Neutral Citation Number: [2019] EWCA Civ 1447

Case No: B4/2019/1286

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NEWPORT (GWENT) COUNTY COURT AND FAMILY COURT
HHJ Furness QC
CF18C00077

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 August 2019

Before:

LORD JUSTICE FLOYD
LORD JUSTICE MOYLAN
and
LORD JUSTICE PETER JACKSON

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E (Children: Reopening Findings of Fact)

- -

Iain Alba (instructed by **Keppe Rofer**) for the **Appellant Mother**
Hayley Daniel (instructed by **Torfaen County Borough Council**) for the **Respondent Local Authority**
The Respondent Father attended in person
Rhian Jones (instructed by **Caswell Jones Solicitors**) for the **Respondent Children through their Guardian**

Hearing date: 30 July 2019

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Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. Welfare decisions made by the family court are based on an assessment of the relevant facts. In care proceedings, facts establishing the threshold are a precondition to making any order at all. Depending on their gravity, findings of fact may be highly relevant to, or even determinative of, the welfare decision, not only in the proceedings in which they were made, but also in other proceedings about the same child or proceedings about different children. An incorrect finding one way or another can have lasting consequences. Consequently, the court goes to great lengths to ensure that its findings of fact are reliable, and the normal process of appeal should ensure that unjustified findings are not allowed to stand. At the same time, the public interest in justice must be balanced against the public interest in the finality of litigation and there are proper limits on the extent to which the court will allow its findings of fact to be revisited.

2. This appeal calls for consideration of the options open to someone wishing to challenge findings of fact in family proceedings on the basis of further evidence that was not available at the trial. Do they have to appeal? Or can they apply to the trial court? And if they can do both, which is the better course?

The appeal

3. It is an appeal by the mother of three children, now aged 9, 4 and 2. They are members of the traveller community who now live with their paternal grandmother. In January 2018, they were removed from their mother after the youngest child, N, then aged 10 months, was found to have three cigarette burns on her arm. The mother, a smoker, gave differing accounts of how that had happened.

4. After a trial during which evidence was given by a range of witnesses including Dr Goodwin, a consultant dermatologist, His Honour Judge Furness QC found the mother's evidence unreliable and determined that the injuries were either inflicted deliberately or caused by seriously culpable negligence. On 31 August 2018, he made care orders, which were not the subject of an appeal at the time. At the case management stage, unsuccessful applications for further expert evidence in relation to how the injuries might have been caused had been made to another judge by the mother and by the Guardian.

5. The mother's accounts had included: that the injuries were caused when N was with her grandmother; that they were caused when the door of her caravan was blown onto her own arm by the wind, causing her to drop her cigarette and propelling the burning tip in a different direction and onto N; that this happened when she was bumped into by her eldest child running past her. At trial, the mother said that her earlier accounts were untrue and the judge did not accept her latest account, also finding that she had asked the children's father and the older child to back up her lies. He found the

description of the cigarette falling one way and the tip falling the other way mechanically improbable. He noted that the evidence suggested at least two applications of heat to the skin. He found that the mother had no explanation for her account that N had not screamed with pain at the moment she was burned.

6. There was however a parallel criminal investigation. The police consulted Mr Colin Rayner, a forensic burns consultant and forensic plastic surgeon, who in a substantial report produced in October 2018 opined that an account he understood the mother to have given represented a plausible accidental explanation for the burns; in consequence there have been no criminal charges.

7. On receiving Mr Rayner's report, the mother immediately tried to challenge the findings against her. By her appellant's notice filed on 24 May 2019 (the protracted delay arising from ultimately unsuccessful attempts to obtain legal aid) she applied for permission to appeal out of time and for permission to file the new report, arguing that it undermined the judge's findings and that a retrial should be ordered. The local authority and the Guardian opposed the application on the basis that the account found plausible by the author of the report was not the one that the mother eventually gave and that her lack of credibility was unaffected by the further evidence.

8. By way of further explanation, the evidence of Dr Goodwin in his report was that photographs showed that the injuries appeared to be significant burns from a cigarette that were likely to have been caused by prolonged contact at two separate sites. Giving evidence, he expressed the view that the contact was likely to have lasted for more than a second, and that the circular shape of two of the marks was suggestive of a cigarette burn. However, he did not profess to have extensive expertise in the matter. For his part, Mr Rayner considered that the appearance in the photographs was consistent with the injuries having occurred at around the time they were discovered. He found nothing in the appearances to suggest either of the two recognised forms of cigarette injury: a direct stub type of injury or a typical accidental brushing pattern. The parties agree that Mr Rayner's more detailed consideration of the appearances was not available to the judge in other evidence, and that it is at least of possible relevance to the finding that the injuries may have been inflicted deliberately.

