Neutral Citation Number: [2020] EWHC 2742 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2020

Before:

THE HONOURABLE MRS JUSTICE GWYNNETH KNOWLES DBE

Re X (Care Proceedings: Jurisdiction and Fact Finding)

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Miss Kate Hudson for the local authority.
Miss Kate Tompkins/Miss Joanne Ecob for the father.
Mr Edward Bennett for the mother.
Miss Kate Mather for the stepmother.
Miss Joanne Porter for X by her Children's Guardian.

Hearing dates: 16, 17, 18 March, 4, 5 May, 1, 5 June, and 12, 14 August 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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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 child 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:

Introduction

1. I am concerned with a young person, X aged 15 years. Private law proceedings concerning X began in February 2019 at the instigation of her stepmother, AB, and, following an invitation from the court to prepare a report pursuant to section 37 of the Children Act 1989, the local authority issued care proceedings in July 2019. The proceedings were case managed by Mrs Justice Theis from August 2019 as, at that time, it was envisaged that X's father would be making an application under either the 1980 Hague Convention or the inherent jurisdiction for X's return to the United States of America ["the USA"]. Though neither contemplated application was made, this case had a variety of complexities, both factual and legal, which made it appropriate for determination by a High Court Judge.

2. The first respondent is named as X's father on her birth certificate though he is not her biological father. However, he has acted as X's father throughout her life. I will refer to him as "*the father*". X's biological father is said to be a Mexican national who has played no role in her life since her birth. His identity and whereabouts are unknown. X's mother is the second respondent and I will refer to her as "*the mother*". The mother, the father and X are all American citizens and the mother and father live, respectively, in Ohio and Tennessee. X lived in Tennessee with her father until July 2018 when both came to England to visit her father's fiancé, AB, X's future stepmother. Apart from short trips to the USA in November and December 2018, X has lived here with AB since July 2018. In September 2018, her father returned to Tennessee for work, leaving X in the care of her stepmother. He has not lived with X since then. For immigration purposes, X is presently an overstayer, having entered this jurisdiction on 7 January 2019 on a six-month visitors' visa which expired in July 2019. The third respondent is AB who began a relationship with the father in February 2018 and married him in November 2018. Their marriage broke down in late February 2019 and divorce proceedings have recently been initiated in Tennessee by the father. I will refer to AB as "*the stepmother*".

3. These proceedings were listed for a combined final fact-finding and welfare hearing in March 2020. However, by February 2020, it had become clear that the March 2020 hearing could not proceed as originally envisaged and so the March 2020 hearing was designated a fact-finding hearing. A welfare hearing was listed in June 2020. The mother, the father, and the stepmother made a variety of allegations about both each other and the care afforded to X which were incorporated by the local authority into a composite schedule of findings. The local authority also invited the court to make additional findings against the adults about the care received by X which were relevant to any determination about her future welfare.

4. In fact, this case proceeded in a manner which neither the parties nor the court envisaged in February 2020 when Theis J directed the split hearing detailed above. I am greatly indebted to the advocates for their assistance in negotiating the twists and turns in this litigation. Ultimately, the proceedings concluded on 14 August 2020 when I made an order approving X's return to the USA to live with her half sister and her family in Michigan. X returned to the USA shortly thereafter.

The Relevant Issues

5. This judgment has been written primarily for the benefit of X. Her time in this jurisdiction has been troubled and unhappy and she has been caught in the middle of adult disputes which impacted on her care. It is important that she has a reliable narrative which might help her understand and, in due course, overcome what has happened to her.

6. These proceedings involved a child who was not a British citizen and whose status in this jurisdiction was uncertain. One of the issues which the court had to grapple with, at various stages of the proceedings, was its jurisdiction to determine X's welfare. Having summarised the background and procedural history, these jurisdictional issues will form the first part of this judgment.

7. The second part of the judgment will concern itself with the factual issues the court was invited to determine and which were of key importance to X. Developments in the litigation meant that I took a decision to abort a fact-finding exercise and my reasons for doing so might be of some wider interest. In the end, factual matters were resolved on the basis of concessions made by the parties in their respective statements.

8. I have read with care an extensive court bundle. This included:

   a) material pertaining to the private law proceedings concerning X;

   b) court documents from Tennessee concerning X;

   c) documents generated during police contact with X, the father and the stepmother;

   d) social work records;

   e) and the documents generated in the care proceedings.

   I heard some oral evidence from the stepmother as to factual matters. It was not possible to conclude her evidence for reasons which will become clear later in this judgment.

Summary of Background

9. I have summarised the background pertinent to the issues in this case, drawing on both the written and oral evidence.

10. The mother and father were married, and X is their only child together. The father has six other children by his first wife, all of whom are now adult and live in the United States. The mother has another child by her present partner who was born during these proceedings. The relationship between X's parents broke down and there were divorce and custody proceedings in the [redacted] County Court, [redacted], Tennessee in 2013-2015. The mother was noted to have failed to attend relevant hearings and was described as having abandoned X. She, however, contended in her statement in these proceedings that she was unaware of hearings as court documents were not sent to her correct address. Whatever the facts bearing on the decision making at that time, it was accepted that X lived with her father following her parents'

separation and continued to live with him throughout his subsequent marriage up until September 2018. Following his divorce from X's mother, the father married a woman called Z though this was a short-lived marriage. X said that she found Z difficult to get along with and this caused tensions between her and her father.

11. The father met the stepmother on an internet dating app in February 2018. In April 2018 he travelled to England to meet the stepmother and, at what was a very early stage in their relationship, they formed an intention to be together without taking into account the impact of their relationship on X. The stepmother has a history of depression, suicide attempts and self-harm and asserted that she told the father about her mental and emotional fragility at an early stage in their relationship. She had worked successfully in the travel industry, but a medical intervention went wrong in 2016 and this appears to have caused longstanding psychological issues for her. She has an outstanding negligence action against the hospital in relation to that matter and has been seen during those civil proceedings by a consultant psychiatrist, Dr Morgan. His two reports have been produced into the family proceedings and describe the stepmother as suffering from symptoms of major depression and post-traumatic stress disorder.

12. In May 2018, the stepmother took a lease on a four-bedroom property which was intended to be a home for herself, the father and X. The father paid the rent and the utilities though his name was not on the lease itself. In July 2018, the stepmother visited the father in the US and met X for the first time. On 15 July 2018 they returned to England together, X gaining entry on a six-month visitor visa. The father and stepmother began planning a life together in England and arranged for X to attend school. X started school in England on 3 September 2018 and remained in attendance at the same school until the conclusion of these proceedings. The father ran a roofing company in the US and hoped to undertake that work in England and, to that end, he set up a company here in June 2018.

13. On or about 8 September 2018, the father and the stepmother went out to celebrate her birthday. On returning home, the stepmother alleged that the father raped her despite her being drunk and protesting. It was noteworthy that the stepmother said she had been raped on four previous occasions, but did not realise that the father's behaviour amounted to rape until she spoke to her mother about what had allegedly occurred.

14. In September 2018, the father had to return to the US for reasons connected with his work there. He left X with the stepmother. From that date until 6 August 2019 when the family court made an interim "*live wit*h" order in favour of the stepmother, there was no adult in England with parental responsibility for X. In November 2018, after her marriage to the father, the stepmother tried to put in place a step-parent parental responsibility agreement but could not formalise this without X's birth certificate.

15. At the end of October 2018, the stepmother took X to hospital as it was said X was having thoughts of self-harm/suicide. CAMHS became involved and X saw a consultant child and adolescent psychiatrist on several occasions thereafter. X is recorded to have had suicidal thoughts whilst living in the US and on one occasion placed a belt round her neck.

