Neutral Citation Number: [2023] EWFC 137

IN THE FAMILY COURT

Date: 11/08/2023

Before:

MRS JUSTICE KNOWLES

- -

Between:

A Mother	**Applicant**
- and -	
A Local Authority and Others	**Respondents**

- -

Re Z (Care Proceedings: Reopening of Fact Finding)

- -

Mr Spollon for the applicant mother of Z
Miss Jaganmohan for the local authority
Miss Pemberton for the mother of X,Y and W
Mr Watson for the father
Mr Brown for the children by their children's guardian

Hearing date: 2 August 2023.

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 11 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Knowles:

Publication

1. It is likely that this judgment will be published at some suitable point in the future, albeit in an anonymised form. I have therefore made limited reference to features of the parties' lives which might otherwise tend to identify them.

Introduction

2. I am concerned with four children: a boy, Z aged 7; a girl, W aged 3; a boy, Y aged 2; and a girl, X aged 1. Z, Y and X all share the same father ("the father") and the identity of W's father is not known to the court. Z's mother is the father's first partner, K. His second partner, L, is the mother of W, Y and X. All four children are the subject of care proceedings which are listed for a final hearing in early September 2023. All are in foster care: Z lives with his maternal aunt, the sister of K, and the three younger children live with foster carers.

3. This hearing was listed to determine K's application to reopen findings of fact made in 2016 by HHJ Orrell in the context of care proceedings brought by a different local authority in respect of Z when he was a small baby. Her application was made on 7 October 2022 and, on 25 May 2023, it was adjourned to await the outcome of a fact finding hearing in care proceedings concerning all four children. On 23 June 2023, I handed down a judgment following the fact finding hearing and listed K's application to re-open HHJ Orrell's findings for determination well before the final hearing listed in September 2023.

4. I have read the skeleton arguments provided by each party and read the bundle which included relevant documents from the 2016 care proceedings as well as transcripts of K's oral evidence and that of the father. I heard oral submissions from the parties and considered a bundle of relevant authorities.

5. I record my thanks to the advocates who appeared on behalf of the parties. Their respective clients could not have had better representation.

Relevant Background

6. In April 2016, a local authority issued care proceedings in respect of Z who was then just over three months old. Z was found to have sustained a number of serious injuries and the court directed that there should be a fact finding hearing to determine how and by whom those injuries had been caused.

7. The fact finding hearing was conducted over three days in September 2016 by HHJ Orrell, who was, at that time, a Designated Family Judge. HHJ Orrell found the following facts:

    a) Z had sustained four fractures to the ribs on his back and front. There was a small bruise under his left eye and a roughly circular bruise below the angle of his right jaw;

    b) Z had significant bruising on the front and back of his chest and on his shoulder blades;

c) Z had sustained trauma to his liver and to the internal wall of his chest;

d) On the unchallenged medical evidence, these injuries were inflicted on two or more occasions;

e) The only people who could have caused these injuries were the father and K;

f) K was Z's primary carer;

g) Applying the criminal standard of proof, K inflicted both sets of injuries and the father had not inflicted any of the injuries;

h) K was described as being *"manipulative, highly intelligent and has skilfully arranged the evidence and her recollections so as to implicate, somewhat obliquely, a very vulnerable father, particularly as it seems agreed between the parents in the past he accidentally inflicted a very small cut on [Z's] lip"*.

8. It was known at this time that the father was vulnerable by reason of his learning disability.

9. In March 2018, Z was placed into his father's care by virtue of a lives with order and K was permitted to have contact with Z five times each year, supervised by the local authority. The father commenced a relationship with L in April 2020 and they began to cohabit in March 2021 after W was born. All four children lived with the father and L though Z visited his maternal aunt every fortnight for weekend staying contact. He continued to see his mother at contact supervised by the local authority.

10. There was no social care involvement with the family until May 2022 when Z's school made a referral to a different local authority due to safeguarding concerns it had about him. Z had alleged in May 2021 that his father had hit him, hurt him, bitten him and tried to flick his *"winky"*. In May 2022, Z presented at school with bruising on his arms which he stated had either been caused by the family dog or resulted from a fall. Z was also said to have difficulties regulating his behaviour and was often aggressive to other children.

