

**IN THE FAMILY COURT SITTING AT LEICESTER**

**CASE No. LK14CO0429**

**Before His Honour Judge Clifford Bellamy  
(judgment handed down on 27<sup>th</sup> October 2014)**

**Re M (A Child: failure to comply with Achieving Best Evidence)**

**Mr Richard Harris for the local authority  
Miss Nasser Butt for the first respondent mother  
Miss Kerrie Croxford for the second respondent father  
Miss Rebecca Franklin for the child**

This judgment was delivered in private. The judge has given leave for it to be reported on the strict understanding that (irrespective of what is contained in the judgment) in any report no person other than the advocates or the solicitors instructing them and any other persons identified by name in the judgment itself may be identified by name or location and that in particular the anonymity of the child and the adult members of his family must be strictly preserved.

### **JUDGE BELLAMY:**

1. Leicestershire County Council ('the local authority') applies to the court for a care order in respect of a young girl, M. M is aged 6. Her mother is LM ('the mother'). Her father is AC ('the father').

#### The issues

2. Both parents accept that the threshold set by s.31(2) of the Children Act 1989 is satisfied. However, they do not agree about which of them was responsible for the multiple bruising with which M presented when seen at hospital on 23<sup>rd</sup> April 2014.
3. The local authority's final care plan proposes that M should be placed in long-term foster care. The mother accepts that she is unable to care for M. She agrees with the local authority's plan. The father does not agree. He proposes that M should be placed in his care.
4. If the court is persuaded that M should be placed in long-term foster care, the local authority proposes that each parent should have contact with M six times a year and that that contact should take place in school holidays and if appropriate be activity based. Both parents seek to persuade the court that they should be permitted more frequent contact.
5. In addition to direct face to face contact the local authority also proposes that the parents should be able to write to M and send presents for her on special occasions and that once M has settled consideration should be given to permitting the parents to have telephone contact with her. The parents raise issues as to the frequency of telephone contact and when it is to begin.

#### Background

6. The mother is aged 28. The father is aged 36.
7. The background history to this case begins in Portugal. Both parents were born and brought up in Portugal. They lived in Portugal until 2006.
8. The mother gave birth to her first child, A, in 2002. AC was not A's father. Sadly, A died when he was only two months old.
9. The parents began their relationship in or around November 2002 when the mother was aged around 16. She was working as a prostitute. She says that the father was a client. He denies that. The mother says that after a short time, believing that he could help her to a better way of life, she formed a relationship with him. At that time both of them were cocaine users.

10. The mother's second child, D, was born in May 2004. AC is his father. The parents lived together until D was four months old. D was eventually placed in the care of his paternal grandparents. Apart from a short period when the mother abducted him from his grandparents, A has lived continuously with his grandparents for most of his life.
11. The mother's third child, H, was born in January 2006. AC is his father. He was removed from the mother's care when he was just 15 days old. He was subsequently placed for adoption.
12. During this hearing the father has been keen to make the point that both D and H were removed from the mother's care, not from his care. He appeared to be making the point that it was the mother's capacity to care for D and H that was lacking, not his. I don't accept that to be the case. D and H had two parents. It is clear that AC has not fulfilled the role of parent with respect to either of them.
13. In 2006, the same year that H was born, the parents moved to live in England after first spending some time living in Holland. Although they have lived here continuously since that time they have not always lived together. They give different accounts of when they finally separated. They also give different accounts of the nature and extent of their relationship since they separated. That is an issue to which I must return later in this judgment.
14. The family first became known to the local authority in 2008 as a result of referrals from the police relating to domestic violence. It is accepted by the parents that their relationship has been abusive though the father seeks to portray himself as the victim and the mother as the abuser. Whereas the mother admits that she has been violent towards the father he does not accept that he has been violent towards her. The mother suffers from an alcohol dependency. The father says that her alcohol dependency undermines both her credibility and her reliability. Whilst there may be some force in that point the police disclosure raises significant question marks over the father's own credibility and reliability.
15. A police log dated 1<sup>st</sup> May 2011 records that the parents had had an argument after the mother saw what she believed to be drugs inside the father's works van. The details of the event are of no real moment. However, it is appropriate to note that the police records state,  

'Whilst AC was being searched in custody, PC 1639 Palmer received a small clear bag containing a brown substance in a hard block. PC 4664 Roe

therefore further arrested him on suspicion of possession of class B substance...’

16. The mother made a further complaint to the police on 29<sup>th</sup> July 2011. The police log records ‘ex partner attends location and attempts to gain entry through a (sic) insecure window, when he sees there is a male in the location he challenges him to a fight’. The father was arrested. He was released on bail on 31<sup>st</sup> July on condition that he did not go to the mother’s address
17. On 4<sup>th</sup> August 2011 the father was found in the mother’s home and accepted that he was hiding from social workers. The police record notes that the father ‘admitted breaching his bail conditions’.
18. Other incidents are recorded in the police logs. The most significant incident occurred in January 2013. This incident occurred in the street. Both parents were heavily intoxicated. Concerned for the mother’s safety, passers by stopped a police car. Although it was the father who suffered minor injuries in this incident, it was he who was arrested and subsequently charged with an offence of battery against the mother. The father pleaded not guilty. After a trial before lay Magistrates the father was convicted. He was later sentenced to a community order with a supervision requirement and an unpaid work requirement. He did not appeal.
19. At this hearing the father has stoutly rejected that he has been responsible for any of the domestic abuse that has occurred during the course of his relationship with the mother. He has sought help from SAFE (‘Stop Abuse for Everyone), an organisation which provides support for victims of domestic abuse. He has not participated in any programme for those who are the perpetrators of abuse. The evidence in this case, not least the conviction to which I have just referred, clearly suggests, and I find, that the father is both the victim of domestic abuse and the perpetrator of abuse
20. The domestic abuse and the mother’s alcohol abuse have not only impacted on the parents’ relationship but have also given rise to concerns about M’s welfare. In July 2010 the local authority convened an initial Child Protection Conference. The conference decided that M should be made the subject of a child protection plan. M remained subject to that plan until June 2012.

