prohibited steps order or a specific issue order: s 9(1).
>
> [24] There are limited exceptions to this principle of non-intervention by the court in the authority's discharge of its parental responsibility for a child in its care under a care order. The court retains jurisdiction to decide disputes about contact with children in care: s 34 of the Children Act 1989. The court may discharge a care order, either on an application made for the purpose under s 39 or as a consequence of making a residence order (ss 9(1) and 91(1)). The High Court's judicial review jurisdiction also remains available.
>
> [25] These exceptions do not detract significantly from the basic principle. The Children Act 1989 delineated the

> boundary of responsibility with complete clarity. Where a care order is made the responsibility for the child's care is with the authority rather than the court. The court retains no supervisory role, monitoring the authority's discharge of its responsibilities. That was the intention of Parliament.
>
> […]
>
> [28] The Children Act 1989, embodying what I have described as a cardinal principle, represents the assessment made by Parliament of the division of responsibility which would best promote the interests of children within the overall care system. The court operates as the gateway into care, and makes the necessary care order when the threshold conditions are satisfied and the court considers a care order would be in the best interests of the child. That is the responsibility of the court. Thereafter the court has no continuing role in relation to the care order. Then it is the responsibility of the local authority to decide how the child should be cared for."

69. Lord Nicholls illustrated the delineation by a reference with approval to the decision of this court in *Re T (A Minor) (Care Order: Conditions)* [1994] 2 FLR 423 that the court has no power to impose conditions upon a care order or add directions with the intention of binding the authority in their implementation of the order, for example that a child should reside at home under an order or that a guardian should have continuing involvement.

70. The opinions in *Re S; Re W*, reinforced a long standing line of authority. In 1981 in *A v Liverpool City Council* [1982] AC 363 the House of Lords reaffirmed a line of jurisprudence that was already more than 20 years old. Lord Wilberforce said (at 373C) that although the High Court's:

> "general inherent power is always available to fill gaps or to supplement the powers of the local authority; what it will not do (except by way of judicial review where appropriate) is to supervise the exercise of discretion within the field committed by statute to the local authority".

Lord Roskill at 377E and 379F said:

> "I am of the clear opinion that, while the prerogative jurisdiction of the court in wardship cases remains, the exercise of that jurisdiction has been and must continue to be treated as circumscribed by the existence of the far-ranging statutory code which entrusts the care and control of deprived children to local authorities. It follows that the undoubted wardship jurisdiction must not be exercised so as to interfere with the day-to-day administration by local authorities of that statutory control,
>
> […]

> The courts must not in the purported exercise of wardship jurisdiction, interfere with those matters which Parliament has decided are within the province of a local authority to whom the care and control of a child has been entrusted pursuant to statutory provisions."

71. It can be stated without question that once a full care or supervision order is made the family courts' functions are at an end unless and until a jurisdiction granted by Parliament or otherwise recognised in law is invoked by an application that is issued. That applies equally to the High Court whether in the Family Division of the High Court in the exercise of its inherent prerogative or Convention jurisdictions or in the Queen's Bench Division of the High Court in the exercise of its public law jurisdiction in the Administrative Court.

72. Within proceedings, however, the local authority in common with all other parties, are bound by the case management decisions of the court. It is the court which decides what the key issues are, that is the matters of disputed fact and opinion that it is necessary to determine in order to make the ultimate decision asked of the court. It is the court which decides the timetable for the child having regard to the welfare of that child and then the implications of that welfare timetable upon each of the interim procedural questions that it is asked to decide. It is the court which decides the timetable for proceedings. The court decides whether there are sufficient facts which if found would satisfy the threshold and provide the jurisdiction to make orders and it is the court which decides what evidence is necessary to answer the key issues and the ultimate decision, whether by directing the local authority or the other parties to provide the same or, if it is necessary, authorising the instruction of an expert on the question.

73. The making of findings of fact and value judgments is not confined to those matters which a local authority seeks to pursue once proceedings have begun. That much is clear, the court can decline to permit the local authority to withdraw proceedings and can impose upon them an order that they did not or no longer seek.

74. The court is not dependent on a willing party. Indeed an unwilling party who flouts the court's orders may find itself in contempt, even if it is an agency of the State such as a local authority. It is necessary to point out for the discussion which follows that the court's orders are to be complied with. They are not preferences, requests or mere indications: they are orders and non-compliance with orders should be expected to and will usually have a consequence.