16. In November 2018, the stepmother, her own mother, CD, and X flew to Los Angeles so that the stepmother and the father could get married. The wedding took place on 9

November 2018. The stepmother and CD alleged that the father was abusive and aggressive following the wedding and the stepmother said he smashed up the apartment in which they were all staying. The stepmother allegedly spoke to the father about an annulment as his behaviour was so bad. The father accepted that there was discussion of an annulment but said this was prompted by the stepmother's refusal to take his name after they married.

17. On 12 November 2018, the stepmother and X returned to England while the father remained in the US. During the 2018 Christmas period, X flew to the US to spend Christmas with her father and other relatives. She returned to England on 7 January 2019, once more on a six-month visitor visa, and did not leave this jurisdiction until her return to the US in August 2020.

18. The father and the stepmother differed as to the status of their relationship following their wedding and up to February 2019. The stepmother asserted that the relationship was effectively at an end whereas the father maintained that, despite some difficulties, the relationship was ongoing. On 18 January 2019, the stepmother reported to the police that she had been raped by the father in September 2018. She also reported this incident to the local authority and said that she had parental responsibility for X when this was not the case. Initially, the local authority had problems meeting with the stepmother who said she was too unwell to get out of bed, but a social worker was able to visit her on 18 February 2019.

19. On 18 February 2019, the stepmother reported that one of X's stepsisters had telephoned X and told her that the father had sexually abused one of X's other half-siblings when that girl was 4 or 5 years old. X was asked by her stepsister if the father had ever touched her inappropriately and X said that he had not. I note that X did not resile from that statement, but the stepmother appeared unable to accept this. On numerous occasions she raised her fear that X had been sexually abused by her father. As a result of X's conversation with her stepsister, it appears that the stepmother told X that she had been raped by the father in September 2018. That is something which the stepmother expressed regret for relatively recently. On 18 February 2019 X told the social worker that her father texted and called her regularly and said their relationship was fine, describing it as being "*7 out of 10*". The stepmother did not believe that X said this to the social worker.

20. In February 2019, the father discovered that the stepmother still had a profile on a dating site and became angry and upset. The stepmother asserted that he threatened to come to England and kill her with his gun, but he denied ever making such threats. On 20/21 February 2019, the stepmother reported to the police that the father had threatened to kill her, but she was described as not wishing to pursue these allegations since she remained financially dependent on the father. She also reported these alleged threats to the local authority and sought its assistance in rehousing herself and X.

21. On 26 February 2019, the stepmother took X to the GP. It appears that X had been stealing the stepmother's antidepressant medication and had been taking half a tablet a day for the last three months. The stepmother told the GP that she had replaced the antidepressant medication with vitamin tablets rather than stopping X from taking the tablets and reported that X's mood had dipped since she made the substitution. The

stepmother told the social worker that she made the substitution after X told her that she had been stealing the antidepressant medication.

22. On 26 February 2019, the father flew to England and arrived at the stepmother's home unannounced. The stepmother said he was angry and aggressive and banged on the door. The police later confirmed that the doorbell was not working, and the father said he had to bang on the door to be heard. His arrival frightened X who locked herself in a wardrobe and the stepmother called the police. The father was arrested and taken to the police station for interview, the stepmother having confirmed to the police that, contrary to her statements at the time of making those allegations, she did now wish to pursue her allegations of rape and threats to kill.

23. The father was interviewed by the police though the stepmother had given no detailed victim statement in respect of either allegation. The police recognised that, had the father threatened the stepmother as alleged on 20 February 2019, they would not have the jurisdiction to pursue matters as the father was in the United States at the time. The father gave a pre-prepared statement in relation to the alleged rape and a no comment interview. He denied rape and asserted that sex with the stepmother was always consensual. The police closed the file in relation to the allegation of rape in June 2019 after the stepmother failed three appointments to give a full statement.

The Proceedings

24. On 28 February 2019, the stepmother issued private law proceedings with respect to X in the Family Court without notice to the father. At the same time, she issued proceedings pursuant to Part IV of the Family Law Act 1996 seeking injunctive relief against the father. On 28 February 2019, the stepmother appeared, represented, before the circuit judge on a without notice basis. The judge made a prohibited steps order, preventing X's removal from the stepmother's care. Recital 8 of the judge's order stated "***Jurisdiction****: The court makes no findings at this stage as to the child's habitual residence but is satisfied that it has power to deal with this case by exercising its interim protective powers under Article 11 of the Hague Convention on the Protection of Children 1996*". Inconsequentially, this recital reflected an incorrect legal position as the 1996 Hague Child Protection Convention does not apply between this jurisdiction and the USA. The USA has signed but not ratified that Convention. However, a protective jurisdiction undoubtedly existed pursuant to Article 20 of Brussels IIA.

25. At a hearing on 14 March 2019, the prohibited steps order was confirmed until further order and the father and the stepmother were directed to file statements. There was once more a recital to the order to the effect that no findings had been made with respect to X's habitual residence. A further hearing was listed on 7 May 2019.

26. At some point the father and the mother jointly commenced proceedings in the Tennessee Court to determine X's home state. On 22 March 2019, the Tennessee Court held a directions hearing. The court had before it the judge's order dated 28 February 2019 and was aware of the May hearing. The father's pleading in support of the application asserted that X was not habitually resident in the UK and that Tennessee was the appropriate forum for any welfare dispute concerning her. The Tennessee court ordered the father's legal representative to work diligently to provide contact information for the family court judge with a view to him participating at the

hearing in May 2019. Additionally, the court granted permission for X's half-sister, EF, and her husband to intervene in the Tennessee proceedings and an order to that effect was dated 9 April 2019.

27. On 2 May 2019, the Tennessee Court declared that (a) it had continuing and legal jurisdiction over X; (b) X was habitually resident in Tennessee and Tennessee was declared to be X's home state; and (c) the order was to remain in full force and effect until such time as the court could communicate with any other court that might claim jurisdiction with respect to X. A recital to the order stated the following:

"*Despite the efforts of father's counsel in both the United Kingdom and Tennessee, this Court has been unable to communicate with the Family Court, or any other High Court, that may claim jurisdiction over any issues regarding the minor child. Therefore, the Court finds that this Court has continuing and legal jurisdiction over the minor child. The Court further finds that the minor child's habitual residence is and has been the State of Tennessee*".

28. On 7 May 2019, the Family Court had before it the 2019 orders made in Tennessee and made further directions to progress the case, including a section 37 report. The matter was listed for further directions before a judge exercising the jurisdiction of the High Court and the father was permitted to disclose the order to both his Tennessee lawyer and the Tennessee court. Once more, the order recited that there had been no determination of substantive jurisdiction with respect to X but that the court continued to exercise protective jurisdiction pursuant to Article 20 of Brussels IIA.

29. The section 37 report concluded that care proceedings were necessary and, amongst other matters, expressed concern as to the long-term implications of X remaining with the stepmother given her vulnerabilities and the difficulties of X maintaining contact with her family in the USA. On 16 July 2019, the local authority issued care proceedings with respect to X and raised jurisdiction as an issue by reference to the 2019 orders made in Tennessee.

30. On 30 July 2019, HHJ Jacklin QC, sitting as a section 9 judge, held a hearing dealing with both the private and public law proceedings. Rightly, the court's orders reflected its concern about the issue of jurisdiction, and both sets of proceedings were listed for directions before Theis J. A recital to the order made plain that the US Embassy had been made aware of the proceedings and had been invited to attend the hearing before HHJ Jacklin but had not done so. Skeleton arguments were directed to be filed in advance of the hearing before Theis J dealing with (a) the court's jurisdiction and (b) whether there should be any direct judicial communication between this court and the court in Tennessee.

