Re: M (Children)

No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

Judgment Date
28 March 2018

Case No: B4/2017/3356

Case No: B4/2017/3359

Court of Appeal (Civil Division)

[2018] EWCA Civ 607, 2018 WL 01512980

Before: Lord Justice McFarlane and Lord Justice Peter Jackson

Date: 28 March 2018

Hearing date: 15 March 2018

Representation

Karl Rowley QC and Lorraine Cavanagh (instructed by Watson Ramsbottom Solicitors) for the Applicant Mother.
Julia Cheetham QC and Simon Rowbotham (instructed by Smith Partnership Solicitors) for the Respondent Father.
James Cleary (instructed by Nottinghamshire County Council) for the Respondent Local Authority.
Emma Kendall (instructed by Jackson Quinn Solicitors) for the Children's Guardian.

Approved Judgment

Lord Justice Peter Jackson:

Introduction

1. These applications concern the admission of expert evidence and the rehearing of findings of fact. They were listed for oral hearing by Lord Justice McFarlane on 23 January 2018. By them, the mother of two children applies:

(1) For permission to appeal out of time from a finding of fact made by His Honour Judge Lea on 27 March 2017 after a 12-day fact-finding hearing in private law proceedings, namely that in December 2014 she had administered sedatives to the children, then aged seven and three, so that the results of drug tests would seem to support her claim that their father and others had drugged them for the purpose of sexually abusing them.

(2) For permission to appeal from the same judge's decision on 17 November 2017 in care proceedings, refusing her applications:

(a) to file further expert evidence that she had unilaterally obtained from Cansford Laboratories ('Cansford') in May 2017 with the aim of challenging the above finding of fact;

(b) for a reopening of the fact-finding hearing in relation to the drugs issue.

(3) For permission to file the Cansford evidence as fresh evidence on this application in relation to both the March and November decisions.

2. After hearing submissions from all parties on 15 March 2018, and reading the Cansford evidence in order to understand the issues (*de bene esse*), we dismissed all the above applications. This judgment contains my reasons for reaching that conclusion. Although this is a decision on a permission application, the court heard full argument, and I would give permission for it to be cited under paragraph 6.1 of the Practice Direction on the Citation of Authorities of 9th April 2001.

Background

3. The judge rightly described the background as calamitous. The parents began living together in 2004, married in 2006 and separated in 2011. In 2012 and again in 2013, the father brought proceedings to secure contact with the children and orders were made. However, in December 2014, the mother and maternal grandmother made allegations to the NSPCC and to the police that the boys had been severely sexually abused by their father, by members of his family and by some of his male friends over a considerable period of time. The allegations led to

there being no contact between the boys and their paternal family for almost three years.

4. During the police investigation into the allegations, the children were medically examined. That provided no supporting evidence. The children were also interviewed, but in a manner that the judge considered to have no evidential value. Additionally, at the insistence of the mother the police arranged for hair strand tests for drugs to be taken from the boys in January 2015. These were not sent for analysis until May 2016. In June 2016, Ms Kirsten Turner, a consultant forensic toxicologist then employed by ChemTox reported to the police the presence in the hair of the sedatives benzodiazepine and nordiazepam. In September 2016, Ms Turner, by now working for Alere Forensics ('Alere') produced a further report identifying the presence of nordiazepam, temazepam and zolpidem, in all cases in very low quantities.

5. In September 2015, the mother and children moved away from their local area. In response, the father issued proceedings to locate them and to restore his contact. It was those proceedings that came before the judge in March 2017. He heard nine days of evidence, including from Ms Turner, who was called by the mother. Her evidence was that the tests indicated that the boys had received the same substances in similar timescales and concentrations. The low levels were not suggestive of administration on a regular basis. They could theoretically be explained by accidental ingestion or environmental exposure. In respect of timing, she concluded that it was not possible to state the exact period covered by the hair samples and that it was possible that some traces of the drugs were from exposure prior to August 2014. However, the results could also be explained by a single tablet of diazepam being administered to each child in mid-December 2014.

