England and Wales Family Court Decisions (High Court Judges)

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Neutral Citation Number: [2019] EWFC 30
Case No: PR18C00407

IN THE PRESTON FAMILY COURT

09/05/2019

B e f o r e :

MR JUSTICE WILLIAMS

Between:

LANCASHIRE COUNTY COUNCIL — **Applicant**

- and -

TP
- and -
CP — **1st Respondent**

- and - **TM**	**2nd Respondent**
- and - **SC**	**3rd Respondent**
- and - **KH**	**4th Respondent**
- and - **JR**	**5th Respondent**
- and - **E, R, C, H, and K** **(children acting by their Children's Guardian Ms D Kennedy)**	**6th Respondent** **7th – 11th Respondents**

Permission to Withdraw Care Proceedings

Gemma Taylor QC and Rehana Begum (instructed by Lancashire County Council) for the Applicant
Tina Cook QC and Danish Ameen (instructed by Marsden Rawsthorn Solicitors) for the 1st Respondent
Julia Cheetham QC and Patrick Gilmore (instructed by Roebucks Solicitors) for the 2nd Respondent
Richard Hunt (instructed by Forbes Solicitors) for the 3rd Respondent
Paul Hart (instructed by C W Booth & Co. Solicitors) for the 4th respondent
Matthew Carey (instructed by Vincents Solicitors) for the 5th Respondent
Ruth Tankel (instructed by Farleys Solicitors) for the 6th Respondent
Stephanie Perplus and Christopher Blackburn (instructed by JWR solicitors) for the 7th – 11th Respondents

Hearing dates: 8th - 11th April 2019

HTML VERSION OF JUDGMENT APPROVED

Mr Justice Williams :

1. On 30 July 2018 the applicant, Lancashire County Council issued care proceedings in respect of 5 children:

   i) E (DOB [a date in] 2002) now 17 years of age,

ii) R ([a date in] 2006) now aged 13,

iii) C (DOB [a date in] 2012) now aged 6,

iv) H (DOB [a date in] 2012) now aged 6,

v) K (DOB [a date in] 2015) now aged 4.

2. The first respondent is TP, the mother of E and R; the second respondent is CP, the father of E and R; the third respondent is TM, the mother of H and C; the fourth respondent is SC, the father of C and H; the fifth the respondent is KH, the mother of K; the sixth respondent is JR, the father of K.

3. All the children are parties to the proceedings and are represented via their Guardian, Dionne Kennedy. E is now 17 years of age and thus even were the local authority continuing to seek a care order no such order could be made.

4. However, as a result of developments over the intervening 9 months, the local authority no longer seek orders in respect of any of the children but quite the contrary they seek the permission of the court pursuant to FPR 29.4(1)(b) to withdraw their application.

5. The threshold criteria that were drafted in July 2018 asserted that the children were suffering and were likely to suffer significant harm, such harm being attributable to the care given to them not being what is expected of a reasonable parent. The nature of the harm/likelihood of harm alleged was neglect and impairment of the child's physical, intellectual, emotional, social, and behavioural development. The central limbs were contained within 6 paragraphs each supported by 'facts relied upon' in subparagraphs.

   i) TP and CP frequently seek referrals/diagnosis for the children in their care for medical conditions relying on symptoms which are not witnessed by other professionals involved in their care. This results in unnecessary investigations by medical professionals and has resulted in them being recorded as having health conditions which are not evidence based. (The facts relied upon identified issues in connection with the health of E, R, H, K, and MY, a foster child.)

   ii) TP and CP persistently pursue mental health diagnoses for children in their care. They provide information to professionals which is not supported by other professionals involved with the children's care and use their knowledge of mental health services to provide information designed to maximise the chances of a referral to specialists. This behaviour has escalated recently (9 facts dating from 2006 to 2018 are identified in support of this).

   iii) TP and CP have acted in a precipitate manner in relation to perceived gender dysphoria in children in their care.

   iv) TP and CP are resistant to acknowledging any potential disadvantages to R and H of being identified as transgender prematurely and the impact on their emotional, physical and sexual development. They are unable to provide appropriate and balanced support to R and

H to make informed decisions as they get older.

v) C has had four A&E attendances for incidents due to a lack of appropriate supervision by TP and CP (Incidents on 7 April 2014, 26 October 2014, 13 June 2015 and 21 February 2016 are relied on.)

vi) TP and CP have failed to prioritise the needs of the children in their care. Despite having care of a large number of children with complex health needs and presentations who need a high level of attention, TP and CP have consistently sought to have additional foster children placed in their care in order to meet their own needs, whether emotional or financial (11 facts are identified which are said to support this).

6. The application first came before the court on 1 August 2018 when interim care orders were made on the basis that there were reasonable grounds for believing that the threshold was met. Although the local authority had been seeking immediate removal of the children, there was insufficient time to deal with that aspect on the first and the matter was put over until 3 August. By that time the Guardian and local authority had visited the children and agreement was reached that the children should remain placed at home with TP and CP. As far as I can tell, the children who were placed with TP and CP as fostered children were placed elsewhere.

7. Subsequently HHJ Singleton QC granted permission for expert reports to be obtained from:

   i) Dr Hellin, a consultant adult psychologist

   ii) Dr Ward, a consultant paediatrician

   iii) Dr Pasterski, a consultant psychologist specialising in gender identity

   A parenting assessment report from an independent social worker, Alex Sayer was also undertaken.

8. These reports were completed in January and February 2019 and as a result of their contents the local authority re-evaluated the case and concluded that they should no longer seek care or supervision orders in respect of any of the children. I shall turn to some of the key aspects of those reports later. On 1 March 2019 the case came before me for an issues resolution hearing. By that stage the local authority had confirmed that it was their intention to apply for permission to withdraw the proceedings, and so the final hearing time estimate was very substantially reduced so as to enable that application and a number of ancillary matters to be adjudicated upon. Although no party at the IRH was opposing the local authority's application for permission to withdraw, there was a dispute on the issue of whether I should approach it on the basis that it was obvious that the local authority could not now establish threshold (Type I) or whether there was a possibility that threshold might still be established (Type II). Apart from the fact that in a Type II case the court might refuse to grant permission to withdraw and might insist on the case proceeding to fact-finding and thus potentially beyond, TP and CP and to an extent the Guardian identified another issue of concern. Put at its simplest, they were concerned that were the court to identify the case as Type II that TP

and CP would be left with a cloud of suspicion over their heads arising from the 'fact' that the court had concluded that threshold might be crossed but in the exercise of its discretion the court had determined not to adjudicate upon the threshold possibilities. Whilst they acknowledged that as a consequence of the binary approach of the law that the absence of any finding equated to no adverse facts having been found against them and thus a clean bill of health forensically speaking, they were concerned about the possibility of the contents of the threshold being either recycled or subconsciously or consciously held against them in some areas on the basis that the court had not explicitly cleared them. On the other hand, were the court to have concluded that it was obvious that the threshold could not be established this would dispel any lingering doubt or cloud of suspicion that might attached to them. It was thus not a distinction without a difference.

9. In preparation for this hearing the local authority, TP, CP, and the Guardian filed comprehensive skeleton arguments on the issue. Counsel for the parents of C, H, and K filed shorter documents dealing briefly with the permission issue and with the residual issues in respect of each of their clients. I was also provided with a Case Summary, a Schedule of Issues which was prepared following the advocates meeting and detailed chronologies prepared on behalf of the local authority and CP. I have also read large sections of the court bundle in particular the contents of the Core bundle. Even the more limited court bundle that I was provided with ran to 6 lever arch files and I understand the unabbreviated edition runs to many more. I would like to express my thanks to all of the lawyers for the way in which the case has been presented. Given the huge volume of evidence and the extensive arguments which have been deployed this judgment cannot aspire to being anything like a full evaluation of the evidence and the arguments but is confined to what I consider to be necessary and proportionate to deal with the issue that remains in dispute. Given the nature of the case and the arguments deployed I have inevitably had to delve in some detail into the documentary evidence but I do not intend to burden this judgment or the parties with anything like a full summary of all that I have read or considered.