9. When pursuing the route of an appeal out of time, those then advising the mother believed that it was the only course open to her. That belief was understandable, being based upon a statement now in the Red Book 2019 at p.2247 that the first instance court has no jurisdiction to re-open findings of fact once an order is sealed, a statement that reflects *obiter* observations made by this court in *Re G (A Child)* [2014] EWCA Civ 1365, to which I will refer again below.

10. On 2 July, I granted permission to appeal, extended the time for appealing, and admitted the report in evidence. In doing so, I noted that it was not clear that the appeal would have a real prospect of success, but that it was not beyond argument and that there was a compelling reason for it to be heard so that this court could address the questions mentioned above.

11. On 30 July, we heard the appeal and told the parties of our decision in these terms:

(1) We confirmed that the report of Mr Rayner was to be admitted on the appeal.

(2) We agreed with the submission made by Mr Alba for the mother that in these circumstances the better course for determining the consequences of that further evidence was by way of an application to the trial judge.

(3) We treated the mother as having made such an application.

(4) We directed that the matter be listed for directions before HHJ Furness QC as soon as possible so that he could consider whether, and if so, how his findings of fact should be reopened.

(5) We considered that the further evidence might have an important influence on the outcome, at least in relation to the question of whether N had been burned deliberately, but emphasised that the extent of its significance was a matter for the judge.

(6) In the circumstances, and without expressing a view on its merits, we dismissed the appeal as being a less appropriate means of resolving the matter.

12. By the end of the appeal hearing, the parties did not significantly dissent from the course taken by the court. Mr Alba did not concede his appeal, and nor did Ms Daniels for the local authority and Ms Jones for the Guardian concede their opposition to it, but all were agreed that as a general proposition, the trial judge was a more suitable arbiter than this court could be of the issues that have arisen. This constructive, child-centred approach is commendable.

13. As can be seen above, we concluded that the *Ladd v Marshall* criteria were satisfied in relation to Mr Rayner's report and that it was properly admitted on this appeal. However, as is apparent from our decision, we considered that it had been open to the mother to have made an application directly to the trial court and that an appeal was not her only remedy.

14. The remainder of this judgment contains my analysis of the procedure by which findings of fact may be challenged on the basis of further evidence, that analysis being the basis upon which I joined in our decision.

Applications and appeals based on further evidence

15. Applications and appeals involving further evidence in family proceedings are perhaps more common than they were; one reason is that the proceedings are shorter, which means that they are commonly completed before the criminal trials from which the further evidence may originate. Another scenario involves a party giving further information after an adverse finding has been made, something that the court encourages. The challenge may then arise in a range of circumstances:

(1) On an appeal on the basis of further evidence, usually an appeal out of time.

(2) On an application within continuing proceedings – for example, between a fact-finding hearing and a welfare hearing.

(3) In proceedings concerning the previous order – for example an application to discharge a care order or an application for contact.

(4) In proceedings about another child.

(5) By a free-standing application brought after the end of the proceedings.

16. The merits of such appeals and applications will of course vary widely. Some may raise real issues while others will be no more than attempts to reargue lost causes or escape sound findings. The court's decision will be case-specific. But insofar as it is always required to balance the competing public interests, it is clearly desirable that it should do so with a consistency of approach that does not unduly differ depending upon the particular procedure that has been followed or because of chance matters arising from when and how the further evidence has arisen.

17. The principles and procedures governing appeals based on fresh evidence are well-established. So are the principles and procedures governing challenges to findings of fact within existing proceedings or in proceedings concerning the previous order or in proceedings concerning another child. What has so far been less clearly demonstrated is the basis for making a freestanding application to the trial court after the proceedings have ended and where there are no other proceedings on foot. In my view, the family court has the statutory power under s. 31F(6) Matrimonial and Family Proceedings Act 1984 to review its findings of fact in all of these circumstances. I also consider that it will generally be more appropriate for the significance of the further evidence to be considered by the trial court rather than by way of an appeal. To explain these conclusions, I shall consider the principles applying to appeals and to applications to the trial court.

Appeal on the basis of further evidence

18. There is no doubt that a party can seek to pursue an appeal accompanied by an application for permission to file further evidence and, usually, an application for an extension of time for appealing.