6. The father and the other adults strongly denied the allegations. The father sought findings that the mother and maternal grandmother had fabricated the allegations and had actively and deliberately involved the boys in the false belief that they had been sexually abused. He further alleged that the mother and/or grandmother had caused the children to ingest drugs in order to produce the test results.

The March findings

7. In his judgment of 27 March 2017, the judge exonerated the father and the other adults of sexual abuse. He found that any statements made by the children were the result of pressure from the mother and grandmother. He found that they genuinely believed that the children had been sexually abused, but that their belief was irrational.

8. The mother does not accept these findings, but they have not been the subject of any appeal.

9. As to the drug test results, the judge rejected the mother's allegation that the father had administered drugs to facilitate abuse. Instead, he found that the mother and/or grandmother had administered substances to the children, saying this:

> "What is striking here is the mother's determination to have the boys tested. She was adamant that it should be done and was highly critical of the police for not doing so. Her determination, it seems to me, was driven by a knowledge of what the test results would be. She knew what they would be because she had caused [the boys] to ingest small quantities of drugs sufficient to produce a test result. The mother saw this as a small harm to prove a far greater harm. The mother knew after the first ABE interview that the case would go no further without some form of corroborative evidence."
>
> "[The administration] was not inadvertent but was done in order to prove the abuse which the mother and the grandmother were convinced had taken place and at a time when they felt frustrated by the police response."

(The date of the first ABE interview was 10 December 2014.)

The mother's response

10. What happened next was that on 27 March 2017, while the judge was delivering his judgment, the mother left court. She took the children and disappeared. A nationwide search followed and in the end the mother and children were found by the police on 6 April 2017. The children were placed in foster care. More recently, on 22 December 2017, they moved into the care of their father.

11. In consequence of the mother's disappearance, the judge made an interim care order. The local authority started care proceedings and it is within those proceedings that this appeal arises.

12. Following the children's recovery, a hearing took place on 21 April 2017. The mother was represented by (different) leading and junior counsel. No application was made for clarification of the findings or for permission to appeal from them, or for further investigation of the test results. Nor was any application made for further expert evidence to be admitted.

13. Instead, the mother's next initiative was to personally telephone Cansford on 24 April to ask them to prepare a report. On 1 May, she sent them Ms Turner's reports and asked a series of questions. At the same time, she instructed new solicitors, who now act for her. On 2 May, she travelled without appointment to Cansford's premises in Cardiff, but the laboratory was unwilling to discuss the matter with her without a solicitor being involved. On 4 May her present solicitor made contact with Cansford, submitting the mother's list of questions. In response to a query as to whether the report would be for the criminal or family court, the solicitor replied that it was for the family court, *"however, they haven't ordered a report at this stage, so it's for our own information."* No information was given to Cansford about the existing proceedings, or the fact that Ms Turner had given evidence.

14. On 10 May, Cansford's laboratory manager, Ms Sian Bevan, sent the solicitor a report on each child and a response to the questions that had been asked. The reports include the signed statement that the author was aware of her obligations

under Part 25 of the Family Procedure Rules 2010 .

15. It is to be noted that Cansford was not carrying out any testing itself, but merely commenting upon Ms Turner's reports. Ms Bevan stated that Chemtox are more experienced in the analysis of benzodiazepines than Cansford and may be better placed to answer questions about them. She agreed with Ms Turner that the hair growth rates of children under school age are highly unpredictable. However, and simplifying her evidence, if the rate of growth was analogous to that of an adult, the hair in which the substances were found could date from the period between approximately early June and early November 2014. She therefore variously stated that it is *"less likely"* or *"highly unlikely"* that the results were due to a single tablet taken in mid-December.

16. Armed with this information, the mother issued an application on 2 June, seeking permission for the Cansford evidence to be admitted, and for the findings about drug administration to be reopened. On 6 June, the judge directed the filing of written submissions on the issues, it being agreed that an oral hearing was not necessary. The application was opposed by the local authority and the father. The Guardian suggested that the Cansford evidence should be released to Alere with agreed questions so that the extent of any disagreement could be ascertained. At a hearing on 30 August, the judge indicated that he was unlikely to allow the application, and would give written reasons.