11. On 31 July 2022, X – then a six week old baby - was taken to hospital by L and paternal grandmother and, on investigation, was found to have sustained a number of significant injuries. X had an oblique displaced fracture of her left humerus and, following a skeletal survey undertaken on 1 August 2022, X was additionally found to have sustained fractures of her posterior right 5th to 8th ribs; anterior fractures of her left 6th and 7th ribs; metaphyseal fractures of both distal femurs; and metaphyseal fractures of her proximal left and right tibias. Some of these injuries were acute but some showed signs of healing which indicated that X had been assaulted on more than one occasion. X was unbruised and had a subconjunctival haemorrhage on the right eye which was birth-related. No underlying health conditions were identified which made X more susceptible to fracture. Those injuries were confirmed as findings of fact at the hearing in June 2023.

12. Additionally, I found that all the above injuries had been inflicted during probably two incidents of abusive handling involving different mechanisms. The humeral and left tibial fracture were no more than 11 days old and occurred as part of the same event, close in time to X's presentation at hospital. Each injury would have been caused by a separate application of force. The remaining fractures were all between two and four weeks old and occurred as part of the same event, though requiring a minimum of three and a maximum of five separate applications of force. The injuries to X were inflicted by either her mother, L, or by the father. The perpetrator of these injuries failed to obtain medical help for X at the time the injuries were caused. If the perpetrator of the older injuries was the father, L was aware of X's pain and distress in consequence and/or the causative events and failed to obtain medical help for X. Both the father and X failed to obtain timely medical help for X's acute injuries on 31 July 2022.

13. In my judgment, I made a number of observations about the father. Neither L nor the father gave me a satisfactory, let alone, reliable or truthful account of X's life. I stated that I had real reservations about the warily given account provided by the father and had formed the very clear impression that his answers were evasive and that he was withholding information from the court. His evidence was peppered with *"I don't know"* or *"I can't remember. It was over a year ago"* and yet those answers were given alongside responses which demonstrated a very clear recollection of what he believed were salient events. Many of his answers sought to distance himself from times when X might have been unsettled or from a role in her care when he might have had an opportunity to harm her.

14. The local authority sought no threshold findings stemming from the safeguarding concerns expressed about Z by his school. Additionally, I note that, following his removal from the family home, Z had told his maternal aunt that the father and L had *"proper fights"* in which each hit the other. Z had been worried that his father would hurt X whilst she was in her mother's womb. Z said he had never been hit or hurt by anyone and denied telling his teachers that his father had hit him. The local authority decided not to pursue any findings about this material at an early stage in the fact finding hearing, a decision I described as *"wise"*.

15. A welfare hearing in respect of all four children is listed in early September 2023.

Positions of the Parties

16. What follows is a summary of the parties' respective positions.

17. On behalf of K, Mr Spollon sought to persuade me there was a sound basis for reopening the findings of fact made by HHJ Orrell in September 2016. He submitted that there was genuine new information which warranted that course, namely: (a) the father was now in a pool of perpetrators, restricted to just two, one of whom had inflicted very serious injuries on a small baby; (b) the father had failed to obtain timely medical help for X; (c) the injuries inflicted on X were strikingly similar to those inflicted on Z in 2016; (d) there had been safeguarding concerns about Z and Z had said that his father had been fighting L in the family home; and (e) the father had been found to be evasive, untruthful and unreliable when giving evidence on matters of critical importance. Mr Spollon advanced strong welfare reasons for establishing the truth which would benefit not only Z, but also K who was due to remarry in early

November 2023. However, with a degree of realism, Mr Spollon submitted that his case for a re-hearing was not overwhelming but was based on strong and reliable evidence. He accepted that K was not stating that she remembered new matters relevant to Z's injuries and she accepted that she had not acquitted herself well in cross-examination at the 2016 hearing.

18. In response, the local authority, the father and the children's guardian all opposed K's application. All three accepted that HHJ Orrell's finding, apparently on the criminal standard of proof, that K had inflicted Z's injuries did not import a higher hurdle for K to overcome in arguing for findings to be reopened since the family court should not import criminal concepts into its processes and reasoning. Likewise, all three accepted that K had not made an unequivocal admission to causing Z's injuries when her counsel had told HHJ Orrell that, though K had no memory of causing Z's injuries, she now accepted she must have done so. On behalf of L, Miss Pemberton took a neutral stance.

19. On behalf of the local authority, Miss Jaganmohan submitted that a pool finding in relation to the perpetrator of X's injuries was insufficient – in combination with other factors – to reopen HHJ Orrell's findings. There was unlikely to be a different outcome to any re-hearing as, subsequent to the hearing before HHJ Orrell, K stated that she had never been away from Z long enough for the father to cause the injuries and thus did not know how the injuries had been caused. The failure of the father to seek medical assistance for X was in marked contrast to the findings made by HHJ Orrell where he had been noted to be hurrying the mother along so that medical assistance could be obtained for Z. The similarities between the injuries were not striking and it was difficult to see how the safeguarding information about Z could ever sustain a finding about the father's propensity to violence.