The Parties' Positions

10. As a result of the developments since July 2018, but in particular the contents of the experts' reports, the local authority accept that the threshold as originally formulated cannot be sustained and should not be pursued. Beyond this, the local authority accept that all 5 children should remain in the care of TP and CP and that no orders of any sort are justified or required. In respect of C, H, and K's Child in Need plans will be implemented to address residual issues in particular relating to contact with their birth parents or siblings and to deal with life story work.

11. However, because of the well-established approach to applications for permission to withdraw an application for a care order, the local authority are obliged to identify whether it is a case where it is obvious that threshold cannot be established or whether it is a case where there is a possibility that threshold might be met. In this case the local authority, through Ms Taylor QC and Ms Begum, have identified at paragraph 29 a) to d) of their Skeleton Argument four particular aspects of the threshold which they submit continue to carry a possibility of satisfying the threshold. I observe that the local authority have not sought

positively to argue that the threshold would be met in those respects but rather Ms Taylor QC confirms that as a matter of intellectual honesty and evaluation of the evidence from the local authority's perspective they submit that those 4 items carry with them a possibility that the facts might be established and that if established they might demonstrate significant harm or likelihood of significant harm attributable to care being given not being what it would reasonable to expect a parent to give. Thus the court must undertake the nine-point analysis identified by McFarlane J (as he then was) to determine whether permission should be granted to withdraw.

12. The 4 points that the local authority identify as carrying with them a possibility of establishing threshold are as follows.

    a) On the basis of the evidence of Dr Ward and the independent social worker, H and R have suffered and are at risk of suffering significant emotional harm because their complete social transition into females occurred at a very young age and was actively encouraged. Formal steps were taken, including changing R's name by deed poll and passport (aged 7), which were not necessary. In addition, H was sent to primary school dressed in a girls' uniform (aged 4), when the school expressly asked that this not happen.

    b) The risk of emotional harm to H and R stems from the unwillingness and inability of TP and CP to recognise the long-term implications of such an early transition and because they are confident that neither child will revert to their assigned gender (opinion of ISW).

    c) Risk of emotional harm to all of the children by pursuit of mental health diagnoses; including of K in 2018 (aged three) and in the referral letter to CAMHS concerning foster child FP in May 2018, which contained a wide range of emotional and behavioural difficulties, which were not supported by other professionals. C27 (TP accepts that she should not have written this letter without reference to Children's Services).

    d) The medical chronology for C confirms that he experienced a greater number of significant injuries that would be expected for a child of his age. The number and severity of the incidents suggests that levels of supervision in the busy home were insufficient, leaving C at risk of significant harm. The injuries sustained are over and above the injuries caused by everyday slips and falls in a child of his age. C was left to his own devices, or left to play with other children, unsupervised (**E284**). None of the injuries were disclosed to C's birth mother (**C44)**. The injuries are;

        - 7.4.14. C taken to A&E because he fell between a sofa and a table, sustaining two linear marks to his face.
        - 26.10.14. C taken to A&E because he fell from a high chair, causing lacerations to the back of his head.
        - 13.6.15. C taken to hospital after almost drowning. He was inadequately supervised by the family swimming pool.
        - 21.6.16. C taken to A&E with a laceration to the inside of his mouth.

- 8.3.17. C attended urgent care centre with history of fall and loss of consciousness.

- TP and CP accept the facts- but say that each was an accident.

13. A comparison between the threshold as drafted in July 2018 at paragraphs 29 (a) –(d) of the local authority's skeleton argument reveals that:

    i) paragraph 29 (a) is a much-narrowed remnant of paragraph 3 of the original threshold,

    ii) paragraph 29 (b) is a much-narrowed remnant of paragraph 4 of the original threshold,

    iii) paragraph 29 (c) is a much-narrowed remnant of paragraph 2 of the original threshold,

    iv) paragraph 29 (d) is an extended version of paragraph 5 of the original threshold.

14. Thus the 4 remaining areas where it is submitted it is possible that threshold might be established constitute a vestigial part of the original threshold. It is a necessary corollary of the position that the local authority have adopted that insofar as they no longer identify a part of the original threshold as having the possibility of being established that they accept that it is obvious that threshold cannot be established. Insofar as that position is based on an acceptance of the reliability of evidence that has been generated since July 2018 that has some relevance to the vestigial four elements insofar as that evidence bears upon those facts.

15. The evidence which could be deployed in support of the 4 possible areas derives in large measure from the expert reports although the source material may be found in medical records, and some additional support may be found in social work statements or other records.

16. On the basis that there is a possibility that threshold could be established Ms Taylor QC and Ms Begum provided the following analysis of the 9 factors which inform the exercise of the discretionary exercise as to whether or not to proceed to fact-finding or to permit withdrawal.

    a) *The interests of the child (relevant not paramount);* It is in the interests of the children to remain in the care of TP and CP and to receive the right resources and support.

    b) *The time the investigation would take*; Any fact-findings hearing would take several weeks.

    c) *The likely cost to public funds*; There is a far greater cost to public funds if findings are pursued.

    d) T*he evidential result*; The LA has set out above the threshold that would possibly be met. It is recognised that the issue of emotional harm because of the gender identity issues is balanced between the opinion of the psychologist who met TP and CP, R, H and C twice, and the independent social worker, who met them 5 times and has looked at the issues more widely and challenged TP and CP. The LA also recognises that although Dr Ward has identified the issue of neglect of C, there has been no reported incident since 2017.

e) *The necessity of the investigation;* The LA does not consider that it is necessary or proportionate for there to be any further investigation.

f) The relevance of the potential result to the future care plans for the child; The care plans for the children are the same, whatever findings are made. They are for the children to remain at home.

g) *The impact of any fact-finding process upon the other parties*; Nothing of relevance

h) The prospects of a fair trial on the issue; If the court considered that there should be a fact-finding trial, there are no issues of fairness to consider. All parties are represented.

i) The justice of the case. Nothing of relevance. The plan for the children remains the same.

17. On behalf of TP it is not accepted that the findings set out in paragraph 29 of the local authority's skeleton argument could be made out and thus the 9 point evaluation would not need to be applied. TP has since July 2018 taken issue with the local authority's evaluation of the case. In her statement, dated 7 September 2018, she addressed the threshold as then formulated. It is a detailed but measured response. Some criticism is accepted in particular in relation to the referral of FP to CAMHS and the remark made regarding H to the school. However the overwhelming thrust of the response is to give explanations which rebut and explain the rebuttal of the threshold. In her more recent statement of 19 March 2019 she rebuts the 4 remaining possible threshold issues.

    i) She relies on Dr Pasterski's report is demonstrating that TP and CP acted appropriately in managing H and R's gender issues.

    ii) As above.

    iii) She maintains that any referrals for mental health diagnoses were in order to get the support that she felt they needed at the time. She denies that any such referrals have caused any harm or could have caused any harm that any risk has been quantified.

    iv) She describes C's accidents as everyday slips and trips which were not unusual. She notes that there have been no further incidents since early 2017.

18. In their skeleton argument Ms Cook QC and Mr Ameen provide a detailed rebuttal of the 4 possibilities in order to show that when properly analysed there is no possibility that the threshold could be met and that rather they fall into the category where it is obvious that threshold would not be crossed. In relation to paragraph 29(a) and (b), they rely largely on the report of Dr Pasterski and point out that the limited observations by Dr Ward in relation to these issues which might be said to support threshold are couched in very qualified terms. In relation to 29(c) they point out that there is much in Dr Ward's evidence which confirms that TP and CP have not inappropriately pursued mental health diagnoses and they note that in so far as Dr Ward is critical there is no evidence that any of the children have suffered or are likely to suffer any harm. Moreover, they point to the wider canvas which supports the

conclusion that over many years, TP has acted appropriately as a parent or Special Guardian and the evidence is that the children have thrived in her care. In relation to paragraph 29(d) they note that notwithstanding Dr Ward's opinion, the level of accidents C suffered simply do not justify any conclusion that they demonstrated a lack of reasonable parenting. All are demonstrably accidents of the sort encountered by many children and even in respect of the swimming pool incident the evidence compellingly demonstrates it was of the 'there but for the grace of God go I' sort. Given that the last happened in 2017 and the local authority continued to place children with TP and CP thereafter it is difficult for the local authority contended that these accidents demonstrate either significant harm or a lack of reasonable parenting.