The November decision

17. The judge's reasons for dismissing the application were not in fact given until 15 November. He noted that there had been no application for permission to appeal in relation to the findings. He described the Cansford evidence as an untested second opinion and recalled that he had relied on far more than expert opinion alone when making the finding about administration of drugs. He said that it would be disproportionate to reopen the evidence in relation to the issue. Significantly, he said: *"Moreover, the Cansford evidence in relation to timings is not wholly inconsistent with my findings."*

18. The judge then noted that the mother had obtained the evidence in what was said to be clear breach of s.13 of the Children and Families Act 2014 , which

prohibits the obtaining of expert evidence for use in children proceedings without the permission of the court. However, he looked beyond what he described as *"these technicalities"* to determine the merits of the mother's application. He directed himself on the law in relation to the reopening of findings of fact, and said this:

> "Is there a real reason to believe that the finding that I made as to the administration of sedatives requires revisiting? Given that the Cansford evidence taken at its highest does not render my finding as to the administration sedatives unsustainable, I see no basis on which I should revisit it. The most important finding that I made was that neither [boy] had been physically or sexually abused by their father or anyone connected with him… The focus of the mother's attention since my findings is not on that central and crucial finding but on the consequential findings I made that the father had not administered date rape drugs to the boys as alleged by the mother and that she or her mother had done so in order to prove her case…"

19. The judge accordingly dismissed the mother's applications for the admission of the Cansford evidence and for a rehearing. The care proceedings are now continuing, alongside investigations into other serious matters not relevant to this appeal.

The grounds of appeal

20. On behalf of the mother, Mr Rowley QC and Ms Cavanagh make these criticisms of the March findings of fact:

(1) The judge did not warn himself that there were alternatives to the drug having been administered by one or other parent, namely accidental administration or environmental exposure. The fact that neither party argued for this did not relieve the judge of the obligation to consider it.

(2) There is an inconsistency between the judge's finding at one point that the mother had caused the boys to ingest the drugs and another point that

she or the grandmother had done so.

(3) The judge failed to warn himself that the mother's belief that drug testing would prove positive may have arisen from her firm conviction that the father was the perpetrator of sexual abuse.

(4) The finding of administration of drugs does not conform with other evidence showing the mother to be opposed to vaccinations and to be highly concerned with the children's health.

(5) The finding that the mother had *"exaggerated, coached, coaxed, misrepresented and/or misinterpreted accounts of what the children actually said under direct emotional pressure and direct encouragement from the mother"* is inconsistent with his finding that the mother genuinely believed the father had sexually abused the boys, in that the concept of coaching and misrepresentation must suggest some deliberate, conscious conduct on the mother's part.

21. Mr Rowley then advances these grounds of appeal in relation to the November 2017 decision not to admit the Cansford evidence or to allow a rehearing of the drugs issue:

(1) The judge failed to engage with the extensive arguments advanced on behalf of the mother in written submissions amounting to 23 pages, his judgement running to five pages only.

(2) The judge should not have cut off the mother's application; instead, he should have followed the Guardian's suggestion of a dialogue between the two testing experts as part of a staged approach.

(3) The judge wrongly fused the test that should be applied to the admission of expert evidence (s.13 of the 2014 Act) and the test for reopening findings (*Re Z (Children)(Care Proceedings: Review of Findings) [2015] 1 WLR 95*).

(4) The judge misstated the test on whether a rehearing should be allowed as being a test of whether the court would in fact change its findings.

(5) The judge drew an incorrect inference from the fact that the mother had not appealed and applied to admit fresh evidence on appeal.

(6) The judge was wrong to consider that a reopening of the finding would be disproportionate, given its crucial nature.