21. Two months later, on 24<sup>th</sup> August 2014, the local authority received a referral from the Child Abuse Investigation Unit. The local authority's chronology records that,

‘AC had fallen asleep on the mother’s sofa and been woken up by the mother slapping him around the face causing minor cuts to [his] lips. On arrival of police AC was in bathroom and the mother was “shouting hysterically at him telling him to get out of the house”. There were gouge marks on bathroom door which the mother admitted she had made with a kitchen knife. The mother was under influence of alcohol. M was in property at time of the incident, although the mother states that she did not witness her stabbing the door with a knife and that when she saw M coming down the stairs put the knife behind her. The mother was arrested on suspicion of assault on the father although he would not make a complaint...’
22. The chronology goes on to describe the problems caused by the mother's dependence upon alcohol and her unreliability in undertaking such basic child care tasks as collecting M from school. This pattern continued until April 2014.
23. It was in April 2014 that, with the agreement of the local authority, the father began to have overnight contact with M. The second occasion of overnight contact began on 18<sup>th</sup> April. The father collected M from the mother. He returned her on the afternoon of Sunday 20<sup>th</sup>. Two days later he contacted the local authority to say that whilst M had been in his care that weekend he had noticed that she had a number of bruises. M had told him that they had been caused by the mother.
24. The police exercised their powers of protection pursuant to s.46 Children Act 1989. M was placed in foster care. The local authority arranged for a child protection medical to take place the next day. That same day M underwent a video-recorded police interview. On 24<sup>th</sup> April the local authority obtained an emergency protection order. The local authority subsequently issued these proceedings.

#### Jurisdiction

25. As I have already noted, both parents are Portuguese. They moved to live in England in 2006. M was born in England in 2008. She has lived in England continuously throughout her short life. It is common ground that M is habitually resident in England. It is also common ground that as a result of Article 8 of Council Regulation (EC) No 2201/2003 (Brussels II revised) this court has jurisdiction to deal with the local authority's application. No party has suggested

that it is appropriate for the proceedings to be transferred to Portugal pursuant to Article 15 of Brussels II revised.

### M's injuries

26. On 23<sup>rd</sup> April M was examined by Dr Haroon, a consultant community paediatrician. In his report he charts 12 marks – bruises, scratches and grazes. Dr Haroon goes on to say that,

‘M has a large number of injuries distributed widely across her body. While some of these may well be accidental, the sheer amount and distribution is not typical for accidental injuries in a child of her age without some other explanation – in my clinical experience. There is a notable lack of consistent [or any] explanation as to how they occurred and some of the bruises are not usually associated with accidental injuries (e.g. to the inner thigh and the back) and 1 injury – [albeit a small graze] is associated with a consistent account of being due to a bite from M's mother, this allegation [of a bite] is very serious even if the injury is now too indistinct to have its cause determined on this occasion.’

27. Whilst M was in his care, on 18<sup>th</sup> and 19<sup>th</sup> April the father took photographs of her injuries. Although many of the photographs are of poor quality, some of them are sufficiently clear to show some of M's injuries.

28. Within these proceedings the parties were given permission jointly to instruct Dr Nicholas Wild, a consultant paediatrician, to prepare a paediatric overview. Dr Wild's report is dated 29<sup>th</sup> July. He was not required to give oral evidence, the parties accepting his conclusions. In a section at the beginning of his report headed ‘Summary’, Dr Wild says that,

‘M is a healthy girl who is growing normally. She appears to be making normal developmental progress apart from some concerns about her expressive language. In the past M has been found to have two bruises on her forehead when she was medically examined in November 2012. On 18<sup>th</sup> April 2014 M's father collected her from her mother and found she had a large number of bruises and abrasions. In my opinion the majority of the injuries were non-accidental...’

29. At paragraph 97 of his report, Dr Wild goes on to say:

‘In my opinion, the majority if not all of the injuries outlined above, (injuries 1-4 and 7-12) are on the balance of probabilities likely to be non-accidental. I accept that it is possible that a small number were accidental injuries but I do not accept that the very large number of bruises and abrasions at different sites on the body could all be the result of accidental trauma.’

30. The significant delay in presentation and the poor quality of the photographs taken by the father lead to there being a complete lack of medical evidence as to

the likely timing of any of M's injuries. There is nothing in the medical evidence which enables the court to determine whether those injuries which were non-accidental in origin occurred whilst M was in her mother's care or in her father's care.

#### Interviews of M

31. On 23<sup>rd</sup> April a formal video-recorded interview was undertaken by the police. Before that, on 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> April the father made some video recordings of conversations with M.
32. The first of these recordings, made on 18<sup>th</sup> April, the day when contact began, is of a discussion with M which appears to have taken place whilst she was watching television. The father asked her about the marks on her right forefinger. He asked 'What's this, M? It looks like a bite. What was it?' M replied, 'Mummy bite me'.
33. The next day there was a second discussion. This time it takes place in the father's car. M is in the rear passenger seat. The father is sitting in the front of the car. The transcript records:

Father: Why you – why you can't say about your finger bite to Jenny in mummy's house.

M: Because my mum would be mad.

Father: But that's the truth. That's right.