75. As McFarlane LJ helpfully describes in *Re G (A Child)* [2013] EWCA Civ 965 at [44], if the threshold criteria in section 31 are capable of being satisfied, the court must evaluate "which set of arrangements for the child's future care are to be endorsed by the court's order … by affording paramount consideration to the child's welfare (the welfare evaluation)". This is not the place to set out the detail of the important guidance set out in *Re G* as to the use of the welfare checklist in section 1(3) in conducting the welfare evaluation and the importance of that evaluation being undertaken in the context of the distinct welfare provisions in the Adoption and Children Act 2002 (and in particular section 1(4)(c)) where the issues before the court include the option of adoption (see paragraphs [44] to [51] and [54] to [56]). For the purposes of this judgment, the important principle to recall from the judgment of

McFarlane LJ in *Re G* is his critique of the linear approach and his description of the right approach to welfare evaluation in the court's consideration of whether to make an order and if so, which order:

> "[50] The linear approach, in my view, is not apt where the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare."

76. The purpose of setting out these basic but important propositions is to provide a very practical example as well as the legal basis for the use of the court's power to direct the evidence that it needs to determine the issues it has identified and answer the questions that are before the court. The welfare evaluation and the question what, if any, orders are to be made engages Article 8 of the Convention and the proportionality of that intervention must be justified. One cannot have a clearer description of the imperative than that contained in the Supreme Court's judgments in *In the matter of B (A Child)* [2013] UKSC 33. A court cannot apply the yardstick of proportionality in its consideration of what is necessary without having evidence about the options to which it can apply a welfare evaluation. As McFarlane LJ said in *Re G* at [54]:

> "What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options.".

77. The court has the power to direct evidence for the very reason that *it* must decide the issues as they become apparent from time to time. It is not for the local authority (or any other party) to decide whether it is going to restrict or limit the evidence that it presents. The local authority is in complete charge of the decision to make an application but from that moment on, it becomes subject to the procedural obligations imposed by the rules and practice directions of the court and the orders of the allocated judge. Procedural fairness for parents, for example in relation to disclosure, notice of decisions made and the reasons for the same, and the obligation to put both sides of the case in statements of evidence including evidence favourable to another party that may be inconsistent with or has the effect of undermining the local authority's case, are all aspects of the objective inquiry mandated by the Act. Likewise, the powers and duties of the children's guardian have to be facilitated and respected if the child is to have effective access to justice. The courts directions relating to evidence have to be complied with.

78. As has recently been explained in *Re B-S (Children* [2013] EWCA Civ 1146 at [36], it may be helpful to those who have to perform this task (and the associated task where placement applications are made under the Adoption and Children Act 2002 where the separate and distinct welfare checklist in s 1(4) of that Act is engaged) to adopt the balance sheet approach first used by Thorpe LJ in medical cases (see, for example: *Re A (Male Sterilisation)* [2000] 1FLR 546 at 560). Setting out the positives and negatives or if you prefer, the benefits and detriments of each placement option by reference to the welfare checklist factors is an illuminating and essential intellectual

and forensic exercise that will highlight the evidential conclusions and their implications and how they are to be weighed in the evaluative balance that is the value judgment of the court. It is to be noted that this exercise is different in substance and form from a mechanical recitation of the welfare checklist with stereotypical commentary that is neither case specific nor helpful.

79. This brings me to that part of the welfare evaluation which is the consideration of the section 31A care plan. It is part of the case management process that a judge may require a local authority to give evidence about what services would be provided to support the strategy set out in its care plan, that is to support the placement options available to the court and meet the risk identified by the court. That may include evidence about more than one different possible resolution so the court might know the benefits and detriments of each option and what the local authority would or would not do. That may also include requiring the local authority to set out a care plan to meet a particular formulation or assessment of risk, even if the local authority does not agree with that risk.

80. The courts powers extend to making an order other than that asked for by a local authority. The process of deciding what order is necessary involves a value judgment about the proportionality of the State's intervention to meet the risk against which the court decides there is a need for protection. In that regard, one starts with the court's findings of fact and moves on to the value judgments that are the welfare evaluation. That evaluation is the court's not the local authority's, the guardian's or indeed any other party's. It is the function of the court to come to that value judgment. It is simply not open to a local authority within proceedings to decline to accept the court's evaluation of risk, no matter how much it may disagree with the same. Furthermore, it is that evaluation which will inform the proportionality of the response which the court decides is necessary.