31. On 6 August 2019, Theis J, exercising a protective jurisdiction in the private law proceedings, made a child arrangements order providing that X was to live with the stepmother. She made clear that this order was a "*holding position*" only and that no findings had been made with respect to X's habitual residence. She also directed that any application pursuant to the 1980 Hague Convention should be joined to the proceedings and determined as part of them and directed the parties to file statements as to habitual residence. Once more, the recital to the order noted that the US Embassy had been informed of the hearing and invited to attend but did not do so. The stepmother was also joined as a party to the care proceedings. Finally, Theis J

approved the instruction of an expert to advise on how X's immigration position might be regularised, given that her visitor visa had expired in June 2019. The matter was further listed for directions on 15 September 2019.

32. Expert advice on X's immigration position was received on 14 August 2019. In summary, X was an overstayer in immigration terms given the expiry of her visitor visa and was thus unlawfully in this jurisdiction. The best prospect of obtaining leave for her to remain in UK would be an application outside of the Immigration Rules on the basis of her private and family life pursuant to Article 8 of the European Convention of Human Rights. The prospects of success were thought to be good if the court made an order that X should live with the stepmother. Without such an order and with an application based only on informal arrangements, the prospects of success would be low. Though an order from the family court would be persuasive, any application should be well documented to show why removal to the US would be an unjustifiable interference with X's Article 8 rights. In the interim, if X left the UK and then attempted to return to UK as a visitor, she might be refused entry. If she wished to remain in the UK, there should be a resolution of her immigration status before she travelled to the US.

33. On 15 August 2019, Theis J listed a four day contested hearing in the private law proceedings to consider jurisdiction, habitual residence and any issued application for X's summary return to the United States pursuant either to the 1980 Hague Convention or in the exercise of the court's inherent jurisdiction. In the care proceedings X was made the subject of an interim supervision order and permission was granted to the solicitor for X to instruct an expert to undertake an assessment of X in respect of parental alienation and her ability to instruct a solicitor directly. A recital to the order confirmed the father's intention to issue an application for the summary return of X to the USA, and the mother and the father were directed to serve narrative statements relevant to the issue of habitual residence.

34. In a statement dated 28 August 2019 prepared by X, she stated that she was led to believe that she was moving to the United Kingdom on a permanent basis and had continued to believe this right up to the incident involving the father in February 2019. Additionally, in a statement dated 30 September 2019, the mother asserted her understanding that X was habitually resident in this jurisdiction. She said that she had been informed about the father's proposal for X to relocate to England and that the father had complied with his obligation under the Tennessee custody order to notify her of that proposed relocation.

35. On 4 October 2019, on the papers and by consent, Theis J extended the deadline for the father to file any application for X's summary return together with his narrative statement. That order recited that the mother had confirmed she would not be making an application under the 1980 Hague Convention or the inherent jurisdiction for X's summary return. Unfortunately, matters were little clearer on 21 October 2019, no application having been made by the father to invoke the Hague Convention or the inherent jurisdiction. It was unclear whether this arose from non-cooperation by the father or inappropriate legal advice. The court directed the father's solicitor to file a statement and for the local authority to file an agreed summary of the proceedings for onward transmission to the court in Tennessee. I note that, whilst this latter document was circulated in draft form, it appears ultimately never to have been agreed nor sent to the Tennessee court. Subject to the issue of jurisdiction and/or a 1980 Hague

Convention application being determined, Theis J listed a fact-finding and welfare hearing commencing on 16 March 2020.

36. By 8 November 2019, it had become apparent that the father had been inadvertently misadvised as to his eligibility for legal aid with respect to 1980 Hague Convention proceedings. His solicitor agreed to transfer the father's representation to specialist international family law solicitors and the hearing to determine habitual residence was adjourned to allow the father time to take legal advice. On 25 November 2019, the court's order recited the following:

"*At that stage, F was still considering his position. F acknowledged that there had already been considerable delay but was anxious to avoid further delay and so agreed, without prejudice to the possibility of his making a Hague Convention application, that he was not making such an application at that time specifically to allow for assessments to be put in place, in the expectation that those assessments would be stayed were he to make a Hague application (see recitals 4 and 10)*".

37. On 10 December 2019, the father confirmed he did not seek to assert that X was not habitually resident in the United Kingdom in February 2019 when he was not permitted to remove her back to the USA and in July 19 when the care proceedings commenced. He further confirmed he would not be making an application under the 1980 Hague Convention and no party sought to suggest that X was not habitually resident in the United Kingdom at the relevant date. Theis J found that X was habitually resident in the United Kingdom on 16 July 2019 when the care proceedings were issued. The court gave directions for the filing of further evidence and vacated the hearing to consider habitual residence and jurisdiction as it was no longer required.

38. On 13 February 2020, Theis J directed that the hearing in March 2020 would be confined to fact-finding alone and listed a welfare hearing in June 2020. This was because, given the allegations made by the parties about each other and the factual matters pleaded by the local authority, there was insufficient time in March 2020 to address both factual matters and welfare issues. Unfortunately, the pressure of other responsibilities in the Family Division meant that Mrs Justice Theis was unable to hear this case and so the proceedings were allocated to me in the week commencing 9 March 2020.

39. The fact-finding hearing began on 16 March 2020 with the oral evidence of the stepmother. Her evidence continued on 17 March though she indicated towards the end of the court day that she was feeling a little unwell. On 18 March 2020, the stepmother was not at court and was said to be experiencing symptoms consistent with Covid-19 infection, which required her to self-isolate at home. Given the serious allegations made by the stepmother about the father's behaviour, it was not possible to hear his evidence prior to the conclusion of her own. That was very unfortunate as the father had travelled from Tennessee to participate in the proceedings.

40. Given the developing alarm worldwide about the Covid-19 pandemic, the father was concerned that delaying his return to Tennessee might mean that he could not access transatlantic flights and might not be able to travel home easily on arrival in the United States. In the light of these difficulties, I adjourned the fact finding hearing to four days commencing on 4 May 2020 and, in accordance with guidance given by the

President of the Family Division, I directed on 8 April 2020 that the fact-finding hearing would be a remote hearing using a video-conferencing platform. All the parties agreed that, in the particular circumstances of this case, this was the only fair means of progressing the litigation and was also in X's welfare interests.

41. Alongside these developments, I endeavoured to put contact between X and her father on a more even footing. By this stage of the proceedings, X was adamant that she did not wish to live with her father come what may. Her contact with him was minimal, being conducted via text or email, and was mediated via the social worker. At a hearing on 8 April 2020 and having heard submissions as to contact, I endorsed a plan for the father to have written contact with X directly, using either text or WhatsApp, twice a week. Alongside that plan I emphasised an expectation that the stepmother should ensure that X responded to messages from her father, either by replying at the time to his messages or by sending him an email on at least one occasion each week.

42. On the morning of 4 May 2020, I received an email informing me that X had made a suicide attempt the previous evening and had been admitted to hospital that night. Further enquiries established that X had taken an overdose of herbal sleeping tablets. Her behaviour seemed to have been precipitated by a row with her stepmother who had found inappropriate material on her tablet device. X climbed out of the kitchen window and ran off, returning home several hours later. The stepmother felt unable to participate in the hearing that day, having had little sleep, and I was anxious to establish what the hospital considered necessary for X's treatment. I adjourned the hearing to allow for the social worker to make enquiries. Incidentally, the father was unable to be present during the hearing on 4 May 2020 as the area where he resided in Tennessee had been hit by a major storm leaving 100,000 homes without power.