19. An appeal to this court will be allowed where the decision of the lower court was (a) wrong, or (b) unjust because of a serious procedural or other irregularity: CPR 51.21(3). Unless it orders otherwise, the appeal court will not receive evidence which was not before the lower court: CPR 51.21(2).

20. Further evidence must therefore pass through the gateway of sub-rule 21(2). When overseeing the gateway, the court seeks to give effect to the overriding objective of doing justice, and the pre-CPR decision of *Ladd v Marshall* [1954] 1 WLR 1489 remains powerful persuasive authority: see *Sharab v Al-Saud* [2009] EWCA Civ 353 and generally the discussion in the White Book 2019 at 52.21.3.

21. *Ladd v Marshall* familiarly provides that:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

22. The durability of *Ladd v Marshall* shows that it encompasses most factors relevant to applications that are likely to arise in practice but as Hale LJ noted in *Hertfordshire Investments Ltd. v Bubb* [2000] EWCA Civ 3013 [37] the criteria are not rules but principles to be looked at with considerable care.

23. It has been said that the *Ladd v Marshall* analysis is generally accepted as being less strictly applied in cases relating to children: *Webster v Norfolk County Council* [2009] EWCA Civ 59 per Wall LJ at [135]. At [138] he continued:

> "The rationale for the relaxation of the rule in children's cases is explained by Waite LJ in *Re S (Discharge of Care Order)* [1995] 2 FLR 639 at 646, where he says:-
>
> > The willingness of the family jurisdiction to relax (at the appellate stage) the constraints of *Ladd v Marshall* upon the admission of new evidence, does not originate from laxity or benevolence but from recognition that where children are concerned there is liable to be an infinite variety of circumstances whose proper consideration in the best interests of the child is not to be trammelled by the arbitrary imposition of procedural rules. That is a policy whose sole purpose, however, is to preserve flexibility to deal with unusual circumstances. In the general run of cases the family courts (including the Court of Appeal when it is dealing with applications in the family jurisdiction) will be every bit as alert as courts in other jurisdictions to see to it that no one is allowed to litigate afresh issues that have already been determined."

24. In *Re G* (to which I have already referred) Macur LJ made this observation about *Webster*:

> "16. For myself, I doubt that this obiter dicta should be interpreted so liberally as to influence an appellate court to adopt a less rigorous investigation into the circumstances of fresh evidence in 'children's cases'. The overriding objective of the CPR does not incorporate the necessity to have regard to "any welfare issues involved", unlike FPR 1.1, but the principle and benefits of finality of decisions involving a

> child reached after due judicial process equally accords with his/her best interests as it does any other party to litigation and is not to be disturbed lightly. That said, I recognise that it will inevitably be the case that when considering outcomes concerning the welfare of children and the possible draconian consequences of decisions taken on their behalf, a court may be more readily persuaded to exercise its discretion in favour of admitting new materials in finely balanced circumstances."

25. A decision whether to admit further evidence on appeal will therefore be directed by the *Ladd v Marshall* analysis, but with a view to all relevant matters ultimately being considered. In cases involving children, the importance of welfare decisions being based on sound factual findings will inevitably be a relevant matter. Approaching matters in this way involves proper flexibility, not laxity.

26. This approach is seen in *Re K (Non-accidental injuries: Perpetrator: New Evidence)* [2005] 1 FLR 285. In December 2013, a finding was made that the parents and a grandmother were possible perpetrators of injuries and in April 2004 two children were made the subject of freeing orders. Soon afterwards, the mother entered a refuge and made allegations of violence and cruelty against her in-laws, including violence towards the injured child. She sought to appeal the original findings and the freeing orders, and to adduce fresh evidence in the form of her statements. Allowing the appeal, setting aside the freeing orders and remitting the question of the identity of the perpetrator for further investigation and consideration by the trial judge, Wall LJ, sitting with Neuberger J, said this:

> "57. As a general proposition we think that it is in the public interest for those who cause serious non-accidental injuries to children to be identified, wherever such identification is possible. It is paradigmatic of such cases that the perpetrator denies responsibility and that those close to or emotionally engaged with the perpetrator likewise deny any knowledge of how the injuries occurred. Any process, which encourages or facilitates frankness, is, accordingly, in our view to be welcomed in principle.
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> 58. As a second background proposition, we are also of the view that it is in the public interest that children have the right, as they grow into adulthood, to know the truth about who injured them when they were children, and why. Children who are removed from their parents as a result of non-accidental injuries have in due course to come to terms with the fact that one or both of their parents injured them. This is a heavy burden for any child to bear. In principle, children need to know the truth if the truth can be ascertained."