22. The Guardian's submission to the judge, restated to this court, is that it was *"highly regrettable in the light of the ongoing proceedings before the court that neither the court nor the other parties were appraised of the mother's approach to Cansford Laboratories. That being said, in the Guardian's view, the new evidence obtained cannot now be ignored."*

23. Finally, as to the admission of the Cansford evidence as fresh evidence on this appeal, Mr Rowley makes these submissions, following the criteria laid down in *Ladd v Marshall [1954] 1 WLR 1489* :

> **Evidence could not have been obtained for use at trial**
>
> The date of the administration of the sedatives gained significance when the judge alighted upon the specific period (after 10 December 2014). The Cansford evidence was obtained some six weeks after the trial ended, the mother having in the meantime been 'missing' and then preoccupied with criminal matters, and having instructed new solicitors.
>
> **It would probably have an important influence on the result of the case**
>
> The Cansford evidence does not show that the mother could not have administered sedatives to the children, but makes it highly unlikely that she did so in mid-December 2014.
>
> **It is presumably to be believed**
>
> There is no issue about Cansford's scientific credentials.

Assessment

Challenge to the March findings

24. In my view, there is nothing in the points raised at paragraph 20 above. Taking them in turn:

(1) The reason why no party argued for accidental administration or environmental contamination is that there was no evidence at all for the former and the latter was a purely theoretical possibility. There was no

plausible way in which not just one, but both boys could have accidentally taken sedatives. Nor, being in capsule form, are these drugs of a kind that can be ingested by way of environmental contamination.

(2) It is clear from the judgment that the judge considered the mother and grandmother to be acting together and that he was not seeking to identify one or other of them as having administered the drugs.

(3) The judge had a very full opportunity to consider all possible explanations for the mother's behaviour. His conclusion about the significance of her insistence on drug tests was one that was clearly open to him.

(4) The fact that the mother may have strong values in relation to the children's health generally could not be of much significance where, as the judge found, she was acting to protect them from what she saw as a greater harm.

(5) The judge had abundant evidence, summarised at paragraph 54 of the submissions made by Mr Cleary on behalf of the local authority, of the way in which the children had been put under pressure. It is clear what he meant by "coaching" from these three passages:

> "In effect [the boys] were being encouraged to repeat their allegations. There is a thin line between repetition and rehearsal and between rehearsal and coaching."
>
> "She became absolutely and totally obsessed with the idea that [the boys] had been grossly sexually abused, failing to see that in offering what she thought was appropriate support to [them], she was encouraging them to disclose things that had not happened to them."
>
> "I am satisfied that the allegations made by [the boys] were generated by the mother placing unwarranted emotional pressure on the children, inappropriately involving them in adult discussions and by repeated questioning and discussion and rewarding for disclosure, **she with her mother in effect coached the children** to make allegations of physical and sexual abuse which were false." (verbatim, emphasis added)

25. Mr Rowley also seeks to challenge the judge's findings about the mother's motivation for administering drugs, saying that the Cansford evidence fatally strikes at the heart of that conclusion. I shall consider this issue below, but in all

other respects I find no reason to grant permission to appeal from any aspect of the March 2017 findings.

The November decision

26. As Mr Rowley correctly identifies, the question of the admission of expert evidence and the application of a rehearing are two separate matters. However, in this case they cannot be considered in isolation as without admission of the evidence there would be no case for a rehearing. It is therefore necessary to consider the two matters separately, and then together.

27. The admission of expert evidence in children proceedings is governed by s.13 of the Children and Families 2014 , which provides:

> **13 Control of expert evidence, and of assessments, in children proceedings**
>
> (1) A person may not without the permission of the court instruct a person to provide expert evidence for use in children proceedings.
>
> (2) Where in contravention of subsection (1) a person is instructed to provide expert evidence, evidence resulting from the instructions is inadmissible in children proceedings unless the court rules that it is admissible.
>
> (3) A person may not without the permission of the court cause a child to be medically or psychiatrically examined or otherwise assessed for the purposes of the provision of expert evidence in children proceedings.
>
> (4) Where in contravention of subsection (3) a child is medically or psychiatrically examined or otherwise assessed, evidence resulting from the examination or other assessment is inadmissible in children proceedings unless the court rules that it is admissible.

(5) In children proceedings, a person may not without the permission of the court put expert evidence (in any form) before the court.