43. At the resumed hearing on 5 May when the father was present, I was told that X had been discharged to the care of her stepmother, having been assessed by Child and Adolescent Mental Health Services ["CAMHS"]. X had been involved with her local CAMHS team prior to this incident and was prescribed a low dose of Sertraline, an antidepressant. This medication was to continue on discharge, and she was due to have contact with the local CAMHS team during the next week. Though the parties were concerned at the loss of court time, all agreed that it would be undesirable to proceed with the fact-finding hearing either that day or on the remaining two days of court time available in May. Adjournment was inevitable in circumstances where the stepmother needed to settle X and where there were no suitable arrangements which could be made for X so that she was not present in the flat when her stepmother continued giving her oral evidence. I considered that X's welfare took priority even though this meant delay in the court process and identified some time in the week commencing 1 June 2020 to continue with the fact-finding hearing.

44. In response to a series of events from 12 May 2020 onwards, the local authority restored the matter before me on 20 May 2020 for further consideration. In summary, the local authority had become increasingly concerned about the fragility of X's placement with the stepmother as it appeared that both the stepmother and X were struggling with their mental and emotional health. At that time, both the stepmother and X proposed that X should travel to the United States to visit her half-sister, EF. That proposal was made notwithstanding the expert advice that X, as an over stayer in the UK, might be at significant risk of not being permitted to return to this jurisdiction once she had left to travel to the USA. Having heard submissions, I considered it

appropriate for this proposal to be further investigated and directed that the local authority provide a clear plan dealing with the practical arrangements for X's travel to the USA and how her physical and emotional well-being would be supported during her stay there. I made it clear that the resumption of the fact-finding hearing would be dependent on the court first determining the issue of X's travel to the USA. I also directed the parties to secure legal advice from an appropriately qualified lawyer prior to the next hearing to address the interaction between this court's jurisdiction and that of the court in Tennessee.

45. On 1 June 2020, there was a general consensus amongst the parties that X should be permitted to travel US to visit EF. I note that EF and her husband had been the subjects of a positive viability assessment which was available to the court. The Children's Guardian sounded a cautionary note and sought additional information, particularly as the expert legal advice I had directed was not yet available. I had considerable sympathy with the reservations expressed by the Children's Guardian. Were X to travel to the US, she might not be able to return UK given her status as an immigration overstayer and there was a lack of clarity as to whether this court could retain jurisdiction over welfare decisions once X was in the United States.

46. Given the developments in this case, it seemed to me the real problem lay with the inability of the adults to consider where X's needs, both in the short, medium, and long-term, could be met. X needed a home, preferably in the USA, where she had spent almost the entirety of her life to date and of which she was a citizen, and where her maternal and paternal families lived. Further, I was not prepared to expose X to the risk that, if she went for a short trip to the USA, she might be denied entry to the UK if she sought to return. That struck me as the worst of all possible outcomes for a highly vulnerable young person. In an attempt to focus the adults on what was important for X, I addressed both the father and the stepmother directly during the hearing to ask them to consider X's overall welfare needs and to abandon what was a contest which neither could win without harming X in the process. To his credit, and having consulted with his counsel, the father quickly acknowledged that X should return to live in the USA with her half-sister, EF, and her husband. That same concession was made by the stepmother, also having received advice from her counsel. Those concessions were highly significant in putting this case onto a more realistic footing and both adults deserve considerable credit for responding in the manner they did. I note that X's mother also endorsed the concessions made by the father and stepmother. X was told about this development on the following day and said she was happy with the plan, it being explained to her that, once she left the UK, it would not be possible for her to return here given the problems with her immigration status.

47. On 5 June 2020 I was able to endorse a plan for X to return to the USA so that she could live with EF for the remainder of her minority if this is what she wished. Advice from an expert in Tennessee law and from an expert in Michigan law (the state in which EF lived) was to the following effect:

a) an order made by this court as to where X should live would be recognised and enforceable in Michigan and such an order could be registered without difficulty;

b) the family court in Tennessee did not lose jurisdiction over X during her minority until it agreed to defer to the jurisdiction of this court. In practical terms, this meant

that, were X to travel to the USA without the court in Tennessee deferring its jurisdiction to this court, any order made by this court in favour of EF could not be recognised in Michigan;

c) in order to defer its jurisdiction, the court in Tennessee would require the filing of an application to transfer jurisdiction together with information on the current state of proceedings in this jurisdiction, the concessions made by the parties that this jurisdiction was where X was habitually resident, and the parties' wish that this court should assume jurisdiction with respect to X from Tennessee;

d) normally, deferral of jurisdiction by the court in Tennessee would take place following a telephone call between the judge in Tennessee and the judge to whom jurisdiction would be deferred, assuming that the conditions for deferral in the law of Tennessee were also met. For the avoidance of doubt, I note those conditions were clearly met in this case; and

e) the court in Tennessee could entertain an emergency application to defer jurisdiction and it might be possible for a decision to be made within two weeks of the application made.

Given the above, the parties were in agreement that this court should make a separate order containing a respectful request to the court in Tennessee that it defer its jurisdiction to this court and discharge the parenting order made in April 2015 in respect of X that she should live with her father. The father and mother confirmed to the court that they would make an application as a matter of urgency to the court in Tennessee to seek deferral of jurisdiction in respect of X to this court. All were further agreed that, as soon as possible after receipt of confirmation that the court in Tennessee had deferred jurisdiction, practical arrangements could be made for X to travel to the USA to live with EF.

48. I approved an order to that effect alongside an order respectfully requesting court in Tennessee to defer jurisdiction to this court. That order contained a series of recitals which, amongst other matters, set out the position with respect to X's habitual residence conceded by the father together with the agreement of the parties that this court should be empowered to make substantive welfare determinations with respect to X. A final hearing was listed for 12 August 2020. My concern throughout this process was to make orders for X which reflected what had been agreed by her parents and the stepmother and which would lawfully secure her placement with EF in Michigan. Without deferral of jurisdiction from Tennessee to this court, EF would be required to apply to the court either in Tennessee or in Michigan for orders with respect to X to put X's placement with her on a secure legal foundation. I was also concerned to guard against the possibility that, despite the concessions made in this jurisdiction, X would find herself once more the subject of acrimonious litigation in the US.

49. My order also recorded my decision that continuation of the fact-finding exercise in this case would be an unnecessary and disproportionate use of the court's resources given that all parties agreed to a plan for X to return to live in the USA. However, I directed that the local authority should file and serve schedules of findings which it believed the court could properly make on the written evidence available to it and to which the parties were directed to respond.

50. Regrettably, on 6 June 2020, X's placement with the stepmother broke down following a row about material on X's electronic device. At the stepmother's request, X was placed in foster care on 7 June 2020 and remained there until the conclusion of the proceedings with the agreement of those with parental responsibility for her, namely the father, the mother and the stepmother. There was nowhere else for her to live whilst awaiting the outcome of the deferral application. Unfortunately, there was a delay in making that application to the court in Tennessee and this was not achieved until 10 July 2020. Email exchanges between the father's attorney in Tennessee and the expert witness as to the law in that state which were brought to the attention of the local authority also raised concern as to the reason for the delay in filing the deferral application. My anxiety about these developments and the effect of prolonged delay on X caused me to list the matter for a hearing on 22 July 2020 and, from an abundance of caution, I decided at that hearing that X should not travel to the USA pending further order of the court.