M: But mummy wouldn't be happy

The reference to 'Jenny' is to Jenny Brotherhood, the allocated social worker.
34. On 22<sup>nd</sup> April, M was interviewed by Detective Constable Fisher. It is clear that before that interview took place there had already been a question and answer session between the officer and M. If the officer made any record of that conversation, the record has not been produced.
35. This interview ought to have complied with the guidance given in *Achieving Best Evidence in Criminal Proceedings*. There are a number of areas of non-compliance with that guidance. For example, there is no evidence of any planning for the interview. If planning did take place, no record of the planning has been disclosed. The officer does not attempt to establish any ground rules for the interview. There is no attempt to establish whether M knew the difference between telling the truth and telling lies. There is no free narrative. The officer

uses leading questions. There is no attempt to follow the very clear guidance about the way in which interviews should be closed.

36. Some of the officers questions challenged answers given by M and were plainly inappropriate:

Officer: ...Now then, I want to just have a look because – I want to see how you did this. How did you do that?

M: I don't know

Officer: You don't know? Are you sure you can't remember?

M: No

Officer: Sure? Does it hurt?

M: I think it's broken.

Officer: Does it hurt? Yeah, you've got a scab. Don't pick it; it'll bleed. It'll make it sore. So where did you do this? Was it at home or somewhere else?

M: I'm not too sure?

Officer: You're not too sure? I think you do know. I think you're keeping secrets. Are you sure you can't remember?

M: MM-mm

And at later point in the interview:

Officer: What about this one, here? This little one here, this bruise. How did you get that?

M: I don't get hurt.

Officer: You don't get hurt?

M: No. It's just some – I think it's, um, not a bruise.

Officer: It looks like a bruise to me.

M: But it's not.

Officer: It's definitely bruise colour.

M: No, it's not. It's not green.

Officer: Yeah, it is.

37. Towards the end of the interview, the officer lifted up M's clothes in order to ask her about particular bruises:

Officer: ...So, can I just ask you to stand up for me one more time, when you've coloured that one in. That's the last one on that page; I want to ask you another question...Now then – I think, under here somewhere, just by your thigh, you've got another little bruise – just there. How did you do that?

M: Don't know

Officer: You don't know?

M: Yeah

Officer: what about this one?

M: What?

Officer: How did you do that?

M: I had a scratch this one...

Officer: And there's one more. Now, I don't think you can see this one, but there's another one just here. Do you remember the doctor had a look at it, and you said it hurt? You can't see it. Do you know how you got that one?

M: No

Officer: And what about all of these down your back?

M: Um, I scratch...

Officer: But they're bruises. I don't think they're from scratching. They're from hitting your skin, like on there. We're nearly finished now, sweetheart.

Do you know how you got those bruises on those back?

And again:

Officer: All of these little bruises all over your body, do you see them?

M: Um, no, I can't.

Officer: All of these little bruises, and all of these – who's done all these?

M: Mummy and daddy.

Officer: Mummy and daddy?

M: U-huh

Officer: Which ones did daddy do? What did daddy do?

M: Um, scratch.

Officer: He scratched?

38. It is right to acknowledge that some of the dialogue resonates with the father's video recorded conversation with M:

Officer: What about your finger? Show me your finger, where you've coloured that in. Put your hands out like this.

M: Mummy bite me. Mummy bite me actually.

Officer: Just here?

M: Yeah. Mummy bite me actually

It is equally appropriate to make the point that the father's interrogation of M was first in time. Leaving aside the inappropriateness of the father's interrogation of M in this way (an issue I return to later) it could be said that his interrogation of M of itself undermines the reliability of the subsequent ABE interview.

#### 18<sup>th</sup> April

39. The father collected M from her mother at around midday. The mother insists there were no bruises on M when the father collected her. The father says that he noticed that M had some injuries to her face. He took some photographs. As I have noted, he also video-recorded a brief conversation with her about an injury to her right forefinger which appeared to him to be a bite mark. M confirmed to him that her mother had bitten her.
40. Later that day the mother came to his home. She was drunk. She was threatening to damage his house. He contacted social services. He did not mention M's injuries. He was advised to call the police.
41. The father then called the police. The police records indicate that that the mother was drunk and was trying to get into his home. The police log records that the father 'states he has already spoken to social services and he can keep his daughter if she doesn't want to go with the mother'. He did not mention M's injuries to the police.
42. PC 2946 Willis attended in response to the father's call. In a written statement he says that he 'saw [the mother] in an adjacent street and she was unsteady on her feet, slurring her speech and holding a large bottle of alcohol spirits'. She was arrested and taken back to her home. The police then returned to the father's home. The officer says that,

'a welfare check was then carried out at [father's home]. I saw M playing in the garden and she seemed happy and well. I did not notice any injuries to her and she appeared to be very comfortable with her father...'
43. The mother now admits that she was drunk on 18<sup>th</sup> April. Indeed, in answer to questions put to her by Mr Harris on behalf of the local authority, the mother said that she was drunk for the whole weekend.

#### 19<sup>th</sup> April

44. By the next day the father had noticed that M had a number of other bruises and grazes to her arms, legs, hips and back. He photographed them. He also produces a video clip of a further conversation between himself and M, recorded in his car,

in which he promises M that after the Bank Holiday he will contact her social worker, Jenny Brotherhood.

20<sup>th</sup> April

45. The father returned M to the mother's care at around 2.00pm on Sunday 20<sup>th</sup> April. The parents' account of what happened next is to be found in the transcripts of their police interviews.
46. When the mother was interviewed by the police on 22<sup>nd</sup> April there was the following exchange

Q: Since Sunday, she came home. Have you bathed her and changed her and stuff?

A: Yeah, I did it on Sunday but I didn't saw nothing at all, you know? I didn't saw, because it's not too strong a bruises, isn't it? It's very clear bruises, you almost don't see them.