81. It is likewise not open to a local authority within proceedings to decline to identify the practicable services that it is able to provide to make each of the range of placement options and orders work in order to meet the risk identified by the court. That is the purpose of a section 31A care plan. If a local authority were able to decline to join with the court in the partnership endeavour of identifying the best solution to the problem, then there would be no purpose in having a judicial decision on the question raised by the application. It might as well be an administrative act. Parliament has decided that the decision is to be a judicial act and accordingly, the care plan or care plan options filed with the court must be designed to meet the risk identified by the court. It is only by such a process that the court is able to examine the welfare implications of each of the placement options before the court and the benefits and detriments of the same and the proportionality of the orders sought.

82. To do otherwise is to risk a disproportionate intervention into the lives of the child and the parents simply because of the financial or other priorities of different local authorities. To put it into stark terms, it cannot be right that in one local authority a child would be placed with a parent or other kinship carer with significant support to meet the risk whereas in another local authority the same child would be placed with a view to adoption in the implementation of a plan to meet the same risk. The proportionality of placement and order are for the court. The services that are available are for the authority. In this regard, I cannot improve on the words of the court most recently in *Re B-S (Children)* [2013] EWCA Civ at [29]:

> "It is the obligation of the local authority to make the order which the court has determined is proportionate work. The local authority cannot press for a more drastic form of order, least of all press for adoption, because it is unable or unwilling to support a less interventionist form of order. Judges must be alert to the point and must be rigorous in exploring and probing local authority thinking in cases where there is any reason to suspect that resource issues may be affecting the local authority's thinking."

83. The same point applies with equal force to a less interventionist form of order which is argued for by a local authority whether that is because the authority disagrees with the judge or is unable or unwilling to support that which is necessary. Although it may not seem as obvious, an order that fails to meet the risk may set up the child's placement for failure. That is critically important where the plan is to maintain a placement with a parent or member of the extended family by the imposition of an order of the court because, as I shall discuss, it would be a disproportionate interference in the child's family life to make an order then fail to support that which has been decided to be in the interests of the child. For the reasons that follow, this court has concluded that although it is for the local authority to decide *what* services to supply, as a matter of law they must supply sufficient services to prevent the State's intervention becoming disproportionate. The decision about the proportionality of intervention is for the court, the decision about the services which are necessary is for the local authority. Not all services will be practicable and it is for these reasons that the court needs to know what services are practicable in support of each of the placement options and orders that the court may approve and make. A local authority cannot refuse to provide lawful and reasonable services that would be necessary to support the court's decision because it disagrees with the decision or the court's evaluations upon which the decision is based. It should form no part of a local authority's case that the authority declines to consider or ignores the facts and evaluative judgments of the court. While within the process of the court, the State's agencies are bound by its decisions and must act on them.

84. If the local authority's care plan fails to meet the court's expectations, the court may ask the local authority to reconsider. If the plan in its formulation or content is deficient on public law grounds, then once the family court has asked for that to be rectified (perhaps more than once) then the High Court may engage with the issue to decide the challenge. In *Re X; Barnet London Borough Council v Y and X* [2006] 2 FLR 998, Munby J (as he then was) concluded that a care plan was not in a child's best interests and also that the local authority's decision making process had breached the procedural safeguards guaranteed to both the child and her mother under both Articles 6 and 8 of the Convention. Furthermore, he held that although the procedural defects had been overtaken by events the local authority's care plan would breach the child's and the mother's Article 8 Convention rights. He warned of the potential consequences for the local authority if their decision had to be challenged in judicial review and he offered injunctive protection should any act be proposed that would be a precipitate abuse of their powers. In the event none was necessary. As a consequence my Lord in that case suggested that the local authority re-consider its position and have in mind the wise words of Wilson J (as he then was) in *Re C (Adoption: Religious Observance)* [2002] 1 FLR 1119 at [51]:

> "The guardian argues that not even a judge of the Family Division has power to quash a local authority decision and that a damaging impasse can develop between a court which declines to approve their care plan and the authority which decline to amend it. The impasse is more theoretical than real: the last reported example is *Re S and D (Children: Powers of Court)* [1995] 2 FLR 456. For good reason, there are often, as in this case, polarised views about the optimum solution for the child: in the end, however, assuming that they feel that the judicial processing of them has worked adequately, the parties will be likely to accept the court's determination and, in particular, the local authority will be likely to amend their proposals for the child so as to accord with it. The event of a failure to make amendment in such circumstances would be the proper moment for a guardian to consider taking proceedings for judicial review … In the normal case let there be – in the natural forum of the family court – argument, decision and sometimes, no doubt with hesitation, acceptance: in other words, between all of us a partnership, for the sake of the child."