51. On 31 July 2020, the court in Tennessee refused the father's application to defer jurisdiction to this court and asserted its jurisdiction with respect to X. It is regrettable that, in so doing, the court in Tennessee expressed the view that this court was in breach of the provisions of the 1980 Hague Convention.

52. At the final hearing on 12 and 14 August 2020, the parties continued to endorse X's placement with EF, who had now been positively assessed by social workers in the US as a long-term carer for X. Further, there was agreement that EF and her husband should seek an order in whichever court was appropriate, be that either Tennessee or Michigan, which would mirror the order I made in respect of care and contact arrangements for X. To conclude these proceedings, I made an order for X to live with EF and her husband and discharged the child arrangements order for X to live with the stepmother. I gave permission to the local authority, in liaison with EF and her husband, to arrange for X to travel to the US, and, amongst other matters, approved the disclosure of various documents from these proceedings to EF and her husband.

Jurisdiction and Habitual Residence

The Legal Framework

53. For reasons which will be self-evident, it is important that I set out the jurisdictional basis upon which I made final orders with respect to X.

54. At all relevant dates in this case, jurisdiction in matters relating to X's welfare fell to be determined in accordance with Council Regulation 2201/2003 EC ["Brussels IIA"]. In so far as is relevant, Article 8 headed "General Jurisdiction" provides at (1) that "*the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised*". Article 16 provides that a court shall be deemed to be seised *"(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps is required to take to have service effected on the respondent*".

55. In A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening); sub nom Re A (Children) (Jurisdiction:

Return of Child) [2014] 1 AC 1, the Supreme Court made clear that Brussels IIA applied when determining the question of jurisdiction regardless of whether there was an alternative jurisdiction in a non-member state. The Court of Justice of the European Union in UD v XB (ECJ) KC-393/18 PPU [2019] 1 WLR 3083 confirmed that Article 8(1) of Brussels IIA is not limited to disputes involving relations between the courts of member states.

56. Declarations of jurisdiction by a foreign court are not binding on the English court, which founds jurisdiction in accordance with English law. One example of this is a decision by Cobb J in N v K [2013] EWHC 2774 (Fam) where he found that the English court had jurisdiction pursuant to Article 8 of Brussels IIA, despite declarations of the Florida court that the court in England and Wales had no jurisdiction. I note that, in the 1980 Hague Convention context, there can be declarations of wrongful removal or retention by a foreign court pursuant to Article 15 to which this court would usually accede.

Habitual Residence

57. The law relating to habitual residence been set out in the following Supreme Court authorities:

a) A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening); sub nom Re A (Children) (Jurisdiction: Return of Child) [2013] UKSC 60, [2014] 1 AC 1;

b) Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre Intervening) sub nom Re KL (Abduction: Habitual Residence: Inherent Jurisdiction) [2013] UKSC 75, [2014] AC 1017;

c) Re LC (Children) (Reunite International Child Abduction Centre Intervening) [2014] UKSC 1, [2014] AC 1038;

d) Re R (Children) (Reunite International Child Abduction Centre Intervening) [2015] UKSC 35, [2016] AC 76; and

e) Re B (A Child) (Habitual Residence) (Inherent Jurisdiction) [2016] UKSC 4, [2016] AC 606.

58. In Re B (A Minor: Habitual Residence) [2016] EWHC 2174 (Fam), Hayden J reviewed the Supreme Court authorities and summarised in paragraphs [17]-[20] the legal principles deriving from them. Paragraph 17 contains 13 matters to which a court should have regard when determining habitual residence and these are set out below, minus the citations in the above Supreme Court authorities on which they are founded:

i) The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment;

ii) The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred

throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence;

iii) In common with the other rule of jurisdiction in Brussels IIA, its meaning is '*shaped in the light of the best interests of the child, in particular on the criterion of proximity'*. Proximity in this context means '*the practical connection between the child and the country concerned*';

iv) It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent;

v) A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her. The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows, the child's integration which is under consideration;

vi) Parental intention is relevant to the assessment, but not determinative;

vii) It will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one;

viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move;

ix) It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there;

x) The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident;

xi) The requisite degree of integration can, in certain circumstances, develop quite quickly (Article 9 of Brussels IIA envisages within 3 months). It is possible to acquire a new habitual residence in a single day. In the latter case Lord Wilson referred to those '*first roots*' which represent the requisite degree of integration and which a child will '*probably*' put down '*quite quickly*' following a move;

xii) Habitual residence was a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It was the stability of the residence that was important, not whether it was of a permanent character. There was no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely; and

xiii) The structure of Brussels IIA, and particularly Recital 12 to the Regulation, demonstrates that it is in a child's best interests to have an habitual residence and

accordingly that it would be highly unlikely, albeit possible (or, to use the term adopted in certain parts of the judgment, exceptional), for a child to have no habitual residence. As such, '*if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former*'.

59. In Re M (Children: Habitual Residence: 1980 Hague Child Abduction Convention) [2020] EWCA Civ 1105, the Court of Appeal commented on the above factors and recommended the omission from consideration of one of the factors that Hayden J considered to be relevant. Moylan LJ (giving the lead judgment) stated at paragraph 63:

"*In many cases, as in the present case, the parties and the court have used the summary of the law set out by Hayden J in Re B, at [17]. I agree that this is a helpful summary for the reasons given above, what is set out in subparagraph (viii) (which I quote below) might distract the court from the essential task of analysing "the situation of the child" at the date relevant for the purposes of establishing jurisdiction or, as in the present case, whether a retention was wrongful. Accordingly, in future I would suggest that, if Hayden J's summary is being considered, this sub-paragraph should be omitted so that the court is not diverted from applying a keen focus on the child situation at the relevant date:*

"(viii) In assessing whether a child has lost a pre-existing habitual residence and gained a new one, the court must weigh up the degree of connection which the child had with the state in which he resided before the move (In Re B - see in particular the guidance at para 46)."

Forum

60. Absent the issue being raised or pursued by the parties, unlike with the issue of jurisdiction, there is no positive obligation on the court to consider the issue of forum once a substantive jurisdiction has been established.

61. MacDonald J summarised the law relating to forum in W v L (Forum Non Conveniens) [2019] EWHC 1995 (Fam); [2020] 1 FLR 78 in paragraphs [30] – [34] and what follows draws on those paragraphs. Whilst W v L was a private law case, the same principles apply, in my view, to a public law context.

62. Where the English court does have jurisdiction under Article 8 but there are proceedings also in a third-party non-member state, the issue becomes one of forum conveniens. This is to be determined by reference to the principles set out in the case of Spiliada Maritime Corporation v Consulex [1997] AC 460 which are:

i) It is upon the party seeking a stay of the English proceedings to establish that it is appropriate;

ii) A stay will only be granted where the court is satisfied that there is some other forum available where the case may be more suitably tried for the interests of all parties and the ends of justice. Thus the party seeking a stay must show not only that

England is not the natural and appropriate forum but that there is another available forum that is clearly and distinctly more appropriate;

iii) The court must first consider what is the '*natural forum*', namely that place with which the case has the most real and substantial connection. Connecting factors will include not only matters of convenience and expense but also factors such as the relevant law governing the proceedings and the places where the parties reside;

iv) If the court concludes having regard to the foregoing matters that another forum is more suitable than England it should normally grant a stay unless the other party can show that there are circumstances by reason of which justice requires that a stay should nevertheless be refused. In determining this, the court will consider all the circumstances of the case, including those which go beyond those taken into account when considering connecting factors.