27. I now turn to applications in the first instance court based on further evidence.

Applications in the first instance court on the basis of further evidence

28. The starting-point is an appreciation of the status of findings of fact in children cases. There is no strict rule of issue estoppel. However, a decision to allow past findings to be relitigated must be a reasoned one. *Re B (Children Act Proceedings: Issue Estoppel)* [1997] Fam 117 concerned the status of findings of fact made in proceedings concerning other children. It is an influential decision and deserves full citation. Hale J said this at 128:

> "It seems to me that the weight of Court of Appeal authority is against the existence of any strict rule of issue estoppel which is binding upon any of the parties in children's cases. At the same time, the court undoubtedly has a discretion as to how the enquiry before it is to be conducted. This means that it may on occasions decline to allow a full hearing of the evidence on certain matters even if the strict rules of issue estoppel would not cover them. Although some might consider this approach to be a typical example of the lack of rigour which some critics discern in the family jurisdiction, it seems to me to encompass both the flexibility which is essential in children's cases and the increased control exercised by the court rather than the parties which is already a feature of the court's more inquisitorial role in children's cases (and beginning to gain ground in other litigation as shown in the Woolf Report on Access to Justice).
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> Hence if the applicant in one set of proceedings wishes to rely on findings made in previous proceedings in order to prove a case, the court will have to consider how this should be done. Frequently, although such findings are not necessarily accepted by the party concerned, that party will accept that a challenge to them in later proceedings will be futile. The court may then simply rely upon the findings made earlier. Sometimes, the party concerned or some other party will wish to challenge them. In such an event, it seems to me, the court may wish to be made aware, not only of the findings themselves, but also of the evidence upon which they were based. It is then for the court to decide whether or not to allow any issue of fact to be tried afresh. There are no doubt many factors to be borne in mind, among them the following.
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> (1) The court will wish to balance the underlying considerations of public policy, (a) that there is a public interest in an end to litigation – the resources of the court and everyone involved in these proceedings are already severely stretched and should not be employed in deciding the same matter twice unless there is good reason to do so; (b) that any delay in determining the outcome of the case is likely to be prejudicial to the welfare of the individual child; but (c) that the welfare of any child is unlikely to be served by relying upon determinations of fact which turn out to have been erroneous; and (d) the court's discretion, like the rules of issue estoppel, as pointed out by Lord Upjohn in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (No.2) [1967] 1 AC 853, 947, "must be applied so as to work justice and not injustice."

> (2) The court may well wish to consider the importance of the previous findings in the context of the current proceedings. If they are so important that they are bound to affect the outcome one way or another, the court may be more willing to consider a rehearing than if they are of lesser or peripheral significant.
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> (3) Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial. By this I mean something more than the mere fact that different judges might on occasions reach different conclusion upon the same evidence. No doubt we would all be reluctant to allow a matter to be relitigated on that basis alone. The court will want to know (a) whether the previous findings were the result of a full hearing in which the person concerned took part and the evidence was tested in the usual way; (b) if so, whether there is any ground upon which the accuracy of the previous finding could have been attacked at the time, and why therefore there was no appeal at the time; and (c) whether there is any new evidence or information casting doubt upon the accuracy of the original findings."

29. This analysis, which has been followed ever since, again points up the need for a principled flexibility in cases concerning children. As was noted by McFarlane J in *Re W (Care Proceedings)* [2010] 1 FLR 1176 at 1183, it shows that when deciding whether findings made in other proceedings should be reopened, the court will "above all" be influenced by the question of whether there is any reason to think that a rehearing of the issue will result in a different finding.

30. *Re B* itself concerned the children of a father against whom findings had been made in proceedings about his children by a previous relationship. But the principles apply equally where there are later proceedings about the same child and where there are later proceedings about another child of the same parents. The issue will only arise where it is suggested that there is further evidence that might make a difference.

31. The same principles apply where a challenge arises within the course of continuing proceedings. Here, of course, it is not a question of issue estoppel, strict or otherwise, but of findings made in the very proceedings themselves. In these circumstances, as the following authorities show, it is well settled that the trial court can revisit its findings of fact if further evidence warrants it.