19. CP adopts a similar approach, arguing that it is obvious that the local authority could not discharge the burden of proof in relation to threshold. He also provided a detailed rebuttal of the July 2018 threshold in his statement of 27 September 2018. In his most recent statement it does not address the 4 remaining threshold points but in their skeleton argument in support Ms Cheetham QC and Mr Gilmore provide a detailed rebuttal. It is noted that '*a finding that the local authority could have met threshold in this cas*e' would have significant consequences for the future of TP and CP's family. In relation to the 4 bases upon which the local authority contended threshold might be met, in general terms they make common cause with the position adopted on behalf of TP.

    i) In relation to paragraphs 29 (a) and (b) they highlight particular aspects of the evidence relating to R's engagement with the Tavistock centre and subsequent guidance that the Tavistock have provided. In particular I was referred to letters from the Tavistock of 23 February 2016 and 2 July 2018. The change in approach identified by Dr Pasterski is evident in the 2-year gap between those letters. The contents are generally supportive of the approach taken by TP and CP to R and H in particular in relation to younger children making full social transitions. Ms Cheetham QC submits that the evidence both from R's treating service and from Dr Pasterski more than rebut any concerns expressed by Dr Ward.

    ii) In relation to paragraph 29(c) they point out that a number of the children placed with TP and CP by definition had suffered significant harm and that the referrals made were done in good faith. In particular in relation to FP, they point out that he had a chromosomal abnormality with various associated developmental difficulties.

    iii) In relation to paragraph 29(d) they make broadly the same points as relied upon by TP. A detailed chronology which accompanies their skeleton charts in detail C's medical history and they say supports the conclusion that these were normal childhood incidents which do not get close to demonstrating parental care falling below the threshold.

20. Ms Cheetham QC and Mr Gilmore make criticisms of the local authority in respect of an asserted lack of professional objectivity in relation to gender issues and a failure to follow proper FII process.

21. On behalf of TM, Mr Hunt does not take any particular position in relation to the application for leave to withdraw the proceedings. TM fully supports the CP and TP in their continuing

to look after the H and C and she does not seek any order within these proceedings. She will continue to spend time with the children by arrangement with TP and CP and is willing to contribute to any life story work that is undertaken.

22. SC, the father of C and H, has not provided instructions to his solicitors for some time or engaged with the local authority position.

23. KH does not oppose the local authority's application to withdraw. She does not (wisely) descend into the detailed arguments on which category of case this is. She has issued an application for an order defining the time she is to spend with K. She seeks an order providing that she may have unsupervised time with K up to once per month. She has recently given birth to another child and is currently living within a residential unit under the auspices of an interim care order. In addition to that order she seeks clarification of various matters in relation to the future care planning for K whether under a child in need plan or special guardianship order support plan.

24. JR has not given instructions to his team since the end of February. At that time he did not oppose the local authority's application for permission to withdraw the proceedings or K's continued placement with TP and CP.

25. The Guardian supports the local authority's application for leave to withdraw the proceedings. She had provided a detailed report which was supported by a skeleton drafted by Ms Perplus and Mr Blackburn. In her analysis the Guardian makes the following points:

    i) Observations of the family and their interactions are extremely positive, the children present as settled and happy, relationships between the sibling group are positive and supportive.

    ii) TP and CP have met the needs of the children in their care to a high standard over many years. Despite the emotional impact on the adults in the family due to the proceedings they have managed to maintain a happy and well-balanced family home. They are confident child focused parents.

    iii) The evidence before the court is overwhelming that there are no concerns regarding TP and CP's ability to meet the needs of their children including those under the SGOs.

    iv) At times they may have been overburdened by the volume of placements made by the local authority in what is a very busy household. However to blame CP and TP is an unfair criticism. It is the social work decision on whether a child can be appropriately placed.

    v) The children, albeit not all biologically related, view themselves as brothers and sisters.

    vi) In relation to the transgender issues the only concern the Guardian continues to express is whether the name change for R was premature. However, she notes that all the experts believe that they have acted appropriately. She expresses some reservation about the longer term impact of current ideology in relation to transgender issues. I believe this is a reference to the extent to which social transitioning is pursued in respect of a child as young as H is

now and as young as R was when she socially transitioned.

vii) The children are settled, have secure attachments to their main carers and although an extremely busy household no concerns have ever been raised about care afforded to the children.

viii) The Guardian notes that life story work is needed for H, C, and K and that contact also needs to be addressed.

26. On the basis of the alleged facts now relied upon by the local authority the Guardian is circumspect as to whether or not those facts if proven would be sufficient to cross the threshold and thus whether the court needs to apply the nine-point evaluation mandated by *ACC-v-P*. Given the local authority's acceptance of the expert evidence, in particular that of Dr Pasterski she submits that it is inconsistent to then pursue paragraphs 29(a) and (b). In respect of the matters identified at paragraphs (c) and (d) she notes that whilst the facts might be capable of proof whether they would be sufficient to demonstrate the children had suffered or were likely to suffer significant harm is doubtful; particularly in respect of (d) when the last incident was so long ago.

27. The Guardian submits that the court should adopt the following method:

i) Identify whether the case is one where it is obvious the threshold cannot be established (Type I) or whether it is one where there is a possibility that the threshold may be crossed (Type II). *The Guardian's position on clarification in oral submissions is that this is a type I case where it is obvious the threshold cannot be established*

ii) If the latter, determine by reference to the 9 'ACC' factors whether a fact-finding exercise ought to take place. *The Guardian's position is that if contrary to her evaluation I reached the conclusion that this is a Type II case then I ought to conclude that no fact-finding is required.* Ms Perplus and Mr Blackburn offer their own analysis of those matters at paragraph 18(a)–(i) of their skeleton.

iii) If no fact-finding is required then determine whether it is in the children's welfare for the local authority to be given permission to withdraw the proceedings. *The Guardian submits that there is no solid advantage to the children in the continuation of the proceedings on the contrary the continuation would be a source of ongoing distress. In those circumstances I should permit the local authority to withdraw the application.*

28. The Guardian whilst supporting the withdrawal of the proceedings identifies the need for further clarification in relation to the children in need or special guardianship support plan to ensure that life story work and contact is adequately addressed in respect H, C, and K.

Background

29. The background to the proceedings and the history of TP and CP's family including H, C and K is very extensive and I propose only to sketch it out for the purposes of this judgment. Immense detail is contained within the chronology prepared by the local authority and by

CP's team.

30. TP was born in 1967 and CP in 1969. In 1997 their first child was born with their second in September 1999. They are now adults. E was born in 2002. In May 2003 TP and CP were approved as foster carers and in June 2004 CP gave up work as a social worker to become a full-time carer. Over the years they fostered many children. One of the children EP had gender identity issues. She left their care was 2007 having been with CP and TP for some 3 ½ years. In February 2006 CP and TP third child N was born. Subsequently N and a variety of developmental and health concerns. It is evident from the various chronologies that a number of the children CP and TP fostered also had developmental or health issues.

31. On 28 November 2012 CP and TP were recommended as local authority foster carers by the fostering panel. That recommendation was approved by the agency decision maker on 7 December 2012 and thereafter CP and TP transferred from being agency foster carers to local authority foster carers.