85. As the postscript to *Re X* reveals, the local authority acquiesced in the judge's evaluation and changed its care plan. The circumstance in which a local authority can or indeed should be judicially reviewed on the content of a care plan should be rare indeed. With his characteristic diplomacy, Wilson J made clear that once the no doubt strong opinions of the parties and the court have been ventilated, it is for the family court to make a decision. That should be respected by the local authority. For the avoidance of doubt, I shall be more plain. If the local authority disagree with the judge's risk evaluation they must in a case where it is wrong appeal it. The appellate court will be able to consider such an appeal, where that is integral to the order or judgment of the court. If the welfare evaluation is not appealed then it stands and the local authority must respect it and work with it while the proceedings are outstanding. To do otherwise risks disproportionate, irrational or otherwise unlawful conduct on their part.

86. There is no purpose in Parliament having decided to give the decision whether to make an order and the duty to consider the basis upon which the order is made to the judge if the local authority that makes the application can simply ignore what the judge has decided and act as if they had made the decision themselves and on a basis that they alone construe.

87. In *Re S; Re W* above at [54] by reference to the judgment of Sedley LJ in the Court of Appeal, which he cites with approval on the point, Lord Nicholls highlights the disproportionality of a care order from which no good is coming:

> "Sedley LJ pointed out that a care order from which no good is coming cannot sensibly be said to be pursuing a legitimate aim. A care order which keeps a child away from his family for purposes which, as time goes by, are not being realised will sooner or later become a disproportionate interference with the

> child's primary Art 8 rights: see *Re W and B; Re W (Care Plan)* [2001] EWCA Civ 757, [2001] 2 FLR 582, para [45]."

88. For my part and with great respect, I strongly agree with Sedley LJ. I would add that for a proportionality judgment to be made it is necessary for the court to identify the purpose which is to be realised and that is why there has to be a plan. As a matter of statutory formulation, the achievement of the purpose where a care order is in place will always involve the sharing of parental responsibility by the local authority with the parent. The local authority's ultimate right to make decisions where a care order is made is not the purpose. That puts the cart before the horse. The purpose is the step or steps that have been identified as being necessary to provide for the needs of the child, including the need for protection. The purpose may be a temporary use of public care to allow an otherwise capable parent to resolve the circumstance that gives rise to the risk of significant harm (and such cases are far more frequent than the general public might imagine). On the other hand, the purpose may be to provide a long term or permanent substitute family life for the child.

89. Aside from any remedy available in the administrative court if such a situation arises, there is also available an application to discharge the care order if the care plan implemented by the authority is no longer proportionate or in the interests of the child and an application for relief under section 7 of the Human Rights Act 1998 where a person claims that an authority has acted or proposes to act in a way which is made unlawful by section 6(1), that is in a way which is incompatible with a Convention right. An example of the full powers of the High Court and the family court being used where a local authority continues to act inappropriately can be found in *Re S and W (Care Proceedings)* [2007] EWCA Civ 232, [2007] 2 FLR 275. A recent example of injunctive relief being granted under section 7 of the Human Rights Act 1998 can be found in *RCW v A Local Authority* [2013] EWHC 235 (Fam), [2013] 2 FLR 95 per Cobb J.

90. It is important to recollect in this context that it is not appropriate to use continuing interim care orders to supervise the role of the local authority and subject only to intended legislation and existing Rules and Practice Directions relating to timetabling, Lord Nicholls approach in *Re S; Re W* remains good:

> "[90] From a reading of s 38 as a whole, it is abundantly clear that the purpose of an interim care order, so far as is presently material, is to enable the court to safeguard the welfare of a child until such time as the court is in a position to decide whether or not it is in the best interests of the child to make a care order. When that time arrives depends on the circumstances of the case and is a matter for the judgment of the trial judge. That is the general, guiding principle. The corollary to this principle is that an interim care order is not intended to be used as a means by which the court may continue to exercise a supervisory role over the local authority in cases where it is in the best interests of a child that a care order should be made."