Later in the interview the officer asked her specifically about the mark on M's right forefinger:

Q: ...They're not very good pictures, but with – on her finger, the social worker had some pictures today, colour pictures, that AC had given to the social worker. And I've had a look at them, and on that finger, on her hand, there's quite a big cut on her finger, there and there. Can you see that?

A: I saw nothing, no

47. Another exchange between the mother and the officer is wholly inconsistent with the two passages to which I have just referred. It relates to the afternoon of 20<sup>th</sup> April when father returned M to her mother. The mother said:

'...I start talking and he walk away. He didn't even listen to me, yeah? And then I saw the bruises. Didn't give me time to talk with him. He just walk away. That's about it...And then I called him, yeah, I've been texting him about the bruises, but he just ignore me...'

In her oral evidence she said that she had seen some of the bruises when she bathed M that Sunday evening.

48. Both parents accept that M sustained the injuries identified by Dr Haroon. The mother says that the bruising to the outside of M's right leg was caused by her going down a slide. That apart, both parents accept that M's injuries are non-accidental. Both deny causing them. Both accuses the other of being responsible..

## The law – finding of fact

### *Identifying the perpetrator*

49. In this case the local authority does not seek a finding in respect of the perpetrator of M's injuries. It takes the view that the evidence does not permit the identification of the perpetrator.
50. The authorities make it clear that the court should not hesitate to make a finding identifying the perpetrator of an injury if the evidence is sufficient to support such a finding. However, the court is not obliged to make a finding identifying the perpetrator at all costs. As Wall LJ put it in *Re D (Care Proceedings: Preliminary Hearings)* [2009] EWCA Civ 472, [2009] 2 FLR 668, at para 12, judges should not strain to identify the perpetrator:

“If an individual perpetrator can be properly identified on the balance of probabilities, then . . . it is the judge's duty to identify him or her. But the judge should not start from the premise that it will only be in an exceptional case that it will not be possible to make such an identification.”

### *Standard of proof*

51. In determining whether the court is able to identify the perpetrator of M's injuries, the standard of proof is the civil standard, that is the balance of probability. The balance of probability standard as it applies to family proceedings was clarified by the House of Lords in *In Re B (Children)(Fc)* [2008] UKHL 35. Baroness Hale said

70. ...I would...announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.’

### *Truth and lies*

52. In this case the mother and the father each alleges that the other is the perpetrator. In a case such as this, where there are several factual issues that are in dispute, it is appropriate that I should remind myself of the observation made by Mr Justice Charles in *A County Council v K, D and L* [2005] 1 FLR 851 that

‘[28]...in determining the facts, a court should have regard to the guidance given in *R v Lucas (Ruth)* [1981] QB 720 and *R v Middleton* [2000] TLR 203.

As appears therefrom, a conclusion that a person is lying or telling the truth about point A does not mean that he is lying or telling the truth about point B.’

*Achieving Best Evidence*

53. A particular concern that arises in this case is the weight to be attached to the ABE interview of M given the non-compliance with the ABE guidance which I noted earlier.. This issue was considered by the Court of Appeal in *TW v A City Council and others [2011] EWCA Civ 17*. The case concerned a four and a half year old girl, LR, who, it was alleged, had been sexually abused by TW, a twenty-four year old man. After making her disclosure LR took part in an ABE interview. TW was charged with one count of sexually touching LR contrary to section 7(1) of the Sexual Offences Act 2003. He was acquitted. He had to face the same allegation within care proceedings relating to LR. The first instance judge found the allegation proved.
54. In granting permission to appeal, Black LJ described the ABE interview as ‘significantly flawed’. The flaws in the process included a lack of information as to the planning for the interview (if, indeed, there had been any planning), the use of leading questions, the giving of inappropriate prompts and the use of what the Court of Appeal described as ‘confusing questions’.
55. At the subsequent hearing before the full court, Sir Nicholas Wall P. said,
  49. ...We deal first with the ABE interview. We have cited substantial extracts from *the Guidance* because, in our view, the ABE interview has no evidential value...
  50. In our view the inadequacies of the ABE interview are manifest. Even allowing for a broad margin of latitude to anyone conducting such an interview, the departures from *the Guidance* are self-evident and glaring. There is, on the face of the interview (1) an inadequate establishment of rapport; (2) absolutely no free narrative recall by the child; (3) an abundance of leading questions, and (4) no closure. Everything is led by the officer, and nothing is introduced into the interview by the child.
  51. We are prepared to leave the first item in the preceding paragraph on one side, as there may have been more rapport before the transcript begins. There may equally have been some planning; although – given the dates and the rapid sequence of events - we think it unlikely. However most importantly, and as is apparent from the extracts we have cited, every proposition either resulted from a suggestion made by the officer...or from a leading question...
  52. As we have already pointed out, *the Guidance* makes it clear that the interviewer has to keep an open mind and that the object of the exercise is *not* simply to get the child to repeat on camera what she has said earlier to somebody else. We regret to say that we were left with the

clear impression from the interview that the officer was using it purely for what she perceived to be an evidence-gathering exercise and, in particular, to make LR repeat on camera what she had said to her mother. That, emphatically is not what ABE interviews are about and we have come to the view that we can place no evidential weight on it.

53. Against this background, the judge's assessment that LR was a forthright child capable of standing up to and overcoming incompetent interviewing does not, in our judgment, stand up to analysis. Of course it is open to a circuit judge to reach a different conclusion on the balance of probabilities from a jury applying the criminal standard of proof. But if this is to happen, it seems to us that it is not sufficient for a judge to rely primarily on the fact that the child is able, when being interviewed in a thoroughly unsatisfactory manner and contrary to *the Guidance*, to make a number of inculpatory statements. A clear analysis of all the evidence is required, and the child's interview must be assessed in that context. The judge needs to explain how and why the criminal trial came to the opposite conclusion, and to look carefully at the evidence available in each set of proceedings.