(6) The court may give permission as mentioned in subsection (1), (3) or (5) only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly.

(7) When deciding whether to give permission as mentioned in subsection (1), (3) or (5) the court is to have regard in particular to—

(a) any impact which giving permission would be likely to have on the welfare of the children concerned, including in the case of permission as mentioned in subsection (3) any impact which any examination or other assessment would be likely to have on the welfare of the child who would be examined or otherwise assessed,

(b) the issues to which the expert evidence would relate,

(c) the questions which the court would require the expert to answer,

(d) what other expert evidence is available (whether obtained before or after the start of proceedings),

(e) whether evidence could be given by another person on the matters on which the expert would give evidence,

(f) the impact which giving permission would be likely to have on the timetable for, and duration and conduct of, the proceedings,

(g) the cost of the expert evidence, and

(h) any matters prescribed by Family Procedure Rules .

(8)-(11) ….

28. The core of this statutory provision is that expert evidence in children proceedings may not be put before the court in any form without permission (ss.5) and that permission will only be granted if it is necessary to assist the court to resolve the proceedings justly (ss.6). Further, the instruction of an expert without permission is prohibited (ss.1) and any evidence resulting from such an instruction is inadmissible unless the court rules otherwise (ss.2). When deciding whether to give permission, the court is to have regard in particular to the matters set out in ss.7 : child welfare, definition of issues, effect on timetable, availability of other expert evidence, cost, and matters arising in the Rules. Although there is no hierarchy within that list, the court will inevitably be most concerned about the implications of admission or refusal of expert evidence for the welfare of the child and for the fairness of the proceedings.

29. It is understandable that the judge dealt with the application for a rehearing on its merits. However, it is not right to describe the question of the admissibility of the evidence that underpinned that application as a technicality. This is primary legislation which, unusually in proceedings relating to children, renders evidence inadmissible unless the court considers it is necessary to admit it to assist it to resolve the proceedings justly. A court considering an application to admit expert evidence is required to have regard to the matters in ss.7 , whether the application is made in proceedings in the normal way or in the unusual circumstances that arose in this case.

30. In this case, the following considerations arise (using the statutory lettering).

31. As to (a), the impact of admitting the evidence on the welfare of the children, the court will first and foremost have regard to the importance of its findings of fact as the basis for decisions that affect their futures. This involves a consideration of the nature of the evidence and the extent to which it might influence any findings of fact. Here, the mother's case is that the Cansford evidence tends to undermine the judge's crucial finding about the timing of the administration of the drugs. That

finding is, Mr Rowley argues, of a different order to the other findings, since it involves the infliction of actual physical harm, rather than emotional harm.

32. To this, the father (through Ms Cheetham QC and Mr Rowbotham) and the local authority (through Mr Cleary) respond that the judge was right in his assessment of the Cansford evidence. As Mr Cleary points out, the evidence, taken at its highest, relates to only two of the three relevant substances. It does not cast doubt on the presence in December of a benzodiazepine (nordiazepam). Secondly, it does not show that the remaining two substances (zolpidem and temazepam) were highly unlikely to have been administered to the children in December 2014; rather, it is to the effect that it would be highly unlikely in the case of adults. Thirdly, Ms Turner noted that absence of zolpidem in the shortest section of hair did not exclude recent ingestion as the concentrations that were found in the longer sections were themselves at the limit of detection. To these points, Mr Rowley responds that they are matters that could form the subject of discussion between the experts.

33. In my view, in addressing this issue in relation to the application for a rehearing, the judge was entitled to reach the view that the Cansford evidence was not wholly inconsistent with his findings. He was also entitled to note that the evidence from the hair strand tests were only one part of the evidence that led him to his finding of fact.

34. There are other aspects to welfare. Mr Rowley explains that the mother, who does not accept any of the judge's findings, takes particular exception to this one. He argues that the admission of the evidence and a rehearing might make it easier for her to move on in her thinking and reconcile herself to the findings as a whole. That, they say, would be in the children's interests. I have to say that I find that scenario entirely speculative. Given the entrenched nature of the mother's beliefs, there can be no confidence that a re-examination of the drugs evidence would help her to accept the judge's wider findings. It would be at least as likely to fuel her resistance to them. As Ms Cheetham submits, there is a risk that the mother's application for a rehearing of part of the judge's findings is in reality a collateral attack on all of them.