91. Furthermore, the courts have repeatedly recognised that there are bound to be uncertainties when a judge has to consider a care plan and decide whether to make an

order. One aspect of the dilemma faced by the judge in this case was that described by Lord Nicholls as follows:

> "[94] More difficult, as a matter of legal principle, are cases where it is obvious that a care order is in the best interests of the child but the immediate way ahead thereafter is unsatisfactorily obscure. These cases exemplify a problem, or a 'tension', inherent in the scheme of the Children Act 1989. What should the judge do when a care order is clearly in the best interests of the child but the judge does not approve of the care plan? This judicial dilemma was described by Balcombe LJ in *Re S and D (Children: Powers of Court)* [1995] 2 FLR 456, 464, perhaps rather too bleakly, as the judge having to choose between 'the lesser of two evils'. "

92. The uncertainty may be as to the underlying facts or opinions which should be made as clearly known as they can be by the court. More likely, there will be divergent opinions about the future which the judge should resolve by hearing evidence on the point. Some cases will need time for there to be clarity. That time will rarely be available within proceedings but more likely will involve a decision of principle for example that there should be rehabilitation to a parent within an identified time (or not, as the case may be) but the steps that are going to be taken in the interests of the child should then be specified so that the purpose may be a specific process of decision making where the function of the court is not to oversee the plan but to entrust its execution to the local authority or to the family or both.

93. The process I have described is necessary in order for the court to come to a judgment on the proportionality of the interference proposed. It is also necessary to ensure that the procedural safeguards implicit within Article 8 are protected. As Lord Nicholls said at

> "[99] Despite all the inevitable uncertainties, when deciding whether to make a care order the court should normally have before it a care plan which is sufficiently firm and particularised for all concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future. The degree of firmness to be expected, as well as the amount of detail in the plan, will vary from case to case depending on how far the local authority can foresee what will be best for the child at that time. This is necessarily so. But making a care order is always a serious interference in the lives of the child and his parents. Although Art 8 contains no explicit procedural requirements, the decision-making process leading to a care order must be fair and such as to afford due respect to the interests safeguarded by Art 8: see *TP and KM v United Kingdom* [2001] 2 FLR 549, para 72. If the parents and the child's guardian are to have a fair and adequate opportunity to make representations to the court on whether a care order should be made, the care plan must be appropriately specific."

94. This is not the place to analyse the extensive body of jurisprudence which now exists on the approach of the court to the decision as to which order is necessary and proportionate. As appears from the order we made, and for the reasons I shall set out, that decision has yet to be undertaken in this case. It is necessary, however, to recollect that only recently the Supreme Court in *In the matter of B (a Child)* [2013] UKSC 33, [2013] 1 WLR 1911 emphasised that care orders are a last resort. Whether the context is an adoptive care plan or not, Lord Neuberger's conclusion on the correct legal test for the making of an order are unambiguous:

> "75. As already mentioned, it is clear that a judge cannot properly decide that a care order should be made in such circumstances, unless the order is proportionate bearing in mind the requirements of article 8.
>
> 76. It appears to me that, given that the Judge concluded that the section 31(2) threshold was crossed, he should only have made a care order if he had been satisfied that it was necessary to do so in order to protect the interests of the child. By "necessary", I mean, to use Lady Hale's phrase in para 198, "where nothing else will do". I consider that this conclusion is clear under the 1989 Act, interpreted in the absence of the Convention, but it is put beyond doubt by article 8. The conclusion is also consistent with UNCRC.
>
> 77. It seems to me inherent in section 1(1) that a care order should be a last resort, because the interests of a child would self-evidently require her relationship with her natural parents to be maintained unless no other course was possible in her interests. This is reinforced in section 1(3)(g) that the court must consider all options, which carries with it the clear implication that the most extreme option should only be adopted if others would not be in her interests. As to article 8, the Strasbourg court decisions cited by Lady Hale in paras 195-198 make it clear that such an order can only be made in "exceptional circumstances", and that it could only be justified by "overriding requirements pertaining to the child's welfare", or putting the same point in slightly different words, "by the overriding necessity of the interests of the child". I consider that this is the same domestic test (as is evidenced by the remarks of Hale LJ in *Re C and B* [2001] 1 FLR 611, para 34 quoted by Lady Hale in para 198 above), but it is unnecessary to explore the point further."