32. On 21 December 2012 H and C were placed with CP and TP. H had sustained very serious injuries including skull fractures and associated subdural bleeding arising from shaking and impact mechanisms. He had also sustained spinal fractures, rip fractures and intra retinal haemorrhages. C had sustained a fracture to his upper left humerus caused by forceful squeezing or gripping and rotation of the bone. The court was unable to determine whether the injuries were caused by the mother or the father and so as they were the only 2 potential perpetrators both remained in the pool. In April 2013 N, by then I think known as R was referred to the Tavistock gender identity clinic, and in that same month date was changed by deed poll to R.

33. In August 2013 an anonymous referral received by the local authority from a member of the extended family under the heading '*preoccupation with and encouragement of gender dysphoria in 3 children*'. In September 2013 R told a member of the school staff that she did not think life was worth living but no further local authority involvement followed and it seems that R was under the care of the local CAMHS was also having some ongoing contact with the Tavistock and with the Mermaid Group (a support group recommended by the Tavistock). The chronology discloses that R continued to suffer from some developmental or health conditions in particular relating to her eating but also in other areas.

34. On 28 January 2014 H was taken to A&E by ambulance having sustained an injury to his forehead in a fall. There were concerns that he was falling a lot and that a physio assessment he presented with some instability and was put on a waiting list in March 2014. On 7 April 2014 C fell at home and sustained a head injury and was taken to A&E.

35. 12 November 2013 C and H were made the subject of special guardianship orders in favour of CP and TP. In September 2014, at a Children in Need review for H and C, TP said she had been told by the physio that H may be showing signs of cerebral palsy.

36. 26 October 2014, C was seen again in A&E having suffered a head injury falling from a high chair.

37. In December 2014 at a two-year developmental, check no concerns were identified in respect of H and C other than ongoing physio for H. R continued to present with a variety of issues including a possible eating disorder and inattention and hyperactivity.

38. On 13 June 2015 C was brought to A&E having fallen into a swimming pool. There is some dispute over the circumstances of this incident. Records suggest that he was found face down in the pool and was thought to be dead [H18/29] whilst CP and TP say that they were at the pool that C jumped in and within seconds was pulled out of the pool by CP.

39. On 25 November 2015 K was placed with CP and TP. She was 8 months old at the time. TP expressed concerns about her emotional attachment.

40. On 7 January 2016 the school made a referral to children services relating to concerns of fabricated and induced illness in respect of 4 children in the care of CP and TP. This in particular appears to have been prompted by a conversation that took place between TP and a teacher in relation to H who was being dressed in girl's clothes. TP was reported to have said '*here's another one for the Tavistock'* and the strategy meeting was then scheduled by the local authority.

41. On 21 February 2016 C presented to A&E with a laceration in his mouth. A referral was made by the hospital to children services and a section 47 investigation ensued.

42. In March 2016 concerns began to be expressed about E's health, he suffering from headaches and various other ailments and in May 2016 he was diagnosed with possible chronic fatigue syndrome.

43. On 23 August 2016 CP and TP were reapproved as local authority foster carers. Throughout this period R continued to present with various issues related to eating, her gender identity and other concerns.

44. On 8 March 2017 C presented at A&E with a face and lip injury having fallen over on his way to nursery and H was still displaying instability walking and was referred to physio.

45. In June 2017 a meeting at the school in advance of H attending discussed in which gender H would present. The school requested that H attend in a boy's uniform. However in September, H came in a girl's uniform. In August 2017 K was made the subject of a special guardianship order.

46. On 19 September 2017 two children were placed with CP and TP as foster placements. They have been identified as AP (born [a date in] 2008) and FP (born [a date in] 2011). Early assessments and statutory visits noted a significant improvement in the functioning of those 2 children. A disagreement arose over the use of a phone app approved by the local authority for use by children in care. FP had a diagnosis of XYY syndrome; a rare chromosomal disorder associated with a variety of developmental or other issues in particular for FP burning needs, speech problems, attention difficulties and emotional and behavioural issues.

47. In January 2018 H had a developmental review and no concerns were expressed. C had a

health screening which again disclosed no health concerns. In January 2018 the special educational needs coordinator raised concerns about K's attention span, her lack of fear and her falling.

48. On 28 February 2018 it was noted that H was presenting fully as a girl. On 14 May 2018 FP was referred to CAMHS by CP and TP without reference to social services. When they saw the referral they considered it was not a true reflection of FP's presentation or the level of need. The suggestion from the social work statement was that there was a significant degree of exaggeration in the report that been made by TP to CAMHS. This appears to have triggered an investigation into the family situation by Lisa North.

49. An initial strategy meeting took place on 13 June 2018 with a follow-up taking place on 3 July 2018. Lisa North prepared a lengthy report for that meeting; this identified a 'summary of current causes for concern' as follows:

    i) Persistent pursuit of a focus upon seeking out mental health diagnosis for children in their care.

    ii) Preoccupation with an encouragement of gender dysphoria in 3 children.

    iii) Family behaviour relating to food and eating disorders in 3 of CP and TP's biological children.

    iv) General concerns about the emotional and physical well-being of the children in their care.

    v) Requests for more children to be placed in their care.

    vi) Financial difficulties of the family.

50. A further strategy meeting was held on 3 July 2018. A report was commissioned from Dr Gupta a consultant paediatrician and the designated doctor for safeguarding for Central Lancashire clinical commissioning group. That report appears to have been commissioned specifically to look at the issue of factitious or induced illness. It focuses on the 12 markers of FII. I am not entirely clear what information she had available to her; she refers to the entire chronologies and the template but what these documents contained I am not sure. She confirmed she had not met the children. Her analysis of the 12 categories identifies various entries from the chronology which are used to demonstrate how that category is demonstrated from the evidence. In her opinion she expressed the view that those documents categorised extensively how the family fulfil the criteria for most of the 12 categories consistent with FII. She said in her opinion the children especially H and R are at risk of significant emotional harm and neglect from the possibility of fabricated illness. She said that she would like to support the children's social care's decision to safeguard the children. Although a further strategy meeting was timetabled for 25 July, the local authority reached the conclusion by 16 July that care proceedings should be initiated and they were formally issued on 30 July 2018.

51. In the first social work statement of Ms Smalley, 6 concerns were identified relating to CP and TP. They are in essence a cut and paste of the concerns identified by Lisa North in her report to the strategy meeting. It is fair to say that the central concern is best is summarised at C32 where it says '*it is suggested that there is an identifiable pattern of CP and TP seeking medical diagnoses and intervention for the children in their care, above and beyond the issues that are evident in observations by professionals…The available information suggests that CP and TP are highly manipulative people…There are significant concerns that parents/carers have manipulated children's gender and diagnosis of additional needs, which is considered the highest division of emotional abuse.'* Clearly the gender identity issues were a central component of the concerns.

52. The original 'Proposed threshold criteria' were drafted on 26 July 2018 and as outlined earlier in this judgment they expand upon the concerns identified above.

53. As I have referred to earlier the case then came before Her Honour Judge Singleton QC and she case managed it making provision for the filing of expert reports addressing the central issue of FII. Although the local authority had initially sought immediate removal of the children, or some of them, the children remained at home.

The Expert Evidence

54. Although the evidence which has been collated since July 2018 is not limited solely to expert evidence the decision by the local authority not to pursue the application is plainly based largely on the contents of the expert reports that have been received including that of the independent social worker. The reports are lengthy and detailed and I shall only seek to outline their principal conclusions insofar as they bear upon the issue that I'm called to determine. Although the Guardian rightly notes in her skeleton argument that care must be taken not to view the remaining 4 threshold issues through the lens of the original July 2018 allegations equally one has to look at the totality of those original allegations in order to put the remaining issues in context and to understand the overall impact of the expert and other evidence. Only then will the court be able to survey the full panorama, to take account of the totality of the evidence rather than isolated chunks of it and to avoid a compartmentalised or to narrowly focused evaluation.