32. In *M & MC (Care: Issues of Fact: Drawing of Orders)* [2003] 1 FLR 461, a finding was made at the first stage of a split hearing that one or other parent had injured a child. Before the welfare decision was made, one parent purportedly admitted to causing the injuries. The judge was sceptical and refused to hear further evidence. This court allowed an appeal. Thorpe LJ explained:

> "13. … plainly trial judges have to be firm in not permitting the court's important duty to investigate and establish past fact to be

> derailed or diverted by what may be simply strategic manoeuvring in response. Particularly must courts be guarded in acceding to applications for yet another trial of an issue of fact in what should be the relatively brief period between the preliminary hearing of disputed facts and the subsequent hearing to dispose of the outstanding application for care orders.
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> 14. So the notion that the process … should be torn up as though it had never happened simply because one of the adults had subsequently made a statement shifting position was plainly unlikely to succeed and was, in my judgment, rightly rejected... That of course is one extreme. The other extreme would be to reject the development absolutely and treat the previous finding of fact as incapable of being revisited. There is, between these two extremes, an obvious middle way, and that is to conduct the disposal hearing in such a way as to adopt the process of preliminary hearing as the foundation, and then to make such adjustments as are necessary to reflect subsequent developments rigorously tested through the process of examination-in-chief and cross examination."

33. There, the court regarded the fact-finding element of a split hearing as being a preliminary determination whose outcome was subject to revision at the subsequent hearing. That approach was followed by this court in *Re A (Children)(Fact-finding: Inadequate Reasons)* [2012] 1 WLR 595 at [21] and was endorsed by the Supreme Court in *Re S-B (Children)(Non-accidental Injury)* [2010] 1 AC 678 at [46]:

> "It is now well settled that a judge in care proceedings is entitled to revisit an earlier identification of the perpetrator if fresh evidence warrants this (and this Court saw an example of this in the recent case of *Re I (A Child)* [2009] UKSC 10)."

34. It should nevertheless be recalled that the ability to challenge a finding of fact always depends on the finding being one that has potential legal consequences. It is not open to a party to appeal a finding simply because they do not like it: see *Lake v Lake* [1955] P 336; *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd* [2002] EWCA 1142 at [27-28]; and *Re M (Children)* [2013] EWCA Civ 1170 at [21]. In my view the same applies to applications to reopen findings by way of application. Whether the court is prepared to entertain an application to reopen a finding will depend upon whether it is satisfied that the finding has actual or potential legal significance: in other words, is it likely to make a significant legal or practical difference to the arrangements that are to be made for these or other children?

35. What then of the situation where the proceedings have concluded and where there are no other proceedings within which a finding of fact might be challenged? It might of course be possible for a party to issue an application (for example, to discharge a care order or for contact) as a vehicle for the challenge. But there may be circumstances in which this would not be the chosen route, for example because (while the findings

may have other legal or practical consequences) there is no immediate challenge to the underlying order – in the present case, the mother does not seek to challenge the care order at this stage and contact is not subject to any order, though it is only supervised because of the findings – or because the findings may significantly affect future decisions concerning other children. Examples of freestanding applications are supplied by *Re U* [2015] EWCA Civ 334; *St Helens Council v M & F* [2018] EWFC 1; *Re R-E (Children)* [2018] EWCA Civ 953; and *M v Derbyshire County Council* [2018] EWHC 3734 (Fam).

36. I return to the decision of this court in *Re G* [2014] EWCA Civ 1365. In that case, care and placement orders were made on the basis of findings of injury perpetrated by one or other of the parents. After the proceedings were over the mother stated that she had discovered that she had been suffering from a medical condition that might be relevant to the child's problems. She obtained the trial court's permission to commission an expert medical review of the previous evidence and on the basis of the resulting report sought leave to appeal out of time and to adduce the report which she argued undermined the findings. The local authority opposed the appeal and challenged the jurisdiction of the first instance judge to permit the instruction of an expert on matters previously determined.