20. Mr Watson, on behalf of the father, submitted that an uncertain perpetrator finding was a relevant factor to weigh in the balance but required the court to evaluate the weight to be given to it by dissecting the evidence in the circumstances of the particular case. Mr Watson doubted that, given the passage of time and the concession made as to K's memory, any re-hearing was likely to lead to a different outcome by identifying the father as the sole perpetrator.

21. Finally, Mr Brown on behalf of the children submitted that the only material new information was the pool finding implicating the father together with the allegations of harm to Z which the local authority had not pursued. This new information had no impact on three fundamental aspects of the 2016 findings, namely, the mechanism of Z's injuries; who cared for Z and when; and Z's presentation at key points in the chronology. The passage of time meant that neither the father nor K was going to be in a good, let alone better, position to tell the court what had happened to Z, especially given the father's cognitive difficulties. K's application was characterized by mere speculation and hope rather than by the existence of solid grounds for challenge.

The Law

Reopening Findings of Fact

22. The law which governs the court's task at this hearing is well settled and was the subject of recent consideration by the Court of Appeal in Re J (Children: Reopening

Findings of Fact) [2023] EWCA Civ 465 (hereinafter referred to as "Re J").

23. In Re J, Peter Jackson LJ set out the legal framework as follows:

> *"5. The law in relation to reopening findings of fact in children's cases is settled. It is to be found in the decisions of this court in Re E (Children: Reopening Findings of Fact) [2019] EWCA Civ 1447, [2019] 1 WLR 6765 and Re CTD (A Child) (Rehearing) [2020] EWCA Civ 1316, [2020] 4 WLR 140. These authorities endorse the decisions of Hale J in Re B (Minors) (Care Proceedings: Evidence) [1997] 2 All ER 29, [1997] Fam 119, [1997] 1 FLR 285, [1997] 3 WLR 1 and Munby P in Re Z (Children) (Care Proceedings: Review of Findings) [2014] EWFC 9, [2015] 1 WLR 95, [2015] 1 WLR 95, [2014] All ER (D) 143.*
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> *6. In summary, the test to be applied upon an application to reopen a previous finding of fact has 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.*
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> *7. In relation to the first stage: (i) the court 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; (ii) it should weigh up all relevant matters, including 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; and (iii) 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 that the earlier findings require revisiting.*
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> *8. As Mr Aidan Vine KC rightly submitted, the requirement for 'solid grounds' is a part of the evaluation that the court must carry out. It is not a shorthand substitute for it.*
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> *9. In Re W (Children: Reopening: Recusal) [2020] EWCA Civ 1685, [2021] 2 FCR 793 at [28] I said this:*
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> > *"It is rare for findings of fact to be varied. It should be emphasised that the process of reopening is only to be embarked upon where the application presents genuine new information. It is not a vehicle for litigants to cast doubt on findings that they do not like or a substitute for an appeal pursued at the time of the original decision. In Re E at [16] I noted that some applications will be no more than attempts to re-argue lost causes or escape sound findings. The court will readily recognise applications that are said to be based on fresh evidence but are in reality dressed up in new ways, and it should deal with these applications swiftly and firmly."*
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> *10. As I noted in Re E at [50], the approach to applications to reopen is now well understood and there is no reason to change it….."*

24. 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, whether it is likely to make a significant legal or practical difference to the arrangements that are to be made for the children (see [34] of Re E (Children: Reopening Findings of Fact) [2019] EWCA Civ 1447). A decision about whether to reopen findings of fact is highly case-sensitive, requiring a careful analysis of the underlying evidence.