### Discussion

56. The father should not have questioned M in the way that he did. He should not have recorded his discussions with her. His discussions were clearly intended to elicit statements from M which could be used to damn the mother and to bolster his own position as a father seeking to care for his child. He asked leading questions. Not surprisingly, he got the answers he was looking for. The 'disclosures' which the father obtained from M are, in my judgment, valueless for forensic purposes. It would be inappropriate for the court to place any reliance upon them.
57. It is impossible to know the extent to which the father's inappropriate questioning of M has coloured the limited disclosures M made in her subsequent ABE interview. However, even if it were the case that it has had no effect on M there remains very real concerns about the way in which the ABE interview was conducted. In terms of compliance with the ABE guidance this interview was significantly flawed and in my judgment is of no evidential value.
58. In terms of identification of the perpetrator, I am left with the evidence of two parents both of whom I find to be unreliable and at times untruthful witnesses.
59. If M had already sustained injuries before contact began on 18<sup>th</sup> April, why didn't the father immediately contact the local authority's Emergency Duty Team about that issue? Why did he not immediately contact the police? Why did he not seek medical advice by taking M to hospital? Given his concern that the mother

had caused M's injuries, why did he return M to her mother's care on 20<sup>th</sup> April? When he returned M to her mother, why did he not challenge the mother about all of M's injuries? Why did the father wait another two days before finally reporting the injuries to the local authority? In asking all of these questions I acknowledge that contact took place over a Bank Holiday weekend from Good Friday to Easter Sunday and that it was not possible for the father to speak to the allocated social worker, Jenny Brotherhood. However, that does not excuse his failure to act promptly. All of this is plainly consistent with a finding of failure to protect. Is it also consistent with a finding that the father is the perpetrator?

60. There are also questions raised by the mother's conduct. She admits that after the father collected M on 18<sup>th</sup> April she drank heavily. She was arrested by the police at around 2.00pm. In cross-examination she said she had been drinking all of that weekend. She agreed that her memory is affected when she drinks heavily. Was she still so affected by alcohol on 20<sup>th</sup> April that she failed to notice M's injuries when the father returned M to her care? Is it conceivable that she did not notice any of those injuries over the course of the next two days? If she did notice the injuries and if she knew that she hadn't caused them, why didn't she challenge the father? More importantly, why didn't she contact the police or the local authority's Emergency Duty Team? Why didn't she take steps to have M examined by a doctor? Why did she not take action on 22<sup>nd</sup> April? Is this consistent with a finding that the mother is the perpetrator?
61. The local authority submits that it is not possible for the court to identify which of these two unreliable parents is the perpetrator. The mother agrees. The father disagrees. On his behalf it is argued that the evidence points clearly to the mother as the perpetrator.
62. I remind myself again that in considering whether it is possible to identify the perpetrator the standard of proof to be applied is the simple balance of probability.
63. I have come to the conclusion that it is possible for me to identify the perpetrator. I am satisfied that the injuries were caused by the mother. I arrive at that conclusion for the following reasons:
  - (a) Notwithstanding my concerns about the father's honesty, it seems to me highly improbable that a parent would cause injuries, photograph and

video them and then (albeit after a delay of four days) report the concerns to the local authority.

- (b) The video taken by the father at on 18<sup>th</sup> April at 14.20pm clearly shows a graze/circular patch on M's right forefinger. At the time of that video M had been in the father's care for less than three hours. The wound does not look fresh.
  - (c) On that same video it is also just possible to see the cut to M's upper lip. Again, this does not appear to be fresh.
  - (d) In video clips taken on Sunday 20<sup>th</sup> April M is wearing a short-sleeved red top. Extensive bruising to her right elbow is clearly visible. The final video is taken as M gets out of the father's car when being returned to her mother. Although M is then wearing a coat, it is clear that underneath the coat she is still wearing the red top. It follows, therefore, that upon returning to her mother's care, as soon as she removed her coat the bruising to her elbow would have been glaringly obvious. Did the mother see the bruising? She gave contradictory answers to that question in her police interview. I am satisfied that she is not being truthful.
  - (e) Whilst I am critical of the father for the tardiness of his response to what he saw, he did eventually report what he had seen to the local authority. In contrast, the mother did not.
  - (f) I also note the mother's admission that her memory is affected when she drinks heavily. This adds to the concerns about her reliability and credibility.
64. I am satisfied on the simple balance of probability that the mother was the perpetrator of those of M's injuries which were not caused accidentally. Given the poor standard of her care of M generally, I am satisfied that it would be to understate the position simply to say that they were the result of negligence on her part. Whilst I do not go so far as to find that the injuries were deliberately inflicted, I am satisfied that in terms of culpability they lie somewhere along the spectrum between negligent and deliberate.
65. The father may consider that my finding vindicates him. It does not. The events of the weekend of 18<sup>th</sup> to 20<sup>th</sup> April raise some very serious questions about his own parenting skills, about his understanding of M's needs and about the

importance of prioritising her needs above his own in order to keep her safe from harm.

Welfare issues – the evidence

66. The mother accepts the care plan of long-term foster care. This part of my judgment will therefore concentrate on the father's wish to be allowed to care for M.

*Relationship between the parents*

67. One of the key concerns in this case relates to the present state of the relationship between the parents. The allocated social worker, Jenny Brotherhood, described the father as 'manipulative' and made the point that although he describes himself as a victim he is still in a relationship with the mother. If that relationship is indeed ongoing that would be a strong contra-indicator to placement of M with her father.