95. For convenience of analysis it is helpful to consider Lady Hale's conclusions after her review of the Strasbourg authorities at [195] and [196]. She goes on to say:

> "197. Thus it is not surprising that Lewison LJ was troubled by the proportionality of planning the most drastic interference possible, which is closed adoption, in a case where the threshold had not been crossed in the most extreme way (see para 174 above). However, I would not see proportionality in

> such a linear fashion, as if the level of interference should be in direct proportion to the level of harm to the child. There are cases where the harm suffered or feared is very severe, but it would be disproportionate to sever or curtail the family ties because the authorities can protect the child in other ways. I recall, for example, a case where the mother was slowly starving her baby to death because she could not cope with the colostomy tube through which the baby had to be fed, but solutions were found which enabled the child to stay at home. Conversely, there may be cases where the level of harm is not so great, but there is no other way in which the child can be properly protected from it.
>
> 198. Nevertheless, it is quite clear that the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by *overriding requirements* pertaining to the child's welfare, in short, where nothing else will do. In many cases, and particularly where the feared harm has not yet materialised and may never do so, it will be necessary to explore and attempt alternative solutions. As was said in *Re C and B* [2001] 1 FLR 611 at para 34,
>
> > "Intervention in the family may be appropriate, but the aim should be to reunite the family where the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child."

96. In *Oxfordshire County Council v L (Care or Supervision Order)* [1998] 1 FLR 70 Hale J held that cogent and strong reasons were required to force upon a local authority a more Draconian order than that asked for. She considered three possible reasons in a judgment that deserves a full reading (and which was expressly approved by this court in *Re T (a child) (care order)* [2009] EWCA Civ 121, [2009] 3 All ER 1079 per Sir Mark Potter P). In summary, they were i) the power to remove a child instantly without any prior judicial sanction and to plan for the child's long term placement outside the family, ii) the necessity to share parental responsibility with the parents and iii) the necessity to place duties on the local authority towards the child. As respects (ii) she held that:

> "A care order would be warranted where there was reason to suppose that the parents would not accept the advice and guidance of the local authority as to the way in which they should be meeting their parental responsibilities. In that situation the parents could not be allowed to be the only people with those responsibilities."

97. It is no accident that in *Re T* the President also reaffirmed the jurisprudence relating to the extent to which a judge may depart from the opinion of experts including the local authority's social workers and the guardian:

> "[50] In a somewhat different context, but relevant to this case, the extent of a judge's entitlement to depart from the opinion of experts in care cases was elucidated in *Re N-B (children) (residence: expert evidence)* [2002] EWCA Civ 1052, [2002] 3 FCR 259 by Thorpe LJ. In that case he drew a distinction between (a) those matters and areas of assessment which are rightly the province of those whose professional training and qualification and clinical expertise equips them for the task in hand, such as the evidence of medical experts as to physical injuries sustained by children or those aspects of risk assessments which depend upon medical or psychiatric opinion, and (b) those where the judge is evaluating the opinion of experts as to placement, management and welfare issues which lie at the heart of care proceedings and must ultimately be a matter for the judge. Thorpe LJ observed (at [59]):
>
> > ' … the judge was at liberty to depart from the opinion of the experts, even if unanimous, on issues of future placement and management and perhaps even on attachment, balancing risks against advantages.' "

Summary:

98. In summary, once a decision to institute proceedings has been made, the court becomes the decision maker until a full order is made. In the course of exercising its jurisdiction the court will make the following judgments:

    i) What is the timetable within which the child's welfare is to be determined;

    ii) What are the key issues that need to be determined for the ultimate decision to be made;

    iii) Whether there are jurisdictional facts which if found are sufficient to satisfy the threshold in section 31;

    iv) What are the findings of fact in respect of the key issues identified.

99. The court will use those judgments to answer the three questions that are to be answered in any care case (see Lady Hale at paragraph [2] of *In the Matter of J (Children)* [2013] UKSC 9):

    i) What is the harm and/or the likelihood of harm;

    ii) To what is the harm or likelihood attributable;

    iii) What will be the best for the child?

100. The local authority will set out in its evidence the range of services that are available in respect of each placement option and under each of the orders which the court can impose to best meet the harm and/or likelihood of harm identified by the court. The court undertakes the following evaluation to determine what is best for the child:

i) What is the welfare analysis of each of the placement options that are available;

ii) What is the welfare evaluation, that is the best option among those available; and

iii) What orders are proportionate and necessary, if any.