Dr Hellin: Psychological report on CP and TP

55. In respect of TP, Dr Hellin concluded that she did not have any personality disorder or any psychiatric condition. She observed that her identity and sense of self and of competence is very much based on her role as a mother carer and the proceedings have attacked this making her feel very insecure vulnerable, self-doubting and frightened. TP's history and presentation is not consistent with some of the markers of those who perpetrate FII. Her own health problems from 2003 onwards may have been caused by fibromyalgia and arthritis which were not identified until later. She did not reach any clear conclusion on the extent to which TP's health complaints might have a psychological component; whether somatoform or fabricated. She noted that TP herself considered that since they were diagnosed they have been well managed. In respect of CP, he concluded that he did not have a history of mood or

personality disorder or a psychiatric condition. His physical health has been unremarkable. He is a relatively psychologically resilient man without specific psychological difficulties. There is nothing to suggest that physical or mental health conditions have any particular significance in his family or his upbringing and there are no psychological factors identified would explain why he might inappropriately seek referral or diagnoses for children or act precipitately with regard to gender dysphoria. Research in relation to non-perpetrating fathers of children who have been subject to FII shows they tend to be uninvolved in the family; CP is certainly not uninvolved; he takes a central role in the children's care. Both were reflective about the issue of gender dysphoria albeit were overly pragmatic about R or perhaps complacent about H.

Dr Ward: Paediatric Review of the Children

56. Dr Ward is a consultant paediatrician who had previously been a designated doctor for safeguarding for a number of clinical commissioning groups. She carried out a paper-based review in order to provide an overview of the children's medical histories and to whether consider and report on the actions of CP and TP and in particular whether their actions had caused or contributed to any impairment of the children's health treatment or medical condition.

57. The report comprises some 209 pages including detailed medical chronologies. I will confine myself to consideration of her Executive Summaries for the purposes of this judgment.

E

i) *'Review of medical records reveals that consultations with health professionals have been appropriate and there has been no evidence of inappropriate health seeking behaviour on the part of the parents. Parents have presented as compliant in their management of E's condition. The natural history of the medical conditions described has been in accordance with expectations and he has responded appropriately to treatment and management suggested by health professionals.'*

> Dr Ward found no evidence of inappropriate use of health services and no evidence of any fabrication or induction of health problems in E.

R

ii) '*...has a complex medical history. She has a history of physical medical problems…R has complex neurodevelopmental problems. She first presented with developmental language disorder but subsequently was diagnosed by a multidisciplinary CAMHS team as having comorbid autism spectrum disorder and ADHD. She has been appropriately treated…R was referred to the nationally commissioned gender identity service … She continues to receive support from that service R is a young person who requires a high level of support*.'

> Dr Ward did not identify any evidence of fabrication or induction of illness by CP and TP in relation to R.

C

iii) *'...Is a healthy, well growing boy who is apparently meeting his developmental milestones. Both H and C were the subject of physical abuse in early life both presented with faltering growth at the time the injuries were identified. C had less severe injuries than his sibling but the impact of emotional and physical abuse should not be underestimated…He has had recurrent viral infections but his history is also suggestive of asthma and he has been prescribed appropriate treatment. C has experienced a number of significant accidental injuries in the care of CP and TP. These included a near drowning incident. The circumstances and nature of injuries are entirely consistent with accidental injury but suggest that there has been inadequate supervision of a young and lively child. In my opinion C is vulnerable in view of his early life experiences and the fact that he has lived in an environment with siblings and other children cared for by CP and TP who have significant needs. C may well be confused by his brother's gender identity. C does not have any identified developmental or emotional difficulties. However, it is important that his needs for nurturing, consistency and positive care are not overlooked.'*

> Dr Ward notes that there is no evidence that CP and TP have sought specialist opinions, or suggested developmental or mental health diagnoses or gender dysphoria referrals. I interpret these observations as indicating that they have not sought inappropriately to pursue such referrals.

H

iv) *'...Is a child who has suffered early trauma as a result of nonaccidental injury in the care of his birth parents. As a consequence, he was placed at risk of physical, emotional and cognitive harm. He is a child who requires consistent, positive and nurturing care. He has made remarkably good progress in terms of his physical, language and cognitive development. His carers have displayed a high level of anxiety about his physical health and development…There is no evidence that he has any underlying medical problem such as immunodeficiency. CP and TP have sought second opinions in relation to his respiratory symptoms and, as a consequence, he was subject to a large number of investigations which, with hindsight were not clinically indicated. In addition there have been concerns about his tendency to trip and fall. This has resulted to referrals to physiotherapy, a referral to orthopaedics and x-ray. There is no evidence that he has any underlying neurological orthopaedic conditions. It is not uncommon for foster carers to express concern about children who have suffered early abuse to take steps to ensure that medical and developmental difficulties are not missed. However there is evidence of CP and TP giving misleading information in relation to cerebral palsy. This is denied but if the court finds that they did give this information then this steps over the behaviour of an anxious parent and reflects fabrication…I am not in a position to comment on the status of H's gender dysphoria. However there is evidence which suggests that a significant proportion of pre-pubertal children who display differences in gender identity revert to their biological gender in adolescence. Failure to seek medical support and opinion leaves H at significant risk of emotional harm as a result of being presented in school as a girl. Failure to seek medical attention in relation to this problem represents neglect of H's emotional and physical well-*

being.'

K

v) *'... Is a healthy, thriving child, who has no identified medical or developmental diagnoses. As a child who experienced early trauma and ineffective parenting, it is likely that she will demonstrate some developmental and behavioural differences according to our understanding of the impact of neglect and trauma on brain development…CP and TP have interpreted these differences as potential neurodevelopmental, or mental health diagnoses, even when K was still very young…Concern has arisen that there has been over interpretation, exaggeration and misinformation in relation to perceived behaviour. This has led to a number of referrals…In the case of the referral to CAMHS, misleading information was provided about the concerns of the health visitor and nursery. Focusing on potential diagnoses, rather than the provision of consistent, nurturing care, is likely to have an adverse impact on K in the long term…Repeated over medicalisation and referral for investigation risks a child perceiving herself as "disabled" or "ill"*

Dr Pasterski

58. Dr Pasterski is a chartered psychologist and gender specialist with 23 years of experience in conducting gender identity assessments in children and adolescents. In her report she identifies that there have been recent changes to the diagnostic criteria for gender dysphoria and that research on mental health and transgender children have shed light onto critical historical misunderstandings related to clinical presentation in gender dysphoria. Firstly, that children who present with gender dysphoria are likely to desist in their cross-gender identification and secondly that gender dysphoria is inherently associated with high rates of comorbid psychopathology. She notes both have been shown to be false. She identifies that these misunderstandings arise from two particular factors. Firstly earlier studies which showed that up to 80% of children desist in gender dysphoria included children who presented with gender incongruent behaviour but did not necessarily state the wish to be or that they were the other gender. Thus children displaying gender variance may have been wrongly diagnosed with gender dysphoria. As a result of this treatment protocols previously incorporated a watch and wait approach which had prevented truly dysphoric children from transitioning which had likely resulted in increased rates of depression and anxiety. As Dr Pasterski puts it '*Put simply, many who have shown to desist were likely not dysphoric and psychopathology in those who persisted was likely due to forbidden expression of their true gender identity*.' Current guidance suggests that supporting a child who clearly and consistently states that they wish to be the other gender in their preferred gender role is associated with improved mental health and well-being.