68. Much of the evidence on welfare issues has been directed to this issue. It is unnecessary for me to review it in meticulous detail. The father's position is that contact has been limited. The mother's position is that contact has been extensive and is ongoing: 'we can't keep away from each other' she said. According to the mother, their contact with each other has included sexual intercourse on around four occasions over the last six months, most recently in September. Intercourse has always taken place at the father's home. She says that he has sex with her 'just because he wants a woman to have sex with'. The father denies an ongoing sexual relationship with the mother.

69. At one point during his oral evidence the father said that his relationship with the mother ended in 2011. Later he said that they had 'separated for good' in January 2013. Although they have had sexual intercourse since then, this has not happened for around eighteen months. In a written statement dated 11<sup>th</sup> September 2014, the father says,

'I am not in a relationship with LM however during the course of these proceedings, LM and I have exchanged text messages. The content of the text messages is limited to M and usually occurs after contact. I think we have been able to demonstrate that we are able to manage ourselves for the benefit of M.'

70. In the father's final statement, dated 13<sup>th</sup> October, he talks about two recent incidents involving the mother. He says that she telephoned him on 1<sup>st</sup> October, She was distressed that she couldn't see M. He arranged to meet her at

McDonalds at 10.00pm that evening. She asked for a lift home because there were no buses. He agreed. When they arrived at the mother's home she invited him in for coffee. He declined. The mother refused to get out of the car. She got a bottle out of her bag and began to drink. The father called the police. The police had persuaded her to get out of his car. There is no evidence from the police with respect to this incident.

71. The second incident was on 8<sup>th</sup> October. The father says that the mother telephoned him that evening. She was obviously drunk. He recorded the conversation which went on for around 16 minutes, partly in English and partly in Portuguese. He says that it sounded to him 'like some sort of confession'. He agreed that he had tried to obtain a confession from her.
72. On the first day of this hearing I asked the mother's counsel to check the mother's mobile phone to identify communication between the parents during the last month. Because of pressure of time, the analysis was confined to telephone contact. The analysis shows that between 2<sup>nd</sup> and 13<sup>th</sup> October the father had called, or tried to call, the mother on 46 occasions. Of those, 23 are recorded as missed calls. The remaining calls were occasions when the parents spoke to each other, calls lasting anything from a few seconds to several minutes. On 12<sup>th</sup> October the father's telephone call to the mother lasted for over an hour. His telephone calls (including missed calls) have been made at all times of the day and night. The longest call, on 12<sup>th</sup> October, began at one minute past midnight. There have been other calls (including missed calls) made during the early hours of the morning.
73. It is regrettable that there is no similar analysis of text messages between the parents because that would have provided detail about the content of their conversation. However, one relevant text message has been produced. The message was in Portuguese and the translation of it is poor. However, the gist of the message, which was sent by the father, appears to be an attempt to persuade the mother that if she M were placed with him then he would ensure that she has contact more frequently than the four times a year then being proposed by the local authority, so long as she was not drunk. In other words, he was trying to solicit her support.

### *Parenting assessments*

74. The local authority has undertaken two parenting assessments of the father. The assessments were completed by Scott Barrowcliffe. In his first report Mr Barrowcliffe highlights the concerns about the parents' relationship. He says,

‘From my sessions I see the crux of the matter as to how AC would manage his ex-partners (sic) behaviour [in the context of their historical and acrimonious relationship] and how he could realistically be seen to safeguard M in the longer term given that he returned M to [her mother's] care even when apparent serious abuse was evidenced photographically...’

75. In his second report, under the heading ‘Ensuring safety’, Mr Barrowcliffe says,

‘...there is (sic) also concerns around the relationship with M's mother...and how he would manage this should he have the wider care of his daughter. AC reported in the final contact that if M was placed in his care he would move away and call the police if LM attended his property. However, LM stated on the 8<sup>th</sup> August during her assessment that she was in regular contact with AC by text which I was shown, (although in Portuguese) and that he had given her a lift back to her property. The exact level of contact and status around the parent's relationship is still unclear at this time and this of course would have a direct bearing on any decision around M's care’.

76. The second report also highlights concerns around the father's practical care, stating that the father

‘has consistently struggled to enforce boundaries around his daughter and this is something that has been reported by contact workers as an area requiring improvement’.

77. In his conclusions, Mr Barrowcliffe says that,

‘AC is improving slowly and there is a picture emerging of the potential relationship that he has with his daughter that would underpin any contact or care arrangements in the future. AC attends his weekly contact early and brings practical items and supports play with his daughter for the majority [of] the time they spend together...’

Having spoken to contact supervisors about their views, it is their impression that the slight improvement in AC's and M's relationship that has been observed may also be associated with the set routine in the safety of the contact centre and that M is aware that she is supported and will have boundaries from staff, if not from her father. AC still has some way to go with regard to his enforcement of positive boundaries around his daughter and this is ongoing...

Although AC has made improvements in some areas of his parenting, I cannot at this time recommend that M is placed in his care.’

78. Mr Barrowcliffe says that he had specifically asked the father whether he was having any communication with the mother. The father had said that he was not.

He had made it clear to the father that he should not be in communication with her. The father knew that communication with the mother was a boundary he must not cross. In the light of the evidence now available concerning the extent of the communication between the parents Mr Barrowcliffe said that he is ‘even firmer in my view’ that placement with the father is not appropriate.

