

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.

Case No: LS18C00605 & LS18C00665

IN THE FAMILY COURT SITTING AT LEEDS

**Coverdale House
East Parade
Leeds**

Before:

HIS HONOUR JUDGE HAYES QC

Between:

A Local Authority

Applicant

- and -

- (1) Ms X**
- (2) Mr Y**
- (3) Child J**
- (4) Child K**

Respondents

Guy Swiffen (Counsel, instructed by the Local Authority Legal Dept.) for the Applicant
Lois Monks (Solicitor) for the 1st Respondent Mother
Stephen Brocklehurst (Solicitor) for the 2nd Respondent Father
Adam Hall (Solicitor) for the 3rd and 4th Respondent Children acting by their
Children's Guardian

Hearing Dates: 11-14 February 2019

Re J and K (Flawed ABE Interview)

JUDGMENT

Explanatory Note:

This is an extract from a Judgment that was handed down in the course of care proceedings brought in respect of two children, J (aged 6) and K (aged 4 months). The details of the proceedings are such that full publication cannot take place as it includes sensitive and confidential information which may lead to the identity of the children or family involved being revealed.

Paragraphs [1] to [59] of the Judgment (not published here) include evidence that went unchallenged by the father and the reasons why the court was satisfied that J and another child from an earlier relationship had been sexually abused by the father.

However, during the Judgment the Court had reason to comment on the manner in which a later video interview was conducted with child J. That later video post-dated the evidence upon which the findings were made. It is that part of the Judgment which is reproduced below, suitably anonymised.

Child J's Video Interview on 22 November 2016 – Some Critical Observations

[60] ... It follows from the above that I make the finding that J was sexually abused by the father without regard to the later video interview of J conducted on 22 November 2016. As I had reason to observe during submissions, I was concerned about the way that video interview was conducted. Mr Swiffen [LA Counsel] conceded on the part of the LA that were the LA seeking to rely *solely* on that video of J he would have found himself in some difficulty. But, of course, the LA's case has never been put in that way. However, given that concession properly made on behalf of the LA and the misgivings that I have, I should make some observations

about the video. These do *not*, in any way, affect the finding that I have made. I am conscious also that (i) my observations relate to the conduct of professionals who have not given oral evidence before me; (ii) they acted in good faith during the video; and (iii) the video took place in 2016 and it may be that the professionals involved have already taken steps to reflect self-critically on what happened and to change their approach in other cases. If they haven't, they need to.

[61] The starting point for what I have to say is that the core purpose of the Achieving Best Evidence (“ABE”) Guidance is that those who elicit evidence from a child during a video interview must conduct themselves professionally and in such a way that the child is given the maximum possible opportunity to recall freely, uninhibited by questions, what he/she is able to say.

[62] The case law addresses both the importance of adhering to the ABE Guidance and that, in cases where it is not adhered to, the court may be left in a situation where it can place little or any weight on the video interview; see, for example, *Re B (Allegation of Sexual Abuse: Child's Evidence)* [2006] 2 FLR 1071; *TW -v- A City Council* [2001] 1 FLR 1606; *Re W; Re F* [2015] EWCA Civ 1300; *AS -v- TS* [2016] EWHC 532.

[63] The Guidance is detailed and it is imperative that it is read, understood and followed by those who conduct video interviews. It is axiomatic that a child who is interviewed has no control over the way in which the interview is conducted by the adult(s) present. A poorly conducted interview does not assist the court in assessing the truth or otherwise of what the child says on video. Rather, it simply tells the court that the adults present have not conducted the video in the way that the Guidance requires.

