Neutral Citation No: [2021] NIFam 3 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **KEE11369** *ICOS No:* **16/109652** *Delivered:* **15/01/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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BETWEEN:

A FATHER

Applicant

and

A HEALTH & SOCIAL CARE TRUST, A MOTHER

Respondents

and

A GRANDMOTHER

Notice Party

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IN THE MATTER OF A CHILD JOE
(REOPENING OF FINDINGS OF FACT)

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Mr McGuigan QC with Mr Stewart (instructed by Macaulay Wray Solicitors) for the Applicant father
Mr Magee QC (instructed by DLS Solicitors) for the Respondent Trust
Ms McGrenera QC with Ms Kerr (instructed by Anderson Gillan Barr) for the Respondent mother
Ms O'Grady QC with Ms Jones (instructed by Dickson & McNulty Solicitors) for the grandmother
Ms Murphy (instructed by Small & Marken Solicitors) for the Guardian ad Litem on behalf of the child

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KEEGAN J

Nothing must be published which would identify the child or his family. The name I have given to the child is not his real name.

Introduction

[1] This case relates to a male child born in September 2016 who is the child of the parents. His case was heard in court on 7 and 8 February 2019 by Her Honour Judge McReynolds sitting as a High Court Judge ("the judge"). This was a threshold hearing. Having heard the case the judge decided as follows:

(i) That the child had sustained fracture injuries and bilateral haemorrhaging to the eyes and haemorrhaging to the brain. The fractures were to ribs and the distal right tibia.

(ii) These injuries were all non-accidental and were inflicted on the baby by an adult carer, namely his father.

(iii) The injuries were caused by the baby being grabbed by the ribcage with sufficient force to fracture his ribs and being shaken with sufficient force to cause the bleeding to his brain and his eyes and being grabbed by the leg causing the fracture to his distal right tibia.

(iv) These injuries were seen to have occurred on at least two occasions and the baby was in the care of his father when the injuries were sustained.

(v) The parent who did not inflict the injuries on the baby failed to protect him from harm and the mother prioritised her requirements for sleep over the baby's needs.

(vi) The father misused cannabis and he smoked cannabis when he was responsible for the baby's care.

[2] At paragraph 36 of her judgment the judge also said:

> "Effectively, I am satisfied to the appropriate standard on foot of the draft threshold prepared on behalf of the applicant Trust, save that I am satisfied on the balance of probabilities that the mother was not physically present when the baby was grabbed and shaken. I am not satisfied that the mother has failed to show insight into the significance of his injuries, nor am I satisfied that the mother prioritised her relationship with the father over the baby's needs. I am, however, satisfied that it was unreasonable for her to leave the baby in his father's care so frequently for such prolonged periods with knowledge of her partner's cannabis habit and with even the limited knowledge which she had of his nocturnal habits and foreseeable fatigue."

[3] The father now brings an application dated June 2020 to reopen the findings of fact for a number of reasons. Given that Judge McReynolds is retired it was agreed that I should deal with this matter.

Reasons given for the application to reopen the case

[4] First, the father instructs that following the conclusion of the fact finding hearing on 8 February 2019, his mother had a conversation with the respondent mother at the entrance to the Royal Courts of Justice wherein it is alleged that the respondent mother effectively admitted to not telling the truth in her evidence, as the respondent mother told the paternal grandmother that she knew the respondent father had not hurt the child but that she had to say otherwise in her evidence.

[5] The second ground for reopening the findings of fact relates to a third party who stayed in the home and is the brother of the mother who the father says is a regular drug user. The father submits that that the use of drugs by the maternal uncle up to and including the time that Joe was injured only became apparent to him after the judgment was given. The father refers to a number of sources in making this claim which I summarise. He states that the maternal uncle's comments which he heard in August/September 2019 that he stopped taking drugs after Joe was injured because this "scared him" and his comments that he "does not feel comfortable with children" should be red flags to the possibility that he may have been involved in the injuries to Joe or may know more about how those injuries were caused.

[6] The father also makes the case that the respondent mother's chronic vulnerabilities regarding her mental health were not apparent at the time of the fact finding hearing and only came to light when she undertook psychological work and testing in the care planning phase. Therefore, the father maintains that the extent to which the respondent mother appears to have depended upon her brother was not known. He states that after the brother moved out of the respondent mother's home in preparation for the rehabilitation of Joe to her care a number of issues came to light; there was an increase in the respondent mother's anxiety; she could not cope with the speed of the process; she was having panic attacks and felt overwhelmed. The father states that this raises questions about (a) the respondent mother's coping abilities at the time of the subject incident and (b) the extent of the role played by the maternal uncle in caring for Joe when the respondent father was at work, especially given that the maternal uncle lived in the family home at the time and would have spent large periods of time in the house with Joe and the mother.

[7] The father submits that all of this should now be subject to further scrutiny. In particular, he contends that this information raises the question of whether the maternal uncle's involvement in Joe's care when the respondent father was not there, was limited as the mother told police and the court or whether he played a more extensive role in caring for Joe than the court was previously told. In summary the father asserts that all of the above raises questions about whether (a) the

maternal uncle or (b) the respondent mother could have caused the injuries to Joe. The father therefore seeks a reopening of the findings of facts made in February 2019.