59. In relation to CP and TP's family and the children she offers the following opinions.

i) The family dynamics appeared to be psychologically and emotionally healthy with evidence of secure attachments.

ii) In respect of R, there is consistency throughout her notes with respect to developmental

history and she appears to be well supported by her parents. Her presentation was consistent with a diagnosis of gender dysphoria. She appeared quite content in her gendered presentation. Dr Pasterski had no concerns regarding CP and TP's management of R's unique presentation and needs. She is under the care of the NHS GID service. Allowing R to present as authentic and according to her preferences, while providing appropriate levels of support is consistent with best clinical guidance.

iii) In respect of H she appeared to have healthy relationships with her parents and siblings. She appeared to be a content, alert and socially engaged little girl. Her gender related presentation was consistent with a diagnosis of gender dysphoria. She clearly identified herself as a girl. She appeared quite content in her gendered presentation. Dr Pasterski had no concerns regarding CP and TP's management of H's unique presentation and needs. She is coming up to the age where CP and TP may wish to engage with the NHS support services. Prior to this, H has been content in living as a girl. There is no indication that she has recently been in need of support services. Indeed, there is a risk of harm from overexposure to unnecessary gender related investigations and assessments. Allowing H to present as authentic and according to her preferences, while providing appropriate levels of support is consistent with best clinical guidance. CP and TP may wish to ask their GP for a referral to start the process within the NHS by age 7.

iv) In relation to C he indicated that he did not feel pressurised to behavioural present in any particular manner. When asked about R and H, he acknowledged that both were boys when they were born but 'they' were now girls they would grow up to be women. His understanding of gender was appropriate for his age though he had a nuanced understanding that one might expect from knowing individuals who have changed gender.

v) With respect to potential influence of fabricated or induced illness in either CP or TP in so far as it relates to gender dysphoria, ASD or ADHD Dr Pasterski thought this would be impossible. Each have a basis in neurological or biological functioning which cannot be affected by interpersonal influence or environmental interference. In her opinion CP and TP had engaged with diagnostic health support services in a manner consistent with the children's needs.

vi) She considered that the children were free to be themselves, that there was no evidence they were at risk of harm from CP and TP and that to the contrary removing them from a loving settled and engaging home would be highly detrimental to them all.

vii) She noted the concern that one would not expect to see 2 children with gender dysphoria in the same family but was of the opinion that it is certainly possible and that she had observed similar instances in her work with nearly 2000 transgender individuals over the previous 10 years.

Independent social worker

60. Alex Sayer was commissioned to carry out an independent social work assessment of CP and TP. Given the expert assessments that were being commissioned from medical experts her

report defers in various aspects to their opinions and also identifies areas where the court might have to determine the factual basis underpinning some of the local authority concerns. Some of the salient opinions expressed in her report are as follows:

i) The children are settled in the care of CP and TP and in many respects are receiving a good standard of care.

ii) CP and TP work collaboratively with the local authority, facilitating social work visits and establishing a positive working relationship with the social worker. They have a long history of working openly with health and social care professionals. No obstructive behaviour was noted. They present as open to professional advice and appear to have largely followed this. The children appeared to have spoken freely.

iii) They are able to meet the children's individual needs with identified support services. H, C and K would benefit from additional support regarding life story work and contact arrangements. The couple's decision to cease fostering is appropriate in the light of the children specific needs.

iv) All 5 children should remain in the care of CP and TP. H, C and K are all regarded as siblings by the birth children and they are fully integrated as one family unit.

v) The couple are relaxed in their parenting approach and this is served well in being able to manage numerous children with complex needs. They appear to be intelligent and proactive carers.

vi) There were some concerns that CP's attitude to gender dysphoria might lead to faulty decision-making with good intentions. Ms Sayer thought they presented as closed to the prospect of either R or H reverting back to their assigned gender. R and H present as suitably content and comfortable with their respective gender identities. She expressed some reservations that such early transitions for R and H set a course which is then difficult for them to explore their gender identity and to revert to their assigned gender should they wish to. This would have the potential to cause emotional distress and difficulty if unaddressed. Although CP and TP report to be open to the possibility of R and H reverting to their assigned gender, Ms Sayer was not clear what opportunities there would be for them to do so.

Legal Framework.

61. FPR 29.4 provides as follows

(1) this rule applies to applications in proceedings-

(a) ....

(b) under parts 10 to 14 or under any other part where the application relates to the welfare or upbringing of a child or;

(c)…

(2) where this rule applies, an application may only be withdrawn with the permission of the court.

62. Although such applications will usually be made in writing pursuant to FPR 29.4(3) it is not essential and in this case the application was not issued but was notified well in advance of the IRH.

63. *In Re W (Care Proceedings: Functions of Court and Local Authority)* [2014] 2 FLR 431 the Court of Appeal concluded (strictly it was obiter) that such an application involves the determination of *'a question with respect to the upbringing of a child'* and thus the paramountcy principle in section 1(1) of the Children Act 1989 applies. The question upon such an application is whether the proposed withdrawal will promote or conflict with the welfare of the child. Because the court is conducting an inquisitorial or at least quasi inquisitorial process ultimately the decision on whether the proceedings should continue or be withdrawn is that of the court not of the local authority.

64. *In A Local Authority v X, Y and Z (Permission to withdraw)* [2017] EWHC 3741 (Fam) Mr Justice MacDonald recently summarised the approach to be taken in such applications drawing together the approach which emerges from previous decisions.

[48] Pursuant to FPR r 29.4(2), a local authority may only withdraw an application for a care order with the permission of the court. Where an application for permission to withdraw is mounted in proceedings in which the local authority is unable to satisfy the threshold criteria pursuant to s 31(2) of the Children Act 1989, then that application must succeed. However, where on the evidence before the court the local authority could satisfy the threshold criteria, then the court must consider whether withdrawal is consistent with the welfare of the child such that no order is required pursuant to s 1(5) of the Children Act 1989 (see Redbridge LBC v B and C and A (Through His Children's Guardian) [2011] 2 FLR 117). An application made pursuant to FPR r 29.4 involves the court determining a question with respect to the upbringing of a child for the purposes of s 1(1) of the Children Act 1989. In the circumstances, when considering an application for permission to withdraw an application for a care order, the child's welfare is the court's paramount concern (see London Borough of Southwark v B [1993] 2 FLR 559 at 572). However, an application for permission to withdraw proceedings falls outside the scope of s 1(4) of the Children Act 1989 and therefore there is no requirement to have regard to the welfare checklist in s 1(3) of the Children Act 1989.

[49] With respect to the former situation where an application for permission to withdraw is mounted in proceedings in which the local authority is unable to satisfy the threshold criteria, in considering whether the threshold criteria can be made out it is important to recall the reminder given by the President in Re A [2015] EWFC 11 at [12] of the need to link the facts relied upon by the local authority with its case on threshold:

"The second fundamentally important point is the need to link the facts relied upon by the

local authority with its case on threshold, the need to demonstrate why, as the local authority asserts, facts A + B + C justify the conclusion that the child has suffered, or is at risk of suffering, significant harm of types X, Y or Z. Sometimes the linkage will be obvious, as where the facts proved establish physical harm. But the linkage may be very much less obvious where the allegation is only that the child is at risk of suffering emotional harm or, as in the present case, at risk of suffering neglect. In the present case, as we shall see, an important element of the local authority's case was that the father "lacks honesty with professionals", "minimises matters of importance" and "is immature and lacks insight of issues of importance". May be. But how does this feed through into a conclusion that A is at risk of neglect? The conclusion does not follow naturally from the premise. The local authority's evidence and submissions must set out the argument and explain explicitly why it is said that, in the particular case, the conclusion indeed follows from the facts."

[50] With respect to the latter situation, where on the evidence before the court the local authority could satisfy the threshold criteria, in J, A, M and X (Children) [2014] EWHC 4648 (Fam) at [30], Cobb J considered that in order for a case to fall into the category of cases in which the local authority is unable to satisfy the threshold criteria, and hence into the category of cases in which the application for permission to withdraw must be granted, the inability on the part of the local authority to satisfy the threshold criteria should be "obvious".

[51] *Within this context, in J, A, M and X (Children), Cobb J considered the proper approach to an application for permission to withdraw care proceedings in a case where it was* possible *that the threshold might be crossed, depending on the court's construction of the evidence. In such a case, Cobb J concluded that, before considering whether the local authority should be given permission to withdraw, the court must first determine whether or not it should proceed with a fact-finding exercise by reference to the factors set out by McFarlane J (as he then was) in* A County Council v DP, RS, BS (By the Children's Guardian) *[2005] EWHC 1593 (Fam), [2005] 2 FLR 1031. Those factors, which in their totality embody the concepts of both necessity and proportionality, are as follows:*

(a) the interests of the child (relevant not paramount);

(b) the time the investigation would take;

(c) the likely cost to public funds;

(d) the evidential result;

(e) the necessity of the investigation;

(f) the relevance of the potential result to the future care plans for the child;

(g) the impact of any fact-finding process upon the other parties;

(h) the prospects of a fair trial on the issue; and

(i) the justice of the case.