[64] In the interview of J, there were a number of matters which caused me particular concern:

- a. The intermediary brought with her a large suitcase and a dog (“B”). The suitcase was placed prominently at the back of the room. It contained various items including anatomically correct dolls. It was visited frequently by the intermediary throughout the video as more and more items were produced from it. The dog, as I shall explain, took up various positions in the room and was a distraction during much of the interview.
- b. During the video, the intermediary introduced two sets of anatomically correct dolls and another toy (“S”, a toy bear) all of which were used as props when speaking with J. The ABE Guidance (para 3.108) cautioning the use of dolls, figures and props does not appear to have been considered or applied during the conduct of J’s interview.
- c. The first set of anatomically correct dolls was produced by the intermediary almost immediately after J said, “We’ve been touching willies and bits”. There

was no attempt first to develop a free narrative from the child without the use of such dolls.

- d. Later in the video, the intermediary herself took hold of the penis of the male doll and moved it into different positions whilst asking J questions. That involved the combination of leading questions and props which the ABE Guidance expressly warns must not happen.
- e. Later again, there was a point when the intermediary took hold of two of the anatomically correct dolls and used them (holding them close together in a standing position) whilst questioning J. Once more, this was a leading questioning technique combined with such items which cannot be squared with the requirements of the ABE Guidance.
- f. The toy bear was then produced and used in substitute for the dolls when asking J to demonstrate what happened. This too was done in a leading and inappropriate manner.
- g. As to the presence of B the dog in the interview room, I have never before seen a dog present during an ABE interview. There was no good reason to have a dog in the room and I find that it was misguided to have the dog present. What took place during the video (summarised below) amply demonstrates why I say this.
- h. The purpose of the video was to speak to and elicit a free narrative from J. And yet there were frequent times during the video when the dog took centre stage and attention / comments were directed to the dog rather than J. At one point, the dog took up a position on one of the chairs. The chair was there for child J, not the dog.
- i. On more than one occasion, the dog licked J on the face and on her hand. J was distracted by this. The adults were enamoured by it. I was left asking myself why it was happening at all during an ABE interview of a young child.
- j. The dog was frequently a distraction to J and the adults in the room. One example of this was when the intermediary (inappropriately) used “S” the toy bear to get J to demonstrate how she touched her father’s penis. The dog was interested in playing with the toy bear and later ended up with the toy bear in his mouth. I ask myself again, what was J, a child being questioned in a sexual abuse investigation, to make of what was going on around her in the video suite?
- k. An even more troubling example was the following exchange:

Officer	Why did you touch daddy’s willy?
J	Because he said, “Don’t ever tell anybody and we’ll do it, er, when mummy isn’t here and when mummy is here we’ll cover them up”
Officer	Okay. Do you smell a little smell in the room? Do you think B has [done] a little trump?
J	Yeah.

Intermediary Has she?
Officer I'm not sure. I think so.
Intermediary Oh no.
Officer That's okay. She's okay. Can you smell it or it is just me?
Intermediary I can't smell anything.
J I can.
Intermediary Can you? Oh no, it's probably going to reach me in a minute.
Officer That's okay.
Intermediary Sometimes she gets a bit of wind.
Officer That's okay. That's what animals do isn't it?
J And we do.
Intermediary Yes, and we do.

So it was that what J said at the start of the above exchange about what her father had said to her (clearly a worrying account) was not developed any further. The smell made by the dog distracted the attention of the officer, the intermediary and the child. The conversation turned from what J said to a discussion about the dog breaking wind. It is simply unacceptable that that this happened.

[65] As I have said, the observations that I have made do not, in the circumstances of this case, have any bearing on my findings of fact. But the errors that were made could – in other circumstances – have had serious evidential consequences. A poorly conducted ABE interview has some parallels with a police officer (or some other person) trampling over a potential crime scene rather than adhering to essential forensic guidelines.

[66] The video interview of J on 22 November 2016 regrettably strayed from its objective of “achieving best evidence” from the child. It would be helpful for my observations to be fed back to the officer and the intermediary and, subject to considering any representations to the contrary by the parties, I will give permission for them to see this Judgment (or part thereof) for that purpose. My observations are intended to be *constructive criticism*. I hope that they are read in that spirit and that those involved will reflect on what went wrong and avoid making the same mistakes in the future.

[End of Extract]

HHJ Hayes QC

14 February 2019