The hearing before me

[8] This application is opposed by the other parties. I received statements of evidence from the parties which I have considered. I also received helpful skeleton arguments in relation to the issues of fact and law. I heard submissions from all counsel. On 9th January 2021 and by agreement I also heard discrete evidence over Sightlink from the mother and the paternal grandmother in relation to the conversation between them. After that evidence I paused and asked all parties to confirm that they had nothing to add and they were content with the hearing. Upon confirmation from the parties that they were so satisfied, I proceeded to prepare this judgment.

Background

[9] Key dates with a summary of facts have been provided by Ms Murphy in her written argument as follows:

2 November 2016	Joe was admitted to hospital aged just over 6 weeks old.
7-8 February 2019	Threshold hearing - the only oral evidence heard by the Court was from the mother - the father did not give evidence.
8 February 2019 (or 10 April 2019)	Conversation alleged to have occurred between the mother and the paternal grandmother in the area of the High Court.
26 February 2019	Judgment delivered in which the Court determined that Joe's injuries had been caused by the father. (This judgment was later amended on application by the paternal grandmother but those amendments did not affect the core finding now challenged)
14 August 2019	Specific Issue Looked After Child ("LAC") Review at which the father asserts he learns for the first time that: - the maternal brother had been using cannabis at the time he lived in the same house as the parents and Joe, and

	that he had stopped using cannabis after Joe was injured as "this had scared him."
12 November 2019	Trust report relied on by the father in which reference is contained to a statement made by the mother that she does not believe the father will hurt Joe; further information in relation to the maternal brother; and mental health struggles of the mother.
June 2020	C2 application issued by the father.

Legal Principles

[10] *Hershman and McFarlane Children, Law and Practice,* deals with this issue at Volume 1 Section C1175A as follows:

> "Where some new information comes to light after a finding of fact hearing which may affect the determination of the findings, the correct course is to apply to the trial judge to reconsider the findings in the light of the new evidence. However, it is incorrect to take the approach that findings of fact are always to be kept under review: in all normal circumstances, findings of fact are definitive and will only be revisited, as a distinct exercise, where there are solid grounds for believing that this is required.
>
> The interests of justice, and the public interests in a child's right to know the truth about who injured them and why, are powerful factors in favour of reopening a fact finding decision if fresh and potentially cogent evidence becomes available, even if that stage is not reached until after the conclusion of proceedings and the making of orders freeing a child for adoption.
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> The court will evaluate what would be the high point of the applicant's case if the fact finding process were reopened and balance this against the negative factors (for example delay and expense). Where there is fresh evidence that justifies some revision of the detailed factual conclusion, but not a retrial, some reference to the fresh material could be attached to the judgment or order in refusing a retrial so that it remains available."

[11] *In Re ZZ (Children) (Care Proceedings: Review of Findings) Practice Note* [2015] 1 WLR 95 Munby P endorsed the formulation of a three stage approach identified by

Charles J in *Birmingham City Council v H and others* [2005] EWHC 2885 (Fam). The first stage is to identify whether there is any new evidence casting doubt upon the accuracy of the original findings. There must be some real reason (solid grounds for challenge) to believe that the earlier findings require revisiting; mere speculation and hope is not enough. The second stage is to consider the ambit of the review or rehearing, which will turn on the circumstances of the particular case. The third stage is the rehearing itself.

[12] It is clear from the jurisprudence that stage 1 will not be satisfied unless there is some real reason to believe that the earlier findings require revisiting; mere speculation and hope are not enough: there must be solid grounds for challenge, but the test should not be set higher than that. In *Re AD and AM (Fact Finding Hearing) (Application for rehearing)* [2016] EWHC 326 (Fam), Cobb J in applying the *Re ZZ* three stage approach held that, in the first stage, the test is not so high as that for permission to appeal (real prospect of success or compelling reason). What is required is a real reason for believing that the earlier findings require reconsideration. A subsequent criminal conviction which is in conflict with early family court findings is likely to give solid ground for challenging that finding.

[13] In the decision of *Re E (Children: Reopening Findings of Fact)* [2009] EWCA Civ 1447 Lord Justice Peter Jackson also referred to the law in this area, at paragraph [50] as follows:

> "In relation to the first stage, these decisions affirm the approach set out in *Re B* (see para. 28 above). That approach is now well understood and there is no reason to change it. A court faced with an application to reopen a previous finding of fact should approach matters in this way:
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> (1) It should remind itself at the outset that the context for its decision is a balancing of important considerations of public policy favouring finality in litigation on the one hand and soundly-based welfare decisions on the other.
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> (2) It should weigh up all relevant matters. These will include: the need to put scarce resources to good use; the effect of delay on the child; the importance of establishing the truth; the nature and significance of the findings themselves; and the quality and relevance of the further evidence.
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> (3) Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in

> the earlier trial. There must be solid grounds for believing that the earlier findings require revisiting."