37. This court refused to admit the expert report in evidence and refused permission to appeal. The jurisdictional issue therefore fell away. However, Macur LJ, giving the leading judgment, expressed a provisional view:

> "28. As indicated in paragraph 11 above, the single judge identified two procedural issues "for the consideration of the full court" namely (i) whether it was possible for the mother to apply to the first instance court to re-open factual issues; and (ii) what jurisdiction a county court judge had to grant permission to obtain and file a fresh expert report on the concluded factual issues in the context of an adjourned application for permission to oppose adoption.
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> 29. Miss Bazley, Mr MacDonald and Miss Hurworth have provided full written submissions supported by numerous authorities and statutory provisions in relation to each. However, we have resisted the opportunity to hear oral submissions, the outcome of any deliberation on these points being superfluous to the merits of the mother's applications. Nevertheless, Miss Bazley invites the court to give its views on the questions posed, albeit obiter, for future reference if necessary.
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> 30. Clearly more detailed examination of these issues may be called for in the future when any alleged procedural irregularity potentially taints the 'fresh evidence' that may otherwise be admitted. In those circumstances the arguments can be more readily appraised when specifically addressed to the point in context…
>
> 31. However, I am content to provide my provisional view in relation to cases in which a sealed order follows on from findings of fact

> which subsequently become subject to challenge such as here in the light of the judgment in *Re L and B (Children)* [2013] UKSC 8. Lady Hale's judgment makes clear that challenge after sealed order must be in the appellate court arena. See paragraphs 16 and 19, and particularly her response to a submission that the order should not be an automatic cut off to re-visitation of the facts in paragraph 42.
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> 32. In the light of this high authority my answer to the first question posed by the single judge would therefore be: if a final order has been sealed, no.
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> 33. I would regard the answer to the second point to be informed by that to the first in so far as it relates to a report containing contrary medical opinion. It follows that if there is no jurisdiction to re-open the findings of fact once an order is sealed then the court has no jurisdiction to permit expert evidence on the point since FPR 25.4(3) provides that the Court may only give permission to adduce expert evidence if "the court is of the opinion that the expert evidence is necessary to assist the court to resolve proceedings." This provision must surely refer to extant proceedings within the court's own jurisdiction and not prospective applications to appeal. The existence of a contrary expert opinion cannot establish a "change of circumstances", absent re determination of the issue, and therefore cannot inform the necessary welfare assessment of the child in an application for leave pursuant to section 47(5) of the 2002 Act.
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> 34. My answer to the second question posed by the single judge would therefore be: none."

The other members of the court (Briggs LJ and Floyd LJ) preferred to express no view on the jurisdictional question.

38. The case referred to (*Re L and B*) was an unusual one. A trial judge had given a short preliminary judgment at the end of a fact-finding hearing, determining that the father was the perpetrator of injuries to the child. A request for clarification was made and two months later a 'perfected' judgment was provided in which the judge stated that both parents may have been the perpetrator. The Supreme Court held that on the facts of that case the judge had been entitled to change her mind as the order in that case had not been sealed. These are the paragraphs referred to in *Re G*:

> "16. It has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected.
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> …
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> 19. Thus there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under the Civil Procedure Rules (rule 40.2(2)(b)), an order is now perfected by being sealed by the court. There is no jurisdiction to change one's mind thereafter unless the

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

39. These paragraphs are therefore particularly concerned with the circumstances in which a judge may or may not change his or her mind. They are not addressed to a situation in which the court is being asked to take account of further evidence, although that clearly could be one reason for a change of mind.

40. But more fundamentally, the statutory landscape had changed with the establishment of the family court. The court came into existence on 22 April 2014 by virtue of Part 4A of the Matrimonial and Family Proceedings Act 1984. This includes section 31F ('Proceedings and Decisions'), comprising nine subsections of which two are relevant:

> "…
>
> (3) Every judgment and order of the family court is, except as provided by this or any other Act or by rules of court, final and conclusive between the parties.
> …
>
> (6) The family court has power to vary, suspend, rescind or revive any order made by it, including—
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> (a) power to rescind an order and re-list the application on which it was made,
>
> (b) power to replace an order which for any reason appears to be invalid by another which the court has power to make, and
>
> (c) power to vary an order with effect from when it was originally made.

…"

41. In my judgement, s. 31F(6) gives the family court (but not the High Court) the power to reconsider findings of fact made within the same set of proceedings or at any time thereafter. While a finding of fact is not in a strict sense "an order", it can comprise the determination of an issue that is crucial to the disposal of the proceedings and is susceptible to appeal: *Re B (Split Hearing: Jurisdiction)* [2000] 1 FLR 334 per Dame Elizabeth Butler-Sloss P at 336-337. Such a finding of fact is integral to the order on which it is based and accordingly comes within the scope and purpose of the section.

42. My further assessment that s. 31F(6) continues to apply after the end of the individual set of proceedings is based firstly on the fact that the words of the section are not expressed to be limited in duration, but secondly and more fundamentally on the intrinsic nature of family proceedings. As I said at the outset, findings of fact can have longstanding consequences for children and families. Their effect is not only felt in the moment they are made, but persists over time. There is therefore no reason to limit the time within which the court can exercise its power to correct a flawed finding of fact that may have continuing legal or practical consequences.