79. Aside from the parenting assessment there is an issue concerning the father’s accommodation. He accepts that it is not a suitable home in which to care for M. He accepts that if M were to be placed in his care he would need to find somewhere more suitable before M could be placed. He says that he would ‘only need a week’ to find somewhere.
80. In her final statement, social worker Jenny Brotherhood says that,
- ‘AC has not shown any active commitment in finding a suitable property for him and M to reside if he was to gain her care. AC appears to have shown little insight into where he would move and how he would manage LM’s behaviour and contact effectively...’

#### *Psychological assessment*

81. Both the mother and M have been assessed by Dr Julie Leather, a consultant clinical psychologist. It is unfortunate that the instructions to Dr Leather required her to assess the relationship between M and her mother but not that between M and her father. That would have been helpful. Dr Leather has not met the father. Nonetheless, her assessment of M raises some significant issues.
82. Dr Leather says that M has ‘a clinically significant elevation for depressed symptomatology suggesting M may show behaviours suggestive of low mood’. She notes that M ‘appears to struggle with changes’, that she ‘can be oppositional in her behaviour’. Dr Leather also notes that M ‘can be over-friendly in her response to strangers and...she would go to anyone, for example would walk up and introduce herself to strangers’.
83. Of particular significance is Dr Leather’s observation that M’s
- ‘behavioural ratings...were consistent in rating M’s behaviour as being above the threshold indicating the presence of clinically significant emotional and behavioural disturbance [with] equivalent ratings for emotional difficulties and conduct difficulties.’

#### *Children’s Guardian*

84. The guardian, too, is concerned about the nature and extent of the relationship between the parents. In her opinion, ‘The precise nature of their relationship is unknown but it is clear that their ties will never be severed.’ She makes the point

that this makes them vulnerable to a resumption of some kind of relationship with a high risk that any such relationship would be abusive.

85. The guardian does not support placement with the father. She says that,

‘M has spoken positively about her contact with her father and would be happy to live with him. Placement with her father would enable her to receive care from one of her parents and clearly the parent whom she identifies as safe. Whilst father has made some positive progress, there are [a] number of issues in relation to his parenting but more significantly, his protection of M and his complex relationship with her mother, that would compromise the quality of her care and place her at potential risk of harm. It would take a considerable period to establish whether he is able to achieve this.’

86. The guardian was clear that having heard all of the evidence at this hearing her conclusions remain unchanged. She supports the proposal for long-term foster care. She also supports the proposal that each parent should have contact with M six times a year. The reduction in contact is necessary in order to enable M to come to terms with the fact that her foster home is now her long-term home and that she will not be returning to the care of her parents. The guardian agrees in principle that telephone contact may at some point be appropriate so long as it does not destabilise the placement.

#### The law – welfare issues

87. The finding that the threshold set by s.31(2) Children Act 1989 is satisfied is the gateway to the making of orders in respect of M. In determining the appropriate orders to make the court must follow the approach set out in s.1 of the Children Act 1989.

88. Section 1(1) provides that when the court determines any question with respect to the upbringing of a child, the child’s welfare shall be the court’s paramount consideration. In determining what is in a child’s best welfare interests the court must have regard to each of the factors set out in the welfare checklist in s.1(3). Section 1(5) provides that when a court is considering whether or not to make an order under the Act with respect to a child, it shall not make the order unless it considers that doing so would be better for the child than making no order at all. In public law cases this means that the level of state intervention should be no greater than is necessary in order to secure the child’s welfare. The court must also have regard to the Article 8 rights of M and of both of her parents and must

endeavour to arrive at an outcome that is both proportionate and in M's best welfare interests.

### Discussion

89. In this case it is unnecessary for me to go through every item in the welfare checklist. Although I have the entire checklist well in mind, it is only necessary for me to address sub-sections (3)(a), (e) and (f).

90. Section 1(3)(a) requires the court to consider M's ascertainable wishes and feelings, considered in the light of her age and understanding.

91. After her placement in foster care M initially made it clear that she did not wish to see either of her parents. She needed considerable reassurance before finally agreeing to see them. In her final statement, the social worker says,

'M presents as a bright little girl however she does appear to find it hard to focus at times and fully articulate herself. M appears to have built up a positive attachment to K [her foster carer] and stated that she likes living there and missed her whilst she has been away. When asked where she would like to live in the future and were (sic) she would feel safe, M responded by saying "I'm not sure" and "I don't know".'

92. A somewhat different view appears in the guardian's report. The guardian records that,

'...I have met with M individually at school on two occasions...She has been consistent in feeling happy to see her father and she loves playing with him. She continues to feel angry about seeing her mother because "she always hurt me...She doesn't hurt me at contact, just at home." M also commented that she loves her Mum and Dad and wants to go to their house but she would be worried about this...

M would be angry to live with mother again because she would hurt her. She would be happy to live with her father because she likes him. M would be sad to be looked after by someone else. She would be sad to see less of her father and her mother.'

93. In drawing conclusions from all of this it is important to bear in mind that M is only 6½ years old. She is far too young to be able to understand the complexities of the issues or to come to an insightful view as to what is in her best interests. That said, on the basis of what she has said I find that she loves both of her parents, that she wishes to continue to have a relationship with them, that she is fearful of further abuse and that she wants to be kept safe.