63. In determining the appropriate forum in cases concerning children, the child's best interests would not appear to be paramount, but rather are an important consideration. The starting point, when determining whether the party seeking the stay has established that England is not the appropriate forum for a case concerning a child, is that the court with the pre-eminent claim to jurisdiction is the place where the child habitually resident (although habitual residence will not be a conclusive factor).

64. Within the context of the above principles, the Court of Appeal in Re K [2015] EWCA Civ 352 at [26] made clear that, in determining the issues of jurisdiction and forum, the court should adopt the following structure:

a) First, the court determines whether or not the court in England and Wales has jurisdiction. It does so, depending on the countries involved, with or without reference to various international provisions. In a case which is not one between Member States of the European Union, the approach is straightforward. The court decides jurisdiction and decides it with regard to the habitual residence of child at the relevant time.

b) Second, if the parties wish to do so and despite a finding that the English court has jurisdiction, it is then possible for the English court to be invited to consider the question of the convenient forum. The court approaches that issue on the well-known basis applicable to civil proceedings set out in the Spiliada case (see above);

c) Again, as a matter of structure, the normal approach is for the party asserting that England and Wales is not the convenient forum to apply for the English proceedings to be stayed. The burden is upon the applicant for such a stay to persuade the court a stay should be granted and that, despite having jurisdiction, the English court should cede to another court which is the more convenient forum. The welfare of the child is a relevant consideration in determining the question of convenient forum, but it is not an issue to which the paramountcy principle in section 1 of the Children Act 1989 applies;

d) The final structural step is that, if jurisdiction is established and if a stay is not imposed because of forum conveniens considerations, then the court is free to go on to make more generally based welfare determinations with respect to the child's future.

65. In VM (A Child) (Stranding: Forum Conveniens: Anti-suit Injunction) [2019] 4 WLR 38, Williams J set out a helpful summary of the factors that will be relevant to the court's determination of the question of '*natural forum*' [35(iii)]:

> "*In assessing the appropriateness of each forum, court must discern the forum with which the case has the more real and substantial connection in terms of convenience, expense and availability of witnesses. In evaluating this limb the following will be relevant; a) the desirability of deciding questions as to a child's future upbringing in the state of his habitual residence and the child's and parties' connections with the competing forums, in particular the jurisdictional foundation; b) the relative ability of each forum to determine the issues including the availability of investigating and reporting systems. In practice, judges will be reluctant to assume that facilities for a fair trial are not available in the court of another jurisdiction but this may have to give way to the evidence in any particular case; c) the availability of witnesses and the convenience and expense to the parties of attending and participating in the hearing; d) the availability of legal representation; e) any earlier agreement as to where disputes should be litigated; f) the stage any proceedings have reached in either jurisdiction and the likely date of the substantive hearing; g) principles of international comity, in so far as they are relevant to the particular situation in the case in question. However, public interest or public policy considerations not related to the private interests of the parties and the ends of justice in the particular case have no bearing on the decision which the court has to make; and h) it has also been held that it is relevant to consider the prospects of success of the applications*".

Foreign Custody Orders

66. Whilst no party has sought recognition of the original Tennessee custody order made in January 2015, and whilst no subsequent custody order of the Tennessee court has been made, for completeness, the approach of the English court such a foreign order is as follows.

67. The USA is not a party to Brussels IIA, the 1980 European Custody Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Registration of Custody of Children and has signed, but has yet to ratify, the 1996 Hague Child Protection Convention. In such circumstances, recognition of the US custody order will be governed by common law principles which are summarised in AB v EM (Jurisdiction: Foreign Custody Order) [2020] 2 FLR 107 at paras [42]-[43].

68. In declining to be bound by foreign custody orders, English courts are prompted by two considerations. The first is that a custody order by its nature is not final and is at all times subject to review by the court which made it. The second is that, by statute, the welfare of the child is the first and paramount consideration. This has been interpreted to apply not only to domestic English cases, but also to cases involving a previous custody order made by a foreign court. With respect to the weight to be given to the foreign order the position is at four is as follows: such an order deserves grave consideration, but the weight given to it must depend on the circumstances of the case. An order made very recently, with no relevant change of circumstances being alleged, will carry great weight. Its persuasive effect is diminished by the passage of time and by a significant change of circumstances, for example the removal of the child to another country or the supervening illness of one of the claimants. The status of the foreign court, and the nature of the proceedings in that

court and the legal approach taken by the court may all be taken into account. The effect of the foreign order will be weakest when it was made many years ago and has since been modified by consent and where the child has nearly attained the age of her/his majority and so can decide for himself with which parent s/he wishes to live.

1980 Hague Convention/Inherent Jurisdiction Summary Return

69. Finally, and for completeness, Article 1 of the 1980 Hague Child Abduction Convention makes clear that one of the objects of the Convention is to secure the prompt return of children wrongfully removed to or retained in any Contracting State. The wrongful nature of a removal or retention is governed by Article 3 which provides that the removal or the retention of the child is to be considered wrongful where (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, or under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of the removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in subparagraph (a) might arise in particular by operation of law, by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

70. Article 12 sets out the obligation to return "*where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed on the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith*". There are limited exceptions to the obligation to return which are set out in Article 13 such as the person, institution or other body having the care of the person of the child not actually exercising custody rights at the time of removal or retention, or having consented to or subsequently acquiesced in the removal or retention, or where there is a grave risk that the child's return would expose it to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial or administrative authority might also refuse to return the child if it found that the child objected to being returned and had attained an age and degree of maturity which made it appropriate to take account of its views.

71. The topic of habitual residence has already been addressed above. Turning to the inherent jurisdiction, the Supreme Court in Re NY [2019] UKSC 49 affirmed that the inherent jurisdiction remained available for the making of a summary order for a child's return abroad. The court will consider whether, in order sufficiently to identify what the child's welfare requires, it should conduct an inquiry into any or all of the matters set out in s 1(3)(a)-(f) of the Children Act 1989 and, if so, how extensive that inquiry should be [49]. The child's welfare is the court's paramount consideration [46].

Discussion

72. Having considered the relevant legal principles, I am satisfied that this court has substantive jurisdiction pursuant to Article 8 of Brussels IIA. I find that X's habitual residence was, at all relevant times, in this jurisdiction of England and Wales. The following matters were pertinent:

a) Both parents accepted that X was habitually resident in England before any legal proceedings in England or in Tennessee were commenced;

b) Close scrutiny of the detail of X's life made plain that her place of stability was, at all relevant dates, England;

c) X considered herself to be habitually resident in England by the relevant date;

d) In December 2019 the court found that X was habitually resident in England as at the commencement of the care proceedings in July 2019;

e) X's evidence as to the father's intention, her own understanding, and the mother having been notified by the father in accordance with Tennessee law of the plan for X's permanent relocation, coupled with X's stability and integration in England, all pointed to habitual residence in this jurisdiction; and

f) The Tennessee court's finding on habitual residence appears not to have been based on a holistic factual analysis though I do not criticise that court for reaching the conclusion it did on an interim basis.

73. I am also satisfied that the existence of the Tennessee court orders do not alter my conclusion on habitual residence given the principles set out in N v K (see above). It is for this court to examine its own jurisdiction under its own law and to make its own determination.