43. This conclusion makes it unnecessary to consider the reach of the provisions contained in FPR r.4.1(6) and CPR r.3.1(7) which provide that "a power of the court under these Rules to make an order includes a power to vary or revoke the order", or the range of authorities before and since *Tibbles v SIG (Trading as Asphaltic Roof Supplies)* [2012] EWCA Civ 518 in which those rules have been considered, though I note that in *N v J (Power to Set Aside Return Order)* [2017] EWHC 2752 (Fam), MacDonald J, while dismissing an application to set aside a High Court wardship order, held that FPR r. 4.1(6) provided a basis for the application to have been made.

44. The scope of s.31F(6) in the context of financial remedy proceedings has been addressed by the Supreme Court in *Gohil v Gohil* [2015] UKSC 61 and *Sharland v Sharland* [2015] UKSC 60. These were cases where the reopening of final financial orders was sought on the basis of allegations of fraudulent non-disclosure. In both cases, the original orders had been made in the High Court, and the procedural route for challenge was in issue. But the conclusion was that no such problem would exist for the family court. In *Gohil* Lord Wilson stated at [18(c)]:

> "It seems highly convenient that an application to set aside a financial order of the family court on the ground of non-disclosure should, again, be made to that court and indeed at the level at which the order was made; and this convenient solution seems already to have been achieved by the provision of the Matrimonial and Family Proceedings Act 1984 recently inserted as section 31F(6), under which the family court has power to rescind any order made by it."

In *Sharland*, in the course of an extensive survey of the procedural issues between [37] and [42] Lady Hale said this:

> "37. The fact that this order had not been perfected makes no difference. The principles applicable in this sort of case are the same

> whether or not the order agreed upon by the parties and the court has been sealed.
>
> …
>
> 41. The most recent survey of the "extensive jurisprudence" in this field is by Munby P in *CS v ACS and BH* [2015] EWHC 1005 (Fam). In that case, the issue was whether an appeal was the *only* route to set aside a consent order made in matrimonial proceedings. He refers to the recent steps to remedy matters, in section 31F of the Matrimonial and Family Proceedings Act 1984, inserted by the Crime and Courts Act 2013, when setting up the family court… On the face of it, as the learned editors of The Family Court Practice 2015 point out (p 1299), this is a very wide power which could cut across some other provisions, for example those prohibiting variation of lump sum and property adjustment orders. Clearly, as Munby P observed, the power, "although general is not unbounded" (para 11). However, it does give the family court power to entertain an application to set aside a final order in financial remedy proceedings on the well-established principles with which we are concerned in this case…"

45. I would therefore respectfully differ from the provisional view expressed in *Re G* and hold that the family court has the statutory power to review its own decisions and that challenges to findings of fact on the basis of further evidence do not have to be by way of appeal only. I would further suggest that, other things being equal, an application to the trial court is likely to be a more suitable course than an appeal. The trial court is likely to be in a better position than this court to assess the true significance of the further evidence, its advantage being all the greater if the findings are relatively recent, and if the matter can be considered by the judge who made them, as should always be the case if possible. Another reason for preferring an application to an appeal is that it is likely to be dealt with more quickly and at less expense. There will, however, be circumstances in which a return to the trial court will not be appropriate. That will certainly be the case where the applicant is alleging an error by the trial judge, regardless of the further evidence. Judges cannot hear appeals from themselves. There may be other situations, which it would not be possible or helpful to try to list, in which an appeal would be more appropriate than an application, but otherwise, an application should be the first port of call.

46. A convenient mechanism for freestanding applications is provided by Part 18 of the Family Procedure Rules 2010:

> "18.1 *Types of application for which Part 18 procedure may be followed*
>
> (1) The Part 18 procedure is the procedure set out in this Part.
>
> (2) An applicant may use the Part 18 procedure if the application is made—

(a) in the course of existing proceedings;

(b) to start proceedings except where some other Part of these rules prescribes the procedure to start proceedings; or

(c) in connection with proceedings which have been concluded.

(3) Paragraph (2) does not apply—

(a) to applications where any other rule in any other Part of these rules sets out the procedure for that type of application;

(b) if a practice direction provides that the Part 18 procedure may not be used in relation to the type of application in question.