94. Section 1(3)(e) requires the court to consider any harm which M has suffered or is at risk of suffering.

95. Both parents accept that M has suffered physical harm. I have found that the mother was the perpetrator. That does not mean that there is no risk of harm if M were to be placed with her father. His failure to act swiftly when he became aware of M's injuries is both astonishing and concerning. It is astonishing that a loving, caring parent could so easily return his child to the care of a parent whom he reasonably believed to have caused his child injury. That this is what the father did gives rise to the concern that he was prioritising his relationship with the mother, trying to keep the peace with her, above the need to ensure his daughter's safety.
96. I am in no doubt that there continues to be an ongoing relationship between the father and the mother. It is not one-sided. It is mutually sought even if also utterly destructive. It is not possible to have any confidence that these parents are genuinely able to separate from each other. Until they do, the risk of M's needs being subordinated to the parental relationship will remain, with the consequence that she would be at risk of harm.
97. For so long as the parents remain in a relationship the risk of further domestic abuse will also remain. In a letter from the Probation Service dated 17<sup>th</sup> September, the father's probation officer says that,
- 'Overall, AC was assessed as a medium risk of harm. He was assessed as a medium risk of harm to known adults due to concerns in regard to domestic abuse and a medium risk to children by virtue of them witnessing domestic abuse.'
98. Section 1(3)(f) requires the court to consider how capable each of M's parents are of meeting her needs.
99. The mother concedes that at this moment in time she does not have the capacity to meet M's needs. I confine my discussion, therefore, to an assessment of the father's capacity. I bear in mind that it is clear from Dr Leather's evidence that M needs more than 'good enough' parenting.
100. There are significant concerns about this father's capacity to care for and meet all of the needs of his daughter. M is his third child. His involvement in the care of his oldest child has been minimal. His involvement in the care of his second child was nil. Since separating from the mother (and accepting, as I do, that the precise point of physical separation cannot confidently be determined) his relationship with M has been modest at best. It was not until April 2014, the month when she

was removed from her mother's care and placed in foster care, that the father began to have overnight contact with her. His experience of caring for any of his children has been extremely limited to the extent that he has had little opportunity to develop the parenting skills required to provide good enough care for M.

101. The father's capacity to care for M is undoubtedly significantly impeded by the ongoing, complex relationship between himself and the mother and their seeming inability to draw a line under that relationship. So far as the father is concerned, it is not simply the fact of the relationship that is of concern but his lack of insight into the potential which that relationship has for undermining placement of M in his care. His decisions to return M to her mother's care despite knowing that she had been injured by her mother and not to report the matter to professionals for four days demonstrates eloquently his inability to prioritise M's needs over his relationship with the mother.

102. The father's lack of honesty, even within this final hearing, is also a matter for concern. If M were to be placed in his care he would, as he acknowledges, need support. Whilst it may be that he would accept that support I have little confidence that he would be open and honest with professionals, particularly with respect to his relationship with the mother.

103. Whilst I note the concerns that the father has failed to find accommodation suitable for himself and M, I equally accept that until he knows that M is to be placed with him it would be unreasonable to expect him to commit to the higher housing costs that would likely be incurred as a result of moving home. However, he could have produced evidence to make good his belief that he could re-house himself within a week. He has not produced any evidence of the type of accommodation available or of what he could afford.

### Conclusions

104. In the light of that analysis I come to the conclusion that the father does not currently have the capacity to meet all of M's care needs, not least the need to keep her safe. Although the professional evidence is that he has made some progress during the course of these proceedings it is clear that that progress has much further to go before it would be safe even to contemplate placing M in his care. It is not possible to say with confidence how long that might take though I am entirely satisfied that it is outwith M's timescales.

105. I am satisfied that the local authority's plan for long-term foster care is proportionate and in M's best welfare interests. I approve that plan.
106. The parents wish to have contact with M more frequently than is proposed by the local authority is entirely understandable. I make no criticism of them for expressing that wish. However, in my judgment the reasons advanced by the guardian for reducing contact to six times per year for each parent are compelling.
107. I note the local authority's agreement to cards and presents being sent on special occasions and its willingness to consider telephone contact at some stage in the future. It is not appropriate for me to tie the local authority's hands on that last issue. Decisions about telephone contact must be made at a time when the local authority is confident that such contact will not destabilise M's placement. I acknowledge the possibility that that could mean that there will be no telephone contact.

Postscript – ABE interviews in Leicestershire

108. This is not the first occasion on which it has been necessary for me to criticise Leicestershire Police for the way it has conducted an ABE interview of a young child. It is also not the first occasion when I have come to the conclusion that an ABE interview is so significantly flawed that it is of no evidential value. The last time I had occasion to express concerns was in an unpublished judgment which I handed down in November 2012 in a case to which I shall refer as *Re LS (A Child)*. The following paragraphs bear repetition:

- '58. This is the second time in a matter of weeks that I have come across flawed ABE interviews... On the previous occasion it was clear that the interviewing police officer had not received recent training. Although in this case I have not heard evidence from [Detective Constable X] the way in which she has conducted this investigation leads me to believe that she, too, may not have received any recent training in conducting ABE interviews.
59. Failure to interview children in accordance with the ABE guidance can lead, as in this case, to the court being unable to place any reliance upon the interview. There will be cases in which the child's evidence in video recorded interview is the only evidence against an alleged perpetrator of abuse. If that evidence is so tainted by failure to comply with the ABE guidance that it cannot be relied upon by the court then there is a real risk that justice will not be done and that the court will be unable to make findings which may have been fully justified had the interviewing process been carried out correctly...

73. The ABE guidance is crystal clear. In this case, as the local authority was eventually driven to accept, non-compliance with that guidance was so profound that the court could not place any reliance upon the interview. This raises very serious issues of training...for police officers working within the Child Abuse Investigation Unit...'

I directed that a copy of that judgment be sent to the Chief Constable

109. I am deeply concerned that it has been necessary to raise the issue of police training for a third time. I direct that a copy of this judgment be sent by the local authority to the Chief Constable of the Leicestershire Police. I shall order that he respond within 28 days, in particular setting out details of the steps that have been taken since my earlier judgment to ensure that those officers responsible for interviewing children receive regular updated training on the ABE guidance relating to the interviewing of children.