[52] Having considered the factors set out in A County Council v DP, RS, BS (By the Children's Guardian) within this context, and determined whether a fact-finding enquiry should be undertaken, the court should then cross-check the conclusion reached having regard to the best interests test under s 1(1) of the Children Act 1989 in reaching its decision on the application for permission to withdraw proceedings (J, A, M and X (Children) at [35]).

[53] Finally, it is important to note that, notwithstanding the emotive subject matter of these proceedings, the courts power under FPR r 29.4 to grant a local authority permission to withdraw proceedings constitutes, to paraphrase Cobb J in J, A, M and X (Children) an objective and dispassionate check on whether the local authority should be entitled to disengage from proceedings.

65. The authorities thus identify two distinct approaches; one which will apply where it is arguable that the threshold might be established (Type II), the other applicable where the inability of the local authority to demonstrate facts which cross the section 31 threshold is obvious (Type I). In such a case no basis will then exist for the state to intervene in the life of the family, or interfere with the right to respect for family life protected by article 8. As noted by Cobb J at paragraph 18 in *J, A, M and X (Children)* [2014] EWHC 4648 (Fam), the threshold criteria operate as a bulwark against wrongful interference by the State with family life. The burden of proving facts which satisfy the threshold lies on the local authority on the balance of probabilities and the court operates a binary system where a fact is proved or is not. If it is not proved it did not happen. Mere possibilities are not sufficient to cross the threshold.

66. Thus where it is obvious the threshold could not be crossed; the authorities indicate that the application for permission to withdraw must succeed. This is not because the court has not applied the paramount welfare of the child but because where there is obviously no basis for the state to interfere (or for the local authority to bring proceedings) it is plainly in the child's welfare that the proceedings terminate and for the child to resume ordinary family life without the cloud of uncertainty, intrusion and stress which accompanies the court process.

67. On the other hand where there is a possibility that the threshold might be crossed the court must undertake a more detailed evaluation of the situation. In *J, A, M and X (Children)* [2014] EWHC 4648 (Fam) Mr Justice Cobb observed that:

> *[32] In a case where there is argument whether the threshold could be crossed, I have to remind myself that answers to the questions relating to threshold may also inform the answer on welfare. The crossing of the 'threshold' is simply one part of a two-stage process (and the court has two questions to ask i.e. has the threshold been crossed? If so, what will be best for the child?) The same factual issues are often relevant to each question. Just because a hearing is split, does not mean that the evidence relevant to stage 1 may not be just as relevant to stage 2: "the finding of those facts is merely part of the whole process of trying*

the case. It is not a separate exercise" (see Baroness Hale in Re B (supra) at para.74).

68. He went onto conclude that in such a case the court should consider whether the fact-finding exercise to determine whether the threshold was in fact established should go ahead should be determined by reference to the 9 factors identified by McFarlane J (as he then was) in the ACC case and set out by Mr Justice MacDonald in *In A Local Authority v X, Y and Z (Permission to withdraw)* [2017] EWHC 3741 (Fam)

69. What in practice though meets the test of 'obvious' so as to fall into the Type I approach? On the other hand what do we mean when we identify a case where the threshold 'could' be crossed or where it is 'possible' that it could be established? Mr Justice MacDonald considered such a case was made out where there was no nexus between the activities of the parent and any harm or risk of harm, hence his reminder of the President's dicta in *Re A*. The same situation existed before Mrs Justice Knowles in *Re ABCDE [2018] 1841 (Fam)* where allegedly extremist behaviour was not demonstrated to have caused any significant harm or to give rise to a likelihood of the children suffering significant harm attributable to those beliefs or behaviour. The situation Mr Justice McFarlane (as he then was) was faced with in *ACC-v-P* (above) was very different indeed. There the court had to consider whether to conduct a fact-finding hearing in relation to injuries sustained by a child which may have been caused by his father. Although no care or supervision order was sought because the child was to remain in the care of the mother with only supervised contact to the father, McFarlane J rejected a submission that if all parties to a case applied to have the proceedings withdrawn then the court had no option but to grant their request. In determining whether a fact-finding was required he identified 9 points which the court would need to consider when deciding whether to exercise its discretion in favour of conducting a fact-finding exercise or not. In identifying those factors, he drew on a series of cases identified at paragraph 22; I note that most of them if not all of them involved such a decision being taken in the context of the threshold having been conceded and the court needing to determine whether to go further. On the facts of that case it was clear that the possibility of the father having inflicted serious injuries on his son would be relevant to his future relationship with his son and so a fact-finding was required. That it seems to me was an example of it being obvious not that proceedings should be withdrawn but that proceedings would need to continue to fact-finding.

70. Thus one can see some cases which are easily recognisable as falling into the Type I 'obvious' category. Equally there will be others which are easily recognisable as falling into the Type II category. Those may range from the very obvious sort encountered by McFarlane J in *ACC-v-P* through to the more nuanced example Cobb J dealt with. That of course leaves something of a blurred dividing line. I do not think that 'obvious' is limited to 'easily identified'. Some may indeed be easily identified for instance where non-accidental injury was alleged but clear expert evidence is obtained which identifies a medical aetiology for the injury. But there will be others which are not easily identified but which may require a fairly detailed analysis of the evidence in order to discern that threshold will obviously not be established. That it seems was the situation in the cases that MacDonald J and Knowles J recently determined.

71. In many cases the distinction between the Type I and the Type II case may ultimately lead to no difference in the outcome. In many Type II cases the application of the 9 *ACC-v-P* factors and the cross-check with paramount welfare will lead to permission to withdraw. In both cases no findings will be made against the parents and thus applying the binary rule they emerge with a clean bill of health. In some Type II cases though the court may refuse to grant permission to withdraw and the case will progress to fact-finding. Thus there is a material difference. Even in those Type II cases where leave to withdraw is granted it seems to me that although there is no difference in terms of the absence of findings it may still be important for the parties, in particular the parents and the child, to know whether that outcome is as a result of the court concluding that whatever the reasons for the institution of the proceedings it was obvious by the time the court came to determine them that there was no basis for the state to intervene. Whilst I'm not at all convinced that the submission made by Ms Cheetham QC at paragraph 47 of her skeleton is accurate forensically it may have some traction on a human level.

72. Whilst I am cautious about importing concepts from the criminal or civil arena into this process it may be that some assistance can be gained in understanding what we mean in this context by 'obvious' by reference to what is meant in the criminal context by 'no case to answer' or in the civil context of 'no reasonable ground' or no real prospect of success. One aspect of submissions of no case to answer involves the consideration of whether evidence taken at its highest, but not picking out all the plums and leaving all the duff behind, might require the case to be left to the jury. It seems to me that in some cases it may be 'obvious' that the threshold cannot be established because viewed in its totality and without compartmentalisation or narrow focus the duff clearly outweighs the plum. In the criminal context that exercise will be undertaken bearing in mind the standard of proof would be 'sure' whereas in the current context the standard would be 'more likely than not' which would suggest cases with fewer plums (supporting possible threshold) and more duff (undermining threshold) might not properly be categorised as obvious. But even having regard to that wider gateway evaluation of whether it was obvious that threshold could not be established, it would permit consideration of issues as to witness credibility, competing or inconsistent accounts, differences in medical opinions etc, none of which may be put to the test but are considered in written form only. And this exercise of a summary appraisal will only of course be undertaken when the Local Authority has applied for permission to withdraw proceedings. In most cases, albeit not all, this course of action will probably be supported by all the parties and the court will be carrying out its role as independent and dispassionate arbiter.