47. Having established that the family court has jurisdiction to review its findings of fact, the next question concerns the proper approach to the task. As with the approach of an appeal court to the admission of further evidence, the family court will give particular weight to the importance of getting it right for the sake of the child. As was said in *Re L and B* at [41]:

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

48. The test to be applied to applications for reopening has been established in a series of cases: *Birmingham City Council v H (No. 1)* [2005] EWHC 2885 (Fam) (Charles J); *Birmingham City Council v H (No. 2)* [2006] EWHC 3062 (Fam) (McFarlane J); and *Re ZZ* [2014] EWFC 9 (Sir James Munby P).

49. These decisions establish that there are three stages. Firstly, the court considers whether it will permit any reconsideration of the earlier finding. If it is willing to do so, the second stage determines the extent of the investigations and evidence that will be considered, while the third stage is the hearing of the review itself.

50. In relation to the first stage, these decisions affirm the approach set out in *Re B* (see para. 28 above). That approach is now well understood and there is no reason to change it. A court faced with an application to reopen a previous finding of fact should approach matters in this way:

(1) It should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly-based welfare decisions on the other.

(2) It should weigh up all relevant matters. These will include: the need to put scarce resources to good use; the effect of delay on the child; the importance of establishing the truth; the nature and significance of the findings themselves; and the quality and relevance of the further evidence.

(3) "Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial." There must be solid grounds for believing that the earlier findings require revisiting.

51. I would also draw attention to the observations of Cobb J in *Re AD & AM (Fact Finding Hearing: Application for Rehearing)* [2016] EWHC 326 (Fam) about the care that must be taken when assessing the significance of further medical opinions at the first stage (para. 71) and as an example of the need to control the identification of issues and gathering of evidence at the second stage (paras. 86-89).

52. Pausing at this point to compare the hurdles facing an applicant to the trial court and an applicant to this court, it can be seen that the processes are by their nature different. The gateway under CPR 52.21(2) and the *Ladd v Marshall* analysis concern the admissibility of evidence, while the first stage of an application for a review requires a consideration of the overall merits of the application. It cannot be ruled out that the different procedures might throw up different results in similar cases, but on the whole I think that this is unlikely. In both contexts, the balancing of the public interests is carried out with a strong inclination towards establishing the truth in cases where there is good reason for a reassessment, and as a result the outcomes will tend to converge.

53. It remains to consider the position of the Family Division of the High Court, which does not benefit from the provisions of s.31F. That lacuna was filled by this court directing a rehearing under the inherent jurisdiction in a case where a child had been adopted: *Re X* [2016] EWHC 1342. I have already mentioned the decision of MacDonald J in *N v J*, invoking FPR r.4.1(6). It would clearly be preferable if procedure in the High Court was equivalent to that in the family court, indeed it is perverse that it is not. I note that in *Gohil* the Supreme Court recommended that a rule be made to confirm the jurisdiction of the High Court to set aside a financial order made in that court. The result was FPR 9.9A, introduced in October 2016, which provides as follows:

> *9.9A Application to set aside a financial remedy order*
>
> (1) In this rule—

> (a) "financial remedy order" means an order or judgment that is a financial remedy, and includes—
>
> (i) part of such an order or judgment; or
>
> (ii) a consent order; and
>
> (b) "set aside" means—
>
> (i) in the High Court, to set aside a financial remedy order pursuant to section 17(2) of the Senior Courts Act 1981 and this rule;
>
> (ii) in the family court, to rescind or vary a financial remedy order pursuant to section 31F(6) of the 1984 Act.
>
> (2) A party may apply under this rule to set aside a financial remedy order where no error of the court is alleged.
>
> (3) An application under this rule must be made within the proceedings in which the financial remedy order was made.
>
> (4) An application under this rule must be made in accordance with the Part 18 procedure, subject to the modifications contained in this rule.
>
> (5) Where the court decides to set aside a financial remedy order, it shall give directions for the rehearing of the financial remedy proceedings or make such other orders as may be appropriate to dispose of the application.

54. The course of this appeal demonstrates the value of an equivalent rule encompassing applications to set aside or vary orders and findings of fact in children cases. This is a matter that the Family Procedure Rules Committee may wish to consider.

55. In conclusion, these are my reasons for joining in the decision to dismiss this appeal and to refer to the trial judge the decision as to whether and to what extent the findings of fact against the appellant should be reopened.

Lord Justice Moylan:

56. I agree.

Lord Justice Floyd

57. I also agree.