[14] The above cases guide me in how to deal with this application. In particular I bear in mind the need for finality in litigation. Against that, in children's cases, if there is good reason, it is open to a court to reopen findings to achieve a just and fair result for a child. The onus is upon the person making the application to satisfy the court that there is good reason to reopen a case.

Consideration

[15] The context of this case is important. It is of note that this fact finding hearing took place with the benefit of evidence before the judge over two days. The respondent father was represented by experienced Senior and Junior Counsel. He decided not to give evidence at the fact finding hearing. The father will have been advised as to the pros and cons of this course and the potential outcomes. By contrast to the father the mother did give evidence at this hearing and the judge had to assess that evidence in reaching her conclusion. The father did not appeal the finding made against him. As such he cannot now argue that the judge got it wrong on the basis of the evidence that was before her.

[16] Rather, the father asserts that relevant material was not available that may have changed the result and also that the mother was untruthful. In relation to the second argument, the father relies on the evidence of his mother. Of course, the paternal grandmother has always been engaged in this case and she also applied to appeal the judge's ruling due to certain points made against her (not in relation to threshold) and that led to an amended judgment.

[17] So, applying the relevant principles, I ask myself has the father persuaded me that this case should be reopened? Having considered all of the evidence and despite the comprehensive and detailed submissions made by Mr McGuigan, who left no stone unturned in arguing this case, I am not convinced that the father's arguments succeed for the following reasons:

(i) The argument based on the maternal uncle's role and alleged new information to include information from a LAC review on 14 August 2019 about drug use stands up to very little scrutiny. The drug use of this man was voluminously documented and thoroughly investigated prior to the hearing. There are examples set out in the various skeleton arguments extracted from Police Service of Northern Ireland ("PSNI") interview notes which refer to this.

(ii) The information from the LAC review is over 13 months old. Clearly, there was an extensive consideration of who should be in the pool of perpetrators prior to this case being determined. I gather from the papers that this maternal uncle was initially in the pool of perpetrators and interviewed by the

PSNI who put to him his drug use with the father and his knowledge of the father arranging to have drug paraphernalia removed from the home. This was then discounted given his involvement with the father at this time in the home. This is not fresh evidence that would persuade the court to reopen the facts of this case.

(iii) I am not satisfied that the fact that the maternal uncle reported in September 2019 that he did not feel comfortable with children is sufficient reason to reopen the case given the circumstances of this case, particularly the living arrangements and the timing of the injuries to the child.

(iv) The argument based upon the mother's own vulnerability is hopeless. The mother's vulnerability was well-known to all parties prior to this case being concluded. It was clear that she spent a considerable amount of time in bed due to her own difficulties and this is reflected in the judgment. There is absolutely no reason to think that this is a new part of the case which would require the court to look at the case afresh.

(v) The argument based on the alleged conversation between the mother and the paternal grandmother is a different avenue about which I needed to hear some evidence. Having done so, I much prefer the mother's evidence on this which was given in an open and forthright manner. The mother accepts that a conversation did take place on 8 February 2019 but denies that there was a discussion as alleged in relation to the testimony that she gave. I think it most likely that the conversation was on 8 February when the fact finding was ongoing and the mother was upset rather than at a later date after she was found not to have caused the injuries.

(vi) However, even if the conversation was in April 2019 as the grandmother alleges I am not persuaded by the grandmother's evidence to me as to the content of the conversation. The grandmother has made a serious allegation which stands up to no scrutiny whatsoever. I do not believe that the mother was forced to give evidence or say things that she did not believe. Rather, the mother chose to give her account while the father did not. Also, as the mother confirmed to me that she did not actually witness the child being injured.

(vii) I find it significant that the maternal grandmother, having raised some appeal points in relation to the judgment, made no mention of this alleged conversation at an earlier stage to the court although she had legal representatives and was engaged in court proceedings. In fact she took no initiative in relation to this conversation until the father brought his application. That course undermines her credibility.

(viii) I agree with the submissions made that this is a concerning representation made by the grandmother in a last ditched attempt to exonerate the father. This chimes with the grandmother's evidence before me when she refused to

answer questions about hers son's culpability. Also, it is in keeping with the report of Ms Armstrong that the grandmother commissioned which was unfavourable to her and which concluded that "essentially if she has to choose between her son and her grandson and although she states that she will do this if her son is convicted she has not yet demonstrated that in reality she would have the capacity to do so. For the grandmother to be able to satisfy the Trust that she can act as a fully protective carer she would have to make that choice and perhaps already should have done so."

(ix) Ms McGrenera raised other issues in cross examination when attacking the grandmother's truthfulness but I do not specifically rely on those matters given the discrete exercise I am conducting. There is other evidence which is sufficient to reject this application for the reasons I have given above.

[18] Accordingly, there is no real reason to believe that the earlier findings require a reopening of this case. Rather, the case should now be timetabled for a care planning hearing given the delay that has already been occasioned. Each party will be able to present evidence and address me as to their capabilities at that stage. I will hear from the parties in relation to any other matters. This application will be dismissed.