35. Next, under (d), there is the question of what other expert evidence is available. I would accept that an application for a rehearing can be based upon new opinion, and not just new facts: *Re AD & AM (Fact-finding hearing) (Application for re-hearing) [2016] EWHC 326 (Fam)* at [71], but in this case, the mother has already called expert evidence from Ms Turner, who dealt thoroughly with all the relevant matters. Hair strand testing is an interpretative science and the fact that another expert has a different view is not a reason for admitting evidence that is not necessary.

36. As to (f), the timetable for the proceedings directly affects the welfare of the children. Here, the application to admit the evidence was being made after the fact-finding stage of the proceedings had concluded. This was not fatal to the application, but it was a consideration. Regard must be had to the principle of finality and, approaching three years since the allegations were first made, the emotional cost to the children of further prolonging the fact-finding process was always likely to be high.

37. Lastly, (h) requires the court to have regard to any matters prescribed by Family Procedure Rules . Here Ms Cheetham strongly submits that the court should have regard to the wholesale flouting of the provisions of Part 25 by the mother and by her solicitor. She refers to: the unilateral approach to Cansford in the middle of proceedings without the knowledge of the court or any other party; the disclosure to Cansford of police material that was covered by a nondisclosure undertaking; the absence of any letter of instruction; and the misleading by omission of Cansford, who were not told about the ongoing proceedings at all. Overall, Ms Cheetham argues that this state of affairs is flatly contrary to the philosophy relating to the instruction of expert witnesses as articulated by Wall J in *Re A (Family Proceedings: Expert Witnesses) [2001] EWHC Fam 7* at [35-37]:

> ”35. The essence of case management in proceedings relating to children is that the process should be transparent, and that each party should know the case that party has to meet. It is equally important when it comes to expert evidence, that if such evidence is required in a case, the issues to be addressed by it should be identified at the earliest possible stage in the proceedings and debated at an early directions appointment, so that the briefs to be given to whatever expert or experts are to

> be instructed can be defined by the court and permission given by the court for the relevant documentation to be disclosed.
>
> 36. It is for the court to decide what expert evidence should or should not be obtained in any case, and it is in my judgment quite contrary both to the spirit and the letter of the approach to expert evidence which has developed since the implementation of the Children Act 1989 , that one party, without notice to the other party or the court, should commission a report from an expert about which neither the court nor the other party knows anything.
>
> 37. It is equally important, in my view, that expert witnesses should always understand their role in the proceedings in clear terms. In particular, they must know the terms of the court order which defines their involvement, and the purpose for which they are being instructed. In my judgment, expert witnesses asked to write reports for proceedings under the Children Act 1989 are not only well advised to find out, but need to know precisely what the court requires of them in order that they can properly fulfil their obligations as experts to report fully and objectively to the court."

38. I agree with Ms Cheetham's submissions on this point. The court should as a matter of principle be slow to admit expert evidence that has been irregularly obtained. Plainly, it will not stand on ceremony at the expense of child welfare, but if the rules are not enforced, parties are encouraged to ignore them. A lax approach will inevitably be felt to be unfair by other parties and satellite issues of this kind cause delay and increase costs. Moreover, although it has not apparently happened in this case, there would be nothing to stop a litigant shopping around, unbeknownst to the other parties, until they alight upon a favourable opinion. A response such as that of the Guardian (see paragraph 22 above) does not in my view give adequate weight to the importance of the proper procedures, which are there to serve the interests of children and of justice.

39. I would suggest that in a case like this, where a court is faced with expert evidence that has already been obtained in breach of s.13 , it should as one part of its thinking ask itself whether it would have granted permission to seek the expert evidence with which it is now presented as a *fait accompli* . That of course is not the only consideration, but to ask the question ensures that the requirements of the statute and the rules are not forgotten. In this case, had the mother made an application at the hearing on 26 April for permission to instruct a further expert, such an application would inevitably have been refused. The fact that she chose to ignore the rules is a matter the court should take into account.