Uncertain Perpetrator

25. In [46]-[48] of Re B (Children: Uncertain Perpetrator) [2019] EWCA Civ 575, Jackson LJ relevantly elucidated the correct approach to the concept of uncertain perpetrators in children proceedings as follows:

> *"46. Drawing matters together, it can be seen that the concept of a pool of perpetrators seeks to strike a fair balance between the rights of the individual, including those of the child, and the importance of child protection. It is a means of satisfying the attributable threshold condition that only arises where the court is satisfied that there has been significant harm arising from (in shorthand) ill-treatment and where the only 'unknown' is which of a number of persons is responsible. So, to state the obvious, the concept of the pool does not arise at all in the normal run of cases where the relevant allegation can be proved to the civil standard against an individual or individuals in the normal way. Nor does it arise where only one person could possibly be responsible. In that event, the allegation is either proved or it is not. There is no room for a finding of fact on the basis of 'real possibility', still less on the basis of suspicion. There is no such thing as a pool of one.*
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> *47. It should also be emphasised that a decision to place a person within the pool of perpetrators is not a finding of fact in the conventional sense. As it is made clear in Lancashire at [19], O and N at [27-28] and S-B at [43], the person is not a proven perpetrator but a possible perpetrator. That conclusion is then carried forward to the welfare stage, when the court will, as was said in S-B, "consider the strength of the possibility" that the person was involved as part of the overall circumstances of the case. At the same time it will, as Lord Nicholls put it in Lancashire, "keep firmly in mind that the parents have not been shown to be responsible for the child's injuries". In saying this, he recognised that a conclusion of this kind presents the court with a particularly difficult problem. Experience bears this out, particularly where a child has suffered very grave harm from someone within a pool of perpetrators.*
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> *48. The concept of the pool of perpetrators should therefore, as was said in Lancashire, encroach only to the minimum extent necessary upon the general principles underpinning s.31(2). It does not alter the general rule on the burden of proof. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown….."*

26. A pool finding – or to put it more accurately – inclusion on a list of those who had the opportunity to cause injury to a child is not a finding on the balance of probabilities

that a person harmed a child. Thus, in itself, such a finding cannot - when the court is considering whether or not to reopen findings of fact - constitute reliable, direct evidence about the perpetration of earlier injuries (by analogy with the analysis set out in [43] of Re A (Children) (Pool of Perpetrators) [2022] EWCA Civ 1348). However, in the context of an application to reopen findings of fact, inclusion on a list of those having the opportunity to injure a child can be information which invites further inquiry and which could contribute – alongside other evidence - to establishing solid grounds for believing that earlier findings require revisiting. This approach is consistent with the flexible approach of the family court to past events and future forecasts, provided these matters are relevant in assisting the court to decide which welfare course is in a child's best interests.

Criminal Concepts

27. Making threshold findings to the criminal standard is inconsistent with recent Court of Appeal decisions such as Re R (Children) (Care Proceedings: Fact-Finding Hearing) [2018] EWCA Civ 198 where the court stated in clear terms that *"the structure and the substance of the criminal law should not be applied in the family court"* [61]. The importation of concepts from the criminal courts to the family court is inappropriate, unnecessary, and unwise and should be avoided (per Hickinbottom LJ in [106] of Re R). This was re-emphasised in Re H-N and Others (Children) (Domestic Abuse: Finding of Fact Hearing) [2021] EWCA Civ 448 at [73] where McFarlane P stated, *"It follows therefore that a Family judge making a finding on the balance of probabilities is not required to decide, and does not decide, whether a criminal offence has been proved to the criminal standard."* In A v B and Anor (Allegations of Rape) [2023] EWCA Civ 360, the Court of Appeal yet again endorsed the approach taken in Re R and Re H-N with respect to concepts taken from the criminal law.

Discussion

28. Having reflected on the written and oral submissions, I am satisfied that I should refuse K's application to reopen the findings of fact made by HHJ Orrell in 2016. My reasoning is set out below.

29. First, there is a public interest in the finality of litigation and in matters not being relitigated without good reason, particularly in circumstances where the resources of the family justice system are under serious strain. The circumstances of this case do not constitute good reason for casting doubt on the findings made by HHJ Orrell. Second, any re-hearing would undoubtedly import delay and uncertainty into decision-making about Z. No rehearing could be accommodated before me until January 2024 at the earliest since, given my fact finding determination in June 2023, I would be best placed to conduct any rehearing about Z and his family. I note that K does not seek to care for Z and so a decision about where he is to live could be made in September 2023. However, K does seek to have the limitations on her contact lifted which could occur in the relatively near future if the findings against her were overturned. Thus, the proceedings with respect to Z could not be concluded in September 2023 alongside those of his half-siblings.

30. Third, the only material new information before the court is the pool finding made against the father and the allegations of harm outlined in paragraphs 10 and 14 above. With respect to the latter, the local authority did not invite me to make findings about

these matters, a decision I described as wise in my fact finding judgment. I did so because there are substantial forensic problems with these allegations such as inconsistent accounts given by Z together with a lack of other corroborative evidence. In my assessment, it would be very unlikely that a court would find them proved on the balance of probabilities.