101. The local authority is required to provide the evidence to enable the judge to undertake the welfare and proportionality evaluations. That includes a description of the services that are available and practicable for each placement option and each order being considered by the court. It may be convenient for that to be put into the form of the section 31A care plan in the alternative so that the court may expressly undertake its statutory function to consider the same or in evidence filed in support. There should be no question of an authority declining to file its evidence or proposed plans in response to the court's evaluations. None of this strays into the impermissible territory of seeking to bind the local authority's care planning and review processes once a full order is made. If a local authority make it clear that they will not implement a care plan option about which evidence has been given and which the judge prefers on welfare and proportionality grounds, then in a rare case they can be subjected to challenge in the High Court within the proceedings. If and in so far as the local authority are of the opinion that they need to change a care plan option approved by the court once the proceedings are complete, they are entitled to do so and must do so in accordance with the processes laid out in the regulations. If they do so without good reason they will risk an appropriate challenge including on behalf of the child after a referral from an IRO to Cafcass or a Welsh family proceedings officer.

102. Nothing in the above analysis should be taken to suggest that family courts need to be more or less protective of children in the findings, value judgments and orders that they make, nor that it is necessary to have a sequential series of hearings or a split hearing to decide the questions identified. Save in the most complex cases, it is to be expected that local authority witnesses, guardians and court appointed experts will address the issues identified by the court (whether in its practice directions or in its case based directions) on the basis or alternative bases identified so that an holistic analysis can be conducted by the court wherever possible at the same time as findings are made. Likewise, nothing in the above analysis should be taken to suggest that it is necessary to exceed the timetable for the proceedings or for the child as described in the Annex to Practice Direction 36C 'Pilot Practice Direction 12A, Care, Supervision and other Part 4 Proceedings: Guide to Case Management' (the Public Law Outline).

The Appeal

103. I turn now to the grounds of appeal which in the context of the extended discussion of the functions of the court and the local authority can be taken quite shortly.

104. The judge is criticised for taking a disproportionate approach in opting for the maximum intervention of a care order. An alternative analysis is that the judge was able to take the least interventionist approach in terms of the placement of the child, that is she remained with her mother, by focussing on the services which could be provided to support the placement, services which the judge concluded were

necessary and would only likely be available if a care order was made. Was the judge right or wrong?

105. In support of her proposition that a care order was disproportionate and that it was not necessary for the local authority to share parental responsibility with mother, Miss Meyer submits:

i) A voluntary agreement with the local authority would engage the section 17 general duties in such a way that there would be a protective network for W which would safeguard her welfare;

ii) Having regard to the fact that it was agreed that W would remain with her mother, the protections afforded by a voluntary agreement or at most a supervision order would be sufficient to safeguard her welfare;

iii) The risk that the judge identified is not one that a care order, the sharing of parental responsibility or any of the specific or general duties under section 22 that would be owed to the child would meet in any better way than a supervision order or no order. In particular, the provision of a mental health worker or any other mechanism to help prevent mother behaving in the way described to the detriment of her child would not be made more likely by the existence of a care order;

iv) The care plan considered by the judge was not approved by her and accordingly ran the risk of being a disproportionate interference in the family life of W and RW;

v) The risk that the local authority might use their power under a care order to remove W from RW's care without recourse to the court was itself a disproportionate consequence of the making of the order with the further unintended consequence that mother might be disempowered in the care of her child given her own evidence to the court about what she felt about that.

106. Mr Tolson submitted that:

i) The findings of fact made by the court are not appealed and the local authority specifically accepts the findings that were made;

ii) The threshold found by the judge is likewise agreed;

iii) The judge was wrong in her evaluation of risk which could not bind the local authority in particular once proceedings had been completed;

iv) A care order would not provide any identifiable services to meet the risk in this case and was neither necessary nor proportionate;

v) The local authority's decision making process was not defective.

107. In oral submissions and in the course of considering what services might be provided under each of the available orders, Mr Tolson pragmatically acknowledged the consequence of the local authority's disagreement with the nature and extent of the risk evaluated by the judge. His most forceful submission was that a court could not

bind a local authority to a care plan. That is not the purpose of the section 31A duty placed on the court. In any event, the local authority has continuing obligations beyond the snapshot of the court's consideration within the proceedings which might oblige the authority to change their plan.