40. I therefore conclude that the considerations in this case weighed heavily against the admission of the Cansford evidence.

41. I now turn to the application for a rehearing and the grounds argued by Mr Rowley at paragraph 21 above. In the same way as the judge, for this purpose I treat the Cansford evidence as if it were admissible.

42. I am not impressed with the argument that the judge dealt inadequately with the submissions he received. The length of judges' reasons should not depend upon the length of counsel's submissions. What is important is that the judge has grasped the issue and dealt with it adequately. For this issue, a judgment of five pages was ample, following on as it did from a substantial fact-finding judgment. As it happens, Mr Rowley and Miss Cavanagh have managed to encapsulate what they describe as "the crux of the argument" in a single sentence at paragraph 23 of their submissions to this court: *"The Cansford evidence as to the administration of the drugs in mid-December being "highly unlikely" is fundamentally at variance with [the finding] and no motivation for the mother administering the sedatives before then was identified by the Learned Judge in his Judgment."* The judge plainly grasped that argument and ruled upon it.

43. Next, there is the question of whether the judge should have given directions for questions to be put to the two experts in order to identify areas of agreement and disagreement. That is a formula that has been adopted, for example in *Re AD & AM* (above) and in other cases. It was an approach that the Guardian advocated here, and one that the judge might have followed if he considered it justified. But I reject

the submission that he was wrong not to have taken that course. The views of the experts were there to be seen. Insofar as Mr Rowley suggests that Ms Turner's evidence about nordiazepam may have changed following further consideration, that is speculative and provided no reason for the judge to postpone his decision.

44. As to the judge fusing the issues of admission of expert evidence on the one hand, and rehearing on the other, what happened here was rather that the judge passed over the first issue and went straight to the second. Given my conclusions on the first issue, that was not to the mother's disadvantage.

45. Nor do I accept that the judge applied the wrong test to the application for a rehearing. In the passage of which Mr Rowley complains (see paragraph 18 above), the judge stated the correct test and then expressed in his own way the conclusion that the new evidence did not call his finding into doubt.

46. Although it does not take matters further, and was not central to the judge's conclusion, I would agree that no inference could be drawn from a decision to pursue the issue of further expert evidence through the continuing proceedings rather than by way of an appeal. That was a course open to the mother, following *O'Connor v Din CA [1997] 1 FLR 226* . Similarly, in those circumstances, I do not regard the fact that the appeal against the March findings is out of time as being a matter of significance.

47. I am not entirely clear what the judge's meaning was when referring to a rehearing of all the evidence about the finding of sedatives in the hair samples as being a disproportionate step in the proceedings. It would clearly be a substantial undertaking, but that could not be the decisive factor if a rehearing was called for. However, in making a decision about whether a partial rehearing of this kind was appropriate, the judge was certainly entitled to note that the mother rejected his central findings, but was not appealing them. In that sense, it might well be disproportionate to embark upon a substantial rehearing that could have only a partial effect on the findings of fact and little or no effect on the welfare decision.

48. I therefore consider that the judge was right to refuse the application for a rehearing. It follows that my provisional conclusion in relation to the admissibility of further expert evidence stands, and I would dismiss the application for permission to appeal from the November decision.

Admission of fresh evidence on appeal.

49. To complete the picture, I am equally clear that the Cansford evidence should not be admitted by this court, for two reasons. The evidence could have been obtained for use at trial, had there been any good reason to commission it. More centrally, I agree with the submission made by Mr Cleary that it has not been shown that the evidence taken at its highest would probably have had an important influence on the result of the case. On the contrary, any modification that it could conceivably have caused to the judge's specific finding could not have affected his central conclusion about these unhappy events and could not have influenced the result of the case.

Conclusion

50. I would refuse permission to appeal and refuse the application to admit fresh evidence.

Lord Justice McFarlane:

51. I agree.

Crown copyright