31. Further, and in accordance with the caselaw cited above, the pool finding means that the father is a possible perpetrator of the injuries to X and not a proven perpetrator. Thus, the father cannot be identified unequivocally as the perpetrator of the serious physical harm which befell X in the care of her parents. Though the father is, as Mr Spollon put it, the common denominator in respect of X's and Z's injuries, that feature does not make it so unlikely that the father and K could both have inflicted injuries on two separate children that solid grounds exist for reopening the 2016 findings. That latter observation is shaped by the relevant principles on inherent probabilities contained in Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35, including the proposition that improbable events occur all the time (see [11], [15], [72] and [73]).

32. Mr Spollon sought to persuade me that there were other matters amounting to genuine new information. I disagree. Both Z and X were babies when they each sustained rib fractures, sadly a relatively commonplace inflicted injury in children of this age. Z sustained extensive bruising and internal injuries which was not the case with X and X sustained limb fractures which Z did not. In my view, the injuries sustained by each child were not so strikingly similar so as to raise alarm bells. Next, the observations I made about the father's lack of candour do not assist K – merely because the father lacked candour about what happened to X does not mean that he lacked candour about Z and injured him. Likewise, the father's failure to obtain timely medical assistance for X does not, of itself, tip the balance in favour of reopening the Z findings.

33. More to the point, none of the new information sheds any light on three fundamental aspects of the 2016 findings, namely: the mechanism of Z's injuries in the context of the unchallenged medical evidence about these; who cared for Z and when; and Z's presentation at key points in the chronology. Those latter two aspects are of fundamental importance to the question of who injured Z in 2016.

34. Fourth, turning to the findings made by HHJ Orrell, these were made following a procedurally fair hearing where both the father and K were represented by counsel and where the court heard oral evidence from both of them. In his judgment, given ex tempore, HHJ Orrell identified inconsistencies between K's oral and written evidence which cast doubt on her credibility. One key issue was whether the father had told K about a strange clicking noise he heard when bathing Z. I observe that this sound might have alerted a parent to the possibility there was something wrong with Z's chest which required medical investigation. In her written evidence, K said the father had spoken to her about this noise before Z was seen by any medical professional but, in her oral evidence, K denied any such conversation or said she did not remember it if the subject had been discussed. K was challenged about this in cross-examination because, being present herself when the father told the triage nurse and out of hours GP about the clicking noise, she made no comment about this and did not question the father's account. Her answers about this issue were wholly inconsistent with the written evidence and with the response to the local authority's threshold document filed on her behalf. K's inconsistency about this key issue was accompanied by

evidence about both her slow response when it was obvious that Z needed to go to hospital and her apparent willingness to take a back seat and allow the father to explain Z's condition to the triage nurse and out of hours GP. This behaviour was highly unusual given that K was Z's primary carer, had more hands on childcare experience, and was the person who guided the father in all matters relating to Z.

35. During the course of the hearing before HHJ Orrell, it became clear that K accepted that there was very little, if any, opportunity for the father to injure Z. K was Z's primary carer and took the lead in all child care matters. The father spent a mere two hours with Z each morning and evening and was otherwise at work. The accommodation was small so noise could be heard easily throughout. Thus, K accepted that she would have heard if anything was amiss in the flat and could not identify any time when the father was left alone with Z for a significant period of time.

36. The overall picture created by K's evidence was of someone not being honest about the circumstances in which Z came to be injured. By contrast, the father was felt to be a more honest and straightforward witness. The impression created by K's evidence was reinforced by her position at the conclusion of the oral evidence – conveyed to HHJ Orrell by her counsel – that K accepted the probability that she was responsible for causing the injuries to Z even though she had no memory of doing so. I note that K signed a document to that effect. HHJ Orrell referred to K's position in his judgment, stating that K *"now accepted that she must have perpetrated both sets of injuries. It was put like that because Mr Bowe said that the mother simply could not recollect inflicting these injuries"*. K was not present in court when Mr Bowe made his submissions to the court because she was extremely distressed.