74. No party to these proceedings sought to argue that England and Wales was not the most convenient forum to determine matters relating to X's welfare. Even if I had considered that such an investigation was warranted given the Tennessee orders and proceedings, and bearing in mind the principle of comity, I would have concluded that this jurisdiction was the most convenient forum to determine welfare matters concerning X. The following matters are relevant:

a) This jurisdiction was the jurisdiction in which X is habitually resident and where, for most of the proceedings she wished to remain, only altering her position once it became clear that the stepmother was not in a position to care for her and had endorsed her return to the USA;

b) X had had extensive professional involvement with mental health and social work services in contrast to the USA;

c) X's wishes and feelings were ascertained here;

d) all the parties had submitted to this jurisdiction and sought substantive welfare orders;

e) All the parties had the benefit of public funding and representation in England; and

f) In inviting the Tennessee court to defer jurisdiction, this court was not submitting to the jurisdiction of that court but was, in the context of forum conveniens and with substantive jurisdiction of its own, inviting the court in Tennessee to cede jurisdiction to it. I note that the Tennessee court made no substantive welfare orders in 2019-2020

and no party to these proceedings sought that the now somewhat dated Tennessee custody order of January 2015 should be recognised or enforced in this jurisdiction.

75. Given the decision by the Tennessee court on 31 July 2020, I have had cause to reflect upon this court's approach to the issue of jurisdiction. Having done so, I am quite satisfied that this court's approach was correct for the following reasons:

a) the issue of jurisdiction was identified at the outset of both private and public law proceedings;

b) the proceedings were transferred first to a section 9 judge and, thereafter, to a High Court Judge;

c) the court proactively took steps to case manage with a view to determining the issue of habitual residence and jurisdiction;

d) even after the parties conceded habitual residence, the court made its own finding on that issue;

e) from the start of the proceedings until December 2019 when the issue of habitual residence was resolved, the court made clear it was only exercising a temporary jurisdiction;

f) and the court rightly took steps to ensure that the US Embassy was made aware of the proceedings and afforded an opportunity to participate and to make representations.

76. However, it is right to acknowledge that this court did not respond to the invitation from the court in Tennessee to communicate with it, presumably because it was considered there was no need to do so in the light of the parties' concessions. Regrettably, the jurisdictional issue took about 10 months to resolve though some of the delay in so doing was occasioned by the poor legal advice received by the father. The summary of developments in the English proceedings intended for the court in Tennessee was not ultimately approved or sent to that court as it should have been. Whilst international judicial liaison can be a useful tool to try and resolve forum difficulties, this would not have been fruitful on the facts of this case given the parties' concessions on jurisdiction and habitual residence.

77. For the avoidance of any doubt, I am also satisfied that this court's approach to the 1980 Hague Convention was correct for these reasons:

a) No application was ever made for X's summary return pursuant either to the Convention or the inherent jurisdiction. I note that the possibility of such an application was implicitly recognised in the Family Court through the exercise of the protective jurisdiction on an initial basis, and in the High Court, explicitly at High Court judge level;

b) Theis J gave numerous directions for case managing any Convention application were one to be issued, including affording the father more time when it became clear he had been misadvised by his solicitor;

c) The Convention has no traction where no party submitted it was engaged, or that there had been either a wrongful removal or retention, or that X was habitually resident in the United States at the date of any alleged wrongful removal or retention; and

d) On the facts of this case, it was difficult to imagine that a court would have ordered a summary return under the inherent jurisdiction when it would not have been in X's best interests for her return to have been dealt with on a summary basis.

Fact Finding

Discontinuance

78. My order dated 5 June 2020 brought an end to the part-heard fact-finding hearing. Mr Bennett for the mother submitted that it might be of benefit for me to explain my decision in that regard in this judgment as the reported authorities had not revealed any case with parallels to this case management outcome. Rather, the more common scenario outlined in the authorities was either where a local authority applied to withdraw public law proceedings following developments arising from the medical evidence or where there was a need for an adjournment for something new to be investigated. Though I am doubtful whether my decision in this unusual case has wider application, my reasons for taking the course I did are set out below.

79. The starting point for any case management decision in family proceedings is r 1.1 of the Family Procedure Rules 2010 ["the FPR"], namely the overriding objective. This directs the court to deal with cases justly, having regard to any welfare issues involved. Dealing with the case justly includes, so far as is practicable:

"(a) ensuring that it is dealt with expeditiously and fairly;

(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

(c) ensuring that the parties are on an equal footing

(d) saving expense; and

(e) allotting to it an appropriate share of the court's resources, while taking into account need to allot resources to other cases."

80. Rule 1.4(a)(c)(i) provides that, in furthering the overriding objective by actively managing cases, the court should decide promptly which issues need full investigation and which do not. Further, r 4.1(2)(l) permits the court, in the exercise of its general powers of management, to exclude an issue from consideration. All the above rules make clear that this court had jurisdiction to bring to an end a part-heard fact-finding inquiry.

81. These rules rule should be read with an understanding of the particular nature of family proceedings. In Re C (Family Proceedings: Case Management) [2012] EWCA Civ 1489, Munby LJ (as he then was) distinguished family proceedings from civil proceeding in this way (paras [14] –[15]):

> "[14] *... But these are not ordinary civil proceedings, there they are family proceedings, where it is fundamental that the judge has an essentially inquisitorial role, his duty being to further the welfare of the children which is, by statute, his paramount consideration. It has long been recognised - and authority need not be quoted for this proposition - that for this reason a judge exercising the family jurisdiction has a much broader discretion than he would in the civil jurisdiction to determine the way in which an application of the kind being made by the father should be pursued. In an appropriate case he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter. He may determine that the matter is one to be dealt with on the basis of written evidence and oral submissions without the need for oral evidence. He may, as His Honour Judge Cliffe did in the present case, decide to hear the evidence of the applicant and then take stock of where the matter stands at the end of the evidence.*
>
> *[15] The judge in such a situation always be concerned to ask himself: is there some solid reason in the interests of the children why I should embark upon, or, having embarked upon, why I should continue exploring the matters which one or other of the parents seeks to raise. If there is or may be solid advantage to the children in doing so, then the enquiry will proceed, albeit it may be on the basis of submissions rather than oral evidence. But if the judge is satisfied that no advantage to the children is going to be obtained by continuing the investigation further, then it is perfectly within his case management powers and the proper exercises of his discretion so to decide and to determine that the proceedings should go no further.*"

82. The overriding objective makes clear that welfare is the first consideration when the court determines how to deal justly with a case. That is reinforced by the above authority which emphasises the welfare context to any case management decision and moreover, as is entirely proper, given that the lives of children and their families are rarely if ever static, stresses the flexible nature of case management decisions which concern children.

83. As the chronology demonstrates, by 1 June 2020, X's well-being had taken a turn for the worse. She had made an attempt at self-harm which led to the postponement of the hearing at the beginning of May 2020 and, by late May 2020, it was abundantly clear that her placement with the stepmother was increasingly tenuous. Both X and her stepmother were clearly struggling with emotional and mental health difficulties. It struck me as foreseeable that, under the pressure generated by a resumed fact-finding hearing, the stepmother would simply be unable to manage her own stress let alone provide the loving, consistent and containing care that a vulnerable teenager required. X's placement was clearly at significant risk.

84. Further, as a result of the concession made by the father and the stepmother at the hearing on 1 June 2020, it had become clear that X's future lay in the US rather than in this jurisdiction. She would return there in the near future, and this court could make final orders based on what was, by 5 June 2020, a broadly agreed way forward. In those circumstances, the continuance of the fact-finding hearing represented an exercise whose value was questionable. It was no longer required to satisfy the section 31(2) threshold criteria since a public law order would not be made in this case. Additionally, from a welfare perspective, continued fact-finding with all its stresses threatened the viability of X's placement with the stepmother.

