

Re P and E (Care Proceedings: Whether to Hold a Fact-Finding Hearing) [2024] EWCA Civ 403

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1. This case concerns an appeal against a case management decision by a circuit judge in care proceedings not to hold a fact-finding hearing where non-accidental injuries were alleged, leaving the local authority unable to establish the threshold criteria in Section 31(2)(a) of the Children Act 1989, resulting in what was effectively a summary dismissal of proceedings.
2. The proceedings related to two children, E, a boy aged 2 years and a P, a girl aged around 6 months at the time of the original hearing. P had suffered a fractured rib, a metaphyseal fracture of the left tibia, and subconjunctival haemorrhages. The three medical experts who had been instructed to provide opinions agreed that the most likely explanation for the injuries was that they were inflicted. Whilst the injuries might all have occurred during the same episode, the injuries required at least two mechanisms. They had rejected an explanation given by the father as not being causative of the injuries.
3. Since the making of interim care orders the children had lived with the maternal grandmother, with family time for the mother and the father of the second child having been supervised by the local authority. No concerns had arisen during contact. A parenting assessment conducted by the local authority gave a generally positive impression of the parents. The assessor was not able to make a recommendation on welfare outcome for the children in the absence of the court's findings as to the cause of the injuries.
4. The circuit judge invited argument as to whether the case should proceed to a fact-finding hearing, given that the hearing listed for that purpose could not proceed as it was likely that the court would need to permit the instruction of a further medical expert. The judge had been concerned about the likely length of the fact-finding hearing and the likely delay in assembling the necessary evidence.

5. The judge decided that the case had many similarities with the decision of Lieven J in ***Derbyshire County Council v AA and Others*** [2022] EWHC 3404 (Fam), a case where it was held that it was not necessary to proceed with a fact-finding hearing. Lieven J had decided, applying the criteria in ***Oxfordshire County Council v DP, RS and BS*** [2005] EWHC 1593 (Fam) (McFarlane J, as he then was), which criteria had been expressly approved and added to by the decision of the Court of Appeal in ***Re H-D-H (Children)*** [2021] EWCA Civ 1192, that it was unlikely that the court would make a public law order. It seemed inevitable that the child in those proceedings would remain in the care of the parents (as the child had done, under the grandparents' supervision, throughout proceedings).
6. The local authority and the children's guardian appealed the decision of the circuit judge. They argued that the judge's approach in drawing similarities between this case and the decision in the ***Derbyshire*** case was wrong. In any event, the similarities contended for by the judge were not there on close analysis. The local authority and the guardian also argued that the judge's decision had left the children exposed, potentially, to significant risk of harm from which the local authority would be unable to properly protect them.
7. Lord Justice Baker, in a judgment with which Lord Justice Lewis and Lady Justice Whipple agreed, held that the judge had fallen into error by seeking to draw comparisons with the ***Derbyshire*** case, which was a first instance decision, rather than applying the criteria in the ***Oxfordshire*** case and in ***Re H-D-H***. The comparison between the instant case and the decision in the ***Derbyshire*** case did not withstand scrutiny in any event. His Lordship noted the conclusions of the parenting assessor in an assessment that had properly set out both the risk factors and the protective factors in this case. The Court of Appeal agreed with assessor that it was not safe to make recommendations as to the welfare outcome for the children in the absence of the court's findings on the allegations of inflicted injuries. The case was remitted to the designated judge for case management and a fact-finding hearing.
8. The lesson to be drawn from this decision is that first instance judges should apply the criteria in ***Oxfordshire County Council v DP, RS and BS*** [2005] EWHC 1593 (Fam) as approved and emphasised by the Court of Appeal in ***Re H-D-H (Children)*** [2021] EWCA Civ 1192, rather than draw comparisons with other first instance decisions.

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