73. Drawing these threads together there may be some cases which are obvious because they hinge on a single issue which is readily discernible, others may be obvious because the overwhelming weight of evidence points in one direction, in others there may be no clear causal link between the behaviour complained of and any harm or risk of harm and in others a more detailed albeit summary evaluation of the evidence may demonstrate that the plum/duff balance makes it obvious threshold could not be established. As with the elephant such cases may be easier to recognise than to describe.

Evaluation

74. So is this a Type I case where it is obvious the threshold cannot be established and where the grant of permission to withdraw follows near automatically as a consequence of the child's paramount welfare being met by the withdrawal of unsustainable proceedings? Or is this a Type II case where it is possible that threshold could be established and where I need to:

    i) Exercise my discretion by reference to the 9 ACC factors as to whether a fact-finding should be conducted, and

    ii) then cross-check the conclusion reached having regard to the best interests test under s 1(1) of the Children Act 1989.

75. Essentially for the reasons articulated on behalf of CP, TP, and the Guardian, I consider that this is a Type I obvious case. The principal reasons underpinning my conclusion are as follows:

    i) I agree with the local authority's decision not to pursue the very significant majority of the threshold as originally drafted in July 2018. The combined effect of the evidence of Dr Hellin, Dr Ward, Dr Pasterski and Ms Sayer taken together with the other witness and documentary evidence made those abandoned aspects unsustainable. The reasons underpinning that decision do though have a bearing on the evaluation of the vestigial elements of the threshold which the LA submit could still lead to the establishment of threshold.

    ii) The picture painted by the totality of the evidence is one which is consistent with the evaluation of the Guardian namely of parents who are child focused, who provide a high quality of care and who seek appropriate referrals and are open to advice from professionals. The evidence from almost all sources of how the children are prospering in the care of CP and TP (notwithstanding any underlying medical or developmental problems) provides very powerful support to the contention that CP and TP are good parents. They are thus unlikely to provide care at a standard which it was not reasonable to expect a parent to provide. To the extent that there may be individual examples which either do amount to, or could be construed as, examples of inaccurate reporting, or over medicalisation or lack of supervision they are isolated outliers in comparison to an otherwise overwhelming evidential panorama of appropriate parenting.

    iii) In respect of paragraphs 29(a) and (b) of the vestigial possible threshold in respect of the concerns about the early and complete social transition of R and H, and the alleged unwillingness of CP and TP to recognise the long-term implications of such an early transition the evidence of Dr Pasterski compellingly rebuts these concerns. Her evidence in respect of the '*2 critical historical misunderstandings*' not only explains the approach of CP and TP but provides clinical justification for that approach. Notwithstanding even the Guardian's caution in respect of the openness of CP and TP to the possibility of an alteration in the children's attitude to their gender identity I conclude that Dr Pasterski's evidence demonstrates that it is obvious that neither of these grounds would meet threshold. Taken

together with the panoramic evidence of the child focused approach of CP and TP it is overwhelmingly obvious that neither H nor R have suffered or are at risk of suffering significant emotional harm arising from their complete social transition into females occurring at a very young age. The evidence demonstrates to the contrary, this was likely to minimise any harm or risk of harm. The evidence does not support the contention that it was actively encouraged rather than appropriately supported.

iv) Those parts of the evidence of Dr Ward, to the extent it can be construed as supporting paragraph 29(c) are, even in the context of the totality of her evidence, isolated examples. Even within Dr Ward's report they do not support a risk of emotional harm to all of the children by pursuit of mental health diagnoses – in the sense that these were inappropriately sought. The general thrust of Dr Ward's evidence is that CP and TP have sought appropriate referrals. There may be isolated examples which could be interpreted as over-medicalisation but taken within the overall effect of Dr Ward's evidence they are almost certainly no more than hypervigilance or perhaps even exaggeration to achieve an end. Within the overall panorama of evidence (including that which might be deployed in support of the threshold) they are obviously not supportive of a risk of emotional harm to all of the children by pursuit of inappropriate mental health diagnoses. The overwhelming weight of the evidence points to CP and TP as being child focused and attuned carers.

v) The examples of the injuries that C and sustained over a three-year period when subjected to a more detailed evaluation do not support paragraph 29(d). Dr Ward's opinion that they demonstrated an inadequate level of supervision is only sustainable at a quite simplistic level. Of course, very many accidents of childhood can be attributed to a lack of supervision at a simplistic level. The reality of child rearing though demonstrates that children suffer accidents even with the most highly attuned and careful parents. Parents and carers cannot protect them from all risks however vigilant they are. As in the case of the swimming pool incident events may occur in a matter of seconds. At the time no one considered that these accidents were anything other than that. Most were observed and most were properly explained and those explanations accepted by doctors and social work professionals. Even the swimming pool incident can properly be explained as a 'there but for the grace of God go I' example of an accident occurring in seconds notwithstanding the presence of two attuned and careful parents. And the overwhelming effect of the panoramic evidence is that CP and TP are attuned and careful parents. Thus I do not consider that on any interpretation the accidents which C has sustained illustrate anything other than the ordinary rough-and-tumble that children of reasonable parents might experience.

76. Whilst at first blush, or perhaps at a prima facie level, the argument that the threshold could be established by reference to the matters set out in paragraphs 29(a)–(d) is understandable and indeed perhaps an intellectually honest one, a more detailed and rigorous examination lead to the inexorable conclusion that it is obvious that the threshold could not be established on those vestigial grounds. For my part I see that principally as an exercise of the plums/duff sort where the balance of the evidence viewed in its totality and on its broad panorama makes it obvious threshold could not be established. It might also be the case that in some respects the parental behaviour alleged does not show a causal link with the causation of significant harm or the risk thereof. I have not felt it necessary to conduct that analysis

having reached my conclusions on the obvious balance of the evidence. Having reached that conclusion it is self-evident that it is not in the children's welfare interests for these proceedings to continue any further. I will therefore grant permission to the local authority to withdraw these proceedings.

77. Having reached that conclusion I do not need to go on to consider whether a fact-finding ought to be held in respect of threshold issues which could possibly be established. Suffice to say that for the reasons set out in particular in the Guardian's skeleton argument and that of CP, were that evaluation to be undertaken and the discretion exercised it seems inevitable that I would conclude that the discretion should be exercised against pursuing a fact-finding. Having regard to that likelihood I cannot conceive of circumstances in which it would be in the children's welfare interests to allow these proceedings to continue for any reason.

Conclusion

78. Given the very extensive investigations that have been carried out in relation to the family of CP and TP and given the very obvious and considerable impact that these proceedings have had upon CP and TP and the children it seems to me that the court system owes them a full explanation as to why and on what basis I am granting permission to the local authority to withdraw these proceedings. I hope in the course of this judgment that I have done that. Given the very extensive investigations that have been undertaken and the time that the parties and the court has invested it seems to me more satisfactory in the final analysis that the outcome is dictated by the overwhelming weight of the evidence rather than the narrower or more technical approach of a 'no causal nexus' outcome.

79. As Mr Justice Cobb identified at paragraph 71-73 of his judgment in *LCC-v- A, M and X* (above) the result of the withdrawal of the proceedings is that the allegations originally made against CP and TP in the July 2018 threshold and the vestigial threshold now score a zero.

80. The lives of the family should now proceed on the basis that those concerns were comprehensively dispelled as a result of the inquisitorial process that has been undertaken through the medium of this court.

81. I do not consider it a proportionate or appropriate exercise within the confines of this hearing and this judgment to express any concluded views on how it was that these proceedings commenced. I observed during the course of the hearing that issues relating to gender identity and the medical understanding of such issues is complex and developing and that inevitably there is some lag between those professionals at the cutting edge such as Dr Pasterski and others (in which I include myself), which might have played some role in how these proceedings came about. Beyond that, as I indicated to Ms Cheetham QC at the IRH, I will not venture.

82. I understand that the parties have reached a near complete agreement in respect of the residual issues relating to life story work and contact which will need to be dealt with either in child in need plan or a special guardianship support plan.

83. That is my judgment.