108. Mr Geekie on behalf of the child submitted that:

i) No realistic case has been put which undermines the court's welfare evaluation, that is the risk that the judge concluded needed to be protected against and that binds the parties including the local authority until there is a change of circumstances;

ii) A supervision order has no teeth, that is no mechanism for the compliance of a parent short of returning to court to apply again for a care order;

iii) There is no regulatory regime of planning and review to support a supervision order;

iv) There is no way in which a child or parent can access or enforce the provision of services by the local authority to meet the risk identified by the court;

v) A voluntary agreement or a supervision order would be likely to provide W with no more than a child in need plan;

vi) In principle, the judge was right to prefer a strong order in order to preserve and support the placement of W with RW;

vii) The local authority elide what they are entitled and indeed required to do before proceedings have been issued and after they have been completed with the responsibilities to the court during proceedings. Before and after proceedings they must assess and make their own decisions within the context of the due process that is described as to what changes there should be to any care plan considered by a court or the services that they intend to provide under any order made by the court. Within proceedings they must use their professional skills and experience to provide that which the court directs so that it can make its own evaluations and decisions;

viii) The judge's conclusion is flawed because she made an order based upon what she decided should be in the care plan not what is actually in the plan. There is accordingly insufficient reasoning based upon evidence to justify the order;

ix) The local authority's failure to address the judge's evaluation of risk by evidence or in their care plan was a procedural flaw of significance. The care plan in this case is a formulaic document that ignores the analysis of key issues determined by the judge.

109. The grandparents made a forceful submission based upon a very real fear that part of mother's behaviours involve what is in reality a deception – not telling the truth. If that happens in the context of an injury not being reported as was alleged had happened recently, how would the services which should be provided to protect the child in fact protect the child. That amounts to a plea for there to be evidence about

who has responsibility for meeting the risk identified and how that responsibility is to be exercised.

110. Mr Geekie's most powerful submission was that the court could and should have directed the local authority to identify the services it would provide to meet the risk evaluated by the court under both a care order and in the alternative a supervision order. Miss Meyer's most powerful submission was that the judge did not have the evidence about the benefits and detriments of statutory intervention in the lives of the mother and child to be able to analyse what was proportionate and that accordingly, the conclusion was flawed. I agree and further, I have concluded that the lack of evidence was a consequence of the local authority's stance. The remedy in the court was to direct the evidence that was missing to be filed.

111. The lack of reasoning vitiated the exercise of determining the proportionality of the order made and accordingly, at the conclusion of the hearing before this court the appeal was allowed to the extent that the care order was set aside. An interim care order is substituted and the matter returned to the judge in the county court to decide what orders are proportionate and why having regard to her welfare evaluation. For that purpose, the local authority was directed to file evidence and care plans which describe the services which would be made available under each order that the court might make to meet the risk identified by the judge.

112. The court considered the invitation to give an indication to the local authority and allow them to reconsider their position but came to the conclusion that even in a case where the child is to remain with a parent the proper administration of family justice and the detrimental effects of continuing litigation required immediate and timely action. Partnership working sometimes needs sanctions for compliance. In the unlikely event that a local authority declines to abide by a judge's orders and directions in the future, the judge should inform the local authority's monitoring officer appointed under section 5 of the Local Government and Housing Act 1989 to make a report to the authority with the intention that the authority is brought back into compliance.

113. The court considered re-making the proportionality decision but was hesitant to do so because of the absence of the evidence that is necessary. It is not so obvious to this court which form of order would result and I express no view at all about the decision that is yet to be made.

Lord Justice McCombe:

114. I agree that this appeal should be allowed to the extent indicated and that an interim care order should be substituted, with a direction in terms of the penultimate sentence of paragraph 111, for the reasons given by Ryder LJ. In particular (for my part) the reasons given in paragraphs 63 to 102 of Ryder LJ's judgment are compelling ones for taking this course.

The President of the Family Division:

115. I agree with the judgment given by Ryder LJ. There is nothing I can usefully add except to emphasise the importance of the principles he has set out so clearly. His judgment explains and elucidates the respective functions of the court and the local

authority in care cases. It complements the recent judgment in *Re B-S*, which explains and elucidates what the court requires from the local authority (as well as from others) in those care cases where the plan is for adoption. The principles in these two judgments will for the future inform practice in all care cases.