85. However, Miss Hudson invited me to make findings based on concessions made by the parties in their response to the schedules of allegations prepared for the fact-finding hearing. She submitted that, whilst it was desirable that X had a reliable narrative from the court to help her come to terms with events in this jurisdiction, that narrative could – on balance – flow from the realistic concessions made by the parties in their respective statements. In these circumstances, the use of court time to continue with the fact-finding hearing was not only a disproportionate use of the court's resources but also unsustainable from a welfare perspective. I accepted that submission and directed on 5 June 2020 that the local authority prepared a comprehensive schedule of findings on that basis.

86. Thus, as matter stood on 5 June 2020, the discontinuance of the fact-finding hearing was both welfare-driven and proportionate. Despite hoping my decision would relieve some of the pressure on the stepmother, I regret that X's placement with her broke down within a day or two of the hearing.

Facts Found

87. In March 2020, the parties each sought a variety of findings against each other. I do not propose to set these out in detail given (a) the manner in which the factual issues were resolved and (b) because this would be unhelpful for X, serving only to distract from the narrative which I hope will help her understand the time she spent in this jurisdiction.

88. In accordance with my direction, Miss Hudson prepared a comprehensive document setting out the findings sought by each of the parties, the response to those findings together with a brief analysis of what the local authority submitted could be taken from the responses and the findings the court was invited to make. It was accepted that, in relation to many of the findings originally sought, no concessions were made and, in the absence of oral evidence, the court would not be able to make findings in relation to those disputed facts. I heard submissions from the parties about some of the findings contended for by the local authority and indicated that I would consider the written material very carefully before making any findings based on the parties' concessions.

89. On reflection, I have not acceded to all the findings which the local authority invited me to make as some were of tangential relevance to X. I have ordered the findings below chronologically where this is possible. What follows should be read alongside the factual summary in paragraphs 10-23 above.

90. I turn first to the findings sought with respect to the mother's and father's relationship. In part, these related to the mother's behaviour at the time and after her relationship with the father broke down in about 2014. I am satisfied that, when the mother's and father's relationship broke down, the mother left Tennessee with X and obtained a protective order from the court in Ohio. Yet, by order of the court in Tennessee which had jurisdiction with respect to X, the mother was ordered to return X to that state. She had nowhere in Tennessee to live and, faced with the choice of a shelter or a return to the father, the mother naturally considered it preferable for X to live with her father. I am also satisfied that the mother subsequently became addicted to prescription drugs which would have affected her ability to provide care for X. From April 2015, the mother's contact to X was twice weekly telephone contact. For

his part, the father failed to provide the mother with updates in respect of X's schooling as he did not believe he was required to do so.

91. Turning to the relationship between the father and the stepmother, it is accepted that the relationship between the father and the stepmother developed extremely quickly. They met online in February 2018 and by May 2018 had rented a house which was to be their family home. The father was aware of the stepmother's past mental health problems but thought that her mental health was under control. He entrusted the stepmother with the care of X having not known her for that long. Unfortunately, he was unable to work in the UK because he had not secured the necessary visa to permit him to do so and he failed to ensure that X was registered with a GP in the UK. It was the stepmother who arranged this. Though the father sought to delegate parental responsibility for X to the stepmother, he was extremely naive as to the relevant law and the document he signed in 2018 at the stepmother's request was not a legally binding document.

92. The relationship between father and the stepmother was difficult and X was exposed to and caught in the crossfire of the acrimonious breakdown of their relationship. In September 2018, the stepmother alleged that she had been raped by the father. Having heard the stepmother give evidence both in chief and in cross examination, and taking into account the concessions she made in her evidence, I am satisfied that she failed to prove on the balance of probability her allegation she had been raped by the father. Around the time of reporting the rape allegation to the police in January 2019, the stepmother informed X of the allegation that she had made, thereby inappropriately exposing X to adult matters with no regard for the emotional impact of this upon X. The stepmother has subsequently expressed regret for having shared this information with X.

93. In November 2018, when the father and stepmother got married in the US, there was an argument between them. During that argument, the father slammed the door and the patio shutters fell down as they were not properly hung. I am satisfied that the stepmother exaggerated her description of the father '*trashing*' the apartment. In February 2019, the father sent the stepmother angry text messages when he discovered she had reactivated her social media account. He attended the family home on 26 February 2019 and the stepmother called the police in response.

94. With respect to the stepmother herself, I find she has a long history of suffering from mental health difficulties. These difficulties increased in 2020 and negatively impacted upon her ability to provide consistently appropriate care to X and led to her reaching a decision in June 2020 that she could no longer care for X. The stepmother was unable to work due to the severity of her mental health difficulties and due to what she perceived to be her responsibility to X and her involvement in these proceedings. At times, when her symptoms were particularly severe, the stepmother would spend all day in her pyjamas and was unable to leave the house or even answer the door. I note that such occasions have diminished since early 2019. She has been diagnosed with post-traumatic stress disorder and symptoms of major depression of moderate severity and has been prescribed antidepressant medication. Regrettably, the stepmother failed to keep her antidepressant medication in a secure location and failed to notice that X had taken this medication for a period of between 3-4 months.

95. The stepmother has attempted suicide on more than one occasion, the last attempt being in March/September 2017. When assessed by Dr Morgan, consultant psychiatrist, on 17 May 2019, he recorded that she was experiencing low mood, flashbacks, disturbed sleep, panic attacks and high levels of anxiety, including somatic anxiety which impacted upon her ability to function in all aspects of her daily life. If she did not take her medication, the stepmother experienced suicidal thoughts. Although the stepmother reported some improvement to her mental health after being seen by Dr Morgan, her condition deteriorated again in early summer 2020 to the point where she no longer felt able to provide care for X.

96. In a statement dated 12 June 2020, the stepmother stated that the ongoing stress and anxiety she was experiencing as a result of caring for X was having a negative impact on her mental health. For example, she had had trouble sleeping as she was constantly on alert to make sure X was not going to harm herself. I note that the stepmother's difficulties with respect to caring for X were highlighted in a psychiatric report dated 25 May 2019 by Dr Morgan, consultant psychiatrist, who noted that: "*based on the information available to me, [the stepmother] is capable of caring for X but the impact of caring for X is considerable on her own mental state. This creates further stress and a burden of responsibility that drains her of emotional and physical energy. It is helpful for her to have a role in life, and in that regard, there are also positives but she finds the situation surreal and despite coping in the short term, she does so with significant impact on her equilibrium*".

97. Additional matters relevant to the capability of the father and the stepmother with respect to parenting X were that, in March 2020, scientific testing indicated that the father had recently used cannabis and cocaine. Without making any findings as to the reason for this, I am satisfied that the father's contact with X since the breakdown of his relationship with the stepmother has been limited. Significantly, there is no allegation that X was ever touched in a sexual way by the father and I make no finding to that effect. However, I am satisfied that the stepmother was concerned that the father had sexually abused X even though X denied being abused by him.

98. I have resisted the invitation to make detailed findings with respect to X's mental health. The summary of background and the progress of the proceedings is sufficient to demonstrate that X was a vulnerable and troubled young person who had been inconsistently parented for some time both here and in the US. I have little doubt that her experiences impacted on her mental and emotional health but I consider that, given subsequent events, it is unhelpful to X to make potentially dated findings on the basis of a brief report from a consultant child and adolescent psychiatrist written in February 2020.

Conclusion

99. This case was beset by jurisdictional issues which took too long to resolve and by an inability to recognise what was needed for X, namely a return to live with her extended family in the USA. It also represents a cautionary tale about the confusion which two sets of proceedings in different jurisdictions can create. For my part, I regret that I was unable to make welfare orders which were capable of recognition in Michigan despite the desire of the parties that I do so.

100. That is my decision.