37. Having heard submissions on this issue, I have decided that it would be unwise to assume that the submission made by Mr Bowe on K's behalf amounted to an admission of perpetrating the injuries to Z. The situation in 2016/2017 was much more nuanced. In my view, Mr Bowe's submission amounted to a recognition that the logical effect of the evidence before the court was that K must have inflicted the injuries though she had no recollection of so doing. K said as much in her statement dated 28 October 2016, namely that she could *"understand why His Honour Judge Orrell came to the conclusion that [she] had caused the injuries to [Z] based on the evidence that the court heard"*. K went on to state that she *"cannot accept that [she] caused those injuries willingly or accidentally"*. When HHJ Bellamy gave judgment in November 2017, he did so on the basis that K had been plain in her oral evidence before him that she did not accept having harmed Z. Thus, any *"admission"* had been withdrawn shortly after the hearing before HHJ Orrell and been treated as such by HHJ Bellamy. In those circumstances, I do not regard what was said on K's behalf before HHJ Orrell as determinative on the issue of perpetration. Though counsel's submissions on K's behalf may not have amounted to an unequivocal admission of guilt, it is apparent that K recognised the strength of the evidence against her and the logical conclusion which the court would draw as a result. It is also equally clear that, were the 2016 findings to be relitigated, K could be cross-examined on her rather awkward position as advanced by Mr Bowe.

38. I observe that whilst HHJ Orrell was entitled to identify K as the perpetrator of Z's injuries, I consider that he was unwise to make reference to the criminal standard in doing so. HHJ Orrell observed that he was satisfied *"on the criminal standard of*

proof which is not necessary but it may be helpful if I say I am sure that the mother inflicted both sets of injuries and I am sure that the father did not inflict either set of injury". His reference to the criminal standard of proof not being *"necessary"* suggests that HHJ Orrell knew what standard of proof he had to apply in family proceedings and expressed himself in this way – as a form of legal shorthand - to demonstrate his certainty in the correctness of his findings. In those circumstances, I am satisfied that I should read his decision as having been made according to the applicable civil standard and proceed on the basis that the findings against Z were made on the balance of probabilities. Though HHJ Orrell came to his conclusions in 2016, well before the Court of Appeal deprecated the importation of concepts from the criminal law into family proceedings, he should not have expressed himself as being satisfied on the criminal standard of proof. It was wholly unnecessary and potentially misleading to do so. No matter how sure they are of their findings, family judges should avoid expressing themselves in the way HHJ Orrell did given the subsequent authoritative decisions of the Court of Appeal cited earlier in this judgment.

39. Thus, it will be apparent that my analysis of HHJ Orrell's decision does not, in conjunction with other matters, support the reopening of the 2016 findings.

40. Fifth, turning to the effectiveness of any rehearing, I consider that the court would be faced with substantial difficulties if I were to permit the responsibility for Z's injuries to be relitigated. Z was injured some 7 years ago, thereby compromising accurate memories of what happened in the family home. Moreover, recent cognitive assessment of the father has yet again established that he is a man of extremely low cognitive ability with significant problems such as an inability to recall specific dates and difficulty in retaining information over an extended period of time. I consider that his memory of past events in 2016 is likely to be very limited. Additionally, whilst K did not have cognitive difficulties, she struggled to remember the days leading up to Z's presentation at hospital during the fact finding hearing in 2016. K accepted it was all a *"huge haze"* which does not bode well for any rehearing. Indeed, Mr Spollon accepted that K had not remembered anything new about the events in 2016.

41. Finally, I agree with Mr Brown that, putting aside all the legal subtleties, Z's welfare lies at the heart of the balancing exercise which I must undertake, weighing up both the value of correctly identifying a perpetrator of his injuries in 2016 and the reopening of previously found facts where that process is unlikely to make a significant legal or practical difference to Z. Thus, I accept that the truth about which parent injured Z has its own significant value which would allow for a better understanding of Z's life-story, his therapeutic needs and would contribute to care planning. Different findings have implications for Z's relationship with his parents and could, for example, materially change the level and type of contact he has with K. Indeed, as Z gets older, the risks K might pose towards him are likely to change such that, irrespective of any rehearing, her contact with him might develop into something less circumscribed. On the other hand, given the pool finding made against the father, there is a real prospect that Z's relationship with him, including considerations of placement and contact, will alter so as to render it less necessary to examine whether the father was responsible for Z's injuries in 2016. These welfare considerations must also recognise K's limited position which is not to advance any role in caring for Z but to improve the nature and frequency of her contact with Z.

42. Standing back and pulling the strands of my analysis together, I am unpersuaded that there are solid grounds for believing that the 2016 findings require revisiting. The likely legal and practical difference consequent upon embarking on a rehearing is very limited for all the reasons I have examined. Sadly, this application is speculative and hopeful and thereby fails to demonstrate that solid grounds for challenge to the 2016 findings exist.

Conclusion

43. That is my decision.